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 AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF RESPONDENTS


Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104

Jessie J. Rossman
Adriana Lafaille
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
One Center Plaza, Suite 850
Boston, MA 02108

Lee Gelernt
*Counsel of Record*
Anand Balakrishnan
Noor Zafar
Omar Jadwat
Priyanka Menon*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(202) 457-0800
lgelernt@aclu.org

Lucas Guttentag
559 Nathan Abbott Way
Stanford, CA 94305

**admitted only in Maryland*

*Counsel for Amici American Civil Liberties Union and American Civil Liberties Union of Massachusetts*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTEREST OF AMICI CURIAE ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 4

I. THE DHS POLICY SEEKS TO BYPASS THE STATUTORY FRAMEWORK FOR JUDICIAL REVIEW. ..... 4

II. SECTION 1252(g) DOES NOT BAR REVIEW. ..... 7

III. SECTION 1252(b)(9) DOES NOT BAR REVIEW. ..... 13

IV. THE CAT-SPECIFIC CHANNELING PROVISIONS IN THE FARRA AND SECTION 2242(d) DO NOT BAR REVIEW. ..... 19

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Dep't of Homeland Sec. v. Regents*,
591 U.S. 1 (2020) .....12, 15

*Dep't of Homeland Sec. v. Thuraissigiam*,
591 U.S. 103 (2020) ..... 1

*E.O.H.C. v. Sec'y, U.S. Dep't of Homeland Sec.*,
950 F.3d 177 (3d Cir. 2020)..... 21

*Fernandez Vargas v. Gonzalez*,
548 U.S. 30 (2006) ..... 17

*Guerrero-Lasprilla v. Barr*,
589 U.S. 221 (2020) ..... 1

*INS v. St. Cyr*,
533 U.S. 289 (2001) .....1, 14, 21

*Jennings v. Rodriguez*,
583 U.S. 281 (2018) .....4, 13, 14, 15, 18, 20, 21

*Kong v. United States*,
62 F.4th 608 (1st Cir. 2023) ..... 1

*Matter of Acosta*,
19 I&N Dec. 211 (BIA 1985) ..... 16

*Nasrallah v. Barr*,
590 U.S. 573 (2020) ..... 6, 21

*Noem v. Abrego Garcia*,
145 S. Ct. 1017 (2025) ..... 12

*Reno v. American-Arab Anti-Discrimination Comm.*,
525 U.S. 471 (1999) .....4, 7, 8, 9, 10, 11, 12, 16

*Riley v. Bondi*,
606 U.S. 259 (2025) ..... 18

*Zadvydas v. Davis*,
533 U.S. 678 (2001) ..... 17

**Statutes**

8 U.S.C. § 1228(a) ..... 5

8 U.S.C. § 1229a..... 5

8 U.S.C. § 1231..... 17

8 U.S.C. § 1231(a)(5) ..... 5, 17

8 U.S.C. § 1231(b)(3) ..... 2

8 U.S.C. § 1231(h) ..... 17

8 U.S.C. § 1252.....4, 9, 10, 17, 19, 20, 21

8 U.S.C. § 1252(a)(1) ..... 4

8 U.S.C. § 1252(a)(2)(B) ..... 17

8 U.S.C. § 1252(a)(2)(B)(i) ..... 17

8 U.S.C. § 1252(a)(2)(C) .....17, 21

8 U.S.C. § 1252(a)(2)(D)..... 17

8 U.S.C. § 1252(a)(4) .....2, 20, 21

8 U.S.C. § 1252(b)(1) ..... 6

8 U.S.C. § 1252(b)(2) ..... 4

8 U.S.C. § 1252(b)(9) .....2, 3, 4, 13, 14, 15, 16, 17, 18

8 U.S.C. § 1252(g) .....2, 7, 8, 9, 10, 11, 12

Foreign Affairs Reform and
Restructuring Act of 1998, Pub. L.
No. 105-277, Div. G, § 2242(d), 112
Stat. 2681-822 ..... 2, 3, 19

