
COMMENT

NONCITIZENS' ACCESS TO FEDERAL DISTRICT COURTS: THE NARROWING OF § 1252(b)(9) POST-JENNINGS

ADAM J. GARNICK[†]

*When can a noncitizen bring her claims directly before a federal district court? The answer is complicated, due in large part to a provision of the Immigration and Nationality Act, codified at 8 U.S.C. § 1252(b)(9). That provision states that if a noncitizen's claims "arise from" her removal proceedings, they cannot be heard by a federal district court. Instead, those claims would be subject to more limited judicial review in a federal court of appeals only after the noncitizen's immigration removal proceedings have concluded. If, however, a noncitizen's claims do not "arise from" removal proceedings, § 1252(b)(9) poses no obstacle to district court jurisdiction. In these instances, noncitizens may have a more immediate opportunity to obtain judicial review and hold the government accountable for its potentially unlawful action. This Comment argues that § 1252(b)(9) should be read narrowly in light of the Supreme Court's decision in *Jennings v. Rodriguez*. To effectuate that interpretation, this Comment offers and evaluates several factors and frameworks that district courts can employ when confronted with claims that may implicate § 1252(b)(9).*

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INTRODUCTION

Efrain and his six-year-old daughter Mia feared being returned to Mexico, for they knew what awaited them there.¹ Just months earlier, in April 2019, the father and daughter fled the violence of their hometown in Guatemala and

¹ Brief for Plaintiffs at 2, *Hernandez Culajay v. McAleenan*, 396 F. Supp. 3d 477 (E.D. Pa. 2019) (No. 19-03204). This fact pattern is based on *E.O.H.C. v. Sec’y of United States Dep’t of Homeland Sec.*, 950 F.3d 177 (3d Cir. 2020), which reversed in part the district court’s decision in *Hernandez Culajay v. McAleenan*, 396 F. Supp. 3d 477 (E.D. Pa. 2019). This Comment uses the pseudonym Efrain for the father.

crossed the southern border of the United States.² But instead of finding the refuge they sought, Efrain and Mia were hauled back across the border and dropped off in Tijuana, Mexico, without food, shelter, or a guarantee of survival.³ They, like nearly 60,000 other migrants, were subject to the Migrant Protection Protocols (MPP), a Trump administration policy that forced asylum seekers to wait for months in increasingly dangerous and crowded Mexican border towns until their appearance in immigration court.⁴ In Tijuana, Efrain and Mia were initially homeless and lived in constant fear for their safety, avoiding harm only because they were taken in by a willing stranger.⁵

In June, they returned to the United States for their immigration court hearing.⁶ Despite having a viable asylum claim,⁷ Efrain told the immigration judge, on the flawed advice of a Customs and Border Patrol (CBP) agent, that he had no fear of returning to Guatemala and was merely seeking a better life for his daughter in the United States.⁸ Because these are insufficient grounds for a grant of asylum, the immigration judge ordered Efrain's removal.⁹ Rather than appeal his removal, Efrain waived his opportunity to do so, fearing that he and his daughter would be sent back to Mexico as they awaited another hearing.¹⁰

To prepare for their deportation to Guatemala, the government transferred Efrain and Mia across the country, from southern California to the Berks County Residential Center—an immigration detention center—in Leesport, Pennsylvania.¹¹ There, an attorney took up their case and appealed it to the Board of Immigration Appeals, arguing that Efrain's waiver of appeal

² Brief for Plaintiffs, *supra* note 1, at 1; *see also* *E.O.H.C.*, 950 F.3d at 181 (“[Petitioners] are from Mixco, Guatemala, a city plagued by violent crime.”).

³ Brief for Plaintiffs, *supra* note 1, at 2; *E.O.H.C.*, 950 F.3d at 181.

⁴ DEP'T OF HOMELAND SEC., MIGRANT PROTECTION PROTOCOLS (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/WG4V-KTDA>]; *see also* Miriam Jordan, *Appeals Court Allows 'Remain in Mexico' Policy to Continue Blocking Migrants at the Border*, N.Y. TIMES (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/migrants-border-remain-in-mexico-mpp-court.html> [<https://perma.cc/8KRN-VXH5>] (“Since the ‘Remain in Mexico’ policy [MPP] was rolled out in January 2019, many of the estimated 60,000 migrants required to wait in Mexican border towns for their immigration hearings have been victimized by sexual assault, kidnap and torture.”).

⁵ Brief for Plaintiffs, *supra* note 1, at 3.

⁶ *Id.*

⁷ Telephone Interview with Mike DePrince, Pro Bono Counsel for Plaintiffs (May 14, 2020) (explaining that Efrain and Mia had a viable claim for asylum).

⁸ Brief for Plaintiffs, *supra* note 1, at 1, 3-4.

⁹ *Id.* at 3-4. To win a grant of asylum, Efrain would have to demonstrate that he was unwilling to return to Guatemala because of “persecution or a well-founded fear of persecution on account of [his] race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A); *see also* 8 C.F.R. § 1208.13 (2020) (describing the eligibility and burden of proof for asylum applicants). Merely desiring a better life is an insufficient ground for asylum or similar relief.

¹⁰ Brief for Plaintiffs, *supra* note 1, at 4.

¹¹ *Id.* at 3-4.

was invalid because he made the decision under duress.¹² Filing the appeal triggered an automatic stay of removal, but it was unclear whether this stay prevented their intermediate return to Mexico or their ultimate removal to Guatemala.¹³ Given this ambiguity, the government took Efrain and Mia from the Berks County facility and put them on a plane to California, with the intent to return them to Mexico for the pendency of their appeal to the Board of Immigration Appeals.¹⁴

In a matter of hours, their pro bono counsel scrambled to draft and file an emergency mandamus petition for a preliminary injunction in federal district court.¹⁵ In their petition, Efrain and Mia alleged, among other things, that returning them to Mexico would violate their constitutional and statutory rights to counsel, and that they were ineligible to be placed in MPP in the first place.¹⁶ Simply put, they asked the district court to prohibit their return to Mexico.

The district court declined to do so.¹⁷ Instead, it found that it lacked jurisdiction to adjudicate Efrain and Mia's claims under 8 U.S.C. § 1252(b)(9),¹⁸ which provides in relevant part:

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.¹⁹

¹² *Id.* at 4 (“Now represented, Plaintiffs initiated an appeal to the Board of Immigration Appeals arguing that the abandonment of their asylum claims was made under duress, and thus not knowing, intelligent, or voluntary.”).

¹³ *Id.*; *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177, 181 (3d Cir. 2020).

¹⁴ Brief for Plaintiffs, *supra* note 1, at 4.

¹⁵ *Id.* at 4-5; *see also* Telephone Interview with Mike DePrince, *supra* note 7 (describing the events leading up to the filing of the petition).

¹⁶ *E.O.H.C.*, 950 F.3d at 181-82. Efrain and Mia also argued that their return to Mexico would violate the *Flores* Agreement and the government’s *non-refoulement* obligations. *Id.* at 182. While central to the case, these claims did not implicate 8 U.S.C. § 1252(b)(9), which is the topic of this Comment.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 8 U.S.C. § 1252(b)(9); *E.O.H.C.*, 950 F.3d at 182. Although it has since been codified, § 1252(b)(9) was originally enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (1996 Act), Pub. L. No. 104-208, § 306, 110 Stat. 3009-546, 607-12 (1996) (codified as amended in scattered sections of 8 U.S.C.). It was later amended by the REAL ID Act of 2005, Pub. L. No. 109-13, § 106, 119 Stat. 231, 302-311. The only change that the REAL ID made to the provision was to add the following language explicitly prohibiting habeas review:

Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, United States Code, 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 of such questions of law or fact.

The district court reasoned that the father and daughter's claims "arose from" an "action taken or proceeding brought to remove [them]" from the United States, and therefore § 1252(b)(9) precluded district court jurisdiction.²⁰ If Efrain and Mia wanted relief, they would have to first bring their claims before the immigration judge, then to the Board of Immigration Appeals, and finally in a petition for review before a court of appeals.²¹ In other words, they would have to return to Mexico and wait to bring their claims to a federal court only *after* trudging through the entire administrative appeals process—one that could take months, if not years.²²

Although the district court's jurisdictional analysis was later overturned by the Third Circuit—an outcome that ultimately prevented the government from returning Efrain and Mia to Mexico—its initial decision represents a larger, and troubling pattern. In dozens of cases like this one, noncitizens bring urgent claims to district court, only to face the potentially insurmountable hurdle of § 1252(b)(9).²³ And when the doors to district court are slammed shut, so too are the doors to justice, as noncitizens have no other avenues to immediate relief.²⁴ Thus, as Efrain and Mia's case illustrates, whether noncitizen plaintiffs can access federal district court may be the difference between relief and removal, freedom and detention, life and death.

In the years following § 1252(b)(9)'s enactment, several scholars published seminal articles addressing the provision and the newly installed judicial

Id. at § 106(a)(2), 119 Stat. at 311, *amending* 8 U.S.C. § 1252(b)(9). The Act did not, however, make any substantive changes to the provision. In examining the amended provision, the Ninth Circuit concluded "[t]he statute now contains an additional sentence on habeas jurisdiction, but the operative jurisdiction-channeling language has not changed from 1996." *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1034 n.6 (9th Cir. 2016); *see also* *Chehazeh v. Att'y Gen.*, 666 F.3d 118, 132 (3d Cir. 2012) (explaining that the REAL ID Act did not modify the scope of § 1252(b)(9)).

²⁰ *Hernandez Culajay v. McAleenan*, 396 F. Supp. 3d 477, 486 (E.D. Pa. 2019) ("[T]his Court lacks jurisdiction under Section 1252(b)(9) [over the right-to-counsel claims]"; *id.* at 487 ("The Court does not have jurisdiction to hear [the Migrant Protection Protocol] claim because Section 1252(b)(9) takes away any such jurisdiction.").

²¹ *Id.* at 488-89; *see also* 8 U.S.C. §§ 1252(a)(1), (b)(9), (d)(1) (requiring noncitizens to exhaust all administrative remedies before bringing claims that "arise from" removal proceedings to federal court through a petition for review). A petition for review is "the document filed by, or on behalf of, an individual seeking review of an agency decision in a circuit court of appeals." *Practice Advisory: How to File A Petition for Review*, AM. IMMIGR. COUNCIL (Nov. 2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf [<https://perma.cc/9YAP-DN7L>].

²² *See Immigration Court Backlog Jumps While Case Processing Slows*, TRAC IMMIGR. (June 8, 2018), <https://trac.syr.edu/immigration/reports/516> [<https://perma.cc/S658-RCH7>] (finding that noncitizens may wait many months, if not years, for their hearing before an immigration judge).

²³ *See infra* Section I.E (discussing the types of claims that § 1252(b)(9) implicates).

²⁴ *See* 8 U.S.C. § 1252(a)(1) (explaining that the petition for review process is the only means of judicial review for anything swept within the reach of § 1252(b)(9)).

review system more broadly, including Professors Lenni B. Benson;²⁵ Gerald L. Neuman;²⁶ and Hiroshi Motomura.²⁷ Since 2000, only one other article, another student Comment, has addressed the provision, which focused specifically on § 1252(b)(9)'s applicability in *Bivens* actions.²⁸

This Comment not only aims to address the provision more comprehensively, but it also seeks to update the literature in light of *Jennings v. Rodriguez*, in which the Supreme Court squarely addressed the scope of § 1252(b)(9) for the first time in nearly two decades.²⁹ Specifically, this

²⁵ Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997). In her article, Professor Benson argued that the severe restrictions on judicial review under IIRIRA “ha[d] revived the default vehicle for judicial review, the writ of habeas corpus.” *Id.* at 1416. She contended that noncitizens are “likely to find a variety of ways to try to evade the strictures of [§ 1252(b)(9)].” *Id.* at 1458. As this Comment will reveal, her prediction was correct. However, rather than rely on the phraseology of “evade the strictures,” this Comment will demonstrate that many noncitizens have brought and continue to bring claims that legitimately fall outside the reach of § 1252(b)(9). *Id.*

²⁶ Gerald Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000). Professor Neuman’s piece evaluated the contemporaneous “state of the debate” in the immigration jurisdiction context and offered important observations about the judicial review system ushered in by IIRIRA. *Id.* at 1964, 1989-97.

²⁷ Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000). Professor Motomura most squarely addressed § 1252(b)(9), noting that the provision “warrants sustained discussion . . . [because it] has widespread practical implications, [and] because it will shape access to federal courts in immigration cases.” *Id.* at 451. In addition to offering a comprehensive analysis of § 1252(b)(9), he contended, among other points, that jurisdictional statutes like § 1252(b)(9) “play an underappreciated role in shaping our view of the merits of a court challenge.” *Id.* This Comment leans heavily on Professor Motomura’s work but has the benefit of analyzing twenty years of case law.

²⁸ See Sripriya Narasimhan, Comment, *Does “Keep Out!” Mean “Stay Out!”?: The Immigration and Nationality Act’s Effect on Access to Federal Courts for Constitutional Actions*, 12 U. PA. J. CONST. L. 1443 (2010) (evaluating whether § 1252(b)(9) limits federal district court jurisdiction specifically in the context of *Bivens* claims).

²⁹ *Jennings v. Rodriguez*, 138 S. Ct. 830, 840-41 (2018) (Alito, J.) (plurality opinion). Since 2018, when *Jennings* was decided, the Supreme Court has discussed the provision on multiple occasions, to varying extents. In 2019, the Court decided *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019), in which it essentially reiterated the same positions offered in *Jennings*. The following year, in 2020, the Court discussed the provision in three cases. See *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070-71 (2020); *Nasrallah v. Barr*, 140 S. Ct. 1683, 1689-90 (2020); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020). Although these cases, especially *Regents*, have an impact on the scope of § 1252(b)(9), *Jennings* remains—by far—the most important recent case to address the provision. In *Guerrero-Lasprilla*, the Court analyzed specific language of § 1252(b)(9) to construe the phrase “questions of law” used elsewhere in § 1252. See 140 S. Ct. at 1070-71 (analyzing the “zipper clause” of § 1252(b)(9) and concluding that it must encompass mixed questions of law and fact, including the application of law to facts). It did not discuss, much less alter, the scope of § 1252(b)(9). In *Nasrallah v. Barr*, the Court held that a court of appeals should deferentially review factual challenges to denials of Convention Against Torture relief. 140 S. Ct. at 1688. In reaching that decision, the Court merely summarized the function of § 1252(b)(9) without interpreting or modifying the scope of the provision. *Id.* at 1689-90. Of the three Supreme Court cases that discussed § 1252(b)(9) in the 2020 term, *Regents* had the greatest impact on the provision’s scope. *Regents*, 140 S. Ct. at 1907. There, the Court held that the government’s rescission of Deferred Action for Childhood Arrivals (DACA) was unlawful.

Comment contributes to the literature in two related ways: first, it presents an argument that *Jennings* substantively narrowed earlier interpretations of § 1252(b)(9). Second, it compiles, outlines, and evaluates the various frameworks and factors that lower courts have used since *Jennings* to determine whether § 1252(b)(9) prohibits review of the claims before them.

Part I provides a brief history of judicial review in the immigration context. It then describes the purpose and framework of § 1252(b)(9), explains the administrative process for immigrants appealing removal decisions, highlights the types of claims that may implicate the provision, and introduces the textual issues courts grapple with when interpreting § 1252(b)(9).

Part II provides a summary and analysis of the Supreme Court's opinion in *Immigration and Naturalization Service v. St. Cyr*, where the Court directly addressed § 1252(b)(9) for the first time.³⁰ It then traces the evolution of how lower courts interpreted and applied § 1252(b)(9) after *St. Cyr*, with a particular focus on the extremely broad reading of § 1252(b)(9) advanced by the U.S. Court of Appeals for the First Circuit and later adopted by the U.S. Court of Appeals for the Ninth Circuit. Finally, it summarizes the Supreme Court's decision in *Jennings*.

Part III provides a substantive analysis of *Jennings*, arguing that it directed a narrower interpretation of § 1252(b)(9) than had previously been embraced by the First and Ninth Circuits. In turn, it outlines and analyzes the various factors lower courts have employed since *Jennings*, many of which have been used to properly effectuate the Court's narrower interpretation of § 1252(b)(9). Finally, the Appendix provides a comprehensive chart summarizing the main district and circuit court cases that have addressed § 1252(b)(9) since *Jennings*.³¹

I. THE HISTORY OF JUDICIAL REVIEW IN IMMIGRATION CASES AND THE INTRODUCTION OF § 1252(b)(9)

The story of judicial review in the immigration context has been analogized to Sir Isaac Newton's Third Law of Motion: for every action there is an equal, and opposite, reaction.³² It may be better characterized, however,

Id. at 1901. The Court made two important observations about the scope of § 1252(b)(9). First, that the provision is not implicated in this sort of case, where “the parties are not challenging *any* removal proceedings.” *Id.* at 1907 (emphasis added). Second, the scope of § 1252(b)(9), like that of its neighboring provision § 1252(g), is “narrow.” *Id.* While both observations are helpful, *Jennings* remains the most influential case on the provision.

³⁰ 533 U.S. 289, 292 (2001).

³¹ The chart is recent as of November 17, 2020. Although it is widely inclusive, it is not entirely exhaustive. It includes only post-*Jennings* cases in which § 1252(b)(9) was treated in some depth. It does not include every case since *Jennings* that has merely cited the provision in passing.

³² Benson, *supra* note 25, at 1419.

as a perpetual game of “Whac-a-Mole” in which Congress seeks to smack down nearly all avenues of judicial review that surface—particularly those that lead to review in federal district court.³³ Congress’s intent to curb judicial review of immigration decisions was most evident in two laws enacted in 1996, which categorically eliminated judicial review for certain noncitizens and for particular claims. Moreover, all judicial review of final orders of removal, as well as any related claims, was to take place solely in a court of appeals presented through the petition for review process, leaving few, if any, paths for immediate review in federal district court.³⁴

This Part first traces the history of judicial review prior to these 1996 laws. It then outlines how the 1996 legislation reshaped judicial review in a general sense before focusing specifically on § 1252(b)(9): Congress’s intent in enacting this provision; the potential consequences of its applicability; the types of claims that may implicate it; and, finally, its text.

A. *Judicial Review in Immigration Proceedings Before 1996*

Prior to 1955, federal courts reviewed the legality of exclusion and deportation of noncitizens exclusively through habeas corpus petitions filed in a federal district court.³⁵ Judicial review was expanded in 1955, however, when the Supreme Court held that the Administrative Procedure Act (APA)³⁶ offered an additional avenue for judicial review of deportation orders.³⁷ In 1956, the Court further extended the opportunity for judicial review under the

³³ See *id.* (“[The 1996] changes are part of the continuing efforts of Congress to control the timing, scope, and nature of judicial review of immigration proceedings.”). As this Part demonstrates, there has been a seemingly endless cycle of congressional attempts to foreclose avenues of judicial review only for the judicial branch to pry them back open.

³⁴ See 8 U.S.C. §§ 1252(a)(5), (b)(9) (requiring all claims “arising from” removal proceedings to be consolidated into a petition for review with a court of appeals).

³⁵ Motomura, *supra* note 27, at 395; see also Neuman, *supra* note 26, at 1966-67 (“Even before the federal government took on the task of regulating immigration, federal courts employed the writ of habeas corpus to inquire into the lawfulness of” noncitizens’ presence in the United States). Prior to the passage of IIRIRA in 1996, discussed *infra* Sections I.B-C, there were two types of immigration proceedings: deportation proceedings and exclusion proceedings. See IMMIGRANT LEGAL RES. CTR. INADMISSIBILITY & DEPORTABILITY § 1.4 (2019) (explaining pre-1997 immigration proceedings and comparing those proceedings to those mandated under current law). In deportation proceedings, the government had to prove the person was deportable, and in exclusion proceedings, the individual had to prove that she was admissible. See *id.* (“Generally, the [Immigration and Naturalization Service] had the burden of proving someone was deportable [in deportation hearings] while the non-citizen had to prove they were not excludable in exclusion proceedings.”).

³⁶ Administrative Procedure Act, ch. 324, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

³⁷ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163; see *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51-52 (1955) (holding that “there is a right to judicial review of deportation orders other than by habeas corpus,” and that the remedy sought in this case, judicial review under the Administrative Procedure Act, “is an appropriate one”).

APA, this time to orders of exclusion.³⁸ After these decisions, noncitizens could challenge their deportation or exclusion order directly in federal district court under the APA, as well as through a habeas petition.³⁹

This expansion of judicial review “led to many novel and creative challenges and, in some notorious cases, lengthy delay in the execution of deportation or exclusion orders.”⁴⁰ Shortly thereafter came the first round of judicial review “Whac-a-Mole,” when Congress amended the Immigration and Nationality Act (INA) in 1961, providing the first statutory provision governing—and restricting—judicial review of exclusion and deportation orders.⁴¹

For exclusion cases, section 106(b) of the amended INA provided that noncitizens could seek review of their final exclusion orders *exclusively* in habeas corpus proceedings in district court—the APA would no longer provide a separate avenue for judicial review of such orders.⁴²

For deportation cases, section 106(a) of the INA set forth the “sole and exclusive” procedure for judicial review of final orders of deportation.⁴³ Under this procedure, noncitizens facing deportation had to first exhaust administrative remedies in the immigration system and then seek judicial review of their final orders only by filing a petition for review in a court of appeals pursuant to the Hobbs Act.⁴⁴ With one exception provided in section 106(a)(9), there were no statutorily authorized avenues for litigants to bring challenges to deportation orders to a district court.⁴⁵

³⁸ See *Brownell v. Shung*, 352 U.S. 180, 181 (1956) (determining that a noncitizen may appropriately pursue either remedy—habeas corpus or a declaratory judgment under the Administrative Procedure Act—when challenging an exclusion order).

³⁹ See David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996-2005)*, 51 N.Y.L. SCH. L. REV. 75, 80 (2006-2007) (discussing how noncitizens facing deportation could now challenge their orders under the Administrative Procedure Act and through habeas corpus proceedings).

⁴⁰ Benson, *supra* note 25, at 1431.

⁴¹ See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650 (amending the statute to include “judicial review of orders of deportation and exclusion”); see also Motomura, *supra* note 27, at 395 (“The enactment of § 106 in 1961 was an attempt by Congress to limit opportunities for judicial review that the Administrative Procedure Act had opened.”).

⁴² See Immigration and Nationality Act of 1952 § 106(b) (codified at 8 U.S.C. § 1105a(b)) (“Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.”) (repealed 1996).

⁴³ § 106(a), 8 U.S.C. § 1105a(a) (repealed 1996).

⁴⁴ *Id.* The Hobbs Act, which governs review for various administrative agencies, eliminates district court jurisdiction and places judicial review solely in the courts of appeals. 28 U.S.C. §§ 2341–2351.

⁴⁵ “[A]ny alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.” INA § 106(a)(9), 75 Stat. 650, 652 (repealed 1996).

But despite Congress's attempt to curtail judicial review in federal district court, section 106 left open several significant avenues to such review.⁴⁶ For one, section 106 only applied to review of a "final order" of exclusion or deportation. Thus, if a noncitizen challenged a matter outside the ambit of a "final order of deportation," she could bring her claims directly to federal district court.⁴⁷

In *Cheng Fan Kwok v. Immigration and Naturalization Service*, for example, a noncitizen challenged an immigration official's decision to deny a temporary stay of deportation while he applied for asylum.⁴⁸ The Supreme Court found that because the denial of the stay was not a determination "made during a [deportation] proceeding," it fell outside the scope of a "final order" and thus was not precluded by section 106.⁴⁹ In other words, because the decision to deny a stay was collateral to his final order of deportation, the noncitizen could bring his claims challenging the immigration official's denial directly to federal district court.⁵⁰

Future litigants relied on *Cheng* to bring their claims to district court, characterizing them as collateral to their "final order" and thus not subject to the requirement of section 106 that review of such orders takes place solely in a court of appeals through a petition for review.⁵¹

Likewise, the Supreme Court's decision in *McNary v. Haitian Refugee Center* provided a path around section 106 for noncitizens alleging "pattern and practice" violations.⁵² At issue in *McNary* was section 210 of the INA, the special agricultural worker legalization program (SAW), which was part of the Immigration Control and Reform Act of 1986.⁵³ Under section 210, the

⁴⁶ See Benson, *supra* note 25, at 1432 ("[L]itigation soon arose about the type of actions, orders and decisions of the agency that were within the term 'final order.'"). Benson highlights the various types of challenges that would fall outside section 106 and thus get into federal district court. *Id.* at 1433.

⁴⁷ See Motomura, *supra* note 27, at 415 ("If a matter was not included in a 'final order,' then review was in the district court under the general federal question statute, 28 U.S.C. § 1331 and former INA § 279.").

⁴⁸ 392 U.S. 206, 207-08 (1968).

⁴⁹ *Id.* at 216.

⁵⁰ *Id.* Motomura explains that subsequent lower court decisions extended this principle from *Cheng*, where a final removal order had already been issued, to cases where a final removal had not yet been issued. Motomura, *supra* note 27, at 416. For example, Professor Motomura recounts *Kavasji v. Immigration and Naturalization Service*, 675 F.2d 236, 237-39 (7th Cir. 1982), where the government ordered a student deported after denying his requests to extend his status and be transferred to another school. *Id.* As Motomura explains, the Seventh Circuit found that such claims fell outside the scope of a "final order" and could thus be brought directly to federal district court. *Id.*

⁵¹ See Benson, *supra* note 25, at 1457 (describing how litigants relied on *Cheng* to characterize their claims as "outside the scope of a removal order" and thus not limited by the procedures prescribed in section 106).

⁵² *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 497 (1991).

⁵³ *Id.* at 483 (describing statutory requirements for adjusting special agricultural workers' statuses); Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359, 3417 (1986).

only means of judicial review for a denied SAW application was with a court of appeals through the petition for review process set forth in section 106.⁵⁴

Despite the statute's claims-channeling provision, the *McNary* plaintiffs brought their claims directly to district court alleging a "pattern and practice" of procedural due process violations by the government in its administration of the SAW program.⁵⁵ The plaintiffs argued that they should be permitted to access federal district court because the administrative procedures did not allow SAW applicants the opportunity to challenge adverse evidence, to present witnesses, or to communicate effectively as competent interpreters were not provided.⁵⁶ In spite of the claims-channeling provision in the statute—mandating that all challenges to application denials go to a court of appeals through a petition for review—the Supreme Court held that the district court retained jurisdiction over the plaintiffs' "pattern and practice" claims.⁵⁷

Two factors underpinned the Court's holding. First, requiring noncitizens to individually exhaust administrative remedies per section 106 would be less efficient than permitting them to compile and bring claims directly to the district court.⁵⁸ Second, and perhaps more importantly, the Court was concerned that precluding district court jurisdiction would deprive the plaintiffs of "meaningful judicial review."⁵⁹ Since the administrative process at issue failed to develop an adequate record for any subsequent appellate court review of the "pattern and practice" claims, the Court reasoned that the plaintiffs must be permitted to develop an adequate record in district court.⁶⁰

Relying on *McNary*, litigants were able to find their way into district court despite the limitations set forth in section 106 by challenging INS enforcement practices and arguing that only a district court could properly develop an adequate record for review of such claims.⁶¹

These cases—*Cheng* and *McNary*—revealed that what seemed like an ironclad judicial review system was, in practice, subject to workarounds. Noncitizens were still finding avenues into federal district court. These perceived loopholes led to

⁵⁴ See Immigration and Nationality Act § 210(e)(3)(A) (codified at 8 U.S.C. § 1160(e)(3)(A)) ("There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title."). If a noncitizen's SAW application were denied and resulted in a deportation order, her only means of judicial review would be to exhaust administrative remedies in the immigration system and file a petition for review with a court of appeals. Immigration and Nationality Act § 106(a) (codified at 8 U.S.C. § 1105a(a)) (repealed 1996).

