

Whether 8 USC § 1252(g) Precludes the Exercise of Federal Jurisdiction over Claims Brought by Wrongfully Removed Noncitizens

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Section 1252(g) of the Immigration and Nationality Act provides that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien.” The Eighth and Ninth Circuits disagree about whether this provision precludes judicial review over claims brought by noncitizens who are wrongfully removed from the United States. This Comment advances four arguments for why § 1252(g) should be interpreted narrowly to allow federal jurisdiction over such claims by looking to Supreme Court precedent, legislative history, and public policy: First, Supreme Court precedent suggests that § 1252(g) may apply to only the Attorney General’s discretionary decisions, and wrongful removal is never in the Attorney General’s discretion. Second, precedent and legislative history support a narrow interpretation of the phrase “arising from” in § 1252(g). Third, the plain language of the statute indicates that § 1252(g) may not be implicated when the Attorney General wrongfully removes someone from the United States. Finally, interpreting the statute narrowly is the best normative outcome because it restrains improper executive action and prevents harm to noncitizens.

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INTRODUCTION

A foreign national is set to testify under subpoena to a grand jury about detainee abuse by certain Immigration and Customs Enforcement (ICE) agents. The district court has issued an order prohibiting the ICE agents from removing the foreign national from the United States. But the foreign national’s testimony is damaging, and the ICE agents would rather deport him than allow him to testify. Believing that 8 USC § 1252(g) strips federal courts of jurisdiction to review their action, the ICE agents intentionally remove the foreign national in violation of the court’s order. Can courts exercise jurisdiction over the agents’ actions?

The Ninth Circuit posed this hypothetical to the Government during oral arguments in *Arce v United States*.¹ The Government reluctantly admitted that, under their theory, § 1252(g) would preclude judicial review of the ICE agents’ actions.² Section 1252(g) states that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the

¹ 899 F3d 796 (9th Cir 2018).
² Oral Argument, *Arce v United States*, No 16-56706, 0:13:33–0:16:22 (9th Cir May 15, 2018), archived at <http://perma.cc/C97X-BEBT>.

decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”³

This Comment considers whether § 1252(g) of the Immigration and Nationality Act of 1965⁴ (INA of 1965) precludes the exercise of federal jurisdiction over claims brought by noncitizens who are wrongfully removed⁵ from the United States. It was inspired by a recent circuit split between the Eighth and Ninth Circuits. Both circuits addressed whether a noncitizen⁶ who was wrongfully removed from the United States in violation of a court-ordered stay of removal could assert a Federal Tort Claims Act⁷ (FTCA) claim against the government. In August 2017, the Eighth Circuit held in *Silva v United States*⁸ that § 1252(g) strips federal courts of jurisdiction when a noncitizen is wrongfully removed from the country.⁹ One year later, the Ninth Circuit held in *Arce* that § 1252(g) should be interpreted narrowly to allow federal jurisdiction over wrongful removals.¹⁰

This Comment analyzes Supreme Court case law, legislative history, and public policy to conclude that § 1252(g) should be interpreted narrowly. Specifically, it builds on a line of cases holding that capacious statutory language—like “arising from” in § 1252(g)—should be interpreted in accordance with legislative history and common sense. These considerations weigh in favor of a narrow interpretation of § 1252(g) because allowing wrongful removal suits does not frustrate the provision’s purpose of limiting frivolous lawsuits and expediting the removal process. A narrow interpretation is also normatively appealing: the executive’s

³ 8 USC § 1252(g). Although the statute refers to the Attorney General, Congress transferred the Attorney General’s immigration enforcement responsibilities to the Department of Homeland Security. 6 USC § 202(3). See *Clark v Martinez*, 543 US 371, 374 n 1 (2005).

⁴ Pub L No 89-236, 79 Stat 911, codified as amended at 8 USC § 1101 et seq.

⁵ In this Comment, the phrase “wrongfully removed” refers only to situations in which an individual is deported in violation of a court order, statute, or government regulation. For more discussion on the scope of “wrongful removal,” see Part II.A.

⁶ Following the Supreme Court, I use the term “noncitizen” throughout this Comment to refer to any person who is not a citizen or national of the United States. See, for example, *Pereira v Sessions*, 138 S Ct 2105, 2110 n 1 (2018).

⁷ 60 Stat 842 (1946), codified as amended in various sections of Title 28. The plaintiff in *Arce*, for example, raised claims of negligence, intentional infliction of emotional distress, false arrest, and false imprisonment. *Arce*, 899 F3d at 799.

⁸ 866 F3d 938 (8th Cir 2017).

⁹ *Id.* at 939.

¹⁰ *Arce*, 899 F3d at 800.

violation of the law should not escape judicial review. Furthermore, interpreting the provision narrowly prevents harm to noncitizens, restrains improper executive action, and maintains consistency with the presumption in favor of judicial review.

This issue is particularly salient in today's political climate. In 2018, more than 256,000 people were deported.¹¹ Even when the government abides by all relevant laws and regulations, the deportation process is dehumanizing and humiliating. Individuals may be held in detention for more than a year,¹² and many have been held for years without a hearing to determine if their continued detention was justified.¹³ Children may be separated from their parents,¹⁴ and prison staff may treat detainees as if they were in punitive custody.¹⁵ Some detention centers are even run by private companies that stand to profit at the expense of detainees.¹⁶ Although wrongfully removed noncitizens are only a subset of this population, allowing them to sue can help prevent these harms from occurring and give some noncitizens recourse when they occur.

This Comment proceeds in three parts. Part I provides a brief history of US immigration law, including the origins and subsequent interpretation of § 1252(g). Part II describes the circuit split over the scope of § 1252(g). Part III argues that § 1252(g) should be interpreted narrowly to allow federal jurisdiction when the government removes someone in violation of a court order, a statute, or its own regulations.

¹¹ US Immigration and Customs Enforcement, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report* *10 (Dec 14, 2018), archived at <http://perma.cc/F4CT-YTNW>.

¹² See Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 *Fordham Intl L J* 243, 255 n 44 (2013).

¹³ See *Jennings v Rodriguez*, 138 S Ct 830, 838, 842–48 (2018) (holding that detained noncitizens do not have a right to periodic bond hearings).

¹⁴ Under President Donald J. Trump's immigration policy, migrant children were separated from their parents or guardians when they entered the United States. Even after an executive order formally ended routine family separations at the border, more than two hundred children were taken from their families and forced to spend potentially months in shelters and foster homes thousands of miles away. Miriam Jordan and Caitlin Dickerson, *Hundreds of Migrant Children Are Taken from Families Despite Rollback of Separation Policy* (Boston Globe, Mar 9, 2019), archived at <http://perma.cc/A7YE-PPLR>.

¹⁵ See Michelle Brané and Christiana Lundholm, *Human Rights behind Bars: Advancing the Rights of Immigration Detainees in the United States through Human Rights Frameworks*, 22 *Georgetown Immig L J* 147, 149, 162 (2008).

¹⁶ See Jaden Urbi, *Here's Who's Making Money from Immigration Enforcement* (CNBC, June 29, 2018), archived at <https://perma.cc/QRM7-VRFD>.

I. BACKGROUND

Evaluating the legislative history and purpose of § 1252(g) requires understanding the history of immigration law in the United States and the context in which the Immigration and Nationality Act was passed. This Part briefly summarizes that history. I first describe the political and social evolution of US immigration law from the Founding to 1965. I then introduce the INA of 1965 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁷ (IIRIRA). Finally, I detail the purpose of § 1252(g) and its twin goals of facilitating expedient removal and limiting frivolous lawsuits.

A. US Immigration Law and Policy from the Founding to 1965

Federal immigration policy was relatively unrestricted for white Europeans in the first hundred years of the United States' existence.¹⁸ The nation's growing economy required new workers, and the government was eager to take a relatively welcoming approach to immigration.¹⁹ The first US immigration law, passed in 1790, specified that "any alien, being a free white person" could apply for citizenship as long as he or she had "resided within the limits and under the jurisdiction of the United States for the term of two years."²⁰ Racial restriction remained an explicit part of naturalization law until 1952.²¹

After the Civil War, US immigration policy became significantly more restrictive. Immigrants, especially Chinese laborers, had become an increasing percentage of the workforce. When the economy entered a depression in 1873, many people blamed the Chinese.²² In 1882, the Chinese Exclusion Act²³ suspended Chinese

¹⁷ Pub L No 104-208, 110 Stat 3009-546, codified as amended at 8 USC § 1101 et seq.

¹⁸ David Weissbrodt, *Immigration Law and Procedure in a Nutshell* 3-6 (West 3d ed 1992).

¹⁹ *Id.*

²⁰ Naturalization Act of 1790, ch 3, 1 Stat 103.

²¹ Immigration and Nationality Act, 66 Stat 163 (1952), codified as amended at 8 USC § 1101 et seq. See also Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 Cal L Rev 1923, 1947-48 (2000).

²² Gabriel J. Chin and Daniel K. Tu, *Comprehensive Immigration Reform in the Jim Crow Era: Chinese Exclusion and the McCreary Act of 1893*, 23 Asian Am L J 39, 40-42 (2016). In fact, the very first sentence of the Chinese Exclusion Act reads, "Whereas, in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof." Chinese Exclusion Act, ch 126, 22 Stat 58 (1882).

²³ 22 Stat 58 (1882).

laborer immigration, prohibited Chinese naturalization, and allowed for the deportation of Chinese people illegally present in the United States.²⁴ In opposition to the Act, one senator stated, “The true intent and meaning of it is to declare that henceforth, excepting only the Chinese now here, and the colored people now here, no man shall work in the United States except he be a white man.”²⁵ In upholding the Chinese Exclusion Act’s constitutionality, the Supreme Court highlighted the widespread belief that Chinese immigrants were a “menace to our civilization.”²⁶

Twelve years later, in 1894, Congress passed a statute limiting judicial review of immigration decisions. The Act stated, “In every case where an alien is excluded from admission into the United States . . . the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury.”²⁷ The Supreme Court upheld the constitutionality of this provision in 1895.²⁸

Immigration was popularly seen as a threat to the US economy by the 1890s.²⁹ The Immigration Act of 1891³⁰ established the Office of the Superintendent of Immigration, which was responsible for inspecting entrants at the ports of entry to the United States.³¹ The Act allowed for the deportation of any noncitizen entering the United States unlawfully, and it provided that “[a]ll decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent

²⁴ Kevin J. Fandl, *Immigration Posses: US Immigration Law and Local Enforcement Practices*, 34 J Legis 16, 18 (2008).

²⁵ Henry S. Cohn and Harvey Gee, “No, No, No, No!”: *Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 Conn Pub Int L J 1, 57 (2003).

²⁶ *Chae Chan Ping v United States*, 130 US 581, 595–607 (1889).

²⁷ Act of Aug 18, 1894, ch 301, 28 Stat 390.

²⁸ *Lem Moon Sing v United States*, 158 US 538, 547–50 (1895):

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.