**Other Authorities**

8 C.F.R. § 208.31 ..... 5

8 C.F.R. § 238.1(b)(2)(ii) ..... 5

8 C.F.R. § 238.1(f)(2) ..... 5

8 C.F.R. § 238.1(f)(3) ..... 5

8 C.F.R. § 241.8(e) ..... 5

8 C.F.R. § 1208.16 ..... 5

8 C.F.R. § 1208.16(b) ..... 15

8 C.F.R. § 1208.16(c) ..... 15

8 C.F.R. § 1208.17 ..... 5

8 C.F.R. § 1208.18 ..... 5

8 C.F.R. § 1208.18(a)(1) ..... 16

8 C.F.R. § 1208.18(a)(7) ..... 16

8 C.F.R. § 1208.31(e) ..... 5

8 C.F.R. § 1240.10(f) ..... 5

H.R. Rep. No. 109–72, 2005
U.S.C.C.A.N. 240 ..... 21

## INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan, nonprofit organization founded in 1920 and dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has frequently appeared on questions of judicial review of immigration decisions before this Court and courts around the country, as counsel for a party and as amicus curiae. *See*, *e.g.*, *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020) (counsel of record); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221 (2020) (amicus); *INS v. St. Cyr*, 533 U.S. 289 (2001) (counsel of record). The American Civil Liberties Union of Massachusetts is a state affiliate of the national ACLU and shares its interest in and commitment to preserving judicial review of executive action threatening individual liberty. *See*, *e.g.*, *Kong v. United States*, 62 F.4th 608 (1st Cir. 2023) (amicus).

[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed money intended to fund preparing or submitting this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Amici file this brief to address the first question presented—whether, as the government contends, its new third-country removal policy is immune from judicial review.[2]

Respondents challenge a novel government policy that purports to give the Department of Homeland Security ("DHS") the unreviewable authority to decide, wholly outside the statutory removal process, when and whether to designate a third country for removal; which third country to designate; and whether to consider a humanitarian protection claim under the withholding of removal statute, 8 U.S.C. § 1231(b)(3), or deferral of removal under the Convention Against Torture ("CAT"). The government argues that the federal courts have no jurisdiction to consider Respondents' claims, citing four judicial review statutes: 8 U.S.C. §§ 1252(g), (b)(9), and (a)(4), and the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, 112 Stat. 2681-822 ("FARRA").

But the government's position is contrary to the plain text of these statutes. Section 1252(g) applies to three discrete *discretionary* decisions "arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal," and not to the legal claims raised by Respondents. The remaining provisions do not bar federal court jurisdiction, but rather channel review to the court of appeals by

[2] Amici agree with Respondents' position on the other two questions presented but do not address them here.

petition for review where, unlike here, the claims can be raised in removal proceedings. Section 1252(b)(9) channels claims "arising from any action taken or proceeding brought to remove an alien" to a petition for review of a final order to the courts of appeal. Section 1252(a)(4) and Section 2242(d) of FARRA channel review of CAT claims to a petition for review of a final order of removal.

None of these statutes deprive the federal courts of jurisdiction to consider Respondents' claims, which do not challenge any aspect of the final removal orders against them but rather challenge DHS's novel third-country designation policy. The policy, on its face, pertains only to individuals with final removal orders "who have no ongoing proceedings in which to raise a claim under [8 U.S.C. § 1231(b)(3)] or [CAT]." J.A. 307 n.2. Thus, every DHS action pursuant to the third-country designation policy challenged by Respondents occurs after and apart from the issuance of a final removal order. Under the new policy, the government designates the third country after the final removal order issues, and all of Respondents' legal claims—that they would be subject to persecution or torture upon removal to that designated third country—arise after the final removal order issues. In short, the third-country designation process is entirely separate from, and subsequent to, the removal proceeding leading to a final removal order. Consequently, Respondents' claims cannot be raised in removal proceedings followed by a petition for review—by DHS's design.

