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Attorneys for *Amici Curiae* Professors of Immigration Law, Civil Procedure, and Administrative Law

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

LAS AMERICAS IMMIGRANT ADVOCACY CENTER; ASYLUM SEEKER ADVOCACY PROJECT; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; INNOVATION LAW LAB; SANTA FE DREAMERS PROJECT; AND SOUTHERN POVERTY LAW CENTER,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; WILLIAM BARR, in his official capacity as Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; AND JAMES MCHENRY, in his official capacity as EOIR Director of the United States,

Defendants.

Case No. 3:19-cv-02051-IM

BREIF OF *AMICI CURIAE* PROFESSORS OF IMMIGRATION LAW, CIVIL PROCEDURE, AND ADMINISTRATIVE LAW IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Amici curiae are law professors who teach, research, and publish on immigration law, civil procedure, and administrative law, including the principles that govern judicial review in immigration law settings. A complete list of the names, titles, and affiliations of *amici* is in the appendix to this brief. *Amici* have a strong interest in assuring that rules governing the adjudication of the rights of noncitizens are fairly and uniformly applied. This case is of critical interest to *amici* because the interpretation of 8 U.S.C. § 1252(b)(9) impacts noncitizens throughout the country.

The jurisdictional provisions of 8 U.S.C. § 1252 (hereinafter "Section 1252") must be construed to maintain the effectiveness of judicial review. Recent U.S. Supreme Court precedent makes clear that a court must interpret and apply restrictions on jurisdiction to claims—even if they are related to removal proceedings in some way—by following several basic principles. Courts must not apply Section 1252(b)(9) to impair the ability of the courts to understand the case or controversy before it. Courts also must not read Section 1252(b)(9) to foreclose such timely relief as may be appropriate based on an adequate record. In the present case, treating the plaintiffs' claims as "arising from" removal proceedings and therefore outside the jurisdiction of this Court would make no sense, for two reasons.

First, there are no removal proceedings from which the plaintiffs' claims could be said to arise.

Second, applying Section 1252(b)(9) to foreclose timely relief in the present case would impair this Court's ability to perform basic judicial functions of understanding the case or controversy and issuing appropriate relief. Applying Section 1252(b)(9) would also render unlawful government actions effectively unreviewable. It follows that the plaintiffs' claims are independent

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of, and therefore do not "arise from," removal proceedings. For this reason, the plaintiffs' claims are outside the jurisdictional restriction in Section 1252(b)(9).

II. ARGUMENT

A. Section 1252 restricts the substance, form, and timing of judicial review.

Section 1252 was added to the Immigration and Nationality Act (INA) by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. *See* Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208 (1996) (Division C). Section 1252, entitled "Judicial review of orders of removal," provides that judicial review of "final orders of removal" are the "sole and exclusive means for . . . review of an order of removal entered or issued" in removal proceedings. 8 U.S.C. § 1252(a)(5).

Section 1252 starts by providing that "[j]udicial review of a final order of removal" generally is governed by the provisions of the U.S. Code that govern judicial review of orders from other federal agencies, except as otherwise provided in Section 1252(b). *See* § 1252(a)(1). Section 1252(a)(2) identifies matters "not subject to judicial review," including categories of decisions defined by their substance. For instance, the statute precludes judicial review of decisions to invoke or execute expedited removal against an individual, *see* § 1252(a)(2)(A); decisions involving discretionary acts of certain government officials, *see* § 1252(a)(2)(B); and decisions to order removal of individuals convicted of certain crimes, *see* § 1252(a)(2)(C). Section 1252(g) precludes judicial review of discretionary decisions of the Attorney General to "commence proceedings, adjudicate cases, or execute removal orders against any alien." *See Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC")*, 525 U.S. 471, 483–87 (1999) (adopting a "narrow reading" of Section 1252(g) as a "discretion-protecting provision" that precludes judicial review of only the discrete, discretionary decisions listed in the statute).

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Section 1252 also establishes two restrictions on the form of judicial review. Regarding expedited removal from the United States under 8 U.S.C. § 1225(b)(1), under Section 1252(e) "no court may . . . certify a class under Rule 23 of the Federal Rules of Civil Procedure" in any of the narrow instances where the statute permits judicial review pertaining to expedited removal. § 1252(e). Under Section 1252(f)(1), "Limit on injunctive relief," "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [certain provisions of the INA] other than with respect to the application of such provisions to an individual alien against whom [removal] proceedings . . . have been initiated." § 1252(f)(1).

