No. 26-426

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Petitioners,

v.

D. V. D., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* FEDERATION FOR AMERICAN IMMIGRATION REFORM IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT. 2

A. The court below erred in concluding that Respondents' removals are unlawful 2

B. Congress has shielded CAT claims from any judicial review other than review alongside removal orders 5

CONCLUSION 9

TABLE OF CITED AUTHORITIES

Page

Cases

Batterton v. Francis,
432 U.S. 416 (1977) 4

Galvan v. Press,
347 U.S. 522 (1954) 3

J.E.F.M. v. Lynch,
837 F.3d 1026 (9th Cir. 2016) 6

Jennings v. Rodriguez,
583 U.S. 281 (2018) 7

Kapoor v. DeMarco,
132 F.4th 595 (2d Cir. 2025) 7

Khouzam v. Att'y Gen.,
549 F.3d 235 (3d Cir. 2008) 5

Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994) 5

Nishimura Ekiu v. United States,
142 U.S. 651 (1892) 3

Zadvydas v. Davis,
533 U.S. 678 (2001) 7

Cited Authorities

Page

Statutes and Other Authorities

5 U.S.C. § 701(a)(1) 8

5 U.S.C. § 704 8

8 U.S.C. § 1182(d)(5)(A) 4

8 U.S.C. § 1231 5

8 U.S.C. § 1231(b)(1) 3

8 U.S.C. § 1231(b)(2) 3

8 U.S.C. § 1252 5

8 U.S.C. § 1252(a)(4) 5, 6, 9

8 U.S.C. § 1252(a)(5) 6, 7, 8

8 U.S.C. § 1252(b)(9) 6, 7, 8

8 U.S.C. § 1252(g) 6

8 C.F.R. § 1208.17(f) 4

8 C.F.R. § 1208.18(c)(3) 4

8 C.F.R. § 208.17(f) 4

8 C.F.R. § 208.18(c)(3) 4

Cited Authorities

Page

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 3

Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822 3

INTEREST OF *AMICUS CURIAE*

Amicus curiae Federation for American Immigration Reform (FAIR) is a nonprofit membership organization founded in 1979 and headquartered in Washington, D.C. FAIR's mission is to advocate for immigration policies that are in America's best interest. In pursuit of this mission, FAIR regularly participates in litigation involving immigration law enforcement, border integrity, and the scope of executive authority over the entry of aliens into the United States.[1]

The decision in this case will likely have a substantial impact on the tools available for dealing efficiently, fairly, and safely with an illegal alien population in the United States estimated to exceed 18 million people. *Amicus* FAIR therefore has direct and vital interests in defending the regulations governing CAT claims in the context of third-country removals and the jurisdictional bars in the Immigration and Nationality Act.

SUMMARY OF ARGUMENT

Congress entrusted the implementation of the Convention Against Torture (CAT) to the Executive Branch. The Guidance Regarding Third Country Removals (Guidance) issued by the Department of Homeland Security (DHS), under which Respondents were ordered removed, comports with regulations that

1. Counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed monetarily to its preparation or submission.

implement that treaty and therefore have the force of law. Contrary to the view of the court below, these regulations cannot be read as requiring individualized diplomatic assurances that a particular alien will not be tortured, as opposed to blanket diplomatic assurances that no alien in a class to which that alien belongs will be tortured. Accordingly, the court below erred in deciding that Respondents' removals were unlawful.

Congress, moreover, has provided for judicial review of CAT claims only if they are raised in a petition for review of a final order of removal. The court below gave no basis in the statute for concluding that this jurisdictional bar only applies to claims that aliens could themselves raise in a petition for review. Indeed, that conclusion eviscerates the sweeping nature of the jurisdictional bar, since it would exempt all CAT claims made after an order of removal has become final. Because the courts below lacked jurisdiction over Respondents' CAT claims, and their removal was pursuant to law, this Court should reverse.