In the government's telling, though, Respondents' claims nonetheless must be brought through the

petition-for-review process. This is not only contrary to the plain text of the four statutes the government cites, but would have perverse and illogical consequences. On the government's theory, for example, judicial review would be barred if DHS were to adopt a policy of summarily removing noncitizens upon issuing a notice of the removal charge, without ever presenting the case to an immigration judge; of removing them while their case is pending and before a final administrative order of removal is issued; or of removing them in violation of a prohibition on removal. In these scenarios, a policy that bypasses removal proceedings altogether would be unreviewable.

This Court has repeatedly rejected interpretations of these review provisions that lead to such "absurd" and "implausible" results. *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018) (plurality opinion); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) ("*AADC*"). It should do so again.

## ARGUMENT

### I. THE DHS POLICY SEEKS TO BYPASS THE STATUTORY FRAMEWORK FOR JUDICIAL REVIEW.

Congress enacted the current judicial review framework for removal orders, codified at 8 U.S.C. § 1252, in 1996 and amended it in 2005. In overview, Congress generally provided for federal court review of removal orders through a "petition for review" initiated in a federal circuit court. *See generally* 8 U.S.C. §§ 1252(a)(1), (b)(2). Section 1252(b)(9) "consolidate[s]" "[j]udicial review of all questions of

law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien" in the petition-for-review process, and precludes habeas jurisdiction "to review such an order or such questions of law or fact." Congress thus ensured that individuals would have a single, consolidated mechanism to seek federal court review of final removal orders and matters arising in the removal proceedings.

Respondents and the class they represent are subject to final orders of removal issued in three types of proceedings: regular removal proceedings under 8 U.S.C. § 1229a, reinstatement of removal proceedings under 8 U.S.C. § 1231(a)(5), and administrative removal proceedings under 8 U.S.C. § 1228(a). In all of these proceedings, noncitizens are given notice of the country to which DHS intends to remove them. They also are entitled to an opportunity to assert country-specific claims that they cannot be removed to the designated country because they would face persecution or torture there. *See* 8 C.F.R. §§ 1240.10(f), 1208.16-1208.18 (notice and opportunity in Section 1229a proceedings); 8 C.F.R. §§ 238.1(b)(2)(ii), 238.1(f)(2), 241.8(e) (notice in administrative removal and reinstatement proceedings); 8 C.F.R. §§ 208.31, 238.1(f)(3), 241.8(e), 1208.31(e) (opportunity in the same). Noncitizens are further entitled to seek judicial review through the petition-for-review process of adverse decisions on such claims by the immigration courts and Board of

Immigration Appeals. *See, e.g.*, *Nasrallah v. Barr*, 590 U.S. 573 (2020).[3]

Contrary to the plain text of these statutes and consistent administrative practice, DHS adopted a novel policy that bypasses Congress's provision for an opportunity to challenge a country designation on protection grounds, where such a designation is made *after* the issuance of a final order of removal.

The new policy unfolds in two ways. Where the newly designated country of removal has provided diplomatic assurances deemed credible by the U.S. government, the policy overrides the existing statutory and regulatory process for raising protection claims. The noncitizen is summarily removed to that third country without any individualized assessment of a protection claim or of the risks the individual may face in that country. Alternatively, where the newly designated third country has not provided diplomatic assurances deemed credible by the United States, the policy establishes a fleeting process for asserting the individual's fear-based claim—a process that the courts below found was entirely lacking in sufficient notice and opportunity to respond.

The government claims that district courts are powerless to review the legality of the new policy even though, by design, the policy applies *outside* of removal proceedings and the protection claims arise *after* removal proceedings are completed, thus wholly insulating the policy from judicial review. Yet the timing of removal to the newly-designated third

[3] Under 8 U.S.C. § 1252(b)(1), a petition for review of a final order of removal is due to the court of appeals within 30 days of the order.

country, which is solely under the government's control, makes asserting any protection claim in a petition for review impossible. The government contends that Congress dictated that result. That is wrong. For the reasons set out below, none of the statutes the government invokes eliminates federal court jurisdiction over the legal claims in this case.