In addition to these restrictions based on substance and form, § 1252 restricts the timing of judicial review. Section 1252(b)(9), "Consolidation of questions for judicial review," requires that judicial review of issues "arising from" removal proceedings be delayed until a final order of removal has been issued. Section 1252(b)(9) provides in pertinent part:

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

B. The Supreme Court in *Jennings v. Rodriguez* prescribed how courts should interpret and apply Section 1252(b)(9).

This brief's focus is the timing restriction in Section 1252(b)(9). A recent decision of the U.S. Supreme Court guides courts in interpreting and applying Section 1252(b)(9). In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the petitioner had filed a habeas petition in the district court alleging that he and others similarly situated were entitled to bond hearings to seek release from their prolonged detention. *Id.* at 838. The Supreme Court plurality, in an opinion by Justice Alito, addressed the question whether the INA provides a statutory right to periodic bond hearings during immigrant detention. Justice Alito assumed *arguendo* that the detention constituted an "action taken

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. . . to remove [the petitioner] from the United States" within the meaning of Section 1252(b)(9). The question, then, was whether the claim for a bond hearing was a claim "arising from" the removal proceeding. *Id.* at 840. Justice Alito explained that it was not. Key to his analysis was the reminder that the Court had "eschewed uncritical literalism" when construing phrases like "arising from" in other statutes. Justice Alito warned that overconfidence in the plain meaning of "arising from" would lead courts to results that "no sensible person could have intended." *Id.*

Justice Alito conceded that a claim seeking a bond hearing could be said to "arise from" a removal proceeding "in the sense that if those actions had never been taken, the aliens would not be in custody at all." *Id.* But he warned against any application of Section 1252(b)(9) that would be so broad as to be oblivious to common sense evaluation of its practical consequences in particular cases. The Court plurality continued:

> [T]his expansive interpretation of § 1252(b)(9) would lead to staggering results. Suppose, for example, that a detained alien wishes to assert a claim under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), based on allegedly inhumane conditions of confinement. Or suppose that a detained alien brings a state-law claim for assault against a guard or fellow detainee. Or suppose that an alien is injured when a truck hits the bus transporting the aliens to a detention facility, and the alien sues the driver or owner of the truck.

138 S. Ct. at 840. Justice Alito rejected the argument that § 1252(b)(9) applies to such claims:

> The "questions of law and fact" in all those cases could be said to "aris[e] from" actions taken to remove the aliens in the sense that the aliens' injuries would never have occurred if they had not been placed in detention. But cramming judicial review of those questions into the review of final removal orders would be absurd.

138 S. Ct. at 840. The plurality then applied Section 1252(b)(9) to the facts and held that the dispute over the bond hearing did not "arise from" the removal proceedings. Justice Alito emphasized that a contrary conclusion "would also make claims of prolonged detention effectively unreviewable." In other words, "[b]y the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place." *Id.*

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Jennings warns courts that "arising from" could literally mean any claim or challenge that would not have arisen but for a removal proceeding. But the plurality noted that the U.S. Supreme Court, when "confronted with [such] capricious phrases" in the context of this very statute, has avoided such broad, literal constructions. *See* 138 S. Ct. at 840. Instead, *Jennings* made clear that courts must first recognize that the statutory text is not precise enough for its plain meaning to decide close cases. Courts must then apply the text of a jurisdictional restriction like Section 1252(b)(9) in a way that is faithful to both its text and the purposes of judicial review. These purposes include making sure that claims are not "effectively unreviewable" and that parties are not deprived of "any meaningful chance for judicial review." *Id.*

The approach in *Jennings* is consistent with the "strong presumption in favor of judicial review of administrative action" in the immigration context." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). Moreover, *Jennings* implicitly rejected the approach, if not necessarily the holding, in pre-*Jennings* Ninth Circuit precedent such at *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016). In *J.E.F.M.*, the individual petitioners asserted a right to appointed counsel at the government's expense in removal proceedings. The Ninth Circuit held that the petitioners' claims were "bound up in and an inextricable part of the administrative process" and therefore under Section 1252(b)(9) must be raised in a petition for review. 837 F.3d at 1033. Whether or not the plurality in *Jennings* would require a different result today on the facts of *J.E.F.M.*, the approach to Section 1252(b)(9) in *Jennings* essentially rejected the approach in *J.E.F.M.*, which had called Section 1252(b)(9) "'breathtaking in scope'" and said it "'swallows up virtually all claims that are tied to removal proceedings.'" *See Cancino-Castellar v. Nielsen*, 338 F. Supp. 3d 1107, 1114–15 (S.D. Cal. 2018) (quoting *J.E.F.M.*, 837 F.3d at 1031, and explaining in detail how the *Jennings* plurality rejected *J.E.F.M.*'s expansive interpretation of (b)(9)).

