No. 20-1010

IN THE

# Supreme Court of the United States

DED RRANXBURGAJ, PETITIONER,

*v.*

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

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

## BRIEF FOR THE RUTHERFORD INSTITUTE AMICUS CURIAE IN SUPPORT OF PETITIONER


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## INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by John W. Whitehead, the Rutherford Institute provides legal representation without charge to individuals whose civil liberties are threatened or infringed, and educates the public about constitutional and human-rights issues. The Rutherford Institute is interested in the resolution of this case because the case is about shutting the courthouse door to someone who is entitled to judicial review of legal issues that are outside the proper purview of the administrative agency. Everyone's civil liberties are at risk when agency authority is allowed to exceed the agency's proper limited role and when a jurisdiction-stripping statute is construed broadly to expand an agency's unreviewable authority. The Rutherford Institute files in support of a grant of certiorari and for reversal of the decision below.

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[1] Counsel of record to the parties in this case have consented to the filing of this amicus brief. Under Rule 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to the brief's preparation or submission.

## SUMMARY OF ARGUMENT

1. The Sixth Circuit's broad interpretation of "arising from" in 8 U.S.C. §1252(g) is inconsistent with this Court's precedents and core principles of separation of powers.

First, the plain meaning of "arising from" is that the challenged action was the consequence of another action, not the antecedent of that other action. That important limitation on the stripping of jurisdiction should not be ignored.

Second, in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 486 (1999), the Court wrote that Section 1252(g) was narrowly targeted to limit judicial interference with prosecutorial discretion. The Court did not suggest that the statute could or would remove the ability to secure judicial review of a decision made *before* the agency could exercise prosecutorial discretion.

Third, a broad interpretation of Section 1252(g) fosters a blurring of the separation of powers between the executive and judicial functions. If an agency's decision to create a new categorical exclusion—here under the name "fugitive"—is not reviewable by a court, then the executive agency is the sole determinant of its own authority, regardless of statutory or regulatory restraints on its conduct.

2. Allowing the broad interpretation of "arising from" to stand would foster unaccountable agency determinations in violation of fundamental principles of due process and separation of powers.

The executive is charged with seeing that the laws are implemented, and it is not charged with creating laws. If an agency is allowed to determine whether the application of law is "moot" as to a category of peo-

ple who are entitled to due process under that law, and if that agency determination cannot be reviewed by a court, then the agency will be usurping the judicial function. An affected individual has due-process rights to have that agency determination reviewed by the court.

## ARGUMENT

### I. The Sixth Circuit's Broad Interpretation of 8 U.S.C. § 1252(g) is Inconsistent With This Court's Precedents and With Core Principles of Separation of Powers.

#### A. The Sixth Circuit Did Not Apply the Plain Language of the Statute.

The Sixth Circuit's decision does not honor the plain meaning of Section 1252(g). By its terms, the statute strips the courts only of 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." The phrase "arising from" necessarily connotes that the challenged action comes after and because of another action. It includes the concept of derivation, causality, sequence.

The claim asserted by Mr. Rranxburgaj was that ICE's decisions (a) classifying him as a "fugitive" and (b) announcing that an application filed by a "fugitive" was moot were decisions that are challengeable under the Constitution, the immigration statutes, and the Administrative Procedure Act. As a matter of syntax,

those challenged decisions did not arise from a discretionary decision to execute a removal order against Mr. Rranxburgaj; the decision to remove came only after the agency made its decisions about the "fugitive."

Individual liberties are best protected when courts apply the terms of statutes as written and do not urge overly broad interpretations. The courts below took the concept of sequence out of "arising from," and thereby exposed Mr. Rranxburgaj to an unreviewable determination. The district court below, for example, described the statute not with reference to the actual statutory language but rather with paraphrases that improperly expanded the scope of the jurisdiction-stripping provision of Section 1252(g): "The stay of removal *is directly related to* Rranxburgaj's final removal order. Since Rranxburgaj's claim *pertains to* a final removal order, he must pursue his claim with the Court of Appeals." (App. 20a-21a, emphasis added, citation omitted.) "Pertains to" and "is directly related to" are not synonymous with "arising from." Likewise, the Sixth Circuit eliminated the critical sequencing embodied in "arising from" when it held that there was "no principled difference between the denial of an application for a stay of removal on the merits and a denial on procedural grounds." (App. 11a.) ICE determined that because Mr. Rranxburgaj was a "fugitive," it was as if he had not filed an application for stay and his claim was "moot." That precedent legal conclusion about "fugitive" status led to the denial of the pending application, not the other way around—which is the sequence that would apply if the claim about erroneous treatment as a fugitive was "arising from" the denial. By not adhering to the statutory language, the courts below impaired the rights which Mr. Rranxburgaj has under the law. Had the plain statutory language been applied, it would

