No. 19-161

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

VIJAYAKUMAR THURAISSIGIAM

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent is an inadmissible alien who was apprehended almost immediately after illegally crossing the U.S. border and was placed into expedited removal proceedings. See 8 U.S.C. 1225(b)(1). An asylum officer conducted a credible-fear interview and found that respondent lacked a credible fear of persecution on a protected ground or a credible fear of torture. Upon *de novo* review, an immigration judge reached the same conclusions and respondent's expedited-removal order became final. Respondent then filed a petition for writ of habeas corpus, which the district court dismissed for lack of jurisdiction because it did not raise the kinds of habeas challenges to expedited-removal orders that are permitted under 8 U.S.C. 1252(e)(2). The court of appeals reversed, concluding that Section 1252(e)(2) violated the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, as applied to respondent.

The question presented is whether, as applied to respondent, Section 1252(e)(2) is unconstitutional under the Suspension Clause.

PARTIES TO THE PROCEEDING

Petitioners were appellees in the court of appeals. They are: Department of Homeland Security (DHS); U.S. Customs and Border Protection (CBP); U.S. Citizenship and Immigration Services (USCIS); U.S. Immigration and Customs Enforcement (ICE); Kevin K. McAleenan, Acting Secretary of DHS and Commissioner of CBP; William P. Barr, Attorney General of the United States; Matthew Albence, Acting Director of ICE; Kenneth T. Cuccinelli, Acting Director of USCIS; Pete Flores, San Diego Field Operations Director, CBP; Greg Archambeault, San Diego Field Office Director, ICE; and Robert Garcia, Acting Warden, Otay Mesa Detention Center.[*]

Respondent was the appellant in the court of appeals. He is Vijayakumar Thuraissigiam.

RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

Thuraissigiam v. *United States Dep't of Homeland Sec.*, No. 18-cv-135 (Mar. 8, 2018)

United States Court of Appeals (9th Cir.):

Thuraissigiam v. *United States Dep't of Homeland Sec.*, No. 18-55313 (Mar. 7, 2019)

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[*] Kevin K. McAleenan, Matthew Albence, Kenneth T. Cuccinelli, and Robert Garcia are substituted for their predecessors Kirstjen Nielsen, Thomas Homan, L. Francis Cissna, and Fred Figueroa. See Sup. Ct. R. 35.3.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-43a) is reported at 917 F.3d 1097. The opinion of the district court (App., *infra*, 44a-58a) is reported at 287 F. Supp. 3d 1077.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2019. On May 24, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 5, 2019. On June 26, 2019, Justice Kagan further extended the time to and including August 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

8 U.S.C. 1252(e)(2) and (5) provide:

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

* * * * *

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 62a-99a.

STATEMENT

Respondent is a native and citizen of Sri Lanka who illegally entered the United States by crossing the U.S. border with Mexico without inspection or admission by an immigration officer and without a visa or other required documentation. C.A. S.E.R. (S.E.R.) 2-4. U.S. Customs and Border Protection (CBP) agents encountered and apprehended him almost immediately after he crossed, 25 yards north of the border. S.E.R. 3.

CBP determined that respondent was inadmissible because of his lack of the required documents and placed him in expedited removal (ER) under 8 U.S.C. 1225(b)(1). S.E.R. 2-4. He claimed a fear of returning to Sri Lanka. S.E.R. 4. After a credible-fear screening interview, an asylum officer determined that he lacked a credible fear of persecution on a protected ground or of torture. See S.E.R. 3-7, 12-16, 18-30. A supervisory asylum officer reached the same conclusions. S.E.R. 16. And on *de novo* review, an immigration judge (IJ) took respondent's testimony and again reached the same conclusion, returning the case to U.S. Immigration and Customs Enforcement (ICE) to remove respondent. S.E.R. 44. Respondent thereafter filed a petition for a writ of habeas corpus, which the district court dismissed for lack of jurisdiction under 8 U.S.C. 1252(e). App., *infra*, 59a-60a. The court of appeals reversed and remanded, holding that the limitations on habeas corpus review of an ER order in Section 1252(e) are unconstitutional under the Suspension Clause as applied to respondent. *Id.* at 1a-43a.