## II. SECTION 1252(g) DOES NOT BAR REVIEW.

First, 8 U.S.C. § 1252(g) does not bar review of Respondents' claims.

Section 1252(g) provides: "Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory) . . . 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 . . . ."

1. This Court has explained that Section 1252(g) is a "narrow" provision that applies only to "discretionary" decisions "arising from" "three discrete events": the decisions to (1) "commence proceedings"; (2) "adjudicate cases"; or (3) "execute removal orders." *AADC*, 525 U.S. at 482. As to these three types of claims, Section 1252(g) does not eliminate review altogether; rather, it channels review through the petition-for-review process. *See* 8 U.S.C. § 1252(g) (stating that review is barred "[e]xcept as provided in this section").[4]

[4] At the time of *AADC*, Section 1252(g) had not yet been amended by REAL ID Act of 2005, which included a reference to

Respondents do not challenge any of the three discretionary actions enumerated in Section 1252(g), so the statute does not bar judicial review of their claims. Faced with the plain text of Section 1252(g), the government argues that a decision "where" to send an individual "arises from" the decision to "execute" the removal order. Petitioners' Brief ("Br.") 16. But this requires an extremely broad interpretation of Section 1252(g) that would apply to *any* legal claim touching upon a removal proceeding—an interpretation which this Court has already rejected as "implausible." *AADC*, 525 U.S. at 482.

In *AADC*, this Court stuck with the plain text and structure of the statute to reject an interpretation of Section 1252(g) that would cover "all claims arising from deportation proceedings" or impose "a general jurisdictional limitation." *Id.* Justice Scalia, writing for the Court, held that Section 1252(g) "applies only to three discrete actions": the "decision or action" to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders" where the government has "prosecutorial discretion." *Id.* (emphasis in original). It does not apply to the "many other decisions or actions that may be part of the deportation process." The purpose of Section 1252(g), Justice Scalia explained, is to cover the Executive's discretionary decisions in the three enumerated stages of the removal process. *Id.* at 483-84.

The government tacitly acknowledges that Section 1252(g), as definitively interpreted in *AADC*, forecloses its sweeping interpretation and resorts to

---

habeas in the statute's notwithstanding clause. That language is not at issue here.

arguing that Justice Scalia's opinion failed to grapple with the statutory text. Br. 16. To the contrary, the Court in *AADC* squarely disposed of the sweeping kind of interpretation the government advances here based on the text and structure of the 1996 jurisdictional amendments: that Section 1252(g) covers "all or nearly all deportation claims." *AADC*, 525 U.S. at 478.

The Court rejected that argument, based on the text and structure of the statute. It explained that Section 1252(g) was "much narrower" than the government argued, *id.*, and found it "implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Id.*; *see also id.* at 485 n.9. And the Court explained at length precisely why the text and structure of the statute compelled reading Section 1252(g) narrowly.[5]

---

[5] *AADC* confronted the interpretation of Section 1252(g) in the context of judicial review of transitional cases—those cases in the pipeline as of the date the 1996 law went into effect. Congress provided that only Section 1252(g), and not the other subsections of the newly-enacted Section 1252, applied to such cases. *See AADC*, 525 U.S. at 477. But that presented a conundrum, since Section 1252(g) refers to the rest of Section 1252, providing that "no court shall have jurisdiction" to hear the covered categories of claims *"[e]xcept as provided in this section*"—that is, the rest of Section 1252. *Id.* at 477-78 (emphasis added). If Section 1252(g) applied broadly to cover all claims as the government argued in that case, then the Court was faced with two alternatives, both of which were contrary to the text and structure of the statute. Either Section 1252(g) eliminated review altogether because Congress specified the rest of Section 1252 did not apply to pipeline cases, including the removal cases at issue in *AADC* itself; or applying Section 1252(g) meant that rest of Section 1252

The government wholly ignores the explanation and logic of the Court's analysis.