have been clear that Congress did not strip the courts of jurisdiction to decide the claims Mr. Rranxburgaj raised.

### B. The Sixth Circuit Decision is Inconsistent with Precedent.

This Court has previously explained that Section 1252(g) is a narrow provision, applicable "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. American-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 482 (1999) (quoting 8 U.S.C. § 1252(g)) (emphasis in original). In other words, the jurisdiction-stripping provision in Section 1252(g) was narrowly targeted "against a particular evil: attempts to impose judicial constraints upon ***prosecutorial discretion***." *Id.* at 486, n.9 (emphasis added). The *AADC* analysis is in line with the general proposition that jurisdiction-stripping statutes are to be narrowly construed. *See, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (evidence should be "clear and convincing" that the legislature intended to restrict access to judicial review). *See* discussion in Section I(C) below at 10-11.

Mr. Rranxburgaj's district-court complaint was not challenging the decision to "execute a removal order." Rather, he challenged ICE's antecedent determinations that he was a "fugitive" and that a fugitive's application for relief was categorically "moot." ICE's determinations created new standards; they were not determinations based on existing regulations or statutes. First, there was no definitive guidance in the Sixth Circuit as to whether a person is deemed a "fugitive" when his location is known to the INS. *See* discus-

sion in Pet. for Cert. at 20. It is undisputed that the day before the January 17, 2018 meeting at the ICE field office, Mr. Rranxburgaj advised ICE that he had sought sanctuary at a church less than three miles from the ICE office.

Second, ICE applied the "fugitive disentitlement doctrine" to Mr. Rranxburgaj even though the regulations regarding review of an application for stay do not authorize using the "fugitive disentitlement doctrine." The regulations state that a decision regarding a stay application is made in the agency's discretion "and in consideration of" factors identified in statute and regulation. Under 8 C.F.R. § 241.6:

> The Commissioner [or other designated officials or directors] in his or her discretion *and in consideration of factors listed in 8 CFR 212.5 and section 241(c) of the Act*, may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate.

8 C.F.R. § 241.6(a) (emphasis added). The regulation, in other words, cabins ICE's discretion by requiring consideration of specified factors. Yet here ICE determined that "fugitive status"—not identified as a factor in either regulations or statutes—excused ICE from exercising discretion altogether. That categorical exclusion from the right to individualized discretionary consideration must be reviewable notwithstanding Section 1252(g)'s stripping of jurisdiction to review discretionary decisions about removal after those decisions are made.

Determining that Mr. Rranxburgaj may properly be classified as a "fugitive" is not an exercise of discretion entrusted to ICE. The characterization of someone as a fugitive is a legal determination or possibly a mixed question of law and fact. But it is certainly not a determination "arising from" a decision to execute a removal order. Moreover, there is no definitive determination under Sixth Circuit law about whether a person who does not appear for a hearing but whose nearby whereabouts are known to ICE automatically is deemed a "fugitive." *Cf. Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009) (applying doctrine to "aliens who have fled custody and cannot be located when their appeals come before this court").

ICE also applied against Mr. Rranxburgaj the "fugitive-disentitlement doctrine" to render his application for a stay "moot." This doctrine arose in the context of criminal law as "a prudential device which [appellate] courts may invoke to estop fugitives from challenging criminal convictions in absentia." *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1097 (1st Cir. 1992). The fugitive-disentitlement doctrine is grounded in the inherent authority of the court of appeals to place conditions on the exercise of its appellate jurisdiction in order to regulate pending proceedings and encourage judicial efficiency. Patrick J. Glen, *The Fugitive Disentitlement Doctrine and Immigration Proceedings*, 27 GEO. IMMIGR. L.J. 749, 751 (2013). "The doctrine is therefore a tool of case management whereby appeals may be dismissed if the appellant becomes a fugitive while the appeal is pending. Although initially confined to criminal cases, . . . it has subsequently been extended to civil cases, including immigration cases, where the appellant qualifies as a fugitive." *Id.* at 752. But the doctrine is an equitable

one, grounded in the "inherent power of the court to manage its own affairs." *Gao v. Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007).

