No. 20-1010

IN THE
Supreme Court of the United States

DED RRANXBURGAJ,

Petitioner

v.

ALEJANDRO MAYORKAS,
U.S. SECRETARY OF HOMELAND SECURITY, ET AL.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* RAPID DEFENSE NETWORK AND JUSTICE ACTION CENTER IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS
(*continued*)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Statutes

TABLE OF AUTHORITIES
(*continued*)

INTEREST OF *AMICI CURIAE*[1]

Rapid Defense Network ("RDN") is a nonprofit legal services organization that provides pro bono representation to noncitizens who are detained or on a fast track to be deported. RDN monitors developments in immigration law that affect the rights of noncitizens, and partners with law firms and law school clinics to bring impact litigation and habeas corpus claims on behalf of noncitizens. RDN has extensive experience litigating jurisdictional issues involving immigration laws before the federal appellate and district courts and has a distinct interest in ensuring that the immigration laws are applied correctly and consistently.

The Justice Action Center ("JAC") is a nonprofit organization dedicated to advancing the civil and human rights of immigrants through a combination of impact litigation, communications, and digital strategies. It provides support to select nonprofit organizations that have immigrant members or that provide direct legal services to immigrant communities. As an organization litigating on behalf of immigrant communities in numerous jurisdictions nationwide, JAC has a strong interest in the accurate and consistent application of immigration laws throughout the federal courts.

SUMMARY OF ARGUMENT

Judicial review of agency action "is the norm in our legal system." *Mach Mining, LLC v. EEOC*, 575

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[1] All parties have consented to the filing of this brief. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

U.S. 480, 495 (2015). "Absent such review, the [agency's] compliance with the law would rest in [its] hands alone," a result contrary to basic principles of administrative law. *Id.* at 488. Legislating against this "well-settled presumption" of judicial review of administrative action, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") to streamline removal proceedings by, among other things, limiting judicial review of certain government acts. One such jurisdiction-limiting provision, 8 U.S.C. § 1252(g), was tailored to preserve the Executive's "prosecutorial discretion" to *commence* proceedings, *adjudicate* cases, and *execute* removal orders. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482-84, 485 n.9 (1999) ("*AADC*"). This Court, consistent with the presumption in favor of judicial review and Section 1252(g)'s text and purpose, has repeatedly read that provision narrowly to preclude non-final-order review of only these three discretionary acts.

In so doing, the Court has maintained the balance Congress struck between protecting Executive discretion and preserving judicial review. The Sixth Circuit upset that balance by shielding from judicial review a *legal* determination that the Executive makes *independent* of performing any discretionary act within Section 1252(g). This holding finds no support in the law and subverts the presumption of judicial review, essentially allowing the Executive's "compliance with the law" to "rest in [its] hands alone." *Mach Mining*, 575 U.S. at 488.

The Sixth Circuit's broad reading of Section 1252(g) is far from the only lower court decision to

stray from this Court's teachings, Congress's intent, and the longstanding presumption of judicial review over agency action. Rather, many courts have advanced similarly expansive interpretations of Section 1252(g), clashing with their more restrained sister courts.

The interpretations of Section 1252(g) vary not just between circuits, but also among and even within district courts. Accordingly, the court will be open (or not), depending on geography (or the judge assigned), to hearing various types of claims, including:

- whether noncitizens are entitled to have their motions to reopen or applications for provisional relief heard before they are removed;
- whether ICE is lawfully detaining noncitizens before removal;
- whether ICE followed its own procedures in revoking orders of supervision;
- whether noncitizens may challenge the immigration courts' jurisdiction over their removal proceedings; and
- whether individual officers may be liable for constitutional torts against noncitizens.

The result is that challenges by similarly situated noncitizens have different outcomes depending on where they are brought—and Executive acts are subject to different judicial oversight depending on where the challenge is brought.

In light of this widespread confusion over the scope of Section 1252(g), this Court should grant the Petition for Certiorari to restore the balance that Congress struck between Executive discretion and

judicial review, and provide much-needed guidance to the lower courts on maintaining it.

