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IF NOT NOW, WHEN? FINDING JURISDICTION TO REVIEW IMMIGRATION ENFORCEMENT ACTION IN THE TRUMP ERA

ELIZABETH L. JACKSON*

ABSTRACT

The Trump Presidency left an indelible mark on the U.S. immigration system. From extreme enforcement practices to unconstitutional policies, the vast power of the executive branch and the underutilized strength of the judicial branch was thrust into a harsh light. The failure of lower courts to adequately understand and apply the narrow construction of jurisdiction-limiting statutes created unjust and absurd results on a number of issues, from the targeting of immigration activists for enforcement actions to the so-called Migrant Protection Protocols. The consistent application of Supreme Court precedent allowing for Federal jurisdiction in this area remains absolutely necessary to right the ship of U.S. immigration policy and enforcement. It will provide avenues for justice for those harmed by Trump administration policies and flex the previously atrophied muscle of the judicial branch in immigration law.

* Elizabeth L. Jackson is expected to receive her Juris Doctor from the Cleveland-Marshall College of Law in May 2022. She offers unlimited gratitude to the editors and associates of the *Cleveland State Law Review* for their patient and thoughtful support; to Bruce Allen for his invaluable feedback and insight; and to her friends, family, and colleagues who have tirelessly supported her throughout her career. She dedicates this note to her late mother, Rachel.

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I. INTRODUCTION

President Trump's administration pursued immigration policies that range from frustrating to cruel. Some of the most damaging policies include the family separation policy first piloted in 2017[1] and the Migrant Protection Protocols, also known as the Remain in Mexico program, first adopted in January 2019.[2] Under the Remain in Mexico program, most people seeking asylum who have entered the United States by land from Mexico are then returned to Mexican border towns while their cases are pending before U.S. immigration courts. As of January 2021, U.S. officials sent more than 71,000 people to Mexico under the program, including at least 16,000 children as of December 2019.[3] The negative impacts of such a program may be difficult to comprehend. As one hopeful asylum applicant shared with Human Rights Watch:

> We are constantly under stress by our inability to request asylum and find shelter in a safe place. We are afraid and anxious in Mexico, given that our kidnappers are still pursuing us. We are afraid of being separated and

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[1] Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html?auth=-google1tap.

[2] Michael Garcia Bochenek, *US: 'Remain in Mexico' Program Harming Children*, HUM. RTS. WATCH (Feb. 12, 2020, 8:00 AM), https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children.

[3] *Id.; Details on MPP (Remain in Mexico) Deportation Proceedings* TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/mpp/ (last visited Mar. 2, 2021).

> detained again in the horrendous conditions in immigration detention . . . . We experience these fears every day.[4]

The enormity of structural injustice can be daunting for any party seeking remedy. If it were not for our government's design of checks and balances, there would be little hope at all to ensure the federal government complies with its own laws and international laws, and the moral duty to respect human beings regardless of country of origin.

Even with an empowered judiciary, there are roadblocks to oversight of the Trump administration's immigration policies. One of these roadblocks is the jurisdiction channeling statute of the Immigration and Nationality Act ("INA") codified at 8 U.S.C. § 1252. Two main subparts have been used by the government to remove these activities from the oversight of the judicial system. They are § 1252(b)(9) and § 1252(g). While the Supreme Court has narrowly construed these sections in various cases over the last twenty years, lower courts have applied that construction inconsistently, creating vastly different results. When the statute is construed broadly, it results in a complete denial of justice and total lack of review for serious violations of law committed by the Government. The need for a clear rule and statement of construction of this section is needed now more than ever.

This Note provides in Part II a brief overview of immigration enforcement law and policy. Part III focuses on the legislative history of the jurisdiction limiting statute found in 8 U.S.C. § 1252 and the Supreme Court's narrow construction of the two main jurisdiction-limiting sections, § 1252(b)(9) and § 1252(g). Part IV discusses the inconsistent application of the Supreme Court's analysis in lower courts. Part V analyzes current litigation challenging the expansion of immigration enforcement under the Trump administration to demonstrate the need for consistent application of the narrow construction of § 1252 jurisdiction-limiting provisions.

II. IMMIGRATION ENFORCEMENT LAW AND POLICY: A BRIEF OVERVIEW

Immigration is one of the most complex and dynamic areas of law.[5] Immigration law directly affects the lives and livelihoods of millions of people in the United States.[6] The topic is rarely out of the news, particularly the Trump administration's enforcement policies that were announced with varying levels of authority and procedure, ranging from presidential tweets to statutory amendments.[7]

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[4] Michael Garcia Bochenek, *US: 'Remain in Mexico' Program Harming Children*, HUM. RTS. WATCH (Feb. 12, 2020, 8:00 AM), https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children.

[5] *See* AM. IMMIGR. COUNCIL, HOW THE UNITED STATES IMMIGRATION SYSTEM WORKS (2019).

[6] D'vera Cohn, *5 Key Facts About U.S. Lawful Immigrants*, PEW RSCH. CTR.: FACT TANK (Aug. 3, 2017), https://www.pewresearch.org/fact-tank/2017/08/03/5-key-facts-about-u-s-lawful-immigrants/.

[7] For an overview of the policy changes in the first two years of the Trump administration issued by Executive Order, Policy Memoranda and reflected by activity at ports of entry, see generally SARAH PIERCE, MIGRATION POL'Y INST., IMMIGRATION-RELATED POLICY CHANGES IN THE FIRST TWO YEARS OF THE TRUMP ADMINISTRATION 5–44 (2019).

Between Fiscal Year 2003 and February 2020,[8] 1,708,364 people have been removed[9] from the United States pursuant to a removal order generated by the U.S. Immigration and Customs Enforcement ("ICE") or ordered by an immigration judge.[10] Being removed from the United States carries serious consequences, including a ban from entering the United States for five years, ten years, or even for life.[11] The real-life impact of these complicated laws and regulations can lead to separated families and lost careers. Carrying out thousands of removals can also result in the violation of rights of citizens and non-citizens, including the detention and removal of U.S. citizens[12] and removal of non-citizens even when the order for their removal has been stayed by a court or by regulation.

Persons whose rights have been violated by the United States government may seek relief through the writ of habeas corpus, *Bivens* claims, or damages through the Federal Tort Claims Act ("FTCA"). The FTCA allows for claims against the United States government for certain tortious conduct, including intentional torts committed by employees of the federal government.[13] When immigration enforcement agencies fail to uphold statutory or constitutional obligations in the course of the removal process, people suffer real harm and should be entitled to their day in court.

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[8] The date of the most recent data available from ICE.

[9] These terms have varied with different immigration laws. As summarized by the U.S. Citizenship and Immigration Service website:

> [Deportation] is the formal removal of an alien from the United States when they have been found removable for violating the immigration laws. An immigration judge orders deportation without imposing or contemplating any punishment. Before April 1997, deportation and exclusion were separate removal procedures. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 consolidated these procedures. After April 1, 1997, aliens in and admitted to the United States may be subject to removal based on deportability. Now called "removal," this function is managed by U.S. Immigration and Customs Enforcement.

Glossary, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/tools/glossary?topic_id=d#alpha-listing [https://perma.cc/4TN6-H8T9] (search "deportation"; then click dropdown arrow to expand to see the full definition).

[10] *See Latest Data: Immigration and Customs Enforcement Removals*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/remove/ (last visited Mar. 2, 2021).

[11] *Unlawful Presence and Bars to Admissibility*, USCIS, https://www.uscis.gov/legal-resources/unlawful-presence-and-bars-admissibility [https://perma.cc/QK66-VWS2] (last updated July 23, 2020).

