No. 20-1791

In the Supreme Court of the United States

KEILA ROSA CAMARENA, ET AL., PETITIONERS

v.

TAE D. JOHNSON, ACTING DIRECTOR OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
WILLIAM C. PEACHEY
NICOLE P. GRANT
MARY L. LARAKERS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 8 U.S.C. 1252(g), which provides in relevant part 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 [Secretary of Homeland Security] to * * * execute removal orders," precludes review of petitioners' claim that the Department of Homeland Security may not execute removal orders against them while they are in the process of pursuing provisional unlawful presence waivers of their inadmissibility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 988 F.3d 1268. The decisions of the district courts (Pet. App. 11a-12a, 13a-16a) are not published in the Federal Supplement but are available at 2019 WL 5535211 and 2019 U.S. Dist. LEXIS 146347.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2021. The petition for a writ of certiorari was filed on June 18, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Federal law provides two distinct pathways for a noncitizen to attain status as a lawful permanent

resident.[1] A noncitizen who has been "inspected and admitted or paroled into the United States" may apply from within the country to adjust his status to that of a lawful permanent resident if, among other qualifications, an immigrant visa is immediately available to him and he is admissible to the United States. 8 U.S.C. 1255(a). A noncitizen also may—and, if ineligible for adjustment of status, must—travel abroad to apply for an immigrant visa via consular processing, which permits him to reenter the United States as a lawful permanent resident. See 8 U.S.C. 1202(a); 22 C.F.R. 42.61(a), 42.62(a)-(b). As with adjustment of status, a noncitizen must be admissible to obtain an immigrant visa through consular processing. See 8 U.S.C. 1182(a).

Two grounds of inadmissibility are relevant here. A noncitizen who is ordered removed or who departs while an order of removal is outstanding is inadmissible for ten years. See 8 U.S.C. 1182(a)(9)(A)(ii). But that ground of inadmissibility is rendered inapplicable "if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission." 8 U.S.C. 1182(a)(9)(A)(iii).[2]

A noncitizen is also inadmissible if he "has been unlawfully present in the United States for one year or more, and * * * again seeks admission within 10 years

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

[2] Although the statutory provisions discussed in this brief frequently refer to the Attorney General, the relevant functions have been transferred to the Secretary of Homeland Security. See 6 U.S.C. 251; *Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005).

of the date of [his] departure or removal from the United States." 8 U.S.C. 1182(a)(9)(B)(i)(II). A noncitizen is unlawfully present if he remains "after the expiration of the period of stay authorized by the [Secretary of Homeland Security]." 8 U.S.C. 1182(a)(9)(B)(ii). The Secretary may waive this ground of inadmissibility in his "sole discretion" if the noncitizen "is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence" and "it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien." 8 U.S.C. 1182(a)(9)(B)(v).

Both of those grounds of inadmissibility are triggered by the noncitizen's departure from the United States. As a result, a noncitizen who departs the United States for consular processing must remedy both grounds to establish eligibility for lawful permanent residence. Traditionally, and as relevant here, noncitizens who sought to obtain a waiver of unlawful presence after leaving the country for consular processing sometimes endured prolonged separation from family members in the United States while awaiting adjudication of their waiver applications. The prospect of such separation deterred noncitizens from departing for consular processing in the first place. See *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 Fed. Reg. 536, 536 (Jan. 3, 2013).

To ameliorate that problem, in 2013, the Department of Homeland Security (DHS) established a system for granting a *provisional* waiver of unlawful presence to a noncitizen who remains within the United States but who would be inadmissible upon departure. 78 Fed.

Reg. at 536. In promulgating the rule, DHS made clear that "the filing or approval of a provisional unlawful presence waiver application will *not*[ ] [c]onfer any legal status * * * or protect an alien from being placed in removal proceedings or removed from the United States." *Ibid.* In 2016, DHS expanded the availability of provisional waivers to noncitizens subject to final orders of removal who have already obtained the Secretary's consent to reapply for admission. *Expansion of Provisional Unlawful Presence Waivers of Inadmissibility*, 81 Fed. Reg. 50,244, 50,245 (July 29, 2016). But the agency again declined to "make an application for a provisional waiver, or the approval of such an application, a basis for granting interim benefits," because "a waiver of inadmissibility do[es] not independently confer any immigration status or otherwise afford lawful presence in the United States." *Id.* at 50,250.