ARGUMENT

I. THIS COURT'S GUIDANCE IS NEEDED TO RESTORE THE BALANCE BETWEEN EXECUTIVE DISCRETION AND JUDICIAL REVIEW THAT CONGRESS STRUCK IN ENACTING SECTION 1252(g)

In 1996, Congress enacted IIRIRA to streamline removal proceedings by limiting judicial review of certain agency acts. *See Nken v. Holder*, 556 U.S. 418, 423-24 (2009). The "theme" of IIRIRA was protecting "Executive discretion" from interference by the courts. *AADC*, 525 U.S. at 486. Section 1252(g) was "directed against" one such "particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 n.9.

Before IIRIRA, the Immigration and Naturalization Service ("INS") had "engag[ed] in a regular practice"—known as "deferred action"—of "declin[ing] to institute proceedings, terminat[ing] proceedings, or declin[ing] to execute [] final order[s] of deportation" against otherwise deportable noncitizens. *AADC*, 525 U.S. at 483-84. Often grounded in humanitarian concerns, these discretionary decisions—reflecting what this Court called an "exercise of prosecutorial discretion"—led to litigation "in instances where the INS chose *not* to exercise" its discretion to defer action against potentially removable individuals. *Id.* at 484, 485 n.9.

With IIRIRA, and specifically Section 1252(g), Congress sought to "give some measure of protection to [these] 'no deferred action' decisions and similar discretionary determinations." *Id.* at 485. Section

1252(g) thus specifically provides that, "[e]xcept as provided [elsewhere in Section 1252] . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to *commence* proceedings, *adjudicate* cases, or *execute* removal orders against any alien under this chapter." 8 U.S.C. § 1252(g) (emphasis added).

The "discretion-protecti[on]" of Section 1252(g) was not crafted to bar non-final-order review of "*all* claims arising from deportation proceedings." *AADC*, 525 U.S. at 482, 487 (emphasis added).[2] In *AADC*, this Court explicitly rejected such a broad reading of the statute, holding that Section 1252(g) is "much narrower." *Id.* at 482. Justice Scalia, writing for the

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[2] On its own terms, Section 1252(g) does not purport to strip *all* federal court jurisdiction over claims that fall within its purview. Rather, the provision "channels" such claims into the courts of appeals, in connection with their jurisdiction to review final orders of removal. *See* 8 U.S.C. §§ 1252(a), 1252(g) (qualifying jurisdiction-stripping clause by stating "Except as provided in this section . . ."); *AADC*, 525 U.S. at 483, 485; *id.* at 495 (Ginsburg, J.) (concurring). In Petitioner's case, however, and others like it, the Sixth Circuit's holding effectively forecloses *all* judicial review, as the events giving rise to his claim did not occur until nine years after his removal order became final. *See, e.g.*, *Pomaquiza v. Sessions*, 2017 WL 4392878, at *2 (D. Conn. Oct. 3, 2017) (petition for review already denied, challenge only to arbitrary denial of stay of removal, not to order of removal); *Nino v. Johnson*, 2016 WL 6995563, at *4 (N.D. Ill. Nov. 30, 2016) (petition for review already denied, challenge only to revocation of order of supervision, not to order of removal). Notably, Petitioner does not challenge the validity of the final order, but seeks only a stay of removal in order to care for his ill wife. The Sixth Circuit's decision thus shields the Executive from *any* judicial check, and deprives Petitioner of *any* judicial review of ICE's invocation of the fugitive disentitlement doctrine.

Court, explained that Section 1252(g) applies "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders'"—that is, the discrete areas over which the Executive may exercise its "prosecutorial discretion" to "initiat[e]. . . prosecut[e] . . . [or] abandon" removal proceedings. *Id.* at 482-83, 485 n.9. As Justice Scalia noted, "[t]here are of course many other decisions or actions that may be part of the deportation process" that do not fall within those three acts, "such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order." *Id.* at 482.

More recently, a plurality of this Court reiterated that although Section 1252(g) by its terms covers claims "*arising from*" the "decision or action" by the Executive to "commence proceedings, adjudicate cases, or execute removal orders," the "arising from" language "refer[s] to just those three specific actions themselves." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (Alito, J.). It does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General." *Id*.

And just last term, the Court again emphasized that Section 1252(g) is "narrow" and does not cover "all claims arising from deportation proceedings" or impose "a general jurisdictional limitation." *Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1907 (2020).

Despite this Court's repeated limitation of Section 1252(g) to its text and targeted purpose, lower courts have not followed suit—their application of the

statute creates a patchwork of rules. In addition to the circuit split illustrated by Petitioner, *see* Pet. for Cert. 11-15, varying interpretations of Section 1252(g) have proliferated among the lower courts, sometimes even *within* the same districts.