⁵⁵ *McNary*, 498 U.S. at 483.

⁵⁶ *Id.* at 487-88.

⁵⁷ *Id.* at 484.

⁵⁸ *Id.* at 490.

⁵⁹ *Id.* at 484.

⁶⁰ *Id.*

⁶¹ See Benson, *supra* note 25, at 1457 n.213 (discussing cases in which noncitizens were successful, and unsuccessful, in convincing district courts that jurisdiction over their claims was proper because they would otherwise be deprived of "meaningful judicial review").

“increasing congressional and administration frustration.”⁶² Despite various responsive attempts to close off these avenues of judicial review, the next bona fide round of judicial review “Whac-a-Mole” would not take place until 1996 when Congress overhauled the system once more.⁶³

B. *Judicial Review in Immigration Proceedings After 1996*

In 1996, Congress passed two statutes that fundamentally altered—and further limited—judicial review of administrative immigration decisions.⁶⁴ The first piece of legislation was the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which specifically eliminated judicial review for noncitizens convicted of certain criminal offenses.⁶⁵ This substantial restriction of judicial review reflected “congressional dissatisfaction with the pace of criminal alien removals under existing laws.”⁶⁶ A similar sentiment was evident in the second piece of legislation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which added § 1252(b)(9), among other provisions.⁶⁷

IIRIRA “restructured judicial review in fundamental ways.”⁶⁸ Most significantly, IIRIRA repealed the entirety of section 106, which had been in place since 1961, and replaced it with section 242 of the INA, now codified at 8 U.S.C. § 1252.⁶⁹ The new law consolidated what were once separate exclusion and deportation proceedings into a singular “removal proceeding” and accordingly created a singular order of removal.⁷⁰

Under section 242, judicial review of these orders was subject to the Hobbs Act, which had previously applied only to deportation orders under section 106.⁷¹ The Hobbs Act prohibits district court review of administrative decisions and instead funnels judicial review into the court of appeals through

⁶² *Id.* at 1433.

⁶³ *See id.* at 1433-38 (tracing the history of judicial review between 1961 and 1996, noting that no major changes had taken place until 1996).

⁶⁴ *See* Motomura, *supra* note 27, at 396 (“[T]wo separate pieces of legislation significantly changed judicial review of immigration decisions.”).

⁶⁵ Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276-77 (1996).

⁶⁶ *See* McConnell, *supra* note 39, at 83 n.2 (citing S. Rep. No. 104-249, at 2, (1996)) (explaining that a purpose of the bill was to “expedit[e] the removal of excludable and deportable aliens, especially criminal aliens”) (emphasis added).

⁶⁷ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. §§ 1101, 1231, 1252) (repealing INA § 106 in IIRIRA § 306(b) and creating the new INA § 242).

⁶⁸ Motomura, *supra* note 27, at 397.

⁶⁹ Immigration and Nationality Act § 242 (codified at 8 U.S.C. § 1252). *See also* Benson, *supra* note 25, at 1442-43 (“[IIRIRA] also completely repealed the former statutory section governing judicial review of deportation and exclusion proceedings . . .”).

⁷⁰ Motomura, *supra* note 27, at 397.

⁷¹ Section 242(a)(1) (codified at 8 U.S.C. § 1252(a)(1)) provides: “Judicial review of a final order of removal . . . is governed only by [the Hobbs Act] . . .”

a petition for review process.⁷² Therefore, under the new judicial review regime, which is still in place today, noncitizens are prohibited from challenging their removal orders in district court. Instead, under § 1252(a)(1), judicial review of final orders of removal can be obtained *only* through the filing of a petition for review with the appropriate court of appeals.⁷³ With this change, Congress eliminated the few remaining statutorily authorized avenues to judicial review in district court.⁷⁴

C. *Consolidation of Claims: The Addition and Intent of § 1252(b)(9)*

IIRIRA did not only deprive district courts of jurisdiction over challenges to final removal orders. With the addition of § 1252(b)(9), IIRIRA also removed district court jurisdiction over many claims that even relate to removal and the removal process. Subsection 1252(b)(9) provides:

Judicial review of all questions of law and fact, including interpretation of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section.⁷⁵

At bottom, the provision is meant to consolidate for review—or “zip”⁷⁶—all precedent claims “arising from” removal proceedings into a subsequent petition for review with a court of appeals, alongside a noncitizen’s challenge to her final removal order.⁷⁷ With the addition of § 1252(b)(9), as one court put it, Congress sought to prevent “piecemeal litigation” by limiting all noncitizens “to one bite of the apple with regard to challenging an order of removal.”⁷⁸

⁷² 28 U.S.C. §§ 2341-2351.

⁷³ 8 U.S.C. § 1252(a)(1). Congress later clarified in the REAL ID Act of 2005, which added section 242(a)(5) to the Immigration and Nationality Act (codified at 8 U.S.C. § 1252(a)(5)), that the petition for review process is “exclusive and not subject to circumvention.” *See* O.A. v. Trump, 404 F. Supp. 3d 109, 128 (D.D.C. 2019) (noting that “a petition for review filed with an appropriate court of appeals” is “the sole and exclusive means for judicial review of an order of removal”).

⁷⁴ As noted *supra*, under section 106(b), noncitizens could challenge final orders of *exclusion* in district court through a petition for habeas, and under section 106(a)(9), noncitizens could challenge custody pursuant to final orders of *deportation* in district court through a petition for habeas. *See supra* notes 42-47 and accompanying text.

⁷⁵ 8 U.S.C. § 1252(b)(9); *see also supra* note 19 (discussing the REAL ID Act’s amendment to § 1252(b)(9)).

⁷⁶ *See* *Reno v. American-Arab Anti-Discrimination Comm. (AADAC)*, 525 U.S. 471, 483 (1999) (describing § 1252(b)(9) as an “unmistakable zipper clause”) (internal quotations omitted).

⁷⁷ *See* *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020) (“Congress intended the zipper clause to ‘consolidate judicial review of immigration proceedings into one action in the court of appeals.’”).

⁷⁸ *Bonhommetre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005). Though the Court was explaining the intent of the REAL ID Act, the logic applies with equal force to the original intent of § 1252(b)(9). *See* *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1269 (9th Cir. 2020) (“The purpose of these claim-channeling provisions is to limit all [noncitizens] to one bite of the apple with regard to challenging an order of removal.”) (internal quotations omitted) (citation omitted).

The legislative history of the REAL ID Act of 2005—which amended § 1252(b)(9) by adding a clause to explicitly state that the provision applied to habeas claims under 28 U.S.C. § 2241—similarly noted that § 1252(b)(9) “made clear that review of a final removal order [through a petition for review with a court of appeals] is the only mechanism for reviewing any issue raised in a removal proceeding.”⁷⁹ In sum, § 1252(b)(9) aims to funnel any claims stemming from removal proceedings away from federal district court and into an eventual petition for review with a court of appeals.

In an article critical of IIRIRA’s judicial review scheme, Professor Benson observes that § 1252(b)(9) was apparently intended to overturn Supreme Court decisions like *Cheng* and *McNary*, which allowed litigants to find their way into district court despite the “sole and exclusive” review procedures of the now-repealed section 106.⁸⁰ Relative to section 106, which consolidated only challenges to “final orders,” § 1252(b)(9) appears to have a broader scope. On its face, § 1252(b)(9) aims to “gather all [] permissible claims and channel them into review of the final order of [removal]” with a court of appeals.⁸¹ Ostensibly, even claims that were previously collateral to “final orders” under section 106—like those at issue in *Cheng*—might be consolidated under a broad reading of § 1252(b)(9).⁸²

D. *The Consequence of Consolidation: The Administrative Process*

Importantly, § 1252(b)(9) does not eliminate access to judicial review altogether.⁸³ Where applicable, the provision only requires noncitizens to consolidate their claims for eventual judicial review in a petition for review with

⁷⁹ H.R. Rep. No. 109-72, at 173 (2005). The House Report further explained that the combination of § 1252(a)(1)—the provision implementing the Hobbs Act—and § 1252(b)(9) were “intended to preclude all district court review of any issue raised in a removal proceeding.” *Id.*; see also *supra* note 19 (explaining the REAL ID Act’s effect on § 1252(b)(9)).

⁸⁰ Benson, *supra* note 25, at 1456-57.

⁸¹ *Id.* at 1456 (emphasis added). Notably, some, including the three dissenting justices in *Jennings*, have construed § 1252(b)(9) in a similar way courts did section 106: that it applies only to challenges to “final orders.” For a more detailed discussion on this point, see *infra* note 198.

⁸² See Motomura, *supra* note 27, at 417 (“[T]he government decision at issue in *Cheng*—denial of a stay of deportation after a deportation order—may be within the new timing consolidation provision in § 1252(b)(9).”).

⁸³ See *id.* at 416-17 (explaining that § 1252(b)(9) consolidated the claims that must be brought in a petition for review in front of a court of appeals); see also *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 11 (1st Cir. 2007) (stating that § 1252(b)(9) “is a judicial channeling provision, not a claim-barring one”).

a court of appeals.⁸⁴ Therefore, when claims implicate § 1252(b)(9), the question is not *if* they can be reviewed by a federal court but *where, when, and how*.⁸⁵

If the claims fall within § 1252(b)(9)'s scope, they must be consolidated into a petition for review before a court of appeals only after exhausting administrative remedies, which in the immigration context is called "removal proceedings." If, on the other hand, claims fall outside the ambit of § 1252(b)(9), they can be reviewed directly and more immediately by a federal district court.⁸⁶ Although judicial review exists in either scenario, having claims consolidated into a petition for review has several critical drawbacks for noncitizens.

First, noncitizens may be forced to wait for a staggering period of time—months or years, often while in detention⁸⁷—before their removal proceedings conclude and they can file a petition for review with a court of appeals.⁸⁸

Removal proceedings unfold in two stages.⁸⁹ In the first, an immigration judge determines whether to sustain the charges contained in the government's official charging documents that present the provisions of the

⁸⁴ See *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 313 (2001) (concluding that the purpose of § 1252(b)(9) is to "consolidate 'judicial review' of immigration proceedings into one action in the court of appeals," and therefore it is not meant to completely eliminate or bar claims).

⁸⁵ See Narasimhan, *supra* note 28, at 1449 ("[§ 1252(b)(9)] consolidate[s] questions for judicial review both as a matter of time and forum."); see also *J. E. F.M. ex rel. Ekblad v. Whitaker*, 908 F.3d 1157, 1158 (9th Cir. 2018), *reh'g denied* (Berzon, J., dissenting) (noting with respect to § 1252(b)(9) that "[t]he issue is only *how* and *where* [the claims] may be raised").

⁸⁶ See, e.g., *S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec.*, No. 18-760, 2020 WL 3265533, at *16-18 (D.D.C. June 17, 2020) (finding that claims challenging conditions of confinement in immigration detention fell outside the scope of § 1252(b)(9), thereby permitting review in district court). To be clear, there are other jurisdiction-limiting provisions in the INA, mainly in § 1252. Even if a claim overcomes § 1252(b)(9), there may be other barriers to district court jurisdiction. See, e.g., 8 U.S.C. § 1252(g) (restricting district court jurisdiction over challenges to an agency's discretionary actions or decisions); Benson, *supra* note 25, at 1445-55 (describing the disfavored litigants and disfavored claims under § 1252).

⁸⁷ See TRAC IMMIGR., *supra* note 22 (finding that the average wait for an immigration hearing is well over a year, though noting that it can be shorter for detained noncitizens).

⁸⁸ The INA provides for two different administrative processes. One is the "expedited removal" process, which, as its name suggests, focuses on rapidly removing noncitizens near the border. See 8 U.S.C. § 1225 (explaining the conditions in which a noncitizen arrives and is subject to expedited removal proceedings); see also 84 Fed. Reg. 35410 (July 23, 2019) (explaining that the Department of Homeland Security "may remove, without a hearing before an immigration judge, certain aliens arriving in the United States . . . who are inadmissible under [certain subsections of the INA]"). The other are "regular removal proceedings." See 8 U.S.C. § 1229a (requiring that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien" and explaining requirements for such proceedings). Since the INA eliminates all avenues of judicial review for those in expedited removal, this Comment only discusses regular removal proceedings. See 8 U.S.C. § 1252(a)(2)(A) (eliminating judicial review in expedited removal proceedings). These paragraphs offer a highly abbreviated summary of removal proceedings. For a more in-depth explanation of the removal process, see Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 957-58 (2015).

⁸⁹ Eagly, *supra* note 88, at 957-58 (explaining the two stages).

INA the noncitizen allegedly violated.⁹⁰ If the immigration judge sustains the charges, that judge will issue a removal order, unless the noncitizen applies for relief, such as asylum or voluntary departure, in which case she moves to the second stage of removal proceedings.⁹¹ In the second stage, the immigration judge adjudicates the application for relief.⁹² If the judge rejects either or both applications, the noncitizen is issued a removal order.⁹³

Regardless of when a removal order is issued—the first stage or the second stage—it does not automatically become “final.” A removal order becomes final after the Board of Immigration Appeals affirms the order on appeal or upon the expiration of the period during which the noncitizen is permitted to seek review of the order with the Board of Immigration Appeals.⁹⁴ Only then, after the removal order becomes final, can a noncitizen finally file a petition for review before a court of appeals.⁹⁵

To underscore how painstakingly long this process can be, consider the following example of a group of noncitizen asylum-seekers detained in an Immigration and Customs Enforcement (ICE) facility in the San Francisco area.⁹⁶ Although the noncitizens had retained counsel to represent them in removal proceedings, a rarity for detained immigrants,⁹⁷ ICE transferred them to faraway facilities outside California, making it nearly impossible for

⁹⁰ See 8 C.F.R. §§ 1003.13, 1003.14 (2020) (defining “[c]harging document” as “the written instrument which initiates a proceeding before an Immigration Judge” and explaining that “proceedings before an Immigration Judge commence, when a charging document is fled with the Immigration Court by the Service”).

⁹¹ Eagly, *supra* note 88, at 957-58. Voluntary departure is an immigration benefit that allows a noncitizen to avoid the harsh penalties associated with receiving a formal removal order. 8 C.F.R. § 1240.26 (2020). Professor Eagly notes that voluntary departure might be better categorized as an immigration “benefit” rather than as an actual form of “relief” because it still results in departure from the United States. Eagly, *supra* note 88, at 938 n.23.

⁹² Eagly, *supra* note 88, at 957-58.

⁹³ *Id.*; see also 8 U.S.C. § 1229a(c)(1)(A) (“At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States.”).

⁹⁴ *Id.* In addition to this statutory provision, federal regulations permit an order of removal issued by an immigration judge to become final in several other circumstances. See, e.g., 8 C.F.R. § 1241.1(a) (2020) (explaining that a removal order shall become final upon dismissal of an appeal by the Board of Immigration Appeals); § 1241.1(b) (upon waiver of appeal by noncitizen); § 1241.1(d) (upon the date of a decision ordering removal if case is certified to the Attorney General or Board of Immigration Appeals); § 1241.1(e) (explaining removal *in absentia*, in which a removal order becomes final immediately if “an immigration judge orders an alien removed in the alien’s absence”).

⁹⁵ See 8 U.S.C. § 1252(a)(1) (requiring removal order to be final before noncitizen can seek judicial review through a petition for review with a court of appeals).

⁹⁶ The following facts are based on *Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1044-45 (N.D. Cal. 2018). It is unclear from the facts provided whether the noncitizens were indeed seeking asylum, but the court noted that many of them already had their first immigration hearing, suggesting they were seeking some form of relief from removal. *Id.* at 1044.

⁹⁷ See Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (finding that only fourteen percent of detained immigrants secure representation).

their lawyers to continue representing them effectively.⁹⁸ In response, the noncitizens brought due process claims under the Fifth Amendment to a federal district court, arguing that their relocation violated their constitutional right to counsel.⁹⁹ The court, however, held that the claims fell within the scope of § 1252(b)(9)—if the noncitizens wanted to bring these constitutional claims, they would have to do so in a petition for review with a court of appeals only *after* completing removal proceedings without the benefit of counsel.¹⁰⁰

Once a district court denies review under § 1252(b)(9), the outlook is grim. It could be years before removal proceedings conclude and the petition for review process becomes available noncitizens seeking judicial review. At the time of writing, the average wait for *any* hearing before an immigration judge is over 800 days.¹⁰¹ If a noncitizen wants to seek asylum or other relief in the second stage of removal proceedings, like the detained noncitizens described above, the wait will be even longer.¹⁰² Although detained immigrants generally face shorter delays, the wait in detention is still a matter of months, not days.¹⁰³

Assuming an immigration judge denies relief,¹⁰⁴ the noncitizens can appeal to the Board of Immigration Appeals—but that will add another several months, if not years, to their path to judicial review. In a 2012 report, the U.S. Department of Justice found that the Board of Immigration Appeals took about three months to complete appeals involving detained noncitizens and completed those involving non-detained noncitizens in around sixteen months, “with some cases taking more than five years to complete.”¹⁰⁵

⁹⁸ *Alvarez*, 388 F. Supp. 3d at 1045.

⁹⁹ *Id.*

¹⁰⁰ This was the holding of *Alvarez*, which read § 1252(b)(9) broadly to encompass the right-to-counsel claims. 388 F. Supp. 3d at 1049. See generally KATE M. MANUEL, CONG. RSCH. SERV. R43613 ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6, <https://fas.org/sgp/crs/homesec/R43613.pdf> [<https://perma.cc/2MRG-NJMA>] (explaining that although noncitizens do not have a Sixth Amendment right to counsel at the government's expense, they generally have a Fifth Amendment right to counsel at their own expense in removal proceedings).

¹⁰¹ See *Immigration Court Backlog Tool*, TRAC IMMIGR. (June 8, 2018), https://trac.syr.edu/phptools/immigration/court_backlog [<https://perma.cc/S658-RCH7>]; see also TRAC IMMIGR., *supra* note 22 (explaining that sixty-one percent of cases in the backlog are waiting for their first hearing before an immigration judge, which represents the “first stage” of removal proceedings).

¹⁰² See TRAC IMMIGR., *supra* note 22 (explaining that the delay to schedule “individual merits hearing[s],” the second stage of removal proceedings, will be “a great deal longer” than the average wait times).

¹⁰³ See *Immigration Court Backlog Tool*, *supra* note 101 (noting that wait times for detained immigrants can be as little as a month or two).

¹⁰⁴ This is a safe assumption because detained noncitizens who are not represented are exceedingly unlikely to obtain relief. See Eagly & Shafer, *supra* note 97, at 50 (finding that only two percent of unrepresented, detained noncitizens obtained relief in removal proceedings between 2007-2012).

¹⁰⁵ OFF. OF THE INSPECTOR GEN. EVALUATION AND INSPECTIONS DIV., U.S. DEP'T OF JUST., I-2013-001, MANAGEMENT OF IMMIGRATION CASES & APPEALS BY THE EXECUTIVE

Although the data are now outdated, the backlog at the Board of Immigration Appeals has only gotten worse. In 2012, when the report was released, there were around 25,000 appeals pending.¹⁰⁶ In 2020, there were nearly 91,000 appeals pending before the Board.¹⁰⁷ Therefore, if § 1252(b)(9) applies to a noncitizen's claims, it will likely be months or years before the noncitizens can administratively exhaust their claims and bring them through a petition for review with a court of appeals. In the interim, noncitizens may be languishing in detention,¹⁰⁸ stranded in dangerous border towns in Mexico,¹⁰⁹ or closely monitored by ICE.¹¹⁰

The second drawback of having claims consolidated by § 1252(b)(9) is that the record for review is limited. When a case reaches the court of appeals through the petition for review process, the court “shall decide the petition only on the administrative record on which the removal order is based.”¹¹¹ But the record developed during the administrative process—the multiple phases of removal proceedings described above—may not adequately address the claims that a noncitizen seeks to raise.¹¹²

Consider, for example, the case of unrepresented noncitizen minors who brought claims into federal district court arguing that they have a constitutional due process right to government-appointed counsel.¹¹³ The district court held—and the circuit court affirmed on appeal—that § 1252(b)(9) applied to the minors' claims, thus forcing them to raise their

OFFICE FOR IMMIGRATION REVIEW iii (2012), <https://oig.justice.gov/reports/2012/e1301.pdf> [<https://perma.cc/2ANK-BTRE>].

¹⁰⁶ EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., ADJUDICATION STATISTICS (2020), <https://www.justice.gov/eoir/page/file/1248506/download> [<https://perma.cc/R228-BFSC>].

¹⁰⁷ *Id.*

¹⁰⁸ See AM. C.L. UNION, HUM. RTS. WATCH & NAT'L IMMIGRANT JUST. CTR., JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 5 (2020) (outlining growth of immigration detention during the Trump administration).

¹⁰⁹ See Jordan, *supra* note 4 (explaining squalid conditions on the U.S.-Mexican border for those migrants subject to MPP).

¹¹⁰ See *Fact Sheet: Electronic Monitoring Devices as Alternatives to Detention*, NAT'L IMMIGR. FORUM (Feb. 22, 2019) <https://immigrationforum.org/article/fact-sheet-electronic-monitoring-devices-as-alternatives-to-detention> [<https://perma.cc/URC3-CLCL>] (highlighting the various invasive means ICE uses to monitor non-detained noncitizens during removal proceedings).

¹¹¹ 8 U.S.C. § 1252(b)(4)(A).

¹¹² See *Reno v. American-Arab Anti-Discrimination Comm. (ADC)*, 525 U.S. 471, 476 (1999) (“Since neither the Immigration Judge nor the Board of Immigration Appeals has authority to hear such claims . . . a challenge to a final order of deportation based upon such a claim would arrive in the court of appeals without the factual development necessary for decision.”). This concern was also articulated by the five Ninth Circuit judges that dissented to the decision to deny rehearing and rehearing *en banc* of *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1034 n.6 (9th Cir. 2016). See *J. E. F.M. ex rel. Ekblad v. Whitaker*, 908 F.3d 1157, 1163 (9th Cir. 2018) (Berzon, J., dissenting) (noting that immigration judges have little reason to develop an adequate record to address a potential future right-to-counsel claim).

¹¹³ These facts are based off *J.E. F.M.*, 837 F.3d at 1029-31.

claims individually in a court of appeals through a petition for review after their removal proceedings concluded.¹¹⁴

If the minors eventually came before a court of appeals through a petition for review, the record to bolster their constitutional claims would be sparse at best. That is because throughout removal proceedings, immigration judges and the Board of Immigration Appeals are uniquely concerned with the merits of an individual's case—whether she is eligible for asylum or another form of relief.¹¹⁵ Not only do these administrative adjudicators have “no reason to develop an adequate record” related to a noncitizen's constitutional right-to-counsel claims—or any other similar claim—but doing so may also exceed their authority.¹¹⁶ The record that develops throughout removal proceedings, therefore, is unlikely to cover the types of claims that are susceptible to the reach of § 1252(b)(9).¹¹⁷ In these circumstances, a reviewing court of appeals is thus restricted to using an inadequate record to adjudicate often significant constitutional issues.

The third disadvantage of having claims swallowed by § 1252(b)(9) concerns representation. Permitting noncitizens to access district courts allows them to bring class action suits, which, in turn, allows public interest organizations to provide representation to a greater number of people than they would be able to assist on an individual basis through removal proceedings.¹¹⁸ If claims fall outside the scope of § 1252(b)(9) and can proceed in district court, the noncitizen may be able sue on behalf of a class, permitting the court to review issues that arise for many other noncitizens during administrative adjudication.¹¹⁹ This is not true of removal proceedings, which can only address claims of individual noncitizens, not classes.¹²⁰ Class actions are a crucial tool, not only because any relief granted will be widely

¹¹⁴ *Id.* at 1031-35.

¹¹⁵ See *J. E. F.M.* 908 F.3d at 1163 (Berzon, J., dissenting) (explaining that immigration judges and the Board of Immigration Appeals are focused solely on the merits of an individual immigration case).

¹¹⁶ *Id.*

¹¹⁷ That was precisely the Supreme Court's concern in *McNary v. Haitian Refugee Center*, where an inadequate record in the administrative process was central to finding that precluding district court jurisdiction would deprive noncitizens of “meaningful judicial review.” 498 U.S. at 496.

¹¹⁸ See *J. E. F.M.*, 908 F.3d at 1158 (Berzon, J., dissenting) (explaining that permitting district court review would allow for the “representation of the class . . . by public interest organizations that lack the capacity to represent each class member individually”).

¹¹⁹ See 8 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 112.02 (Matthew Bender, rev. ed.) (discussing necessary steps for bringing class action lawsuit in the immigration context). It is worth noting that 8 U.S.C. § 1252(f)(1) may limit certain class actions in the immigration context. See Jill E. Family, *Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 CLEV. ST. L. REV. 11, 13 (2005) (observing that 8 U.S.C. § 1252(f)(1) may limit the ability of federal courts to grant class-wide injunctive relief in immigration cases).

¹²⁰ See 8 U.S.C. § 1229a(a)(3) (explaining that individual removal proceedings are the “sole and exclusive procedure” for determining admissibility); *id.* § 1229a(a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportation of an alien.”) (emphasis added).

enjoyed, but also because public interest organizations may lack the capacity to represent each class member individually. Therefore, if claims can be heard in district court, these organizations can consolidate their efforts into class actions and distribute their representation more broadly.

Whether a noncitizen can access district court has significant, if not grave, consequences. Had the Third Circuit upheld the district court's decision to dismiss Efrain and Mia's case, they would have been sent back to Mexico—with no guarantee of safety or survival. But their case is just one of a number of situations in which § 1252(b)(9) may be implicated.

E. *The Contexts Where § 1252(b)(9) May Arise*

Claims that implicate § 1252(b)(9) are most often brought to federal district court *before* and *during* removal proceedings and challenge a wide range of allegedly unlawful action. As the following scenarios illustrate, determining whether claims raise a question “arising from any action taken or proceeding brought to remove an alien from the United States” is anything but straightforward.¹²¹

Noncitizens often seek to bring claims to district court that arise even before the initiation of removal proceedings. For example, they have sought to challenge the way in which ICE stopped, searched, and detained them, which includes claims challenging large, indiscriminate ICE raids and sweeps.¹²² Likewise, noncitizens (and organizational plaintiffs) have sought to challenge immigration policies such the rescission of Deferred Action for Childhood Arrivals (DACA)¹²³ and severe restrictions placed on access to asylum.¹²⁴ Although not clearly brought “before” removal proceedings, these are claims brought by noncitizens who were never in removal proceedings or are seeking to apply for asylum, which requires the initiation of removal proceedings.¹²⁵

¹²¹ 8 U.S.C. § 1252(b)(9).