Following DHS's adoption of the provisional-waiver system, a noncitizen who is inadmissible both because of a final order of removal and because of unlawful presence in the United States must generally follow a multistep process to become a lawful permanent resident through consular processing. *First*, DHS must approve a visa petition filed on the noncitizen's behalf by a qualifying relative (via a Form I-130) or employer (via a Form I-140). *Second*, the noncitizen must submit a Form I-212, for permission to reapply for admission following removal. *Third*, upon DHS's conditional approval of the Form I-212, the noncitizen must file a Form I-601A, for a provisional waiver of unlawful presence. *Fourth*, upon approval of the Form I-601A, the noncitizen must travel abroad to complete a consular interview and obtain the immigrant visa. *Fifth*, the noncitizen must present his immigrant visa at a port of

entry for admission to the United States as a lawful permanent resident. See 8 C.F.R. 212.7(e)(3) and (7) (explaining aspects of process); 78 Fed. Reg. at 536 (same); 81 Fed. Reg. at 50,255-50,256 (same).

b. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that a noncitizen aggrieved by a final order of removal may, absent a bar to review, file a petition for review of that order in the appropriate court of appeals within 30 days. 8 U.S.C. 1252(a)(1) and (b)(1). A petition for review is the "sole and exclusive means" of obtaining "judicial review of an order of removal." 8 U.S.C. 1252(a)(5).

Various channeling provisions ensure that a petition for review is also the exclusive mechanism for challenging various other Executive determinations in the immigration context. Section 1252(b)(9) provides 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" is "available only in judicial review of a final order" under Section 1252. 8 U.S.C. 1252(b)(9). At issue here is 8 U.S.C. 1252(g), which provides:

> 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 alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

2. a. Petitioner Keila Camarena is a citizen of the Dominican Republic who entered the United States in

2002 on a tourist visa. Pet. App. 3a. She then received an employment visa but remained in the United States beyond her authorized period of stay, which terminated in 2005. *Ibid.* She was eventually ordered removed in 2013. See *Camarena* Gov't C.A. Br. 4. Rather than remove her immediately, DHS placed Camarena under an order of supervision, and she remained in the United States subject to monitoring. Pet. App. 3a. She filed, and DHS conditionally approved, a Form I-212. Pet. 5. Her employer filed a Form I-140 on her behalf, which remains pending. *Ibid.* If it is approved, she could file a Form I-601A, seeking a provisional waiver of unlawful presence. *Ibid.*

Petitioner Javier Barrios is a citizen of Argentina who entered the United States in 2001 pursuant to a visa waiver program that authorized him to stay for just under 90 days. Pet. App. 4a; *Barrios* Gov't C.A. Br. 2; see 8 U.S.C. 1187. He remained in the United States beyond his authorized period of stay and was administratively ordered removed in 2009. Pet. App. 4a; see 8 C.F.R. 217.4(b). As with Camarena, DHS issued Barrios an order of supervision. Pet. App. 4a. Barrios subsequently married a United States citizen (also a petitioner in this Court, see Pet. 6), who filed a Form I-130 on his behalf, which DHS approved. *Ibid.* Barrios then filed a Form I-212 application, which DHS conditionally approved. *Ibid.* Finally, Barrios filed a Form I-601A, for provisional waiver of unlawful presence. That application remains pending. *Ibid.*

b. In 2019, DHS sought to enforce both Camarena's and Barrios's valid final orders of removal by ordering each of them to depart the United States by a specific date. See *Camarena* Gov't C.A. Br. 5; *Barrios* Gov't C.A. Br. 3. Petitioners filed petitions for writs of habeas

corpus, seeking emergency injunctive relief blocking their removal from the United States and alleging that they have the right to remain in the United States while they are in the multistep process of pursuing provisional waivers of unlawful presence. See Pet. App. 3a-5a. Both district courts denied the requested emergency relief and dismissed petitioners' claims for lack of subject-matter jurisdiction. See *id.* at 11a-12a (Barrios), 13a-16a (Camarena).