²⁹ Weissbrodt, *Immigration Law and Procedure* at 7 (cited in note 18). See also John Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925* 68–106 (Rutgers 2002).

³⁰ 26 Stat 1084.

³¹ Immigration Act of 1891 § 7, 26 Stat at 1085.

of immigration, whose action shall be subject to review by the Secretary of the Treasury.”³²

Over the next thirty years, piecemeal legislation continued to restrict the classes of noncitizens that could immigrate to the United States and the level of judicial review that deported individuals could seek.³³ The Immigration Act of 1917³⁴ stated that “[i]n every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.”³⁵

The end of World War I marked a turning point for US immigration policy.³⁶ After the war, the United States adopted an isolationist policy to protect its own labor force from an influx of immigrants from postwar Europe.³⁷ Technological advances allowed the economy to depend on mass industrialization, rather than mass immigration.³⁸ The Emergency Quota Act of 1921³⁹ placed a limit on the number of people who could immigrate to the United States.⁴⁰

The Immigration and Nationality Act of 1952⁴¹ (INA of 1952) consolidated earlier legislation into one law and still serves as the basis for federal immigration law.⁴² This Act retained the national origins quota, kept the “quality control” exclusions found in earlier legislation, stiffened the requirements for naturalized citizenship, and codified new conditions for relief from deportation and suspension of deportation.⁴³

Advocates of a more liberal immigration policy began to emerge in the early 1950s, but they were unable to stop the passage of the INA of 1952. With the help of interest groups and a growing support for the Civil Rights movement, Congress passed

³² Immigration Act of 1891 § 8, 26 Stat at 1085. The Supreme Court held this provision to be constitutional in *Ekiu v United States*, 142 US 651, 660 (1892).

³³ See Weissbrodt, *Immigration Law and Procedure* at 8–9 (cited in note 18).

³⁴ Act of Feb 5, 1917, 39 Stat 874.

³⁵ Immigration Act of 1917 § 19, 39 Stat at 890. The Supreme Court upheld this provision in *Heikkila v Barber*, 345 US 229, 233–37 (1953) (explaining that “limitations on judicial review of deportation must be followed ‘despite [their] apparent inconvenience to the alien’”).

³⁶ See Higham, *Strangers in the Land* at 300–24 (cited in note 29).

³⁷ Weissbrodt, *Immigration Law and Procedure* at 11 (cited in note 18).

³⁸ Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 19 (Princeton 2014).

³⁹ 42 Stat 5.

⁴⁰ Emergency Quota Act of 1921 ch 8, 42 Stat at 5.

⁴¹ 66 Stat 163 (1952), codified as amended at 8 USC § 1101 et seq.

⁴² Fandl, 34 J Legis at 19 (cited in note 24).

⁴³ See Ngai, *Impossible Subjects* at 237–39 (cited in note 38).

the Immigration and Nationality Act of 1965 (INA of 1965), marking a dramatic break from past immigration policy.⁴⁴

B. The Modern Framework: The Immigration and Nationality Act of 1965 and the Illegal Immigration Reform and Immigrant Responsibility Act

The INA of 1965 established the modern framework for US immigration law. It amended the INA of 1952 by loosening the previous quota system, giving prospective immigrants from every corner of the world a nearly equal shot at immigrating to the United States.⁴⁵

The INA of 1965 focused on reforming the process for legal immigration. By the mid-1990s, Congress wished to reform procedures relating to illegal immigration, which had gone largely unchanged since 1952. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which amended the INA of 1965 to

improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for the eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States, and for other purposes.⁴⁶

Among other things, the IIRIRA provides for expedited removal proceedings,⁴⁷ consolidated deportation and exclusion proceedings,⁴⁸ and expanded categories of inadmissible aliens.⁴⁹ Some legislative history suggests that Congress intended the IIRIRA to “strengthen the border enforcement by nearly doubling the size of the Border Patrol” and to “ensure that aliens who commit serious crimes are detained upon their release from prison until they can

⁴⁴ See *id.* at 239–48.

⁴⁵ Dave McGurdy, *The Future of US Immigration Law*, 20 *J Legis* 3, 5 (1994). The INA maintained limits on the number of immigrants who could come to the United States, but it eliminated national origin, race, and ancestry as a basis for immigration. It also significantly increased the ceiling for non–Western European countries. *Id.*

⁴⁶ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Conference Report, HR Rep No 104-828, 104th Cong, 2d Sess 1 (1996).

⁴⁷ 8 USC § 1225.

⁴⁸ 8 USC § 1229a.

⁴⁹ 8 USC § 1182.

be deported, and then they will be deported under expedited procedures.”⁵⁰

Before Congress enacted the IIRIRA, courts lacked jurisdiction to review the deportation orders of noncitizens who had already been removed from the United States.⁵¹ Accordingly, a noncitizen who appealed a removal order was typically entitled to remain in the United States, pending judicial review.⁵² To facilitate prompt removal, the IIRIRA adjusted these provisions in three ways: First, Congress allowed for review once a noncitizen had been deported.⁵³ Second, Congress repealed the presumption of an automatic stay.⁵⁴ Finally, the IIRIRA restricted the availability of injunctive relief.⁵⁵ Taken together, these changes mean that a noncitizen asserting a claim arising from their removal is not entitled to remain in the United States while the suit is pending.

C. Section 1252(g)

Before the IIRIRA was enacted, removal orders were treated like other agency actions and were appealable under 28 USC § 2342.⁵⁶ The IIRIRA repealed the old judicial-review scheme and replaced it with § 1252(g), which restricts judicial review of the Attorney General’s “decision or action” to “commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter” unless an exception applies.⁵⁷ The full text of § 1252(g) states:

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any

⁵⁰ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 104th Cong, 2d Sess, in 142 Cong Rec S10572 (daily ed Sept 16, 1996) (*IIRIRA Record*) (statement of Sen Simpson).

⁵¹ See 8 USC § 1105a(c) (1994) (“An order of deportation or of exclusion shall not be reviewed by any court . . . if [the noncitizen] has departed from the United States after the issuance of the order.”).

⁵² See 8 USC § 1105a(a)(3) (1994) (“The service of the petition for review . . . shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs.”).

⁵³ See IIRIRA § 306, 110 Stat 3009-612 (repealing § 1105a).

⁵⁴ 8 USC § 1252(b)(3)(B).

⁵⁵ 8 USC § 1252(f).

⁵⁶ See 8 USC § 1105a (1994), repealed by IIRIRA § 306(b), 110 Stat 3009.

⁵⁷ 8 USC § 1252(g).

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.⁵⁸

The legislative history of the IIRIRA indicates that Congress intended the IIRIRA's jurisdiction-stripping provisions to make it easier to remove deportable noncitizens. Section 1252(g)'s purpose was "to streamline removal proceedings and enhance enforcement of immigration laws that had gone largely unchanged since 1952."⁵⁹ The Act's Senate Report further provides that the judicial review provisions were intended to "expedit[e] the removal of excludable and deportable aliens."⁶⁰

Section 1252(g) was not included in the IIRIRA without opposition. Congressman Jerrold Nadler cautioned, "The bill eliminates judicial review for most [Immigration and Naturalization Service (INS)] actions. Just think, a Federal bureaucracy with no judicial accountability. . . . No government agency should be allowed to act, much less lock people up or send them back to dictatorships, without being subject to court review."⁶¹

Perhaps Congressman Nadler was right. On its face, § 1252(g) appears very broad. It seemingly abolishes judicial review of almost every challenge a noncitizen can make to her detention or removal. Congress also plainly intended to expedite removal proceedings of noncitizens.

But the rest of the legislative history makes clear that the majority of members of Congress did not intend for this provision to be infinitely broad, and it is unlikely that wrongful removal was even considered when enacting the statute.⁶² In congressional testimony, the INS General Counsel remarked that "[t]he Administration is committed to ensuring that aliens in deportation proceedings are afforded appropriate due process; however, the

⁵⁸ 8 USC § 1252(g). See also note 3.

⁵⁹ Patricia Flynn and Judith Patterson, *Five Years Later: Fifth Circuit Case Law Developments under the Illegal Immigration Reform and Immigrant Responsibility Act*, 53 Baylor L Rev 557, 561 (2001). See also *Immigration in the National Interest Act of 1995*, HR Rep No 104-469(1), 104th Cong, 2d Sess 365-67 (1996).

⁶⁰ S Rep No 104-249, 104th Cong, 2d Sess at 2 (1996).

⁶¹ Conference Report on HR 2202, *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, in 142 Cong Rec H11085 (daily ed Sept 25, 1996) (statement of Rep Nadler).

⁶² See *Immigration and Naturalization Service v St. Cyr*, 533 US 289, 314 (2001). The Court held that Congress did not clearly intend for § 1252 to preclude judicial consideration of habeas claims. This is one example of a limit on § 1252's seemingly broad scope, which illustrates that it was not intended to abolish judicial review of every challenge a noncitizen could make. For additional support that § 1252 (g) was intended to contain limits, see *Reno v American-Arab Anti-Discrimination Committee*, 525 US 471, 482 (1999).

availability of multiple layers of judicial review has frustrated the timely removal of deportable aliens.”⁶³ According to one senator, the bill would “create an expedited removal process, so that those who seek to enter the United States surreptitiously or with fraudulent documents can be promptly deported and not allowed to stay here for years while pursuing various *frivolous* appeals.”⁶⁴ Consequently, it is unlikely that Congress intended for § 1252(g) to preclude the exercise of federal jurisdiction in cases in which the removal violates a court order, a statute, or a government regulation because those cases do not contain “deportable” noncitizens or “frivolous” appeals. Additionally, the plaintiffs in these cases tend to seek damages rather than a prolongation of their stay in the United States, so allowing these suits will not frustrate the IIRIRA’s goal of expedient removal.⁶⁵

* * *

US immigration policy was most restrictive in the early twentieth century. Modern immigration law retreats from that isolationism, but immigration is still heavily restrictive—especially for those facing removal. When Congress passed the IIRIRA in 1996, it intended to expedite the removal process and limit frivolous appeals. This is clear in § 1252(g), which restricts judicial review of a noncitizen’s claims “arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders.”

II. THE CIRCUIT SPLIT OVER THE SCOPE OF § 1252(G)

Courts have struggled to define the scope of 8 USC § 1252(g). As Congressman Nadler suggested, the statute seems infinitely broad—noncitizens cannot sue for claims arising from *any* decision or action to remove them. But the provision’s legislative history makes clear that it was not meant to be all-encompassing, and courts have had trouble identifying a limiting principle.

⁶³ *Removal of Criminal and Illegal Aliens, Hearing before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary*, 104th Cong. 1st Sess 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service).

⁶⁴ *IIRIRA Record*, 142 Cong Rec at S10572 (statement of Sen Simpson) (emphasis added) (cited in note 50).

⁶⁵ See, for example, *Arce*, 899 F3d at 799; *Silva*, 866 F3d at 939. In both of these cases the plaintiffs sought damages rather than a prolongation of their stay in the United States.