[12] *See* Jacqueline Stevens, *United States Citizens in Deportation Proceedings*, DEPORTATION RSCH. CLINIC, https://deportationresearchclinic.org/USCData.html (last visited Oct. 14, 2019) (finding that between January 1, 2011 and June 2017, ICE detained 268 people who were in fact US citizens); *see also* Camila Domonske, *U.S. Citizen Who Was Held by ICE for 3 Years Denied Compensation by Appeals Court*, NPR: THE TWO-WAY (Aug. 1, 2017), https://www.npr.org/sections/thetwo-way/2017/08/01/540903038/u-s-citizen-held-by-immigration-for-3-years-denied-compensation-by-appeals-court.

[13] "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674.

Those who have been wrongfully removed, wrongfully arrested, or wrongfully detained face additional barriers to justice. The INA removes the federal court's authority to review certain immigration enforcement actions, including the execution of a removal order.[14] The Ninth and Eighth Circuit Courts of Appeal disagree over whether this jurisdiction-stripping statute also applies to civil actions based on the removal of a non-citizen in violation of a stay of the removal order. The INA also limits the judicial review of questions of law or fact arising from immigration enforcement actions by channeling that review into a single proceeding only available after the issuance of a final removal order.[15]

The channeling of review has been read overbroadly by some district and circuit courts to preclude any claim even tangentially related to the removal proceeding. The result of this erroneous application of § 1252 is a complete denial of remedy for the federal government's wrongful and unlawful conduct, and no check on the federal government's unlawful conduct against her people.

III. LEGISLATIVE HISTORY AND SUPREME COURT CONSTRUCTION OF 8 U.S.C. § 1252 TO DATE

A. Legislative History

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") which reformed a number of elements of the INA, including sections that focused on streamlining the process of enforcement actions.[16] Because each challenge and appeal at every step of the removal process generated delay of the final removal order, Congress perceived that the system created an overwhelming motivation to file numerous collateral attacks on the underlying removal proceedings.

IIRIRA created a statutory framework whereby federal district courts were stripped of jurisdiction over many immigration-related cases in order to channel the review of issues into one instance for judicial expediency.

The statutory framework seeks to bar federal district court review of immigration matters in a number of ways. For example, § 1252(a)(2)(A)(i) prevents courts from reviewing "any other cause or claim arising from or relating to the implementation or operation of an order of removal."[17] Other subsections limit federal courts' power to certify a putative class, grant equitable relief, and, in particular, enjoin a noncitizen's removal, or provide any other injunctive relief.[18] IIRIRA sought to stem the flow of duplicative immigration appeals by enacting 8 U.S.C. § 1252(g), which states:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any

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[14] 8 U.S.C. § 1252(g).

[15] 8 U.S.C. § 1252(b)(9).

[16] Enforcement actions include issuance of a Notice to Appear before an immigration judge, detention in ICE facilities, removal from the United States, imposition of bans from applications to re-enter the United States, and criminal liability.

[17] 8 U.S.C. § 1252(a)(2)(A)(i).

[18] Yael Ben Tov, *The Right to Stay: The Suspension Clause, Constitutional Avoidance, and Federal District Court Jurisdiction to Grant Stays of Removal Despite 8 U.S.C. § 1252(g)*, 41 CARDOZO L. REV. 811, 825 (2019).

> other habeas corpus provision, and sections 1361 and 1651 of such title, 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.[19]

This provision limits the jurisdiction of federal courts to review final orders of removal by any procedure other than the single petition for review described in § 1252(b).[20]

Federal courts have wrestled over whether this jurisdiction-stripping statute prohibits civil actions under the FTCA.[21] Some courts have construed this language broadly to hold that non-citizens cannot recover damages even when the federal government has violated their rights.[22] However, the legislative history reveals a narrower scope. The Immigration and Nationality Act's jurisdiction-stripping provisions enacted by IIRAIRA were created to simplify the process of immigration enforcement and removal, not to deprive non-citizens of fundamental rights.[23] For example, in April 1996, the Senate Report of IIRAIRA describes the intent of the legislation as follows:

> The committee bill is intended, first, to increase control over immigration to the United States—decreasing the number of persons becoming part of the U.S. population in violation of this country's immigration law (through visa overstay as well as illegal entry); expediting the removal of excludable and deportable aliens, especially criminal aliens; and reducing the abuse of parole and asylum provisions. It is also intended to reduce aliens' use of welfare and certain other government benefits.[24]

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[19] 8 U.S.C. § 1252(g).

[20] Section 1252(b) provides generally for the requirements and circumstances of review of a removal order. The jurisdiction limiting provision is found in §1252(b)(9) titled Consolidation of questions for judicial review, which reads:

> 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.

8 U.S.C. § 1252(b)(9).

[21] Sameer Ahmed, *INA Section 242(g): Immigration Agents, Immunity, and Damages Suits*, 119 YALE L.J. 625, 626 (2009).

[22] Kimberly P. Will, *The Limits of 8 U.S.C. § 1252(g): When Do Courts Have Jurisdiction to Entertain an Alien's Claim for Damages Against the Government?*, 51 CORNELL INT'L L.J. 533, 534 (2018).

[23] Ahmed, *supra* note 21, at 628.

[24] S. REP. NO. 104-249, at 2 (1996); Ahmed, *supra* note 21, at 628.

Providing a cause of action for wrongful removal or detention or other violations of constitutional rights does not conflict with any of these purposes.

Beyond the Congressional intent in enacting § 1252, the plain language of the statute precludes an overly broad interpretation of the statute. As Sameer Ahmed argued, applying the principles of *expressio unius* to § 1252(g) indicates that civil claims for damages were not intended to be barred.[25] The broad interpretation of § 1252(g) would also bar plaintiffs from asserting claims arising under the Constitution.[26]

B. Supreme Court's Narrow Construction of § 1252(g) in Reno v. American-Arab Anti-Discrimination Committee

The Supreme Court addressed this question in *Reno v. American-Arab Anti-Discrimination Committee*.[27] In *Reno*, the plaintiffs were members of an politically unpopular group in the United States, the Popular Front for the Liberation of Palestine.[28] The government sought to remove them for their affiliation with this group as well as for routine status violations, such as overstaying a visa and failure to maintain student status.[29] The plaintiffs claimed they were subject to selective enforcement in violation of their First Amendment rights.[30]

In holding that the federal courts did not have jurisdiction in this case, the Court nevertheless interpreted § 1252(g) narrowly to apply "only to three discrete actions that the Attorney General may take."[31] These are actions arising from the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders.[32] The Court explained that:

> It is 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. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting.[33]

Furthermore, in his concurrence, Justice Stevens concluded that "the meaning of 8 U.S.C. [§ 1252(g)] is perfectly clear. . . . [It] deprives federal courts of jurisdiction over collateral challenges to ongoing administrative proceedings."[34] It is clear § 1252(g) must be read narrowly to channel certain claims to one proceeding, not remove jurisdiction entirely.

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[25] Ahmed, *supra* note 21, at 629.

[26] *Id.* at 630.

[27] Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 473 (1999).

[28] *Id.*

[29] *Id.*

[30] *Id.* at 474.

[31] *Id.* at 482.

[32] *Id.* (citing 8 U.S.C. §1252(g)).

[33] *Id.*

[34] *Id.* at 499 (Stevens, J., concurring).