The Court should use this case as a vehicle to clarify the scope of Section 1252(g) for the benefit of lower courts struggling with inconsistent and contradictory precedents.

II. CONFUSION OVER THE SCOPE OF SECTION 1252(g) HAS PROLIFERATED ACROSS THE LOWER COURTS

Courts are divided over precisely what claims are included in or arise from the "three discrete actions" covered by Section 1252(g). *AADC*, 525 U.S. at 482. The wide variation in approach to Section 1252(g) is fundamentally unfair. Courts that read Section 1252(g) broadly to bar jurisdiction—despite this Court's repeated admonitions that the statute is narrow and the "strong presumption favoring judicial review of administrative action," *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021)—shield from review numerous government actions that, had they occurred in other districts, would face judicial scrutiny. Disparities in the balance between Executive discretion and judicial review proliferate arbitrarily across jurisdictions, and similarly-situated noncitizens thus receive wildly different treatment depending on accidents of geography and judicial assignment. This Court's guidance on the proper scope of Section 1252(g) is sorely needed.

A. Lower courts are divided on the applicability of Section 1252(g) to a wide range of claims

Section 1252(g) issues arise in a broad array of contexts, leaving courts divided as to what claims they may hear. The following sections illustrate the discordant judicial approaches and conclusions that have proliferated.[3]

1. Claims challenging the Executive's legal authority to act

A principal issue about which lower courts disagree is whether Section 1252(g) bars a noncitizen's claim that the Executive lacked any predicate legal authority to exercise its purported discretion in one of the three specific areas set forth in Section 1252(g). This issue often arises in connection with petitions for writs of habeas corpus in which a petitioner seeks a stay of removal while pursuing provisional waivers or similar types of relief that would allow them to remain in the United States.[4]

The court in *Singh v. Cole* recently summarized the divergence in case law on this issue. 2020 WL 7655276, at *5-6 (W.D. La. Nov. 17, 2020), *report and recommendation adopted*, 2020 WL 7647537 (W.D. La. Dec. 23, 2020). The *Singh* court reviewed several decisions holding that Section 1252(g) did not strip

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[3] *Amici* in this brief focus on the need for the Court to explain the standard for applying Section 1252(g). This brief does not address the specific errors that *amici* believe infect many of the decisions discussed herein.

[4] Such relief includes provisional unlawful presence waivers, "T-Visas" for victims of human trafficking, and relief under the Violence Against Women Act ("VAWA") for victims of domestic violence.

courts of jurisdiction over a request for a stay of removal pending petitioner's exhaustion of the provisional waiver process. *Id.* Such claims were construed to present a "purely legal" question concerning "the *legal authority* of ICE to exercise such discretion when the subject of the removal order also has a right to seek relief made available by the DHS," and were not construed as a challenge to "ICE's prosecutorial discretion in executing removal orders." *Id.* at *6 (citing, *e.g.*, *De Jesus Martinez v. Nielsen*, 341 F. Supp. 3d 400, 406 (D.N.J. 2018), and *Calderon v. Sessions*, 330 F. Supp. 3d 944, 954 (S.D.N.Y. 2018)) (emphasis added); *see also, e.g.*, *Pena v. Meade*, 2020 WL 7647022, at *5 (S.D. Fla. Dec. 3, 2020) (finding jurisdiction where "Petitioner challenges ICE's *legal authority* to exercise its discretion in removing him before he has had a chance to avail himself of the provisional waiver process"), *report and recommendation adopted*, 2020 WL 7641054 (S.D. Fla. Dec. 23, 2020); *S.N.C. v. Sessions*, 2018 WL 6175902, at *4-5 (S.D.N.Y. Nov. 26, 2018) (APA and due process challenge to execution of removal order before adjudication of T-Visa and VAWA applications did "not challenge the wisdom of ICE's decision to remove her, but dispute[d] ICE's legal authority . . . to remove her while her visa applications are being adjudicated").