ICE categorized the absent Mr. Rranxburgaj as a fugitive and then categorically treated his application for a stay as being "moot" because he was disentitled from pursuing relief. Such determinations would ordinarily be reviewable under the APA and Title 8 but for the expansive reading of Section 1252(g) endorsed by the Sixth Circuit.

When this Court construed Section 1252(g) to be narrowly targeted "against a particular evil—attempts to impose judicial constraints upon prosecutorial discretion," *AADC*, 525 U.S. at 486, n.9—the Court could not have meant that Section 1252(g) removed from judicial scrutiny an agency's determination not to apply standards set forth by regulation. ICE determined that a "fugitive" was not entitled to an exercise of discretion—a determination that not only did not follow the exercise of prosecutorial discretion but, indeed, precluded the exercise of discretion. As the Ninth Circuit correctly recognized, "[t]he district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority." *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004)).

The Sixth Circuit's decision is inconsistent with *AADC*. The Court should grant this petition not only to reverse this decision but also as a vehicle to restore to this area of law the proper limited scope of Section 1252(g) which was discussed in *AADC*.

### C. The Sixth Circuit Decision is Inconsistent with Separation-of-Powers Principles.

"Even before the birth of this country, separation of powers was known to be a defense against tyranny." *Loving v. United States*, 517 U.S. 748, 756 (1996) (citing Montesquieu, *The Spirit of the Laws*, 151-52; 1 W. Blackstone, Commentaries 146-47, 269-70). The Constitution's separation of powers is based on traditions dating back at least to the Magna Carta, traditions which prohibit the government from depriving individuals of life or liberty except by the law of the land or with due process of law. Nathan S. Chapman, Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1682 (2012); *see also Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring) ("'No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than' the separation of powers.") (quoting THE FEDERALIST NO. 47, p. 301 (James Madison) (C. Rossiter ed. 1961)).

Indeed, the Framers specifically sought to prevent "the 'gradual concentration of the several powers in the same department.' It was this fear that prompted the Framers to build checks and balances into our constitutional structure, so that the branches could defend their powers on an ongoing basis." *Dep't of Transp.*, 575 U.S. at 74 (Thomas, J., concurring) (quoting THE FEDERALIST NO. 51, at 321). And the Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is es-

sential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989); *see also Clinton v. City of New York*, 524 U.S. 417, 450 (1998) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.") (Kennedy, J., concurring); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (the "declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty.") (cleaned up). "The 'check' the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review." *Dep't of Transp.*, 575 U.S. at 76 (Thomas, J., concurring) (citing *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 123 (2015)).

Our concept of "due process of law" has evolved in part to reflect "the increasing institutional separation of law-making from law enforcing and law interpreting." Chapman, *supra*, at 1679. "Due process" has "consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law." *Id.* "It entailed an exercise of what came to be known as the judicial power to interpret and apply standing law to a specific legal dispute." *Id.* When the Fifth Amendment was adopted, it was understood that due process applied to "executive officials and courts. It meant that the executive could not deprive anyone of a right except as authorized by law, and that to be legitimate, a deprivation of rights had to be preceded by certain procedural protections. . . ." *Id.*

The importance of the judicial "check" in preventing executive overreach has given rise to a "strong presumption" in favor of judicial review of agency action. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 498 (1991) (narrowly interpreting jurisdictional limitations because otherwise "meaningful judi-

cial review of [immigrants'] statutory and constitutional claims would be foreclosed."); *see also Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (noting "the strong presumption that Congress did not mean to prohibit all judicial review of executive action.") (quotations omitted). This "presumption of reviewability" has been "consistently applied" to immigration statutes. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (internal citation omitted). And because this presumption is "well-settled, the Court assumes that Congress legislates with knowledge of it." *Kucana*, 558 U.S. at 251-52 (internal citations and quotations omitted). "It therefore takes *clear and convincing evidence* to dislodge the presumption." *Id.* at 252 (internal quotations omitted; emphasis added); *see also Bowen*, 476 U.S. at 670 ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.") (internal quotations omitted).