C. Supreme Court's Narrow Construction of § 1252(b) in Jennings v. Rodriguez

The Supreme Court continues to re-affirm its narrow interpretation of "arising from" in § 1252 in *Jennings v. Rodriguez.*[35] In holding that the federal courts have jurisdiction to consider a noncitizen's right to release during the course of removal proceedings, the Court stated that "[w]e did not interpret [§ 1252(g)] to 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."[36]

The Supreme Court discussed at length the absurdities created by a broad interpretation of § 1252(g) in a related context in *Jennings*. Citing § 1252(b)(9), the Court pointed out that § 1252(g) does not preclude all review of legal issues related to a removal decision.[37] Rather, the provision channels such review into the unitary review procedure established by § 1252(b) itself. The Court concluded that only those legal issues amenable to resolution through the statutory review process were removed from federal consideration through other statutory procedures.[38]

The Court stressed the absurd results that would flow from channeling all legal questions into the unitary review process. The Court stated:

> [T]his expansive interpretation . . . would lead to staggering results. Suppose, for example, that a detained alien wishes to assert a claim . . . based on allegedly inhumane conditions of confinement. Or suppose that a detained alien brings a state-law claim for assault against a guard or fellow detainee. Or suppose that an alien is injured when a truck hits the bus transporting aliens to a detention facility, and the alien sues the driver or owner of the truck. The "questions of law and fact" in all those cases could be said to "aris[e] from" actions taken to remove the aliens in the sense that the aliens' injuries would never have occurred if they had not been placed in detention. But cramming judicial review of those questions into the review of final removal orders would be absurd.[39]

With these words, the Supreme Court established definitively that the jurisdiction-stripping provisions of § 1252(g) do not apply to tort claims of any kind arising from the removal process. As the Supreme Court confirms, it is inconceivable and absurd that the federal courts of appeal have been tasked with adjudicating civil actions for damages in the course of reviewing an order of removal. Clearly, the courts of appeals have no ability to conduct civil trials for damages, as this is the role of trial courts. This is the best and strongest argument that Congress did not intend § 1252(g) to preclude claims that are not challenging the removal proceeding itself.

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[35] Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018).

[36] *Id.* at 841.

[37] *Id.* at 840–41.

[38] *Id.* at 841.

[39] *Id.* at 840 (second alteration in original) (citations omitted).

D. Supreme Court's Reaffirmation of a Narrow Construction of §§ 1252(b) and (g) in Department of Homeland Security v. Regents of the University of California

On June 18, 2020, yet again, the Supreme Court confirmed the narrow application of the limitations on jurisdiction of §§ 1252(b)(9) and 1252(g) in the highly publicized case *Department of Homeland Security v. Regents of the University of California*.[40] This litigation is related to the Trump administration's recission of the Deferred Action for Childhood Arrivals program, commonly referred to as DACA.[41] Before reaching the claims brought under the Administrative Procedure Act and the Equal Protection Clause of the Fifth Amendment, the Court was once again faced with the government's argument that §§ 1252(b)(9) and 1252(g) bar judicial review of this issue.[42]

In the opinion of the Court, Chief Justice Roberts explained that neither statute applies here. As stated in *Jennings*, the "targeted language" of § 1252(b)(9) barring "review of claims arising from 'action[s]' or 'proceeding[s] brought to remove an alien' . . . is not aimed at this sort of case."[43] The Court again makes plain that this section "is certainly not a bar where, as here, the parties are not challenging any removal proceedings."[44]

The Court also rejected the argument that § 1252(g) bars judicial review describing it as "similarly narrow" to the limitations of § 1252(b)(9).[45] Reminding the government of the analysis in *Reno*, the Court states: "We have previously rejected as 'implausible' the government's suggestion that §1252(g) covers 'all claims arising from deportation proceedings' or imposes 'a general jurisdictional limitation.'"[46]

The Court's analysis quickly dismissed the government's argument. However, its reluctance to articulate a stronger rule highlights the need for a clearer standard of application with language stronger than "implausible." It is clear that the government will continue to raise this issue and lower courts will struggle to correctly apply the Supreme Court's narrow construction unless and until a clearer standard of applicability is articulated either by legislation or by the Supreme Court. Some examples of the wide variety of lower court analyses of this issue demonstrating the urgent need for a clear analytical structure are discussed below.

IV. INCONSISTENT APPLICATION OF SUPREME COURT PRECEDENT BY LOWER COURTS

Courts of appeals have attempted to apply the *Reno* analysis in a number of cases involving unlawful conduct in the course of the removal process. These include claims

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[40] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020).

[41] *Id.* at 1901. For summary of the history and the decision's impact on DACA recipients, see Ilana Etkin Greenstein, *DACA, Dreamers, and the Limits of Prosecutorial Discretion:* DHS v. Regents of the University of California, 64 BOS. BAR J. 11 (2020).

[42] *Regents*, 140 S. Ct. at 1907.

[43] *Id.* (alteration in original).

[44] *Id.*

[45] *Id.*

[46] *Id.* (quoting Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999)).

arising under the Federal Tort Claims Act,[47] petitions for habeas corpus,[48] and actions related to the violation of the Constitution known as *Bivens* actions.[49]

A salient example of different outcomes on similar facts relates to a pair of cases both arising under the FTCA. The FTCA establishes a cause of action to protect individuals from the tortious conduct of the government and allow for compensatory damages. A wrongfully-removed noncitizen suffers immense hardship both in the traumatic experience of an unlawful removal at the hands of the United States government and in the attempt to return to the United States to complete the lawful proceedings and preserve his or her rights.

A. Failure to Consistently Apply Narrow Construction Creates Unjust and Absurd Results

On August 9, 2018, the Ninth Circuit held that a district court had jurisdiction to hear an FTCA lawsuit as the result of a noncitizen's removal from the United States

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[47] *See* 28 U.S.C. §§ 1346(b), 2671–2680.; 28 C.F.R. §§ 14.1–14.11. For a discussion of the applicability of an FTCA claim in the immigration context and a general primer on the statute, see Priya Patel, *Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys*, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD (Jan. 24, 2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2013_24Jan_ftca-faq.pdf ("The Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity and authorizes suits for money damages based on the negligent acts or omissions of federal employees, and, in some instances, intentional misconduct of such employees. FTCA actions proceed in two steps. First, the claimant files an administrative complaint with the relevant federal agency or agencies. If the agency does not elect to settle the claim, and, instead, makes a 'final denial' of the claim (i.e., denies the claim or fails to act on it within six months), the claimant then may file a complaint in federal district court.").

[48] For a summary of habeas corpus petitions in the immigration context, see *Introduction to Habeas Corpus*, AM. IMMIGR. COUNCIL: LEGAL ACTION CTR. (June 2008), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_0406.pdf ("The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless government action. Historically, habeas corpus has served as a means of reviewing the legality of Executive detention. The right to habeas corpus is rooted in the U.S. Constitution's Suspension Clause. There also is a federal habeas corpus statute, 28 U.S.C. § 2241. . . . Since its inclusion in the Judiciary Act of 1789, 28 U.S.C. § 2241 has given district courts jurisdiction to grant writs of habeas corpus to people who are held in "custody" by the federal government in violation of the Constitution, laws, or treaties of the United States. Under this statute, federal courts have considered both constitutional claims and claims of statutory interpretation. . . . [However, t]he REAL ID Act of 2005 purports to eliminate habeas corpus jurisdiction over final orders of removal, deportation, and exclusion and consolidate such review in the court of Appeals." (internal citations omitted)).

