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Without a Voice, Without a Forum: Finding IIRIRA Section 1252(g) Unconstitutional

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FINDING IIRIRA SECTION 1252(G) UNCONSTITUTIONAL

INTRODUCTION

The Federal Tort Claims Act (FTCA) abrogates sovereign immunity in certain circumstances to allow private individuals, regardless of citizenship, to sue the United States for specific torts committed by government officials.[1] Yet in 2013, when Jesus Eduardo Lopez Silva, a lawful permanent resident of the United States, tried to sue the government for harm resulting from having been wrongfully removed—that is, mistakenly deported—the District Court for the District of Minnesota dismissed the suit for lack of subject matter jurisdiction, and the Eighth Circuit affirmed.[2] In doing so, both courts relied on a federal immigration statute, 8 U.S.C. § 1252(g), which they found precluded any judicial review of Silva's removal order.[3] This statute provides that, subject to certain exceptions: "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."[4]

Similarly, Mexican citizen Claudio Anaya Arce brought an FTCA action against the United States after being wrongfully removed in 2015.[5] The Ninth Circuit, like the Eighth Circuit had

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[1] The complex procedures required by the FTCA are outside the scope of this note. The relevant statutory provision provides: "The district courts shall have original jurisdiction . . . . [of a]ny other civil action against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U.S.C. § 1346(a)(2).

[2] Silva v. United States, 886 F.3d 938, 939, 942 (8th Cir. 2017).

[3] *Id.*

[4] The statute in full: "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 this chapter." 8 U.S.C. § 1252(g).

[5] Unlike Lopez Silva, Arce was not a permanent resident of but rather sought asylum in the United States. Arce v. United States, 899 F.3d 796, 798 (9th Cir. 2018) (per curiam).

done just a year earlier, considered the effect of the jurisdiction-stripping provision of the Immigration and Nationality Act on Arce's claims but instead found that section 1252(g) did not bar the lawsuit.[6] In fact, the Ninth Circuit did not merely distinguish the case from *Silva* but expressly rejected the Eighth Circuit's reasoning as incorrect, inconsistent with Supreme Court precedent and general rules of statutory interpretation, and ignorant of "common sense."[7]

How did two federal circuit courts reach such starkly opposing conclusions on overtly similar facts, particularly when the cases turned not on the facts themselves but on the application of section 1252(g)? The current circuit split means that noncitizens who bring claims pursuant to the FTCA for injury resulting from unlawful removal from the United States may either receive damage awards—compensation for the great harm they suffered when abruptly displaced by the government—or will simply see their claims dismissed, depending on the region of the country in which these plaintiffs bring their actions.[8] A justice system which inequitably offers remedies only to those plaintiffs who find themselves fortunate enough to bring an action in a court which happened to interpret a federal statute in their favor is absurd.[9] Moreover, the jurisdiction-stripping nature of section 1252(g) on its own prompts serious constitutional concerns when considered alongside separation of powers principles.[10] As such, the answers to why *Silva* and *Arce* cannot be reconciled and any means for this conflict's resolution are far from easy.

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[6] *Id.* at 798; ;*Silva*, 886 F.3d at .at 942.

[7] *Arce*, 899 F.3d at 800–01.

[8] In many cases, it is not only the deported individual who suffers harm but the families of those left in the United States. *See* Robert T. Muller, *The Traumatic Effects of Forced Deportation on Families*, PSYCHOL. TODAY (May 18, 2013), https://www.psychologytoday.com/us/blog/talking-about-trauma/201305/the-traumatic-effects-forced-deportation-families [https://perma.cc/4TN3-R2G2]. Researchers have found that the children of a single deported parent may suffer from anxiety, depression, and even post-traumatic stress anxiety in the children of a deported parent. *Id.* Additionally, some women whose husbands are deported find themselves with no mode of transportation and may become unable to meet financial needs. *Id.*

[9] *See*, *e.g.*, 28 U.S.C. § 1346(a).

[10] The debate, in its simplest form, is thus:

> Some believe that the Constitution clearly authorizes Congress to control federal jurisdiction and that this is an important political check on the judiciary. Others contend that there are significant limits on Congress' ability to restrict federal court jurisdiction; they maintain that Congress cannot act with the purpose and effect of undermining constitutional rights and that due process requires a judicial forum.

Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM. L. REV. 295, 296 (1999).

The Constitution grants the Supreme Court broad federal question jurisdiction "extend[ing] to all cases, in [l]aw and [e]quity, arising under [the] Constitution [and] the [l]aws of the United States."[11] Congress subsequently granted similar federal question jurisdiction to the district courts by enacting 28 U.S.C. § 1331, which provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[12] Despite these grants of power, matters concerning immigration have traditionally been considered part of the plenary powers of Congress and the executive.[13] As a result, federal courts have historically approached legislation and executive orders regarding immigration with great deference towards Congress and the executive.[14] In most instances, when challenges to immigration laws arise, federal courts apply only rational basis review in which the government must present only a conceivable purpose for enacting the law.[15] To survive this highly deferential standard of review and uphold the law, courts must find merely that the legislation is reasonably related to the government's purpose of enactment.[16]

This judicial deference to Congress and the executive in the immigration context has several advantages notwithstanding the potential discriminatory concerns arising from the inevitable classification of groups based on race and ethnicity.[17] First, the traditional plenary powers doctrine allows the executive and legislative branches to respond adequately and swiftly to foreign policy concerns without judicial interference into the two branches' political machinations.[18] Additionally, administrative immigration proceedings are perceptibly more expedient and efficient without subjecting every decision made by the Department of Homeland

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[11] U.S. CONST. art. III, § 2, cl. 1.

[12] 28 U.S.C. § 1331.

[13] *See* Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 151 (2015); Sarah A. Moore, *Tearing Down the Fence Around Immigration Law: Examining the Lack of Judicial Review and the Impact of the REAL ID Act While Calling for a Broader Reading of Questions of Law to Encompass "Extreme Cruelty"*, 82 NOTRE DAME L. REV. 2037, 2038 (2007).

[14] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 923 (5th ed. 2017).

[15] *See* United States v. Carolene Products Co., 304 U.S. 144, 151–52 n.4 (1938); *see also* Williamson v. Lee Optical Co. 384 U.S. 483, 488 (1955).

[16] *Id. See* sources cited *supra* note 14–15.

[17] *See* CHEMERINSKY, *supra* note 14, at 931 ("Since decisions of these matters may implicate [the United States'] relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." (quoting Matthews v. Diaz, 426 U.S. 67, 81 (1976)).

[18] *See* Moore, *supra* note 13, at 2059 , at 2059.

Security (DHS) or the Attorney General to multiple levels of potential judicial review.[19]

Judicial restraint in these matters, however, too often results not only in unpredictable, error-prone decisions but in the subversion of constitutional due process rights.[20] When the consequences of judicial hesitance are considered in the light of federal jurisdiction-stripping statutes, such hesitance ultimately threatens the inalienable rights of individuals as well as the foundation of a nation grounded in the principle of separation of powers. Thus, the Supreme Court has tended to approach such statutes with a "well settled presumption favoring interpretations of statutes that allow judicial review of administrative action,"[21] particularly with respect to constitutional claims.[22]

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) was enacted in part due the aforementioned expediency concern.[23] Under the prior regime authorized by the Immigration and Nationality Act (INA), plaintiffs would challenge "deferred-action" decisions of the Immigration and Naturalization Service (INS) when the INS opted to forego exercising its discretion.[24] Furthermore, removal proceedings were often stalled by unsubstantiated claims, procedural motions, and appeals, and Congress wanted to streamline the deportation process.[25] In order to prevent these stall tactics and thereby streamline the deportation process, Congress enacted the jurisdiction-stripping statute section 1252(g).[26]

Silva and *Arce* are neither the first nor the only cases to address the statutory meaning of section 1252(g).[27] In 1999, the

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[19] *Id.* at 2039–41.

[20] *Id.* at 2062–63.

[21] Meghan Dougherty, Reno v. American-Arab Anti-Discrimination Committee et al.: *Judicial Review of Constitutional Claims Under the IIRIRA*, 77 DENV. U. L. REV. 243, 247 (1999) (quoting McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 490 (1991)).

[22] *See* Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 296 (2012).

[23] Kimberly P. Will, *The Limits of 8 U.S.C. § 1252(g): When Do Courts Have Jurisdiction to Entertain an Alien's Claim for Damages Against the Government?*, 51 CORNELL INT'L L.J. 533, 535–56 (2018).