1. a. The statutory and regulatory provisions of the ER regime are at the heart of this case. ER procedures may be applied to an alien arriving at a port of entry who is inadmissible because he lacks valid documentation or seeks to enter through fraud or willful misrepresentation of a material fact. 8 U.S.C. 1225(b)(1)(A)(i); see 8 U.S.C. 1182(a)(6)(C) and (7). The Secretary of Homeland Security also may designate for application of ER procedures any or all aliens who are inadmissible on those grounds, are unlawfully present inside the United States without having been admitted or paroled, and have been continuously physically present for less than two years. 8 U.S.C. 1225(b)(1)(A)(iii). Under ER, inadmissible aliens are ordinarily ordered removed by an immigration officer, without further hearing or review. 8 U.S.C. 1225(b)(1)(A)(i). The ER system includes special procedures, however, for aliens who claim a fear of return to their home countries or express an intent to apply for asylum. See pp. 6-8, *infra*.

Congress established ER to "streamline[] rules and procedures" for "deny[ing] admission to inadmissible aliens," while ensuring that there is "no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 157-158 (1996) (House Report). Congress was particularly concerned with abuse of the asylum system. *Id.* at 107. At the time, "[t]housands of smuggled aliens arrive[d] in the United States each year with no valid entry documents and declare[d] asylum." *Id.* at 117. "Due to lack of detention space and overcrowded immigration court dockets," however, "many ha[d] been released into the general population" and "a majority of such aliens d[id] not return for their hearings." *Ibid.*

Without ER, those aliens would be placed in full deportation proceedings before an IJ and "could reasonably expect that the filing of an asylum application would allow them to remain indefinitely in the United States." *Id.* at 118.

b. In 2004, the Secretary invoked his authority under Section 1225(b)(1)(A)(iii) and designated for application of ER procedures aliens who are encountered within 100 air miles of the U.S. border and within 14 days of having unlawfully entered the United States without inspection or admission. 69 Fed. Reg. 48,877, 48,878-48,881 (Aug. 11, 2004).[1] The Secretary designated that category in response to an "urgent need" to "improve the safety and security of the nation's land borders, as well as the need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations." *Id.* at 48,880.

At the time, "nearly 1 million aliens [were] apprehended each year in close proximity to the borders after illegal entry." 69 Fed. Reg. at 48,878. Application of ER procedures to such aliens who are inadmissible on the covered grounds was necessary, the Secretary explained, because "[i]t is not logistically possible" for the Department of Homeland Security (DHS) to initiate full

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[1] The Acting Secretary of Homeland Security recently issued a notice designating an additional ER category: Aliens who are inadmissible on the relevant grounds, are present without being admitted or paroled, have been continuously present for less than two years, and are not covered by an existing designation, *i.e.*, who fall outside the 14-day/100-mile designation at issue here and other existing designations. 84 Fed. Reg. 35,409 (July 23, 2019).

IJ removal proceedings under 8 U.S.C. 1229a "against all such aliens." 69 Fed. Reg. at 48,878. DHS would often allow Mexican nationals to return home "without any formal removal order." *Ibid.* But "many of those who [we]re returned to Mexico s[ought] to reenter the U.S. illegally, often within 24 hours of being voluntarily returned." *Ibid.* And DHS could not allow such voluntary returns at all to Central America or other noncontiguous countries. Without ER, DHS thus would put those aliens into IJ removal proceedings under Section 1229a, but DHS "lack[ed] the resources to detain" all of them in the interim. *Ibid.* As a result, "many of these aliens [we]re released in the U.S. each year," and many "subsequently fail[ed] to appear for their removal proceedings, and then disappear[ed] in the U.S." *Ibid.*