Here, Mr. Rranxburgaj was entitled to due process with respect to his removal proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."). This Court has emphasized that the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotations omitted). He was certainly entitled, at the least, to have his application considered under the regulatory standards in 8 C.F.R. § 241.6(a), which includes an exercise of discretion and consideration of listed factors.

Despite Mr. Rranxburgaj's right to be heard and the "strong presumption" in favor of judicial review,

the Sixth Circuit found that no court had jurisdiction to hear his claim pursuant to Section 1252(g). That overbroad reading of Section 1252(g) leaves ICE with the unchallenged authority to decide whether to apply standards that are inconsistent with statute or regulations. That reading would logically allow ICE to use any categorical reason—even if not facially legitimate—to avoid the requirements of the statute and regulations. Suppose ICE determined that applications for stays filed by anyone from Albania will be deemed "moot" and therefore denied? Would that be a claim "arising from" a removal decision and therefore beyond judicial review? What about an ICE policy that an application filed by a person from a predominantly Muslim country will be deemed "moot"? Under the Sixth Circuit's interpretation of Section 1252(g), such categorizations are not judicially reviewable. Needless to add, such an expansion of agency authority is a grave threat to the rights of anyone caught up in the immigration system.

It was error for the Sixth Circuit to interpret the phrase "arising from" so broadly as to insulate from judicial review any antecedent legal determination which in some way happens to be connected later to the execution of a removal order. If anything, Mr. Rranxburgaj's right to judicial review only strengthened once ICE declared his application "moot" because of his alleged "fugitive" status.

If allowed to stand, the Sixth Circuit's decision would cede to ICE the unchecked power to make legal determinations with any articulable connection to a removal order—which, of course, would be *every* determination made by ICE. But "the power of the interpretation of the laws [is] the proper and peculiar province of the courts." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S.

211, 222 (1995) (quoting THE FEDERALIST NO. 78 at 523-25 (Alexander Hamilton) (internal quotations omitted); *see also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.") As this Court has explained:

> [T]he 'judicial Power of the United States' vested in the federal courts by Art. III, s 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (S. Mittell ed. *705 1938). We therefore reaffirm that it is the province and duty of this Court 'to say what the law is'. . .

*United States v. Nixon*, 418 U.S. 683, 704-05 (1974); *see also Stern v. Marshall*, 564 U.S. 462, 484 (2011) ("Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III.").

In particular, allowing an executive branch agency to serve as both the interpreter and enforcer of the law would be especially damaging to the Constitution's carefully crafted system of checks and balances:

> Although the Constitution entrusts the President with the enormous responsibility of faithfully executing the law, **the notion that the President is vested with unreviewable power to both execute and interpret the law is foreign to our system of government.** The Framers, concerned about the corrosive effect of power and animated by fears of unduly blending government powers, dispersed the authority to enforce the law and the authority to interpret it. To hold otherwise would mean that the President alone has the ultimate authority to interpret what the Constitution means. **Allowing the President to be the final arbiter of both the interpretation and enforcement of the law…would gravely offend separation of powers.**

*In re Trump*, 958 F.3d 274, 288-89 (4th Cir. 2020), cert. granted, judgment vacated as moot following the end of the president's term sub nom. *Trump v. District of Columbia*, No. 20-331, 2021 WL 231542 (U.S. Jan. 25, 2021) (emphasis added; internal citation omitted). In the past, this Court has "not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch," *see Mistretta*, 488 U.S. at 382, and it should not hesitate to do so here.

While Congress may have a legitimate interest in protecting ICE from excessive review of determinations within the unique purview of agency discretion, it is also true that just because "a given law or procedure is efficient, convenient, and useful in facilitating func-

tions of government, standing alone, will not save it if it is contrary to the Constitution," for "convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010) (cleaned up).