[24] The INS generally reserved the ability to abandon—at its discretion—deportation proceedings during any stage of the removal process. Prior to the IIRIA's enactment, the INS "had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience." The problem, however, arose when petitioners began to challenge removal orders where INS chose *not* to exercise its discretion. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 484–85 (1999).

[25] *See* Dougherty, *supra* note 21, at 248.

[26] 8 U.S.C. § 1252(g).

[27] *See, e.g.*, Arce v. United States, 899 F.3d 796 (9th Cir. 2018) (per curiam); Silva v. United States, 866 F.3d 938, (8th Cir. 2017); Garcia v. Att'y Gen., 553 F.3d 724 (3rd Cir. 2009); Humphries v. Various Fed. USINS Emps., 164 F.3d 936 (5th Cir. 1999).

United States Supreme Court interpreted the jurisdiction-stripping language for the first time in *Reno v. American-Arab Anti-Discrimination Committee*, choosing to read the provision narrowly.[28] Writing for the majority, Justice Scalia rejected the assumption that the statute "covers the universe of deportation claims—that it is a sort of 'zipper clause' that says 'no judicial review in deportation cases unless this section provides judicial review.'"[29] Instead, the Court described the provision as "appl[ying] only to three discrete actions that the Attorney General may take: her decision or action to *commence* proceedings, *adjudicate* cases, or *execute* removal orders."[30] Thus, according to precedent, only those three decisions would fall within the scope of section 1252(g) to bar a federal court's subject matter jurisdiction over a claim.

If Supreme Court precedent has already construed the statute narrowly, why do the Eighth and Ninth Circuit reach different conclusions? This note argues that the current circuit split exists because of a misapplication of Supreme Court precedent and demonstrates that both principles of federalism and due process concerns strain the validity of section 1252(g). Part I provides historical context of section 1252(g)'s enactment as well as its initial interpretation by the Supreme Court in *Reno*. Part II presents the facts and arguments of *Arce* and *Silva* and critiques the analyses in both cases. Despite this note's critique of the decision, Part II concludes that the *Arce* court reached the outcome required by existing law, albeit in a roundabout way that leaves its analysis vulnerable to future challenges. Part III focuses on why section 1252(g) in its current state must fail constitutional challenges based on due process and separation of powers concerns and describes the best methods for current plaintiffs seeking to recover damages from the United States after having been unlawfully uprooted and deported from the country.

I. BACKGROUND: SECTION 1252(G) AND ITS INTERPRETATION IN *RENO*

When Congress passed the IIRIRA on September 30, 1996, it enacted the statute in response to a need to revamp the

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[28] *See Reno*, 525 U.S. at 482.

[29] *Id.*

[30] *Id.* (emphasis in original) (internal quotations omitted). Due to a congressional decision in 2002 to transfer immigration enforcement duties, the term "Attorney General" now refers to the Secretary of the Department of Homeland Security. *Arce*, 899 F.3d at 799 n.4.

speed and efficiency of immigration proceedings and enforcement in the United States.[31] Additionally, Congress enacted the statute amidst hotly contested political calls for immigration reform aimed at deterring illegal immigration into the country.[32] In a change from prior immigration legislation, Congress included within the IIRIRA the new jurisdiction-stripping provision of section 1252(g).[33] The statute appears to apply broadly and proscribes a court's "jurisdiction to hear any cause or claim by . . . any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders."[34]

Unsurprisingly, the statute became the focus of much criticism due to its jurisdiction-precluding nature.[35] It proved troubling that Congress so boldly seemed to obliterate judicial review in the immigration context—a realm where the judiciary has generally granted wide deference to Congressional legislation with respect to shaping immigration policy—because the provision allowed Congress to usurp powers traditionally reserved for the judiciary.[36] Nearly three years after its enactment, section 1252(g) found itself at the center of a Supreme Court decision which, although the decision ultimately sidestepped constitutional questions posed by the statute, laid down the interpretive framework for analyzing claims brought pursuant to the statute.[37]

The full scope of Congress' power to wholly restrict federal jurisdiction in any context is the subject of much scholarly debate.[38] Despite the merits of both viewpoints, the Supreme Court has repeatedly deferred to Congress's judgments on immigration matters based on the plenary powers doctrine.[39] Yet when faced with statutes which on their face appear to preclude judicial

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[31] Patricia Flynn & Judith Patterson, *Five Years Later: Fifth Circuit Case Law Developments under the Illegal Immigration Reform and Immigration Responsibility Act*, 53 BAYLOR L. REV. 557, 560–61 (2001).

[32] *See* Dougherty, *supra* note 21, at 248.

[33] Legislation preceding the IIRIRA did not contain any jurisdiction-stripping provisions. *See* Flynn & Patterson, *supra* note 31, at 563.

[34] The statute in full provides:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory . . . 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.

8 U.S.C. § 1252(g).

[35] *See* Chemerinsky, *supra* note 10, at 298.

[36] *See id.* at 298–99.

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

[38] *See, e.g.*, Chemerinsky, *supra* note 10.

[39] *See* CHEMERINSKY, *supra* note 14, at 931.

review, the Supreme Court often narrowly interprets the statutes to allow judicial review in specific instances or to preclude review in only a limited set of circumstances.[40] Essentially, the Supreme Court "will do everything possible to interpret statutes to avoid their precluding all judicial review," citing the "well settled presumption" that "favor[s]" preserving judicial review.

The Supreme Court followed this longstanding approach to such statutes when it interpreted section 1252(g) in *Reno v. American-Arab Anti-Discrimination Committee*.[41] In 1987, the INS sought to deport eight individuals belonging to the Popular Front for the Liberation of Palestine for suspected communism-related activities, charging six of the individuals—those who were temporary residents—with overstaying visas and failing to maintain student status.[42] The individuals promptly brought claims in the District Court for the Central District of California for violations of their Fifth and First Amendment rights, alleging that the INS was "selectively enforcing" the immigration laws against them because of their affiliation with a politically unpopular group.[43] While the case oscillated between the district court and the Ninth Circuit, Congress passed the IIRIRA containing the jurisdiction-stripping provision section 1252(g).[44]

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[40] *See* Dougherty, *supra* note 21, at 246–47. For other cases where the Supreme Court followed this approach in the immigration context as well as other contexts in which Congress attempted to preclude judicial review, see, e.g., McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991); Webster v. Doe, 486 U.S. 592 (1988); United States v. Mendoza-Lopez, 481 U.S. 828 (1987); Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667 (1986); Johnson v. Robison, 415 U.S. 361 (1974); Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968).

[41] *Reno* 525 U.S. at 482. The case eventually arrived at the Supreme Court after a complicated procedural history. *Id.* at 473–76.

[42] A temporary resident of the United States is one who receives a visa to remain in the country for a specified duration of time, usually for purposes related to business or education. The INS originally charged the individuals under the now-repealed McCarrran-Walter Act, which at the time allowed for deportation of aliens whom were found to advocate communism, because the individuals were members of the Popular Front for the Liberation of Palestine (PFLP), a group that the government determined to be a terrorist and communism advocacy organization. *Id.* at 473–74. When the individuals filed suit, the INS dropped the advocacy-of-communism charges, but the charges for overstaying the visas and failing to maintain student status remained. *Id.*

[43] *Id.*

[44] The procedural history is as follows: all of the individuals charged received preliminary injunctions against their removal proceedings in 1994, only six of which were upheld by the Ninth Circuit. The Ninth Circuit reversed the injunctions for the remaining two individuals—Hamide and Shehadeh—and remanded the case to the district court, which reinstated the injunctions. The Attorney General appealed this decision as to Hamide and Shehadeh, and the appeal was pending in the Ninth Circuit at the time Congress passed the IIRIRA. After the IIRIRA's enactment, however, the Attorney General filed motions in both the district court and the Ninth Circuit for dismissal due to a lack of subject matter jurisdiction pursuant to section 1252(g). After the district court denied the motion, the Attorney General appealed to the Ninth Circuit. This appeal was consolidated with the Attorney General's previous appeal regarding the awarded injunction of removal proceedings

Upon the IIRIRA's enactment, the Attorney General moved to dismiss the suit for lack of subject matter jurisdiction pursuant to the new jurisdiction-stripping provision.[45] After the district court denied the motion and the Ninth Circuit affirmed, the question of the scope of section 1252(g) reached the Supreme Court, nearly twelve years after the case began.[46]

The Supreme Court limited the review-precluding power of the statute to only three "discrete actions" taken by the Attorney General: the decision to (1) "commence proceedings," (2) "adjudicate cases," and (3) "execute removal orders."[47] The Supreme Court reasoned that Congress did not intend to bar any claim at all related to a deportation proceeding.[48] Rather, the majority reasoned that Congress had "good reason . . . to focus special attention upon, and make special provision for" these three acts, all of which—whether in regards to initiation of a removal proceeding or its prosecution—involve some level of discretion by the Attorney General.[49] In particular, the majority emphasized that the Attorney General should retain the ability to decide whether to initiate a removal proceeding in the first place, as well as the ability to abandon a proceeding for any reason at any time, reasoning that several other provisions of the IIRIRA were also aimed at protecting executive discretion.[50]

By limiting the reach of section 1252(g) to these three categories, the Supreme Court left the door open for judicial review of immigration proceedings in several circumstances which fall outside the statute's coverage.[51] The majority listed the following examples where a petitioner could obtain judicial review: "decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to

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to Hamide and Shehadeh. It is this issue of jurisdiction which ultimately becomes the focus of the Supreme Court's decision. *Id.* at 475–76.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 482 (emphasis omitted).