*AADC* thus held that Section 1252(g) applied to just the specified "three discrete events" and that there was "good reason" for Congress to make this choice. The Court explained: the three acts "represent the initiation or prosecution of various stages in the deportation process . . . [where] the Executive has discretion to abandon the endeavor" for "humanitarian reasons or simply for its own convenience." *Id.* at 483-84. And Congress specifically sought to curtail the practice by which parties had brought federal court challenges to these discretionary determinations. *Id.* at 484-85.

Here, Respondents' claims do not fall within Section 1252(g) because they do not challenge the government's discretionary decision to "commence proceedings, adjudicate cases, or execute removal orders." Instead, Respondents challenge the government's policy governing mandatory protection claims, raising regulatory, statutory, and constitutional claims. Section 1252(g) does not apply on its plain terms.

---

had to apply to pipeline cases as well to provide some avenue for review. But Congress had expressly provided that the rest of the new Section 1252 did *not* apply. *Id.* at 478. Thus, Justice Scalia explained that the only proper interpretation to avoid those two anti-textual results was to strictly limit Section 1252(g) to the types of claims it was drafted to address, namely the three enumerated discrete discretionary events. *Id.* at 482.

To be sure, if a claim of protection is granted, the government cannot execute an order of removal to that country. But the Court in *AADC* anticipated and rejected attempts—like the government's here—to expand the scope of Section 1252(g) beyond what Congress intended. *AADC* recognized that there "are of course many other decisions or actions that may be part of the deportation process—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. Nonetheless, the Court was unequivocal that Section 1252(g)'s text did not include those acts, which are far closer to the three covered provisions than the policy here.

2. Beyond being at odds with the statutory text and *AADC*, the government's reading of Section 1252(g) leads to perverse consequences that are inconsistent with other post-*AADC* precedents. For example, if the government were correct, Section 1252(g) would cover a claim challenging a blatantly illegal removal in violation of an immigration court order granting withholding of removal or CAT relief, where the removal occurred well after removal proceedings had concluded. On the government's theory, that claim would "arise from" a decision or action to execute the removal order. Indeed, the government recently made this precise argument to the Court. *See* Application to Vacate Injunction at 18, *Noem v. Abrego Garcia*, No. 24A949 (U.S. Apr. 7, 2025) (arguing "the execution of a removal order necessarily

involves deciding *where* the alien will go") (emphasis in original). But the Court exercised jurisdiction and affirmed the district court's order granting relief and requiring the government to facilitate the noncitizen's return. *Noem v. Abrego Garcia*, 145 S. Ct. 1017 (2025).

Similarly, under the government's reading of Section 1252(g), this Court would have lacked jurisdiction to review the government's rescission of the Deferred Action for Childhood Arrivals ("DACA") program in *Dep't of Homeland Sec. v. Regents*, 591 U.S. 1 (2020). But as this Court explained, Section 1252(g) did not bar review of the challenge in *Regents* because the recission of a "deferred action program with associated benefits" was not "a decision to 'commence proceedings,' much less to 'adjudicate' a case or 'execute' a removal order." *Id.* at 19. If the policy at issue in *Regents,* which delayed the initiation of proceedings and promulgated guidance on granting deferred action, was outside Section 1252(g)'s ambit, then the policy at issue in this case, which governs how and whether protection claims can be raised at all, is even more clearly outside Section 1252(g)'s scope.

3. Finally, even if the government were correct that Section 1252(g) encompassed Respondents' claims, it would only channel those claims to a petition for review from an order of removal. As the Court in *AADC* additionally explained, Section 1252(g), where it applies, is a channeling provision, not a complete bar on review. *See AADC*, 525 U.S. at 483 (describing Section 1252(g) as "making it clear that those specified decisions and actions . . . are covered by the

'zipper' clause of § 1252(b)(9)") (emphasis omitted). But as discussed more fully below, the Act's channeling provisions streamline certain claims to a petition for review of a final order of removal, and Respondents' claims cannot be channeled to a petition for review because they arise only after the final removal order is issued—again, by DHS's design.