The Secretary anticipated that this designation would be used for "those aliens who are apprehended immediately proximate to the land border and have negligible ties or equities in the U.S." 69 Fed. Reg. at 48,879. Noting that some designated aliens "may possess equities that weigh against the use of" ER, the Secretary stated that officers have discretion to place a designated alien into IJ removal proceedings under Section 1229a. *Ibid.*

c. The ER system includes special procedures applicable to an alien who "indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country." 8 C.F.R. 235.3(b)(4); see 8 U.S.C. 1225(b)(1)(A)(ii) and (B). Such an alien is referred for screening before an asylum officer, who interviews the alien, considers relevant facts, and determines whether the alien has a credible fear. 8 U.S.C. 1225(b)(1)(A)(ii) and (B); see 8 C.F.R. 208.30(d)

and (e). A credible fear exists when there is a "significant possibility," 8 U.S.C. 1225(b)(1)(B)(v), that the alien could establish eligibility for asylum, withholding of removal, or protection under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, 114. See 8 C.F.R. 208.30(e)(2) and (3). An alien in turn may be eligible for asylum if he is unable or unwilling to return to the alien's home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1158(a). An alien may be entitled to withholding of removal if the Attorney General decides that his life or freedom would be threatened on account of one of those protected grounds in the country of removal. 8 U.S.C. 1231(b)(3). And an alien may be entitled to CAT protection if it is "more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. 208.16(c)(2), 1208.16(c)(2).

The asylum officer must "create a written record of his or her determination" regarding credible fear, including a "summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture." 8 C.F.R. 208.30(e)(1); see 8 U.S.C. 1225(b)(1)(B)(iii)(II). If the officer finds that the individual lacks a credible fear, that finding "shall not become final until reviewed by a supervisory asylum officer." 8 C.F.R. 208.30(e)(7). If the supervisory asylum

officer agrees that there is no credible fear, the asylum officer "shall" provide the alien a "written notice of decision" that notifies the alien of the decision and the fact that he can request IJ review. 8 C.F.R. 208.30(g)(1), 235.3(b)(4)(i)(C); see 8 U.S.C. 1225(b)(1)(B)(iii)(III).

If an alien requests IJ review, that review is *de novo*. 8 C.F.R. 1003.42(d). The IJ "may receive into evidence any oral or written statement which is material and relevant to any issue in the review." 8 C.F.R. 1003.42(c). If the asylum officer (or IJ) finds that the alien has a credible fear, the alien is referred for full IJ removal proceedings under Section 1229a to consider whether to grant asylum or withholding of removal. 8 C.F.R. 208.30(e)(5) and (f), 235.6(a), 1208.30(g)(2)(iv)(B); see 8 U.S.C. 1225(b)(1)(B)(ii). If the asylum officer (along with the supervisory asylum officer and, if review is sought, the IJ) finds that the alien lacks a credible fear of persecution on a protected ground or torture, the alien shall be removed without further hearing or review. 8 U.S.C. 1225(b)(1)(B)(iii)(I).

2. In 8 U.S.C. 1252, Congress sharply limited judicial review of final orders of removal issued under ER. Subject to specified exceptions, Congress provided that, "[n]otwithstanding 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 review": (1) any "cause or claim arising from or relating to the implementation or operation of an [ER] order of removal"; (2) the government's decision to invoke ER; (3) "the application of [ER] to individual aliens, including the [credible fear] determina-

tion"; or (4) "procedures and policies adopted" to "implement the provisions of section 1225(b)(1)." 8 U.S.C. 1252(a)(2)(A)(i)-(iv).

Section 1252(e) sets forth the exceptions to the bar on judicial review of ER orders. As relevant here, it provides that judicial review of an ER order "is available in habeas corpus proceedings," but "shall be limited" to three specific determinations. 8 U.S.C. 1252(e)(2). Those are whether the individual: (1) "is an alien"; (2) "was ordered removed under" the ER statute; or (3) can prove that he or she was previously admitted to the United States as a lawful permanent resident, refugee, or asylee, and that such status has not been terminated. *Ibid.* "In determining whether an alien has been ordered removed" under the ER statute, Congress specified, "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." 8 U.S.C. 1252(e)(5); see H.R. Rep. No. 828, 104th Cong., 2d Sess. 220 (1996) ("[R]eview does not extend to determinations of credible fear and removability in the case of individual aliens.").[2]

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[2] Congress has also authorized judicial review of whether the ER statute or any ER regulation "is constitutional," and whether any ER regulation, policy, guideline, or procedure is unlawful. 8 U.S.C. 1252(e)(3)(A). The United States District Court for the District of Columbia has jurisdiction over such a challenge, so long as it is filed within 60 days of the first implementation of the challenged practice. 8 U.S.C. 1252(e)(3)(B). Congress also provided for expedited treatment of such cases on appeal. 8 U.S.C. 1252(e)(3)(D).