The circuit courts are split as to how § 1252(g) should be interpreted. This can have major implications for noncitizens. For example, noncitizens separated from their jobs and families by wrongful deportations can recover damages if they live in Oregon but not if they live in Iowa. As a general matter, some circuits interpret § 1252(g) broadly and others interpret it narrowly. But the split is deeper than that—even circuits that agree about how the statute should be interpreted disagree about why. This Part separates the discussion of the circuit split into two sections based on the reasoning and justifications relied upon by the circuits. The first Section discusses circuits that focus on the issue of wrongful removal, and the second examines circuits that emphasize the issue of discretionary authority.⁶⁶

A. Circuits That Primarily Analyze Wrongful Removal

The Eighth and Ninth Circuits agree that the focus when interpreting § 1252(g) should be on whether the statute applies to wrongful removal suits. But the two disagree about the outcome. The Eighth Circuit holds that § 1252(g) precludes the exercise of federal jurisdiction when a noncitizen is wrongfully removed from the United States,⁶⁷ and the Ninth Circuit holds the opposite.⁶⁸

The phrase “wrongful removal” has a narrow, particular meaning. It refers only to situations in which an individual is removed in violation of a court order, a statute, or a federal regulation. It does not matter whether the removal was intentionally wrongful. The most typical wrongful removal case involves the government deporting someone after a court has issued a stay of removal. This may happen uncomfortably often because 8 CFR § 1003.6(a) grants noncitizens an automatic stay of removal when they file a timely appeal against an immigration judge’s decision.⁶⁹

⁶⁶ This circuit split overlaps in part with the wrongful removal split. The Ninth Circuit in *Arce*, for example, stated that “even if we agreed with the government that [the plaintiff’s] claims tangentially ‘arise from’ the execution of his removal order, we would still retain jurisdiction because the Attorney General entirely lacked the authority, and therefore the discretion, to remove him.” *Arce*, 899 F3d at 800. The discretionary authority split is broader, however, because it encompasses cases that do not involve wrongful removal. See, for example, *Mustata v Jenifer*, 179 F3d 1017, 1018 (6th Cir 1999) (dealing with an ineffective assistance of counsel claim). It is also narrower because the legal analysis is confined to whether § 1252(g) requires discretionary action.

⁶⁷ See *Silva*, 866 F3d at 939.

⁶⁸ See *Arce*, 899 F3d at 798.

⁶⁹ 8 CFR § 1003.6(a).

1. The Eighth Circuit held in *Silva* that § 1252(g) applies to wrongful removal suits.

Silva involved a Federal Tort Claims Act (FTCA) claim brought by a noncitizen who was wrongfully removed from the United States after being convicted of two criminal offenses in Minnesota.⁷⁰ After the government initiated removal proceedings, the plaintiff filed a timely appeal with the Board of Immigration Appeals. This appeal automatically stayed the execution of a removal order,⁷¹ but the government ignored the stay and removed the plaintiff to Mexico.⁷² In response, the plaintiff sued under the FTCA, but the district court dismissed the case for lack of subject matter jurisdiction under § 1252(g).⁷³

The Eighth Circuit held that § 1252(g) precludes the exercise of federal jurisdiction when a noncitizen is wrongfully removed from the United States.⁷⁴ The court reasoned that, “[a]lthough the execution of this removal order happened to be in violation of a stay, the alien’s claims are directly connected to the execution of the removal order.”⁷⁵ According to the court, the removal order “still existed” despite the stay, thereby connecting the plaintiff’s FTCA claim “directly and immediately” to the decision to execute the order.⁷⁶ Furthermore, the Eighth Circuit disagreed with the plaintiff’s argument that his claims arose from a violation of the stay of removal proceedings rather than from “a decision or action to execute a removal order” as required by § 1252(g).⁷⁷

Sharply dissenting from the majority opinion, Judge Jane Kelly argued that § 1252(g) is “much narrower” than the majority held it to be.⁷⁸ She emphasized that § 1252(g) only strips federal courts of jurisdiction over claims arising from three discrete “decision[s] or action[s]” that the Attorney General may take: “to ‘commence proceedings, *adjudicate* cases, or *execute* removal orders.”⁷⁹ Reasoning that the court’s stay “divested the government of its authority to remove [the plaintiff],” Judge Kelly concluded the plaintiff’s claims could not “be fairly characterized as ‘arising

⁷⁰ *Silva*, 866 F3d at 939.

⁷¹ *Id.*, citing 8 CFR § 1003.6(a).

⁷² *Silva*, 866 F3d at 939.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 940.

⁷⁶ *Silva*, 866 F3d at 940.

⁷⁷ *Id.*

⁷⁸ *Id.* at 942 (Kelly dissenting).

⁷⁹ *Id.*, quoting 8 USC § 1252(g).

from the government's decision or action to execute a removal order."⁸⁰ As such, she concluded that § 1252(g) should not preclude the exercise of federal jurisdiction over a wrongfully removed noncitizen's claims.⁸¹

2. The Ninth Circuit held in *Arce* that § 1252(g) does not apply to wrongful removal suits.

The facts in *Arce* are similar to those presented in *Silva*. US Border Patrol apprehended the plaintiff, a Mexican citizen, and transferred him to a Department of Homeland Security (DHS) detention facility.⁸² An asylum officer found that the plaintiff did not have a reasonable fear of persecution⁸³ and an immigration judge ordered his removal after affirming this finding. The plaintiff filed for a petition of review and stay of removal, which the Ninth Circuit granted.⁸⁴ DHS proceeded to remove the plaintiff in direct violation of the stay.⁸⁵ In turn, the plaintiff sued under the FTCA, but the district court dismissed the complaint on the belief that § 1252(g) deprived it of jurisdiction.⁸⁶

The Ninth Circuit reversed, holding that “§ 1252(g) does not strip the federal courts of jurisdiction over claims challenging . . . [a] decision or action to violate a court order staying removal.”⁸⁷ According to the court, the plaintiff's claims arose “not from the execution of the removal order, but from the violation of [the] court's order” to stay the removal proceedings.⁸⁸ Furthermore, it reasoned that the Secretary of DHS lacked the authority, and therefore the discretion, to remove the plaintiff.⁸⁹ The court held that “[w]here the Attorney General totally lacks the discretion to effectuate a removal order, § 1252(g) is simply not implicated.”⁹⁰

⁸⁰ *Silva*, 866 F3d at 942 (Kelly dissenting).

⁸¹ *Id.*

⁸² *Arce*, 899 F3d at 798.

⁸³ This is required for the plaintiff to be granted asylum. See 8 CFR § 208.31 (“The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion.”).

⁸⁴ *Arce*, 899 F3d at 799.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 800.

⁸⁸ *Arce*, 899 F3d at 800.

⁸⁹ *Id.*

⁹⁰ *Id.* at 801.

The Ninth Circuit reasoned that its interpretation was “supported by the express instructions of the Supreme Court, [the Ninth Circuit’s] precedent, and common sense, all of which require[d] [it] to read the statute narrowly.”⁹¹ It reasoned that the Supreme Court’s precedent dictates a narrow reading of § 1252(g) and that “[t]he Supreme Court has not ‘interpret[ed] [the statute’s] language to sweep in any claim that can technically be said to ‘arise from’ the three listed actions of the Attorney General.”⁹²

B. Circuits That Primarily Analyze Discretionary Authority

While the Eighth and Ninth Circuits focus on the issue of wrongful removal, other circuits analyze the scope of § 1252(g) by focusing on whether the statute applies only to the Attorney General’s discretionary decisions. If so, then suits stemming from wrongful removal will not be precluded from judicial review because government officials never have the discretion to violate statutes, court orders, or the Constitution.⁹³ The Third, Sixth, Ninth, and Eleventh Circuits hold that § 1252(g) applies only to discretionary decisions. The Fifth and Eighth Circuits hold the opposite.⁹⁴

The difference between this approach and the wrongful removal approach can have significant consequences for noncitizens. Because wrongful removal is a narrower limiting principle than discretionary authority,⁹⁵ fewer cases will proceed in jurisdictions that exclusively embrace wrongful removal. A noncitizen

⁹¹ *Id.* at 800.

⁹² *Arce*, 899 F3d at 800, quoting *Jennings v Rodriguez*, 138 S Ct 830, 841 (2018) (alterations in original) (holding that 8 USC § 1252(b)(9) does not strip courts of jurisdiction to hear a noncitizen’s challenge to the constitutionality of prolonged detention in the absence of periodic bond hearings). The *Jennings* Court held that even though the case technically arose from the Attorney General’s decision to execute a removal order, § 1252(b)(9) should be interpreted narrowly because otherwise it makes claims of prolonged detention effectively unreviewable. *Jennings*, 138 S Ct at 840.

⁹³ See *Myers & Myers, Inc v United States Postal Service*, 527 F2d 1252, 1261 (2d Cir 1975) (“It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.”), citing *Larson v Domestic & Foreign Commerce Corp*, 337 US 682, 689–90 (1949). See also *Nurse v United States*, 226 F3d 996, 1002 (9th Cir 2000) (“In general, governmental conduct cannot be discretionary if it violates a legal mandate.”).

⁹⁴ Note that *Arce* and *Silva* discuss both wrongful removal and discretionary authority. The other circuits discussed in this Section *only* address the issue of discretionary authority.

⁹⁵ This is because all wrongful removal cases can be seen as discretionary authority cases, but not all discretionary authority cases can be seen as wrongful removal cases.

claiming to have received ineffective assistance of counsel in a deportation proceeding, for example, can appeal in a discretionary authority jurisdiction, but not a wrongful removal jurisdiction.⁹⁶

1. The Third, Sixth, Ninth, and Eleventh Circuits hold that § 1252(g) applies only to discretionary decisions.

Four circuits hold that § 1252(g) applies only to the Attorney General's discretionary decisions. These circuits tend to ground their reasoning in *Reno v American-Arab Anti-Discrimination Committee*,⁹⁷ in which the Court stated that § 1252(g) “applies only to three discrete actions that the Attorney General may take: her ‘decision or action’ to ‘commence proceedings, adjudicate cases, or execute removal orders.’”⁹⁸

The Third Circuit was the first to hold that § 1252(g) does not apply to cases in which the Attorney General acts without discretion. According to the court, § 1252(g)'s jurisdictional bar does not apply when the petitioner “is not challenging the discretionary *decision* to commence proceedings, but is challenging the government's very *authority* to commence those proceedings.”⁹⁹ This distinction is subtle, and the court did not elaborate on it. Essentially, the court reasoned that a noncitizen removed in violation of a stay is not challenging a “decision or action” to execute removal orders—rather, the noncitizen is arguing that the Attorney General did not even have the *authority* to execute the removal order.¹⁰⁰ The

⁹⁶ See *Madu v Attorney General of the United States*, 470 F3d 1362, 1367–68 (11th Cir 2006).

⁹⁷ 525 US 471 (1999).

⁹⁸ *Id.* at 482 (emphasis omitted).