[48] *Id.* at 482–84. Writing for the majority, Justice Scalia famously noted:

> It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting. We are aware of no other instance in the United States Code in which language such as this has been used to impose a general jurisdiction limitation . . . .

Id. at 482.

[49] *Id.* at 483.

[50] *Id.* at 484–86.

[51] *Id.* at 482.

refuse reconsideration of that order."[52] Surely, the Supreme Court did not mean this to be an exhaustive list of circumstances, but rather merely meant to highlight instances where the statute—having been narrowly construed—could not bar review.[53]

Where the majority in *Reno* misstepped, however, lay not with its interpretation of the statute, but with outright dismissal of the American-Arab Anti-Discrimination Committee's (ADC) constitutional selective enforcement claims in light of the new interpretation of section 1252(g).[54] The Court briefly considered whether the doctrine of constitutional doubt could apply to the petitioners' First Amendment claims.[55] The principle of constitutional doubt requires a court to first determine whether a challenged statute can be construed consistently so that the constitutional challenge may be avoided.[56] Essentially, where there are "two possible interpretations of a statute, by one of which it would be unconstitutional and the other valid," the Supreme Court's duty is to embrace the interpretation which avoids nullifying the legislation.[57] Because the Supreme Court acknowledged that aliens unlawfully present in the United States commit an ongoing violation by remaining in the country, and as such, have "no constitutional right to assert selective

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[52] *Id.*

[53] The Supreme Court's use of the phrase "such as," a term which is "used to introduce an example or series of examples," suggests that the list of circumstances where judicial review remains possible is open-ended. *Id.* ("There are of course many other decisions or actions that may be part of the deportation process—*such as* the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order.") (emphasis added); *Such as*, MERRIAM-WEBSTER DICTIONARY https://www.merriam-webster.com/dictionary/such%20as [https://perma.cc/HDN7-NSJG]; *see also* Dougherty, *supra* note 21, at 246–47 ("The Court further justified its interpretation by explaining that . . . . 1252(g) was aimed at reducing judicial restraint of the Attorney General's exercise of prosecutorial discretion as well as the fragmentation and prolongation of removal proceedings.").

[54] *See Reno*, 525 U.S. at 482–92. The AADC is an organization dedicated to "defending the rights of people of Arab descent and promoting their rich cultural heritage." *American-Arab Anti-Discrimination Committee (ADC)*, CULTURAL TOURISM DC, https://www.culturaltourismdc.org/portal/american-arab-anti-discrimination-committee-adc#:~:text=Founded%20in%201980%2C%20the%20American,promoting%20their%20rich%20cultural%20heritage [https://perma.cc/U63Z-AJWB]. The organization brought sought suit on behalf of the affected individuals in *Reno*. *Reno*, 525 U.S. at 482–92 (1999). The selective enforcement claims are grounded in the Constitution such that these claims allege that immigration officers purposefully chose the petitioners for deportation *because* of their views—an action which would violate the First Amendment. *See id.* at 488.

[55] *See Reno*, 525 U.S. at 488.

[56] Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

[57] N.L.R.B. v. Jones & Laughlin Steel Corp., 201 U.S. 1, 30 (1937). Another case involving the National Labor Relations Board involved the question of whether the National Labor Relations Board (NLRB) had jurisdiction over employees at religious schools. The Supreme Court applied the doctrine of constitutional doubt and construed the statute to prevent NLRB jurisdiction in order to avoid the Court's need to address serious constitutional questions. *See* N.L.R.B. v. Catholic Bishop of Chi., 440 U.S. 490, 504–07 (1937).

enforcement as a defense" to deportation, the majority refused to apply the doctrine of constitutional doubt to the AADC's claims and thereby avoided the serious constitutional question.[58] However, the Court left open the possibility of doing so in a case where the alleged discrimination is "so outrageous" as to call into question the validity of the executive's decision-making.[59]

The Supreme Court's ruling in *Reno* not only suggested that section 1252(g)'s application to constitutional questions are more tenuous than would appear at first blush, but also left the statute itself ripe for a constitutional challenge. First, the majority does not define what would constitute a case with such "outrageous" discrimination; instead, the Supreme Court ducks the question by leaving the determination to district and circuit courts on a case-by-case basis.[60] Of course, this naturally leads to the circuit confusion and the artificial creation of exceptions, which in many cases erode the precedential holding.[61]

Second, the concurring and dissenting opinions in *Reno* suggest that a Supreme Court with a different makeup might be willing to reconsider the statute's applicability with respect to palpable violations of constitutional rights—namely, egregious miscarriages of due process—particularly where habeas corpus relief is unavailable.[62] Specifically, Justice Ginsburg's concurrence highlights the ambiguity of "outrageous" discrimination by suggesting that a plaintiff might be able to receive immediate review of INS action if that plaintiff could show a high probability of success on the merits of the case, a "chilling effect" on the exercise of a constitutional right, and a "flagrantly improper" act of the agency.[63] Yet in his dissent, Justice Souter admonished the majority's interpretation of the

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[58] *Reno*, 525 U.S. at 488. The Court went on, stating that "[w]hile the consequences of deportation may assuredly be grave, they are not imposed as a punishment." *Id.* at 491. Arguably, this is where the case draws the most criticism, and not merely from scholars. Justice Ginsburg filed a concurring opinion but suggested the possibility of an interlocutory intervention when "the INS act in bad faith, lawlessly, or in patent violation of constitutional rights." *Id.* at 494 Ginsburg, J., concurring).

[59] *Id.* at 491.

[60] *Id.*

[61] For a discussion of such exceptions and confusion, see Arce v. United States, 899 F.3d 796, 800-01 (9th Cir. 2018) (per curiam); Silva v. United States, 866 F.3d 938, 940-41 (8th Cir. 2017); Garcia v. Att'y Gen., 553 F.3d 724, 729 (3d Cir. 2009); Humphries v. Various Fed. USINS Emps., 164 F.3d 936, 942-45 (5th Cir. 1999); *see also infra* Part II.

[62] *See Reno*, 525 U.S. at 495–99 (Ginsburg, J., concurring); *id.* at 501–02 (Souter, J., dissenting).

[63] *Id.* at 498 (Ginsburg, J., concurring). Elaborating further, Justice Ginsburg noted that, in regards to selective enforcement, the "'decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.' I am not persuaded that selective enforcement of deportation laws should be exempt from that prescription." *Id.* at 497 (internal citations omitted) (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

statute more broadly.[64] Recognizing the Court's extreme deference to the legislature and executive in matters of immigration law, Justice Souter suggested that the majority's decision to preclude judicial review for most removal claims brought by aliens left a dangerous door open for Congress to extend the Court's reasoning by way of legislation as a means to "block every remedy for enforcing a constitutional right."[65]

II. THE SPLIT: FACTS, FINDINGS, FLAWS, AND SHORTCOMINGS OF *SILVA* AND *ARCE*

Despite the Supreme Court's interpretation of the jurisdiction-stripping language in 8 U.S.C. § 1252(g), courts have struggled to apply the law in a consistent, coherent manner.[66] Though minimally discussed in the cases, the facts, of *Silva v. United States* and *Arce v. United States* are strikingly similar: Both cases involved individuals who resided in the United States for years prior to any removal proceedings, who were inevitably wrongfully removed from the country, and who thereafter brought claims pursuant to the FTCA for damages resulting from that unlawful removal.[67] While the Eighth and Ninth Circuits reached different outcomes as to whether section 1252(g) bars federal courts from hearing these FTCA claims for damages, the courts appeared to agree that the statute must be applied narrowly, seemingly in keeping with the Supreme Court's decision in *Reno*.[68] This Part dissects the outcomes and reasoning of both cases and critiques the methods employed by both courts, exposing the need for a new constitutional challenge to section 1252(g).