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C. The approach to Section 1252 in *Jennings* is consistent with long-standing interpretations of restrictions on judicial review in immigration cases.

History confirms the long-standing pedigree of the Supreme Court plurality's commitment in *Jennings v. Rodriguez* to applying Section 1252(b)(9) to remain faithful to both statutory text and purpose. The scope and timing of judicial review are not new issues, but before 1996 the statutory foundation was somewhat different. At that time, former INA § 106 provided that court of appeals review under the Hobbs Act "shall apply to, and shall be the sole and exclusive procedure form the judicial review of all *final orders* of deportation." INA § 106(a); 8 U.S.C. § 1105a(a) (repealed 1996) (emphasis added).

At stake under INA § 106 was not whether or when judicial review was available. Instead, the ultimate question was whether federal district courts or federal courts of appeals would have jurisdiction to undertake that review. But the interpretative task was similar to that posed by Section 1252(b)(9) — what questions of law or fact were part of a "final order," and what questions were not. If a question was part of a "final order," then Section 106(a) applied, and judicial review was in the court of appeals. If a question was not part of a "final order," then the district court had jurisdiction to review under the general federal question statute, 28 U.S.C. § 1331, and former 8 U.S.C. § 1329 (Supp. III 1998).

To be sure, Section 1252(b)(9) has different text and context, but the general interpretive challenge is the same. Both former INA § 106 and current Section 1252(b)(9) require courts to interpret a jurisdictional statute's ambiguous phrasing. "Final order" in former INA § 106 seems at first glance to be narrower than the phrase "arising from" in Section 1252(b)(9). But the government urged an expansive reading of "final order" in former INA § 106, just as it now urges an expansive reading of "arising from" in Section 1252(b)(9). Even if "final order" seems narrower, both phrases are inherently elastic. For this reason, both phrases demand an interpretation informed

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by an understanding of practical consequences, as Justice Alito urged in *Jennings*.

A trilogy of Supreme Court cases construed the phrase "final order" in INA § 106(a) in ways that meet that interpretative demand, and thus shed light on Section 1252(b)(9). In the first case, *Foti v. INS*, 375 U.S. 217 (1963), the noncitizen had sought discretionary suspension of deportation at his deportation hearing. The immigration judge denied suspension and ordered the noncitizen deported. *Id.* at 218. The Court held that "final order" in INA § 106(a) included the denial of suspension, so that judicial review of the denial had to be included in review of the final order of deportation. This channeled judicial review to the court of appeals. "[A]ll determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals . . . are . . . included within the ambit of the exclusive jurisdiction of the Court of Appeals under [INA] § 106(a)." *Id.* at 229. The second case, *Giova v. Rosenberg*, 379 U.S. 18 (1964), reached a similar result. There, the noncitizen had been ordered deported and moved the BIA to reopen the deportation proceeding. The BIA denied the motion to reopen, and the noncitizen sought judicial review of that denial. The U.S. Supreme Court held that the BIA denial of the motion to reopen was part of the "final order" of deportation, so former § 106 channeled judicial review to the federal court of appeals.

The third case, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), presented a closer question and different result that illuminate Section 1252(b)(9) in a different way. Cheng was a noncitizen with a final order of deportation. To gain time to prepare an asylum application, he sought a stay of deportation, which the INS district director denied. The Supreme Court held that the court of appeals lacked jurisdiction to review the denial because it was not a determination "made during a [deportation] proceeding." *Id.* at 216. As an order issued *after* the deportation proceeding, it was not part of the "final order." Accordingly, judicial review was not channeled to the court of appeals,

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and the district court had jurisdiction. Lower courts applied *Cheng* to preclude § 106 review of *pre-order* immigration decisions if the government issued them outside of deportation proceedings. In *Kavasji v. INS*, 675 F.2d 236 (7th Cir. 1982), a student had asked the INS to extend his nonimmigrant student status and let him transfer schools. The INS denied the request and commenced deportation proceedings. Eventually, he was ordered deported, but the Seventh Circuit held that it lacked jurisdiction under INA § 106 to review the extension and transfer denials. As in *Cheng*, any judicial review would have to proceed in the district court. *Id.* at 239.