⁹⁹ *Garcia v Attorney General*, 533 F3d 724, 729 (3d Cir 2009) (emphasis in original).

¹⁰⁰ See *id.* at 728–29.

Ninth,¹⁰¹ Eleventh,¹⁰² and Sixth¹⁰³ Circuits have since joined in that reasoning.

2. The Fifth and Eighth Circuits hold § 1252(g) does not distinguish between discretionary and nondiscretionary decisions.

In contrast, the Fifth and Eighth Circuit hold that § 1252(g) is not restricted to the Attorney General’s discretionary decisions. These two circuits reason that a strictly textualist interpretation of § 1252(g) does not differentiate between discretionary and non-discretionary action. The Fifth Circuit, for example, directly addressed whether § 1252(g) “requires that judicial review be precluded only when the Attorney General makes discretionary decisions.”¹⁰⁴ Rejecting an argument in the affirmative, the court held that “[a]lthough the [Supreme] Court emphasized the importance of preserving the Attorney General’s discretionary functions in the three enumerated categories, it did not explicitly state that the provision applies *only* to review of discretionary decisions by the Attorney General in these areas and not to review of non-discretionary decisions.”¹⁰⁵ The court further noted that Supreme Court precedent contains “no discussion of review over non-discretionary actions” and that “a plain reading of the statute

¹⁰¹ The Ninth Circuit held in *Catholic Social Services, Inc v Immigration and Naturalization Service*, 232 F3d 1139, 1150 (9th Cir 2000) (en banc), that § 1252(g) “applies only to the three specific discretionary actions mentioned in its text, not to all claims relating in any way to deportation proceedings.” This was reaffirmed in *Arce*, in which the court held that § 1252(g) is limited “to actions challenging the Attorney General’s discretionary decisions to initiate proceedings, adjudicate cases, and execute removal orders.” *Arce*, 899 F3d at 800.

¹⁰² In *Madu*, the Eleventh Circuit held that § 1252(g) does not strip the court of jurisdiction to hear a constitutional challenge to detention and impending removal. *Madu*, 470 F3d at 1363. The plaintiff had filed a habeas petition challenging his detention and removal on the grounds that he had left the United States by the deadline set forth in the immigration judge’s voluntary departure order. The court reasoned that while § 1252(g) “bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions.” *Id* at 1368.

¹⁰³ The Sixth Circuit reasoned in *Mustata* that § 1252(g) does not bar review of an ineffective assistance of counsel claim because “[the petitioners] are not asking the Attorney General to exercise her discretion to allow them to remain in the United States.” *Mustata*, 179 F3d at 1022–23.

¹⁰⁴ *Foster*, 243 F3d at 214.

¹⁰⁵ *Id*, citing *American-Arab Anti-Discrimination Committee*, 525 US at 486 (emphasis added).

demonstrates that Congress did not exclude nondiscretionary decisions from this provision limiting judicial review.”¹⁰⁶ The Eighth Circuit has adopted substantially similar reasoning.¹⁰⁷

III. WRONGFUL REMOVAL IS OUTSIDE THE SCOPE OF § 1252(g)

Part II established that circuit courts disagree about how to interpret § 1252(g). The Third, Sixth, Ninth, and Eleventh Circuits disagree with the Fifth and Eighth Circuits about whether § 1252(g) applies only to the Attorney General’s discretionary decisions. Similarly, the Eighth and Ninth Circuits disagree about whether § 1252(g) applies to wrongful removal suits. There is some overlap between these embedded circuit splits, but the takeaway is clear—there is no prevailing interpretation of the statute.

Resolution of this question would have significant consequences. Hundreds of thousands of noncitizens are removed each year.¹⁰⁸ The deportation process can take several years, families may be separated, and detainees may be treated like prisoners.¹⁰⁹ The current state of the law arbitrarily conditions relief on which federal jurisdiction the noncitizen was removed from.

This Part advances four discrete arguments for why § 1252(g) should be interpreted narrowly to allow federal jurisdiction when, in the context of a challenge to removal, the government violates a court order, a statute, or its own regulations. First, the Supreme Court has suggested that § 1252(g) may apply only to the Attorney General’s discretionary decisions, and wrongful removal is never in the Attorney General’s discretion. Second, Supreme Court precedent and the legislative history of § 1252(g) counsel in favor of a narrow interpretation of the phrase “arising from” in § 1252(g). Third, wrongful removal might not be covered by § 1252(g) because it is not a “decision or action . . . [to] execute removal orders.”¹¹⁰ Finally, several policy considerations push in favor of a narrow interpretation. Specifically, a narrow interpretation would restrain the executive and prevent harm to

¹⁰⁶ *Foster*, 243 F3d at 214. Interestingly, the Fifth Circuit’s opinion in *Foster* does not engage in any way with *Catholic Social Services*, despite being decided only a year apart and *Catholic Social Services* being decided en banc.

¹⁰⁷ See *Silva*, 866 F3d at 940–42 (“The statute [] makes no distinction between discretionary and nondiscretionary decisions. So long as the claim arises from a decision to execute a removal order, there is no jurisdiction.”).

¹⁰⁸ US Immigration and Customs Enforcement, *Fiscal Year 2018* at *10 (cited in note 11).

¹⁰⁹ See notes 13–15.

¹¹⁰ See 8 USC § 1252(g).

noncitizens. Taken together, these arguments strongly suggest that § 1252(g) should be interpreted narrowly to allow federal jurisdiction over wrongful removal cases.

A. Supreme Court Precedent Suggests That § 1252(g) May Be Confined to the Attorney General’s Discretionary Decisions

In this Section, I argue that Supreme Court precedent weighs in favor of confining § 1252(g) to cases involving the Attorney General’s discretionary decisions. While this potentially resolves the circuit splits described in Part II, it ultimately rests on ambiguity in Supreme Court case law. Relying on wrongful removal as the limiting principle to § 1252(g), I suggest below, has a much stronger legal foundation and addresses concerns articulated by the circuit courts on both sides of the split.

In *American-Arab Anti-Discrimination Committee*, the Supreme Court suggested that the scope of § 1252(g) may be confined to discretionary decisions, even though the face of the statute does not impose such a requirement.¹¹¹ Throughout the opinion, the Court repeatedly characterized § 1252(g) and the IIRIRA as specifically protecting the Attorney General’s *discretionary* decisions. That specificity suggests that § 1252(g) might not apply to the Attorney General’s nondiscretionary decisions. For example, according to the Court, § 1252(g) “seems clearly designed to give some measure of protection to . . . *discretionary* determinations.”¹¹² The Court continued, “[M]any provisions of IIRIRA are aimed at protecting the Executive’s discretion from the courts—indeed, that can fairly be said to be the theme of the legislation.”¹¹³ After considering the statute’s purpose and legislative history, the Court declared that “Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion.”¹¹⁴

The Court repeatedly characterized § 1252(g) as “narrow.”¹¹⁵ It explained that “[t]he provision applies only to three discrete actions that the Attorney General may take: her ‘decision or action’ to ‘*commence* proceedings, *adjudicate* cases, or *execute* removal orders.”¹¹⁶ The Court cited various examples of decisions

¹¹¹ 525 US at 487.

¹¹² Id at 485 (emphasis in original).

¹¹³ Id at 486 (emphasis omitted).

¹¹⁴ Id at 485 n 9.

¹¹⁵ *American-Arab Anti-Discrimination Committee*, 525 US at 482, 487.

¹¹⁶ Id at 482 (emphasis in original).

or actions that are part of the deportation process but are nonetheless reviewable, including decisions to open investigations, surveil suspected violators, and reschedule deportation hearings.¹¹⁷ Despite repeatedly emphasizing the narrowness of § 1252(g), the Court did not explicitly state whether the statute is limited to the Attorney General's discretionary decisions. Without additional Supreme Court guidance, it is unlikely that the circuit split on this issue will be resolved.

A possible solution is for courts to embrace wrongful removal, rather than discretionary authority, as the limiting principle to § 1252(g)'s scope. As discussed below, the wrongful removal limiting principle has a strong legal foundation in Supreme Court precedent, legislative history, and public policy.

B. The Scope of Capacious Language like “Arising From” Should Be Informed by Legislative History and Common Sense

In this Section, I argue that Supreme Court precedent strongly suggests that § 1252(g) should be interpreted narrowly to not apply to cases involving wrongful removal. Section 1252(g) applies only to cases “arising from” the Attorney General's decision or action to remove someone from the United States.¹¹⁸ I identify two principles from seven modern Supreme Court cases¹¹⁹ deciding the scope of capacious language like “arising from,” “in connection with,” “related to,” or “affecting.” First, the scope of statutory language should be informed by the statute's purpose and legislative history. Second, courts should avoid reading statutes with an “uncritical literalism” that will lead to results that “no sensible person could have intended.”¹²⁰ As discussed below, these two rules guide this Comment's principal argument—that “arising from” in § 1252(g) should be interpreted narrowly.

¹¹⁷ See *id.* at 482.

¹¹⁸ 8 USC § 1252(g).

¹¹⁹ See generally *Jennings*, 138 S Ct 830; *Gobeille v Liberty Mutual Insurance Co*, 136 S Ct 936 (2016); *Federal Energy Regulatory Commission v Electric Power Supply Association*, 136 S Ct 760 (2016); *Maracich v Spears*, 570 US 48 (2013); *Dan's City Used Cars, Inc v Pelkey*, 569 US 251 (2013); *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Insurance Co*, 514 US 645 (1995); *Celotex Corp v Edwards*, 514 US 300 (1995). To the best of my knowledge, no other modern Supreme Court case analyzes the scope of “capacious language” as one of its primary holdings. *Jennings* decided the issue as a threshold question, and the other six cases decided the issue as their primary holdings. Furthermore, I could find no Supreme Court case that stands contrary to the two principles I distill from these cases.

¹²⁰ *Jennings*, 138 S Ct at 840, citing *Gobeille*, 136 S Ct at 943.

With these two principles in mind, this Section proceeds in four subsections. The first analyzes *Jennings v Rodriguez*,¹²¹ in which the Court interpreted the phrase “arising from” in a neighboring provision—8 USC § 1252(b)(9)—of the INA narrowly.¹²² The second describes four other cases in which the Court interpreted other capacious language narrowly. The third describes two cases in which the Court interpreted such language broadly. Even though these cases reach opposite conclusions, they demonstrate how the two principles identified above determine how broadly the statute should be read. The fourth Section applies the legal rules synthesized in Parts III.B.1–3 to conclude that the phrase “arising from” in § 1252(g) should be interpreted narrowly.