ARGUMENT

A. The court below erred in concluding that Respondents' removals are unlawful.

There is no question that the United States has a right inherent in its sovereignty to defend itself from foreign dangers by controlling the admission of aliens. "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in

such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . ."). Exercising this sovereign prerogative, Congress has enacted a comprehensive and detailed statutory scheme regulating immigration, the purpose of which is to prevent and deter illegal immigration and provide for the removal of certain aliens.

Congress has authorized the Executive Branch to carry out "third country removals," that is, to remove aliens to countries other than their designated country of removal. *See* 8 U.S.C. § 1231(b)(1), (2). In so authorizing the Executive, Congress did not set forth any procedural requirements for third country removals. Instead, Congress entrusted the Executive Branch with ensuring that no alien will be removed to a country in which the alien will be tortured. *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822 (directing "the heads of the appropriate agencies" to "prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention"); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

Such regulations have been prescribed. In them, for example, the right to protection under CAT is subject to termination or pretermission where, as happened here, JA at 4-5 (quoting DHS Guidance); *id.* at 52-53 (same), reliable diplomatic assurances against torture render CAT protection unnecessary. 8 C.F.R. §§ 208.17(f), 1208.17(f) (termination of CAT protection); 208.18(c)(3), 1208.18(c)(3) (pretermission of pending CAT claims). The court below has given no reason to believe that these regulations fail to implement either CAT itself or FARRA, and thus no reason to believe that these regulations lack the force of law. *See*, *e.g.*, *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (explaining that substantive regulations implementing a statute have the force and effect of law).

The court below did claim that, under the regulations, any diplomatic assurances disposing of CAT claims have to be individualized, since the regulations requiring diplomatic assurances refer to "an alien" and "the alien" in the singular. JA 32 n.14, 128-31. But assurances that no alien in the class to which a given alien belongs will be tortured already imply that that given, singular alien will not be tortured. Thus, under the regulations, such blanket assurances are already sufficient to protect the individual alien so covered. To require more, the regulations would have to state that individualized assurances tailored to the specific alien in question, or assurances made on a "case-by-case basis," were required—as, for example, Congress has required the Secretary of Homeland Security to assess "on a case-by-case basis" whether parole is warranted. 8 U.S.C. § 1182(d)(5)(A). Absent such language, the regulations actually imply that blanket diplomatic assurances are enough to protect the individual, not that further, individualized assurances must be obtained.

The district court relied on a Third Circuit case in concluding that the CAT regulations "require[] an individualized determination as to the reliability of diplomatic assurances." JA 129-31 (citing *Khouzam v. Att'y Gen.*, 549 F.3d 235, 254-55 (3d Cir. 2008)). But in *Khouzam*, the Third Circuit merely held that the regulations governing CAT do not "*preclude* individualized determinations" and that it would not be unreasonable for the government to "create a procedure for making an individualized determination …." *Khouzam*, 549 F.3d at 254 (emphasis added). That, of course, is far from saying that the regulations require such determinations.

Because the court below based its ruling on its own judicial add-on to regulations having the force of law, its order should be reversed.

B. Congress has shielded CAT claims from any judicial review other than review alongside removal orders.

In any event, Congress has deprived the district court of jurisdiction to set aside the government's third country removal policy.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). Congress has made clear that judicial review of CAT claims is only available "as part of the review of a final order of removal" pursuant to 8 U.S.C. § 1252. FARRA, § 2242(d) (codified as a note to 8 U.S.C. § 1231); *see also* 8 U.S.C. § 1252(a)(4) ("[A] petition for review filed with an appropriate court of

appeals in accordance with this section shall be the *sole and exclusive* means for judicial review of any cause or claim under the [CAT] ….") (emphasis added). Indeed, the jurisdictional bar established by Congress applies "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision and sections 1361 and 1651 of such title …." 8 U.S.C. § 1252(a)(4). Thus, Congress sought to protect the Executive's implementation of CAT from judicial review except only insofar as review is permitted alongside a final order of removal.