[49] For an introduction to *Bivens* claims in the immigration context, see Havan Clark et al., Bivens *Basics: An Introductory Guide for Immigration Attorneys*, AM. IMMIGR. COUNCIL (Aug. 21, 2018), https://www.aila.org/infonet/bivens-an-introductory-guide ("Under the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), individuals—including noncitizens or those whom the government perceives to be noncitizens—may have access to a judicial remedy for conduct by federal agents that violates the U.S. Constitution. Although litigating *Bivens* claims in the immigration context has become increasingly challenging in recent years, a successful claim could result in compensatory and/or punitive damages as well as injunctive relief.").

in violation of a court order staying his removal.[50] This ruling is in direct conflict with a ruling by the Eighth Circuit in a split decision on August 8, 2017, which held that a district court did *not* have jurisdiction to hear an FTCA lawsuit after the plaintiff was removed from the United States in violation of an automatic stay of a removal order.[51] This disagreement arises over the interpretation of § 1252(g). Both plaintiffs brought claims under the FTCA for damages related to their wrongful removals from the United States.[52]

The Eighth Circuit affirmed the district court's ruling in a 2-1 decision in *Silva v. United States*.[53] Mr. Silva was a permanent resident of the United States.[54] He was convicted of two criminal offenses while living in Minnesota and the government initiated removal proceedings against him.[55] An immigration judge issued an order to remove Mr. Silva to Mexico, his country of citizenship.[56] Mr. Silva timely filed an appeal of the order with the Board of Immigration Appeals ("BIA") triggering an automatic stay of his removal as governed by 8 C.F.R. § 1003.6(a).[57] However, Mr. Silva was still removed by the Department of Homeland Security.[58] He eventually was able to return to the United States, and an immigration judge granted him cancellation of removal.[59] Mr. Silva then brought a claim for damages under the FTCA.[60]

The Eighth Circuit held that the claim was barred because it arose from the decision to execute a removal order as covered in § 1252(g).[61] Judge Kelly authored a dissent arguing that Silva's claims cannot arise from the decision to execute a removal order because there "was no enforceable removal order for the government to execute."[62] Judge Kelly argued that Mr. Silva's claim challenges the government's authority to execute a removal order, not the decision to do so.[63] The Eighth Circuit's

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[50] Arce v. United States, 899 F.3d 796, 798 (9th Cir. 2018).

[51] Silva v. United States, 866 F.3d 938, 939 (8th Cir. 2017).

[52] *Arce*, 899 F.3d at 798; *Silva*, 866 F.3d at 939.

[53] *Silva*, 866 F.3d at 938.

[54] *Id.* at 939.

[55] *Id.*

[56] *Id.*

[57] *Id.*; 8 C.F.R. § 1003.6(a) (2006) ("Except as provided under § 236.1 of this chapter, § 1003.19(i), and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification.").

[58] *Silva*, 866 F.3d at 939.

[59] Cancellation of removal is a species of statutory relief available to some long-time permanent residents. *See id.*; *see also* 8 U.S.C. § 1229b.

[60] *Silva*, 866 F.3d at 939.

[61] *Id.* at 940.

[62] *Id.* at 942 (Kelly, J., dissenting).

[63] *Id.*

decision in *Silva* is in line with the Fifth Circuit's decision in *Foster v. Townsley*[64] and decisions from the Eleventh Circuit.[65]

In *Foster v. Townsley*, Mr. Foster was removed from the United States while his case was pending before the Board of Immigration Appeals, just as Mr. Silva was.[66] Mr. Foster was returned to the United States and filed a claim pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[67] He argued that he was improperly removed in violation of the automatic stay afforded to cases pending appeal before the BIA, and that immigration officials used excessive force when removing him.[68] The district court held that it did not have jurisdiction to hear Mr. Foster's claims because of § 1252(g).[69] The Court of Appeals for the Fifth Circuit affirmed the district court's ruling and held that Mr. Foster's "claims of excessive force, denial of due process, denial of equal protection and retaliation are all directly connected to the execution of the deportation order. Therefore, their acts fall within the ambit of § 1252(g) and are precluded from judicial review."[70]

The Ninth Circuit came to the opposite conclusion, creating a circuit split when it decided *Arce v. United States*.[71] In *Arce*, the plaintiff was apprehended and detained by U.S. Border Patrol officers in California.[72] After he failed to convince the officers that he had a reasonable fear of persecution[73] if returned to his home country of Mexico, the Department of Homeland Security ("DHS") began to effectuate his removal.[74] However, before he was removed, Mr. Arce filed an emergency petition for review and motion for a stay of removal.[75] The court granted a temporary stay of

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[64] Foster v. Townsley, 243 F.3d 210, 211 (5th Cir. 2001).

[65] *See* Gupta v. McGahey, 709 F.3d 1062, 1065 (11th Cir. 2013) (holding that a *Bivens* claim related to alleged unlawful treatment during an otherwise lawful apprehension and detention does "arise from the actions taken to commence removal proceedings against him within the meaning of § 1252(g)"); for a discussion of the adoption of the *Foster* analysis and its absurd results, see also Will, *supra* note 22, at 539–42; *cf.* Madu v. U.S. Att'y Gen., 470 F.3d 1362, 1367–68 (11th Cir. 2006) (holding in the context of a claim of unlawful detention as opposed to an unlawful removal, that "a habeas petition is actually a challenge to the *execution* of a removal order [as distinguished from a substantive challenge to the validity of a removal order, or . . . a challenge to detention on the ground there is no removal order"]).

[66] *Foster*, 243 F.3d at 211.

[67] *Id.* at 211–12.

[68] *Id.* at 212.

[69] *Id.*

[70] *Id.* at 214–15.

[71] Arce v. United States, 899 F.3d 796, 801 (9th Cir. 2018).

[72] *Id.* at 798.

[73] *Id.* Reasonable fear of persecution is a ground for granting asylum in the United States. *See Elements of Asylum Law*, IMMIGR. EQUAL., https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-basics-elements-of-asylum-law/#.XeP3zFdKhPY (last visited Dec 1, 2019).

[74] *Arce*, 899 F.3d 796 at 798.

[75] *Id.* at 799. The circuit court has jurisdiction over this petition under *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 959 (9th Cir. 2012).

Mr. Arce's removal pending further order of the court.[76] Several hours later, DHS removed Mr. Arce to Mexico.[77] Two weeks later he was returned to the United States pursuant to a court order to bring him back.[78]

Mr. Arce then filed a claim under the FTCA for false arrest, false imprisonment, intentional infliction of emotional distress, and negligence.[79] As in *Silva*, the district court dismissed the case for lack of jurisdiction under § 1252(g).[80] The Ninth Circuit reversed and remanded holding that the claim did not arise from the execution of a removal order, but from a challenge to the authority to do so in the first place.[81] In its reasoning, the Ninth Circuit relied heavily on the Supreme Court's ruling in *Reno*. As discussed above, the Supreme Court narrowly construed the jurisdiction-stripping effects of § 1252(g) to describe only the three "discrete actions that the Attorney General may take," and not to any other decisions made in the removal process.[82] Applying this analysis, the Ninth Circuit concluded that "[a] decision or action to violate a court order staying removal similarly falls outside of the statute's jurisdiction-stripping reach."[83]

A stay is the "postponement or halting of a proceeding, judgment, or the like." [84] As the Supreme Court explained in *Nken v. Holder*,[85] a stay has "the practical effect of preventing some action before the legality of that action has been conclusively determined . . . by temporarily suspending the source of the authority to act."[86] Contrasting stays with injunctions, the Court observed that "[a]n alien seeking a stay of removal pending adjudication for a petition for review does not ask for a coercive order against the Government, but rather for the temporary setting aside of the source of the Government's authority to remove."[87]

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[76] *Arce*, 899 F.3d 796 at 799.

[77] *Id.*

[78] *Id.*

[79] Arce v. United States, No. CV162419, 2016 WL 10957949, at *1 (C.D. Cal. Oct. 3, 2016), *rev'd and remanded*, 899 F.3d 796 (9th Cir. 2018).

[80] *Arce*, 899 F.3d at 799.

[81] *Id.* at 801.

[82] Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999).

[83] *Arce*, 899 F.3d 796 at 800.

[84] *Stay*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[85] Nken v. Holder, 556 U.S. 418, 421 (2009).

[86] *Id.* at 428–29.

[87] *Id.* at 429.