1. The Court held in *Jennings* that the phrase “arising from” in § 1252(b)(9) should be interpreted narrowly.

The plaintiff in *Jennings*—a Mexican citizen and lawful permanent resident of the United States—sought relief after being detained for more than six months without a bond hearing during an immigration proceeding.¹²³ Before reaching the primary issue—whether detained noncitizens have a right to periodic bond hearings—the Court first analyzed the threshold question of whether § 1252(b)(9) deprived it of jurisdiction.¹²⁴ Section 1252(b)(9) states that “[j]udicial review of all questions of law and fact . . . 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.”¹²⁵

A plurality of the Court held that § 1252(b)(9) did not deprive it of jurisdiction, even though that holding conflicts with the literal reading of the statute. It admitted that “if those actions [to remove the plaintiffs from the United States] had never been taken, the aliens would not be in custody at all.”¹²⁶ Nonetheless, the Court held that “when confronted with capacious phrases like

¹²¹ 138 S Ct 830 (2018).

¹²² *Jennings* is discussed in its own Section because it is the Court’s most recent decision on “capacious language” and it deals with the phrase “arising from” in § 1252 of the INA. The other cases all support the legal rules drawn from *Jennings*.

¹²³ *Jennings*, 138 S Ct at 838–40.

¹²⁴ *Id* at 839.

¹²⁵ 8 USC § 1252(b)(9).

¹²⁶ *Jennings*, 138 S Ct at 840.

‘arising from,’ we have eschewed ‘*uncritical literalism*’ leading to results that ‘no sensible person could have intended.’”¹²⁷

The court gave several examples of situations in which federal courts would retain jurisdiction even though the operative “questions of law and fact” could be said to “aris[e] from” actions taken to remove the noncitizens. First, “[s]uppose, for example, that a detained alien wishes to assert a claim under *Bivens*. . . based on allegedly inhumane conditions of confinement.”¹²⁸ Second, “suppose that a detained alien brings a state-law claim for assault against a guard or fellow detainee.”¹²⁹ Finally, “suppose that an alien is injured when a truck hits the bus transporting aliens to a detention facility, and the alien sues the driver or owner of the truck.”¹³⁰ In each of these cases the court explained that it “would be absurd” to “cram[] judicial review of [these] questions into the review of final removal orders.”¹³¹

Although he concurred with the case’s disposition, Justice Clarence Thomas disagreed with the plurality’s holding. He reasoned that the words “arising from,” even when read narrowly, covered the claims at issue in the case “because detention *is* an ‘action taken . . . to remove’ an alien.”¹³² Justice Thomas addressed the plurality’s argument that a broad reading of “arising from” would lead to “staggering results”—describing the three examples given by the plurality—by claiming that “those actions are neither congressionally authorized nor meant to ensure that an alien can be removed.”¹³³ He thus drew a distinction between challenging the fact of detention, “an action taken in pursuit of the lawful objective of removal,” and claims about injuries suffered during detention, “actions that go beyond the Government’s lawful pursuit of its removal objective.”¹³⁴

Justice Thomas’s reasoning is consistent with holding that § 1252(g) does not apply to cases involving wrongful removal. In instances in which the government violates a statute, a court order, or its own regulation, deportation is not “an action taken in pursuit of the *lawful* objective of removal.”¹³⁵ Suits stemming from

¹²⁷ Id at 840 (emphasis added), citing *Gobeille*, 136 S Ct at 943.

¹²⁸ *Jennings*, 138 S Ct at 840 (citation omitted).

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² *Jennings*, 138 S Ct at 855 (Thomas concurring in part and concurring in the judgment) (emphasis in original).

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id (emphasis added).

wrongful removal also tend to be damages actions in response to the government's violation of a court order, rather than a challenge to the fact of removal. For example, the plaintiffs in both *Silva* and *Arce* asserted FTCA claims for damages against the government, rather than challenging the fact of their removal.¹³⁶

Jennings was decided in early 2018, so only the Ninth Circuit had the opportunity to address it in its opinion.¹³⁷ In *Arce*, the Ninth Circuit stated that its interpretation was supported by the Supreme Court's "express instructions" that § 1252(g) does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General."¹³⁸ This language was derived from the Supreme Court's decision in *American-Arab Anti-Discrimination Committee*,¹³⁹ which the Eighth Circuit distinguished in *Silva*.¹⁴⁰

2. Supreme Court cases in which capacious language is read narrowly.

In addition to *Jennings*, there are four modern cases¹⁴¹ in which the Court has interpreted similarly capacious language narrowly. These cases stand for the same two principles: the scope of statutory language should be informed by the statute's purpose and legislative history, and courts should avoid reading statutes with an "uncritical literalism" that will lead to results that "no sensible person could have intended."¹⁴² When considering legislative history and purpose, courts ask whether the conduct allegedly covered by the statute undermines Congress's objective in enacting that statute. If so, then the statute's "capacious language" should not be interpreted to cover the challenged conduct. Similarly, reading capacious language sensibly requires courts to find some logical limit to the statute's scope. Such language

¹³⁶ See *Arce*, 899 F3d at 799; *Silva*, 866 F3d at 939.

¹³⁷ *Silva* was decided on August 9, 2017, *Jennings* was decided on February 27, 2018, and *Arce* was decided on August 9, 2018.

¹³⁸ *Arce*, 899 F3d at 800 (referring to the Court's statement in *Jennings*).

¹³⁹ See *American-Arab Anti-Discrimination Committee*, 525 US at 482 ("[Section 1252(g)] applies only to three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'").

¹⁴⁰ *Silva*, 866 F3d at 941 ("But this reference to discretionary decisions [in *American-Arab Anti-Discrimination Committee*] did not say that § 1252(g) applies *only* to discretionary decisions, notwithstanding plain language that includes no such limitation.").

¹⁴¹ See note 119 (explaining my selection methodology).

¹⁴² *Jennings*, 138 S Ct at 840, citing *Gobeille*, 136 S Ct at 943.

should not be interpreted limitlessly, and the court's interpretation of it should not be so broad that it cannot "be attributed to a rational Congress."¹⁴³ That said, defining the scope of capacious language is necessarily a case-by-case inquiry that depends on the statute's specific language, Congress's objective when enacting the provision in question, and the conduct allegedly covered by the Act.

First is *Maracich v Spears*,¹⁴⁴ in which the Court applied these two principles to hold that the phrase "in connection with" in the Driver's Privacy Protection Act¹⁴⁵ (DPPA) should be interpreted narrowly.¹⁴⁶ The case involved a group of attorneys who had used personal information obtained from the South Carolina DMV to send solicitation letters to prospective clients.¹⁴⁷ The DPPA provided that such information may be disclosed "[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court."¹⁴⁸ The defendant attorneys argued that the solicitation of potential clients was a use "in connection with" litigation, so their actions were protected by the DPPA.¹⁴⁹

The DPPA's legislative history supported a narrow interpretation. Congress enacted the DPPA to protect an individual's right to privacy in his or her motor vehicles.¹⁵⁰ The Court reasoned, "If [§ 2721](b)(4) were read to permit disclosure of personal information whenever any connection between the protected information and a potential legal dispute could be shown, it would undermine in a substantial way the DPPA's purpose."¹⁵¹ Consequently, a broad interpretation of the statute would both undermine Congress's objectives and would violate common sense.

Similarly, a "sensible interpretation" that eschews "uncritical literalism" supported a narrow interpretation. The Court noted that the DPPA's "in connection with" language must have a limit, and a "logical and necessary conclusion is that an attorney's solicitation of prospective clients falls outside of that limit."¹⁵² After considering both these principles, the Court concluded that the

¹⁴³ See *Dan's City Used Cars*, 569 US at 265.

¹⁴⁴ 570 US 48 (2013).

¹⁴⁵ Pub L No 103-322, 108 Stat 2099 (1994), codified at 18 USC § 2721 et seq.

¹⁴⁶ *Maracich*, 570 US at 59–61.

¹⁴⁷ *Id.* at 51–53.

¹⁴⁸ 18 USC § 2721(b)(4).

¹⁴⁹ *Maracich*, 570 US at 59.

¹⁵⁰ *Id.* at 60–61.

¹⁵¹ *Id.*

¹⁵² *Id.*

“in connection with” language in the statute did not cover attorneys using DMV records to send solicitation letters to clients.¹⁵³

The Court continued to apply these two principles—that the scope of capacious language should be considered in light of the statute’s legislative history and purpose, and that courts should read capacious language sensibly—in *Dan’s City Used Cars, Inc v Pelkey*.¹⁵⁴ The plaintiff sued the defendant for violating state laws governing the enforcement of statutory liens for towing fees after the defendant towed the plaintiff’s car and sold it to a third party.¹⁵⁵ The defendant argued that the plaintiff’s claims were preempted by the Federal Aviation Administration Authorization Act of 1994¹⁵⁶ (FAAAA), which preempted state laws “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”¹⁵⁷

The Court considered Congress’s objective in enacting the statute, which was to displace “*certain* aspects of the State regulatory process” that “impeded the free flow of trade, traffic, and transportation of interstate commerce.”¹⁵⁸ It reasoned that claims stemming from improperly towed vehicles did not relate to this purpose.¹⁵⁹ Furthermore, the Court refused to read the preemption clause with “uncritical literalism”—stating that “the breadth of the words ‘related to’ does not mean the sky is the limit.”¹⁶⁰ It cautioned against an interpretation of the phrase “related to” that is so broad that it cannot “be attributed to a rational Congress.”¹⁶¹ Considering these two principles in tandem, the Court concluded that that the phrase “related to” does not include claims stemming from improperly towed vehicles.¹⁶²

The third case is *Federal Energy Regulatory Commission v Electric Power Supply Association*,¹⁶³ in which the Court applied the two principles to the Federal Power Act¹⁶⁴ (FPA).¹⁶⁵ The FPA authorized the Federal Energy Regulatory Commission (FERC)

¹⁵³ *Maracich*, 570 US at 78.

¹⁵⁴ 569 US 251 (2013).

¹⁵⁵ *Id* at 251–52.

¹⁵⁶ Pub L No 103-305, 108 Stat 1569, codified as amended in various sections of Title 49.

¹⁵⁷ 49 USC § 14501(c)(1).

¹⁵⁸ *Dan’s City Used Cars*, 569 US at 263 (emphasis in original).

¹⁵⁹ *Id* at 263.

¹⁶⁰ *Id* at 252, 260 (internal citations omitted).

¹⁶¹ *Id* at 265.

¹⁶² *Dan’s City Used Cars*, 569 US at 265.

¹⁶³ 136 S Ct 760 (2016).

¹⁶⁴ 41 Stat 1063 (1920), codified as amended at 16 USC § 791a et seq.