In addition, Congress has barred district courts from reviewing legal or constitutional claims relating to actions taken to remove aliens from the United States. 8 U.S.C. § 1252(g) ("Except as provided in this section … 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 [government] to … execute removal orders against any alien under this chapter."). To prevent piecemeal litigation and streamline the removal process, Congress requires aliens to seek judicial review of all removal-related claims in a "petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(5). Further, 8 U.S.C. § 1252(b)(9) provides that, if a legal or constitutional claim "aris[es] from any action taken or proceeding brought to remove an alien," then "[j]udicial review of all questions of law and fact . . . shall be available *only* in judicial review of a final order" of removal (emphasis added). Because judicial review of a final order of removal is available only in the courts of appeals, district courts cannot review these "arising from" claims. *See, e.g.*, *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or

factual—arising from *any* removal-related activity can be reviewed *only* through the PFR process." (emphasis in original) (citation omitted)); *id.* (describing section 1252(b)(9) as "breathtaking" in scope and "vise-like" in grip, such that it "swallows up virtually all claims that are tied to removal proceedings"); *but see Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018) (reading "arising from" in section 1252(b)(9) as not encompassing claims related to prolonged detention).

Respondents are not challenging indefinite or prolonged detention pending removal.[2] Instead, Respondents sought and the district court granted declaratory relief providing procedural protections beyond those set forth in the regulations implementing CAT and "set aside" as unlawful the government's third-country removal policy. In asserting jurisdiction, the district court claimed, without a basis in the statute, that 8 U.S.C. § 1252(a)(5) only applies to matters that Respondents could themselves raise in a petition for review under section 1252. JA at 76-85. That reading of the jurisdictional bar, of course, eviscerates its sweeping application, noted above, since it would preserve jurisdiction in district courts to hear CAT claims after an order of removal has become final. *See, e.g., Kapoor v. DeMarco*, 132 F.4th 595, 608 (2d Cir. 2025) (holding that section 1252(a)(4) bars all habeas jurisdiction over CAT claims with narrow, non-relevant exceptions). Quite plainly, Congress precluded judicial review of CAT claims except any raised in a petition for review of a final

2. This Court's decision in *Zadvydas v. Davis* precludes the government from detaining Respondents indefinitely pending their removal. 533 U.S. 678, 699 (2001) ("[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.").

order of removal. Thus, that Respondents now lack the opportunity to seek review of their now-final orders of removal means that judicial review is barred, not that it is available.

The court below relied solely on the "categorical" grounds for jurisdiction, concluding that section 1252(a)(5) cannot apply because "this is not a case that seeks review of an order of removal, the decision to seek removal, or the process by which removability is determined." JA 27. But, as the government points out, Pet. Br. at 21-22, the Immigration and Nationality Act (INA) bars review of any claims that "aris[e] from any action" taken to remove an alien. 8 U.S.C. § 1252(b)(9). That Respondents are challenging an action taken to remove them from the United States goes without saying. Indeed, the courts below declared the government's actions to effectuate Respondents' removal to third countries unlawful and set those policies aside. JA at 46-47, 152.

To the extent the court below suggested that the Administrative Procedure Act (APA) confers jurisdiction to review Respondents' fear of torture claims, JA at 21-24, it erred. The APA allows federal courts to review an agency action that is "made reviewable by statute" or is a "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. Agency action is not subject to judicial review under the APA where the relevant statute precludes such review. 5 U.S.C. § 701(a)(1). As demonstrated above, the INA precludes such review outside of a petition for review of a final order of removal.

Because Respondents' CAT claims were not raised in "a petition for review filed with an appropriate court

of appeals in accordance with [section 1252]," 8 U.S.C. § 1252(a)(4), the jurisdictional bar applies, and the district court lacked jurisdiction to review Respondents' CAT claims.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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