Petitioners appealed to the Eleventh Circuit, which consolidated the two cases and affirmed. Pet. App. 1a-10a. The court found that petitioners' claims "seeking to halt their removal while they apply for provisional unlawful presence waivers" "arise from the government's 'decision or action' to 'execute' their removal orders." *Id.* at 6a (quoting 8 U.S.C. 1252(g)). The court explained that petitioners' claims accordingly "fall squarely within § 1252(g)'s jurisdictional bar." *Ibid.*

Petitioners contended that Section 1252(g) does not apply because "they are challenging the government's underlying authority to execute [their removal] orders, rather than its discretion to do so." Pet. App. 7a. In their view, "the waiver process contains within it a 'regulatory right' to remain until that process is resolved." *Ibid.* The court rejected that argument, explaining that the statute's plain text, which bars "any" challenge to the execution of a removal order, 8 U.S.C. 1252(g), "does not offer any discretion-versus-authority distinction of the sort [petitioners] claim." Pet. App. 7a.

The court of appeals further noted that, although its jurisdictional ruling made it unnecessary to reach the merits of petitioners' claims, petitioners had failed to identify "any regulation conferring" a right to remain in the United States while they pursue the process that

may result in a provisional waiver of inadmissibility. Pet. App. 7a n.2. The court explained that, to the contrary, "a brief review of regulatory authorities suggests the opposite." *Ibid.*

ARGUMENT

Petitioners renew their contention (Pet. 14-19) that 8 U.S.C. 1252(g) does not preclude their claims seeking to enjoin their removal while they pursue the multistep process that includes an application for a provisional waiver of unlawful presence. They further assert (Pet. 7-11) that the courts of appeals are in conflict over the question presented. Further review is unwarranted. The decision below was correct and does not conflict with any decision of this Court or of another court of appeals. This case would also be a poor vehicle for resolving the question presented.

1. The court of appeals correctly held that Section 1252(g) bars jurisdiction over petitioners' lawsuits. Section 1252(g) eliminates jurisdiction (including habeas jurisdiction), outside the context of a petition for review, over "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." 8 U.S.C. 1252(g) (emphasis added). That language indisputably encompasses petitioners' claims, which seek to enjoin execution of their outstanding removal orders while they pursue provisional waivers of their unlawful presence from within the United States.

Petitioners' contrary arguments are unpersuasive. They rely principally on this Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*). As petitioners note (Pet. 14-15), the *AADC* Court rejected the notion that Section

1252(g) "covers the universe of deportation claims," instead concluding 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.'" *AADC*, 525 U.S. at 482 (quoting 8 U.S.C. 1252(g)) (emphasis omitted). But that observation does not help petitioners, whose claims unmistakably and directly challenge the Secretary's decision to execute their removal orders. See Pet. App. 3a-5a.

Petitioners further contend (Pet. 16) that Section 1252(g) is limited to discretionary determinations and is therefore inapplicable to their cases, which each rest on a challenge to the Secretary's legal authority to execute their removal orders. That interpretation is incompatible with the provision's textual reference to "*any* cause or claim." 8 U.S.C. 1252(g) (emphasis added).

Nor does *AADC* support petitioners' conclusion. To be sure, the *AADC* Court described Section 1252(g) as a "discretion-protecting provision," 525 U.S. at 487, and it observed that at each of the three stages specified in the provision—commencement, adjudication, and execution—"the Executive has the discretion to abandon the endeavor," *id.* at 483. The Court noted that Section 1252(g) was designed, in part, to limit a trend of selective-prosecution challenges to such exercises of discretion. *Id.* at 485. Petitioners extrapolate from this reasoning a general rule that Section 1252(g) does not apply to claims that the Secretary or Attorney General lacks the legal authority to take one of the specified actions and is instead limited to claims that he has abused his discretion.