Other decisions, also discussed in *Singh*, reached the opposite conclusion—typically characterizing similar claims as seeking to "override the Executive's discretion to execute a valid removal order." 2020 WL 7655276, at *6 (citing, *e.g.*, *Karr v. Meade*, 447 F. Supp. 3d 1293, 1302 (S.D. Fla. 2020); *Probodanu v. Sessions*, 387 F. Supp. 3d 1031, 1040-43 (C.D. Cal. 2019) (government's decision to execute removal order despite pending waiver application process was

unreviewable); *Mamadjonova v. Barr*, 2019 WL 6174678, at *7 (D. Conn. Nov. 20, 2019) (same); *Gomes v. Smith*, 381 F. Supp. 3d 120, 122-24 (D. Mass. 2019) (relief sought "emanate[d] from his removal proceedings" thus precluding review)); *see also, e.g.*, *E.F.L. v. Prim*, 2020 WL 586803, at *6 & n.3 (N.D. Ill. Feb. 6, 2020) (removing petitioner while her VAWA application was pending was an unreviewable "act of discretion"), *aff'd*, 2021 WL 244606 (7th Cir. Jan. 26, 2021).

After setting forth this nationwide split in authority, the *Singh* court held that Section 1252(g) barred the petitioner's claim, reasoning that, even though the petitioner was not challenging removal and sought only "the opportunity to complete the steps of the process that can be applied for stateside prior to his removal," the "arising from" language of Section 1252(g) insulated the Executive's decision "as to when to execute Singh's removal order." 2020 WL 7655276, at *8.

Recently, the Eleventh Circuit waded into the conflict, siding with courts that have held that Section 1252(g) bars jurisdiction. *Camarena v. Director, Immigration and Customs Enf't*, -- F.3d --, 2021 WL 627411 (11th Cir. Feb. 18, 2021). In *Camarena*, the petitioners sought stays of removal while applying for provisional unlawful presence waivers. *Id.* at *1-2. The petitioners argued that they were not challenging the Executive's "discretion" in executing their removal orders, but its "underlying authority" to do so in light of their claimed "regulatory right" to remain in the country until their provisional waiver processes are resolved. *Id.* at *3. The Eleventh Circuit disagreed, broadly holding that Section 1252(g) "does not offer any discretion-versus-authority distinction of the sort

. . . claim[ed]," and that the petitioners were simply "attack[ing] . . . the government's execution of their removal orders." *Id.* at *4. Because this "attack" "runs afoul of § 1252(g)," the court ruled that it lacked jurisdiction. *Id.* at *4.

Lower courts similarly disagree as to whether a district court may entertain a claim to request a stay of removal pending resolution of a motion to reopen. In *Beltran Prado v. Nielsen*, 379 F. Supp. 3d 1161, 1166 (W.D. Wash. 2019), the petitioner argued that his due process rights would be violated if he were to be removed before his motion to reopen was adjudicated. The court held that Section 1252(g) did not bar the claim because the petitioner was "not directly challenging the government's discretionary decision to execute his removal order. Rather, he is raising collateral legal and constitutional challenges to the process by which the government seeks to remove him; he asserts 'a due process right to challenge the [removal] order[] in the appropriate court.'" *Id.* at 1168 (quoting *Chhoeun v. Marin*, 306 F. Supp. 3d 1147, 1158 (C.D. Cal. 2018)). In so holding, the court noted that courts were split on the issue. *See id.* at 1167-68 (*comparing Ma v. Holder*, 860 F. Supp. 2d 1048, 1057-60 (N.D. Cal. 2012) (request for stay of removal pending adjudication of motion to reopen was barred) *and Nken v. Chertoff*, 559 F. Supp. 2d 32, 36-37 (D.D.C. 2008), *with Sied v. Nielsen*, 2018 WL 1142202, *14-15 (N.D. Cal. Mar. 2, 2018) (staying execution of removal order pending resolution of motion to reopen)).

Other cases challenging the Executive's authority to act focus on the legal limits that constrain the Executive's exercise of its prosecutorial discretion.