To be sure, the text of former INA § 106 differs from the text of Section 1252(b)(9); "final order" is not the same phrase as "arising from." Former INA § 106 put judicial review of "final orders" in the court of appeals, whereas Section 1252(b)(9) now consolidates for judicial review "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States." In spite of these differences, the history remains relevant because it establishes how the U.S. Supreme Court has interpreted phrases that define when and how judicial review is channeled, consolidated, or delayed. The Court's approach, especially in *Cheng*, was first to recognize the ambiguity in the statutory phrase "final order" and to then interpret the restriction on judicial review in the way that recognizes that some matters, though they could be viewed as part of a "final order" in some sense, are separate enough from an immigration proceeding to merit separate treatment for the purpose of determining jurisdiction for judicial review.

Actual outcomes may vary, perhaps depending on the phrase in the statute being considered. The phrase "final order," even if ambiguous, can reasonably be interpreted to require a closer nexus to the core deportation proceeding than the nexus probably required by "arising from." At the same time, however, the phrase "arising from" in Section 1252(b)(9) is not as broad as it may first appear. First, it appears in subsection (b), which applies to "orders of removal." The title of subsection (b)

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is "Requirements for review of orders of removal," and the text begins with this limiting language: "With respect to review of an order of removal under subsection (a)(1), the following requirements apply: . . . ." 8 U.S.C. § 1252(b). In this respect, Section 1252(b)(9) looks more like former INA § 106, with its reference to "final order," than a cursory reading out of statutory context might suggest. Moreover, the phrase "arising from" in Section 1252(b)(9) implicitly requires a closer nexus to preclude judicial review than other phrases—"related to" or something similar—that Congress could have adopted. *See Humphries v. Various Fed. U.S. INS Emps.*, 164 F.3d 936, 943 (5th Cir. 1999); *see also Jennings*, 138 S. Ct. at 841 (noting, in a discussion of Section 1252(b)(9), that the phrase "arising from" in Section 1252(g) has not been construed to "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General," but has instead been construed narrowly "to refer to just those three specific actions themselves" (citing *AADC*, 525 U.S. at 482–83)). Again, jurisdictional rules that rely on nexus are not as clear as they might first seem.

As interpreted by the U.S. Supreme Court in *Foti*, *Giova*, and *Cheng*, former INA § 106 yields one central lesson, which the plurality in *Jennings v. Rodriguez* reinforced. The lesson is that even if statutory text varies, with some phrases calling for a closer nexus to a removal proceeding than other phrases, courts cannot pretend that the statutory text is clear and self-executing. With each statute of this general type, courts must recognize that some questions of law or fact, even if connected in some way to a pending removal proceeding, are so independent of, or collateral to, a final removal order that they must fall outside the scope of restrictions on judicial review that require some nexus with a removal proceeding. From this perspective, it made sense to treat the challenges in *Cheng* and *Kavasji* as outside the deportation proceeding (and its administrative record) that would normally be reviewed in the court of appeals. *Jennings* applied this basic

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principle to recognize that some questions, though related in some attenuated way, remain outside the channeling effect of Section 1252(b)(9).

D. Analogous jurisdictional rules in federal civil litigation shed light on applying *Jennings* to Section 1252(b)(9).

The interpretative challenge posed by Section 1252(b)(9) requires considering how courts have interpreted similar statutes governing judicial review. Analogous jurisdictional issues arise in federal civil litigation, where courts must also interpret restrictions on the timing of judicial review. Here, too, courts have remained faithful to basic procedural values—including substantive accuracy and adequate remedies for violations of law—that have traditionally informed judicial interpretation of jurisdictional rules.

First, the statute governing federal appellate court jurisdiction, 28 U.S.C. § 1291, generally consolidates issues for appellate review, deferring review until the district court reaches a "final decision." But courts have consistently construed Section 1291 to allow immediate appeals of "collateral orders." Second, the general federal question jurisdictional statute, 28 U.S.C. § 1331, uses the phrase "arising under" federal law to define federal subject matter jurisdiction based on federal questions. Under well-settled law, a narrow reading of this "arising under" jurisdiction is essential for the practical functioning of the federal courts. Third, 28 U.S.C. § 1367 calls on federal courts to decide the reach of their "supplemental jurisdiction." Court decisions applying 28 U.S.C. § 1367 confirm that two claims, even if related in some sense, may be so independent of each other that they should not be consolidated into a single proceeding. Though the statutory foundations for these three inquiries differ from Section 1252(b)(9), they all show that the federal courts, as in *Jennings*, consistently consider the practical effects of jurisdictional rules and interpret them to safeguard substantive accuracy and adequate remedies.