¹⁶⁵ *Electric Power Supply*, 136 S Ct at 776.

to regulate “the sale of electric energy at wholesale in interstate commerce,” including both wholesale electricity rates and any rule or practice “affecting” such rates.¹⁶⁶

The Court believed that a narrow reading of the statute was consistent with congressional intent, stating, “We cannot imagine that [FERC’s argument] was what Congress had in mind.”¹⁶⁷ Focusing on the requirement that courts interpret capacious language sensibly, the Court stated that its holding was “a common-sense construction of the FPA’s language.”¹⁶⁸ The Court reiterated, “As we have explained in addressing similar terms like ‘relating to’ or ‘in connection with,’ a non-hyperliteral reading is needed to prevent the statute from assuming near-infinite breadth.”¹⁶⁹

Finally, the Court applied the same two principles in *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Insurance Co*¹⁷⁰ to hold that the phrase “relate to” in the Employee Retirement Income Security Act of 1974¹⁷¹ (ERISA) should be read narrowly.¹⁷² In the case, New York passed a statute that required hospitals to charge patients covered by commercial insurers more than patients covered by a Blue Cross/Blue Shield plan.¹⁷³ The plaintiffs sued, claiming that § 514(a) of ERISA preempted the state statute.¹⁷⁴ Section 514(a) provides that ERISA “shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan” covered by the statute.¹⁷⁵

The Court held that the state statute does not “relate to” employee benefit plans and “accordingly suffer no pre-emption.”¹⁷⁶ To reach this holding, it looked to the purpose behind § 514(a). After concluding that Congress’s intent behind the preemption provision

¹⁶⁶ *Id.* at 766, citing 16 USC §§ 824(b)(1), 824e(a). FERC issued an order requiring market operators to pay demand response providers the same amount for conserving energy as they pay generators for producing it. The plaintiffs challenged the order as exceeding FERC’s authority to regulate “the sale of electric energy at wholesale in interstate commerce.” FERC argued that indirect or tangential impacts on wholesale electricity rates sufficed to give it jurisdiction under the FPA. *Electric Power Supply*, 136 S Ct at 774.

¹⁶⁷ *Electric Power Supply*, 136 S Ct at 774.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 514 US 645 (1995).

¹⁷¹ Pub L No 93-406, 88 Stat 829, codified as amended at 29 USC § 1001 et seq.

¹⁷² *New York State Conference*, 514 US at 649.

¹⁷³ *Id.* at 645.

¹⁷⁴ *Id.*

¹⁷⁵ 29 USC § 1144(a).

¹⁷⁶ *New York State Conference*, 514 US at 649.

was “to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans,” the Court adopted a narrow reading of the statute.¹⁷⁷ Like in *Jennings*, the majority eschewed an “uncritical literalism” that would require them to read the phrase “relate to” broadly.¹⁷⁸ It stated that “[i]f ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course.”¹⁷⁹

While Congress’s legislative purpose behind the statutes in these four cases differed, the Court’s methodology for determining the scope of the statutes’ capacious language was similar. First, the Court considered Congress’s objective in enacting the statute. Next, the Court asked whether the challenged conduct fell within that purpose—and in each case it concluded that the challenged conduct undermined Congress’s objective. Simultaneously, the Court eschewed in each statute a literal interpretation that would lead to results that “no sensible person could have intended.”¹⁸⁰ These two factors led the court to interpret each of the four statutes narrowly.

3. Supreme Court cases in which capacious language is read broadly.

There are at least two Supreme Court cases that have resulted in “capacious language” being interpreted broadly. These cases should not be viewed as exceptions to the principles I have outlined above—they both follow the same framework. These cases come out differently because the legislative purpose and history of the respective acts suggest that the pertinent capacious language should cover the challenged conduct. In the cases discussed in the above Section, the conduct allegedly covered by the Act undermined Congress’s purpose in enacting the statutes. But in the two cases discussed here, the challenged conduct was consistent with Congress’s objectives. So while these cases come out differently, they support my overall framework for how courts should interpret the scope of capacious language: first, consider Congress’s objective in enacting the statute, and then consider how to read the statutory language sensibly.

¹⁷⁷ *Id.* at 645, 657.

¹⁷⁸ *See id.* at 656.

¹⁷⁹ *Id.* at 655.

¹⁸⁰ *Jennings*, 138 S Ct at 840, citing *Gobeille*, 136 S Ct at 943.

In *Gobeille v Liberty Mutual Insurance Co.*,¹⁸¹ the Court dealt with a similar issue as it did in *New York State Conference* but came to the opposite conclusion—that the phrase “relate to” in ERISA should be interpreted broadly enough to include the plaintiff’s claims.¹⁸² ERISA preempted “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”¹⁸³ The plaintiff operated a self-insured employee health plan. He sought a declaratory judgment that ERISA preempted a Vermont statute requiring all health insurers to file certain disclosures with the state.¹⁸⁴

In reaching its decision, the Court considered the breadth that Congress intended to give ERISA’s preemption provision and the importance of “reject[ing] ‘uncritical literalism’ in applying the clause” so that the provision still has “workable standards.”¹⁸⁵ The Court referenced *New York State Conference* and suggested it was correctly decided.¹⁸⁶ But then it reasoned that the two principles—considering Congress’s objective and sensible interpretation—*as applied to Vermont’s disclosure requirement*, suggested a different outcome here. The Court noted that Congress intended ERISA’s preemption clause to have a broad scope. Specifically, ERISA was designed to preempt laws that “govern, or interfere with the uniformity of, plan administration.”¹⁸⁷ The Court found that it was consistent with ERISA’s purpose to hold that the Vermont statute was preempted.¹⁸⁸ The Court found that its holding “ensure[s] that ERISA’s express preemption clause receives the broad scope Congress intended while avoiding the clause’s susceptibility to limitless application.”¹⁸⁹

Reaching a similar conclusion in *Celotex Corp v Edwards*,¹⁹⁰ the Court interpreted the phrase “related to” in the Bankruptcy Reform Act of 1978¹⁹¹ broadly.¹⁹² The case concerned the scope of bankruptcy courts’ jurisdiction. A bankruptcy court had enjoined

¹⁸¹ 136 S Ct 936 (2016).

¹⁸² *Id.* at 943.

¹⁸³ 29 USC § 1144(a).

¹⁸⁴ *Gobeille*, 136 S Ct at 941–42.

¹⁸⁵ *Id.* at 943.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Gobeille*, 136 S Ct at 943–45.

¹⁸⁹ *Id.* at 943.

¹⁹⁰ 514 US 300 (1995).

¹⁹¹ Pub L No 95-598, 92 Stat 2549, codified as amended at 11 USC § 101 et seq.

¹⁹² *Celotex*, 514 US at 308.

respondents from executing on a supersedeas bond¹⁹³ posted by petitioner without the bankruptcy court's permission.¹⁹⁴ For the bankruptcy court to have jurisdiction to decide whether the respondents were entitled to immediate execution on the bond, the proceeding must have been "related to" the petitioner's bankruptcy.¹⁹⁵

The Court first looked to Congress's purpose and intention in enacting the Bankruptcy Code. Even though "a proceeding by respondents against [the third party] on the supersedeas bond does not directly involve [the petitioner], except to satisfy the judgment against it secured by the bond," it was consistent with congressional intent to interpret the statute's language broadly.¹⁹⁶ The Court noted that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate."¹⁹⁷ It went on to say that "a bankruptcy court's 'related to' jurisdiction cannot be limitless," but a broad reading of the statute here was reasonable.¹⁹⁸

Additionally, policy considerations support the Court's holding in *Celotex*. Courts generally apply "a strong presumption in favor of judicial review of administrative action."¹⁹⁹ When there is an ambiguity in a jurisdiction-stripping statute, some courts hold that it should be resolved in favor of the narrow interpretation.²⁰⁰ It was unclear whether the Bankruptcy Act intended to strip bankruptcy courts of jurisdiction, so the Court may have been motivated in accordance with these principles to preserve judicial review.

Even though *Gobeille* and *Celotex* resulted in a broad reading of capacious language, the cases still apply the same interpretive

¹⁹³ A supersedeas bond is a bond posted by an appellant in order to obtain a stay of the district court's judgment. If the appellant loses the appeal, the appellee is paid the judgment plus any damages caused due to delay from the appeal. *Bond* (Merriam-Webster, 2018), archived at <http://perma.cc/BE3M-QM9M>.

¹⁹⁴ *Celotex*, 514 US at 301–02.

¹⁹⁵ *Id.* at 307. The Bankruptcy Code states that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11," 28 USC § 1334(b), and that district courts may refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." 28 USC § 157(a).

¹⁹⁶ *Celotex*, 514 US at 308–09.

¹⁹⁷ *Id.* at 308 (quotation marks omitted).

¹⁹⁸ *Id.*

¹⁹⁹ See, for example, *Immigration and Naturalization Service v St. Cyr*, 533 US 289, 298 (2001).

²⁰⁰ See, for example, *ANA International Inc v Way*, 393 F3d 886, 894 (9th Cir 2004); *American-Arab Anti-Discrimination Committee*, 525 US at 480–82.

methodology as the cases in the preceding Section. The only difference is that the specific application of these principles to the facts suggested a different outcome. With these principles in mind, I turn to the next Section to apply them to the phrase “arising from” in § 1252(g).

4. Legislative history and Supreme Court precedent support a narrow reading of § 1252(g).

The seven Supreme Court cases interpreting the scope of “capacious” statutory language like “arising from” each stand for the same two rules: First, the scope of statutory language should be informed by a statute’s purpose and legislative history. If the challenged conduct undermines Congress’s objective in enacting the statute, it is highly likely that the conduct should not be included under the statute’s capacious language. Second, courts should avoid reading statutes with “uncritical literalism” such that a strict reading of the statute will lead to results that “no sensible person could have intended.”²⁰¹ In every case identified in this Section, the Court has agreed that capacious language should not be read literally so as to cover every claim that could tenuously be included under the capacious language. These two rules, when applied to § 1252(g), strongly support a narrow reading of § 1252(g). This Section takes each rule in turn.

First, the IIRIRA’s purpose and legislative history suggest a narrow reading of § 1252(g)’s jurisdiction-stripping provision. Congress’s objective in enacting § 1252(g) was to expedite the removal process and to limit frivolous appeals, and neither of these goals are undermined by allowing wrongful removal suits.²⁰² Furthermore, a sensible interpretation of § 1252(g) will allow wrongful removal suits because the government should not be able to violate a court order, a statute, or a regulation without an opportunity for judicial review.

According to a Senate Report, one of the major purposes of the IIRIRA was to “create an expedited removal process, so that those who seek to enter the United States surreptitiously or with fraudulent documents can be promptly deported and not allowed to stay here for years while pursuing various frivolous appeals at all levels and in all forums, administrative and judicial.”²⁰³ Similarly,

²⁰¹ *Jennings*, 138 S Ct at 840, citing *Gobeille*, 136 S Ct at 943.

²⁰² For a discussion on the objectives of the IIRIRA, see Part I.B–C.