¹²² See *Tun-Cos v. Perrotte*, No. 17-943, 2018 WL 3616863, at *1 (E.D. Va. Apr. 5, 2018) (challenging allegedly illegal ICE stops and searches), *rev'd on other grounds by* *Tun-Cos v. Perrotte*, 922 F.3d 514, 517 (4th Cir. 2019); *Nava v. Dep't of Homeland Sec.*, 435 F. Supp. 3d 880, 885 (N.D. Ill. 2020) (challenging ICE's allegedly race-based traffic stops and large-scale, indiscriminate sweeps); *Nak Kim Chhoeun v. Marin*, No. 17-01898, 2018 WL 1941756, at *1 (C.D. Cal. 2018) (challenging ICE's decision to round up and detain approximately 100 Cambodian nationals).

¹²³ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020).

¹²⁴ See *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1259 (9th Cir. 2020) (challenging the November 2018 rule and proclamation that, together, “strip[] asylum eligibility from every migrant who crosses into the United States between designated ports of entry”); *O.A. v. Trump*, 404 F. Supp. 3d 109, 117 (D.D.C. 2019) (presenting a similar challenge to the one brought in *E. Bay Sanctuary Covenant*); *Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 857 (S.D. Cal. 2019) (challenging the “asylum ban,” which required most non-Mexican nationals to seek asylum in Mexico).

¹²⁵ This is only true of defensive asylum applications. See U.S. CITIZENSHIP & IMMIGR. SERVS., OBTAINING ASYLUM IN THE UNITED STATES (Sept. 22, 2020), <https://www.uscis.gov/>

Likewise, noncitizens often seek to bring claims implicating § 1252(b)(9) to federal district court *during* removal proceedings. For example, noncitizens have sought to challenge their transfer to faraway detention facilities (or foreign countries) in the midst of their removal proceedings because it would violate their right to counsel;¹²⁶ they have brought challenges to the use of videoconference technology during their removal proceedings;¹²⁷ and they have attempted to challenge their prolonged detention pending completion of removal proceedings.¹²⁸

Less often, claims squarely implicating § 1252(b)(9) are brought *after* removal proceedings have concluded and a removal order has already become final. At that point, noncitizens may be able to bring any precedent claims to a court of appeals in a petition for review, alongside their challenge to a final removal order, because that process has become available to them.¹²⁹ But it may also be the case that a neighboring provision, § 1252(a)(5), serves an identical channeling function for claims brought to district court *after* a

humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states [https://perma.cc/4Z2S-LJ6U] (explaining the differences between affirmative and defensive asylum).

¹²⁶ See *Arroyo v. U.S. Dep't of Homeland Sec.*, No. 19-815, 2019 WL 2912848, at *3-4 (C.D. Cal. June 20, 2019) (discussing a right-to-counsel claim noncitizen plaintiff brought after being transferred to detention facilities outside a particular ICE field office's "Area of Responsibility"); *Avilez v. Barr*, No. 19-08296, 2020 WL 570987, at *1 (N.D. Cal. Feb. 5, 2020) (discussing a right-to-counsel claim noncitizen plaintiff brought after being transferred from a detention facility in California to one in Texas); *Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1044 (N.D. Cal. 2018) (discussing a right-to-counsel claim noncitizen plaintiff brought after being transferred from detention facility in California to others in Washington and Colorado). Similar claims have also been brought by plaintiffs who have been or will be removed from the country. See, e.g., *Anaya Murcia v. Godfrey*, No. 19-587, 2019 WL 5597883, at *1 (W.D. Wash. Oct. 10, 2019) (discussing the right-to-counsel claim noncitizen plaintiff brought after ICE removed him to El Salvador before his case was remanded to an immigration court for further proceedings), *appeal docketed*, No. 19-35-35913 (9th Cir. Oct. 31, 2019); *Hernandez Culajay v. McAleenan*, 396 F. Supp. 3d 477, 481-82 (E.D. Pa. 2019) (discussing right-to-counsel claim that noncitizen plaintiff raised in anticipation of their return to Mexico during the pendency of their removal proceedings).

¹²⁷ See *P.L. v. U.S. Immigr. & Customs Enf't*, No. 19-01336, 2019 WL 2568648, at *1 (S.D.N.Y. June 21, 2019) (discussing a noncitizen plaintiff's claim that ICE's policy regarding video teleconferencing violates plaintiff's due process rights); *Flores Valle v. U.S. Immigr. & Customs Enf't*, No. 19-2254, 2019 WL 7756069, at *1 (N.D. Tex. Oct. 8, 2019) (discussing a noncitizen plaintiff's claim that exclusive use of video teleconference technology in immigration removal proceedings violates plaintiff's constitutional and statutory rights).

¹²⁸ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018) (addressing challenge to prolonged detention during removal proceedings).

¹²⁹ See 28 U.S.C. § 2344 ("Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.").

removal order has become final.¹³⁰ Indeed, many courts have stated as much¹³¹ and have deployed § 1252(a)(5) without § 1252(b)(9) in such cases.¹³²

Some courts have contended, however, that the two provisions necessarily work in tandem to channel claims into a single petition for review.¹³³ In fact, many courts examining claims brought after a removal order has become final have simultaneously used § 1252(a)(5) and § 1252(b)(9) to evaluate a noncitizen's claims. This includes challenges to agency decisions to dismiss adjustment of status applications for lack of jurisdiction,¹³⁴ challenges to deficient Notices To Appear (NTAs), which resulted in removal *in absentia*,¹³⁵ and cases in which

130 Added by the REAL ID Act of 2005, 8 U.S.C. § 1252(a)(5) provides:

Notwithstanding any other provision of law (statutory or nonstatutory), including [28 U.S.C. § 2241], or any other habeas corpus provision . . . 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 an order of removal entered or issued under any provision of this chapter

8 U.S.C. § 1252(a)(5), amended by REAL ID Act of 2005, § 106(a)(1)(B). Through this provision, Congress made clear that the petition for review process outlined in § 1252(a)(1) is the “sole and exclusive means for judicial review of an order of removal.” *Id.* (emphasis added).

131 See *Rivas Rosales v. Barr*, No. 20-008888, 2020 WL 1505682, at *5 (N.D. Cal. Mar. 30, 2020) (“[B]ecause there had not been an order of removal in the [present case], section 1252(a)(5), which pertains to review of removal orders, does not govern the analysis here.”), *appeal filed* No. 20-15813 (9th Cir. Mar. 30, 2020); *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177, 184 (3d Cir. 2020) (explaining that § 1252(a)(5) specifically bars challenges to removal orders); *J.E. F.M. ex rel. Ekblad v. Whitaker*, 908 F.3d 1157, 1162 (9th Cir. 2018) (Berzon, J., dissenting) (“§ 1252(a)(5) . . . applies only when there is an order of removal, not when none has been entered.”).

132 See, e.g., *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (holding that if a noncitizen “challenges the procedure and substance of an agency determination that is ‘inextricably linked’ to the order of removal, it is prohibited by section 1252(a)(5)”) (emphasis added); *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011) (holding that “the substance of the relief” the noncitizen is seeking will determine if claims challenge an order of removal and are channeled by § 1252(a)(5)).

133 According to one court, “§ 1252(a)(5) is central to Section 1252(b)(9)’s scope.” *Cancino-Castellar v. Nielsen*, 338 F. Supp. 3d 1107, 1111 (S.D. Cal. 2018). Another explained that § 1252(a)(5) “prescribes the vehicle for judicial review” and § 1252(b)(9) establishes the types claims that should be placed into that vehicle. *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016).

134 See, e.g., *Patel v. Wolf*, 427 F. Supp. 3d 161, 164-65 (D. Mass.) (“[P]laintiffs request that the Court invalidate the Attorney General regulations depriving USCIS of jurisdiction and order defendants to adjudicate plaintiffs’ applications.”); *Santa Maria v. McAleenan*, No. 18-3996, 2019 WL 2120725, at *2 (S.D. Tex. May 15, 2019) (“[Plaintiff] sued the heads of the Department of Homeland Security and of Citizenship and Immigration Services, arguing that the decision to close her application for lack of jurisdiction was arbitrary, capricious, or contrary to the law.”); *Isaula v. Nielson*, No. 18-2992, 2019 WL 93307, at *1 (S.D. Tex. Jan. 3, 2019) (“[Plaintiff] argues that USCIS’s administrative closure of his I-485 application [for lack of jurisdiction] was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law[.]’”); *Herbert L.R. v. Tritten*, 421 F. Supp. 3d 688, 692 (D. Minn. 2019) (“[Plaintiff] alleges that he qualifies as an ‘arriving alien’ based on his 2008 parole entry and that, as a result, USCIS retains jurisdiction to adjudicate his application.”).

135 See e.g., *Asylum Seeker Advocacy Project v. Barr*, 409 F. Supp. 3d 221, 223 (S.D.N.Y. 2019) (examining an objection to *in absentia* removal orders issued with allegedly deficient notice to the noncitizens subject to these orders); *Rickey R. v. Sessions*, No. 18-15613, 2018 WL 5962479, at *1 (D.N.J. Nov. 13, 2018) (examining an objection to an allegedly deficient notice to appear, and

noncitizens with existing orders of removal attempt to adjust their status or reopen their removal proceedings but are arrested, detained, or even removed in the process.¹³⁶ But even when used together in these post-final-removal-order cases, § 1252(a)(5) may be doing more of the work than § 1252(b)(9).

That is to say, the precise division of labor between the two provisions is imprecise and outlining its contours is beyond the scope of this Comment. What is clear, though, is that § 1252(b)(9) plays a uniquely important role in cases brought *prior* to a removal order becoming final, which is the primary focus of this Comment. And in those cases, a federal district court must determine whether its jurisdiction is foreclosed by § 1252(b)(9), an inquiry that necessarily centers on the provision's text.

F. Textual Considerations When Interpreting § 1252(b)(9)

Courts have grappled with three major textual issues when applying § 1252(b)(9).

First, at issue has been the extent to which the introductory clause of § 1252(b) modifies or limits the scope of § 1252(b)(9). Section 1252(b) provides: "With respect to review of an *order of removal* under subsection (a)(1), the *following requirements apply*."¹³⁷ Many courts have interpreted this clause to impose serious limitations on the range of claims § 1252(b)(9) encompasses.¹³⁸ But today, especially in light of *Jennings*, few courts, if any, still maintain that view.¹³⁹

Second, and most fervently contested in today's § 1252(b)(9) jurisprudence, is how broadly the phrase "arising from" should be read. Perhaps the broadest reading proposed is that any legal claim that would not have arisen "but for" some removal action should fall within the reach of the

ultimately dismissing for lack of jurisdiction); *Diaz-Ceja v. McAleenan*, No. 19-00824, 2019 WL 2774211, at *1 (D. Col. July 2, 2019) (examining an objection to a removal order issued after the Department of Homeland security issued a notice to appear without a time or date of the appearance).

¹³⁶ See, e.g., *Mamadjonova v. Barr*, No. 19-01317, 2019 WL 6174678, at *5 (D. Conn. Nov. 20, 2019) (no jurisdiction); *Ketsoyan v. U.S. Dep't of Just.*, No. 19-01198, 2019 WL 4261881, at *3 (C.D. Cal. July 2, 2019) (no jurisdiction); *Sied v. Nielsen*, No. 17-06785, 2018 WL 1142202, at *11 (N.D. Cal. Mar. 2, 2018) (jurisdiction); *De Jesus Martinez v. Nielsen*, 341 F. Supp. 3d 400, 407-08 (D.N.J. 2018) (jurisdiction); *You, Xiu Qing v. Nielsen*, 321 F. Supp. 3d 451, 460 (S.D.N.Y. 2018) (jurisdiction); *Wanrong Lin v. Nielsen*, 377 F. Supp. 3d 556, 562 (D. Md. 2019) (jurisdiction); *Chaudhry v. Barr*, No. 19-0682, 2019 WL 3713762, at *5-7 (E.D. Cal. Aug. 7, 2019) (jurisdiction); *Chhoeun v. Marin*, 306 F. Supp. 3d 1147, 1158-59 (C.D. Cal. 2018) (jurisdiction); *M'Bagoyi v. Barr*, 423 F. Supp. 3d 99, 105-06 (M.D. Pa. 2019) (jurisdiction); *Calderon v. Sessions*, 330 F. Supp. 3d 944, 955-56 (S.D.N.Y. 2018) (jurisdiction); *Jimenez v. Nielsen*, 334 F. Supp. 3d 370, 381-85 (D. Mass. 2018) (jurisdiction).

¹³⁷ 8 U.S.C. § 1252(b) (emphasis added). Subsection 1252(a)(1) sets forth that judicial review of a final order of removal is exclusively governed by the petition for review process. 8 U.S.C. § 1252(a)(1).

¹³⁸ See *infra* notes 191-201 and accompanying text (analyzing readings that place substantial weight on the prefatory clause of § 1252(b)).

¹³⁹ See *infra* Part II (explaining how this view has fallen out of favor).

provision and therefore must be consolidated into a petition for review.¹⁴⁰ Another broad reading of “arising from” was adopted by the First and Ninth Circuits prior to *Jennings*.¹⁴¹ Although the *Jennings* plurality failed to provide a clear and comprehensive definition of the phrase, it explicitly rejected the “but for” interpretation¹⁴² and implicitly, as this Comment contends, rejected that broad interpretation embraced in the First and Ninth Circuits.¹⁴³

Third, the contours of an “action taken or proceeding brought to remove an alien from the United States”¹⁴⁴ has been questioned. Overall, this clause has received less attention than “arising from,” but it has still been construed in divergent ways. For instance, Justice Thomas argued in *Jennings* that detention is an “action taken to remove an alien from the United States,”¹⁴⁵ which the plurality met with substantial skepticism.¹⁴⁶

As Professor Benson predicted in her 1997 article, “litigants are likely to find a variety of ways to try to evade the strictures” of § 1252(b)(9).¹⁴⁷ Although it may be better phrased as litigants trying to bring claims that legitimately fall outside the scope of § 1252(b)(9), her prediction was prescient—noncitizens have consistently sought to bring removal-related claims directly to federal district court despite the channeling provision of § 1252(b)(9).¹⁴⁸ Part II will

¹⁴⁰ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 854 (2018) (Thomas, J., Concurring) (“Detaining an alien falls within [‘arising from’]—indeed, this Court has described detention during removal proceedings as an ‘aspect of the deportation process.’”) (citing *Demore v. Kim*, 538 U.S. 510, 523 (2003)).

¹⁴¹ See *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 9 (1st Cir. 2007) (“By its terms, the provision aims to consolidate ‘all questions of law and fact’ that ‘arise from’ either an ‘action’ or a ‘proceeding’ brought in connection with the removal of an alien.”); *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1033 (9th Cir. 2016) (agreeing with the *Aguilar* decision and holding that a noncitizen’s right to counsel claim is “inextricably intertwined with” the removal process).

¹⁴² See *Jennings*, 138 S. Ct. at 840 (Alito, J.) (plurality opinion) (explaining that if “the applicability of § 1252(b)(9) turns on whether the legal questions that we must decide ‘aris[e] from’ the actions taken to remove these aliens” then “[i]t may be argued that . . . if those actions had never been taken, the aliens would not be in custody at all. But this expansive interpretation of § 1252(b)(9) would lead to staggering results”).

¹⁴³ See *infra* Part III (arguing that *Jennings* narrowed interpretations advanced in *Aguilar* and *J.E. F.M.*).

¹⁴⁴ 8 U.S.C. § 1252(b)(9).

¹⁴⁵ *Jennings*, 138 S. Ct. at 855 (Thomas, J., Concurring) (“[D]etention is an ‘action taken . . . to remove’ an alien.”).

¹⁴⁶ *Id.* at 841 n.3 (Alito, J.) (plurality opinion) (explaining that it would be illogical to view detention as an action taken “to remove an alien”). Several district courts have similarly interpreted this clause of § 1252(b)(9). See, e.g., *O.A. v. Trump*, 404 F. Supp. 3d 109, 132 (D.D.C. 2019) (“The challenged Rule is not an ‘action taken . . . to remove an alien from the United States,’ and was not promulgated as part of a removal ‘proceeding.’”); *Hernandez Culajay v. McAleenan*, 396 F. Supp. 3d 477, 487 (E.D. Pa. 2019) (“The immigration officer’s decision to place Plaintiffs in line for regular proceedings, rather than expedited proceedings . . . is an ‘action taken . . . to remove an alien.’”).

¹⁴⁷ Benson, *supra* note 25, at 1458.

¹⁴⁸ See Appendix, *infra* (highlighting the many cases noncitizens have brought that are removal-related yet may not fall within the scope of § 1252(b)(9)).

begin to distinguish situations where § 1252(b)(9) operates to preclude litigants' claims from district court and those where it does not.

II. THE LONG-ROAD TO *JENNINGS*: A POST-*ST. CYR* CIRCUIT SPLIT

“The maze of immigration statutes and amendments is notoriously complicated and has been described as ‘second only to the Internal Revenue Code in complexity.’”¹⁴⁹ That may help explain why § 1252(b)(9) jurisprudence has developed in the confusing and piecemeal way it has. The Supreme Court directly addressed the scope of § 1252(b)(9) for the first time in *St. Cyr*, where it offered an ambiguous but narrow interpretation of the provision, emphasizing the prefatory clause contained in § 1252(b).¹⁵⁰ In the ensuing years, lower courts diverged on how to apply § 1252(b)(9) in light of *St. Cyr*, but the prevailing interpretation became an extremely broad construction of the phrase “arising from,” first offered by the First Circuit and later adopted by the Ninth Circuit. Against this backdrop, almost two decades after *St. Cyr*, the Supreme Court revisited § 1252(b)(9), resulting in a sharply divided decision that failed to offer a comprehensive interpretation of the provision, leaving lower courts to fill in the gaps.¹⁵¹

This Part summarizes the first two cases in which the Supreme Court tackled § 1252(b)(9), focusing primarily on the second case, *St. Cyr*, where it did so directly. Then, it turns to the lower courts' evolving understanding of the provision, focusing primarily on the First and Ninth Circuits' broad interpretation of “arising from.” Finally, it summarizes *Jennings* and offers some brief observations, prior to beginning a more comprehensive analysis of the case in Part III.

A. *The First Attempt: Reno v. AADC*

In 1999, three years after the passage of IIRIRA, the Supreme Court was tasked with interpreting the jurisdiction-limiting statute § 1252.¹⁵² *Reno v. AADC* involved eight noncitizens affiliated with the Popular Front for the Liberation of Palestine who alleged that the government was selectively

¹⁴⁹ *Singh v. Gonzales*, 499 F.3d 969, 980 (9th Cir. 2007) (citations omitted).

¹⁵⁰ *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 313 (2001).

¹⁵¹ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 839-41 (2018) (Alito, J.) (plurality opinion) (concluding that § 1252(b)(9) did not bar jurisdiction); *id.* at 853-59 (Thomas, J., concurring) (concluding that § 1252(b)(9) barred jurisdiction); *id.* at 876 (Breyer, J., dissenting) (concluding that § 1252(b)(9) did not bar jurisdiction but on different grounds than those the plurality advanced).

¹⁵² See *Reno v. American-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 476 (1999) (introducing the Court's discussion of § 1252).

enforcing immigration laws against them for political activity protected under the First Amendment.¹⁵³

At the time the noncitizens in *AADC* brought their claims to district court, 8 U.S.C. § 1252(g) was the only jurisdiction-limiting provision in the newly enacted IIRIRA that had been phased in.¹⁵⁴ Section 1252(g) provides: “[N]o 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.”¹⁵⁵

The government argued that § 1252(g) is “a channeling provision, requiring aliens to bring all deportation-related claims in the context of a petition for review of a final order of deportation filed in the court of appeals”¹⁵⁶ and thus deprived the district court of jurisdiction over the noncitizens’ selective-enforcement claim.¹⁵⁷

The Court agreed with the government that § 1252(g) barred district court jurisdiction over the selective-enforcement claim, but it read the provision “much more narrowly.”¹⁵⁸ Writing for the majority, Justice Scalia explained that § 1252(g) limited judicial review with respect to only “three discrete actions that the Attorney General may take: her ‘decision or action’ to ‘commence proceedings, adjudicate cases, or execute removal orders.’”¹⁵⁹

¹⁵³ *Id.* at 474 (“Respondents amended their complaint to include an allegation that the INS was selectively enforcing immigration laws against them in violation of their First and Fifth Amendment rights.”).

¹⁵⁴ *Id.* at 477 (explaining that § 1252(g) was the only provision that applied retroactively under IIRIRA).

¹⁵⁵ 8 U.S.C. § 1252(g). Subsection (g) is frequently implicated in cases where § 1252(b)(9) presents potential jurisdictional barriers. In *Nava v. Department of Homeland Security*, for example, the government argued that § 1252(g) applied because Plaintiffs “challenge[d] aspects of ICE’s decision to arrest them in order to commence removal proceedings against them.” 435 F. Supp. 3d 880, 895 (N.D. Ill. 2020). That case involved a challenge to ICE’s “indiscriminate, large-scale immigration sweeps.” *Id.* at 885. Because it arguably involved both the Attorney General’s decision to “commence proceedings” as well as a claim “arising from any action taken or proceeding brought to remove an alien,” both § 1252(g) and § 1252(b)(9) were at issue. *Id.* at 894-95. The district court held that neither subsection applied and that it properly retained jurisdiction over the case. *Id.* at 895. Though a discussion of § 1252(g) is beyond the scope of this Comment, it has been the subject of recent scholarly attention. See, e.g., Matthew Miyamoto, Comment, *Whether 8 USC § 1252(g) Precludes the Exercise of Federal Jurisdiction Over Claims Brought by Wrongfully Removed Noncitizens*, 86 U. CHI. L. REV. 1655, 1655 (2019) (arguing that § 1252(g) should be interpreted narrowly); Kimberly P. Will, Comment, *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) (contending that § 1252(g) only applies in situations where the government exercises discretionary authority).

¹⁵⁶ *AADC*, 525 U.S. at 478.

¹⁵⁷ *Id.* at 471 (“The Attorney General filed motions in both the District Court and the Ninth Circuit, arguing that § 1252(g) deprived them of jurisdiction over respondents’ selective-enforcement claim.”).

¹⁵⁸ See Motomura, *supra* note 27, at 403 (explaining how the Court’s decision in *AADC* narrowed the scope of § 1252(g)’s channeling function).

¹⁵⁹ *AADC*, 525 U.S. at 482 (alteration in original) (quoting 8 U.S.C. § 1252(g)).

The Court continued, explaining that § 1252(g) “performs the function of categorically excluding from non-final-order judicial review . . . certain specified decision and actions of the INS”¹⁶⁰—specifically, matters of prosecutorial discretion.¹⁶¹ It concluded that the selective-prosecution claim “falls squarely within” the scope of § 1252(g) and thus was dismissed.¹⁶²

Given its focus on § 1252(g), the Court did not directly examine the scope of § 1252(b)(9), but it did characterize the provision as an “unmistakable ‘zipper’ clause.”¹⁶³ What exactly is “zipped” into the clause, however, did not become clearer until the Supreme Court squarely addressed the provision in *St. Cyr*.

B. *The Second Attempt: INS v. St. Cyr*

Two years later, the Court directly confronted the scope of § 1252(b)(9) in *St. Cyr*.¹⁶⁴ The respondent in *St. Cyr* was a lawful permanent resident who was issued a removal order after having pleaded guilty to a state drug charge, a removable offense.¹⁶⁵ As a result of his criminal charge, the noncitizen respondent was ineligible for the petition for review process set forth in § 1252(a)(1).¹⁶⁶ So, because he was prohibited from filing a petition for review with a court of appeals, the noncitizen instead filed a petition for habeas corpus under 28 U.S.C. § 2241 in federal district court, claiming he was eligible for a discretionary waiver of deportation, which had been available to him prior to the passage of AEDPA and IIRIRA.¹⁶⁷

Among its various arguments, the government contended that § 1252(b)(9) precluded habeas jurisdiction and instead required consolidation of such claims into a petition for review before a court of appeals—a process for which the “criminal alien” was ineligible.¹⁶⁸ The Court rejected the government’s argument, holding that § 1252(b)(9) did not contain a sufficiently clear statement to repeal habeas jurisdiction under § 2241.¹⁶⁹ In so

¹⁶⁰ *Id.* at 483.

¹⁶¹ Motomura, *supra* note 27, at 404.

¹⁶² *AADC*, 525 U.S. at 487.

¹⁶³ *Id.* at 483. In his analysis of *AADC*, Professor Neuman explains that the term “zipper clause” is derived from labor law, where it “refers to a provision in a collective bargaining agreement that prohibits further collective bargaining during the term of the agreement or, more generally, that limits the agreement of the parties to the four corners of the contract.” Neuman, *supra* note 26, at 1984-85 (citing *Nat’l Fed’n of Fed. Emps. v. Dep’t of Interior*, 526 U.S. 86, 89 (1999)).

¹⁶⁴ *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 298 (2001).

¹⁶⁵ *Id.* at 293.

¹⁶⁶ *See id.* at 313 (explaining that there was no other judicial forum where the noncitizen could have brought his claims). *See also* 8 U.S.C. § 1252(a)(2)(C) (removing jurisdiction to review any final order of removal against certain “criminal aliens”).

¹⁶⁷ *St. Cyr*, 533 U.S. at 293.

¹⁶⁸ *Id.* at 313-14.

¹⁶⁹ *See id.* at 314 (concluding that AEDPA and IIRIRA do not repeal habeas jurisdiction, given “the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial

finding, the Court made an important observation about § 1252(b)(9) that caused deviations across the lower courts.

The Court first reprised its characterization of § 1252(b)(9) as a “zipper clause”¹⁷⁰ and stated that the provision’s “purpose is to consolidate judicial review of immigration proceedings into one action in the court of appeals.”¹⁷¹ The Court also noted, however, that the introductory clause in § 1252(b) limited the range of claims to which § 1252(b)(9) applies.¹⁷² It was largely this limitation that led the Court to hold that § 1252(b)(9) did not bar the district court’s jurisdiction over the noncitizen’s habeas petition.¹⁷³

The introductory clause of § 1252(b) states: “With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply.”¹⁷⁴ Since § 1252(b) modifies its sub-provisions, the Court reasoned that § 1252(b)(9) “applies only with respect to review of an order of removal under subsection (a)(1).”¹⁷⁵ Put differently, the Court found that § 1252(b)(9)’s channeling function applied *only* to review of final removal orders eligible for the petition for review process outlined in § 1252(a)(1). Because the “criminal alien” (and his removal order) was categorically ineligible for that petition for review process, however, § 1252(b)(9), “by its own terms,” had no bearing on his claims.¹⁷⁶ To clarify, because Congress had categorically prohibited “criminal aliens” like the noncitizen here from seeking judicial review under the petition for review process set forth in § 1252(a)(1), § 1252(b)(9) did not apply to the claims. Accordingly, § 1252(b)(9) did not bar the district court’s habeas jurisdiction.¹⁷⁷

On its face, the Supreme Court’s opinion in *St. Cyr* appears to draw a categorical distinction: if a noncitizen is eligible for the petition for review process under § 1252(a)(1), then the restrictions of § 1252(b)(9) would apply. If, however, the noncitizen is ineligible for that process, § 1252(b)(9) and its prohibition of district court jurisdiction would not apply.

consideration on habeas”). As a result, Congress, in the REAL ID Act, amended § 1252(b)(9) to make clear that habeas petitions could not be used to circumvent the provision’s strictures. *See supra* note 19 and accompanying text (discussing the REAL ID Act’s effect on § 1252(b)(9)).