V. THE NEED FOR A CONSISTENT APPLICATION OF PRECEDENT IN LIGHT OF THE TRUMP ADMINISTRATION'S EXPANSION OF IMMIGRATION ENFORCEMENT

A. ICE's Alleged Practice of Targeting Activists for Enforcement

The Trump administration has been accused of engaging in a policy and practice of retaliatory enforcement of immigration laws against immigration rights activists.[88] This conduct has been challenged by a coalition of immigration rights organizations in a complaint filed against ICE in the Western District of Washington in the case of *NWDC Resistance v. Immigration & Customs Enforcement*.[89] This complaint recently survived a motion to dismiss where the government argued that § 1252 precluded judicial review of the decision to enforce immigration regulations against certain individuals.[90]

ICE's motion to dismiss claimed that its "selective" enforcement of immigration law was precluded from review under §1252(g) and even attempted to rely on *Reno*,[91] the first Supreme Court case narrowly construing that same section.[92] The district court correctly distinguished this complaint from the circumstances of *Reno*. In *Reno*, the plaintiffs were challenging individual removals which were allegedly undertaken due to a particular political affiliation.[93] Here, the plaintiffs are challenging an alleged policy and practice, not the individual removal orders.[94] The court held correctly that this distinction is sufficient for the federal courts to retain jurisdiction of this matter.[95]

In contrast to the *NWDC Resistance* analysis of the limited applicability of § 1252(g), the Second Circuit held nearly the opposite on similar facts in *Ragbir v. Homan*.[96] *Ragbir* included many of the same claims and even some of the same individuals as *NWDC Resistance*.[97] However, the Second Circuit came to the conclusion that § 1252(g) removed the matter from its jurisdiction, explaining:

> Here, the Government unquestionably had statutory authority to execute Ragbir's final order of removal, and that very conduct is the retaliation about which Ragbir complains. To remove that decision from the scope of

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[88] Eli Rosenberg, *Trump Administration Settles with Latino Farm Activists Who Said They Were Targeted over Political Work*, WASH. POST (Oct. 28, 2020, 12:44 PM), https://www.washingtonpost.com/business/2020/10/28/dhs-farmworkers-lawsuit-immigration/; *see* NWDC Resistance v. Immigr. & Customs Enf't, No. C18-5860, 2020 WL 5981998 (W.D. Wash. Oct. 8, 2020).

[89] *NWDC Resistance*, 2020 WL 5981998, at *1.

[90] *Id.* at *3.

[91] *Id.* (citing Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999)). *Reno* is discussed more fully in Section III.B, *supra*.

[92] *Reno*, 525 U.S. at 482.

[93] *Id.* at 472.

[94] *NWDC Resistance*, 2020 WL 5981998, at *7.

[95] *Id.*

[96] Ragbir v. Homan, 923 F.3d 53, 64 (2d Cir. 2019), *vacated sum nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020).

[97] *NWDC Resistance*, 2020 WL 5981998, at *3; *see Ragbir*, 923 F.3d at 63–66.

> section 1252(g) because it was allegedly made based on unlawful considerations would allow Plaintiffs to bypass § 1252(g) through mere styling of their claims. And so, we conclude that the Government's challenged conduct falls squarely within the ostensible jurisdictional limitation of § 1252(g).[98]

The Second Circuit's concern with the "bypassing" of § 1252(g) with "stylization" is both short-sighted and inappropriate. In *Ragbir*, the Second Circuit applied § 1252(g) too broadly, with a loose justification for concern about "stylized claims." The court in *Ragbir* failed to attempt to actually resolve whether § 1252(g) applied to an alleged policy and practice rather than a challenge to an individual's actual removal proceedings. This important distinction is what led to survival of the *NWDC Resistance* claim.[99]

Correctly construed, § 1252(g) does not preclude review of allegedly unconstitutional practices, particularly where the relief sought is not the challenge of an individual's actual removal order but the injunction of an unlawful policy or practice. As the court in *NWDC Resistance* stated in the order denying the motion to dismiss for lack of subject matter jurisdiction:

> Plaintiffs here are not aliens seeking to undo or prevent removal proceedings commenced against them. A narrow reading of section 1252(g) does not apply to constitutional challenges brought by one who is not the alien subject to the three discrete decisions articulated in that statute, or one who is not bringing a challenge to such actions on the alien's behalf.[100]

The district court's application of § 1252(g) correctly applied Supreme Court precedent which allowed for allegedly unconstitutional practices of the government to be challenged in the federal court system.

B. Sanctuary City Enforcement Actions

Immigration and Customs Enforcement has increased its aggressive enforcement actions during the course of the Trump administration. These actions include the targeting of so-called sanctuary cities and the deployment of tactical enforcement teams in these cities.[101] A city is a sanctuary city in the sense that it is a "jurisdiction[] that ha[s] policies in place designed to limit cooperation with or involvement in federal

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98 *Ragbir*, 923 F.3d at 64.

99 *NWDC Resistance*, 2020 WL 5981998, at *5.

100 *Id.*

101 Caitlin Dickerson & Zolan Kanno-Youngs, *Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities*, N.Y. TIMES (Feb. 14, 2020), https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html?auth=link-dismiss-google1tap.

immigration enforcement actions."[102] "Cities, counties and some states have a range of informal policies as well as actual laws that qualify as 'sanctuary' positions."[103]

In May 2018, ICE undertook a large-scale enforcement action in the city of Chicago.[104] ICE arrested 156 people over that week.[105] Of that number, 106 individuals were arrested as at-large, or collateral arrests.[106] This means that ICE did not have an arrest warrant for 106 of the 156 individuals they arrested.[107] As a result of this enforcement action, five individual plaintiffs and two organizational plaintiffs filed a putative class action to seek declaratory and injunctive relief to "ensure that Defendant U.S. Immigration and Customs Enforcement complies with its clear statutory obligations . . . when conducting warrantless arrests."[108] The complaint also sought declaratory relief to "ensure that ICE complies with the Fourth Amendment when making traffic stops."[109]

The plaintiffs asserted that ICE's "policy and practice of making warrantless arrests without the required individualized flight risk analysis" violates the Administrative Procedure Act.[110] The plaintiffs also alleged that ICE violated the Fourth Amendment of the U.S. Constitution[111] based on ICE's traffic stop of the plaintiffs which ultimately led to their arrest and detention.[112] The plaintiffs said that ICE failed to meet the requirements of 8 U.S.C. § 1357(a)(2) when it made arrests without individualized flight risk determinations.[113]

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[102] Tal Kopan, *What Are Sanctuary Cities, and Can They be Defunded?*, CNN (Mar. 26, 2018, 3:40 PM), https://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html.

[103] *Id.*

[104] *ICE Arrests 156 Criminal Aliens and Immigration Violators During Operation Keep Safe in Chicago Area*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/news/releases/ice-arrests-156-criminal-aliens-and-immigration-violators-during-operation-keep-safe [https://perma.cc/A7C4-W3JK] (last updated Oct. 16, 2018).

[105] *Id.*

[106] *Id.*

[107] Nava v. Dep't of Homeland Sec., 435 F. Supp. 3d 880, 885.

(N.D. Ill. 2020).

[108] *Id.* at 884 (citation omitted).

[109] *Id.* at 885.

[110] *Id.* at 885–86.

[111] *Id.* The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[112] *Nava*, 435 F. Supp. 3d at 886.

[113] The statute provides for immigration powers available to ICE without a warrant:

The government's motion to dismiss for lack of subject matter jurisdiction argues that both § 1252(b)(9) and §1252(g) deprive the federal district court of jurisdiction to hear these claims.[114] They argue that pursuant to §1252(b)(9), "[p]laintiffs can obtain judicial review of their claims only by filing a petition for review of a final removal order with a U.S. court of appeals."[115] The opinion of Judge Pallmeyer denying the government's motion to dismiss on these grounds examines the current jurisprudence and adopts a version of the analysis found in the plurality opinion in *Jennings*.[116] The court found that:

> Even assuming that the stops and detentions in this case were actions taken to remove Plaintiffs from the United States under the INA, the factual and legal questions that Plaintiffs raise are . . . "collateral to the removal process." That is, they are "too remote from" removal actions "to fall within the scope of § 1252(b)(9)," and therefore do not arise from them.[117]

The government argued that the analysis required for the contested questions of law and fact required individual analysis of removability, and was therefore subject to § 1252(b)(9).[118] The court was not persuaded, distinguishing that:

> [The] Fourth Amendment claim concerns conduct by ICE officers that allegedly occurred before they had any reason to believe that the Individual Plaintiffs had violated an immigration law, and before the government had initiated removal proceedings against them. In these circumstances, the question whether ICE's alleged racial profiling violated Plaintiff's Fourth Amendment rights cannot be said to have a close relation to removal proceedings and "cramming judicial review" of that question into an appellate court's review of a final removal order "would be absurd."[119]

The application of the *Jennings* analysis of which claims would be absurd to "cram" into the review of a final removal order is a sensible limiting principle to the

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> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States . . . .