A. Denying Jurisdiction: The Eighth Circuit Approach to Section 1252(g)

The Eighth Circuit blinded itself to wrongfully removed immigrants and found that it lacked authority to entertain suits for damages under the FTCA.[69] Jesus Eduardo Lopez Silva became a permanent resident of the United States in 1992 and lawfully

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[64] *Id.* at 508.

[65] *Id.*

[66] *See, e.g.*, Arce v. United States, 899 F.3d 796, 800–01 (9th Cir. 2018) (per curiam); Silva v. United States, 866 F.3d 938, 940–41 (8th Cir. 2017); Garcia v. Att'y Gen., 553 F.3d 724, 729 (3d Cir. 2009); Humphries v. Various Fed. USINS Emps., 164 F.3d 936, 942–45 (5th Cir. 1999).

[67] *See Arce*, 899 F.3d at 798–99; *Silva*, 866 F.3d at 938–39.

[68] *See Arce*, 899 F.3d at 800–01; *Silva*, 866 F.3d at 940–41.

[69] *See Silva*, 866 F.3d at 940–41.

resided in the country for twenty years.[70] After he was convicted of two offenses in Minnesota, DHS began removal proceedings against Lopez Silva in April 2012.[71] However, because Lopez Silva properly filed an appeal to the Board of Immigration Appeals (BIA), he was entitled to an automatic stay of his removal order pursuant to federal immigration regulations.[72] In clear violation of the stay of removal, DHS removed Lopez Silva to Mexico on July 17, 2013, where he remained for approximately two months until the American government returned him to United States after "realizing the mistake."[73] While in Mexico, Lopez Silva suffered great harm.[74] He endured separation with minimal contact from his wife and four children, and he no longer could receive medical treatment for his medical issues.[75]

Upon his return to the United States, Lopez Silva brought suit vis-à-vis the FTCA for damages for the harm he suffered from his wrongful removal, including claims for constitutional violations of his Fourth and Fifth Amendment rights.[76] The District Court for the District of Minnesota, employing a broad interpretation of section 1252(g), accepted the government's argument that Lopez Silva's claims arose from the decision to execute a removal order and granted the government's motion to dismiss Lopez Silva's case for lack of subject matter jurisdiction.[77]

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[70] *Id.* at 939. A permanent resident is a "person who has been granted 'the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws.'" RYAN BAUGH, U.S. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: U.S. LAWFUL PERMANENT RESIDENTS 2018 1 (2018) (quoting 8 U.S.C. § 1101(a)(20)). After becoming a lawful permanent resident of the United States, Lopez Silva was convicted of two offenses: possession of a controlled substance, for which he spent forty-five days incarcerated, and illegal possession of a firearm. Brief for Respondent at 1, *Silva*, 866 F.3d 938 (8th Cir. 2017) (No. 16-1870).

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

[72] *Id.*; *see also* 8 C.F.R. § 1003.6(a) ("Except as provided . . . the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall *not* be executed . . . while an appeal is pending or while a case is before the Board by way of certification." (emphasis added)).

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

[74] Brief for Petitioner at 2, Silva v. United States, 866 F.3d 938 (8th Cir. 2017) (No. 16-1870).

[75] *Id.*

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

[77] *Id.* To hear any case, courts require jurisdiction over the "subject matter" of the case. Subject matter jurisdiction can be created by diversity or by questions arising under the Constitution (which is what the lawsuits discussed in this note concern). Because the statute effectively strips the courts of the subject matter jurisdiction required to hear a lawsuit if it arose from one of the three discretionary acts of the DHS, a Rule 12 motion would result in the case being dismissed. *Id.*; *see also* 28 U.S.C. §§ 1331–1332; Fed. R. Civ. P. 12(b)(1)(a).

On appeal to the Eighth Circuit, Lopez Silva presented three central arguments.[78] First, and perhaps most boldly, Lopez Silva contended that his claims did not, as the district court held, "arise from a decision . . . to execute a removal order."[79] Rather, Lopez Silva asserted that his claims instead arose from a "*violation* of the stay of removal proceedings."[80] Essentially, Lopez Silva primarily sought to distinguish between a discretionary action on behalf of DHS to physically remove him from the United States—an action which would likely preclude judicial review—and the non-discretionary decision of DHS to defy federal law by refusing to abide by the stay order.[81] Second, Lopez Silva made a distinct argument that the Secretary's decision to ignore the stay of removal order could not be ensnared by section 1252(g)'s reach under the Supreme Court's interpretation in *Reno* because the Secretary's decision to defy a court order was not one of the three discretionary exceptions.[82] Finally, Lopez Silva—pragmatically leaning in on the constitutional uncertainties left open in *Reno*—contended that the statute does not apply to constitutional claims or to claims under the FTCA.[83]

The Eighth Circuit disagreed with Lopez Silva on every contention, providing flawed reasoning at every turn.[84] As to the first argument, the Eighth Circuit found that Lopez Silva mischaracterized the action because, despite federal regulations prohibiting execution of a removal order while an administrative appeal is pending, as it was here, the removal order nevertheless "still existed."[85] The court, without explanation or justification, applied the "immediate and direct connection"[86] test from the Fifth Circuit in order to reason that although the action here "*happened* to be in violation of a stay, the alien's claims are directly connected to the execution of the removal order."[87]

The Eighth Circuit employed the test that was developed in *Humphries v. Various Federal USINS Employees*, in which

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[78] *Silva*, 866 F.3d at 940–41. The American Immigration Council and the National Immigration Project of the National Lawyers Guild submitted a brief as *amici curiae* in support of Lopez Silva. Brief for Am. Immigration Council and the Nat'l Immigration Project of the Nat'l Lawyers Guild as Amici Curiae Supporting Petitioner, *Silva*, 866 F.3d 938 (8th Cir. 2017) (No. 16-1870).

[79] *Silva*, 866 F.3d at 940.

[80] *Id.*(emphasis added).

[81] *See id.*

[82] *Id.* at 940–41.

[83] *Id.* at 941.

[84] *Id.* at 940–42.

[85] *Id.* at 940.

[86] *Id.* (citing Humphries v. Various Fed. USINS Emps., 164 F.3d 936, 943 (5th Cir. 1999).

[87] *Id.* (emphasis added).

the Fifth Circuit, in a suit for wrongful removal claiming constitutional violations and compensation, construed the meaning of "arising from" in section 1252(g).[88] Although the Fifth Circuit recognized that "arising from" implies a nexus between the petitioner's claim and an INS order that is tighter than a mere relation—and proceeded to exclude claims which only have a "weak, remote, or tenuous" relationship to a discretionary act of the Secretary—the *Humphries* court went on to find that, on the opposite end of the "arising from" spectrum, section 1252(g) encompasses claims "connected directly and immediately" to the Secretary's decision to "commence proceedings, adjudicate cases, or execute removal orders."[89]

The Fifth Circuit's approach in *Humphries*, applied to the petitioner's individual claims, suggested that the test is easily satisfied.[90] In other words, the court in *Humphries* developed a test which would—for ostensibly good reason—allow the court to dismiss actions.[91] However, the court did acknowledge claims with a plausible constitutional challenge which would, at the present time, fall under the scope of section 1252(g).[92] In a footnote, the court provided that that although not before them in *Humphries* and therefore not addressed, the court remained concerned about being confronted with the question of a grave constitutional importance in the future when a federal statute

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[88] *See Humphries*, 164 F.3d at 941–43.The case presents an interesting fact pattern where the petitioner, Humphries, a citizen of Kenya with a United States non-immigrant visa, worked for the United States Customs Service as a confidential informant in drug-related activity. *Id.* Although his visa expired, Humphries made repeated trips between the United States and Kenya as part of his informant duties and was allowed to re-enter the United States each time because the Federal Bureau of Investigation (FBI) would parole him into the country "in the public interest." *Id.* Some time thereafter, Humphries began working with the INS and FBI in an investigation in which the government's tactics caused Humphries concern. *Id* After voicing this concern, the INS terminated Humphries' parole, and Humphries filed suit. The following claims represent the constitutional claims actually entertained by the Fifth Circuit: involuntary servitude, mistreatment while in detention, and retaliatory exclusion (similar to the selective enforcement claims brought by the AAADC in *Reno*). *Id.* at 938–41.

[89] *Id* at 943. Interestingly, the court here trails off by engaging in some discussion of minimum contacts with a forum as it relates to "arising out of." Usually, the minimum contacts analysis arises in the context of a personal jurisdiction calculus—a calculus which, unsurprisingly, still proves difficult for courts to apply today. *See* Mwani v. Bin Laden, 417 F.3d 1, (D.C. Cir. 2005) ("Whether the exercise of jurisdiction is consistent with the Constitution turns on whether a defendant has sufficient contacts with the nation as a whole to satisfy due process."); Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945) ("[N]ow that the *capias as respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting Miliken v. Meyer, 311 U.S. 457, 463 (1940))).