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1. Federal appellate jurisdiction – "final decision"

Section 1291 of Title 28, U.S. Code, generally limits the jurisdiction of the federal courts of appeals to appeals from "final decision of the district courts of the United States." Like Section 1252(b)(9), 28 U.S.C.§ 1291 prevents a party from separately seeking review of every adverse ruling in the tribunal of first instance. *See, e.g.*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (noting that "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits" and holding that orders denying motions to disqualify counsel are not appealable final decisions under 28 U.S.C. § 1291); *see also id.* ("Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.").

Under 28 U.S.C. § 1291, unless a decision qualifies as "final," the losing side on any issue in district court generally must wait until a final decision is issued before it may appeal. Until then, the court of appeals lacks jurisdiction. Both 28 U.S.C. § 1291 and Section 1252(b)(9) consolidate and defer judicial review of a decision of a lower tribunal. Both raise this question: what issues may a court review without waiting until the end of the proceedings to which they may be seen as linked in some way? To answer this question under 28 U.S.C. § 1291, courts have construed the "final decision" rule to allow immediate appeals of "collateral orders." As the U.S. Supreme Court observed in *Cohen v. Beneficial Industrial Loan Corporation*, such orders "finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. 541, 546 (1959).

Cohen involved a federal court order that declined to apply a state statute requiring the posting of bond in a shareholder derivative action. Giving the order a "practical rather than a

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technical construction," the Court held that order immediately appealable under 28 U.S.C. § 1291 because it was a "collateral order." A later Supreme Court decision explained that an order is collateral if it meets three conditions: the order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985). This analysis is also consistent with Federal Rule of Civil Procedure 54(b), a rule-based exception to the "final decision" rule. Under FRCP 54(b), district courts may allow an immediate appeal of some decided claims in a case, if those claims are separable from others that remain undecided. Both rules are consistent with the *Jennings* plurality's concern that judicial review must remain effective.

2. Federal question jurisdiction – "arising under"

The prevailing view of 28 U.S.C. § 1291 is consistent with an even more deeply rooted tradition involving the interpretation of a jurisdictional rule relying on nexus. 28 U.S.C. § 1331 is the statutory authority for subject matter jurisdiction in the federal district courts under Article III, section 2, of the U.S. Constitution, under which the federal "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2. The prevailing reading of "arising under" in 28 U.S.C. § 1331 comes from the U.S. Supreme Court's 1908 decision in *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908). Under the "well-pleaded complaint" rule in *Mottley*, a suit "arises under" federal law for purposes of Section 1331 "only when the plaintiff's statement of his own cause of action shows that it is based upon federal law." *Id.* at 152. Federal jurisdiction thus cannot be based on an actual or anticipated defense or counterclaim.

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The interpretation of "arising under" in *Mottley* helped to establish a bedrock tradition in federal courts to read jurisdictional statutes to adhere to statutory text, but also to keep practical consequences in mind. The "well-pleaded complaint" rule avoids having federal question jurisdiction depend on a court's guesses about whether defendants will later make arguments based on federal law. The Supreme Court has held that "it would undermine the clarity and simplicity of that rule if federal courts were obliged to consider the contents not only of the complaint but also of responsive pleadings in determining whether a case 'arises under' federal law." *Vaden v. Discover Bank*, 556 U.S. 49, 60–61 (2009) (citing *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002)). The Supreme Court's interpretation of 28 U.S.C. § 1331 is relatively easy to administer, allows subject matter jurisdiction to be decided early in litigation, and minimizes the possibility of anomalous outcomes. In short, *Mottley* shows how courts consider practical consequences on the effective functioning of the federal courts when they interpret nexus-based jurisdictional rules, including 28 U.S.C. § 1331 and Section 1252(b)(9).

3. Federal supplemental jurisdiction – "case or controversy"

Under 28 U.S.C. § 1367, federal courts must determine the reach of their "supplemental jurisdiction." This term refers to subject matter jurisdiction to hear claims that have no independent basis for federal subject matter jurisdiction, but which are related to claims with an independent basis. Under 28 U.S.C. § 1367 and abundant related caselaw, federal courts will hear *some* related claims, but the relationship must be close enough that the related claim must be part of the same "case or controversy." Otherwise, the related claim is outside the scope of the federal judicial power as defined by Article III, section 2, of the U.S. Constitution. According to the leading Supreme Court case, *United Mine Workers v. Gibbs*, a constitutional "case" "must derive from a common nucleus of operative fact," and claims must be "such that [the plaintiff] would ordinarily be expected

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to try them all in one judicial proceeding." 383 U.S. 715, 725 (1966).

Codifying this constitutional requirement, 28 U.S.C. § 1367(a) sets out the threshold rule: in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367. As with other jurisdictional statutes based on nexus, claims that are somehow related may still be so attenuated from each other—impairing the practical effectiveness of trying them together in one judicial proceeding—that federal courts no longer have supplemental jurisdiction over those other claims.