¹⁷⁰ *St. Cyr*, 533 U.S. at 313 (citing *Reno v. American-Arab Anti-Discrimination Comm. (AADAC)*, 525 U.S. 471, 483 (1999)).

¹⁷¹ *Id.* (internal quotations marks omitted).

¹⁷² *Id.*

¹⁷³ *See id.* (“[§ 1252(b)(9)] does not bar habeas jurisdiction over removal orders *not* subject to judicial review under § 1252(a)(1)” (emphasis added)).

¹⁷⁴ 8 U.S.C. § 1252(b).

¹⁷⁵ *St. Cyr*, 533 U.S. at 313 (internal quotation omitted). Subsection 1252(a)(1) states judicial review of a final order of removal is governed *only* by the petition for review process set forth in the Hobbs Act. 8 U.S.C. § 1252(a)(1).

¹⁷⁶ *St. Cyr*, 533 U.S. at 313.

¹⁷⁷ *Id.* at 313-14.

But another legitimate interpretation of the Court's opinion centers on a temporal limitation of § 1252(b)(9). Subsection 1252(b)(9) "applies only with respect to review of an *order of removal* under subsection (a)(1)," and accordingly, the provision is inoperative unless and until such a removal order has been issued.¹⁷⁸ Therefore, the applicability of § 1252(b)(9) does not turn on whether an individual may *eventually* be eligible for the petition for review process, but rather, whether or not they are eligible for that process *at the specific moment in which they attempt to bring their claims in district court*. Noncitizens whose orders of removal have not yet become final remain ineligible for the petition for review process in § 1252(a)(1). But the issuance of a final removal order triggers a noncitizen's eligibility for the petition for review process, which in turn activates the channeling function of § 1252(b)(9). In short, the reasoning of this interpretation goes, a noncitizen cannot possibly seek judicial review of a final order of removal under § 1252(a)(1) if such an order does not yet exist.

This distinction can be understood as temporal instead of categorical: § 1252(b)(9) will not operate to channel claims into the petition for review process unless and until that process becomes available, when a noncitizen's removal order has become final. In effect, this distinction seriously narrows the range of individuals whose claims would be channeled pursuant to § 1252(b)(9). A noncitizen is free to bring their claims in federal district court up until the point at which her order of removal becomes final.

Justice Scalia responded to this alternate temporal reading in his dissent. He argued that the majority, under this reading, put too much weight on the introductory clause of § 1252(b) and specifically on the word "apply."¹⁷⁹ In his view, § 1252(b)(9) would be rendered meaningless if it applied only *after* a final removal has been issued.¹⁸⁰ What role would the provision play if it could not channel claims prior to the moment an order of removal becomes final?¹⁸¹

Justice Scalia acknowledged the prefatory clause of § 1252(b) but read it differently. From his perspective, § 1252(b)(9) certainly "applies" to the review of a final order of removal under § 1252(a)(1), but it does so "in the broad sense."¹⁸² It is not that § 1252(b)(9) applies only *within* review of a final order of removal under § 1252(a)(1) but that it operates "*in connection with*" such review.¹⁸³ Accordingly, the provision requires that all claims "arising from" removal proceedings be consolidated and brought together in a petition

¹⁷⁸ *Id.* at 313 (emphasis added) (internal quotation marks omitted).

¹⁷⁹ *Id.* at 332 (Scalia, J., dissenting).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* ("These provisions have no effect if they must apply . . . to review of an order of removal under subsection (a)(1).") (internal quotation marks omitted).

¹⁸² *Id.*

¹⁸³ *Id.*

for review, after the removal order becomes final.¹⁸⁴ That, in Justice Scalia's opinion, is "application" enough.¹⁸⁵

Thus, the main inquiry in Justice Scalia's approach is whether claims are "arising from" removal proceedings (or another "action taken" to remove a noncitizen).¹⁸⁶ If they are "arising from," the claims fall within the reach of § 1252(b)(9) and must be brought *after* removal proceedings through a petition for review, alongside a review of a final order of removal under § 1252(a)(1).

Importantly, and perhaps ironically, Justice Scalia's interpretation is wholly compatible with the majority's actual holding, just not the alternate reading to which he responded. The majority held that claims that will *never* be subject to judicial review under § 1252(a)(1) are also not subject to § 1252(b)(9). Because the "criminal alien" in *St. Cyr* was categorically excluded from the petition for review process of § 1252(a)(1), there would *never* be any such process into which § 1252(b)(9) would require that he consolidate his claims—he would have no way to fold his claims into an eventual petition for review. The facts of *St. Cyr* thus differ from claims of a noncitizen who would *eventually* be eligible for the petition for review process under § 1252(a)(1) once his removal proceedings concluded. In this scenario, both the majority and dissent would likely agree that, if that noncitizen wants to bring claims "arising from" her removal proceedings, she must wait to do so through the petition for review process, once her removal order becomes final.

But Justice Scalia did not identify or discuss this middle ground. Perhaps he was anticipating how lower courts would read the majority's opinion. If so, his prediction was prescient. Although Justice Scalia's reading of the provision eventually became the clear majority approach, several courts prior to *Jennings* adopted the narrow, temporal distinction to which he responded in his dissent.

C. Divergences After *St. Cyr*, Before *Jennings*

The Supreme Court did not revisit § 1252(b)(9) until 2018—almost two decades after *St. Cyr* was decided. During that period, lower courts that addressed § 1252(b)(9) diverged on the provision's scope. A number of courts embraced the temporal reading from *St. Cyr* and applied § 1252(b)(9) only after a removal order had become final.¹⁸⁷ Far more influential, however, became the "arising from" framework Justice Scalia offered in his dissent.¹⁸⁸ Indeed, the First Circuit and eventually the Ninth Circuit not only embraced this framework, but also interpreted the phrase "arising from" extremely

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 328 (Scalia, J., dissenting).

¹⁸⁷ See *infra* subsection II.C.1. (discussing the "temporal approach").

¹⁸⁸ See *supra* notes 179-184 and accompanying text (discussing the Justice Scalia's opinion in *St. Cyr*).

broadly.¹⁸⁹ Although the “arising from” framework has endured—indeed, it is the prevailing approach today—this Comment argues that the broad interpretation within that framework is incorrect in light of *Jennings*.

The scholarship in this area could benefit from a more thorough, nuanced analysis of the various strands of § 1252(b)(9) pre-*Jennings* case law. Such analysis, however, is outside the scope of this Comment. Instead, this section aims to outline the evolving understanding of this provision in the years between *St. Cyr* and *Jennings*.

1. The Temporal Approach

The *St. Cyr* majority emphasized that § 1252(b)(9) “applies *only* with respect to review of an order of removal under subsection [1252](a)(1).”¹⁹⁰ As Justice Scalia seemed to have anticipated in his *St. Cyr* dissent,¹⁹¹ several courts interpreted that limitation to mean that § 1252(b)(9) does not operate unless and until a final removal order has been issued.¹⁹² This reading substantially narrows the range of claims that fall within the scope of § 1252(b)(9), as the provision would pose no barrier to noncitizens bringing claims to district court prior to the conclusion of removal proceedings. In other words, under this interpretation, the door to district court would be left wide open unless and until an order of removal becomes final.

The Third Circuit most prominently and expressly embraced this narrow reading of § 1252(b)(9). In *Chehazeh v. Attorney General of the United States*, after citing the majority language from *St. Cyr*, the Third Circuit held:

§ 1252(b)(9) . . . requires only that, *when there is an order of removal under subsection (a)(1)*, review of any issues related to that order must be consolidated into a single petition for review and cannot be brought piecemeal. One may not, for instance, follow a petition for review with a habeas petition or a petition for a writ of mandamus.¹⁹³

The court continued, explaining that “because § 1252(b) refers only to ‘review of an order of removal under subsection (a)(1),’ it, and its subsections, are inapplicable when there is no such order.”¹⁹⁴

¹⁸⁹ See *infra* subsection II.B.2 (analyzing the “arising from” framework in *Aguilar* and *J.E. F.M.*).

¹⁹⁰ 533 U.S. at 313 (emphasis added) (citation omitted).

¹⁹¹ *Id.* at 332 (Scalia, J., dissenting) (arguing that the majority’s application makes it so § 1252(b)(9) is “given effect only *within* the review of removal orders that takes place under subsection (a)(1),” rendering it meaningless.).

¹⁹² See *infra* note 199 (collecting cases where the court applied the temporal limitation).

¹⁹³ *Chehazeh v. Att’y Gen.*, 666 F.3d 118, 131 (3d Cir. 2012) (emphasis added).

¹⁹⁴ *Id.* at 132 (quoting *St. Cyr*, 533 U.S. at 313). Several district courts, including some outside of the Third Circuit, expressly followed the Third Circuit’s temporal interpretation. See, e.g., *Michalski v. Decker*, 279 F. Supp. 3d 487, 494 (S.D.N.Y. 2018) (“[The noncitizen] cannot be challenging an order

In adopting this view, the Third Circuit concluded that it was joining the Ninth and Eleventh Circuits.¹⁹⁵ Although these circuits had similarly embraced the *St. Cyr* majority's language emphasizing the prefatory clause of § 1252(b), both courts appeared to read it as imposing more of a substantive limitation than a temporal limitation.¹⁹⁶

Under this related reading adopted at the time by the Ninth and Eleventh Circuits, § 1252(b)(9) “applies *only* with respect to review of an *order of removal* under 8 U.S.C. § 1252(a)(1),” and therefore the provision applies only to claims that “seek[] review of a final order of removal within the meaning of § 1252.”¹⁹⁷ Thus, the inquiry does not turn on *when* the claim was brought to district court—before or after a removal order becomes final—but whether a noncitizen's claims challenge the substance of “an order of removal.”¹⁹⁸

of removal for the common-sense reason that *he is not yet subject to one*. Consequently, because his challenge to the lawfulness of pre-removal detention cannot be connected to that which does not exist, § 1252[(b)(9)] does not bar his petition.” (emphasis added)); *De La Paz v. Coy*, 954 F. Supp. 2d 532, 544 (W.D. Tex. 2013) (“Because Plaintiff here is not seeking review of an order of removal—like the petitioner in *Chehazeh*, ‘there has been no such order with respect to him’—section 1252(b)(9) does not preclude judicial review of Plaintiff’s constitutional claims.”); *Doe v. Rodriguez*, No. 17-1709, 2018 WL 620898, at *4 (D.N.J. Jan. 29, 2018) (finding jurisdiction over habeas claim because § 1252(a)(5) and § 1252(b)(9) are “inapplicable where a petitioner is not challenging an order of removal, *including in those cases where a removal order has yet to be entered.*”) (emphasis added)).

¹⁹⁵ See *Chehazeh*, 666 F.3d at 133 (“We therefore join with the Ninth and Eleventh Circuits and hold that § 1252(b)(9) applies only with respect to review of an order of removal under subsection (a)(1).”)

¹⁹⁶ See *Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007) (concluding that a noncitizen's ineffective assistance of counsel claims “cannot be construed as seeking judicial review of his final order of removal” because his success on a habeas petition would lead only to “the restarting of the thirty-day period for” filing a petition for review); *Madu v. U.S. Att’y Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006) (declining to apply § 1252(b)(9) because “this case does not involve review of an order of removal”). For a discussion on later Ninth Circuit precedent, which appeared to diverge significantly from *Singh*, see *infra* note 218 and accompanying text.

¹⁹⁷ *Singh*, 499 F.3d at 978-79 (emphasis in original). Indeed, the dissenting justices in *Jennings* eventually adopted a similar—and perhaps identical—reading of the provision. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 882 (2018) (Breyer, J. dissenting) (finding that § 1252(b)(9) did not affect jurisdiction because “by its terms” that provision “applies *only* ‘with respect to review of an order of removal under [§ 1252(a)(1)]’” (alterations in original) (emphasis added)).

¹⁹⁸ *Singh*, 499 F.3d at 979; *Madu*, 470 F.3d at 1367. In *Singh*, the Ninth Circuit was considering an ineffective assistance of counsel (IAC) claim, which the noncitizen brought to district court *after* his removal order became final. 499 F.3d at 973. Because the noncitizen was not challenging his “removal order” but merely seeking a “day in court,” § 1252(b)(9) did not apply. *Id.* at 979. In *Madu*, because the noncitizen was contesting the very existence of an order of removal, such a challenge could not possibly involve review of such an order, and therefore § 1252(b)(9) did not apply. 470 F.3d at 1367. Notably, this is the precise inquiry courts employed when applying § 1252's predecessor section 106, as discussed *supra* Section I.A. In *Cheng*, discussed above, *supra* note 48 and accompanying text, the Supreme Court found that the noncitizen's claims fell outside the scope of a “final order” and thus were not precluded by section 106 of the INA. *Cheng Fan Kwok v. Immigr. and Naturalization Serv.*, 392 U.S. 206, 216 (1968). Congress, in turn, aimed to foreclose such workarounds by adding § 1252(b)(9), which weighs against the adoption of this interpretation of § 1252(b)(9). See *Benson*, *supra* note 25, at 1455-57 (describing Congress' creation of “catch-all

To be sure, the substantive and temporal characterizations of § 1252(b)(9) are not mutually exclusive. A court that embraces the substantive limitation could simultaneously adopt the temporal one advanced by the Third Circuit, but no other circuits have clearly embraced the temporal limitation.¹⁹⁹

The temporal reading of § 1252(b)(9) is not without merit. Indeed, it finds substantial support in the text and structure of § 1252 and in the legislative history of the REAL ID Act of 2005, which added a provision to § 1252 and modified others, including § 1252(b)(9).²⁰⁰

But there are also compelling reasons that weigh against the adoption of this reading. Most obviously, as Justice Scalia argued in his *St. Cyr* dissent, interpreting § 1252(b)(9) as unable to channel claims brought prior to the issuance of a final removal order seems to render the provision “meaningless.”²⁰¹ If § 1252(b)(9) cannot prohibit noncitizens from bringing claims to district court prior to the conclusion of removal proceedings, what work is it doing?²⁰² Perhaps partly as a result of that question, the temporal interpretation of § 1252(b)(9) has been relegated to a minority approach,²⁰³ giving way to the “arising from” framework, which is the majority approach today.

barriers” intending to supersede the Supreme Court’s decisions in *Cheng* and *McNary*, which created loopholes in § 1252(b)(9)’s bar against jurisdiction over review of final orders).

¹⁹⁹ However, the five Ninth Circuit judges dissenting from the court’s denial of a rehearing *en banc* argued that *Singh* stood for—or at least was consistent with—the proposition that the Ninth Circuit had adopted the Third Circuit’s temporal interpretation. See *J. E. F.M. ex rel. Ekblad v. Whitaker*, 908 F.3d 1157, 1162 (9th Cir. 2018) (Berzon, J., dissenting) (“In sum, our precedents, guided by the Supreme Court’s understanding in *St. Cyr*, have repeatedly held that § 1252(b)(9) strips district courts of habeas jurisdiction only in cases where a final order of removal has been entered and the claim seeks relief from that order.”).

²⁰⁰ The five Ninth Circuit judges described above, *supra* note 199, advanced a persuasive argument that the text and structure of § 1252, as well as prior circuit case law, supported this temporal reading of § 1252(b)(9). *J. E. F.M.*, 908 F.3d at 1162 (Berzon, J., dissenting). There is also an argument that legislative intent bolsters this reading. The House Report on the REAL ID Act of 2005 states, “[The Act] would not preclude habeas review over challenges to detention that are independent of challenges to removal orders. Instead, the bill would eliminate habeas review only over challenges to removal orders.” H.R. Rep. No. 109-72, at 175 (2005) (Conf. Rep.), as reprinted in 2005 U.S.C.C.A.N. 240, 299 (emphasis added). Thus, if a noncitizen’s claims are “independent of challenges to removal orders,” § 1252(b)(9) poses no obstacle. *Id.* Claims brought to district court prior to the issuance of a final order of removal, the reasoning goes, are necessarily “independent” from challenges to removal orders for the simple reason that no such order exists.

²⁰¹ See *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 332 (2001) (Scalia, J., dissenting) (“[T]o insist that subsection (b)(9) be given effect only within the review of removal orders that takes place under subsection (a)(1), is to render it meaningless.”).

²⁰² Justice Scalia also advanced a persuasive structural argument in his *St. Cyr* dissent. See *id.* (noting that other numbered subsections such as §§ 1252(b)(7) and (b)(8) would “have no effect if they must apply . . . to review of an order of removal under subsection (a)(1)’”).

²⁰³ See, e.g., *O.A. v. Trump*, 404 F. Supp. 3d 109, 130 (D.D.C. 2019) (explicitly rejecting the temporal interpretation of § 1252(b)(9)); *Nava v. Dep’t of Homeland Sec.*, 435 F. Supp. 3d 880, 888-95 (N.D. Ill. 2020) (implicitly rejecting the temporal interpretation because claims were brought prior to the issuance of a final removal order, yet the court did not end its analysis).

2. The “Arising From” Framework

The “arising from” framework stems directly from the express language of § 1252(b)(9) which states, “Judicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order”²⁰⁴ In contrast to the temporal interpretation of *St. Cyr*, the “arising from” framework interprets § 1252(b)(9) as consolidating any removal-related claims into a petition for review after a removal order has become final.²⁰⁵ Under this reading, the provision can be distilled as follows: if a noncitizen wants to bring claims that “arise from” a proceeding brought to remove her, she may do so *only* by later seeking “judicial review of a final order [of removal]” through the petition for review process, once it becomes available.²⁰⁶ The inquiry in this framework, as the name suggests, turns on the phrase “arising from.” The challenge, as will become clear, is that the “words ‘arising from’ do not lend themselves to precise application.”²⁰⁷

After *St. Cyr*, the First Circuit in *Aguilar* was the first court of appeals to expressly embrace the “arising from” framework.²⁰⁸ In so doing, the court construed the phrase quite broadly, describing § 1252(b)(9) as “breathhtaking” in scope and “vise-like” in grip.²⁰⁹ Under this reading of “arising from,” § 1252(b)(9) applies to almost all claims even remotely related to removal proceedings—including those that arise prior to a removal proceeding’s

²⁰⁴ 8 U.S.C. § 1252(b)(9). As Justice Scalia argued in his *St. Cyr* dissent, the plain text of the provision supports this reading. *St. Cyr*, 533 U.S. at 328 (Scalia, J., dissenting) (quoting 8 U.S.C. § 1252(b)(9) directly to connect the arising from framework to the text of the statute). This approach also finds support in Congress’s intent in enacting § 1252(b)(9). With the passage of IIRIRA, which added § 1252(b)(9), Congress intended to make clear three things: (1) “only courts of appeals—and not district courts—could review a final removal order;” (2) “review of a final removal order is the only mechanism for reviewing any issue raised in a removal proceeding;” and (3) the statute was “intended to preclude all district court review of any issue raised in a removal proceeding.” H.R. Rep. No. 109-72, at 173 (2005) (Conf. Rep.), as reprinted in 2005 U.S.C.C.A. 240, 299.

²⁰⁵ As explained in *supra* Section II.B, this framework is still consistent with the *St. Cyr* majority opinion, which can be read as holding that even if § 1252(b)(9) does not apply when a noncitizen will *never* be able to access a petition for review, it still applies when a noncitizen will *eventually* be able to bring a petition for review. Thus, under this framework, claims “arising from” removal proceedings should *eventually* be brought to a court of appeals via a petition for review.

²⁰⁶ See *St. Cyr*, 533 U.S. at 327-28 (Scalia, J., dissenting) (“In other words, *if* judicial review is available, it consists *only* of [the petition for review process] specified in § 1252(a)(1).”) (emphasis in original); see also *O.A.*, 404 F. Supp. 3d at 130-31 (explaining the “arising from” framework from Justice Scalia’s dissent in *St. Cyr* and noting that it is consistent with *St. Cyr* majority’s opinion).

²⁰⁷ *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 10 (1st Cir. 2007) (citing *Motomura*, *supra* note 27, at 424).

²⁰⁸ *Id.* at 10

²⁰⁹ *Id.* at 9-10.

initiation.²¹⁰ Indeed, the Ninth Circuit later described the First Circuit's reading of "arising from" as one that effectively "swallows up virtually all claims that are tied to removal proceedings."²¹¹

To be sure, the First Circuit recognized that the phrase "arising from" imposes some limits on the scope of § 1252(b)(9). Because of that phrase, the provision must be read to exclude those claims that are "independent of, or wholly collateral to, the removal process."²¹² Therefore, independent and collateral claims are not subject to the jurisdictional restrictions that § 1252(b)(9) imposes. As the First Circuit noted, however, what constitutes a "collateral claim" is unclear and has been the subject of several Supreme Court decisions.²¹³

According to the First Circuit's interpretation in *Aguilar*, collateral claims are primarily those that cannot be handled effectively by the administrative process set forth in the INA.²¹⁴ Because requiring exhaustion of those claims would "foreclose them from any meaningful judicial review," it would frustrate Congress's purpose to channel, rather than bar, such claims.²¹⁵ Thus, under the *Aguilar* interpretation, courts must seek to delineate between claims that the administrative process could handle and those that it could not.²¹⁶ Claims that could be handled are considered "arising from" and thus precluded from district court review, while those that could not be handled are considered collateral to removal proceedings and thus outside the ambit of § 1252(b)(9).

²¹⁰ *See id.* at 10 ("[N]othing in the statute limits its reach to claims arising from *extant removal proceedings*." (emphasis added)).

²¹¹ *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016).

²¹² *Aguilar*, 510 F.3d at 11.

²¹³ *Id.* at 12 ("Courts long have recognized an exception to the exhaustion requirement for claims that are collateral to administrative proceedings."). There are a number of Supreme Court decisions on point. *See, e.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994) (discussing whether petitioner's claims are collateral and reviewing previous cases); *Bowen v. City of New York*, 476 U.S. 467, 483 (1986) ("The claims in this lawsuit are *collateral* to the claims for benefits that class members had presented administratively." (emphasis added)); *Heckler v. Ringer*, 466 U.S. 602, 618 (1984) ("The latter exception to exhaustion is inapplicable here where respondents do not raise a claim that is wholly '*collateral*' to their claim for benefits under the Act." (emphasis added)).

²¹⁴ *Aguilar*, 510 F.3d at 11 ("[C]laims that cannot effectively be handled through the available administrative process fall within [collateral] . . . purview.").

²¹⁵ *Id.* The First Circuit in *Aguilar* derives the phrase "meaningful judicial review" from the Court's decision in *Thunder Basin*. *Id.* at 12 (quoting *Thunder Basin*, 510 U.S. at 212-13). In that case, the Supreme Court found that Congress intended for a certain statute, the Mine Act, to preclude district court jurisdiction. *Thunder Basin*, 510 U.S. at 207. The Court stated that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded *meaningful review*." *Id.* (citation omitted) (emphasis added).

²¹⁶ The court in *Aguilar* noted two specific refinements that would help guide its inquiry: first, whether the administrative process could provide "adequate relief" for the claims. *Aguilar*, 510 F.3d at 12 (citing *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976)). Second, whether a party would be "irreparably injured" if they were required to adhere to the administrative process. *Id.* (citing *Bowen*, 476 U.S. at 483).

The inquiry, however, does not end there. The final step into whether the administrative process can “handle claims effectively” depends on which part of the administrative process is evaluated. If the inquiry turns on the capabilities of immigration judges, whose authority is quite restricted,²¹⁷ then fewer claims could be “handled effectively” in the administrative process and thus there would be more collateral claims that fell outside the purview of § 1252(b)(9). But the Ninth Circuit, which appeared to deviate from earlier precedent when it adopted the *Aguilar* interpretation in *J.E. F.M.*,²¹⁸ did not center its inquiry on the competencies of the immigration judge. Instead, it focused its inquiry on whether claims were cognizable in a petition for review before a court of appeals.²¹⁹

In *J.E. F.M.*, the court considered constitutional right-to-counsel claims of indigent, noncitizen minors who had “tried and failed to obtain pro bono counsel for removal proceedings.”²²⁰ Borrowing the dramatic language of *Aguilar* that § 1252(b)(9) is “breathtaking” in scope and “wise-like” in grip, the court held the provision barred the minors’ claims.²²¹ Because right-to-counsel claims are “routinely raised in petitions for review filed with a federal court of appeals”²²² and are “teed up for appellate review,”²²³ they were “bound up in and an inextricable part of the administrative process.”²²⁴

This echoed the holding in *Aguilar*, where the First Circuit held that § 1252(b)(9) precluded the noncitizens’ right-to-counsel claims because such a right “possesses a direct link to, and is *inextricably intertwined* with,” the administrative system.²²⁵ To arrive at this conclusion, the First Circuit found that right-to-counsel claims are “commonplace” and are “often featured in [petitions

²¹⁷ See U.S. DEPT OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 1.5 (2020), <https://www.justice.gov/eoir/page/file/1258536/download> [https://perma.cc/C2A4-ZFJ5] (describing the limited jurisdiction and authority of immigration judges).

²¹⁸ *J.E. F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016). For a brief discussion of previous Ninth Circuit precedent, see *supra* notes 196-200 and accompanying text. In the view of five Ninth Circuit judges, *J.E. F.M. v. Lynch* marked a significant break from prior circuit case law. See *J. E. F.M. ex rel. Ekblad v. Whitaker*, 908 F.3d 1157, 1161-63 (9th Cir. 2018) (Berzon, J., dissenting) (asserting that the court in *J.E. F.M.* wrote prior precedential cases “out of existence”).

²¹⁹ *J.E. F.M.*, 837 F.3d at 1033 (“[Right-to-counsel] claims are routinely raised in petitions for review filed with a federal court of appeals.”).

²²⁰ *Id.* at 1029.

²²¹ *Id.* at 1031-33. The court specified that § 1252(a)(5) worked in tandem with § 1252(b)(9) to channel the claims. See *id.* at 1031 (referring to § 1252(a)(5) and (b)(9) and noting that “the provisions channel judicial review over final orders of removal to the court of appeals”). For a discussion on the relationship between the two provisions, see *supra* notes 133-139 and accompanying text.

²²² *J.E. F.M.*, 837 F.3d at 1033 (citing cases).

²²³ *Id.* at 1038.

²²⁴ *Id.* at 1032-33.