[90] *See Humphries*, 164 F.3d at 944–45.

[91] *See id.*

[92] *See id.* at 945 n.9.

such as section 1252(g) is interpreted to prohibit a federal court from entertaining a "colorable constitutional claim."[93]

Interestingly, the Eighth Circuit unabashedly adopted the *Humphries* "immediate and direct connection" test, seemingly without concern for the underlying rationale or worries the Fifth Circuit elucidated regarding the potential preclusion of constitutional claims.[94] At best, the Fifth Circuit's test is persuasive dicta for the Eighth Circuit, but it cannot be considered controlling precedent.[95] By blindly accepting the *Humphries* test without a shred of justification, however, the Eighth Circuit gives the impression that the *Humphries* decision may as well be binding.[96] The *Silva* Court did not acknowledge whether it accepted the reasoning in *Humphries*—or even, if it did wholly accept it, why—but the court went forward and applied the analysis regardless. Indeed, even the analysis here was minimal: By ignoring the fact that the mandatory stay of Lopez Silva's removal "temporarily divested the order of enforceability,"[97] the court misguidedly found a connection between Lopez Silva's claim and a removal order which had been rendered ineffective in order to find section 1252(g) applicable.[98] Finally, the Eighth Circuit mystifyingly placed heavy reliance on the *Humphries* test despite *Humphries* having been decided approximately one month *prior* to the Supreme Court's ruling in *Reno* interpreting section 1252(g).[99] While it purported to apply proper precedent from *Reno*, the Eighth Circuit's unjustified reliance on *Humphries* subtly points to the idea that it eagerly looked for a workaround to find no jurisdiction over Lopez Silva's claims.[100]

With regard to Lopez Silva's second argument that his claims were excluded from the scope of section 1252(g) because his claims did not relate to a discretionary decision on the Secretary's part, the Eighth Circuit fundamentally misapplied Supreme Court

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[93] The court here specifically notes that Supreme Court left this precise question open in *Webster v. Doe*. *Id.* (quoting Webster v. Doe, 486 U.S. 592, 603 (1988)).

[94] *See* Silva v. United States, 866 F.3d 938, 940 (8th Cir. 2017); *Humphries*, 164 F.3d at 945 n.9.

[95] *See Silva*, 866 F.3d at 940.

[96] *See id.*

[97] *Id.* at 942 (Kelly, J., dissenting) (quoting Nken v. Holder, 556 U.S. 418, 428-29 (2009)) (alterations omitted).

[98] *See id.* at 940.

[99] While the Fifth Circuit decided *Humphries* on January 21, 1999, the Supreme Court's ruling in *Reno* came down nearly one month later on February 24, 1999. It is both unclear and troubling why the Eighth Circuit places so much weight on the *Humphries* analysis when controlling precedent demanded a narrow reading of the statute. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 471 (1999); *Silva*, 866 F.3d 938, 940 (8th Cir. 2017); Humphries v. Various Fed. USINS Emps., 164 F.3d 936, 936 (1999).

[100] *Silva*, 866 F.3d at 940–41.

precedent from *Reno*.[101] Lopez Silva argued that under *Reno*, the scope of section 1252(g) applies only to discretionary actions taken by the Secretary that involve the commencement of proceedings, the adjudication of cases, and the execution of removal orders, and that as such, the Eighth Circuit must read the statute narrowly and find that jurisdiction over Lopez Silva's claims existed.[102] Lopez Silva read *Reno* correctly, but the court here instead decided that although the Supreme Court *referenced* discretionary decisions, the Supreme Court did not explicitly indicate that section 1252(g) "applies *only* to discretionary decisions."[103]

This, of course, is not what *Reno* suggested, and the Eighth Circuit in *Silva* makes the mistake—again—of overlooking the Supreme Court's core apprehensions and interests when it decided *Reno*.[104] When construing the statute, the Supreme Court clearly worried about interpreting section 1252(g) in a way that would preclude judicial review of all INS actions and, based on the plain language of the statute, found that, absent more, Congress intended only to limit the reach of the statute to the three discrete acts set forth.[105] The *Reno* Court's robust textual approach to the statute contributed to the majority's decision to read the statute narrowly, and it is this narrow interpretation that should have been subsequently applied by lower courts.[106] Additionally, that the Eighth Circuit entirely disregarded the fact that the Supreme Court contemplated a situation where due process concerns were so pressing as to obviate the statute's jurisdictional bar lends further support to the idea that the Eighth Circuit deeply misunderstood the majority's trepidations in *Reno*.[107] It was in part for these reasons that the Supreme Court in *Reno* not only underscored the need for, but *required* a narrow reading of the statute.[108]

Yet in its discussion regarding the distinction between discretionary and nondiscretionary acts, the Eighth Circuit acknowledged an exception to section 1252(g).[109] This exception, previously used by the Eighth Circuit, was meant for cases when the petitioner's claims challenge a legal conclusion as opposed to a

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[101] Unlike with *Humphries*, this time the Eighth Circuit misapplied *actual* precedent. *Id.*

[102] *Id.*

[103] *Id.* at 941 (emphasis in original).

[104] *See Reno*, 525 U.S. at 482–86.

[105] Justice Scalia, writing for the majority, made this painstakingly apparent. *Id.* at 482–84.

[106] *See id.*

[107] *See id.*; *Silva*, 866 F.3d at 941.

[108] *See Reno*, 525 U.S. at 482–84; *Silva*, 866 F.3d at 941.

[109] *Silva*, 866 F.3d at 941 discussing the exception for a challenge to a "legal conclusion" from *Jama*).

discretionary decision.[110] In *Jama v. Immigration and Naturalization Service*, the Eighth Circuit found that the petitioner's writ of habeas corpus did not challenge a discretionary act of the INS.[111] Instead, the direct challenge to the Secretary's decision to remove the petitioner without first determining that his birth country would accept him was a challenge to a legal conclusion—the Attorney General's statutory construction.[112]

Despite the existence of this exception—an exception of the Eighth Circuit's own making, no less—the court in *Silva* refused to distinguish the legal conclusion in *Jama* from the violation of the order staying Lopez Silva's removal.[113] In fact, the *Silva* court seemed to accept that the Secretary's decision to violate the stay was *not* discretionary at all, noting, "Lopez Silva's case may not involve a discretionary decision by the agency, but neither does it present a habeas claim that raises a purely legal question of statutory construction."[114] Yet the Eighth Circuit proceeded no further, making no mention of how the violation of the stay order fits into or falls outside the exception.[115] As such, not only did the Eighth Circuit undermine its own preceding argument as to *Reno*'s inapplicability, but the court also managed to avoid the question of what, other than on facts involving a writ for habeas corpus, would amount to a legal conclusion, a challenge of which would suffice to break the jurisdictional barrier.[116] Beyond this lurking unanswered question, the fact that an exception for finding jurisdiction has already been chiseled out crucially weakens the argument that no exceptions exist in other cases which also implicate violations of procedural due process.

Lastly, the Eighth Circuit dismissed the final argument put forth by Lopez Silva by finding that the constitutional claims and the claims brought pursuant to the FTCA are not exempt from section 1252(g)'s jurisdiction-stripping effect.[117] The court held that

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[110] *Id.* (discussing the exception for a challenge to a "legal conclusion" from *Jama*); *see also* Jama v. Immigration and Naturalization Serv., 329 F.3d 630 (8th Cir. 2003), *aff'd* 543 U.S. 335 (2005).

[111] *Jama*, 329 F.3d at 631–32.

[112] The petitioner in *Jama* was returned to his birth country of Somalia. The district court denied the habeas petition on the grounds that the petition arose from the execution of a removal order under section 1252(g). The appeal to the Eighth Circuit followed. *See Silva*, 866 F.3d at 941 citing Jama v. Immigration and Naturalization Service, 329 F.3d 630 (8th Cir. 2003), *aff'd on other grounds*, 543 U.S. 335 (2005)).

[113] *See id* ("The alien's claims here arise from a decision to execute a removal order, and *Jama's* rationale does not warrant excepting these claims from the limitation on the district court's jurisdiction.").