4. Lessons from 28 U.S.C. §§ 1291, 1331, and 1367

Combining well-established interpretations of 28 U.S.C. § 1291, 28 U.S.C. § 1331, and 28 U.S.C. § 1367 yields several lessons for Section 1252(b)(9) that the Supreme Court plurality in *Jennings v. Rodriguez* reinforced. First, courts do not limit analysis to declaring that the statutory text of a jurisdictional restriction is clear when it is not. Second, for jurisdictional restrictions like Section 1252(b)(9), *Jennings* directs courts to interpret and apply the statutory text in light of an interpretation's practical consequences on the effective functioning of the federal courts.

E. Section 1252(b)(9) preserves district court jurisdiction over claims that are independent and collateral based on either of two criteria.

Applying these principles to the present case shows that Section 1252(b)(9) does not apply to the plaintiffs' claims and therefore does not require deferring judicial review or channeling those claims into removal proceedings. In fact, there are no removal proceedings involving the plaintiffs in the present case. The plaintiffs are all organizations, not individuals. In any event, the conclusion that Section 1252(b)(9) has no application becomes clear from a closer look at Supreme Court and lower court precedents that decline to apply Section 1252(b)(9) to restrict judicial review

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when doing so would have either of two practical consequences.

1. Section 1252(b)(9) does not apply when claims cannot be remedied by an immigration judge in removal proceedings.

First, Section 1252(b)(9) does not apply when claims cannot be remedied by an immigration judge in removal proceedings. In such cases, applying Section 1252(b)(9) would be "absurd"—in other words, it would serve no purpose to channel such claims in the judicial review of the immigration judge's ruling when the immigration judge altogether lacks authority to remedy them. This also explains why the Supreme Court plurality in *Jennings* called "absurd" the possibility that Section 1252(b)(9) would apply to a detained noncitizen's claim under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), based on allegedly inhumane conditions of confinement. At least as "absurd," according to the *Jennings* plurality, would be applying Section 1252(b)(9) to a state-law claim for assault against a guard or fellow detainee, or to a personal injury lawsuit based on an accident involving a bus transporting the noncitizen to a detention facility. *See* 138 S. Ct. at 840.

These observations in *Jennings* are consistent with *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007), for example. That case involved the petitioner's ineffective assistance of counsel claim raised in connection with an appeal filed after the removal proceeding was over, a final removal order had issued, and the 30-day deadline for filing a petition for review already had passed. Even though the noncitizen's "ultimate goal or desire [was] to overturn that final order," the court held that Section 1252(b)(9) did not apply to judicial review of this claim, because it was too late for the immigration judge to remedy the alleged error. *Id.* at 972, 979.

The importance of asking if an immigration judge in a removal proceeding can provide the relief sought is evident from the Southern District of New York's recent decision in *Asylum Seeker Advocacy Project v. Barr (ASAP)*, 409 F. Supp. 3d 221 (S.D.N.Y. 2019). There, an organizational

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plaintiff "challenge[d] the lawfulness of *in absentia* removal orders entered pursuant to allegedly deficient notices to appear ('NTAs') before immigration judges." *Id.* at 222. According to the district court, whether Section 1252(b)(9) precludes jurisdiction "turns 'on the substance of the relief' sought," *id.* at 224 (quoting *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011)); *see also* 409 F. Supp. 3d at 225 (listing cases applying that rule). In *ASAP*, the plaintiffs ultimately sought relief that focused on, and thus arose from, the *in absentia* removal orders themselves. An immigration judge could grant the relief in a removal proceeding, so § 1252(b)(9) precluded district court jurisdiction. *Id.* at 225–26.

2. Section 1252(b)(9) does not apply when deferring judicial review would seriously impair the opportunity to remedy a violation of law.

Second, Section 1252(b)(9) does not apply when deferring judicial review would seriously impair the opportunity to remedy a violation of law. This explains the result in *Jennings* itself, where judicial review, if significantly delayed until after a final removal order, could do nothing to remedy any violations of law inherent in prolonged detention during that entire time period. Similarly, the Supreme Court decision in *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019), involved noncitizens' challenge to the legality of detaining the petitioners without bond. Again, deferred judicial review would effectively mean no judicial review at all of the alleged violation of law. The Court concluded: "[a]s in *Jennings*, respondents here 'are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal . . . ; and they are not even challenging any part of the process over which their removability will be determined. Under these circumstances,' . . . § 1252(b)(9) does not present a jurisdictional bar." 139 S. Ct. at 962.