Petitioners' ultimate contention cannot be squared with *AADC* itself, which involved a selective-prosecution claim that the government had violated the plaintiffs'

First Amendment rights by commencing removal proceedings against them. See 525 U.S. at 474. The Court found that that claim was barred by Section 1252(g). *Id.* at 492. Critically, the plaintiffs alleged that the Attorney General's decision to commence proceedings was illegal because it violated the Constitution—not merely that it constituted an abuse of discretion. See *American-Arab Anti-Discrimination Comm.* v. *Reno*, 119 F.3d 1367, 1374-1375 (9th Cir. 1997) (describing the merits of the plaintiffs' claims). *AADC* thus defeats petitioners' purported distinction between discretionary and nondiscretionary actions. And in any event, their claims are materially indistinguishable from the claims that the Court found were barred in *AADC*. As in *AADC*, petitioners allege that the decision to execute their removal orders is unlawful because it conflicts with an external legal requirement (imposed, in their view, by agency regulations). See Pet. 6-7, 16; *Barrios* C.A. Br. 9-10; *Camarena* C.A. Br. 9-10.[3]

Petitioners' resort to canons of construction (Pet. 18-19) is similarly futile. Section 1252(g)'s unambiguous

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[3] Petitioners assert (Pet. 15 n.2) that, in *Jama* v. *ICE*, 543 U.S. 335 (2005), this Court "exercised jurisdiction in circumstances not materially distinct from those here." But the government did not pursue its jurisdictional objection in this Court in *Jama*, and this Court failed to mention the issue at all, meaning that its decision was not even the kind of "'drive-by jurisdictional ruling[]' that should be accorded 'no precedential effect.'" *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). Moreover, four months after this Court's decision, Congress amended Section 1252(g) to clarify that its bar applies "notwithstanding * * * section 2241 of Title 28, or any other habeas corpus provision." 8 U.S.C. 1252(g); see REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106(a)(3), 119 Stat. 311.

text overcomes the various clear-statement rules that petitioners invoke. See, *e.g.*, *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 486 (2015). Petitioners also contend (Pet. 19) that Section 1252(g) should be read narrowly to avoid triggering constitutional concerns under the Suspension Clause. But petitioners have not "shown that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result." *Department of Homeland Sec.* v. *Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020). Instead, "[t]he writ simply provided a means of contesting the lawfulness of restraint and securing release," *ibid.*—a remedy not at issue here.

2. Petitioners assert (Pet. 8-10) that the decision below conflicts with decisions from the Third and Ninth Circuits. There is, however, no conflict.

In *Garcia* v. *Attorney General*, 553 F.3d 724 (3d Cir. 2009) (cited at Pet. 8), the court held that Section 1252(g) did not bar a noncitizen's claim that the removal charges violated the applicable statute of limitations. See *id.* at 726. Significantly, however, the noncitizen raised that claim in a petition for review of the validity of a final order of removal under Section 1252(a)(1). See *id.* at 726, 729; 8 U.S.C. 1252(g) (permitting judicial review "as provided in this section"). That holding does not apply here, where petitioners sought writs of habeas corpus in district court and do not challenge their final orders of removal. See 8 U.S.C. 1252(g) (barring review "notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision").

In any event, the Third Circuit has since applied Section 1252(g) in circumstances analogous to those present here in *Tazu* v. *Attorney General United States of America*, 975 F.3d 292 (2020). Petitioners quote part of *Tazu*'s description of *Garcia*, see Pet. 9 n.1, but they omit the court's conclusion that *Garcia* permitted review only when the INA "itself took away the Attorney General's authority" to commence a removal proceeding, 975 F.3d at 298—a rationale that would not apply to petitioners' challenge. Moreover, *Tazu* concluded that Section 1252(g) barred a noncitizen's attempt to enjoin the execution of his removal order while he pursued a provisional waiver of unlawful presence. *Id.* at 295. The court of appeals expressly rejected the noncitizen's attempt to "styl[e] his constitutional and statutory objections as challenging not the Executive's *discretion*, but its *authority* to execute his removal order." *Id.* at 297. The court explained that "[a]ny other rule would gut § 1252(g)," because "[f]uture petitioners could restyle any challenge to the three actions listed in § 1252(g) as a challenge to the Executive's general lack of authority to violate due process, equal protection, the Administrative Procedure Act, or some other federal law." *Id.* at 298.