3. As set forth above, see p. 3, *supra*, respondent was apprehended 25 yards from the U.S.-Mexico border, shortly after illegally entering without inspection or admission and without a valid entry document. He was found inadmissible and processed for ER. Respondent asserted a fear of return to Sri Lanka, and an asylum officer conducted a credible-fear interview. *Ibid.* At the interview, respondent stated that he was a farmer and that, while working one day, a group of men approached and beat him, causing him to be hospitalized for 11 days. S.E.R. 23-25. The asylum officer's records state that respondent told the asylum officer that he did not know who the men were or why they had beaten him, that they had not said anything to him and never identified themselves, and that he had not reported the incident to police because they "w[ould] ask who did it" and he "d[id] not know" so the police "w[ould] not help [him]." S.E.R. 24-25. The asylum officer asked respondent whether he had ever been or was "afraid of being harmed because of [his] political opinion," and his answer was "No." S.E.R. 25; see S.E.R. 6 ("Are you a member of any political party? No.").

The asylum officer found that respondent testified credibly, but found "No Nexus" to persecution on a protected ground. S.E.R. 15; see S.E.R. 29 ("The applicant provided no testimony indicating that he was or will be targeted because of race, religion, nationality, membership in a particular social group, or political opinion. It is unknown who these individuals were or why they wanted to harm the applicant."). The asylum officer accordingly determined that no credible fear of persecution on a protected ground had been established, and

that there was "not a significant possibility that [respondent] could establish eligibility for withholding of removal" or protection under the CAT. S.E.R. 15.

A supervisor reviewed those determinations and agreed, signing the form. S.E.R. 16. Respondent was provided a written record of the decision, including Forms I-863 (DHS Notice of Referral to Immigration Judge), I-869 (Record of Negative Credible Fear Finding and Request for Review by Immigration Judge), and I-870 (Record of Determination/Credible Fear Worksheet). S.E.R. 46-66; see S.E.R. 81.

Respondent requested and received *de novo* IJ review. The IJ's order records that review occurred on March 17, 2017, and that the IJ took testimony regarding respondent's background and fear of returning to his country of origin. S.E.R. 44.[3] The order states that "[a]fter consideration of the evidence," the IJ "f[ound]" that respondent "has not established a significant possibility" that he would be persecuted "on the basis of his/her race, religion, nationality, membership in a particular social group, or because of his/her political opinion." *Ibid.* Handwritten notes indicate that the IJ also found that respondent had not established a significant possibility that he was eligible for protection under the CAT. *Ibid.* The IJ accordingly affirmed the asylum officers' decision, and returned the case to DHS "for removal of the alien." *Ibid.*

4. Respondent thereafter filed a petition for a writ of habeas corpus in the District Court for the Southern

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[3] A transcript of the IJ hearing is available but is not in the record. The government offers to lodge the transcript if requested by the Clerk. See Sup. Ct. R. 32.3.

District of California. D. Ct. Doc. 1 (Jan. 19, 2018). Respondent contended that his "expedited removal order violated his statutory, regulatory and constitutional rights," sought vacatur of the order, and requested relief in the form of a "new, meaningful opportunity to apply for asylum and other relief from removal." *Id.* at 1. In particular, respondent alleged that the asylum officer failed to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture" as provided for in 8 C.F.R. 208.30(d), and "failed to consider relevant country conditions evidence." D. Ct. Doc. 1, at 11-12. Respondent also alleged that the asylum officer and IJ deprived respondent "of a meaningful right to apply for asylum" and other forms of relief under Section 1225(b)(1) "by applying an incorrect legal standard" in making the credible-fear determination, and failing to provide him "with a meaningful opportunity to establish his claims, failing to comply with the applicable statutory and regulatory requirements, and in not providing him with a reasoned explanation for their decisions." *Id.* at 14-15.