3. These two limits make clear that Section 1252(b)(9) does not apply.

Applying these two limits on the scope of Section 1252(b)(9) to the present case, it is clear

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that Section 1252(b)(9) does not apply, and this Court has jurisdiction. First, broader programmatic challenges to agency policies and practices are beyond the authority of immigration judges to address or remedy in individual removal proceedings to address. This is true for several reasons. Most strikingly, this case has no individual plaintiffs who might be respondents in a removal proceeding in immigration court. Even if there were such individuals in removal proceedings, the record in any such individual case is limited to that individual respondent's case, and thus cannot support a decision regarding broader, programmatic claims. The Immigration and Nationality Act provides procedural mechanisms only for obtaining or presenting evidence in support of the individual's particular case. *See, e.g.*, 8 U.S.C. § 1229a(b)(4)(B) (right to present evidence and cross-examine adverse witnesses). Relatedly, individual respondents in removal proceedings have no right to discovery in removal proceedings. In short, it is beyond the immigration judge's competence to address broader programmatic challenges to agency policies and practices. The considerations confirm that any application of Section 1252(b)(9) must reflect this key fact: petitions for review in the courts of appeals are designed only to consider claims of individual respondents in removal proceedings.

Second, deferring judicial review in the present case would eliminate or seriously impair the opportunity to remedy a possible violation of law. The ability of the court of appeals to remedy violations depends on its authority to make necessary inquiries into the relevant facts and law. But the INA limits this authority, and thus the courts of appeals' remedial powers. First, the court of appeals must "decide the petition [for review] only on the administrative record on which the order of removal is based. § 1252(b)(4)(A). Second, the court of appeals, when reviewing a removal order, "may not order the taking of additional evidence under section 2347(c)" of Title 28 of the U.S. Code. § 1252(a)(1). Section § 2347(c), part of the Hobbs Act on review of agency action,

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generally authorizes a court to remand to an agency for further findings if a party presents additional material evidence and shows reasonable grounds for failing to adduce that evidence before the agency. 28 U.S.C. § 2347(c). But federal legislation in 1996 eliminated that authorization in review of final orders of removal. *See* Pub. L. No. 104-208, Div. C, §§ 306(a)(1), (a)(2), 110 Stat. 3009-607, 607-08 (1996) (codified as amended at 8 U.S.C. § 1252(a)(1) (2000)).

If a court applies Section 1252(b)(9) to bar jurisdiction in federal district courts to hear programmatic, policy-and-practice challenges and force those claims to be raised before an immigration judge in removal proceedings, such claims would become effectively unreviewable. This concern was the touchstone in the *Jennings* plurality's approach to Section 1252(b)(9). Put differently, a broad reading of Section 1252(b)(9) that ignores these practical consequences would, in essence, operate to prejudge all claims—not necessarily by directly deciding the merits of the claims, but by putting the challenges in a procedural straightjacket that would predetermine what the substance of the claim must be. This outcome would be the result of the inability of immigration judges to provide remedies outside of the individual case before them, combined with the irreparable inadequacy of the administrative record generated in removal proceedings. *See, e.g.*, *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007–09 (9th Cir. 2003); *Wang v. Att'y Gen.*, 423 F.3d 260, 267 n.3, 271 (3d Cir. 2005). The effect would be "the practical equivalent of a total denial of judicial review," *see Ortiz v. Meissner*, 179 F.3d 718, 722 (9th Cir. 199) (internal quotation marks omitted), an effect that courts should not assume Congress that intended, absent a clear congressional statement. *See INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

The core idea, then, is that reading Section 1252(b)(9) to bar jurisdiction in the federal district courts over programmatic, policy-and-practices challenges—including the challenges in the present case—would distort the substance of such challenges and effectively preclude courts from

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exercising judicial review in a way that might afford remedies that a court finds appropriate. This was the idea at the heart of the U.S. Supreme Court's decision in *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991). *McNary* concerned the special agricultural worker legalization program, which was part of the Immigration Reform and Control Act of 1986. The plaintiffs in *McNary* sued as a class, alleging a pattern and practice of procedural due process violations by the INS in administering the program. Plaintiffs alleged, among other things, that they were not given the opportunity to challenge adverse evidence, to present witnesses on their own behalf, or to communicate effectively through competent interpreters.