In *You v. Nielsen*, 321 F. Supp. 3d 451, 455

(S.D.N.Y. 2018), a noncitizen subject to a final order of removal petitioned for habeas relief after the government, without warning, arrested and detained him for removal when he appeared for an adjustment-of-status interview based on his wife's citizenship. *Id.* at 455. The petitioner argued that his arrest and detention violated the INA, due process, and the APA. *Id.* at 455-56. The court rejected the government's jurisdictional objections, holding that while Section 1252(g) barred challenges to "why" the government "chose to execute the removal order," the petitioner's claim was different, asking instead whether the "way [officials] acted accords with the Constitution and the laws of the country." *Id.* at 457. Whether the steps taken by the agency to remove the petitioner were legal "is not a question of discretion," and therefore fell "outside the ambit of § 1252(g)." *Id.* at 457-58. "Put another way," the court explained, while the Executive has unreviewable discretion to remove noncitizens, it "cannot do so in any manner they please." *Id.* at 457; *see also, e.g.*, *D.A.M. v. Barr*, 474 F. Supp. 3d 45, 60 (D.D.C. 2020) (recognizing that Section 1252(g) does not bar review over "*non*discretionary decisions, such as physically deporting noncitizens in an unconstitutional manner" and holding that the court had jurisdiction to hear claims regarding "how to transport deportees during the [COVID-19] pandemic" because such claims challenged "the physical manner of their deportation[s] [and] do[] not implicate the agency's discretionary decision to execute their removal orders"); *Michalski v. Decker*, 279 F. Supp. 3d 487, 495 (S.D.N.Y. 2018) ("[T]he decision or action to detain an individual" is different from "the decision or action to commence a removal proceeding.").

In *Yearwood v. Barr*, 391 F. Supp. 3d 255, 263

(S.D.N.Y. 2019), however, the court came to the opposite conclusion. There, the detained petitioner suffered from serious medical conditions and had obtained a physician's opinion that he should not travel by airplane. *Id.* at 258. The petitioner subsequently arranged, with ICE's approval, for a medical specialist to examine him at the detention facility in support of an anticipated application for a stay of removal. *Id.* at 258-59. Two nights before the scheduled medical appointment, officials removed him via airliner to his country of origin, denying him a phone call to legal counsel until they arrived at the airport for departure. *Id.* at 259. The petitioner suffered a heart attack during the flight. *Id.* at 260. The petitioner asserted due process and APA violations challenging the manner of the removal order's execution. *Id.* at 263. The court rejected the petitioner's framing of his claims and held that Section 1252(g) barred jurisdiction because the claim purportedly amounted to a challenge to the removal order itself. *Id.* at 263-64.

Third Circuit courts have also found that Section 1252(g) bars courts from hearing claims directed to the steps the agency took for removal. In *Tazu v. Attorney General United States*, 975 F.3d 292, 294 (3d Cir. 2020), the petitioner was released from detention on an order of supervision ("OSUP"). *See* Brief for Pet'r in *Tazu*, No. 19-1715 at 1 (3rd Cir. Jan. 15, 2020). Nearly a decade later, while in the middle of the process of obtaining a provisional waiver, he was re-detained for the purpose of removal. *Tazu*, 975 F.3d at 295. The petitioner filed a habeas petition arguing that his re-detention violated the agency's own rules and due process. *Id.* at 298. The court disagreed, holding that "[r]e-detaining Tazu was simply the enforcement mechanism the Attorney General picked

to execute his removal," and Tazu's challenge to that discretionary act was covered by Section 1252(g). *Id.* at 298-99. This is in stark contrast to *You*, *D.A.M.*, and similar decisions in other courts, which teach that the analysis should focus on "[w]hether [the Executive's] actions were legal," rather than as "a question of discretion." *You*, 321 F. Supp. 3d at 457; *see also D.A.M.*, 474 F. Supp. 3d at 60.

Courts are split even on the specific legal issue presented in *Tazu*: whether Section 1252(g) bars a challenge to ICE's process in re-detaining noncitizens upon revoking OSUPs. *See, e.g.*, *Ahmad v. Whitaker*, 2018 WL 6928540, at *4 (W.D. Wash. Dec. 4, 2018) (challenging the revocation of an OSUP "does not attack ICE's decision to execute [the] removal order"; it challenges the ICE detention prior to removal, and "[s]uch claims may be brought through a habeas petition"); *Alam v. Nielsen*, 312 F. Supp. 3d 574, 579-81 (S.D. Tex. 2018) (finding jurisdiction over challenge to process ICE followed in cancelling OSUP). *But see Nino v. Johnson*, 2016 WL 6995563, at *4 (N.D. Ill. Nov. 30, 2016) (decision to revoke OSUP "arose from" the decision to execute the removal order and was thus within the ambit of Section 1252(g)).