The district court dismissed the petition for lack of jurisdiction under Section 1252(e)(2). App., *infra*, 59a-60a; see *id.* at 44a-58a. The court determined that Section 1252(e)(2) unambiguously prohibited habeas review of respondent's claims because it limited review to whether respondent (1) is an alien; (2) was "ordered removed under" Section 1225(b)(1); and (3) had not been previously admitted as a lawful permanent resident, refugee, or asylee. 8 U.S.C. 1252(e)(2)(A)-(C); App., *infra*, 49a-53a. The court then held that Section 1252(e)'s restrictions on habeas corpus review are constitutional. App., *infra*, 53a-57a. The court "d[id] not dispute that

the Suspension Clause applies" to respondent, but determined that Section 1252(e)'s restrictions on habeas relief did not violate the Suspension Clause because respondent was subject to a final order of removal via ER and Section 1252(e) "still 'retains some avenues of judicial review, limited though they may be.'" *Id.* at 54a (brackets and citation omitted). The court also found *Castro* v. *U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157 (E.D. Pa.), aff'd, 835 F.3d 422 (3d Cir. 2016), cert. denied, 137 S. Ct. 1581 (2017), to be "incredibly persuasive" in rejecting a Suspension Clause challenge in the "identical" factual and legal context. App., *infra,* 56a.

5. The court of appeals reversed and remanded. App., *infra*, 1a-43a. First, the court agreed with the district court that Section 1252(e)(2) unambiguously barred review of respondent's challenge to his ER removal order. *Id.* at 9a-12a. Second, the court of appeals held that Section 1252(e)(2) violated respondent's rights under the Suspension Clause. *Id.* at 12a-42a. Relying on *Boumediene* v. *Bush*, 553 U.S. 723 (2008), the court applied a two-step approach. App., *infra*, 28a; see *id.* at 15a-20a. "[A]t step one," the court "examine[d] whether the Suspension Clause applies to the [habeas] petitioner; and, if so, at step two," the court "examine[d] whether the substitute procedure provides review that satisfies the Clause." *Id.* at 18a-19a.

Applying that framework here, the court of appeals first determined that aliens on U.S. soil, no matter their mode of entry or how brief their presence, "may invoke the Suspension Clause." App., *infra*, 35a. At step two, the court determined that "the Suspension Clause entitles the [habeas] petitioner to a meaningful opportunity

to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Ibid.* (quoting *Boumediene*, 553 U.S. at 779) (brackets and internal quotation marks omitted). The court stated that this included "claims for statutory as well as constitutional error," "claims that deportation hearings were conducted unfairly," claims regarding "the erroneous application or interpretation of statutes," and "mixed questions of fact and law—those involving an application of law to undisputed fact." *Id.* at 38a (citations omitted). The court noted that respondent had claimed that "the government denied him a 'fair procedure,' 'applied an incorrect legal standard' to his credible fear contentions," and "'failed to comply with the applicable statutory and regulatory requirements.'" *Id.* at 37a (brackets omitted). The court concluded that the Suspension Clause requires review of those claims in this case. *Ibid.*

The court of appeals then held that the existing procedural mechanisms were inadequate to satisfy the Suspension Clause. The court first stated that the existing administrative scheme lacked "rigorous adversarial proceedings prior to a negative credible fear determination." App., *infra*, 39a. The court then found that feature "compounded by the fact that § 1252(e)(2) prevents" review of "whether DHS *complied* with the procedures in an individual case, or applied the correct legal standards." *Id.* at 40a. The court determined that respondent's rights under the Suspension Clause "[were] not satisfied by such a scheme." *Id.* at 41a.

In reaching that result, the court of appeals distinguished this Court's cases holding "that an alien seeking initial admission to the United States requests a

privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). The court of appeals understood those cases to be limited to due process claims, and to be "not relevant" to claims under the Suspension Clause. App., *infra*, 28a; see *id.* at 24a-28a.

The court of appeals also recognized that it was creating a circuit conflict with *Castro* v. *United States Department of Homeland Security*, 835 F.3d 422 (3d Cir. 2016), cert. denied, 137 S. Ct. 1581 (2017). App., *infra*, 25a. The court stated that *Castro* decided "the precise question" at issue here, holding that Section 1252(e)(2) did not violate the Suspension Clause as applied to "'recent surreptitious entrants'" who were ordered removed via ER after being found to lack a credible fear of persecution. *Id.* at 13a, 24a (citation omitted). The court "disagree[d] with *Castro*'s resolution" of the question, however, and in particular disagreed with the Third Circuit's reliance on *Plasencia* to hold that recent surreptitious entrants could not invoke the Suspension Clause to demand additional process beyond that which Congress has provided. *Id.* at 25a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for a writ of certiorari because the Ninth Circuit has held unconstitutional an important Act of Congress that has long governed judicial review of final orders of removal in expedited removal proceedings. That decision is wrong, creates a circuit conflict, and has significant practical importance.