Nor does the decision below conflict with *Arce* v. *United States*, 899 F.3d 796 (9th Cir. 2018) (per curiam) (cited at Pet. 9). In *Arce*, the Ninth Circuit held that Section 1252(g) did not bar a noncitizen's suit for damages under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, brought after DHS removed him in violation of a court-ordered stay of his removal order. 899 F.3d at 798. As the court explained, however, "the stay of removal 'temporarily suspended the source' of the Attorney General's 'authority to act,' resulting in a 'setting

aside of the authority to remove'" the noncitizen. *Id.* at 800 (quoting *Nken* v. *Holder*, 556 U.S. 418, 428-429 (2009)) (brackets and ellipsis omitted). In other words, given the stay, "there was no enforceable removal order for the government to execute." *Id.* at 801 (citation omitted). Consistent with *Arce*, the decision below acknowledged that Section 1252(g) would not bar a challenge to the execution of a purported removal order alleging that no valid removal order existed in the first place. See Pet. App. 8a (discussing *Madu* v. *United States Att'y Gen.*, 470 F.3d 1362 (11th Cir. 2006)). But in this case, "no one disputes the validity—or the existence—of the petitioners' removal orders." *Ibid.*

Moreover, subsequent Ninth Circuit decisions belie any inference that district courts in that circuit would have had jurisdiction to entertain petitioners' challenges. *See, e.g.*, *Rauda* v. *Jennings*, 8 F.4th 1050, 1053-1055 (2021) (relying on *Tazu* and the decision below; concluding that Section 1252(g) precluded jurisdiction over a noncitizen's request for a temporary restraining order barring execution of his removal order pending resolution by the Board of Immigration Appeals of his motion to reopen his removal proceedings; rejecting his contention "that his challenge pertains not to the Attorney General's discretionary authority, but rather to the Attorney General's allegedly unlawful decision to 'remov[e] him *now*'" because that was still a challenge to the discretion to execute a removal order) (brackets in original);[4] *Velarde-Flores* v. *Whitaker*, 750 Fed. Appx.

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[4] In *Rauda*, the noncitizen has filed a motion to vacate the opinion as moot or to "de-publish" it, C.A. Doc. 23-1, at 18, *Rauda*, *supra*, No. 21-16062 (Sept. 17, 2021), but the court's ability to issue the opinion in the first instance still shows the lack of a conflict with the decision below.

606, 607 (2019) (holding that Section 1252(g) barred jurisdiction over a habeas petition seeking to enjoin the removal of noncitizens who had pending applications for U-visas because the petition arose "from the government's decision to execute valid orders of removal").

3. Finally, this case would also be a poor vehicle for resolving the question presented because petitioners' claims plainly lack merit. They contend that execution of their removal orders would run afoul of this Court's decision in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), which generally requires agencies to comply with their own regulations. See *Barrios* C.A. Br. 9-10; *Camarena* C.A. Br. 9-10. In petitioners' view, "the waiver process contains within it a 'regulatory right' to remain until that process is resolved." Pet. App. 7a. But as the court of appeals correctly recognized, petitioners "do not point to any regulation conferring such a right, and a brief review of the regulatory authorities suggests the opposite." *Id.* at 7a n.2. The applicable regulation states that "[a] pending or approved provisional unlawful presence waiver does not constitute a grant of a lawful immigration status or a period of stay authorized by the Secretary." 8 C.F.R. 212.7(e)(2)(i). And when promulgating that regulation, DHS explicitly "remind[ed] the public that the filing or approval of a provisional unlawful presence waiver application will *not*," among other things, "[c]onfer any legal status * * * or protect an alien from being placed in removal proceedings or removed from the United States." 78 Fed. Reg. at 536.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
WILLIAM C. PEACHEY
NICOLE P. GRANT
MARY L. LARAKERS
Attorneys

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