[114] *See id.*

[115] *Id.*

[116] *See id.*

[117] *Id.* More specifically, Lopez Silva brought constitutional claims based on *Bivens*, a case in which the Supreme Court held that individuals have a private right of action for

Congress intended to enact sweeping legislation broad enough to proscribe any claim from being heard once the Government establishes that it arises from the decision to execute a removal order, regardless of its gravity.[118] This finding, however, neglects the constitutional concerns voiced by the entire Supreme Court in *Reno*—not merely by the majority, but also by the concurrences and dissent—that there may very well arise a situation of discrimination "so outrageous" and so ostentatiously dissonant with cherished notions of procedural due process as to call the validity of section 1252(g) into question.[119]

B. Finding Jurisdiction: The Ninth Circuit Approach to Section 1252(g)

Although *Arce v. United States* was decided just a year after *Silva* on similar facts, the Ninth Circuit ruled differently and held that the court did have jurisdiction over the case.[120] In 2014, U.S. Customs and Border Patrol officers stopped and detained Claudio Anaya Arce, a citizen of Mexico, in Southern California.[121] Despite a plea for asylum, both an asylum officer and an immigration judge determined Arce's fear of persecution or torture in his home country to be unreasonable, and the DHS moved forward with the removal process.[122] Undeterred, Arce filed a motion for a stay of removal in the Ninth Circuit, which the court granted on the morning of February 6, 2015.[123] DHS received multiple letters and electronic communications from both the court and Arce's attorney that the Ninth Circuit had stayed the proceedings and therefore, Arce should remain in the

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damages against federal government officials who have violated the individuals' constitutional rights. *See* Bivens v. Six Unknown Names Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1999).

[118] *See Silva*, 866 F.3d at 941.

[119] Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999); *see also supra* Part I.

[120] *See generally* Arce v. United States, 899 F.3d 796 (9th Cir. 2018) (per curiam); *Silva*, 866 F.3d 938.

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

[122] When a noncitizen violates a prior order of removal by staying in the United States, as Arce had done, the government initiates the second removal attempt from the date of the original removal order. *See* 8 U.S.C. § 1231(a)(5) ("If the Attorney General finds that an alien has reentered the United States illegally after having been removed . . . the prior order of removal is reinstated from its original date.") However, Arce's fear of "persecution or torture" upon returning to Mexico provided him with the immediate opportunity for an asylum officer to determine whether such fear was reasonable. *See* 8 C.F.R. § 1208.31(e) ("If an alien whose prior order of removal has been reinstated . . . expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture."); *Arce*, 899 F.3d at 798–99.

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

United States.[124] Despite awareness of the stay order, DHS illegally removed Arce to Mexico anyway mere hours later.[125] DHS thus directly violated the court order staying the removal.[126] Arce remained in Mexico until February 20, 2015, returning to the United States only after the Ninth Circuit ordered the DHS to bring him back.[127]

Upon his return to the United States after having been wrongfully removed, Arce filed several tort claims under the FTCA, including negligence, false arrest, false imprisonment, and intentional infliction of emotional distress.[128] The district court refused to hear the case, applying a broad reading of section 1252(g) and concluding that the statute unambiguously deprived the court of jurisdiction over Arce's claims.[129] Arce thereafter appealed to the Ninth Circuit.[130]

Arce fared much better than Lopez Silva in the Eighth Circuit.[131] At the outset, the Ninth Circuit rejected the argument that section 1252(g) swept as broadly as the Eighth Circuit held.[132] Instead, the court noted that Arce attacked the government's actual authority to violate the court order staying Arce's removal, rather than the Secretary's discretionary decision to execute the order of removal.[133] The Ninth Circuit thus found that because the government lacked the authority to remove Arce due to the stay order, Arce's claims arose from the violation of the stay of removal rather than from the execution of a removal order.[134]

In so finding, the Ninth Circuit echoed the logic from a Third Circuit decision in *Garcia v. Attorney General of the United States.*[135] In *Garcia*, the court, reading the statute narrowly as it was bound to do so under *Reno*, found that the jurisdictional bar of section 1252(g) did not apply because the petitioner did "not challeng[e] the discretionary *decision* to commence proceedings,

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *See id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 800; Silva v. United States, 866 F.3d 938, 941 (8th Cir. 2017). Like Judge Kelly highlighted in dissenting opinion in *Silva*, the court here recognized that a stay of removal "temporarily suspend[ed] the source of the Attorney General's authority to act, resulting in a setting aside of . . . [the] authority to remove Anaya." *Arce*, 899 F.3d at 799 (alterations in original) (quoting Nken v. Holder, 566 U.S. 418, 428-29 (2009)); *Silva*, 866 F.3d at 942 (Kelly, J., dissenting).
[134] *Arce*, 899 F.3d at 800.
[135] *See id.*; Garcia v. Att'y Gen. of the United States, 553 F.3d 724, 725, 728–29 (3d Cir. 2009).

but challeng[ed] the government's very *authority* to commence those proceedings."[136] The Ninth Circuit's reasoning follows this logic precisely, and this is the result mandated by precedent and common sense.[137] Indeed, the Ninth Circuit itself stressed that beyond the Supreme Court's interpretation in *Reno*, common sense requires such a narrow reading of the statute.[138] As such, it should be unsurprising that other circuit and district courts have followed the approach, and why Judge Kelly's dissent in *Silva* vehemently disapproved of the Eighth Circuit's failure to adopt this logic.[139]

Although the Ninth Circuit expressly referenced its sister circuit's ruling in *Silva* and accepted the *Silva* dissent's reasoning, the court failed to effectively critique the Eighth Circuit's approach, passing on an opportunity to offer guidance to other courts that reach the issue in the future.[140] The Ninth Circuit did, however, slyly suggest that the *Silva* decision both employed faulty judgment and threw concern for preserving judicial scrutiny by the wayside in stating, "[W]e are guided here, as elsewhere, by the general rule to resolve any ambiguities in a jurisdiction-stripping statute in favor of the narrower interpretation, and by the 'strong presumption in favor of judicial review.'"[141] This powerful statement should serve as a beacon for courts dealing with section 1252(g) as a matter of first impression to use common sense and pay particular attention to the need to preserve judicial review when applying the statute.

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[136] *Garcia*, 553 F.3d at 729 (alterations added) (emphasis in original).

[137] *See Arce*, 899 F.3d at 800.

[138] *See id* ("Our interpretation is supported by the express instructions of the Supreme Court, our precedent, and common sense, all of which require us to read the statute narrowly.").

[139] *See Silva*, 866 F.3d at 942–43 (Kelly, J., dissenting) (citing Garcia v. Att'y Gen., 553 F.3d 724, 729 (3rd Cir. 2009)); The Second Circuit acknowledged the logic in *Arce*, but ultimately distinguished the case on grounds that *Ragbir* did not involve a situation where the government lacked the authority to execute the order of removal. Ragbir v. Homan, 923 F.3d 53, 64 (2d Cir. 2019) (holding that section 1252(g) applied where the Secretary retained authority to actually execute a removal order). The Sixth Circuit, however, used similar logic by examining the underlying substance of the petitioner's claim in determining whether they arose from one of the three, narrow, discretionary acts of the Secretary. *See* Mustata v. U.S. Dep't. of Justice., 179 F.3d 1017, 1022–23 (6th Cir. 1999) ("The fact that the [petitioners] . . . seek a stay of deportation does not make their claim one against the decision to execute a removal order. The substance of their claim is that their counsel's failure to investigate and present relevant evidence resulted in a violation of their due process rights. Whether or not the Attorney General executes a removal order against the [petitioners] is immaterial to the substance of this claim."); *see also* Turnbull v. United States, No. 1:06cv858, 2007 WL 2153279, at *4–*5 (N.D. Ohio July 23, 2007) ("[P]laintiff is not challenging the order of removal. Rather, the focus of the present lawsuit is the damages that flowed from defendant's refusal to abide by the stay order issued in the habeas proceeding and the forced deportation that followed. Because plaintiff's action does not arise from defendant's original decision to execute a removal order, [section] 1252(g) does not rob this Court of subject matter jurisdiction.").

[140] *See Arce*, 899 F.3d at 801 ("Respectfully, we find the analysis in Judge Kelly's dissent much more persuasive.").

[141] *Id* (quoting Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289, 298 (2001) (internal citations omitted)).