The Ninth Circuit held that the Suspension Clause provides respondent with a constitutional right to additional review of his application for admission, beyond the review Congress has established. But this "Court has long held that an alien seeking initial admission to the United States" has "no constitutional rights regarding his application." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). Moreover, even if the Suspension Clause guaranteed some minimal constitutional baseline of review in this context, the existing framework for review would more than suffice. Respondent was apprehended shortly after illegally crossing the U.S. border, and he did not and does not dispute that he is inadmissible. He was provided a credible-fear screening interview by an asylum officer, supervisory review of the asylum officer's negative determination, and *de novo* IJ review; and Congress has ensured that appropriately tailored habeas corpus review of ER orders is available. 8 U.S.C. 1252(e)(2). Where such an alien merely seeks to prevent his release to his home country by recasting a due process challenge to his removal as a challenge to an alleged suspension of the writ of habeas corpus, no more is required.

As the Ninth Circuit recognized, its decision conflicts with the Third Circuit's decision in *Castro* v. *United States Department of Homeland Security*, 835 F.3d 422 (2016), cert. denied, 137 S. Ct. 1581 (2017), which rejected the same Suspension Clause challenge here. App., *infra*, 13a-14a; see *id.* at 25a. The question presented also has significant practical importance. Thousands of aliens each year are ordered removed via ER after illegally entering, claiming a fear of persecution or torture,

but then being found after several layers of review (including *de novo* IJ review) to lack a credible fear of persecution on a protected ground or of torture. Under the Ninth Circuit's rule, virtually all of those aliens could potentially seek largely unrestricted habeas review in a district court, in direct contravention of Congress's clear judgment to narrowly limit such review. The effect is to invalidate Section 1252(e)(2) in its core applications and to significantly delay removal of aliens like respondent, preventing expedited removal of such aliens from being expedited at all and undermining the government's ability to control the border. This Court should grant certiorari and reverse.

A. The Court Of Appeals Erred In Holding That Application Of Section 1252(e)(2) To Respondent Violates The Suspension Clause

1. Section 1252(e)(2) does not violate any rights of respondent under the Suspension Clause.

a. "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 (1972); see *id.* at 767 ("[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.") (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 591 (1952); *United States ex rel. Knauff* v.

Shaughnessy, 338 U.S. 537, 543 (1950); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892); cf. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). The Constitution accordingly does not furnish to an alien seeking initial admission the right to demand additional procedures beyond those Congress provided.

Of particular relevance here, this Court's decisions strongly support the conclusion that, for constitutional purposes, an alien apprehended soon after illegally crossing the border is properly treated as an alien seeking initial admission. For example, in *Yamataya* v. *Fisher*, 189 U.S. 86 (1903), the Court addressed a due process challenge brought by an alien who had presented herself for inspection at a port of entry and been allowed to enter, but who was placed into deportation proceedings days later on the ground that she was likely to become a public charge. *Id.* at 100-101; see *id.* at 87 (statement of the case) (noting that she entered July 11, 1901, and a warrant for her arrest was issued July 23, 1901). The Court concluded that she could invoke the Due Process Clause—but expressly left "on one side the question" whether an alien "who *has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population*," can "rightfully invoke the due process clause of the Constitution" before "his right to remain is disputed." *Id.* at 100 (emphasis added). That language indicates that an alien apprehended briefly after crossing the U.S. border surreptitiously cannot lay the same claim to constitutional protection in connection

with their admission as aliens who were lawfully admitted in the first place. Rather, such a clandestine entrant may be treated as an applicant for initial admission.

