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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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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

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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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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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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

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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 *Id*

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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

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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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exercising judicial review in a way that might afford remedies that a court finds appropriate. This

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