## III. SECTION 1252(b)(9) DOES NOT BAR REVIEW.

The government is equally wrong on its assertion that Section 1252(b)(9) bars review of Respondents' claims.

Section 1252(b)(9) is titled "Consolidation of questions for judicial review" and in its entirety provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

The purpose of Section 1252(b)(9) is to provide a "meaningful chance for judicial review," *Jennings*, 583

U.S. at 293 (plurality opinion), by channeling claims arising from final removal orders "into one action in the court of appeals," *INS v. St. Cyr*, 533 U.S. 289, 313 (2001).

The government would interpret Section 1252(b)(9) to require Respondents to bring their claims through a petition for review of a final removal order even though their claims arise from a process DHS has deliberately set outside of removal proceedings. To state the government's position is to refute it: "[C]ramming judicial review of [Respondents' legal] question into the review of final orders of removal would be absurd." *Jennings*, 583 U.S. at 293 (plurality opinion). It would turn the very provision intended to guarantee meaningful judicial review into the justification to deprive Respondents of *any* review whatsoever.

Section 1252(b)(9) "turns on whether the legal questions that [a court] must decide 'aris[e] from' the actions taken to remove" noncitizens. *Id.* In *Jennings*, the plurality opinion explained that terms like "arising from" are not self-defining when used in jurisdictional statutes. Instead, "when confronted with capacious phrases like 'arising from,' [the Court has] eschewed uncritical literalism leading to results that no sensible person could have intended." *Id.* at 293-94 (cleaned up) (collecting cases). Applying these principles, the *Jennings* plurality held that Section 1252(b)(9) does not apply to a claim that would be "effectively unreviewable" on a petition for review. *Id.* at 293.

In *Regents*, this Court again held that "§ 1252(b)(9) does not present a jurisdictional bar

where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined." 591 U.S. at 19 (citation modified). The Court thus concluded that Section 1252(b)(9) did not bar review of a challenge to the decision to rescind the DACA program. *See id.*

Here, as the court of appeals correctly noted, Respondents' challenge does not seek "review of an order of removal, the decision to seek removal, or the process by which removability is determined." J.A. 27. Rather, the determination of *where* Respondents are to be removed and *how* (if at all) they are to be notified "post-dates any of the contexts identified in *Regents*." J.A. 27. Consistent with this Court's repeated admonitions that Section 1252(b)(9) is "targeted" and "narrow," *Regents*, 591 U.S. at 19; *see also Jennings*, 583 U.S. at 293-94 (plurality opinion), that provision cannot be stretched to encompass these claims that arise after removal proceedings have concluded.

It is both legally and practically impossible for Respondents to challenge the policy at issue, or any individual third country removal of class members, in a petition for review. Legally, even if a clairvoyant noncitizen raised a fear-based claim concerning yet-to-be-designated third countries, they could not receive relief or adjudication as to those claims because the regulations contemplate claims concerning the risk of persecution or torture only in "the *proposed* country of removal." 8 C.F.R. §§ 1208.16(b)-(c) (emphasis added). There is no review concerning speculative countries of removal.

And it is, of course, impossible as a practical matter for Respondents to raise the instant challenge in the petition-for-review process. The government demands that noncitizens, fearing the possibility that DHS might in the future designate a third country for removal, raise every potential fear-based claim that they might have to every country in the world. And, even if a noncitizen accomplished that impossible task, country conditions can and do change over time, making it infeasible to identify all possible protection claims in advance. The prospect of "chain refoulement" further exacerbates the difficulties, as Respondents would have to anticipate not just which countries pose a direct danger, but which of those countries might transfer them onward to another country where they face a recognized risk of persecution or torture. *See* J.A. 78-83 (illustrating "the inherent practical difficulty" of raising such claims prophylactically). And, contrary to the government's assertion, Br. 41, CAT protection and withholding of removal are available where the risk of persecution or torture is at the hands of third parties, not just state actors. *See* 8 C.F.R. §§ 1208.18(a)(1), (7); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). Thus, Respondents would be required to guess at future changes across all of society, in any country in the world which DHS might possible designate.