Indeed, perhaps the most important part of the *Arce* opinion is the court's strong, well-founded concerns about the necessity of judicial review and its steadfast enforcement, concerns which mirror those addressed twenty years earlier in *Reno*.[142] The court writes:

> Finally, taken to its logical conclusion, the government's reading would significantly circumscribe our authority to enforce our orders. As government counsel conceded at argument, in its view, the district court would lack jurisdiction even to sanction DHS for intentionally deporting a subpoenaed witness while under a court order not to do so. There is no support for the government's claim that Congress intended to prohibit federal courts from enforcing *any* court order so long as it is related to or in connection with an immigration proceeding.[143]

The Ninth Circuit frowned upon the fact that the government unabashedly disregarded the court's order enjoining Arce's removal.[144]

The court thereafter unambiguously emphasized that the implications of stripping jurisdiction in such a broad, all-encompassing manner are decidedly profound, because the consequences threaten the system of separation of powers.[145] Where the executive can openly defy a valid, enforceable court order and then submit to no judicial forum due to a legislative enactment barring federal question subject matter jurisdiction, the tenets of these treasured constitutional principles begin to unravel. And these fears are not illusory—they arose here in *Arce*, they arose in *Silva*, and they will undoubtedly continue to arise until the contours of section 1252(g) are properly shaped.[146]

III. RESOLVING THE SPLIT: THE CONSTITUTIONALITY OF 8 U.S.C. § 1252(G)

The split between the Eighth and Ninth Circuits must be resolved in favor of preserving the narrow interpretation decided in *Reno* such that courts do not consider suits alleging wrongful removals contained within the discretionary authority of the DHS.[147] The decision for DHS to violate a stay of removal is simply not part of the discretionary aspects of the deportation process, as it does not involve the commencement of a

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[142] *See id.*

[143] *Id.*

[144] *See id.*

[145] *See id.*

[146] *See id* at 800–01. Silva v. United States, 866 F.3d 938, 942–43 (8th Cir. 2017) (Kelly, J., dissenting).

[147] Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491–92 (1999).

proceeding, the adjudication of a case, or the execution of an order.[148] A violation of a stay order is a violation of the law, and DHS does not have the discretion to violate the law, to ignore court orders, or to shun the Constitution.[149]

Yet merely finding that wrongful removal actions are subject to the jurisdiction of federal courts ignores the larger issue—that the statute itself is unconstitutional. The jurisdiction-stripping provision denies a forum for immigrants who would raise not only claims for damages based on wrongful removal but also for deprivations of liberty within the context of the removal process. This Part will demonstrate that as a matter of law, section 1252(g) violates both separation of powers principles and procedural due process.

A. Stark Separation of Powers Problems

When faced with a suit challenging the validity of section 1252(g), the Supreme Court should find the statute facially unconstitutional. Justice Ginsburg's concurring opinion in *Reno* reiterates the critical importance of providing a forum for colorable constitutional claims to be subject to judicial review, but notes that the Supreme Court "[has] not previously determined the circumstances under which the Constitution requires immediate judicial intervention in federal administrative proceedings of this order."[150] Furthermore, the *Reno* majority suggests that on different facts—namely, faced with a petitioner being removed for more benign reasons than suspected terrorism—the Supreme Court would need to address whether the deportation "offend[s] the Constitution."[151]

Beyond the cracks left ajar in *Reno*, the constitutionality of section 1252(g) must be approached from both a separation of powers and a due process perspective.[152] As to the former, Article III, section 2 provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made . . . to controversies to which the United States shall be a party,

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[148] 8 U.S.C. § 1252(g).

[149] *See Arce*, 899 F.3d at 800–01; *see also* Nurse v. United States, 226 F.3d 996, 1002 (9th Cir. 2000) ("In general, governmental conduct cannot be discretionary if it violates a legal mandate.").

[150] *Reno*, 525 U.S. at 492, 497-99 (1999) (Ginsburg, J., concurring).

[151] *Id.* at 491–92 (1999).

[152] *See, e.g.*, Chemerinsky, *supra* note 10, at 314.

> to controversies between two or more states, between a state and citizens of another state.[153]

By denying federal question jurisdiction to immigrants, lawful or unlawful, who seek to challenge an administrative order made by U.S. officials, Congress not only effectively deprives aliens of an independent judicial forum, but acts contrary to the Constitution.

Yet currently, most constitutional challenges to federal executive or legislative acts affecting aliens—aside from removal—receive only rational basis review at the Supreme Court.[154] The Supreme Court's continued deference to the plenary powers doctrine in the immigration context where the act at issue strips the judiciary of subject matter jurisdiction impinges upon the Article III requirement that the "judicial power *shall* extend to *all* cases . . . *arising under*" the Constitution.[155] From a purely textual standpoint, the Constitution's use of "shall" necessarily means that the Supreme Court's original jurisdiction is "inevitable" and thus should not be subservient to the whims of more politically-minded branches.[156] By defaulting to rational basis review, the Supreme Court fails to consider the consequences of Congress's attempts to sidestep the judiciary by enacting laws which may potentially discriminate on the basis of race or ethnicity under the pretext of immigration policy. Because rational basis review of immigration matters means that the Supreme Court does not conduct a searching inquiry into the reasons behind a particular law, the Supreme Court does not generally address the question of whether jurisdiction-stripping statutes like section 1252(g) are unconstitutional on their faces.

Additionally, a constitutional challenge to a statute like section 1252(g) should assert that the Constitution guarantees a right to a judicial forum.[157] As preeminent constitutional law scholar Edwin Chemerinsky argues, when Congress establishes a schema where most of an executive agency's acts are non-reviewable except in limited circumstances, such as with section 1252(g), Congress infringes upon an individual's right to be heard. "An administrative proceeding is not an adequate substitute for a

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[153] U.S. CONST. art. III, § 2. Note that these are suits to which the United States is a party and are not suits which implicate the 11th Amendment.

[154] *Matthews v. Diaz* is the leading case discussing the level of scrutiny applied to constitutional challenges on the basis of alienage discrimination. The Supreme Court specified that for federal laws which classify on the basis of alienage, only rational basis review need be applied. Matthews v. Diaz, 426 U.S. 67, 85–86 (1976).

[155] U.S. CONST. art. III, § 2 (emphasis added).

[156] "Shall," although not colloquially used as such, implies "must." *See Shall*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2019).

[157] *See* Chemerinsky, *supra* note 10, at 314.

federal judicial proceeding," and allowing an executive agency on its own to make quasi-judicial determinations about a person's status in the United States appropriates a function of federal courts without the sensitivities usually employed by an independent judiciary.[158] Moreover, when error-prone executive agency proceedings cannot be reviewed by an independent judicial forum, this offends separation of powers principles and demands that a forum be made available.[159]

An independent judiciary is a core characteristic of the constitutional framework, and section 1252(g) threatens the structural role the judiciary plays in this framework.[160] By subverting the availability of an unbiased forum in reviewing removal proceedings, Congress obviates the possibility of ensuring that each immigrant, whether residing in the United States legally or without documentation, receives the fairness guaranteed to all within the nation's borders.[161] This congressional power to immunize certain actions of DHS from judicial review prevents courts from enjoining individual violations of constitutional law.[162] Additionally, if Congress can boundlessly use this power to strip courts of jurisdiction whenever it sees fit, then Congress could completely annihilate the Supreme Court's power of judicial review.[163] Despite the Supreme Court's efforts to preserve jurisdiction in some circumstances, such as those circumstances not covered by the jurisdiction-stripping provision of section 1252(g), the natural effect of doing so may ultimately render these alternative possibilities practically moot.[164] In effect, allowing jurisdiction-stripping statutes to prevail erodes the foundational tenet of the judicial function and would gradually usurp judicial powers.[165]

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[158] *Id.*

[159] *See* United States v. Mendoza-Lopez, 481 U.S. 828, 837–38 (1987) ("Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding. This principle means . . . that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available . . . .").

[160] *See* Chemerinsky, *supra* note 10, at 314.

[161] *Id.* at 315.

[162] Michael J. Gerhardt, *The Constitutional Limits to Court Stripping*, 9 LEWIS & CLARK L. REV. 347, 354 (2005).

[163] *Id.*

[164] *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999); *see also* Arce v. United States, 899 F.3d 796 (9th Cir. 2018) (per curiam); Silva v. United States, 866 F.3d 938 (8th Cir. 2017).

[165] *See* Gerhardt, *supra* note 162.

B. Preservation of Substantive & Procedural Due Process Demands that Section 1252(g) Fail a Constitutional Challenge

A statute that wholly sbars judicial review of immigration matters offends the due process that the Constitution affords to all individuals.[166] Due process consists of two separate components: substantive due process and procedural due process.[167] Here, we need only examine procedural due process since section 1252(g) transgresses procedural due process by denying adequate procedures where a government seeks to deprive a person of life, liberty, or property —namely, by not allowing a claim to be heard in a judicial forum.[168]

In *Mathews v. Eldridge*, the Supreme Court introduced a balancing test for practices that the plaintiff alleged denied an individual of procedural due process rights.[169] In considering whether a government practice violates an individual's procedural due process rights, the court considers and balances the following three factors:

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[170]

Applying the *Mathews* test to section 1252(g), it is clear that the statute deprives aliens of the due process to which they are entitled. As to the first prong, the private interest implicated here is assuredly significant: It implicates a person's ability to remain in a country, uninterrupted by government intrusion.[171] For example, in *Silva*, the private interest involved Lopez Silva's interest in remaining with his wife and his four children—citizens of the United States—as well as receiving continued medical care for his health conditions.[172] Any plaintiff seeking to challenge the jurisdiction-stripping provision at issue here will indubitably be able to demonstrate similar interests, as the very

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[166] The Fifth Amendment states, "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[167] *See* CHEMERINSKY, *supra* note 14, at 951.