2. Claims challenging the agency's jurisdiction over the removal proceedings

Section 1252(g) has also been asserted in challenges to the immigration court's jurisdiction over the removal proceedings. Again, courts have come to different conclusions. For example, in *Vargas v. Beth*, 378 F. Supp. 3d 716, 723 (E.D. Wis. 2019), the petitioner claimed that the immigration court lacked jurisdiction to issue the order of removal against him because the charging document that was served on

him—the "notice to appear" ("NTA")—lacked certain information required by statute. The court held that this claim "is precisely the sort of claim that is barred by § 1252(g). Resolution of that claim in Vargas' favor would necessarily amount to an invalidation of his order of removal, and the jurisdiction-stripping provisions of the INA manifestly prohibit this court from granting such relief." *Id*.

The court in *Diaz-Ceja v. McAleenan*, 2019 WL 2774211, at *12-14 (D. Colo. July 2, 2019), reached the opposite conclusion. The petitioner there also claimed that the immigration judge lacked jurisdiction over his removal proceedings due to a defective NTA. The court determined that it had jurisdiction over the claim notwithstanding Section 1252(g) because the petitioner was "not challenging the Attorney General's discretionary decision to begin removal proceedings, but rather whether jurisdiction properly attached due to the alleged defect in the NTA." *Id.* at *13. The court specifically noted its disagreement with *Vargas*, stating that a finding that the immigration court lacked jurisdiction "would not . . . invalidat[e]the removal order but rather recogniz[e] that the order is a nullity and was never valid." *Id.* at *13 n.13.

3. *Bivens* claims and other claims sounding in tort

Finally, individual defendants have asserted Section 1252(g) as a bar to noncitizens' *Bivens* claims and other claims sounding in tort. Here, too, there is confusion among courts as to whether the conduct complained of "arises from" one of Section 1252(g)'s three discretionary actions. For example, as noted by Petitioner, the circuit courts are split as to whether Section 1252(g) bars tort claims against officers

alleging that they wrongfully removed the plaintiff in violation of a stay order or similar regulation. *See* Pet. for Cert. at 12-13.

Similar discrepancies have developed with regard to allegedly illegal arrests, detentions, and searches and seizures. For example, in *Prado v. Perez*, 451 F. Supp. 3d 306, 310-11 (S.D.N.Y. 2020), a noncitizen brought *Bivens*, Federal Tort Claims Act (FTCA), and other claims alleging that ICE agents unlawfully arrested him and negligently provided him medical care while he was detained. *Id.* at 310. The court held that it had jurisdiction to consider his "unlawful arrest or detention" claims because "those claims are too distinct to be said to 'arise from' the commencement of removal proceedings." *Id*. at 312.

But in *Khorrami v. Rolince*, 493 F. Supp. 2d 1061 (N.D. Ill. 2007), the court went the other way. There, the plaintiff alleged that his arrest and months-long detention following the revocation of his immigration parole—which was based on what turned out to be false information—violated the Fourth Amendment. *Id.* at 1065, 1067. The court reasoned that because the plaintiff's arrest and detention "was a direct outgrowth of the decision to commence proceedings," the claim therefore "arises from the decision to commence removal proceedings" and is barred by Section 1252(g). *Id.* at 1067-68; *see also, e.g.*, *Rene Morales v. United States*, 2018 WL 8368658, at *5 (N.D. Ga. Aug. 6, 2018) (Section 1252(g) bars jurisdiction over FTCA claims against ICE agents who allegedly seized plaintiffs "by means of misrepresentations and disregard for policy" because Section 1252(g) bars "challenge[s] [to] the methods

that ICE use[s] to detain [noncitizens]").[5]

Section 1252(g) issues arise in other contexts, as well. This Court's guidance is needed to facilitate a more uniform interpretation of the provision.

B. The confusion over the reach of Section 1252(g) leads to unfair disparities in outcomes and nationwide variation in the balance of power between the Executive and the Judiciary

These discrepancies in the interpretation of Section 1252(g) are not merely academic. Each split in authority manifests in inconsistent results for similarly-situated noncitizens and regional disparities between Executive discretion and judicial review.