²²⁵ *Id.* at 1033 (quoting *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 13 (1st Cir. 2007)) (emphasis added).

for review] of removal orders” before courts of appeals.²²⁶ Thus, because they could technically be brought through the petition for review process, barring these claims from district court and requiring their administrative exhaustion does not “foreclose all meaningful judicial review” of such claims.²²⁷

In sum, to determine whether claims could be “effectively handled” by the administrative process, the First and Ninth Circuits examined whether claims could be brought in a petition for review with a court of appeals—not whether immigration judges or the Board of Immigration Appeals could more immediately provide the remedies noncitizens sought. And because the courts concluded that right-to-counsel claims in both *Aguilar* and *J.E. F.M.* were “routinely” raised in petitions for review, district court review was unnecessary.²²⁸ But it bears mentioning that just because a claim is “routinely” raised in a petition for review before a court of appeals, it is not tantamount to that claim being “effectively handled” in that forum. As will be discussed, *infra*, several courts since *Jennings* have noted as much.²²⁹

Nevertheless, *Aguilar*’s influence was significant. The Sixth Circuit cited *Aguilar* approvingly,²³⁰ and many district courts—both within and outside the First Circuit—applied *Aguilar*,²³¹ even if in some instances, courts considering identical claims came out differently.²³² The Ninth Circuit’s full-throated

²²⁶ *Aguilar*, 510 F.3d at 13. The First Circuit also rejected the noncitizens’ argument that requiring exhaustion of their right-to-counsel claims will give rise to a substantive constitutional question similar to that discussed in *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991). *Aguilar*, 510 F.3d at 13; *see also supra* notes 46-54 and accompanying text (describing the availability of review over “pattern and practice” claims that *McNary* provided). The court found *McNary* distinguishable on several grounds. *Aguilar*, 510 F.3d at 15. Most relevant for present purposes is that the unlike in the special agricultural worker program, where the record was limited for any reviewing tribunal, the initial record in *Aguilar* posed no issue because immigration judges “possess ample evidence-gathering faculties” and thus the right-to-counsel claims will need “no supplemental factfinding in order to create a solid platform for further administrative and judicial review.” *Id.*

²²⁷ *Id.* at 14. (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994)).

²²⁸ *J.E. F.M.*, 837 F.3d at 1033; *see also Aguilar*, 510 F.3d at 18 (noting that right to counsel claims are “commonplace” in petitions for review).

²²⁹ *See, e.g., Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019) (explaining that right-to-counsel issues do “sometimes appear in immigration proceedings and related [petitions for review], [but] they are cognizable *only in a narrow sense*”) (emphasis added); *see also infra* Part. III.B.1 (discussing the reviewability considerations).

²³⁰ *See Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 626 (6th Cir. 2010) (agreeing with the First Circuit’s reasoning that § 1252(b)(9) is a “judicial channeling provision, not a claim-barring one”) (quoting *Aguilar*, 510 F.3d at 11) (internal quotation marks omitted).

²³¹ *See, e.g., Robledo v. Chertoff*, 658 F. Supp. 2d 688, 693-94 (D. Md. 2009) (“Following the *Aguilar* court’s logic” to determine that certain claims were “collateral” to the removal process and therefore were reviewable in district court despite § 1252(b)(9)); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 467-68 (D. Mass. 2010) (holding that a noncitizen’s challenges to the applicability of mandatory detention statute to his offense and his removal order are “*intertwined* rather than independent” of removal and thus § 1252(b)(9) foreclosed jurisdiction) (emphasis added).

²³² *Compare Argueta v. U.S. Immigr. & Customs Enf’t*, No. 08-1652, 2009 WL 1307236, at *15 (D.N.J. May 7, 2009) (holding that § 1252(b)(9) did not bar noncitizens’ Fourth Amendment *Bivens*

endorsement of *Aguilar* underscored its influence and the impact it might have had if the Supreme Court had not intervened in *Jennings* just two years later.

D. *The Third Attempt: Jennings v. Rodriguez*

In 2018, the Supreme Court addressed § 1252(b)(9) in *Jennings* for the first time since *St. Cyr*.²³³ *Jennings* involved a class action challenging the prolonged detention of noncitizens pending the completion of their removal proceedings, including judicial review.²³⁴ Although neither party raised § 1252(b)(9),²³⁵ the Court addressed the provision head on, resulting in three divergent opinions.²³⁶ Cobbed together, the Court concluded, 6-2, that § 1252(b)(9) did not divest the district court of jurisdiction over the challenge to prolonged detention during removal proceedings.²³⁷

Justice Breyer, writing for three dissenting justices, took the narrowest view of § 1252(b)(9) in a brief, two-sentence paragraph, stating:

Jurisdiction also is unaffected by 8 U.S.C. § 1252(b)(9), which by its terms applies only “[w]ith respect to review of an order of removal under

claim because if denied review in the district court, there would be “no forum where he can seek redress of his grievances against the government”), *with* *Arias v. U.S. Immigr. & Customs Enf’t*, No. 07-1959, 2008 WL 1827604, at *6 (D. Minn. Apr. 23, 2008) (holding that § 1252(b)(9) bars noncitizen’s *Bivens* claims because they are “common in removal proceedings” and could “directly impact Plaintiffs’ immigration status”).

²³³ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 839-40 (2018) (Alito, J.) (plurality opinion) (discussing § 1252(b)(9) and the prior precedents of the Court interpreting its meaning).

²³⁴ *Id.* at 838. The certified class, of which *Rodriguez* was representative, included noncitizens who “are or were detained . . . pending completion of removal proceedings.” *Id.*

²³⁵ *Id.* at 853 (Thomas, J., concurring in part) (“Although neither party raises § 1252(b)(9), this Court has an independent obligation to assess whether it deprives us and the lower courts of jurisdiction.”) (internal quotations omitted) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)).

²³⁶ In his concurrence in part, Justice Thomas, joined by Justice Gorsuch, concluded that § 1252(b)(9) apply to the claims at issue. *Id.* at 853-59 (Thomas, J., concurring in part). Writing for the plurality, Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, concluded that the claims did not fall within the scope of § 1252(b)(9). *Id.* at 839-41 (Alito, J.) (plurality opinion). In dissent, Justice Breyer, joined by Justices Ginsburg and Sotomayor, agreed that the claims did not fall within the provision’s ambit but read it more narrowly than did the plurality. *Id.* at 876 (Breyer, J., dissenting). Justice Kagan took no part in the decision. *Id.* at 852.

²³⁷ See *supra* note 236 (reviewing alignment of the justices of the Court on the jurisdiction question). Although there was no controlling opinion on the jurisdictional issue, six justices agreed that § 1252(b)(9) did not preclude district court jurisdiction over this challenge to prolonged detention during removal proceedings. *Id.* Normally, the “Supreme Court creates precedent only when [a majority of] Justices endorse a single rule of decision” Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1943 (2019). The main exception, however, was established in *Marks v. United States*, which provides: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

[§ 1252(a)(1)].' § 1252(b). Respondents challenge their detention without bail, not an order of removal.²³⁸

Like the *St. Cyr* majority, Justice Breyer's dissent appears to give significant weight to the prefatory clause of § 1252(b), which limits the reach of § 1252(b)(9) solely to claims challenging "an order of removal."²³⁹ Under this interpretation, the inquiry of § 1252(b)(9)'s application turns on whether a noncitizen's claims challenge "an order of removal," not whether they are arising from some removal action.²⁴⁰ Claims challenging detention without bail, the dissent suggested, are distinct from those challenging "an order of removal" and thus fall outside the ambit of § 1252(b)(9).²⁴¹

Justice Thomas, writing for the two justices concurring in part, took perhaps the broadest possible view of § 1252(b)(9). For one, he discarded the dissent's narrow interpretation that § 1252(b)(9) is restricted to challenges to removal orders.²⁴² Justice Thomas first noted that the text of § 1252(b)(9) "refers to review of 'all questions of law and fact' arising from removal," not just removal orders."²⁴³ In addition, by interpreting § 1252(b)(9) as governing only removal orders, the dissent would "render superfluous § 1252(a)(5), which already specifies that the review made available under § 1252(a)(1) 'shall be the sole and exclusive means for judicial review of an order of removal.'"²⁴⁴

Under Justice Thomas's interpretation, claims that challenge detention during removal proceedings, like the claim at issue in *Jennings*, "fall within the heartland of § 1252(b)(9)."²⁴⁵ Justice Thomas reasoned that the phrase "any action taken . . . to remove an alien from the United States" must at least include any "congressionally authorized portions of the deportation process that necessarily serve the purpose of ensuring an alien's removal."²⁴⁶ Since detention is merely one step of the prescribed process to remove a noncitizen, the challenge at issue must "arise from" removal proceedings.²⁴⁷ In other words, as long as the events that gave rise to the noncitizen's claims would

²³⁸ *Jennings*, 138 S. Ct. at 876 (Breyer, J., dissenting).

²³⁹ *Id.*

²⁴⁰ *Id.* This is the same reading that the Ninth Circuit adopted in *Singh*, before *J.E. F.M.*, and the one the Eleventh Circuit adopted in *Madu*. For a more detailed discussion of this interpretation, see *supra* note 198.

²⁴¹ *Jennings*, 138 S. Ct. at 876 (Breyer, J., dissenting).

²⁴² *Id.* at 855 (Thomas, J., concurring in part).

²⁴³ *Id.* (emphasis in original).

²⁴⁴ *Id.* (emphasis in original).

²⁴⁵ *Id.* at 854.

²⁴⁶ *Id.*

²⁴⁷ *Id.* In his analysis, Justice Thomas blurred the "arising from" inquiry with the "action taken to remove" inquiry. As the plurality highlighted, "[t]he question is not whether *detention* is an action taken to remove an alien but whether the *legal questions* in this case arise from such an action." *Id.* at 841 n.3 (Alito, J.) (plurality opinion) (emphasis in original).

not have happened *but for* the removal action, those claims “arise from” that action and are swallowed by § 1252(b)(9).

Even though Justice Thomas qualified his conclusion by suggesting that § 1252(b)(9) may not cover claims challenging actions which “go beyond the government’s lawful pursuit of its removal objective,”²⁴⁸ he took an expansive view of the provision. Indeed, his interpretation extended § 1252(b)(9) even beyond the scope of the First Circuit’s interpretation in *Aguilar*. *Aguilar* was at least clear that § 1252(b)(9) did not affect district courts’ jurisdiction over challenges to the legality of immigration detention.²⁴⁹ Under Justice Thomas’s approach, exceedingly few challenges would escape the strictures of § 1252(b)(9).

The three-justice plurality authored by Justice Alito took a middle-ground approach. Although it voiced skepticism, the plurality assumed for the sake of argument Justice Thomas’s contention that detention is an “action taken . . . to remove an alien.”²⁵⁰ Justice Alito’s analysis, thus, turned on whether the legal questions before the Court arose from those actions taken to remove the aliens.²⁵¹

In finding that the legal questions in *Jennings* did not “arise from” a removal action and thus fell outside the ambit of § 1252(b)(9), the plurality made several important observations about the scope of the provision.

First, the plurality flatly rejected the broad, “but for” test suggested by Justice Thomas. It noted that this “expansive interpretation” of § 1252(b)(9) would have “staggering results”²⁵² and provided three examples to illustrate the kinds of claims that would be barred by such an interpretation: a *Bivens* claims based on inhumane conditions of confinement; a state-law assault claim against a guard or fellow detainee; and a tort claim against a truck driver or owner who hit the bus transporting noncitizens to a detention facility.²⁵³ Although these injuries would not have occurred *but for* the government’s decision to place the noncitizens in detention, “cramming judicial review of those questions into the review of final removal orders would be absurd.”²⁵⁴ Put simply, these challenges do not arise from removal proceedings or an action taken to remove a noncitizen.

Second, the plurality expressed concern about reviewability. Adopting an extreme but for formulation of claims “arising from” removal orders would

²⁴⁸ *Id.* at 855 (Thomas, J., concurring in part).

²⁴⁹ *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 11 (1st Cir. 2007) (explaining that § 1252(b)(9) does not preclude district court jurisdiction over claims challenging detention).

²⁵⁰ *Jennings*, 138 S. Ct. at 841 n.3 (Alito, J.) (plurality opinion) (questioning whether detention actually is an “action taken . . . to remove an alien”).

²⁵¹ *Id.*

²⁵² *Id.* at 840 (Alito, J.) (plurality opinion).

²⁵³ *Id.*

²⁵⁴ *Id.*

make claims of prolonged detention, like the one at issue in *Jennings*, “effectively unreviewable.”²⁵⁵ The justices in the plurality were concerned about two distinct but related outcomes. In one, a final order of removal is eventually entered but the injury has already taken place, so judicial review would fail to remedy the harm.²⁵⁶ In the other, no order of removal is ever issued and thus the petition for review process never becomes available, so the noncitizen would be deprived of “any meaningful chance for judicial review.”²⁵⁷

Finally, the plurality cautioned against adopting “uncritical literalism” when interpreting “capacious phrases” such as “arising from.”²⁵⁸ It recalled the Court’s approach in *Reno v. AADC*, where it narrowly construed identical language from a neighboring provision, 8 U.S.C. § 1252(g). The *Jennings* plurality explained that the Court “did not interpret this language to sweep in any claim that can technically be said to ‘arise from’ the three listed actions. . . . Instead, we read the language to refer to *just* those three specific actions themselves.”²⁵⁹

With these warnings in mind, the plurality concluded that it was not necessary to “attempt to provide a comprehensive interpretation” of § 1252(b)(9).²⁶⁰ Instead, “[f]or present purposes,” it was “enough” that the noncitizen detainees here were “not asking for review of an order of removal; they [were] not challenging the decision to detain them in the first place or to seek removal; and they [were] not even challenging any part of the process by which their removability will be determined.”²⁶¹ The plurality also noted that even if detention were an “action taken to remove an alien,” as Justice Thomas argued, the legal questions are “too remote” to be said to “arise from” such an action.²⁶² Therefore, the claims at issue did not fall within the scope of § 1252(b)(9) and the district court rightfully retained jurisdiction.

Between the three justices in the plurality’s jurisdictional analysis and three in the dissent, six of the eight justices involved in the decision held

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* In the recent case that overturned the district court’s adverse decision in Efrain and Mia’s case, the Third Circuit distilled a “now-or-never” principle from *Jennings, Preap*—which largely repeated the positions of *Jennings*, see *infra* Section III.B—and the presumptions favoring judicial review. See *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177, 185–86 (3d Cir. 2020). Although the principle will be more closely examined in Part III, it is worth noting here that Justice Alito’s discussion of reviewability circles around the concept of “now-or-never.” See *Jennings*, 138 S. Ct. at 840 (Alito, J.) (plurality opinion) (“Interpreting ‘arising from’ in this extreme way would also make claims of prolonged detention effectively unreviewable.”).

²⁵⁸ *Jennings*, 138 S. Ct. at 840 (Alito, J.) (plurality opinion).

²⁵⁹ *Id.* at 841 (emphasis added).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 841 n.3 (quotation marks omitted).

§ 1252(b)(9) did not bar claims challenging prolonged detention without a bond hearing, even when detainees had ongoing removal proceedings.²⁶³

A year after *Jennings*, Justice Alito, joined now by Justice Kavanaugh and again by Chief Justice Roberts, essentially reprised these positions in *Nielsen v. Preap*, finding that § 1252(b)(9) did not preclude district court jurisdiction over a challenge raising the question of whether noncitizens were subject to mandatory detention when the government failed to detain them immediately after their release from state court.²⁶⁴ It stated:

As in *Jennings*, respondents here ‘are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal . . . ; and they are not even challenging any part of the process by which their removability will be determined. Under these circumstances . . . § 1252(b)(9) does not present a jurisdictional bar.’²⁶⁵

After *Jennings* and *Preap*, lower courts were left to make sense of the Supreme Court’s fractured jurisdictional holdings.²⁶⁶

III. POST-*JENNINGS* AND THE PRESENT STATE OF § 1252(b)(9)

Jennings failed to provide lower courts with clear guidance on how to construe § 1252(b)(9). Perhaps as a result, litigation implicating § 1252(b)(9) has proliferated since *Jennings*,²⁶⁷ underscoring the need for a comprehensive

²⁶³ *Id.* at 841, 876.

²⁶⁴ *Nielsen v. Preap*, 139 S. Ct. 954, 960-62 (2019).

²⁶⁵ *Id.* at 962 (quoting *Jennings*, 138 S. Ct. at 841 (Alito, J.) (plurality opinion)).

²⁶⁶ As mentioned before, the Supreme Court has—to varying degrees—discussed § 1252(b)(9) in three cases since *Preap* was decided. *See supra* note 29. Of the three cases to treat the provision, *Department of Homeland Security v. Regents of the University of California* adds the most to the discussion. 140 S. Ct. 1891 (2020). In *Regents*, the Court determined that the Trump administration’s rescission of DACA was unlawful. *Id.*; *see also* Meghan Downey & Adam Garnick, *Explaining the Supreme Court’s DACA Decision*, REG. REV. (July 7, 2020), <https://www.theregreview.org/2020/07/07/downey-garnick-explaining-supreme-court-daca-decision/> [<https://perma.cc/93JJ-4PZX>] (explaining the Court’s analysis of the Administrative Procedure Act challenges to the DACA rescission). In so holding, the Court discussed § 1252(b)(9) and held the provision did not present a jurisdictional bar to petitioners’ challenge to the DACA rescission. *Regents*, 140 S. Ct. at 1907. As in *Preap*, the Court articulated the same rule from *Jennings*. *Id.* Importantly, however, it went further, holding that § 1252(b)(9) “is certainly not a bar where, as here, the parties are not challenging any removal proceedings.” In addition, the Court described the language of § 1252(b)(9) as “targeted” and “narrow.” *Id.* This language was almost immediately seized upon by at least two circuit courts. *See Canal A Media Holding, LLC v. U.S. Citizenship and Immigr. Servs.*, 964 F.3d 1250, 1257 (11th Cir. 2020) (citing *Regents* in overturning district court’s expansive interpretation of § 1252(b)(9) because it “does not square with that provision’s ‘narrow’ scope”); *Gonzalez v. U.S. Immigr. and Customs Enf’t*, 975 F.3d 788, 810 (9th Cir. 2020) (finding that § 1252(b)(9) did not bar challenge to the use of immigration detainers in part because the Supreme Court has “instructed that [the provision] is . . . ‘targeted’ and ‘narrow’”).

²⁶⁷ In the roughly three years since *Jennings*, at least 200 cases have cited the provision. *See infra* Appendix (listing cases). To be sure, pure citation-count is an imperfect proxy to support the

synthesis of the law in its current form. This Part aims to provide that in three steps. First, this Part contends that *Jennings*, fractured as it was, undercut the broad interpretation of “arising from” previously embraced by the First and Ninth Circuits. Second, this Part lays out a roadmap of the law,²⁶⁸ based on *Jennings* and other recent Supreme Court cases, that sets the stage for a narrower reading of “arising from”. Finally, this Part analyzes the specific factors and frameworks that courts have relied on when construing “arising from” in light of the narrower reading that *Jennings* commands.

A. *The Conflict Between Jennings and the Aguilar Interpretation*

Although it did not do so explicitly, the *Jennings* Court rejected the *Aguilar* interpretation of “arising from,” and counseled in favor of a quite narrow reading of that phrase.²⁶⁹ On a purely semantic level, the language of the *Jennings* plurality runs counter to the broad, dramatic language used in the *Aguilar* interpretation, which described § 1252(b)(9) as “breathtaking in scope” and “vice-like in grip.”²⁷⁰ The plurality cautioned against an “expansive” reading of § 1252(b)(9) and expressed concern over the “staggering results” that would result from “cramming judicial review” of certain claims into a petition for review of final removal orders.²⁷¹ The three justices in the plurality also recalled the Court’s narrow reading of § 1252(g) in *AADC*, noting that any interpretation of “arising from” must avoid the “uncritical literalism” that could lead to results that “no sensible person could have intended.”²⁷² Coupled with the three dissenters who embraced the even narrower interpretation,²⁷³ six of eight justices involved in *Jennings* urged lower courts not to adopt a broad reading of § 1252(b)(9).

But the interpretive conflict is not merely semantic. The Supreme Court’s decision in *Jennings* substantively narrowed the scope of § 1252(b)(9) as interpreted by *Aguilar* and its progeny. One district court in the Ninth Circuit

proposition that *Jennings* initiated a wave of litigation, but the stark difference in number of cases pre- and post-*Jennings* is noteworthy. The Trump administration’s severe immigration policies may have also contributed to the uptick in challenges implicating § 1252(b)(9). *See, e.g.,* *Casa De Maryland v. Dep’t of Homeland Sec.*, 924 F.3d 684, 691 (4th Cir. 2019) (challenging DACA rescission); *O.A. v. Trump*, 404 F. Supp. 3d 109, 117 (D.D.C. 2019) (challenging the policy popularly referenced as the “asylum ban”).

²⁶⁸ *See supra*, note 29 (discussing the Supreme Court cases that addressed § 1252(b)(9) after *Jennings*).

²⁶⁹ As mentioned, this assertion is further supported by the Court’s discussion of the provision in *Regents* in which it explicitly described it as “targeted” and “narrow.” 140 S. Ct. at 1907; *see also supra* notes 29, 266, (discussing *Regents* in more detail).

²⁷⁰ *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 9-10 (1st Cir. 2007).

²⁷¹ *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (Alito, J.) (plurality opinion).

²⁷² *Id.* at 840-41 (quoting *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016)) (internal quotation marks omitted).

²⁷³ *Id.* at 876 (Breyer, J., dissenting).

suggested that its circuit's precedent, which most notably includes *J.E. F.M.*, treats § 1252(b)(9) "too broadly in light of the *Jennings* plurality's rejection of an 'expansive' interpretation of 'arising from' that would sweep a claim into Section 1252(b)(9) simply because an alien is in removal proceedings or a removal action was taken."²⁷⁴ Likewise, after reviewing prior case law that interpreted § 1252(b)(9) as expansive in scope, a district court in the Second Circuit noted, "as the Supreme Court's plurality opinion in [*Jennings*] explained, § 1252(b)(9) should not be construed broadly."²⁷⁵

A district court case that reconsidered and partially reversed in light of *Jennings* best illustrates the substantive narrowing. In that case, the district court was confronted with noncitizens' Fifth Amendment claims regarding the government's alleged failure to promptly present them to an immigration judge for a probable cause determination.²⁷⁶ Prior to *Jennings*, the district court found that the pre-hearing custody decisions were "inextricably linked" with removal proceedings because the initial hearing is a "crucial stage of the removal proceedings."²⁷⁷

In reconsidering the case after *Jennings*, however, the district court reversed.²⁷⁸ It found that the Fifth Amendment claims did not "arise from" any of the challenges to removal listed in *Jennings* that § 1252(b)(9) might circumscribe.²⁷⁹ Moreover, it held that if the noncitizens could not bring their claims to district court, those claims might become "effectively unreviewable," an outcome the *Jennings* plurality explicitly cautioned against.²⁸⁰

²⁷⁴ *Cancino-Castellar v. Nielsen*, 338 F. Supp. 3d 1107, 1114 (S.D. Cal. 2018); see also *Las Americas Immigrant Advoc. Ctr. v. Trump*, No. 19-20051, 2020 WL 4431682, at *7 (D. Or. July 31, 2020) ("Defendants rely heavily on language in *J.E. F.M.* that characterizes § 1252(b)(9) as 'breathtaking' in its scope In determining the scope of § 1252(b)(9), however, this Court must look not only to *J.E. F.M.* but also to *Jennings* . . . which appears to adopt a somewhat more limited view of the scope of § 1252(b)(9)."); *Roy v. Cnty. of Los Angeles*, No. 12-09012, 2018 WL 914773, at *18 (C.D. Cal. Feb. 7, 2018) (holding that § 1252(b)(9) does not bar claims pertaining to ICE detainers, as these actions occur before and oftentimes independently from "any decision to commence removal proceedings"); *Nava v. Dep't of Homeland Sec.*, 435 F. Supp. 3d 880, 893 (N.D. Ill. 2020) (citing *Roy* for the proposition that the language in *Jennings* counseled against an expansive interpretation of "arising from").

²⁷⁵ *P.L. v. U.S. Immigr. & Customs Enf't*, No. 19-01336, 2019 WL 2568648, at *3 (S.D.N.Y. June 21, 2019).

²⁷⁶ *Castellar v. Nielsen*, No. 17-0491, 2018 WL 786742, at *6, *12-13 (S.D. Cal. Feb. 8, 2018). A "probable cause determination" refers to DHS seeking prompt judicial review and approval of their detention of noncitizens, consistent with the Fourth and Fifth Amendments' requirement that seizures by government agents are reasonable and noncitizens are afforded due process. HILLEL R. SMITH, CONG. RSCH. SERV., LSB10375, IMMIGRATION DETAINERS: BACKGROUND AND RECENT LEGAL DEVELOPMENTS 2 (2019).

²⁷⁷ *Castellar*, 2018 WL 786742 at *12.

²⁷⁸ *Cancino-Castellar*, 338 F. Supp. 3d at 1117.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

Claims outside the detention context that were likely to have been swept into § 1252(b)(9) under the *Aguilar* approach have likewise fallen outside the provision's strictures in light of *Jennings*. Several courts, including one district court in the Ninth Circuit, have found that right-to-counsel claims fall outside the reach of § 1252(b)(9), despite the contrary holdings of *J.E. F.M.* and *Aguilar*, which held that § 1252(b)(9) prohibited district court review of those claims.²⁸¹

Likewise, multiple district courts have found that § 1252(b)(9) does not foreclose their jurisdiction where a noncitizen challenged the legality of ICE's conduct during their initial stop and detention.²⁸² This makes sense given that the *Jennings* plurality warned courts not to "cram" such challenges into the administrative process.²⁸³ Under the *Aguilar* interpretation, these claims would likely have been swallowed by § 1252(b)(9) given their nexus to removal proceedings, even though they arose prior to the initiation of removal proceedings and thus were at risk of never receiving any judicial review.²⁸⁴

In sum, *Jennings*, despite lacking a majority opinion, undercut the broad *Aguilar* interpretation of § 1252(b)(9). How exactly lower courts have applied *Jennings* to effectuate its narrower construction of "arising from" is a more complicated question.

B. *The State of the Law: Interpreting "Arising From"*

To properly situate the factors and frameworks courts have employed when construing "arising from," it is worth providing a brief roadmap of the

²⁸¹ See *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 187 (3d Cir. 2020) (concluding that constitutional right-to-counsel claims are not barred by § 1252(b)(9)); *Arroyo v. U.S. Dep't of Homeland Sec.*, No. 19-815, 2019 WL 2912848, at *13 (C.D. Cal. June 20, 2019) (represented noncitizens' claims not barred by § 1252(b)(9)); *Torres v. U.S. Dep't of Homeland Security*, 411 F. Supp. 3d 1036, 1048-49 (C.D. Cal. 2019) (represented and unrepresented noncitizens' claims not barred by § 1252(b)(9)).