Section 210(e) of the INA allowed judicial review of denials of legalization in agricultural worker cases only "in the judicial review of an order of exclusion or deportation." The Supreme Court held, however, that INA § 210(e) did not foreclose a challenge to the agency's unconstitutional practices and procedures if that challenge was collateral to a denial in any particular individual case. *See* 498 U.S. at 491–94; *see also City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 873 (9th Cir. 2009) (so describing *McNary*). The Court explained that the text of INA § 210(e) barred judicial review of individual denials only. Moreover, review under a scheme designed for individual orders of exclusion or deportation would not produce an adequate record on which to assess the merits of the plaintiffs' programmatic claims. *See* 498 U.S. at 493. Nor did the court of appeals have the fact-finding and record-building authority to correct these shortcomings in an individual administrative record. *Id.* Because pattern-and-practice claims require consideration of facts beyond those that would exist in the administrative record of an individual case, the claims required broader factual development in a federal district court. *See id.*; *see also Rialto*, 581 F.3d at 873. The Supreme Court reaffirmed *McNary* in its decision in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993). That decision construed a "virtually identical" statute and likewise held

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that it did not foreclose challenges to a pattern or practice in government decisionmaking.

Since 1996, the Ninth Circuit has distilled "guiding principles" from *McNary* and *Reno* for determining jurisdiction in cases alleging programmatic, pattern-or-practice challenges. The asserted programmatic challenges must be ripe for judicial review—that is, the challenge "still must satisfy the jurisdictional and justiciability requirements that apply in the absence of a specific congressional directive.'" *Rialto*, 851 F.3d at 874 (citing *Reno*, 509 U.S. at 56). Courts must also ask "whether the claim challenges a 'procedure or policy that is collateral to an alien's substantive eligibility,' for which 'the administrative record is insufficient to provide a basis for meaningful judicial review.'" *Rialto*, 851 F.3d at 874 (quoting *Ortiz*, 179 F.3d at 722). With respect to this guiding principle, the Ninth Circuit "has stressed the importance of meaningful judicial review of agency action." *Id.* (citing *Ortiz*, 179 F.3d at 722). The question is whether the claim can be remedied effectively by an immigration judge in a removal proceeding. If not—because the administrative record is insufficient or because claim raises issues that are outside the authority of an individual immigration to resolve—then the district court has jurisdiction notwithstanding § 1252(b)(9) and other nexus-based restrictions on judicial review.

Two possible doubts about the direct relevance of *McNary* and *Reno* to the present case deserve frank discussion. One is that the text of the jurisdictional restriction was not the same as the "arising from" formulation in Section 1252(b)(9). The other possible doubt about the direct relevance of *McNary* and *Reno* is that the Ninth Circuit decision in *J.E.F.M.* addressed *McNary* very briefly, concluding that "policies-and-practices challenges . . . , whenever they 'arise from' removal proceedings," fall within the scope of Section 1252(b)(9). *J.E.F.M.*, 837 F.3d at 1035.

These doubts may have some superficial appeal, but *J.E.F.M.* involved children's' right-to-counsel claims that might be remedied by an immigration judge in children's individual removal

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proceedings, *see J.E.F.M.*, 837 F.3d at 1035, just as *Asylum Seeker Advocacy Project v. Barr* involved plaintiffs' requests for relief that could be remedied in individual removal proceedings. *See* 409 F. Supp. 3d 221, 226 (S.D.N.Y. 2019). *J.E.F.M.* did not address jurisdiction over programmatic challenges that simply cannot be remedied in any individual removal proceedings, by any individual immigration judge, or through the petition for review process—*e.g.*, challenges to the agency-wide implementation of case quotas, remand rates, or structural biases that exist and persist throughout the immigration court system.

Moreover, the plurality in *Jennings* addressed both of these doubts about the direct relevance of *McNary* and *Reno*. Justice Alito made clear that courts must not simply think that ambiguous phrases like "arising from," "arising under," "final order," and "final decision" are clearer than they are. Instead, courts must go further to interpret and apply those phrases in light of the practical consequences of restricting jurisdiction in specific cases. *Jennings* also instructs courts when they should be especially hesitant to apply jurisdictional restrictions in light of practical considerations—in particular the limited authority of immigration judges in removal proceedings, and the risk that justice delayed will be justice denied. Where, as here, both of these considerations are present, courts must preserve meaningful judicial review of independent and collateral claims, including programmatic, pattern-and-practice challenges. Courts must also take care to ensure that claims are not rendered "effectively unreviewable," *Jennings*, 138 S. Ct. at 840–841, or that the adjudication of claims is unable to contribute to any body of law on the issues in such cases.

III. CONCLUSION

For all of the reasons set forth above, *amici* urge this Court to find that Section 1252(b)(9) does not preclude this Court's jurisdiction to hear plaintiffs' claims.

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