In *You*, for example, the Southern District of New York explained that it had jurisdiction to hear the noncitizen's habeas claim because even though ICE agents have discretion to remove noncitizens, "they cannot do so in any manner they please. . . . [They] could not, for example, execute removal by dropping [the p]etitioner on a life raft in the middle of the Atlantic Ocean" or detain him indefinitely. *You*, 321 F. Supp. 3d at 457; *see also D.A.M.*, 474 F. Supp. 3d at 60 (same, in District of Columbia); *but see Yearwood*, 391 F. Supp. 3d at 263 (Southern District of New York holding that Section 1252(g) bars jurisdiction over challenge to method of removal). Courts in the Third Circuit, by contrast, effectively insulate whatever "enforcement mechanism" the government "pick[s]" to execute a removal—even if, presumably, the

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[5] The holding in *Khorrami* was announced with reluctance. *See id.* at 1068-69 ("I am not at all certain that this is the type of claim Congress sought to bar when it enacted § 1252(g).").

mechanism is to abandon the noncitizen at sea. *Tazu*, 975 F.3d at 298-99.

Likewise, if the Executive is operating in the Third Circuit or the Northern District of Illinois, it may revoke a noncitizen's OSUP and re-detain him however it wishes, secure that federal courts in those jurisdictions shield such actions from review because they are deemed to "arise from" the commencement of removal proceedings. *Tazu*, 975 F.3d at 298-99. In Seattle or Houston, however, courts are open to review OSUP revocations and re-detentions. *Ahmad*, 2018 WL 6928540, at *4; *Alam*, 312 F. Supp. 3d at 579-81.

A woman subject to human trafficking and domestic abuse seeking a T-Visa or VAWA waiver would also face different outcomes depending on where she happened to be detained. In New York, district courts hear habeas petitions seeking stays of removal based on the pendency of such applications. *S.N.C.*, 2018 WL 6175902, at *5. But in Chicago, a similarly situated woman would have no recourse if the Executive decides to remove her without giving her an opportunity to pursue the relief that the law provides. *E.F.L.*, 2020 WL 586803, at *6 and n.3.

Basic questions of whether the Executive has the legal authority to remove a petitioner when a motion to reopen is still pending would not be heard by some judges in San Francisco, but would be heard by some judges in Seattle. *Compare Ma*, 860 F. Supp. 2d at 1057-60, *with Beltran Prado*, 379 F. Supp. 3d at 1166-68.

Individual executive officers could operate under less constraint in Illinois and Georgia, knowing that their conduct may be viewed as "arising from"

discretionary removal actions and thus not subject to federal or constitutional tort claims in district court, while colleagues in New York may be more constrained, knowing that their actions could be subject to suit. *Compare Khorrami*, 493 F. Supp. 2d at 1067-68 *and Rene Morales*, 2018 WL 8368658, at *5, *with Prado*, 451 F. Supp. 3d at 312.

These disparities in the law affect many people. Immigration courts ordered more than 181,000 people removed in the last fiscal year—during a global pandemic. *See Outcomes of Deportation Proceedings in Immigration Court*, Transactional Records Access Clearinghouse, https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php (last visited Feb. 26, 2021). Where so many individuals are involved, and so much is at stake, the balance between Executive discretion and judicial review is a crucial one. And if, as the Sixth Circuit did here, courts are permitted to sweep more and more Executive conduct under the "narrow" confines of Section 1252(g), the more unfettered from the law the Executive's actions may grow to be, and the more likely it is that noncitizens will be removed unjustly without any meaningful day in court. *AADC*, 525 U.S. at 487.

III. THE SIXTH CIRCUIT'S DECISION MISINTERPRETS SECTION 1252(g)

The Sixth Circuit's decision in this case is typical of the impermissibly broad interpretations of Section 1252(g) that should be reined in.

A. The Sixth Circuit's holding shields from judicial review far more than claims "arising from" discretionary Executive action

The Sixth Circuit's capacious reading of "arising from" precludes judicial review of not just the agency's *discretionary* decisions, but *all legal* determinations *antecedent* to these decisions. In holding that it lacked jurisdiction to hear Petitioner's claims, the Sixth Circuit reasoned that whether ICE correctly invoked the fugitive disentitlement doctrine went directly to "ICE's decision to execute an order of removal." *Rranxburgaj v. Wolf,* 825 F. App'x 278, 283 (6th Cir. 2020). But ICE's collateral designation of Petitioner as a "fugitive" did not "arise from" executing an order of removal. Far from it: ICE invoked the fugitive disentitlement doctrine to dismiss as "moot" Petitioner's application to stay removal on collateral grounds that had nothing to do with the grounds for his original removal order. *See* Pet. for Cert. 3. ICE was not "executing" anything; rather, it was making an erroneous legal decision, the effect of which was to prevent Petitioner's stay application from being heard on the merits. Petitioner's APA suit challenged that error of law, not a "discretionary" action taken by the agency to "execute" a removal order. *See* Pet. for Cert. 20.