²⁸² See, e.g., *Nak Kim Chhoeun v. Marin*, No. 17-01898, 2018 WL 1941756, at *4 (C.D. Cal. Mar. 26, 2018) (finding district court jurisdiction over claims challenging the government's failure to notify petitioners of changed circumstances justifying detention and deportation); *Tun-Cos v. Perrotte*, No. 17-943, 2018 WL 3616863, at *1, *6 (E.D. Va. Apr. 5, 2020) (finding district court jurisdiction over an action for damages following an allegedly unlawful search by government agents); *Nava v. Dep't of Homeland Sec.*, 435 F. Supp. 3d 880, 885 (N.D. Ill. 2020) (finding district court jurisdiction over claims challenging "indiscriminate, large-scale immigration sweeps").

²⁸³ See *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (citing *Aguilar v. U.S. Immigr. & Customs Enf't*, 510 F.3d 1, 9 (1st Cir. 2007)) (noting that § 1252(b)(9) "swallows up virtually all claims that are tied to removal proceedings").

²⁸⁴ *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (Alito, J.) (plurality opinion). See *infra* subsection III.B.2 (discussing how claims arising prior to the initiation of removal proceedings do not fall into the scope of § 1252(b)(9) in light of *Jennings*).

current law as it stands after *Jennings* and other recent Supreme Court cases.²⁸⁵

At this point, courts understand § 1252(b)(9) to function as a “zipper clause”²⁸⁶ meant to “consolidate judicial review of immigration proceedings into one action in the court of appeals.”²⁸⁷ By its own terms, the provision applies *only* to legal questions that “arise from” removal proceedings and does not encompass claims that are “too remote from” such proceedings.²⁸⁸

Although the Supreme Court has not yet offered a comprehensive interpretation of “arising from,”²⁸⁹ it has repeatedly urged that the phrase should be construed narrowly.²⁹⁰ In addition, the Court has explained that claims that do *not* challenge (1) an order of removal, (2) the government’s decision to seek removal, or (3) the process by which removability will be determined categorically do not “arise from” removal proceedings and thus do not fall within § 1252(b)(9)’s reach.²⁹¹ Likewise, claims that do not challenge *any* removal proceedings “certainly” do not “arise from” such proceedings.²⁹² Therefore, if claims do not challenge one of these enumerated categories, § 1252(b)(9) does not present a jurisdictional bar and the court’s analysis ends.

But when a claim does not fall cleanly outside one of those enumerated categories—when it presents a closer call—lower courts since *Jennings* have applied a range of factors to construe “arising from,” some of which are more useful than others in how they effectuate the narrow reading that *Jennings* commands.

This subsection argues that reviewability—one of the leading factors courts have employed—should turn on whether an immigration judge has the ability to grant the relief sought. It further contends that a “timeframe consideration” categorically excludes § 1252(b)(9) from swallowing any claims that challenge actions arising *prior to* the commencement of removal proceedings. After those discussions, it surveys other important factors and occasionally offers their benefits and drawbacks.

²⁸⁵ To be clear, the case law of § 1252(b)(9) is rapidly changing within each circuit, but this introduction draws upon several recent Supreme Court decisions to provide an overview of where the law stands across all jurisdictions.

²⁸⁶ See *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020) (referring to § 1252(b)(9) as a “zipper clause”).

²⁸⁷ *Id.*

²⁸⁸ *Jennings*, 138 S. Ct. 830, 841 n.3 (Alito, J.) (plurality opinion).

²⁸⁹ *Id.* at 841 (noting that it was “not necessary for us to attempt to provide a comprehensive interpretation” of § 1252(b)(9)).

²⁹⁰ See *id.* at 840 (cautioning against an expansive reading of “arising from”). See also *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (describing § 1252(g) and § 1252(b)(9), which both contain the phrase “arising from,” as “similarly narrow”).

²⁹¹ *Jennings*, 138 S. Ct. at 840 (Alito, J.) (plurality opinion); see also *Regents*, 140 S. Ct. at 1907 (quoting *Jennings*, 138 S. Ct. at 841 for this proposition).

²⁹² *Regents*, 140 S. Ct. at 1907.

1. Reviewability

Reviewability—whether claims will receive adequate judicial review—has been at the center of § 1252(b)(9) jurisprudence since the provision was enacted. In fact, the Supreme Court in *McNary* provided an avenue around the strictures of § 1252(b)(9)'s predecessor because if noncitizens were “not allowed to pursue their claims in the District Court, [they] would not as a practical matter be able to obtain *meaningful judicial review*”²⁹³

“Meaningful judicial review” has remained a baseline consideration in determining whether claims are channeled by § 1252(b)(9).²⁹⁴ The *Jennings* plurality highlighted as much when it warned that interpreting “arising from” in an “extreme way” would make some claims “*effectively unreviewable*.”²⁹⁵ Of course, as one district court aptly noted, reviewability is not the sole factor used to determine whether § 1252(b)(9) prohibits a district court from having jurisdiction over certain claims.²⁹⁶ If it were, the *Jennings* plurality would have ended its analysis once it discussed reviewability, which it did not.²⁹⁷ But at minimum, “meaningful judicial review” remains a significant—and perhaps the leading—factor courts use when construing § 1252(b)(9).

Determining what exactly “meaningful review” requires is a fraught but critical exercise. The *Aguilar* interpretation tended to look at whether claims were cognizable in a petition for review before the court of appeals.²⁹⁸ *Aguilar* itself stated that § 1252(b)(9) applies to claims that were “cognizable within the review process” established by Congress.²⁹⁹ But the *Aguilar* court was less clear on *precisely* what that inquiry entailed. Did this mean cognizable before an immigration judge, or eventually cognizable in a petition for review before the court of appeals?

Almost ten years later, *J.E. F.M.* helped answer that question. There, the Ninth Circuit embraced the *Aguilar* interpretation and rejected the argument that the unaccompanied minors’ right-to-counsel claims would be denied any

²⁹³ *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496 (1991).

²⁹⁴ *Id.*; see *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1035-36 (9th Cir. 2016) (analyzing whether foreclosing the noncitizen minors’ claims would deny them “meaningful judicial review”).

²⁹⁵ 138 S. Ct. at 840 (Alito, J.) (plurality opinion) (emphasis added). It bears emphasizing that Congress meant § 1252(b)(9) to be a claims challenging provision, “not a claims-barring one.” *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 11 (1st Cir. 2007) (emphasis added).

²⁹⁶ *Cancino-Castellar v. Nielsen*, 338 F. Supp. 3d 1107, 1114 (S.D. Cal. 2018).

²⁹⁷ *Id.*

²⁹⁸ See *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 17 (1st Cir. 2007) (“[T]he most salient questions involve whether the underlying claims are cognizable within the review process established by Congress, and if so, whether enforcement of the exhaustion requirement will allow meaningful judicial review without inviting an irreparable injury.”); see, e.g., *Arroyo v. U.S. Dep’t of Homeland Sec.*, No. 19-815, 2019 WL 2912848, at *14 (C.D. Cal. June 20, 2019) (“Reviewability by an [immigration judge] is not the standard as to whether an action is unreviewable.”).

²⁹⁹ *Aguilar*, 510 F.3d at 17.

meaningful judicial review because “a right-to-counsel claim is *teed up for appellate review*,” despite conceding that neither the immigration judge nor the Board of Immigration Appeals has authority to provide the requested relief.³⁰⁰ The “reviewability” inquiry, then, under the *Aguilar* interpretation as clarified in *J.E. F.M.* focused on whether claims were cognizable at the petition for review level—it did not examine whether immigration judges or the Board of Immigration Appeals had the ability to provide relief.

Lower courts since *Jennings*, however, have looked at another part of the administrative process: whether the *immigration judge* could provide the requested relief. In *O.A. v. Trump*, the District Court for the District of Columbia considered in depth the scope of § 1252(b)(9), in light of *Jennings*.³⁰¹ Holding that a challenge to the Trump administration’s “asylum ban” was not barred by § 1252(b)(9), the court dedicated much of its opinion to concerns of reviewability.³⁰² In particular, it stated, “Plaintiffs’ challenges are also outside the . . . competence and expertise of asylum officers, immigration judges, and the [Board of Immigration Appeals].”³⁰³ Even if the claims could eventually be “teed up” for appellate review through a petition for review, that would be insufficient to prohibit district court jurisdiction under § 1252(b)(9). Instead, courts must look at the abilities of the initial decisionmakers—the immigration judges and the Board of Immigration Appeals officials who are responsible for responding during removal processes to noncitizens’ requests for relief.

Courts have employed this inquiry across several contexts. In conditions of confinement cases, for example, one court explained that “interpreting section 1252(b)(9) to reach [such claims] would be problematic, especially because Immigration Judges are ‘powerless to remedy the conditions alleged.’”³⁰⁴ Likewise, in a case considering a challenge to the rescission of an individual’s DACA status, the district court found determinative that because “an immigration judge in a removal proceeding does *not* have the power to grant or deny deferred action, or to review or reverse an agency’s decision to revoke it,” § 1252(b)(9) posed no jurisdictional bar.³⁰⁵ In the *Bivens* context,

³⁰⁰ *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016) (emphasis added). To be sure, the Ninth Circuit noted that constitutional claims fell within a “narrow exception” whereby a court of appeals could still consider those claims although they were not raised during administrative proceedings. *Id.*

³⁰¹ *O.A. v. Trump*, 404 F. Supp. 3d 109, 134-38 (D.D.C. 2019).

³⁰² *Id.*

³⁰³ *Id.* at 137 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010)).

³⁰⁴ *S. Poverty L. Ctr. v. U.S. Dep’t of Homeland Sec.*, No. 18-760, 2020 WL 3265533, at *16 (D.D.C. June 17, 2020) (citing *Torres v. U.S. Dep’t of Homeland Security*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019)).

³⁰⁵ *Inland Empire—Immigrant Youth Collective v. Nielsen*, No. 17-2048, 2018 WL 4998230, at *14 (C.D. Cal. Apr. 19, 2018) (emphasis in original).

numerous cases have applied the same logic: because immigration judges cannot award damages, these claims escape the reach of § 1252(b)(9).³⁰⁶

In Efrain and Mia's case, the Third Circuit held that § 1252(b)(9) did not bar most of Efrain and Mia's claims, including their Fifth Amendment right-to-counsel due process claim.³⁰⁷ The court centered its decision—particularly its “arising from” inquiry—on reviewability.³⁰⁸ The court distilled a principle from *Jennings*, *Preap*, and “the presumptions favoring judicial review,” which essentially compels courts to ask: If a noncitizen cannot obtain judicial review now, then will meaningful review be available at all?³⁰⁹ Put differently, if it will be too late to remedy the harm later, the district court must have jurisdiction to review—and potentially remedy—the harm now.

In effect, the Third Circuit's “now-or-never principle” requires courts to assess the competencies of immigration judges and the Board of Immigration Appeals, because the principle is primarily concerned with the urgency of the claims and the ability of the administrative process to remedy that harm.

In another right-to-counsel case, a district court found that the “limited jurisdiction of *Immigration Judges*” weighed in favor of finding that § 1252(b)(9) did not bar right-to-counsel claims.³¹⁰ The court explained that even though right-to-counsel issues do sometimes appear in removal proceedings and related petitions for review, “[t]hey are cognizable only in a narrow sense.”³¹¹ In the petition for review context, the focus is “categorically different” than it would be in a full hearing on the merits because the only question in a petition for review is “whether to overturn a decision below,” rather than to conduct a thorough review of the removal proceeding.³¹² Such reasoning strongly suggests that confining judicial review of right-to-counsel claims to the petition for review process would risk shortchanging the noncitizens' opportunity to obtain “meaningful judicial review.”

In sum, in light of *Jennings*, the proper inquiry into reviewability examines the competencies of the immigration judge and whether she can provide

³⁰⁶ See, e.g., *Tun-Cos v. Perrotte*, No. 17-943, 2018 WL 3616863, at *6 (E.D. Va. Apr. 5, 2020) (holding § 1252(b)(9) does not bar *Bivens* claims partly because the immigration judge cannot grant Plaintiffs the relief they seek); *Rueda Vidal v. U.S. Dep't of Homeland Sec.*, No. 18-9276, 2019 WL 7899948, at *11 (C.D. Cal. Aug. 28, 2019), *rev'd on other grounds*, *Rueda Vidal v. Bolton*, 822 F. App'x 643 (9th Cir. 2020) (“Because claims for damages are not available in removal proceedings, they are collateral to that process for purposes of Section 1252(b)(9).”; cf. *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (Alito, J.) (plurality opinion) (suggesting that interpreting § 1252(b)(9) to encompass *Bivens* claims would be “absurd”).

³⁰⁷ *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 184-87 (3d Cir. 2020).

³⁰⁸ See *id.* (analyzing whether claims would be subject to meaningful review).

³⁰⁹ *Id.* at 185-86.

³¹⁰ *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019) (emphasis added).

³¹¹ *Id.*

³¹² *Id.*

relief.³¹³ It no longer focuses on what type of claims could *eventually* be “teed up” for appellate review.³¹⁴ As a result, an array of claims that may have been (and indeed were) encompassed by § 1252(b)(9) under the *Aguilar* interpretation now fall outside its reach.

2. Timeframe

A closely related factor is “timeframe,” which examines the point during removal proceedings at which the claims were brought or the challenged actions occurred. This factor can be distilled into the following bright-line rule: claims challenging actions that occurred before the initiation of removal proceedings categorically do not fall within the reach of § 1252(b)(9).

To some extent, similar concerns that underpin the reviewability consideration support the timeframe consideration. If § 1252(b)(9) foreclosed district court review for claims arising prior to the initiation of removal proceedings, there is no guarantee that the government will ever issue a removal order, much less commence removal proceedings in the first place. In either instance, the noncitizen never has an opportunity to bring claims through a petition for review and would be completely deprived of *any* judicial review.³¹⁵ This is precisely the “absurd” result *Jennings* sought to avoid.³¹⁶

But reviewability on its own, as explained, cannot form the basis of the categorical rule proposed here.³¹⁷ What pushes the timeframe consideration into the realm of a categorical rule is that any claims arising prior to removal proceedings present legal questions that the *Jennings* plurality warned would be “too remote” from such proceedings to be said to “arise from” them.³¹⁸

Courts previously applying the *Aguilar* interpretation, however, did not share the same concern. In *Aguilar* itself, removal proceedings had not been initiated by the time that the noncitizens brought their claims to district court.³¹⁹ Even still, the court held that § 1252(b)(9) could still channel the noncitizens’ claims into a petition for review because the provision’s scope

³¹³ Cf. *Urbina v. Barr*, No. 20-325, 2020 WL 3002344, at *5 (E.D. Va. June 4, 2020) (focusing the inquiry on whether claims are cognizable at the petition for review stage, noting that “Urbina can challenge his removability in a petition for review filed with the Fourth Circuit, which has the clear authority to adjudicate whether an alien’s prior convictions are crimes involving moral turpitude”).

³¹⁴ *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016).

³¹⁵ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (Alito, J.) (plurality opinion) (explaining that if § 1252(b)(9) applied to certain claims prior to the issuance of an order of removal, it would make such claims “effectively unreviewable”).

³¹⁶ *Id.*

³¹⁷ See *supra* notes 298-299 and accompanying text (noting that *Jennings* implies that reviewability cannot be the only factor in the “arising from” analysis).

³¹⁸ See *Jennings*, 138 S. Ct. at 840 n.3 (Alito, J.) (plurality opinion) (explaining that the legal questions at issue were “too remote” from the actions taken to fall within § 1252(b)(9)).

³¹⁹ *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 10 (1st Cir. 2007).

was not limited to claims arising from “extant removal proceedings.”³²⁰ That is no longer the case after *Jennings*.

Since *Jennings*, several courts have held that § 1252(b)(9) cannot channel claims brought prior to the initiation of removal proceedings. In *Innovation Law Lab v. Nielsen*, a case that considered a challenge to the conditions of pre-hearing detention, the district court found it could not have constituted a challenge to removal proceedings for the obvious reason that such proceedings had not yet commenced.³²¹ It noted that the *Jennings* plurality cautioned against reading § 1252(b)(9) in a way that makes certain claims “effectively unreviewable.”³²² Because foreclosing jurisdiction may have denied *all* avenues to judicial review, that consequence weighed heavily against applying § 1252(b)(9).³²³ But that alone would not suffice. The lynchpin, according to the court, was that the legal questions at issue—raised before removal proceedings even commenced—were simply “too remote” from removal proceedings to be said to “arise from” them, leading the court to hold that § 1252(b)(9) did not apply to the claims.³²⁴

The same was true in *Al Otro Lado, Inc v. McAleenan*, a case in which noncitizens challenged restrictive policies that prohibited certain individuals from applying for asylum in the first place.³²⁵ The court held that since the entire goal of the suit was to *commence* removal proceedings so that plaintiffs could apply for asylum, they could not possibly be challenging such proceedings.³²⁶ As a result, the court held § 1252(b)(9) posed no obstacle to the noncitizens’ claims.³²⁷

Under this categorical timeframe rule, even if removal proceedings have commenced by the time the claims are brought to district court, § 1252(b)(9) does not present a jurisdictional bar as long as the *actions* occurred prior. In one case, which considered noncitizens’ challenge to ICE’s use of detainers to apprehend them in the first place, the court held that “[b]ecause Plaintiffs’ . . . claims relate to the ICE officers’ actions *before* removal proceedings were filed . . . the Court finds that they are independent of the removal process.”³²⁸

³²⁰ *Id.* at 6-9, 10.

³²¹ *Innovation L. Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1071-77 (D. Or. 2018).

³²² *Id.* at 1077 (quoting *Jennings*, 138 S. Ct. at 840) (Alito, J.) (plurality opinion)).

³²³ *Id.*

³²⁴ *Id.* at 1078.

³²⁵ *Al Otro Lado, Inc v. McAleenan*, 432 F. Supp. 3d 848, 859-61 (S.D. Cal. 2019)

³²⁶ *See id.* at 863 (“The Government does not allege that any Plaintiff is in removal proceedings or that a final order of removal has been issued as to any Plaintiff. . . . In fact, the very relief Plaintiffs seek is to commence such proceedings and have their asylum claims adjudicated.”).

³²⁷ *Id.*

³²⁸ *Roy v. Los Angeles Cnty.*, No. 12-09012, 2018 WL 914773, at *18 (quoting *Medina v. U.S. Dep’t of Homeland Sec.*, No. C17-218, 2017 WL 2954719, at *11 (W.D. Wash. Mar. 14, 2017)).

The district court in *Nava v. Department of Homeland Security* reached a similar conclusion in a class action challenge to ICE's allegedly race-based traffic stops, which led to the arrest and detention of several individuals.³²⁹ There, the court observed that "the risk that certain Plaintiffs could be precluded from presenting their claims in *any forum* weighs in favor of a finding that Section 1252(b)(9) does not deprive the court of jurisdiction."³³⁰ In addition to the reviewability concerns, what ultimately pushed the claims outside the provision's scope was that the plaintiffs' challenges to "[a]n illegal stop conducted *before* the government has any legitimate reason to believe the subject is removable" were "*too remote from removal actions* to fall within the scope of § 1252(b)(9), and therefore did not 'arise from' them."³³¹

When claims "arise from" actions that occur before the initiation of removal proceedings, they cannot be barred by § 1252(b)(9). For one, reviewability concerns are particularly heightened because there is a risk that an individual is deprived of any and all judicial review, which is an unacceptable outcome. If removal proceedings are never initiated or if the noncitizen obtains relief, an opportunity to bring claims through a petition for review will never manifest.

It is tautological that events occurring prior to the commencement of removal proceedings present legal questions that are "too remote from" such proceedings.³³² Indeed, two years after *Jennings*, the Supreme Court explained that claims "not challenging *any* removal proceedings" "certainly" do not arise from such proceedings.³³³ Therefore, this timeframe consideration provides a simple rule that any claims that challenge action occurring prior to the initiation of removal proceedings must not "arise from" such proceedings and thus fall outside the sweep of § 1252(b)(9). The bright-line rule this creates is a helpful tool for district courts confronted with these types of claims, as it would allow them to quickly dispose of challenges to their jurisdiction on § 1252(b)(9) grounds.

3. Nature of the Right

Courts have recently paid more attention to the nature of the right that was allegedly violated. Generally, if claims assert rights that afford

³²⁹ *Nava v. Dep't of Homeland Sec.*, 435 F. Supp. 3d 880, 890 (N.D. Ill. 2020).

³³⁰ *Id.* at 894 (emphasis added). This language mirrors that of the Supreme Court's in *St. Cyr*: "If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS' reading of § 1252. But the absence of such a forum, coupled with the lack of [an express statement to repeal habeas], strongly counsels against adopting a construction that would raise serious constitutional questions." *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 314 (2001).

³³¹ *Nava*, 435 F. Supp. 3d at 890-91 (emphasis added) (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 n.3 (2018) (Alito, J.) (plurality opinion)).

³³² *Jennings*, 138 S. Ct. at 841 n.3 (Alito, J.) (plurality opinion)

³³³ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020).

protections beyond those afforded in removal proceedings, they fall outside the reach of § 1252(b)(9). This has been particularly pronounced in cases where right-to-counsel claims fall outside the reach of § 1252(b)(9).³³⁴

In *Arroyo v. Department of Homeland Security*, for example, a district court held that § 1252(b)(9) posed no jurisdictional barrier to claims of noncitizens who had an existing attorney-client relationship.³³⁵ Guided by *Jennings*, the court explained, “the nature of right violated guides the jurisdictional inquiry rather than the source of the right.”³³⁶ Under both the INA and Constitution, a noncitizen enjoys the “right not to have that relationship unduly burdened or interfered with.”³³⁷ The attorney–client relationship “carries with it certain rights separate from and additional to their rights in removal proceedings.”³³⁸ Therefore, the alleged harm accrues at the moment that the relationship is burdened, without reference to the removal proceedings.³³⁹ In other words, the right asserted offers protections that extend beyond the bounds of removal proceedings, and thus, such claims could not “arise from” those proceedings.

Torres v. Department of Homeland Security employed the same logic and extended it to cover unrepresented noncitizens in addition to already represented noncitizens.³⁴⁰ The court said that because the asserted rights extend beyond removal proceedings, an alleged violation of those rights are equally “apart from the removal process.”³⁴¹

The decision in Efrain and Mia’s case, *E.O.H.C.*—which otherwise centered on reviewability—also discussed the “nature of the right,” specifically with regard to the right-to-counsel claim.³⁴² The Third Circuit found that § 1252(b)(9) did not bar the father and daughter’s constitutional right-to-counsel claims because there are certain rights separate from and

³³⁴ Right-to-counsel claims present perhaps the most complicated—or, at least, divisive—questions about the scope of § 1252(b)(9). One district court summarized the state of the law as such: “The question of whether the Court would have jurisdiction over Plaintiff’s access to counsel claim is a complicated one and the authorities are equipoise.” *S. Poverty L. Ctr. v. U.S. Dep’t of Homeland Sec.*, No. 18-760, 2020 WL 3265533, at *35 n.4 (D.D.C. June 17, 2020). This area of the law is ripe for further scholarship, given that the Supreme Court has yet to confront a right-to-counsel claim, but these claims have been the subject of some of the most important § 1252(b)(9) circuit cases since the provision’s enactment. *See, e.g.*, *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1 (1st Cir. 2007); *J.E. F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016); *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177 (3d Cir. 2020).

³³⁵ *Arroyo v. U.S. Dep’t of Homeland Sec.*, No. 19-815, 2019 WL 2912848, at *13 (C.D. Cal. June 20, 2019).

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019).

³⁴¹ *Id.*

³⁴² *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020); *Arroyo v. U.S. Dep’t of Homeland Sec.*, No. 19-815, 2019 WL 2912848, at *13 (C.D. Cal. June 20, 2019).

additional to those implicated in removal proceedings.³⁴³ Conversely, the court held that § 1252(b)(9) did bar the statutory claims because “the right is limited to [removal proceedings].”³⁴⁴

While *Torres* and *Arroyo* differed from *E.O.H.C.* in holding that both the constitutional and statutory right to counsel extend beyond removal proceedings, the key takeaway is that a growing number of courts view the “nature of the right” as integral to their § 1252(b)(9) analysis.³⁴⁵ Since the bounds of a noncitizen’s right to counsel are unclear,³⁴⁶ noncitizens can and should construe them as expansively as possible to circumvent the strictures of § 1252(b)(9). Under the logic adopted in *Torres* and *Arroyo*, if any part of the asserted right falls outside the confines of removal proceedings, those claims do not “arise from” such proceedings and thus § 1252(b)(9) poses no jurisdictional bar.

4. Three Challenges Approach

A widely used inquiry that comes directly from the *Jennings* plurality can be described as the “three challenges approach.” It is taken from the plurality’s suggestion that it was “enough” for “present purposes” that the noncitizens in the case were “not asking for review of an order of removal; they [were] not challenging the decision to detain them in the first place or to seek removal; and they [were] not even challenging any part of the process by which their removability will be determined.”³⁴⁷

As noted in the introduction to this Section, if claims are not directed toward one of these three categories, the analysis ends and § 1252(b)(9) must not apply. In *Regents*, for example, the Court found that a challenge to the rescission of a deferred action policy did not fall within § 1252(b)(9) because those bringing suit were “not asking for review of an order of removal, the decision . . . to seek removal, or the process by which . . . removability will be determined.”³⁴⁸

Likewise, the district court in *Vasquez Cruz v. Barr* found that because the noncitizen’s objection to continued detention was not directed at any of the three challenges enumerated in *Jennings*, § 1252(b)(9) posed no jurisdictional barrier.³⁴⁹ The same was true in *Al Otro Lado*, where the court allowed challenges to asylum policies to proceed in district court, partially because

³⁴³ *E.O.H.C.*, 950 F.3d at 188.

³⁴⁴ *Id.* at 187.

³⁴⁵ *See, e.g., id.* at 186; *Arroyo*, 2019 WL 2912848, at *13.

³⁴⁶ *See* MANUEL *supra* note 100 (discussing noncitizens’ right to counsel in removal proceedings).

³⁴⁷ *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (Alito, J.) (plurality opinion)

³⁴⁸ *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020). The Court added that § 1252(b)(9) was “certainly not a bar where, as here, the parties are not challenging any removal proceedings.” *Id.* (emphasis added).

³⁴⁹ *Vasquez Cruz v. Barr*, No. 19-05251, 2019 WL 6327576, at *3 (N.D. Cal. Nov. 26, 2019).

they did not implicate any of *Jennings*' three challenges.³⁵⁰ Courts have similarly found that claims challenging the denial of bond petitions,³⁵¹ ICE conduct,³⁵² and an ICE field office detention policy³⁵³ do not fall within one of the three categories and thus fall outside § 1252(b)(9)'s reach.

In contrast, several courts have analogized the claims before them to one of the “three challenges” to find that § 1252(b)(9) bars jurisdiction. This is problematic for several reasons. For one, the Supreme Court has only held that claims that do *not* challenge any of the three categories fall outside the ambit of § 1252(b)(9).³⁵⁴ It has *not* held that the reverse is true—that where claims *do* challenge one of the three categories that they automatically fall within the reach of § 1252(b)(9). In any event, the second and third of the enumerated categories are imprecisely defined.³⁵⁵ Courts using those two categories as the basis for sweeping claims into § 1252(b)(9) risk painting the provision's scope with too broad a brush. It is worthwhile to address each of the “three challenges” in turn, although the first can be disposed of quickly.

a. “Review of an Order of Removal”

The *Jennings* plurality first listed “review of an order of removal” as a challenge swept into § 1252(b)(9).³⁵⁶ This type of challenge is essentially restating the crux of § 1252(b)(9), so it offers nothing new. In fact, such challenges would even be barred under the *Jennings* dissent's interpretation, which reads § 1252(b)(9) quite narrowly.