Ultimately, the government's reading of Section 1252(b)(9) would convert an "unmistakable zipper clause" into a claim-barring provision. *AADC*, 525 U.S. at 483. Such a result is contrary to the plain text and antithetical to the purpose of a channeling provision, which is not to foreclose judicial review but

to ensure that claims can be heard, but heard at a proper point in the proceedings.

The government claims that reading Section 1252(b)(9) as broadly preclusive would simply bring it in line with "countless other judicial-review bars" in the INA. Br. 23. But some of the provisions the government cites are not categorical bars on judicial review.[6] And the provisions in Section 1252 that *do* prohibit review of certain claims demonstrate that Congress knows how to write a bar on judicial review and did not do so in Section 1252(b)(9). *See* 8 U.S.C. § 1252(a)(2)(B)(i) (providing that "no court shall have jurisdiction to review . . . the granting of relief" of adjustment of status, voluntary departure, cancellation of removal, and inadmissibility waivers); *id.* § 1252(a)(2)(C) ("no court shall have jurisdiction to review any final order of removal against" noncitizens with certain criminal convictions). Yet the government asks this Court to read such a judicial review bar into Section 1252(b)(9), transforming a "zipper clause"—which is intended to provide orderly, yet meaningful, judicial review of final orders of removal—into a secret categorical bar on judicial

[6] The government cites Sections 1231(a)(5) and (h), and 1252(a)(2)(B) and (C). Section 1231(a)(5) simply clarifies there is no *second* opportunity for judicial review of an order of removal when it is reinstated upon a subsequent reentry. It does not bar review of reinstatement orders. *See Fernandez Vargas v. Gonzalez*, 548 U.S. 30 (2006). Section 1231(h) is not a bar on jurisdiction at all—it clarifies that Section 1231 does not itself provide an independent cause of action. *See Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001). And Section 1252(a)(2)(D) restores review over "constitutional claims and questions of law" raised in a petition for review otherwise barred under Sections 1252(a)(2)(B) and (C).

review of claims that postdate the entry of the final orders (and thus cannot be "zipped" into the petition-for-review process). This is precisely the type of "staggering result[]" that *Jennings* was careful to avoid in delineating the proper scope of Section 1252(b)(9). 583 U.S. at 293 (plurality opinion).

The government half-heartedly invokes *Riley v. Bondi*, 606 U.S. 259 (2025), to argue that the practical consequences arising from its reading of Section 1252(b)(9) to bar any review of claims that postdate the entry of the final order of removal are immaterial. Br. 23. That fundamentally misapprehends both Respondents' argument and *Riley*. In that case (which did not concern a jurisdictional bar), the Court held that an order denying deferral of removal in "withholding-only" proceedings was not a "final order" for purposes of calculating when noncitizens must seek review. 606 U.S. at 269. It then explained that any practical difficulties in obtaining review arising from that conclusion "are not unavoidable" and could be addressed by the Executive or by the courts. *Id.* at 272. Here, Respondents do not complain of practical concerns that would arise from reading Section 1252(b)(9) as the government suggests. The claims at issue can *never* arise in a removal proceeding—by DHS's design—and can thus *never* be reviewed through a petition for review of the final order of removal. *Riley* is wholly inapposite.