²⁰³ *IIRIRA Record*, 142 Cong Rec at S10572 (statement of Sen Simpson) (cited in note 50).

the Supreme Court stated in *American-Arab Anti-Discrimination Committee* that § 1252(g) is “specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings.”²⁰⁴ But wrongful removal suits almost always take the form of FTCA damages claims, which cannot contribute to the “deconstruction, fragmentation, and hence prolongation of removal proceedings”²⁰⁵ because the plaintiff is not entitled to remain in the United States while the suit is pending.²⁰⁶

Although the purpose of the IIRIRA was to expedite the removal process, it was not meant to be at the complete expense of due process.²⁰⁷ For example, in congressional testimony, the INS General Counsel stated that “[t]he Administration is committed to ensuring that aliens in deportation proceedings are afforded appropriate due process; however, the availability of multiple layers of judicial review has frustrated the timely removal of deportable aliens.”²⁰⁸ And even if one finds Congress’s intent here to be ambiguous, the Supreme Court has held that “when a particular interpretation of a statute invokes the outer limits of Congress’ power, [there needs to be] a clear indication that Congress intended that result.”²⁰⁹

Various canons of construction also support interpreting § 1252(g) narrowly. One may argue that the INA’s silence on the breadth of § 1252(g) substantiates the view that Congress intended to bar judicial review of most actions by the INS, but this argument is weakened by a line of cases that interpreted a similar provision in the INA narrowly before the IIRIRA. In both *Arevalo v Woods*²¹⁰ and *Sanchez v Rowe*,²¹¹ for example, courts allowed *Bivens* and FTCA claims under the old judicial review provision.²¹² The lack of any text or legislative history indicating that Congress intended to diverge from past practice suggests that courts should continue to allow such suits under § 1252(g).²¹³ The INA’s silence

²⁰⁴ *American-Arab Anti-Discrimination Committee*, 525 US at 487.

²⁰⁵ *Id.*

²⁰⁶ 8 USC § 1252(b)(3)(B).

²⁰⁷ See *St. Cyr*, 533 US at 314.

²⁰⁸ *Hearing on Removal*, 104th Cong, 1st Sess at 15 (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service) (cited in note 63).

²⁰⁹ *St. Cyr*, 533 US at 299.

²¹⁰ 811 F2d 487 (9th Cir 1987).

²¹¹ 651 F Supp 571 (ND Tex 1986).

²¹² See 8 USC § 1105a.

²¹³ See, for example, *Green v Bock Laundry Machine Co.*, 490 US 504, 521–22 (1989) (“A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.”).

also pushes in favor of a narrow reading of § 1252(g) because there is a “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen].”²¹⁴

The constitutional avoidance canon may also suggest a narrow reading of the statute. The canon instructs that when courts face multiple plausible interpretations of a statute, and one of the interpretations would render the statute unconstitutional, courts should interpret the statute in a way that is constitutional.²¹⁵ The Court applied the constitutional avoidance canon to the IIRIRA in *Immigration and Naturalization Service v. St. Cyr*,²¹⁶ holding the law could not be interpreted to “entirely preclude review of a pure question of law by any court.”²¹⁷ For the same reasons as advanced in *St. Cyr*, the constitutional avoidance canon suggests that courts ought to construe § 1252(g) narrowly.²¹⁸ As has been interpreted by the Fifth and Eighth Circuits, § 1252(g) precludes judicial review over *any claim* brought by removed noncitizens—thereby raising a serious constitutional issue. To avoid this dilemma, the constitutional avoidance canon may counsel in favor of a narrow interpretation of the statute.

Finally, there is a “strong presumption in favor of judicial review of administrative action.”²¹⁹ In *Marbury v. Madison*,²²⁰ Chief Justice John Marshall insisted that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.”²²¹ In later cases, the Court has repeatedly emphasized that administrative action is presumably subject to judicial review.²²² The Court has established that “judicial 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.”²²³ In *Abbott Laboratories v. Gardner*,²²⁴ the Court stated that “only upon a showing of ‘clear and convincing

²¹⁴ *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 US 421, 449 (1987) (explaining the immigration rule of lenity).

²¹⁵ *Id.* See also *Zadvydas v. Davis*, 533 US 678, 689 (2001) (holding that the constitutional avoidance canon instructs courts to construe the INA to contain an implicit “reasonable time” limitation on a noncitizen’s post-removal detention period).

²¹⁶ 533 US 289 (2001).

²¹⁷ *Id.* at 300.

²¹⁸ See *id.* (stating that some judicial intervention in deportation cases is “unquestionably ‘required by the Constitution.’”).

²¹⁹ *St. Cyr*, 533 US at 298.

²²⁰ 5 US (1 Cranch) 137 (1803).

²²¹ *Id.* at 163.

²²² *St. Cyr*, 533 US at 298.

²²³ *Bowen v. Michigan Academy of Family Physicians*, 476 US 667, 670 (1986).

²²⁴ 387 US 136 (1967).

evidence’ of a contrary legislative intent should the courts restrict access to judicial review.”²²⁵

At best, it is ambiguous whether Congress intended § 1252(g) to preclude judicial review of cases by wrongfully removed noncitizens. Congress likely did not consider the possibility that the executive might remove individuals in violation of a court order. Under Supreme Court precedent, this ambiguity pushes in favor of judicial review. The Court has said, “The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such *slender and indeterminate evidence of legislative intent*.”²²⁶ Additionally, the Court has articulated a “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.”²²⁷ This ambiguity suggests that § 1252(g) should be interpreted narrowly. Perhaps other circuits should adopt the Ninth Circuit’s “general rule to resolve any ambiguities in a jurisdiction-stripping statute in favor of the narrower interpretation.”²²⁸

In summary, the first principle—that courts should consider Congress’s objectives when defining the scope of a statute’s capacious language—suggests that § 1252(g) should be interpreted narrowly. The IIRIRA’s legislative history shows that its purpose was to expedite the removal process and limit frivolous appeals. Construing § 1252(g) narrowly is consistent with these goals because noncitizens asserting wrongful removal claims are almost always asserting damages claims, rather than seeking to prolong their stay in the United States. Furthermore, the IIRIRA’s legislative history suggests that Congress did not intend for § 1252(g) to come at the complete expense of due process. Given that there is no indication that Congress intended for § 1252(g) to preclude wrongful removal suits, the application of a variety of substantive canons support a narrow interpretation of the statute.

The second rule from the seven cases²²⁹ discussed above is that courts should eschew applying an “uncritical literalism” when interpreting a statute. Taken together, the cases suggest

²²⁵ Id at 141.

²²⁶ Id (emphasis added, quotation marks omitted).

²²⁷ *Cardoza-Fonseca*, 480 US at 449.

²²⁸ *ANA International*, 393 F3d at 894.

²²⁹ See *Jennings*, 138 S Ct at 840; *Gobeille*, 136 S Ct at 943; *Electric Power Supply*, 136 S Ct at 774; *Maracich*, 570 US at 49; *Dan’s City Used Cars*, 569 US at 252; *New York State Conference*, 514 US at 656; *Celotex*, 514 US at 309.

that capacious phrases like “arising from,” “in connection to,” “related to,” and “affecting” should be read with reasonable limitations. In each case, a “hyperliteral” reading of the statute would allow it to assume a “near-infinite breadth” that violates common sense.²³⁰

Applying this principle here, § 1252(g) should not extend to cases in which the government wrongfully removes someone from the United States. Such a broad reading of the provision is a result that “no sensible person could have intended” because it allows the government to remove someone from the United States in violation of a stay, a statute, or its own regulations without any mechanism for judicial review.²³¹ Wrongfully removed noncitizens with salient claims of abuse at the hands of government agents can seek relief only under a narrow reading of § 1252(g).

This returns us to the hypothetical posed to the government during oral arguments in *Arce*. The government conceded that its interpretation of § 1252(g) would preclude federal jurisdiction over suits in which the government intentionally and wrongfully violates a stay of removal.²³² This is the type of “uncritical literalism” that the Court cautioned against in *Jennings*. The plurality offered three scenarios in which it believed it would still have jurisdiction under § 1252(g): a detained noncitizen wishing to assert a *Bivens* claim based on allegedly inhumane conditions of confinement, a detainee bringing a state-law claim for assault against a guard, and a noncitizen being injured when a truck hits the bus transporting him to a detention facility.²³³ Similarly, courts should also have jurisdiction under § 1252(g) when the government removes someone in violation of a court order, a statute, or its own regulation. This result comports with common sense and what we expect a “rational Congress” to legislate.²³⁴

The government might respond that a literal interpretation is not overbroad on the grounds that its application is reasonable in the vast majority of cases, and applying the literal interpretation to extreme cases amounts to reasonable deference to the executive regarding national security issues. I do not dispute that § 1252(g) is valid in most of its applications. Unlike the majority

²³⁰ *Electric Power Supply*, 136 S Ct at 774.

²³¹ *Jennings*, 138 S Ct at 840.

²³² Oral Argument, *Arce* at 13:31 (cited in note 2).

²³³ *Jennings*, 138 S Ct at 840.

²³⁴ *Dan’s City Used Cars*, 569 US at 265.

of what § 1252(g) precludes, however, there is not a similarly compelling justification for precluding wrongful removal suits. These suits almost always take the form of damages actions that do not allow the citizen to remain in the United States while the suit is pending. They also tend to result from the violation of a court-ordered stay, so a neutral magistrate has already determined that the noncitizen was entitled to remain in the United States (and hence did not pose a significant national security risk). Therefore, the government does not have a compelling argument that precluding wrongful removal suits through § 1252(g) is a sensible interpretation.

Justice Thomas's concurrence in *Jennings* pointed out that the three situations discussed by the plurality are distinguishable because they are challenges stemming from injuries suffered during detention, rather than challenges to the fact of detention.²³⁵ However, this distinction is not supported by the IIRIRA's legislative history, which focuses on expedited procedures²³⁶ and frivolous appeals.²³⁷ In fact, this distinction seems contrary to the Act's legislative history, in which INS counsel stressed that "aliens in deportation proceedings are afforded appropriate due process."²³⁸

* * *

The Supreme Court has repeatedly held that the scope of "capacious language" like "arising from," "in connection with," "related to," or "affecting" should be informed by two legal principles: First, the statute's purpose and legislative history should inform its breadth. If the challenged conduct undermines Congress's objective in enacting the statute, it is highly likely that the conduct should not be included under the statute's capacious language. Second, courts should avoid reading statutes with "uncritical literalism" such that a strict reading of the language will lead to results that "no sensible person could have intended."²³⁹ In every

²³⁵ *Jennings*, 138 S Ct at 855 (Thomas concurring in part and concurring in the judgment).

²³⁶ S Rep No 104-249 at 2 (cited in note 60). See also text accompanying notes 59–65 for a discussion on the legislative history of the IIRIRA.

²³⁷ *IIRIRA Record*, 142 Cong Rec at S10572 (statement of Sen Simpson) (cited in note 50).

²³⁸ *Hearing on Removal*, 104th Cong, 1st Sess at 15 (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service) (cited in note 63).

²³⁹ *Jennings*, 138 S Ct at 840, citing *Gobeille*, 136 S Ct at 943.

case identified in this Section, the Court has agreed that capacious language should not be read literally so as to cover every claim that could tenuously be included under the capacious language.