³⁵⁰ *Al Otro Lado, Inc v. McAleenan*, 432 F. Supp. 3d 848, 863 (S.D. Cal. 2019)

³⁵¹ See *Torosyan v. Nielsen*, No. 18-5873, 2018 WL 5784708, at *3 (C.D. Cal. Sept. 27, 2018) (distinguishing a challenge to decision to detain petitioner without bail from a challenge arising from action taken to remove the petitioner); *Monterosa v. Decker*, No. 20-02653, 2020 WL 1847771 at *2, *4 (S.D.N.Y. Apr. 11, 2020) (finding district court jurisdiction where petitioner challenged his detention without bond).

³⁵² See *Tun-Cos, v. Perrotte*, No. 17-943, 2018 WL 3616863, at *6 (E.D. Va. Apr. 5, 2020) (finding district court jurisdiction in an action seeking damages after law enforcement agents allegedly violated plaintiff's Fourth and Fifth Amendment rights).

³⁵³ See *Aguilar v. U.S. Immigr. & Customs Enf't*, 346 F. Supp. 3d 1174, 1184 (N.D. Ill. 2018) (concluding that § 1252(b)(9) did not bar district court jurisdiction over class action challenges to the conditions of detention).

³⁵⁴ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (Alito, J.) (plurality opinion) (“[I]t is enough to note that respondents are *not* asking for review [of one of the three categories].” (emphasis added)).

³⁵⁵ The second category includes claims challenging the decision to detain or to seek removal in the first place. *Id.* The third category includes claims challenging “any part of the process by which removability will be determined.” *Id.*

³⁵⁶ *Id.*

b. “Decision to Detain [Noncitizens] in the First Place or to Seek Removal”

The second of the three categories of claims are those directed at the “decision to detain [noncitizens] in the first place or to seek removal.”³⁵⁷ Notably, this mirrors the language of § 1252(b)(9)’s neighboring provision, § 1252(g), which bars challenges “arising from the decision or action by the Attorney General to *commence proceedings*, adjudicate cases, or execute removal orders against any alien.”³⁵⁸

Nonetheless, the district court in *Cancino-Castellar* partially relied on this language from *Jennings* to hold that § 1252(b)(9) channeled claims contesting detention without a prompt probable cause determination.³⁵⁹ The court reasoned that the prompt presentment claim “plainly ‘challenges the decision to detain them in the first place’ . . . [because it] expressly challenged ‘decisions to keep persons in custody beyond 48 hours and before their initial Master Calendar Hearing . . . without prompt judicial review.’”³⁶⁰ Even though the claim seems to challenge *how* they were detained—the circumstances of detention—the court folded this claim into the government’s decision to “detain them in the first place” and thus the claim fell within the restrictions of § 1252(b)(9).³⁶¹

Another similar case came out the other way. In *Aguilar v. U.S. Immigration and Customs Enforcement Chicago Field Office*—a case unrelated to the First Circuit’s *Aguilar* decision—plaintiffs brought claims to district court challenging ICE’s policy of failing to promptly initiate removal proceedings, thus forcing people to wait days or weeks in custody before seeing an immigration judge.³⁶² During that period, ICE did not provide detainees a particularized statement of probable cause nor a probable cause determination.³⁶³ These claims were almost identical to those in *Cancino-Castellar*. Despite acknowledging the same “detain in the first place” language from *Jennings*, the court found that § 1252(b)(9) did not apply because the plaintiffs, “like the *Jennings* plaintiffs,” were only challenging the *circumstances* of their detention.³⁶⁴

Reconciling these two cases presents a challenge. One plausible explanation for *Cancino-Castellar*’s reading of § 1252(b)(9) is that unlike those in *Aguilar*, the claims in *Cancino-Castellar*, which fell into § 1252(b)(9), did not involve a “policy

³⁵⁷ *Id.*

³⁵⁸ 8 U.S.C. § 1252(g) (emphasis added); *see also* *Reno v. American-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 483 (1999) (interpreting § 1252(g) narrowly as applying only to the statute’s enumerated actions).

³⁵⁹ *Cancino-Castellar v. Nielsen*, 338 F. Supp. 3d 1107, 1115 (S.D. Cal. 2018) (emphasis added).

³⁶⁰ *Id.*

³⁶¹ *Id.* (citing *Jennings*, 138 S. Ct. at 841 (Alito, J.) (plurality opinion)).

³⁶² *Aguilar v. U.S. Immigr. & Customs Enf’t*, 346 F. Supp. 3d 1174, 1178-81 (N.D. Ill. 2018).

³⁶³ *Id.* at 1179.

³⁶⁴ *Id.* at 1183-84 (citing *Jennings*, 138 S. Ct. at 841 (Alito, J.) (plurality opinion)).

in which individuals are detained without probable cause.”³⁶⁵ Rather, the court in *Cancino-Castellar* characterized the claims as concerning “the mere fact than an immigration officer has taken any action at all against the Plaintiffs and the putative class.”³⁶⁶ But that characterization is divorced from the language of the complaint, which alleged the government had a “policy and practice of detaining individuals for extended periods without promptly presenting them for an initial hearing before an immigration judge.”³⁶⁷

In addition, like those in *Aguilar*, the plaintiffs in *Cancino-Castellar* alleged that individuals “‘routinely languish in detention for two months or longer before they see a judge’ because of [the] alleged policy.”³⁶⁸ Therefore, the claims in *Cancino-Castellar* and *Aguilar* are almost indistinguishable. Whereas one court found them to be challenging circumstances of detention and therefore not barred by § 1252(b)(9), another found them to be challenging the government’s decision to detain or remove noncitizens in the first place and thus swallowed by the provision.³⁶⁹

The foregoing discussion reveals the risk involved in using the second category of the three challenges approach as a reason to sweep claims into § 1252(b)(9). The initial decision to detain a noncitizen could be read broadly, like it was in *Cancino-Castellar*, to encompass claims that are really too remote from removal proceedings.³⁷⁰ Willing courts could read this language so broadly that § 1252(b)(9) would apply to claims challenging ICE’s conduct in its initial stop and detention simply because it could be analogized to a decision to detain individuals “in the first place.”³⁷¹

But it must not be so. Courts should resolve such close calls resulting from this ambiguous language in favor of the noncitizen for two reasons. First, the Supreme Court has consistently recognized a strong presumption in favor of judicial review, especially in the immigration context.³⁷² Second, the Court

³⁶⁵ *Cancino-Castellar v. Nielsen*, 338 F. Supp. 3d 1107, 1115 n.6 (S.D. Cal. 2018) (emphasis added).

³⁶⁶ *Id.* at 1116.

³⁶⁷ *Id.* at 1109 (emphasis added).

³⁶⁸ *Id.* (citing *Jennings*, 138 S. Ct. at 841 (Alito, J.) (plurality opinion)).

³⁶⁹ *Id.* (citing *Jennings*, 138 S. Ct. at 841 (Alito, J.) (plurality opinion)); *Aguilar v. U.S. Immigr. & Customs Enf’t*, 346 F. Supp. 3d 1174, 1184 (N.D. Ill. 2018).

³⁷⁰ *Cancino-Castellar*, 338 F. Supp. 3d at 1114 (quoting Justice Alito’s analysis in *Jennings*, 138 S. Ct. at 841 n.3). Separately, noncitizens with prompt presentment claims may also invoke the timeframe consideration because their claims occur before the initiation of removal proceedings. Moreover, they may also use the illegal conduct consideration from Justice Thomas’s concurrence. Arguably, these claims challenge illegal ICE conduct during pre-hearing detention. See *infra* subsection III.B.5.

³⁷¹ *Cancino-Castellar*, 338 F. Supp. 3d at 1115 (citing *Jennings*, 138 S. Ct. at 841 (Alito, J.) (plurality opinion)).

³⁷² See *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (explaining that the Court has “consistently applied” the “strong” and “well-settled” presumption in favor of judicial review to immigration statutes). See also *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496 (1991)

has now repeatedly urged a narrow reading of “arising from,” and accordingly, when courts employ the second of the “three challenges approach,” they must do so with caution and err on the side of preserving judicial review.³⁷³

c. *“Any Part of the Process by Which [] Removability [Would] Be Determined”*

The third of the “three challenges approach” implicates a small subset of claims that object to the processes “by which . . . removability will be determined.”³⁷⁴

Since *Jennings*, the “third challenge” has been used primarily to channel claims contesting the use of videoconference technology in removal proceedings. *P.L. v. U.S. Immigration and Customs Enforcement* is the leading case and has been cited in two subsequent videoconference technology cases that came out the same way.³⁷⁵ At issue was a new policy adopted by the ICE New York Field Office whereby it would no longer bring detained noncitizens to immigration court but would instead conduct removal proceedings remotely through videoconference technology.³⁷⁶

In addition to technological issues that caused delays, which resulted in longer periods of detention, organizational plaintiffs alleged that the policy prevented them from meaningfully participating in removal proceedings.³⁷⁷ The court determined that, “[h]ow immigrants appear for removal proceedings constitutes part of the process of these proceedings.”³⁷⁸ Thus, § 1252(b)(9) precludes jurisdiction because “Plaintiffs are challenging, by seeking to enjoin, a ‘part of the process by which . . . removability will be determined’”³⁷⁹

(recognizing a “well-settled presumption . . . that allow[s] judicial review of administrative action”) (citing *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 671 (1986)); see also *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962) (refusing to deny judicial review in the absence of “clear and convincing evidence that Congress so intended”); *Benson*, *supra* note 25, at 1458 (“Litigants [trying to evade the strictures of § 1252(b)(9)] will also rely on the long line of cases which hold that courts should narrowly construe statutes which seek to limit judicial review and, absent the express intent of Congress, should preserve review of constitutional challenges.”). *Benson* cites several cases that “reflect the presumption of preserving judicial review, especially for constitutional questions.” *Id.* at 1458-59 n.215.

³⁷³ *Jennings*, 138 S. Ct. at 840-41 (Alito, J.) (plurality opinion) (explaining that the Court must read “capacious phrases” like “arising from” narrowly, as it did in *AADC*); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (describing the provision as “targeted” and “narrow”).

³⁷⁴ *Jennings*, 138 S. Ct. at 841 (Alito, J.) (plurality opinion) (emphasis added).

³⁷⁵ See *Flores Valle v. U.S. Immigr. & Customs Enf’t*, No. 19-2254, 2019 WL 7756069, at *1, *5 (N.D. Tex. Oct. 8, 2019) (challenging the use of videoconference technology in ICE’s Dallas Field Office); *Rivas Rosales v. Barr*, No. 20-00888, 2020 WL 1505682, at *5 (N.D. Cal. Mar. 30, 2020) (challenging the use of videoconference technology in individual removal proceedings).

³⁷⁶ *P.L. v. U.S. Immigr. Customs Enf’t*, No. 19-01336, 2019 WL 2568648, at *1-2 (S.D.N.Y. June 21, 2019).

³⁷⁷ *Id.*

³⁷⁸ *Id.* at *3.

³⁷⁹ *Id.*

Although only a few courts outside the videoconference technology context have explored it,³⁸⁰ this language from *Jennings* must be construed narrowly. Under a broad reading, it could sweep a wide swath of claims into § 1252(b)(9). For example, Efrain and Mia challenged the Trump administration's MPP policy.³⁸¹ In the context of the three challenges approach, the government might have argued that the policy is part and parcel of the process by which removability will be determined—in this instance, at the U.S.-Mexican border. But because this is the type of “cramming judicial review” that would be “absurd,” courts must avoid reading this third category of claims too broadly and overlook that explicit warning from *Jennings*.³⁸²

Claims such as those in the videoconference technology cases may struggle to find their way into federal district court given this language from *Jennings*. Noncitizens could frame videoconference technology or similar claims as challenges to the circumstances of detention, or assert that their right to counsel has been violated, although such arguments failed in *P.L.*³⁸³ Without alternative strategies, though, the third category of the “three challenges approach” seems to sweep these types of claims into the ambit of § 1252(b)(9).

5. Effect on Removal Proceedings

Another factor that courts use when analyzing “arising from” is whether granting relief would have bearing on the underlying merits of removal proceedings. This factor is most frequently used in challenges where a removal order has already become final, but after *Jennings*, a similar consideration has made its way into a small subset of pre-removal order challenges as well.³⁸⁴

For example, a noncitizen challenged his continued detention during removal proceedings on the grounds that he was not subject to mandatory detention.³⁸⁵ The court held that because the resolution of the continued

³⁸⁰ See e.g., *Ali v. Barr*, 464 F. Supp. 3d 549, 558 (S.D.N.Y. 2020) (holding claims that sought to enjoin filing deadlines until after the government lifted the stay-at-home orders related to the pandemic were part of the process by which removability will be determined and thus fell into the scope of § 1252(b)(9)).

³⁸¹ See Brief for Plaintiffs, *supra* note 1.

³⁸² *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (Alito, J.) (plurality opinion).

³⁸³ See *supra* notes 376-379 and accompanying text.

³⁸⁴ See *supra* note 132 (describing cases where courts have deployed § 1252(a)(5) without § 1252(b)(9)).

³⁸⁵ See *Torosyan v. Nielsen*, No. 18-5873, 2018 WL 5784708, at *1 (C.D. Cal. Sept. 27, 2018) (summarizing petitioner's argument that it was unlawful to subject him to mandatory detention, as doing so contravened the text of 8 U.S.C § 1226 and created a “new category of offenses eligible for mandatory detention that Congress did not authorize”).

detention claims “will neither invalidate nor imply the invalidity of any removal order *he might face*,” they cannot be channeled by § 1252(b)(9).³⁸⁶

Likewise, in a challenge to various government asylum policies brought by a number of organizational plaintiffs, the court held § 1252(b)(9) did not foreclose jurisdiction, partially because “Plaintiffs are not challenging any removal order, nor would granting a remedy require any removal order to be overturned.”³⁸⁷ In other words, because the court’s decision would have no effect on any singular removal proceeding, it skirted the reach of § 1252(b)(9).

When this consideration functions to bar claims, it only operates in a small subset of pre-removal order challenges: where no removal order has been issued but some other agency decision has already been made such that granting relief sought would effectively negate that agency decision. Such was the case in *Gomez*, where the district court was confronted with a challenge to the policy of placing applicants for cancellation of removal in a “queue,” rather than immediately issuing a visa.³⁸⁸ The court held § 1252(b)(9) precluded jurisdiction because if the district court were to grant relief, it would “have the effect of negating an order of removal, should one be issued.”³⁸⁹

This consideration must be confined to this narrow group of pre-removal-order cases for two reasons. First, it cannot apply conceptually in most other situations. For this consideration to operate, there must have been some ancillary administrative decision made, overturning which would substantially affect a future removal order. Second, to the extent that it could be applied in other contexts, it might be construed too broadly. Anything *could* have *some* effect on the validity of a future removal order, even if the effect were attenuated. But in the words of the *Jennings* plurality, such claims are “too remote” to be “arising from” removal proceedings.³⁹⁰ Therefore, this consideration has little relevance in pre-removal order challenges.

³⁸⁶ *Id.* at *3 (emphasis added). See also *Tun-Cos, v. Perrotte*, No. 17-943, 2018 WL 3616863, at *6 (E.D. Va. Apr. 5, 2020) (holding that noncitizens’ *Bivens* claims are not channeled by § 1252(b)(9) because their “success or lack of success . . . will have absolutely no effect on the removal proceedings”).

³⁸⁷ *Las Americas Immigrant Advocacy Ctr. v. Trump*, No. 19-20051, 2020 WL 4431682, at *8 (D. Or. July 31, 2020).

³⁸⁸ *Gomez v. McAleenan*, No. 19-04199, 2019 WL 5722619, at *1 (N.D. Cal. Nov. 5, 2019).

³⁸⁹ *Id.* at *4; see also *Nikolic v. Decker*, No. 19-6047-LTS, 2019 WL 5887500, at *2-3 (S.D.N.Y. Nov. 12, 2019) (holding that § 1252(b)(9) channels claims that allege failure to accommodate noncitizen’s disabilities because they “cannot be remedied without first invalidating the final order of removal that has been entered against him,” though it was pending appeal to the Board of Immigration Appeals); *Calmo v. Sessions*, No. C 17-07124, 2018 WL 2938628, at *2 (N.D. Cal. June 12, 2018) (holding that § 1252(b)(9) channels claims that challenge continued detention because “we cannot review one without reviewing the other,” referring to the removal order).

³⁹⁰ *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 n.3 (2018) (Alito, J.) (plurality opinion).

6. An Action Taken or Proceeding Brought

The final consideration pertains not to “arising from” but rather to the language that follows. Section 1252(b)(9) states that the provision only applies to legal questions “arising from *any action taken or proceeding brought to remove* an alien from the United States”³⁹¹ If a noncitizen’s claims do not challenge an “action taken or proceeding brought to remove” her, those claims would necessarily fall outside the ambit of § 1252(b)(9).

The only Supreme Court guidance on this part of the provision comes from Justice Thomas’s concurrence in *Jennings*, which interpreted § 1252(b)(9) extremely broadly. There, Justice Thomas delineated between actions that are “congressionally authorized” or “meant to ensure that an alien can be removed” and those that “go beyond the Government’s lawful pursuit of its removal objective.”³⁹² According to Justice Thomas, claims challenging the former—like those in *Jennings*—are swept into § 1252(b)(9), whereas those challenging the latter likely fall outside the provision’s scope.³⁹³

For example, courts have agreed that § 1252(b)(9) does not bar *Bivens* claims brought by noncitizens that challenge ICE’s allegedly illegal conduct when initially stopping and detaining the noncitizens.³⁹⁴ Drawing from language in Justice Thomas’s concurrence, two courts found it significant that the noncitizens were not challenging conduct that was “congressionally authorized” nor “meant to ensure that an alien can be removed.”³⁹⁵ Instead, the noncitizens were challenging “actions that go beyond the Government’s lawful pursuit of its removal objective[s]” and challenges to such actions cannot be swept into the reach of § 1252(b)(9).

This consideration could be broadened and applied in contexts outside of *Bivens* claims. For example, in the videoconference technology cases discussed above, a noncitizen could argue that indiscriminate deployment of videoconference technology in lieu of in-person hearings is a noncongressionally-authorized action taken to remove a noncitizen.³⁹⁶ Relying on Justice Thomas’s concurrence, a court might reasonably conclude that such a challenge falls outside of the reach of § 1252(b)(9).

³⁹¹ 8 U.S.C. § 1252(b)(9) (emphasis added).

³⁹² *Id.* at 855 (Thomas, J., concurring).

³⁹³ *Id.*

³⁹⁴ See *Tun-Cos, v. Perrotte*, No. 17-943, 2018 WL 3616863, at *6 (E.D. Va. Apr. 5, 2020) (concluding that the plaintiffs’ Fourth and Fifth Amendment claims were outside the scope of § 1252(b)(9)); *Nava v. Dep’t of Homeland Sec.*, 435 F. Supp. 3d 880, 904 (N.D. Ill. 2020) (denying defendant’s motion to dismiss plaintiff’s complaint alleging Fourth Amendment violations for lack of jurisdiction).

³⁹⁵ *Tun-Cos*, 2018 WL 3616863 at *6 (citing *Jennings*, 138 S. Ct. at 855 (Thomas, J., concurring); see also *Nava*, 435 F. Supp. 3d at 891 (“[I]n *Jennings*, the Court’s discussion of detention as an action taken to remove a non-citizen appears to have contemplated *lawful* detention.”) (emphasis in original)).

³⁹⁶ See *supra* note 375 and accompanying text (discussing videoconference technology cases).

CONCLUSION

The Supreme Court took an important step in *Jennings* to narrow the scope of § 1252(b)(9). But because it failed to provide a comprehensive interpretation of the provision, lower courts have been tasked with effectuating the narrow reading *Jennings* counsels. This Comment seeks to provide those courts with the tools necessary to effectuate that reading.

Whether lower courts interpret § 1252(b)(9) narrowly is not merely a matter of adhering to Supreme Court precedent. Their reading of the provision has significant practical consequences for noncitizens, who must frequently seek urgent relief in federal district court. Whether it is a group of hundreds of noncitizen workers rounded up in an ICE raid and fast-tracked for deportation, or a father and daughter facing imminent expulsion to Mexico, the federal district court is often the best and potentially only forum where noncitizens can meaningfully seek relief. But when an executive can take harsh action against noncitizens and then wield § 1252(b)(9) to preclude any judicial review of its alleged abuses, immigrants are mired in a catch-22.

For that reason, it is essential that § 1252(b)(9)—and provisions like it—are read narrowly. *Jennings* was an important step, but more must be done. Federal courts now must clearly and consistently apply a narrow interpretation of § 1252(b)(9) to ensure noncitizens have fundamental access to justice. The difference, after all, can be one of life and death.

APPENDIX: CHART OF MAJOR § 1252(b)(9) CASES SINCE *JENNINGS*

This chart, recent as of November 17, 2020, compiles all the non-Supreme Court cases since *Jennings* that cite and discuss § 1252(b)(9) with some level of detail. Those that merely cite the provision or mention it only in passing are not included in this chart. The chart is organized first by the type of claim, with the intent that similar claims appear in consecutive order, and then by jurisdiction, which is organized by circuit.

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING Jennings OR Regents?
Hussein v. Brackett, No. 18-273, 2018 WL 2248513, at *3-4 (D.N.H. May 16, 2018)	1st	Challenging asylum decision, right to reopen, and detention	Yes	<ul style="list-style-type: none"> Asylum claim "arises from" because INA violated only if removal order executed Right to reopen "arises from" because right exists because of removal order Detention "arises from" because he would not be detained without order 	No
E. Bay Sanctuary v. Trump, 950 F.3d 1242, 1269-71 (9th Cir. 2020)	9th	Challenging asylum policy	No	<ul style="list-style-type: none"> The provision applies "only to removal orders" and because a bar to asylum eligibility is not linked with removal orders and thus (b)(9) is irrelevant 	No
Al Otro Lado, Inc. v. McAleenan, 423 F. Supp. 3d 848, 862-63 (S.D. Cal. 2019)	9th	Challenging asylum policy	No	<ul style="list-style-type: none"> Not challenging removal order, decision to seek removal, or any step that has been taken to determine removability Plaintiffs seek to <i>commence</i> such proceedings 	Yes
Las Americas Immigrant Advoc. Ctr. v. Trump, No. 19-02051, 2020 WL 4431682, at *6-8 (D. Or. July 31, 2020)	9th	Challenging asylum policy	No (except claim re: asylum-free zones)	<ul style="list-style-type: none"> Claims do not plainly challenge any decision to detain an alien Plaintiffs not challenging any removal order, nor would granting a remedy require any removal order to be overturned Plaintiffs challenge immigration <i>process</i> Plaintiffs do not have access to PFR process for their asserted claims 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
Cap. Area Immigrants' Rts. Coal. v. Trump, No. 19-2117, 2020 WL 3542481, at *8 (D.D.C. June 30, 2020)	D.C.	Challenging asylum policy	No	<ul style="list-style-type: none"> No support for proposition that organizations may not facially challenge under the APA immigration-related regulations that harm their own interests No removal proceedings at issue here so provision is not implicated 	Yes
O.A. v. Trump, 404 F. Supp. 3d 109, 128-38 (D.D.C. 2019)	D.C.	Challenging asylum policy	No	<ul style="list-style-type: none"> The challenged Rule is not an "action taken . . . to remove an alien" and was not promulgated as part of a removal proceeding Not "arising from" removal proceedings but from the challenged rulemaking Congress did not intend for (b)(9) to swallow APA challenges to rulemaking Collateral challenge Reviewability concerns Challenges outside competence/expertise of asylum officers, immigration judges, and BIA 	Yes
Urbina v. Barr, No. 20-235, 2020 WL 3002344, at *4-5 (E.D. Va. June 4, 2020)	4th.	Challenging BIA's removability decision	Yes	<ul style="list-style-type: none"> BIA's removability decision "arises from" his removal proceedings Plaintiff can challenge removability in petition for review 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
<i>Ndaula v. Hoover</i> , No. 19-1152, 2020 WL 996761, at *3-4 (M.D. Pa. Mar. 2, 2020)	3d	Challenging BIA's sua sponte decision to reopen and remand removal proceedings	No	<ul style="list-style-type: none"> • Petitioner is not seeking to challenge a final order of removal • <i>Chehazeh</i> did not preclude review in district court of BIA's sua sponte decision to reopen removal proceedings 	No
<i>Torres v. Dep't of Homeland Sec.</i> , 411 F. Supp. 3d 1036, 1046-49 (C.D. Cal. 2019)	9th	Challenging conditions of confinement and claiming right to counsel	No	<ul style="list-style-type: none"> • Primarily conditions-of-confinement claims and <i>Aguiar</i>, upon which <i>J.E.F.M.</i> relies, assumed claims regarding detention conditions are independent of removal proceedings • Extending <i>Arroyo</i> to both represented and unrepresented plaintiffs because relationships burdened with regard to non-removal immigration proceedings • Immigration judges have limited power over claims 	Yes
<i>Innovation L. Lab v. Nielsen</i> , 342 F. Supp. 3d 1067 (D. Or. 2018)	9th.	Challenging conditions of pre-hearing detention	No	<ul style="list-style-type: none"> • No challenge to removal proceedings because they have not yet commenced • The mere fact that a noncitizen has been detained does not mean that (b)(9) presents a bar to all claims arising from circumstances of that detention 	Yes
<i>Ramos v. Sessions</i> , 293 F. Supp. 3d 1021, 1076-78 (N.D. Cal. 2018)	9th	Challenging continued detention (after denial of bond petitions)	No	<ul style="list-style-type: none"> • <i>Jennings</i> affirmed that (b)(9) is not a jurisdictional bar to habeas cases challenging denial of bond • <i>Jennings</i> confirmed that bond petitions are not challenging decision to detain in first place or to seek removal 	Yes
<i>Malam v. Adducci</i> , 452 F. Supp. 3d 643, 653 (E.D. Mich. 2020)	6th	Challenging continued detention (alleging due process concerns in bond hearings)	No	<ul style="list-style-type: none"> • <i>Jennings</i> is on point because here claims challenge continued detention 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
<i>Calmo v. Sessions</i> , No. C 17-07124, 2018 WL 2938628, at *2 (N.D. Cal. June 12, 2018)	9th.	Challenging continued detention (alleging due process concerns in bond hearings)	Yes	<ul style="list-style-type: none"> Though claims only seek relief from immigration detention without reaching merits of the order of removal, they are “wholly intertwined” with merits of removal order 	No
<i>Aguayo v. Martinez</i> , No. 20-00825, 2020 WL 2395638, at *4 (D. Colo. May 12, 2020)	1st	Challenging continued detention (because alleges not subject to mandatory detention)	No	<ul style="list-style-type: none"> Plaintiff challenges interpretation and application of statute that was made during pending removal proceedings Plaintiff challenges decision to detain him in the first place 	Yes
<i>Sophia v. Decker</i> , No. 19-9599, 2020 WL 764279, at *1-2 (S.D.N.Y. Feb. 14, 2020)	2d	Challenging continued detention (because alleges not subject to mandatory detention)	Yes	<ul style="list-style-type: none"> Alleged legal error is a question of law, and provision is not limited to questions of law that would in fact determine removability 	No
<i>Vasquez Cruz v. Barr</i> , No. 19-05251, 2019 WL 6327576, at *3-4 (N.D. Cal. Nov. 26, 2019)	9th.	Challenging continued detention (because alleges not subject to mandatory detention)	No	<ul style="list-style-type: none"> Claims are not directed at any of those listed in <i>Jennings</i> plurality Holding otherwise would insulate agency from review of decision to detain 	Yes
<i>Torosyan v. Nielsen</i> , No. 18-5873, 2018 WL 5784708, at *3-6 (C.D. Cal. Sept. 27, 2018)	9th	Challenging continued detention (because alleges not subject to mandatory detention)	No	<ul style="list-style-type: none"> Merely challenging detention decision on statutory grounds that, whether upheld or rejected, will neither invalidate nor imply the invalidity of any removal order he might face 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
<i>Msezane v. Gartland</i> , No. 19-51, 2020 WL 1042293, at *5-6 (S.D. Ga., Jan. 29, 2020)	11th	Challenging continued detention (while challenge to removal pends because claims US citizenship)	No	<ul style="list-style-type: none"> Allowing alien to avoid detention while removal proceedings are ongoing based only on a claim of citizenship would render entire statutory framework invalid 	Yes
<i>Duncan v. Kavanagh</i> , 439 F. Supp. 3d 576, 582-87 (D. Md. 2020)	4th	Challenging continued detention (while challenge to removal pends because claims US citizenship)	Yes	<ul style="list-style-type: none"> Citizenship claim is not one of those “unusual circumstances” in the Ninth Circuit that justified departure from statutory scheme 	No
<i>Michalski v. Decker</i> , 279 F. Supp.3d 487, 492-94 (S.D.N.Y. 2018)	2d	Challenging continued detention (without probable cause determination)	No	<ul style="list-style-type: none"> Plaintiff cannot be challenging an order of removal for the “common-sense reason” that he is not yet subject to one 	No
<i>Monterosa v. Decker</i> , No. 20-02653, 2020 WL 1847771, at *4 (S.D.N.Y. Apr. 11, 2020)	2d	Challenging continued detention during COVID-19 pandemic	No	<ul style="list-style-type: none"> Plaintiff’s challenge does not fall into any of the three categories barred in <i>Jennings</i> 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec., No. 18-760, 2020 WL 3265533, at *14-17 (D.D.C. June 17, 2020)	D.C.	Challenging conditions of confinement during COVID-19 (court does not consider access to counsel claims)	No	<ul style="list-style-type: none"> Plaintiff does not challenge a final removal order; these claims are analogous to the conditions of confinement claims that plurality opinion in <i>Jennings</i> highlighted as collateral Interpreting (b)(9) to reach these claims would be problematic because IJs are "powerless to remedy the conditions alleged" 	Yes
Moran v. U.S. Dep't of Homeland Sec., No. 20-00696, 2020 WL 6083445, at *6-7 (C.D. Cal. Aug. 21, 2020)	9th	Challenging continued detention during COVID-19 pandemic	No	<ul style="list-style-type: none"> Claims are independent of removal process 	Yes
Casa De Md. v. Dep't of Homeland Sec., 924 F.3d 684, 697 (4th Cir. 2019)	4th	Challenging DACA rescission	No	<ul style="list-style-type: none"> Section (b)(9) does not help government because it "applies only with respect to review of an <i>order of removal</i> under (a)(1)" 	No
Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 504 n.19 (9th Cir. 2018), <i>aff'd in part</i> 140 S. Ct. 1891, 1907 (2020)	9th	Challenging DACA rescission	No	<ul style="list-style-type: none"> Not challenging a final order of removal 	No