## IV. THE CAT-SPECIFIC CHANNELING PROVISIONS IN THE FARRA AND SECTION 2242(d) DO NOT BAR REVIEW.

Finally, the government relies on two CAT-specific provisions in its attempt to convince this Court that judicial review is completely foreclosed. To start, neither addresses withholding of removal and thus are insufficient—even on the government's terms—to bar review of Respondents' challenge. More fundamentally, reliance on these provisions fails for the same reasons outlined above: Both are channeling provisions that presume that claims under the CAT can be brought in regular removal proceedings and therefore affirm that they can be reviewed by the federal courts. They cannot be read to eliminate review of a policy designed to preclude individuals from raising such claims during removal proceedings.

Section 2242(d) of the FARRA provides that judicial review of claims raised under the CAT may be had "as part of the review of a final order of removal pursuant to [Section 1252]."[7] It does not address, let

[7] FARRA Section 2242(d), titled "Review and Construction," provides in full:

> Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal

alone remove, jurisdiction that may otherwise exist to review claims outside the petition-for-review-process (with the sole exception of claims challenging implementing regulations, which are not at issue here).

Section 1252(a)(4), in turn, provides that "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.[8] As with FARRA, the government seeks to read Section 1252(a)(4) to bar a challenge to a policy that eliminates the ability to seek CAT protection. But the Court has rejected this sort of "uncritical literalism" that obtains jurisdictional "results that no sensible person could have intended." *See Jennings*. 583 U.S. at 293-94 (plurality opinion) (cleaned up).

To the contrary, Section 1252(a)(4) is a channeling statute that "by its terms *limits*, but does not *eliminate*" CAT claims outside petitions for review—

---

> pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

[8] Section 1252(a)(4) is titled "Claims under the United Nations Convention" and provides in full:

> Notwithstanding 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, 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 United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

and so "does not bar" CAT claims "that cannot meaningfully be brought in a petition for review." *E.O.H.C. v. Sec'y, U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 188-90 (3d Cir. 2020). Section 1252(a)(4)'s text places jurisdiction over denials of CAT protection in the courts of appeals to provide "an opportunity for judicial review" of a CAT order, *Nasrallah*, 590 U.S at 586, but does not affirmatively strip alternative sources of jurisdiction over claims that fall outside the petition-for-review process. *Compare* 8 U.S.C. § 1252(a)(2)(C) ("no court shall have jurisdiction to review").

Statutory history confirms that Section 1252(a)(4) is a channeling provision, not one wholly eliminating review. It was introduced as part of the REAL ID Act of 2005, in response to this Court's 2001 decision in *St. Cyr*, which read Section 1252 not to strip habeas jurisdiction over certain challenges to orders of removal. *See* 533 U.S. at 304-05. The judicial review provisions enacted as part of the REAL ID Act responded by channeling claims to the courts of appeal—*not* barring judicial review altogether. *See* H.R. Rep. No. 109–72, at 175, 2005 U.S.C.C.A.N. 240, 299 (the jurisdictional changes made by the REAL ID Act "would give every alien one day in the court of appeals").

The government's reading of Section 1252(a)(4) would be even more staggering than the reading of "arising from" rejected in *Jennings* and *AADC*. It would transform a provision that presumes individuals may raise CAT claims against their removal, and that guarantees review of such claims in a petition for review, into a provision barring both.

Nothing in the text supports that singularly perverse result.

## CONCLUSION

The Court has jurisdiction over Respondents' claims. It should affirm the judgment of the court below.

Respectfully Submitted,


Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street
Suite 700
San Francisco, CA 94104

Jessie J. Rossman
Adriana Lafaille
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, INC.
One Center Plaza
Suite 850
Boston, MA 02108

Lee Gelernt
*Counsel of Record*
Anand Balakrishnan
Noor Zafar
Omar Jadwat
Priyanka Menon*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
18th Floor
New York, NY 10004
(202) 457-0800
lgelernt@aclu.org

Lucas Guttentag
559 Nathan Abbott Way
Stanford, CA 94305

**admitted only in Maryland*

*Counsel for Amici American Civil Liberties Union and American Civil Liberties Union of Massachusetts*


Dated: November 23, 2026