8 U.S.C. § 1357(a).

[114] *Nava*, 435 F. Supp. 3d at 895.

[115] *Id.*

[116] *Id.* at 889–95.

[117] *Id.* at 891 (citing Jennings v. Rodriguez, 138 S. Ct. 830, 844 n.3 (2018)).

[118] *Id.*

[119] *Id.* (quoting *Jennings*, 138 S. Ct. at 840).

broad language of § 1252(b)(9). In addition, the court reached the same conclusion by another analysis, which is whether the claims are substantively related to the removability of the alien, as opposed to the underlying authority for removal, as discussed above in *Arce*. The court found that here, "Plaintiffs' INA-based claim raises questions of law and fact that are quite remote from the issue of the Individual Plaintiff's removability. Section 1252(b)(9), therefore, does not deprive the court of jurisdiction."[120]

The conclusion is supported by the analysis used by the Seventh Circuit in *Torres-Tristan v. Holder*. There, the court held it did not have jurisdiction to review U.S. Citizenship and Immigration Services actions to deny discretionary waiver of inadmissibility.[121] In interpreting § 1252(a) which grants jurisdiction, the court used analogous reasoning to find it did not have jurisdiction. It held that "[a]ncillary determinations made outside the context of a removal proceeding . . . are not subject to direct review."[122] The Seventh Circuit went on to discuss in dicta that the jurisdictional bar in § 1252(b)(9) applies whenever a claim is "inextricabl[y] linked" to a removal order, but not when it is collateral to such an order.[123] The court in *Nava* found that "if a court of appeals may not make 'ancillary determinations' on direct review of a final removal order, then it makes little sense for Section 1252(b)(9) to deprive district courts of jurisdiction over such determinations."[124]

In response, the government asserted that only three types of claims are actually collateral to the removal process and subject to judicial review at the district court level: claims for ineffective counsel based on conduct after the issuance of a final removal order; claims for unconstitutionally prolonged detention; and certain claims challenging bond procedures.[125] The exact principle for determining what claim is collateral or not is not in the statute, and the Supreme Court in *Jennings* explicitly left the exact delineation of § 1252(b)(9)'s scope for another day.[126]

There are other cases that challenge ICE conduct and were found to be collateral, including the ICE practice of issuing immigration detainers[127] based solely on the use

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[120] *Id.*

[121] Torres-Tristan v. Holder, 656 F.3d 653, 654 (7th Cir. 2011).

[122] *Id.* at 658.

[123] *Id.* at 662.

[124] Nava v. Dep't of Homeland Sec., 435 F. Supp. 3d 880, 892 (N.D. Ill. 2020); *see also, e.g.*, Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 313 (2001) (holding that the purpose of Section 1252(b)(9) "is to consolidate judicial review of immigration proceedings into one action in the court of appeals" (internal quotation marks omitted)).

[125] *Nava*, 435 F. Supp. 3d at 892.

[126] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018) (Justice Alito stating that the Court would not "attempt to provide a comprehensive interpretation" of the circumstances where § 1252(b)(9) removes jurisdiction).

[127] The American Immigration Council defines "detainer" as follows:

> An immigration detainer is a tool used by U.S. Immigration and Customs Enforcement (ICE) and other Department of Homeland Security (DHS) officials when the agency identifies potentially deportable individuals who are held in jails or prisons nationwide. Typically, detainers are issued by an authorized immigration official or local police officer designated to act as an immigration official under section 287(g) of the

of electronic databases, alleged to be in violation of the Fourth Amendment as challenged in *Roy v. County of Los Angeles*.[128] There the court decided that the Fourth Amendment claims did not "arise from" removal proceedings because the plaintiffs "were not subject to ongoing removal proceedings *at the time* that ICE issued detainers against them, and the detainers were not based upon a final order of removal signed by a judge."[129] Here, again, the timing of the conduct alleged to give rise to the cause of action takes place before removal proceedings are brought, or removal orders were issued. The timeline of conduct along the road to removal appears to be a key distinguishing element for courts faced with these difficult questions of jurisdiction and the ambiguous statute.

The Western District Court of Washington, before the *Jennings* decision, held in *Medina v. United States Department of Homeland Security* that constitutional claims arising from arbitrary arrest and detention allegedly motivated by racial animus and false assumptions were not a challenge to the removal process or a final order of removal and therefore were not removed from the jurisdiction of the district court.[130] In this case, ICE allegedly engaged in enforcement actions including a four-hour long interrogation and detention even after learning the plaintiff was a beneficiary of the Deferred Action for Childhood Arrivals program ("DACA").[131]

> Immigration and Nationality Act (INA). Detainers instruct federal, state, or local law enforcement agencies (LEA) to hold individuals for up to 48 business hours beyond the time they otherwise would have been released (i.e., when charges have been disposed of through a finding of guilt or innocence; when charges have been dropped; when bail has been secured; or when convicted individuals have served out their sentence).

AM. IMMIGR. COUNCIL, IMMIGRATION DETAINERS: AN OVERVIEW 1 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detainers_an_overview_0.pdf (citations omitted).

[128] The action alleged:

> By statute, ICE is authorized to make arrests pursuant to administrative warrants and—under certain circumstances—to make arrests without an administrative warrant. An arrest without an administrative warrant is permitted only if the ICE officer has a "reason to believe" an individual is removable from the United States and determines that the individual "is likely to escape before a warrant can be obtained for his arrest." ICE issues detainers without making any determination whether the subject is likely to escape before an administrative warrant can be obtained. Under ICE's 2017 Detainer Policy, ICE now issues an administrative warrant to accompany an immigration detainer request. The suit alleged that the 2017 Detainer Policy provides that it "may be modified, rescinded, or superseded at any time without notice" and that "no limitations are placed by this guidance on otherwise lawful enforcement or litigative prerogatives of ICE."

Roy v. Cnty. of Los Angeles, No. CV1209012, 2018 WL 914773, at *3 (C.D. Cal. Feb. 7, 2018) (citations omitted).

[129] *Id.* at *18 (emphasis added).

[130] Medina v. U.S. Dep't of Homeland Sec., No. C17-218, 2017 WL 2954719, at *1, *15 (W.D. Wash. Mar. 14, 2017).