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CLAIMS OR <i>Jennings</i> OR <i>Regents</i> ?
Inland Empire— Immigrant Youth Collective v. Nielsen, No. 17-2048, 2018 WL 4998230, *12-16 (C.D. Cal. Apr. 19, 2018)	9th	Challenging DACA rescission	No	<ul style="list-style-type: none"> Immigration judge does not have power to handle deferred action Claims not “arising from” because challenging a decision completely separate from removal proceedings 	Yes
Canal A Media Holding, LLC v. U.S. Citizenship and Immigr. Servs., 964 F.3d 1250, 1257-58 (11th Cir. 2020)	11th	Challenging denial of intracompany executive transferee visa request	No	<ul style="list-style-type: none"> No challenge to removal proceedings “District Court’s expansive interpretation of the zipper clause does not square with that provision’s ‘narrow’ scope” 	Yes
Nikolic v. Decker, No. 19-6047, 2019 WL 5887500, at *3 (S.D.N.Y. Nov. 12, 2019)	2d	Challenging failure to accommodate disability while detained	Yes	<ul style="list-style-type: none"> Claims are “arising from” because petitioner explicitly challenges removal process Claims cannot be remedied without first invalidating final order of removal (though appeal to BIA pending) 	No
Nak Kim Chhoeun v. Marin, No. 17-01898, 2018 WL 1941756, at *4-5 (C.D. Cal. Mar. 26, 2018)	9th	Challenging ICE’s conduct in initial stop and detention (“rounded up” 100 Cambodian nationals)	No	<ul style="list-style-type: none"> Claims do not challenge any final order of removal, but rather challenge ICE’s conduct before they could challenge removal orders 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
<i>Neufville v. Barr</i> , No. 19-292, 2019 WL 5537947, at *1 (D.R.I. Oct. 25, 2019)	D.C.	Challenging ICE's conduct in initial stop and detention ("unlawful seizure")	Yes	<ul style="list-style-type: none"> Review of removal orders " includes all matters on which the validity of the final order is contingent" and here claims must be sought through PFR 	No
<i>Ton-Cos v. Perrotte</i> , No. 17-943, 2018 WL 3616863, at *3-7 (E.D. Va. Apr. 5, 2018) <i>rev'd on other grounds</i> , 922 F.3d 514 (4th Cir. 2019)	9th	Challenging ICE's conduct in initial stop and detention (home invasion)	No	<ul style="list-style-type: none"> Seeking damages, not challenging the three listed in <i>Jennings</i> plurality Accords with <i>Jennings</i> concurrence because challenging unlawful conduct Success in this action will have "absolutely no effect" on removal proceedings Removal proceedings cannot provide relief they seek 	Yes
<i>Nava v. Dep't of Homeland Sec.</i> , 435 F. Supp. 3d 880, 888-95 (N.D. Ill. 2020)	4th	Challenging ICE's conduct in initial stop and detention (illegal stop and search)	No	<ul style="list-style-type: none"> "An illegal stop conducted before government has any legitimate reason to believe subject is removable cannot be an 'action taken . . . to remove an alien'" Accords with <i>Jennings</i> concurrence because challenging unlawful conduct Claims "collateral," PFR would be "absurd" result Reviewability not sufficient here 	Yes
<i>Aguilar v. U.S. Immigr. & Customs Enf't</i> , 346 F. Supp. 3d 1174, 1183-84 (N.D. Ill. 2018)	7th	Challenging ICE's policy of delaying issuance of NTA	No	<ul style="list-style-type: none"> Because plaintiffs, like those in <i>Jennings</i>, only challenge circumstances of their detention, (b)(9) is inapplicable 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
Velazquez-Hernandez v. U.S. Immigr. & Customs Enf't, No. 20-2060, 2020 WL 6712223, at *3 (S.D. Cal. Nov. 16, 2020)	9th	Challenging ICE's practice of arresting noncitizens in federal courthouse	No	<ul style="list-style-type: none"> The provision is "targeted" and "narrow" and is not a bar where, as here, parties are not challenging any removal proceedings 	Yes
Alam v. Nielsen, 312 F. Supp. 3d 574, 580 (S.D. Tex. 2018)	5th	Challenging ICE's procedure to revoke order of supervision	No	<ul style="list-style-type: none"> Claims do not challenge order of removal, but rather the process that ICE followed in cancelling Order of Supervision and returning plaintiff to detention 	Yes
NWDC Resistance v. Immigr. & Customs Enf't, No. 18-5860 2020 WL 5981998, at *5-8 (W.D. Wash. Oct. 8, 2020)	9th	Challenging ICE's selective enforcement policy as unconstitutional and in violation of APA	No	<ul style="list-style-type: none"> Noting that <i>Jennings</i> narrowed Ninth Circuit precedent and holding that (b)(9) is inapplicable to claims that do not challenge any removal order or part of the process by which removability would be determined 	Yes
Gonzalez v. United States Immigr. and Customs Enf't, 975 F.3d 788, 810-11 (9th Cir. 2020)	9th	Challenging ICE's use of immigration detainers	No	<ul style="list-style-type: none"> Class of plaintiffs is not challenging "any removal proceedings" and they are challenging the legality of detention, which is outside the provision's scope 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING Jennings OR Regents?
Roy v. Los Angeles Cnty., No. 12-09012, 2018 WL 914773, at *17-19 (C.D. Cal. Feb 7, 2018)	9th	Challenging ICE's use of immigration of detainees	No	<ul style="list-style-type: none"> Claims relate to ICE officers' actions before removal proceedings were filed, do not seek to disrupt outcome of removal proceedings, thus independent of removal process Reviewability concern for those who never will be in removal proceedings 	No
Gomez v. McAleenan, No. 19-04199, 2019 WL 5722619, at *3-4 (N.D. Cal. Nov. 5, 2019)	9th	Challenging policy of putting applicants in "queue" for cancellation	Yes	<ul style="list-style-type: none"> Since claims ask for relief that will have effect of negating an order of removal, should one be issued, they must be brought through PFR 	No
Sanchez v. McAleenan, No. 19-4728, 2020 WL 607032, at *5 (D. Md. Feb 7, 2020)	4th	Challenging practice of detaining noncitizens who come to USCIS for waiver interview (see I-130 cases)	No	<ul style="list-style-type: none"> Claims "arise from" not an "action taken" but from allegation that DHS has adopted new policy that nullifies its own rules 	No
Cancino-Castellar v. Nielsen, 338 F. Supp. 3d 1107, 1110-18 (S.D. Cal. 2018)	9th	Challenging probable cause determination and prompt presentment	Yes/No	<ul style="list-style-type: none"> Fourth Amendment probable cause claims "arising from" because challenge decision to detain them in the first place and to seek removal. Reviewability not the inquiry and any remedy would impede removal proceedings Fifth Amendment prompt presentment claims do not "arise from" because challenging conduct of immigration authorities delaying removal process, thus, essentially prolonged detention 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING Jennings OR Regents?
Hesketh R. v. Warden, No. 18-15172, 2019 WL 1466904, at *2 (D.N.J. Apr. 2, 2019)	3d	Challenging process of removal proceedings	Yes	<ul style="list-style-type: none"> Claims are directed “not at his detention, but instead at his removal proceedings” <i>Verde-Rodriguez</i> is on point and dispositive 	No
Benitez-Garry v. Dep’t of Homeland Sec., No. 18-422, 2019 WL 542035, at *5-6 (W.D. Tex. Feb. 8, 2019)	5th	Challenging process of removal proceedings	Yes	<ul style="list-style-type: none"> Claims all relate to validity of IJ decision to deny withholding from removal; all issues upon which validity of order of removal is contingent and relief would be inconsistent with removal order 	No
Cheema v. Curran, No. 17-3692, 2018 WL 2090719, at *2-5 (D. Ariz. Apr. 11, 2018)	9th	Challenging process of removal proceedings, ineffective assistance of counsel	Yes	<ul style="list-style-type: none"> Both claims concern effectiveness of counsel in removal proceedings, thus they challenge procedure of agency determination and are “inextricably linked” to removal order 	No
Huiwu Lai v. United States, No. 17-1704, 2018 WL 1610189, at *2-4 (W.D. Wash. Apr. 3, 2018)	9th	Challenging revocation of Green Card	No	<ul style="list-style-type: none"> “Absent relief from this Court, Plaintiff may not have an opportunity for relief for some of his claims” 	No

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
Diaz-Ceja v. McAleenan, No. 19-00824, 2019 WL 2774211, at *13 (D. Col. July 2, 2019)	10th	Challenging sufficiency of NTA	No	<ul style="list-style-type: none"> NTA itself is not a final order of removal nor is it an antecedent finding of “fact or law” to such an order under the provision 	No
Asylum Seeker Advocacy Project v. Barr, 409 F.Supp.3d 221, 224-228 (S.D.N.Y. 2019)	2d	Challenging sufficiency of NTA	Yes	<ul style="list-style-type: none"> Relief that plaintiffs seek is a “necessary prerequisite” to challenge removal order and such indirect challenges are barred Challenging two of the three problematic claims set out in <i>Jennings</i> plurality 	Yes
Rikey R. v. Sessions, No. 18-15613, 2018 WL 5962479, at *1-2 (D.N.J. Nov. 13, 2018)	3d	Challenging sufficiency of NTA	Yes	<ul style="list-style-type: none"> Once an alien is subject to final order of removal, district court is without jurisdiction, so because petitioner is subject to such an order, must go through PFR process 	No
Patel v. Wolf, 427 F. Supp. 3d 161, 165-66 (D. Mass. 2019)	1st	Challenging USCIS decision to dismiss adjustment of status application for lack of SMJ	Yes	<ul style="list-style-type: none"> Claims inextricably linked to removal order because if relief granted, would invalidate removal order 	No

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
Santa Maria v. McAleenan, No. 18-3996, 2019 WL 2120725, at *2-3 (S.D. Tex. May 15, 2019)	5th	Challenging USCIS decision to dismiss adjustment of status application for lack of SMJ	Yes	<ul style="list-style-type: none"> Because USCIS closed application based on the removal order, challenge is inextricably linked to removal order's continuing validity Claims inextricably linked to removal order because if relief granted, would invalidate removal order 	No
Isaula v. Nielson, No. 18-2992, 2019 WL 93307, at *2-3 (S.D. Tex. Jan. 3, 2019)	5th	Challenging USCIS decision to dismiss adjustment of status application for lack of SMJ	Yes	<ul style="list-style-type: none"> Because USCIS decision to close application is based on removal order, challenge to that decision is "inextricably linked" to determination relating to order 	No
Herbert L.R. v. Tritten, 421 F. Supp. 3d 688, 692-94 (D. Minn. 2019)	8th	Challenging USCIS decision to dismiss adjustment of status application for lack of SMJ	Yes	<ul style="list-style-type: none"> Claims challenge the procedure and substance of USCIS' s decision to close application, which was based on his removal order and related removal proceedings Though favorable resolution of APA claim would not <i>per se</i> prevent removal, claim is necessary prerequisite to adjusting his status 	No
Flores Valle v. U.S. Immigr. & Customs Enf't, No. 19-2254, 2019 WL 7756069, at *1-6 (N.D. Tex. Oct. 8, 2019)	5th	Challenging use of video conference (VTC) (challenge to Dallas office policy)	Yes	<ul style="list-style-type: none"> Claims challenge a " part of the process by which . . . removability will be determined" per <i>Jennings</i> Review will remain available to them through PFR process 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
<i>P.L. v. U.S. Imigr. & Customs Enf't</i> , No. 19-01336, 2019 WL 2568648, at *2-4 (S.D.N.Y. June 21, 2019)	2d	Challenging use of video conference (VTC) (challenge to NY office policy)	Yes	<ul style="list-style-type: none"> Claims challenge a "part of the process by which . . . removability will be determined" per <i>Jennings</i> 	Yes
<i>Rivas Rosales v. Barr</i> , No. 20-00888, 2020 WL 1505682, at *4-9 (N.D. Cal. Mar. 30, 2020)	9th	Challenging use of video conference (VTC) (individual challenge)	Yes	<ul style="list-style-type: none"> Joining <i>P.L.</i> and <i>Flores Valle</i> Claims challenge procedure utilized within immigration proceedings; they are "inextricably intertwined" with process 	Yes
<i>Candra v. Cronen</i> , 361 F. Supp. 3d 148, 155-58 (D. Mass. 2019)	1st	Claiming familial association	No	<ul style="list-style-type: none"> Claims fall outside administrative process because unclear how children could assert their separate rights under Constitution or APA in their father's removal proceedings 	No
<i>Cooper Butt ex rel. Q.T.R. v. Barr</i> , 954 F.3d 901, 905-07 (6th Cir. 2020)	6th	Claiming familial association	Yes	<ul style="list-style-type: none"> Relief sought cannot be granted by federal court because it would interfere with removal order 	No
<i>Duron v. Johnson</i> , 898 F.3d 644, 646-47 (5th Cir. 2018)	5th	Claiming familial association and selective enforcement	Yes/No	<ul style="list-style-type: none"> Familial association barred because relief sought is stop removal and courts "routinely consider" constitutional claims via PFR Selective enforcement not barred because could not be raised in initial removal proceedings 	No

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
Reyna v. Hott, No. 17-01192, 2018 WL 3551558, at *3 (E.D. Va., Mar. 20, 2018)	4th	Claiming family integrity after detention transfer	No	<ul style="list-style-type: none"> • <i>Jennings</i> plurality and dissent construed (b)(9) narrowly • Accords with <i>Jennings</i> concurrence because challenging <i>unlawful</i> conduct 	Yes
Conteh v. Wolf, No. 20-10736, 2020 WL 6363910, at *4-8 (D. Mass. Oct. 29, 2020)	1st	Claiming right to be present at proceedings after removal	Yes	<ul style="list-style-type: none"> • Challenging the “process by which his removability will be determined” because he is seeking to fight removal in person as opposed to via videoconference, since he was already removed • Indistinguishable from <i>Anaya Murcia</i>, where section 1252(b)(9) precluded claims 	Yes
Avilez v. Barr, No. 19-08296, 2020 WL 570987, at *2-4 (N.D. Cal. Feb. 5, 2020)	9th	Claiming right to counsel after detention transfer	Yes	<ul style="list-style-type: none"> • <i>F.J.E. F.M.</i> and <i>Alvarez</i> are on point • <i>Arroyo</i> is unpersuasive and contrary to broad language of <i>J.E. F.M.</i> 	No
Alvarez v. Sessions, 338 F. Supp. 3d. 1042, 1046-50 (N.D. Cal. 2018)	9th	Claiming right to counsel after detention transfer	Yes	<ul style="list-style-type: none"> • <i>J.E. F.M.</i> on point • <i>Jennings</i> offers no assistance because still “arising from,” creates no absurdity, and no preclusion of meaningful judicial review • Analysis does not change depending civil or habeas claims 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
<i>Arroyo v. DHS</i> , No. 19-815, 2019 WL 2912848, at *12-17 (C.D. Cal. June 20, 2019)	9th	Claiming right to counsel after detention transfer	Yes/No	<ul style="list-style-type: none"> • Represented not barred because counsel relationship carries additional rights separate from removal proceedings, thus harm accrues immediately upon transfer, without effect on removal proceedings • Unrepresented barred because rights cannot be violated without reference to underlying fairness of removal proceeding and not unreviewable because can be brought via PFR 	Yes
<i>E.O.H.C. v. Sec'y of United States Dept of Homeland Sec.</i> , 950 F.3d 177, 184-88 (3d Cir. 2020)	3d	Claiming right to counsel and challenging MPP and non- <i>refoulement</i>	Yes/No	<ul style="list-style-type: none"> • MPP and <i>non-refoulement</i> claims not barred because by time of final order, too late to remedy return to Mexico • Constitutional counsel claim does not “arise from” removal proceedings and cannot await later review • Statutory counsel claim barred because the right is tied to removal proceedings themselves 	Yes
<i>Anaya Murcia v. Godfrey</i> , No. 19-587, 2019 WL 5597883, at *3-8 (W.D. Wash. Oct. 10, 2019)	9th	Claiming right to counsel and right to be present at proceedings after removal	Yes	<ul style="list-style-type: none"> • Following the <i>Jennings</i> plurality, must first identify legal questions, which are all challenging the removal proceeding • Declining to follow <i>Arroyo</i> 	Yes
<i>Nat'l Immigr. Project of Nat'l Laws. Guild v. Exec. Off. of Immigr. Rev.</i> , 456 F. Supp. 3d 16, 29-30 (D.D.C. 2020)	D.C.	Claiming right to counsel during COVID-19 pandemic	Yes	<ul style="list-style-type: none"> • Claims arise from the course of removal hearings • Whether there has been a violation of right to counsel will depend on specific facts that arise from removal proceedings 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
<i>Paz v. California</i> , No. 16-0003, 2019 WL 1581418, at *4 (C.D. Cal. Feb. 11, 2019)	9th	Claims unclear: challenging legality of detention	Yes	<ul style="list-style-type: none"> PFR is the exclusive means to directly challenge a final removal order 	No
<i>Patel v. Barr</i> , No. 20-3856, 2020 WL 4700636, at *3-4 (E.D. Pa. Aug. 13, 2020)	3d	Seeking order compelling BIA to decide pending motions and stay of removal	No	<ul style="list-style-type: none"> Claims do not plainly challenge any decision to detain an alien Plaintiffs not challenging any removal order, nor would granting a remedy require any removal order to be overturned Plaintiffs challenge immigration process Plaintiffs do not have access to PFR process for their asserted claims (i.e., reviewability concerns) 	Yes
<i>A.M.P.V. v. Barr</i> , No. 20-913, 2020 WL 2079433, at *4-6 (D.D.C. Apr. 30, 2020)	D.C.	Seeking stay of removal	Yes	<ul style="list-style-type: none"> Claims squarely challenging a final order of removal 	No
<i>Tazu v. Att’y Gen. U.S.</i> , 975 F.3d 292, 299 (3d Cir. 2020)	3d	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	Yes	<ul style="list-style-type: none"> Plaintiff’s brief re-detention was part of the process of removing him back to his home country and the legal questions he raises “arise from” that “action taken” 	No
<i>Villanueva-Bustillos v. Marin</i> , 370 F. Supp. 3d 1083, 1089 (C.D. Cal. 2018)	9th	Seeking stay of removal, grant of credible fear interview, and issuance of NTA	No	<ul style="list-style-type: none"> Concern that petitioner will not have an opportunity for a full and fair hearing and lack of meaningful review 	No

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
<i>Jimenez v. Nielsen</i> , 334 F. Supp.3d 370, 381-82 (D. Mass. 2018)	1st	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	No	<ul style="list-style-type: none"> No other means to have claims decided by court of appeal Immigration court cannot grant relief and court of appeals cannot hear claim 	No
<i>Compere v. Nielsen</i> , 358 F. Supp. 3d 170, 177 (D.N.H. 2019)	1st	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (changed circumstances)	Yes	<ul style="list-style-type: none"> Claims arise directly from removal proceedings 	Yes
<i>Calderon v. Sessions</i> , 330 F. Supp.3d 944, 955-56 (S.D.N.Y. 2018)	2d	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	No	<ul style="list-style-type: none"> Claims are neither direct nor indirect challenges to his removal order because merely seeks access to immigration process 	No
<i>You, Xiu Qing v. Nielsen</i> , 321 F. Supp.3d 451, 456-60 (S.D.N.Y. 2018)	2d	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	No	<ul style="list-style-type: none"> "Cramming" claims here into a PFR would render them "effectively unreviewable" This is independent from a challenge to removal order 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING Jennings OR Regents?
Mamadjonova v. Barr, No. 19-01317 2019 WL 6174678, at *3-7 (D. Conn. Nov. 20, 2019)	2d	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	Yes	<ul style="list-style-type: none"> Indirect challenge to removal order because seeking to have court stay removal so he can more easily pursue unlawful presence waiver, with ultimate goal of staying in US (i.e., not being removed) 	No
M'Bagoyi v. Barr, 423 F. Supp. 3d 99, 104-07 (M.D. Pa. 2019)	3d	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	No	<ul style="list-style-type: none"> Claims not directly or indirectly challenging validity of the order of removal because even if relief is granted, order of removal remains untouched 	No
De Jesus Martinez v. Nielsen, 341 F. Supp. 3d 400, 406-08 (D.N.J. 2018)	3d	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	No	<ul style="list-style-type: none"> Plaintiff challenges merits of a <i>separate</i> proceeding, specifically that he has right to engage in provisional waiver process <i>before</i> removal 	Yes
Wanrong Lin v. Nielsen, 377 F. Supp. 3d 556, 561-62 (D. Md. 2019)	4th	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	No	<ul style="list-style-type: none"> Claims could not be raised in immigration court or the BIA, as the relief sought can only be secured <i>after</i> such a court has issued a removal order Claims do not "arise from" an "action taken" but from allegation that DHS has adopted new policy that nullifies its own rules 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
Chhoeun v. Marin, 306 F. Supp. 3d 1147, 1157-58 (C.D. Cal. 2018)	9th	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	No	<ul style="list-style-type: none"> Claims do not seek review of viability of removal orders Indirect challenge to removal order because petitioner merely seeks a "day in court" 	No
Chaudhry v. Barr, No. 19-0682, 2019 WL 3713762, at *7 (E.D. Cal. Aug. 7, 2019)	9th	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (changed circumstances)	No	<ul style="list-style-type: none"> Petitioner is not raising a direct challenge to an order of removal If granted, removal order would not be vacated, but rather a "day in court" 	No
Sied v. Nielsen, No. 17-06785, 2018 WL 1142202, at *11-19 (N.D. Cal. Mar. 2, 2018)	9th	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (changed circumstances)	No	<ul style="list-style-type: none"> Grounds for petition arose only <i>after</i> removal order was entered Indirect challenge to removal order because petitioner merely seeks a "day in court" 	Yes
Ketsoyan v. DOJ, No. 19-01198, 2019 WL 4261881 at *3-4 (C.D. Cal. July 2, 2019)	9th	Seeking stay of removal or challenging detention while trying to reopen case/adjust status (I-130)	No	<ul style="list-style-type: none"> Claims seek interference with execution of final order of removal Claims <i>are</i> challenging potential detention pursuant to removal, which is one of the <i>Jennings</i> challenges 	Yes

CASE	CIR.	CLAIMS	(B)(9) BARS CLAIMS?	REASONING	CITING <i>Jennings</i> OR <i>Regents</i> ?
Sergio S.E. v. Rodriguez, No. 20-6751, 2020 WL 5494682, at *3-5 (D.N.J. Sept. 11, 2020)	3d	Seeking stay of removal while T Visa is decided on the merits	No	<ul style="list-style-type: none"> If plaintiff is removed, he will become ineligible for T Visa and thus his claims are “now or never” 	Yes
Ali v. Barr, No. 20-3337, 2020 WL 2986692, at *4-5 (S.D.N.Y. June 3, 2020)	2d	Seeking to enjoin filing deadlines until after stay-at-home orders are lifted (re: COVID-19)	Yes	<ul style="list-style-type: none"> Claims here are part of the process by which removability will be determined 	Yes