This Court should grant certiorari and reverse the Sixth Circuit in order to reaffirm its previous interpretation of Section 1252(g)—that it narrowly applies only to the commencement of proceedings, the adjudication of cases, and the execution of removal orders. *See AADC*, 525 U.S. at 482; *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."). The Court should also make clear that the purpose of Section 1252(g) is to restrain judicial review after the agency exercises its discretion ("arising from") not before that exercise.

## II. Judicial Review of Agency Actions Must Be Preserved in Order to Prevent Executive Overreach.

### A. Role of Separation of Powers in Preserving Due Process.

Laws are meaningless without a strong judiciary empowered to enforce them. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 558 (1962) ("Laws are a dead letter without courts to expound and define their true meaning and operation.") (quoting THE FEDERALIST, NO. 22, at 197 (Alexander Hamilton); *see also* THE FEDERALIST NO. 80 at 475-76 (Alexander Hamilton) ("there ought always to be a constitutional method of giving efficacy to constitutional provisions. . . No man of sense will be-

lieve that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them."). Accordingly, Article III granted federal courts broad authority to "decide all cases of every description, arising under the constitution or laws of the United States," (*Cohens v. State of Virginia*, 19 U.S. 264, 382 (1821)), so that the courts may serve as "the guardians of [Constitutional] rights . . . an impenetrable bulwark against every assumption of power in the legislative or executive." 1 Annals of Cong. 439 (1789) (Joseph Gales ed., 1834).

But the broad reading of Section 1252(g) adopted by the Sixth Circuit would prohibit courts from fulfilling their unique role as "guardians" of liberty because that reading allows an agency to expand its own jurisdiction. An agency could choose not to act as required by law simply by "defining away" the applicant as outside the agency's processes. Contrary to the consideration required by the regulations, ICE declared that Mr. Rranxburgaj was a "nonperson," or at least someone whose application the agency was not required to review under the applicable regulations.

In the absence of judicial review, neither Congress nor the Executive can be expected to serve as an adequate check on ICE's legal determinations. Moreover, separation-of-power principles prohibit either Congress or the President from "say[ing] what the law is," a role uniquely reserved for the judicial branch. *See Marbury*, 5 U.S. at 177; *see also* THE FEDERALIST NO. 47, at 299 (James Madison) ("There can be no liberty. . . if the power of judging be not separated from the legislative and executive powers.") (quotations omitted).

### B. Proper Limits on Jurisdiction-Stripping Laws.

This Court considers three factors in determining whether Congress intended that a statute should limit federal-court jurisdiction. Specifically, it is presumed that Congress did not intend to limit jurisdiction if (1) the suit is "wholly collateral to a statute's review provisions"; (2) the claims are "outside the agency's expertise"; and (3) "a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994) (internal quotations omitted). Those three factors weigh heavily here in favor of the district court having jurisdiction over Mr. Rranxburgaj's claim.

*First*, while Section 1252(g) bars judicial review of claims challenging the "decision" to "execute" a removal order, Mr. Rranxburgaj seeks to challenge the antecedent legal determination classifying him as a "fugitive." These are separate and distinct issues, governed by different laws and different factual predicates.

*Second*, ICE cannot claim any special or unique expertise in applying the fugitive-disentitlement doctrine. The doctrine arose in the context of criminal law as "a prudential device which [appellate] ***courts*** may invoke to estop fugitives from challenging ***criminal convictions*** in absentia." *United Elec., Radio & Mach. Workers of Am.*, 960 F.2d at 1097 (emphasis added). And while it has since been extended to civil and immigration court cases, the fugitive-disentitlement doctrine is one of general application and does not relate specifically to the enforcement of any immigration statute. Indeed, it is a doctrine regarding the authority of courts to control their dockets—a consideration not shared by an administrative agency charged to rule on

applications under an express regulatory framework. Accordingly, ICE does not have any particular expertise in the doctrine's application. *See Traynor v. Turnage*, 485 U.S. 535, 544 (1988) (Veterans' Administration did not have "special expertise in assessing the validity of its regulations construing veterans' benefits statutes under a later passed statute of general application").