[131] *Id.* DACA is a program that was established by the Obama administration as an extension of the principles of prosecutorial discretion. The program is an immigration option for undocumented immigrants who came to the United States before the age of 16. Although DACA does not provide a pathway to lawful permanent residence, it does provide temporary protection

In *Nava*, the government argued that § 1252(b)(9) is a jurisdictional bar to even these cases because the issues raised by plaintiffs are "cognizable in a petition for review at the end of removal proceedings."[132] This logic is unpersuasive. The harms and issues that arise from constitutional claims and claims alleging violations of the Administrative Procedure Act may never result in the issuance of a final removal order. By this logic, all of these types of claims would be virtually nonreviewable. As Justice Alito stated in *Jennings*, this "would be absurd."[133]

The government also argued that § 1252(g) strips federal courts of jurisdiction in *Nava*.[134] As discussed at length above, § 1252(g) provides that, except as otherwise provided in the circuit court or in review of a final removal order, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien."[135] The government argued that the claims challenging ICE's policy and practice to not abide by its statutory obligations, and alleged violations of the Fourth Amendment are essentially challenges to "aspects of ICE's decision to arrest [the plaintiffs] in order to commence removal proceedings."[136] As with the analysis under § 1252(b)(9), the court found that the alleged conduct "occurred well before the government decided to initiate removal proceedings," and therefore did not arise from the decisions protected by § 1252(g).[137] The court discussed numerous cases where the challenged conduct of ICE was held to be barred from review by § 1252(g), but it found each distinguishable from the instant case in two main ways. The first was a set of cases that were themselves challenges to final removal orders. The only outlier in that analysis was the Eighth Circuit's opinion in *Silva v. United States*, also discussed above at length.[138] The second set of cases set out to support that § 1252(b)(9) removed review of the conduct from district courts were actually all claims challenging ICE's conduct *as a means to suppress evidence* concerning the plaintiff's removability, which inherently challenges the removability and is barred from district court review.[139]

The court, in facing both constitutional and statutory challenges to conduct that occurred before the commencement of removal proceedings, found that the claims related to issues of law and fact were collateral to the removal and did not arise from

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from deportation, work authorization, and the ability to apply for a social security number. Immigr. Legal Res. Ctr. & Nat'l Immigr. L. Ctr., *DACA Frequently Asked Questions* 1, ILRC (Aug. 24, 2020), https://www.ilrc.org/sites/default/files/resources/nilc_ilrc_daca_faq_dhs_memo_august_2020.pdf.

[132] Nava v. Dep't of Homeland Sec., 435 F. Supp. 3d 880, 893 (N.D. Ill. 2020).

[133] Jennings v. Rodriguez, 138 S. Ct. 830, 840 (2018).

[134] *Nava*, 435 F. Supp. 3d at 895.

[135] 8 U.S.C. § 1252(g).

[136] *Nava*, 435 F. Supp. 3d at 895.

[137] *Id.*

[138] *See supra* text accompanying notes 53–64.

[139] *Nava*, 435 F. Supp. 3d at 894.

the removal proceedings themselves.[140] In so applying the *Jennings* analysis here, the court continued on the road of analysis to reasonably apply the jurisdiction-channeling provisions of § 1252 to a sensible, narrow limiting principle of whether or not the claims are collateral to the removal proceeding itself. While the principle is in many ways just as nebulous as the statute, it draws on common-sense analysis that asks the questions, what government conduct or action is being challenged, and when did it occur. The analysis receives further refinement and definition in the Third Circuit as it addresses the Trump administration's Remain in Mexico policy and challenges to judicial review.

C. Migrant Protection Protocols

In April 2019, E.O.H.C., a father, and his seven-year-old daughter, M.S.H.S., fled from their home in Mixco, Guatemala, a city plagued by violent crime, to seek refuge in the United States.[141] After crossing into the United States outside of legal port of entry, they turned themselves over to the U.S. Customs and Border Patrol officers.[142] The government began removal proceedings to remove the family back to Guatemala and set a hearing in June in San Diego.[143] The government also determined that E.O.H.C. and his daughter were subject to the "Migrant Protection Protocols"[144] ("MPP") announced in 2018 by the Department of Homeland Security, and sent E.O.H.C. and his daughter to Mexico to await their hearing.[145]

These Protocols describe the government's practice of taking many aliens who cross the U.S.-Mexico border and returning them to Mexico while awaiting their U.S. immigration hearings. Before the enactment of the MPP, aliens detained pending removal proceedings were housed in the United States. E.O.H.C. and his daughter were left to fend for themselves in Tijuana, Mexico, a notoriously dangerous city, to await their hearing.[146]

E.O.H.C. and his daughter were denied asylum, and they were ordered removed back to Guatemala.[147] At the hearing, E.O.H.C. stated that he did not fear going back to Guatemala, and later alleged that a Customs and Border Protection officer advised him to say this.[148] E.O.H.C. did not have legal counsel at this time.[149] E.O.H.C. also waived his right to appeal allegedly from fear that he and his daughter would again be

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[140] *Id.* at 904.

[141] E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec., 950 F.3d 177, 181 (3d Cir. 2020).

[142] *Id.*

[143] *Id.*

[144] *See Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [https://perma.cc/SFJ7-3B6F].

[145] *E.O.H.C.*, 950 F.3d at 177.

[146] *Id.* at 181.

[147] *Id.*

[148] *Id.*

[149] *Id.*

subject to the MPP and sent back to Tijuana.[150] E.O.H.C. and his daughter were transferred to an immigration detention facility in Berks County, Pennsylvania to await their removal back to Guatemala.[151]

While detained, E.O.H.C. appealed to the Board of Immigration Appeals, arguing that the appeal waiver was invalid because it was made under duress.[152] The BIA granted an emergency stay of removal pending the appeal.[153] However, it was unclear whether the stay prevented E.O.H.C. and his daughter's removal to Mexico pursuant to the MPP, or only his removal back to Guatemala. The government flew them to San Diego, with the apparent intent to return them to Mexico to await the appeal.[154] To prevent their removal to Mexico, E.O.H.C. filed an emergency mandamus petition in the U.S. District Court for the Eastern District of Pennsylvania.[155] The government returned them to the detention facility in Berks County, where they remain today.[156]

E.O.H.C. argued that returning him and his daughter to Mexico pending the appeal to the Board would violate the law in four ways. First, that the government lacks the statutory authority to apply the MPP to them because the Migrant Protection Protocols violate the Administrative Procedure Act.[157] Second, he argued that returning them to Mexico would interfere with their relationship with their lawyer in violation of the Due Process Clause of the Fifth Amendment of the Constitution and 8 U.S.C. § 1362.[158]

The third argument against returning E.O.H.C. and his daughter to Mexico is that doing so would violate treaty obligations established under two United Nations treaties.[159] The first is the Convention Against Torture, which forbids returning or extraditing "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[160] The second treaty alleged to be violated by this practice is the Refugee Convention, which prohibits expelling or returning a "refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality,

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[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* Section 1362 states:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362.

[159] *E.O.H.C.*, 950 F.3d at 182.

[160] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, ¶ 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

membership of a particular social group or political opinion."[161] These types of claims are known as "nonrefoulement" claims.

The fourth and final argument is that returning M.S.H.S., a minor, to Mexico would violate the United States' commitments under the 1997 *Flores* settlement agreement, which set forth a nationwide policy for the "detention, release, and treatment of minors" in immigration custody.[162] The *Flores* settlement agreement provides that any minor who disagrees with the government's treatment may sue the government to enforce her rights under the agreement.[163]

The district court dismissed all four claims, stating it lacked subject matter jurisdiction over the challenges to the Protocols and the right-to-counsel claim due to 8 USC § 1252(b)(9), which limits review of claims that "arise from removal proceedings" to the review of a final removal order.[164] The district court also held that it lacked jurisdiction over the *Flores* claim because the *Flores* settlement agreement is not a federal law, and it could not enforce another court's injunction.[165]

> On February 13, 2020, the Third Circuit Court of Appeals reversed the district court's decision and remanded for further proceedings, holding in a powerful affirmation of the role of judicial review of executive action:
> This case raises the age-old question: "If not now, when?" *Mishnah, Pirkei Avot* 1:14. For aliens who are challenging their removal from the United States, the answer is usually "later." But not always. And not here.
> . . . .
> [S]ome immigration-related claims cannot wait. When a detained alien seeks relief that a court of appeals cannot meaningfully provide on petition for review of a final order of removal, § 1252(b)(9) does not bar consideration by a district court. Neither does § 1252(a)(4), a provision that generally requires Convention Against Torture claims to await a petition for review. For if these provisions did bar review of all claims before the

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[161] Convention Relating to the Status of Refugees art. 33, ¶ 1, July 28, 1951, 189 U.N.T.S. 150.