[168] *See* 8 U.S.C. § 1252(g); *see also* CHEMERINSKY, *supra* note 14, at 951.

[169] Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

[170] *Id.*

[171] *See, e.g.*, Muller, *supra* note 8.

[172] Brief for Respondent at 1, Silva v. United States, 866 F.3d 938 (8th Cir. 2017) (No. 16-1870).

nature of deportation requires the uncomfortable uprooting of an individual from a country he or she has made a home.[173]

Beyond this, an arguably more important private interest exists: The private interest in obtaining a fair forum in the United States in which to have constitutional claims heard—a forum which the current jurisdiction-stripping provision denies.[174] The undoubted "personal suffering caused by the inability to obtain an impartial hearing of a claim of injustice is incalculable."[175] As such, due process requires the availability of an Article III court to hear such cases.[176] Section 1252(g) thus implicates the private interest by imposing unconstitutional burdens on an individual's right to due process.[177]

In regards to the second prong of the *Mathews* test, there lies enormous risk with allowing the Secretary and INS to execute removal proceedings free from judicial intervention.[178] In both *Silva* and *Arce*, the INS acted in violation of temporary stays of the petitioners' removal orders; as a result, both Lopez Silva and Arce were wrongfully removed from the United States, causing them both substantial harm.[179] These cases are not outliers—even U.S. citizens born abroad to American parents have been increasingly wrongfully deported or detained.[180] Additionally, allowing the federal courts to review INS actions currently barred from judicial scrutiny by section 1252(g) would result in a decreased likelihood of an erroneous removal decision when such decisions are made by impartial judges in a neutral forum.[181]

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[173] *See* Muller, *supra* note 8.

[174] *See* Gerhardt, *supra* note 162, at 359.

[175] *See* Eve Cary, *Edward V. Sparer Public Interest Law Fellowship Symposium: Road Blocks to Justice: Congressional Stripping of Federal Court Jurisdiction*, 67 BROOK. L. REV. 405, 406 (2001).

[176] *See* Gerhardt, *supra* note 162, at 359.

[177] *Id.*

[178] Esha Bhandari, *Yes, The U.S. Wrongfully Deports Its Own Citizens*, ACLU (Apr. 25, 2013, 11:45 AM), https://www.aclu.org/blog/speakeasy/yes-us-wrongfully-deports-its-own-citizens [https://perma.cc/7ENF-VSBZ].

[179] Arce v. United States, 899 F.3d 796, 799 (9th Cir. 2018) (per curiam); Silva v. United States, 866 F.3d 938, 939 (8th Cir. 2017).

[180] Even American citizens both born in the United States or to citizen parents abroad have been wrongfully detained or deported by Immigration and Customs Enforcement (ICE) agents. The agency has become invigorated since the election of President Trump in 2016. Darlena Cunha, Opinion, *ICE is Dangerously Inaccurate*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/opinion/ice-raids.html [https://perma.cc/W8FT-MQ52]; *see also* Meredith Hoffman, *The US Keeps Mistakenly Deporting Its Own Citizens*, VICE NEWS (Mar. 8, 2016, 7:43 AM), https://www.vice.com/en_us/article/pa4mq7/the-us-keeps-mistakenly-deporting-its-own-citizens [https://perma.cc/T9LX-43E3].

[181] Lawful permanent residents and their families often fear that past convictions from decades prior—and for which the individuals have already served prison time—will result in them being deported unexpectedly. Brittny Mejia, *Must Reads: It's Not Just People in the U.S. Illegally—ICE is Nabbing Lawful Permanent Residents Too*, L.A. TIMES (June 28, 2018, 4:00 AM,), https://www.latimes.com/local/lanow/la-me-ln-lawful-resident-20180628-htmlstory.html

Permitting judicial review of INS Secretary actions may impose high financial and administrative costs on the government.[182] Despite these costs, however, the government's interest in removing aliens would still remain—in fact, the government's interest might be enhanced by more unitary outcomes as a result of judicial predictability since federal courts have traditionally dealt with deportation and various other immigration matters.[183] When determinations of INS' removal actions are made by courts in a consistent manner, the executive can more confidently and swiftly undertake removals it deems important to better enforce the government's immigration scheme.

Ultimately, denying an individual a forum is not only a breach of the principle of separation of powers but a denial of procedural due process as well. With new executive orders permitting deportations to occur within hours an immigrant's arrest, it is necessary now more than ever for courts to retain jurisdiction over challenges to immigration proceedings, particularly removal orders.[184] Plaintiffs seeking to challenge section 1252(g) must first be sure to frame their claim as falling outside the three discretionary actions of DHS which would bar the court's jurisdiction over the case in order to avoid having the case prematurely dismissed for lack of subject matter jurisdiction.[185] Next, plaintiffs will want to make a facial challenge to the statute, claiming that the law deprives them of their right to a judicial forum and, alternatively, that the statute impinges on the horizontal separation of powers created by the Founders. Plaintiffs may assert that stripping the courts of jurisdiction over immigration proceedings via section 1252(g) bears no reasonable

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[https://perma.cc/75Y3-N59R]. For some, deportation to an individual's home country presents risk of great danger, and even death. Fear of deportation causes significant stress on these individuals. Sarah Stillman, *When Deportation is a Death Sentence*, NEW YORKER (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence [https://perma.cc/4W2P-8892] ("[B]efore Laura crossed the McAllen-Hidalgo International Bridge into Mexico, she turned to the Border Patrol agent supervising her return to Mexico. 'When I am found dead,' she told him, 'it will be on your conscience.'").

182 Indeed, the legislation was enacted against the backdrop of the need to streamline immigration proceedings and reduce opportunities for challenges to clog courts and delay removals indefinitely. *See* Dougherty, *supra* note 21, at 248–49.

183 *See* Chemerinsky, *supra* note 10 , at 316 ("There is no indication that [federal courts' review of deportation and immigration matters] has placed an undue burden on the judiciary.").

184 Vanessa Romo, *Trump Administration Moves To Speed Up Deportations With Expedited Removal Expansion*, NPR (July 22, 2019, 5:20 PM), https://www.npr.org/2019/07/22/744177726/trump-administration-moves-to-speed-up-deportations-with-expedited-removal-expan [https://perma.cc/X9SE-TXM3]. In June 2020, the Supreme Court upheld the constitutionality of expedited removal in *DHS v. Thuraissigiam*. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020); *see also* Josh Gerstein, *Supreme Court OKs Fast-Track Deportations*, POLITICO, https://www.politico.com/news/2020/06/25/supreme-court-fast-track-deportations-339739 [https://perma.cc/J7LA-E287].

185 8 U.S.C. § 1252(g).

relationship to Congress's overall immigration policy because the legislation infringes on the scope of due process.[186] With these arguments on the table, the Supreme Court must find section 1252(g) unconstitutional.

CONCLUSION

Despite its narrow interpretation in *Reno*, the troubling constitutional questions surrounding the jurisdiction-stripping provision have remained, and the lack of clarity provided by *Reno* with respect to these questions has resulted in serious harm to individual immigrants. Misapplications of the law have resulted in families being separated without any chance at receiving, at a minimum, compensation for their emotional distress and wrongful removal. Both *Silva* and *Arce* highlight the grave consequences of statutes which seemingly provide jurisdiction in some cases but completely preclude judicial review in other cases, particularly when the boundaries set by Supreme Court precedent remain unclear.

Wrongful removal should be considered a non-discretionary action by DHS under section 1252(g), but this alone is not enough. Merely finding that a single type of action falls outside the scope of the jurisdiction-stripping provision would allow courts to shirk their duties to preserve the integrity of an independent judiciary, safeguard personal liberties, and maintain a check on the legislative and executive branches as the framers so contemplated. It is for these reasons that the statute must be found invalid at the next constitutional challenge.

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[186] United States v. Carolene Products Co., 304 U.S. 144, 151–52 n.4 (1938). *See generally* Williamson v. Lee Optical Co. 384 U.S. 483 (1955).

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