*Third*, the Sixth Circuit's broad interpretation of Section 1252(g) would foreclose not just "*meaningful* judicial review," but *all* judicial review of Mr. Rranxburgaj's claim. Such an absolute jurisdictional bar could make sense for cases involving discrete exercises of "prosecutorial discretion." *See AADC*, 525 U.S. at 482. After all, courts generally lack authority to review or override decisions committed to the sole discretion of the executive branch. *See Smith v. Meese*, 821 F.2d 1484, 1491 (11th Cir. 1987) ("The prosecutorial function, and the discretion that accompanies it, is thus committed by the Constitution to the executive, and the judicial branch's deference to the executive on prosecutorial decision making is grounded in the constitutional separation of powers."); *Marbury*, 5 U.S. at 165–66 ("[T]he President is invested with certain important political powers, in the exercise of which he is to use his own discretion. . . whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.").

But the Sixth Circuit's order insulated from judicial review not just exercises of "prosecutorial discretion," but *all* legal determinations connected thereto. This case is thus distinguishable from other decisions upholding limited statutory review provisions because Section 1252 (g) does not simply call for "delayed judi-

cial review of final agency actions," it eliminates judicial review entirely. *Cf. Thunder Basin Coal Co.*, 510 U.S. at 207-08 (although Mine Act precluded jurisdiction over a pre-enforcement challenge, the Act "establishe[d] a detailed structure for reviewing violations" thereunder, including review before an administrative law judge, the Federal Mine Safety and Health Review Commission, and the Court of Appeals); *see also Elgin v. Dep't of Treasury*, 567 U.S. 1, 5-6 (2012) (although the Civil Service Reform Act of 1978 provides the exclusive avenue to judicial review, employees have the right to be heard before a covered agency action is taken against them, the right to contest a final adverse agency action before the Merit Systems Protection Board, and the right to appeal an adverse determination to the Court of Appeals).

By contrast, this Court has previously recognized the necessity of judicial review for legal determinations and other challenges collateral to the execution of a removal order. For example, "the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings." *Agosto v. Immigration & Naturalization Serv.*, 436 U.S. 748, 753 (1978). That is because a citizen's liberty interest in being protected from improper removal is too important to be left unchecked in the hands of an administrative agency:

> To deport one who so claims to be a citizen obviously deprives him of liberty. . . It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee

> of due process of law. The difference in security of judicial over administrative action has been adverted to by this court.

*Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922).

Last Term, this Court held that even when a statute limits the judicial review of certain immigration decisions, the statute should not be stretched to reach other immigration-related determinations. In *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), the Court held that although the provisions of 8 U.S.C. § 1252(a)(2)(C) precluded judicial review of the factual determinations undergirding a final removal order, the statute did not preclude judicial review of the factual determinations undergirding a concurrent order under the Convention Against Torture. As a matter of "straightforward statutory interpretation," the CAT order did not merge into the final removal order: "It would be easy enough for Congress to preclude judicial review of factual challenges to CAT orders, just as Congress has precluded judicial review of factual challenges to certain final orders of removal. But Congress has not done so, and it is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President." 140 S.Ct. at 1692.

Similarly, this Court has also held that statutes limiting review of discretionary decisions by the Attorney General do not bar challenges collateral to that exercise of discretion. *See McNary*, 498 U.S. 479 (alien could bring due process challenge to INS amnesty determination procedures, despite provision expressly limiting judicial review to orders of exclusion or deportation, because statute did not evidence an intent to preclude broad "pattern and practice" challenges, and because if the aliens were "not allowed to pursue their

claims in the District Court, respondents would not as a practical matter be able to obtain meaningful judicial review.").

This Court should grant certiorari in order to ensure that Section 1252(g) is not construed more broadly than Congress intended. The purpose of Section 1252(g) was to protect ICE from being flooded with lawsuits challenging its "discretionary determinations" (*AADC*, 525 U.S. at 485), and there is no basis for expanding the statute's reach to shield antecedent legal determinations from judicial review, particularly where those determinations are collateral to ICE's exercise of discretion and outside of the agency's expertise.

## CONCLUSION

Keeping agency authority within the bounds established by statute and subject to judicial review is essential to the preservation of civil rights. An untrammeled administrative authority—an unreviewable "fourth branch"—puts the rights of citizens and noncitizens at risk. The courthouse door must remain open for review by the courts of legal decisions not statutorily entrusted to an agency. Mr. Rranxburgaj's unfortunate experience is the perfect vehicle for the Court to level-set the proper role of the agency and the courts under Section 1252(g).

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