[162] *See* Stipulated Settlement Agreement, Flores v. Reno, No. CV-85-4544 (C.D. Cal. Jan. 17, 1997) [hereinafter Flores Settlement Agreement]. The Agreement remains in effect today, under the continued oversight of a district judge in the Central District of California. Flores v. Barr, 407 F. Supp. 3d 909, 914 (C.D. Cal. 2019), *appeal dismissed*, 934 F.3d 910, 916–17 (9th Cir. 2019) (holding that August 2019 regulations have not ended the Agreement).

[163] *See* Flores Settlement Agreement, *supra* note 162, at ¶ 24.

[164] *E.O.H.C.*, 950 F.3d at 182 (quoting 8 U.S.C. § 1252(b)(9)). Section 1252(b)(9) 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.

8 USC § 1252(b)(9).

[165] *E.O.H.C.*, 950 F.3d at 182.

> agency issues a final order of removal, certain administrative actions would effectively be beyond judicial review. If "later" is not an option, review is available now.
>
> . . . .
>
> One claim, involving the statutory right to counsel, arises from the proceedings to remove them to Guatemala, so it can await a petition for review. But the rest of the claims challenge the Government's plan to return them to Mexico in the meantime. For these claims, review is now or never.[166]

The powerful words of Judge Bibas get to the heart of the jurisdiction-narrowing provisions of § 1252 and the consolidation of review of § 1252(b)(9). This decision comports with the legislative history, scholarly analysis, and the Supreme Court's own limited construction of the statute so as to avoid the outrageous conclusion that significant administrative conduct and policy would be completely beyond judicial review.

The court's analysis identified a workable limiting principle to the scope of § 1252: to separate what the court deems "now-or-never claims" from the claims meant to be channeled by § 1252(b)(9). The court finds that "now-or-never claims do not 'arise from any action taken or proceeding brought to remove an alien.'"[167] In determining that the claims to prevent the removal to Mexico as part of the MPP do not arise from the action to remove, the court correctly noted that the term "removal" is "a term of art in immigration law that means sending an alien back permanently to his country of origin"[168] and therefore the interim placement of an individual in Mexico is not part of the proceedings to remove the alien to his country of origin, i.e. Guatemala. The court also noted that "[i]f anything, it makes removal more difficult, because the Government must first bring [the aliens] back to the United States to continue their removal proceedings."[169]

The court briefly discusses the amorphous nature of the phrase "arising from" and holds that while the Supreme Court has addressed § 1252(b)(9) in *Jennings*[170] in a plurality opinion, a majority of the Court has not settled on a precise reading of that provision.[171] Even so, the Third Circuit held that such "now-or-never claims do not 'arise from' detention or removal proceedings and so may go forward."[172] In *Jennings*, as discussed above, each Justice seemed to determine that § 1252(b)(9) does not bar challenges to the conditions of confinement, as opposed to challenges to the removal itself, or the facts of confinement.[173]

Applying the *Jennings* reasoning, the court here found that but-for causation was not enough to strip district courts of jurisdiction over all claims that, in the broadest

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166 *Id.* at 181.

167 *Id.* at 184.

168 *Id.* (citing Zhong v. U.S. Dep't of Just., 480 F.3d 104, 108 n.3 (2d Cir. 2007)).

169 *Id.* at 184.

170 Jennings v. Rodriguez, 138 S. Ct. 830, 840 (2018).

171 *E.O.H.C.*, 950 F.3d at 185.

172 *Id.* at 185.

173 *Id.* (citing *Jennings*, 138 S. Ct. at 841).

sense, result from the fact or removal or detention.[174] The court held that if judicial review would otherwise never be effectively available, then § 1252(b)(9) does not bar district courts from jurisdiction, holding that "it does not strip jurisdiction when aliens seek relief that courts cannot meaningfully provide alongside review of a final order of removal."[175] The court goes on to expand upon the logic of *Jennings* by stating:

> Some hypotheticals drive the point home. Consider a detained alien who needs halal or kosher food, or a diabetic who alleges that the Government is depriving him of insulin. Or take *Jennings*'s example of a challenge to prolonged detention. Under the Government's reading, these aliens could get no judicial review until the Board enters their final orders of removal. That cannot be so. For one, the final order of removal may never come. Even if it does, review and relief may come too late to redress these conditions of confinement.[176]

In applying the presumption favoring judicial review, the court was careful not to challenge the longstanding principle that Congress has the authority to strip jurisdiction.[177]

Applying this principle of now-or-never types of claims to the facts of E.O.H.C., the court held that § 1252(b)(9) does not bar review of the Migrant Protection Protocols claim, the nonrefoulement claim, or the *Flores* settlement agreement claim.[178] The court reasoned that these claims do not challenge the government's decision to detain or seek removal in the first place, as discussed in *Jennings*.[179] Instead, these claims are to prevent an alleged danger upon returning to Tijuana, Mexico. If these claims are barred until a final removal order is issued, it will be too late to review or remedy their return to Mexico. The harm will be done, and a final removal order may never be issued. The court also held that § 1252(b)(9) does not bar the *Flores* conditions-of-confinement claim because to hold that would gut the *Flores* settlement agreement, which it finds is not required of the Immigration and Nationality Act.[180]

The court applies the now-or-never principle to the right to counsel claim and finds that § 1252(b)(9) does bar the statutory right to counsel found in 8 U.S.C. § 1362, but it does not bar the constitutional claim arising under the Due Process Clause of the Fifth Amendment.[181] In alleging that the return to Mexico would interfere with the relationship with counsel in violation of the Fifth Amendment, the court claimed it would not reach this issue and remanded to the district court.[182] However, it went on to say:

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[174] *Id.*

[175] *Id.* at 186.

[176] *Id.* (citations omitted).

[177] *Id.*

[178] *Id.* at 187.

[179] *Id.* at 186.

[180] *Id.* at 185.

[181] *Id.* at 187.

[182] *Id.*

> It is enough to note that the constitutional violation, as alleged, arises not from the efforts to remove them to Guatemala, but from those to return them to Mexico in the meantime. And the constitutional harm from those matters could not be remedied after a final order of removal. Because this too is a now-or-never claim, § 1252(b)(9) does not bar a district court's review. The District Court erred in holding otherwise.[183]

The court's synthesis and analysis of the legislative history, Supreme Court jurisprudence, and common sense application of the presumption for judicial review creates the workable, if somewhat nebulous, now-or-never principle for limiting the ambiguous and harmfully broad language of § 1252's jurisdiction channeling provisions.

Hopefully the Third Circuit's opinion sets an example for future circuits as they address these issues in an era of increasingly aggressive and expansive immigration enforcement and over-enforcement.

VI. CONCLUSION

Immigration enforcement continues to evolve at a rapid pace under the Trump administration. With these recent court developments, the power of judicial review as limited by § 1252 has also evolved. With the first limiting construction in *Reno* and reinforced in *Jennings*, the rights of an individual do not instantly become nonjusticiable once the law enforcement context includes removal proceedings. The Supreme Court has enunciated these principles consistently over the last twenty-five years.[184] The lower courts have an obligation to apply the correct precedent. With the Third Circuit's recent decision distinguishing between claims that are barred from judicial review until the appeal of a final removal order, and those claims which are so collateral to the removal proceeding that they are "now or never" in terms of relief or correcting the wrong, a reasonable analysis finally takes shape at the circuit court level. Section 1252's channeling provisions were designed to limit judicial review and consolidate cases. It was not and should not be used to eliminate the power of the courts to enforce constitutional rights and provide justice when the government acts wrongfully.

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[183] *Id.*

[184] *See supra* Sections III.B, III.C & III.D.