If ICE's erroneous invocation of the fugitive disentitlement doctrine to moot a stay application is shielded from review under Section 1252(g), that logic would encompass virtually any agency action or decision connected to an eventual removal of a noncitizen, no matter how legally indefensible or tangential to the exercise of discretion.

This is not the law. As a plurality of this Court

explained in *Jennings*, the phrase "arising from" in Section 1252(g) does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to *just those three specific actions themselves*." 138 S. Ct. at 841 (Alito, J.) (emphasis added). ICE's purely legal determination as to the applicability of the fugitive disentitlement doctrine is not one of "those three specific actions themselves." *Id.* To allow the Sixth Circuit's decision to stand would transform Section 1252(g) from a "narrow" provision intended to protect the Executive's "prosecutorial discretion" into a free pass for the Executive to interpret and flout the law at will, free from judicial constraint.

B. The Sixth Circuit's broad reading of Section 1252(g) contravenes this Court's jurisdiction-stripping jurisprudence

This Court has repeatedly acknowledged the "strong presumption favoring judicial review of administrative action." *Salinas*, 141 S. Ct. at 698. This "presumption of reviewability" can only be overcome by "clear and convincing evidence of congressional intent to preclude judicial review." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020). Here, if anything, the plain text and legislative history of IIRIRA "clear[ly] and convincing[ly]" reflect Congress's intent not to sweep so broadly. The "particular evil" Congress sought to prevent with Section 1252(g)—judicial constraints on three specific discretionary acts—does not apply to review of ICE's erroneous application of a legal doctrine to moot a stay application. *AADC*, 525 U.S. at 485 n.9.

To hold otherwise would ignore this Court's "consistent[] appli[cation]" of the presumption of reviewability to immigration statutes and concomitant narrow reading of jurisdiction-stripping provisions. *Guerrero-Lasprilla*, 140 S. Ct. at 1069. In *McNary*, for example, this Court held that 8 U.S.C. § 1160(e)(1), which bars "judicial review of a determination respecting an application for adjustment of status," did not preclude review over "collateral challenges," including the respondents' constitutional and statutory challenge to the agency's policies and practices. 498 U.S. at 491-94. A contrary holding would have resulted in "the practical equivalent of a total denial of judicial review," which, in light of the "well-settled presumption" of judicial review, could not have been what Congress intended. *Id.* at 496-97.

Similarly, in *Kucana v. Holder*, 558 U.S. 233 (2010), this Court rejected the Seventh Circuit's broad reading of another of IIRIRA's jurisdictional limitations, which precludes review of any Executive action "specified under this subchapter to be in the discretion of the Attorney General." 558 U.S. at 237 (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)). The Seventh Circuit had interpreted the provision to foreclose review not only of determinations made discretionary by statute, but also those made discretionary by the Attorney General himself through regulation. *See id.* In reversing, this Court emphasized that the "basic principle[] that executive determinations generally are subject to judicial review" counseled in favor of subjecting to judicial scrutiny decisions deemed discretionary by regulation. *Id.* at 251; *see also Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (same

provision only precludes review of discretionary acts, not the extent of the Attorney General's legal authority).

In *Guerrero-Lasprilla*, this Court interpreted the phrase "questions of law" in another IIRIRA provision, 8 U.S.C. § 1252(a)(2)(D), to preserve review over not just "pure" questions of law, but also the "application of a legal standard to settled facts." 140 S. Ct. at 1068-70. That a contrary holding would pose a "barrier to meaningful judicial review" served as a "strong indication" that "questions of law" encompassed more than just pure questions of law. *Id.* at 1070.

The Sixth Circuit's decision stands in stark contrast to these precedents, upending the presumption of judicial review and depriving Petitioner of the opportunity to challenge ICE's non-discretionary legal determination that he is a "fugitive."

Section 1252(g)'s purpose is to ensure the Executive can exercise discretion in carrying out three delimited actions without undue judicial interference—not to empower agencies to determine unreviewably the meaning of the law and the extent of their own authority. The Sixth Circuit's decision should be reversed to ensure that the Executive's "compliance with the law" does not "rest in [its] hands alone." *Mach Mining*, 575 U.S. at 488.

CONCLUSION

For the reasons stated above and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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