These rules suggest that § 1252(g) should be construed narrowly to allow federal jurisdiction over wrongful removal claims. First, the purpose of the statute—to facilitate expedient removal and limit frivolous appeals—is not frustrated by wrongful removal suits because they tend to take the form of damages actions that do not allow a noncitizen to remain in the United States while the suit is pending. Similarly, the Act’s legislative history demonstrates that Congress did not intend for § 1252(g) to extend to every case that tangentially arises from the Attorney General’s removal decisions.²⁴⁰ Second, a broad reading of § 1252(g) allows the statute to extend beyond what any Congress could have reasonably intended.²⁴¹

There are additional arguments in favor of holding that § 1252(g) does not apply to wrongful removal suits. As discussed in the following Section, the plain language of the statute may not even be implicated when the Attorney General wrongfully removes someone from the United States.

C. Wrongful Removal Is Not One of the Three Discrete Actions That the Attorney General May Take under § 1252(g)

Section 1252(g) only strips federal courts of jurisdiction over three discrete actions that the Attorney General may take: “to commence proceedings, adjudicate cases, or execute removal orders.”²⁴² This Section argues that a lawsuit for wrongful removal does not arise “from the execution of the removal order,” but it instead results “from the violation of [a] court’s order” to stay the removal.²⁴³ Modern jurisprudence on the legal effect of stays supports this reasoning.

The argument is grounded in the Supreme Court’s decision in *American-Arab Anti-Discrimination Committee*. In describing the scope of § 1252(g), the Court noted that “petitioners and re-

²⁴⁰ See *St. Cyr*, 533 US at 299–300.

²⁴¹ See Oral Argument, *Arce* at 13:31 (cited in note 2) (describing a hypothetical in which ICE agents intentionally remove a foreign national to prevent him from testifying at trial).

²⁴² 8 USC § 1252(g).

²⁴³ See *Arce*, 899 F3d at 800.

spondents have treated § 1252(g) as covering all or nearly all deportation claims. . . . Respondents have described it as applying to ‘most of what INS does.’”²⁴⁴ The Court went on to say that § 1252(g) “applies only to three discrete actions that the Attorney General may take: her ‘decision or action’ to ‘commence proceedings, *adjudicate* cases, or *execute* removal orders.’ . . . There are of course many other decisions or actions that may be part of the deportation process” that fall outside of the statute.²⁴⁵

The Supreme Court’s precedent on the legal effect of stays suggests that a lawsuit arising from a wrongful removal does not fall within the direct scope of § 1252(g) because such a suit is predicated on the violation of a court order, rather than on a decision or action to execute a removal order. For example, the plaintiffs in *Silva* and *Arce* were suing under the FTCA for a violation of state tort law.²⁴⁶ Rather than seeking damages for a violation of the INA or IIRIRA, the plaintiff in *Arce*, for example, sought recovery for negligence, intentional infliction of emotional distress, false arrest, and false imprisonment.²⁴⁷

Violating a stay is not part of the deportation process—nor is it a decision or action to execute a removal order. A stay “temporarily suspend[s] the source of authority to act,” “either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability.”²⁴⁸ Furthermore, the Court has held that “[a]n alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the Government, but rather for the temporary setting aside of the source of the Government’s authority to remove.”²⁴⁹ If there is no enforceable removal order for the government to execute, then wrongfully removed noncitizens are not suing the government for “execut[ing] removal orders” as required by § 1252(g).²⁵⁰

D. Public Policy Supports a Narrow Reading of § 1252(g)

The arguments until now have been derived from Supreme Court precedent, legislative history, and statutory interpretation. This Section presents several policy arguments for why § 1252(g)

²⁴⁴ *American-Arab Anti-Discrimination Committee*, 525 US at 478.

²⁴⁵ *Id* at 482 (emphasis added).

²⁴⁶ *Silva*, 866 F3d at 941; *Arce*, 899 F3d at 798.

²⁴⁷ *Arce*, 899 F3d at 799.

²⁴⁸ *Nken v Holder*, 556 US 418, 428–29 (2009).

²⁴⁹ *Id* at 429.

²⁵⁰ 8 USC § 1252(g).

should be interpreted narrowly. A narrow reading restrains the executive, prevents harm to noncitizens, and maintains consistency with the presumption in favor of judicial review.

Restricting the scope of § 1252(g) to exclude cases in which the government wrongfully removes a noncitizen from the United States forces the executive to abide by court orders, statutes, and its own regulations. The government conceded during oral arguments in *Arce* that its interpretation of § 1252(g) would preclude federal jurisdiction over suits in which the government intentionally and wrongfully violates a stay of removal.²⁵¹ Allowing federal jurisdiction in these cases would not only allow the courts to police their behavior, but also would deter the government from committing these wrongs in the first place.

One could argue that there are other mechanisms in place to prevent the executive from wrongfully removing noncitizens from the United States. For example, ICE agents that intentionally violate a stay of removal may face disciplinary action by their supervisors, and the executive would likely face public backlash if it were to intentionally violate a court order or statute. But internal disciplinary processes may not adequately hold agents responsible, especially if ICE believes these actions will not typically attract broad public attention.²⁵² The threat of an external, adversarial process like a lawsuit is likely to further deter wrongful conduct.

Additionally, restricting the scope of § 1252(g) is more likely to prevent harm to noncitizens. Hundreds of thousands of migrants are swept into ICE custody each year.²⁵³ Even when the government follows all relevant laws and regulations, the deportation process is dehumanizing and humiliating. It is not uncommon for individuals to remain in detention for more than a year.²⁵⁴

²⁵¹ See Oral Argument, *Arce* at 13:31 (cited in note 2).

²⁵² Consider Robert Batey, *Deterring Fourth Amendment Violations through Police Disciplinary Reform*, 14 Am Crim L Rev 245, 248–52 (1976) (arguing that internal police disciplinary processes are not sufficient at deterring wrongful police conduct).

²⁵³ Gilman, 36 Fordham Intl L Rev at 252–53 (cited in note 12) (“[I]mmigration detention [] more than doubled from 209,000 immigration detainees in 2001 to 429,000 immigration detainees in 2011.”).

²⁵⁴ See id at 257–58:

[A]n independent study looking at data regarding detention for a single snapshot day—January 25, 2009—found that ICE detained migrants for an average of at least eighty-one days. The study further found that ICE held ten percent of detainees in custody pending removal proceedings for longer than six months but less than a year, and held more than 500 individuals in detention for longer than a year awaiting final adjudication of their cases.

Children may be separated from parents, and prison staff may treat detainees as if they were in punitive custody.²⁵⁵ In fact, ICE has nine facilities available to detain children who have been separated from adults, and it is estimated that there are more than ten thousand children in detention.²⁵⁶ Some detention centers are even run by private companies that stand to profit at the expense of detainees.²⁵⁷ While this might be an unfortunate consequence of removal, restricting the scope of § 1252(g) prevents harm to noncitizens by (1) allowing them to recover damages when they are wrongfully removed, and (2) possibly reducing the number of wrongful deportations.

CONCLUSION

This Comment argues in favor of a narrow interpretation of 8 USC § 1252(g), which states that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”²⁵⁸ I suggest that courts should interpret § 1252(g) narrowly so that it does not cover cases in which the Attorney General removes someone from the United States in violation of a court order, a statute, or a government regulation. This conclusion is rooted in the INA and IIRIRA’s legislative histories, the purpose of their jurisdiction-stripping provisions, Supreme Court precedent, and public policy considerations.

More specifically, this Comment has made four discrete arguments in favor of a narrow interpretation of § 1252(g). First, Supreme Court precedent and the IIRIRA’s legislative history suggest that § 1252(g) may only apply to the Attorney General’s discretionary decisions.²⁵⁹ If § 1252(g) only covers discretionary decisions, then suits stemming from wrongful removal will not be precluded from judicial review because government officials do

²⁵⁵ See Brané and Lundholm, 22 *Georgetown Immig L J* at 162 (cited in note 15) (“[W]hen interviewed by the Office of the Inspector General, five Bureau of Prison (BOP) officials did not know that standards specifically applicable to ICE detainees existed, and so corrections officers were trained to treat detainees the same as inmates.”).

²⁵⁶ Mona Chalabi, *How Many Migrant Children Are Detained in US Custody?* (The Guardian, Dec 22, 2018), archived at <http://perma.cc/AK4L-6WHU> (“The New York Times reported in September [2018] that 12,800 children were in federally contracted shelters based on information that had been reported to members of Congress. Updated estimates published earlier this week now put that number at 15,000.”).

²⁵⁷ Urbi, *Here’s Who’s Making Money* (cited in note 16).

²⁵⁸ 8 USC § 1252(g).

²⁵⁹ *American-Arab Anti-Discrimination Committee*, 525 US at 487.

not have the discretion to violate the law, court orders, or the Constitution.²⁶⁰

Second, Supreme Court precedent suggests that “capacious” phrases like “arising from,” “in connection with,” “related to,” and “affecting” should be read sensibly—courts should eschew an “uncritical literalism” when determining the breadth of these phrases—and courts should consider the statute’s purpose and legislative history when interpreting its breadth.²⁶¹ Section 1252(g)’s purpose was to increase expediency and to avoid frivolous lawsuits. But suits stemming from wrongful removal do not challenge the fact of removal and are much more likely to take the form of damages actions.²⁶² Consequently, a noncitizen asserting a damages action like an FTCA or *Bivens* claim against the government for wrongful removal would not receive an automatic stay that allows them to remain in the United States while the suit was pending.²⁶³ Consequently, the solution most consistent with Supreme Court precedent is to exclude wrongful removals from the scope of § 1252(g).

Third, wrongful removal is not one of the three discrete actions that the Attorney General is authorized to make under § 1252(g). Because stays “temporarily suspend[] the source of authority to act” on removal orders,²⁶⁴ a wrongfully removed noncitizen is not suing the government for “execut[ing] removal orders” as required by the statute.²⁶⁵

Finally, public policy favors a narrow reading of § 1252(g). The interpretation that I propose restrains the executive and helps to protect noncitizens from harm. It is also consistent with the strong presumption in favor of judicial review and the “general rule to resolve ambiguities in a jurisdiction-stripping statute in favor of the narrower interpretation.”²⁶⁶

To return to the opening hypothetical, imagine that a noncitizen has a claim against ICE agents for detainee abuse, but those agents remove him in violation of a court order so that he cannot

²⁶⁰ See note 93.

²⁶¹ See *Jennings*, 138 S Ct at 840.

²⁶² *Arce*, 899 F3d at 799; *Silva*, 866 F3d at 939.

²⁶³ This also addresses Justice Thomas’s concern with the plurality’s jurisdictional holding in *Jennings*. See 138 S Ct at 855 (Thomas concurring in part and concurring in the judgment) (distinguishing between challenges to the fact of detention and claims about injuries suffered during detention, and concluding that suits about the latter should go forward).

²⁶⁴ *Nken v Holder*, 556 US 418, 428–29 (2009).

²⁶⁵ 8 USC § 1252(g).

²⁶⁶ See *St. Cyr*, 533 US at 298.

testify against them. A court in the Fifth or Eighth Circuit could not review their action. But the solution I have proposed would not prevent courts from reviewing this injustice.