This Court further held in *Yamataya* that—as applied to an alien who was lawfully admitted and thus could claim due process protections—due process was satisfied by summary administrative procedures consisting of an in-person interview by an immigration officer and the possibility of appeal to the Secretary of Treasury, without any further review. See 189 U.S. at 102. *Yamataya* thus confirms that, even if the Constitution itself guaranteed some minimal protection for respondent in connection with seeking admission to the United States, the existing framework would be sufficient. See pp. 20-24, *infra*.

The Court's subsequent decisions reinforce these points. The Court has described *Yamataya* as holding that a "deportation statute must provide a hearing *at least for aliens who had not entered clandestinely and who had been here some time even if illegally*." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950) (emphasis added). And the Court has repeatedly indicated that constitutional protections in connection with admission are not conferred upon the alien's illegal entry into the country, but instead require residence for some period. See *Plasencia*, 459 U.S. at 32 ("[O]nce an alien gains admission to our country *and begins to develop the ties that go with permanent residence*, his constitutional status changes accordingly.") (emphasis added); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) ("[O]nce an alien *lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the

Constitution to all people within our borders.") (emphasis added; citation omitted); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.").

b. The existing process of administrative and habeas corpus review under ER is consistent with the Suspension Clause. In particular, a clandestine entrant like respondent is properly treated, for constitutional purposes, as an alien seeking initial admission and thus has no underlying due process rights to vindicate in a habeas corpus challenge to an ER order. Such an alien "has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. Accordingly, respondent cannot invoke the Suspension Clause to demand additional process beyond the existing framework for obtaining review of ER orders, including the appropriately tailored review in habeas corpus permitted under Section 1252(e)(2).

Moreover, to whatever extent the Suspension Clause applies in this context and provides respondent some limited constitutional rights in connection with his application for admission, the existing framework of administrative and habeas corpus review would be more than sufficient. Respondent is an alien who was apprehended shortly after surreptitiously entering the United States, without a valid entry document, and he does not dispute that he is inadmissible and thus lacks any right to enter or reside in the United States. 8 U.S.C. 1182(a)(6)(A)(i) and (7)(A). Asylum is a form of discretionary relief, not a right. See 8 U.S.C.

1158(b)(1)(A). And withholding of removal and CAT relief, while mandatory when the criteria are satisfied, only provide protection from removal to a particular country, not a right to live in the United States. See 8 U.S.C. 1231(b)(3)(A); 8 C.F.R. 208.16(a), 208.17(a). Moreover, the credible-fear screening process is just that: A screening process for weeding out claims of asylum or withholding of removal that are least likely to succeed on the merits, namely, when there is not even a "significant possibility" of the alien establishing eligibility. 8 U.S.C. 1225(b)(1)(B)(v). If the alien passes that screening and is found to have a credible fear, as often occurs, the alien is placed in removal proceedings before an IJ under Section 1229a to consider the asylum or withholding claim, see 8 U.S.C. 1225(b)(1)(B)(iii); may appeal to the Board of Immigration Appeals, 8 U.S.C. 1229a(c)(5); and from there may seek review in a court of appeals, 8 U.S.C. 1252(a).

Respondent was afforded the procedures applicable to a person who claims a fear, but he failed to satisfy even the threshold screening standard: He was provided a credible-fear screening interview by an asylum officer, with the opportunity to present evidence. That officer found that respondent lacked a credible fear of persecution on account of a protected ground (or a credible fear of torture) if removed to Sri Lanka. A supervisory officer agreed with that determination. Respondent then received *de novo* review by an IJ, who again found, after taking respondent's testimony and asking him questions, that respondent lacked a credible fear of persecution on a protected ground or of torture. S.E.R. 18-30, 32-33, 44. Furthermore, habeas corpus is available to challenge application of ER for purposes of

determining whether the individual is not an alien, is not the person ordered removed, or was previously admitted as a lawful permanent resident, refugee, or asylee. 8 U.S.C. 1252(e)(2); see also 8 U.S.C. 1225(b)(2)(C), 1252(e)(4) (such aliens are entitled to IJ removal proceedings under Section 1229a).[4]

Indeed, the sufficiency of the existing review framework is particularly clear under the circumstances of this case. Respondent contends that the IJ deprived respondent "of a meaningful right to apply for asylum." D. Ct. Doc. 1, at 14. But respondent does not dispute that he was, in fact, provided all the procedural steps in the screening process described above, including *de novo* IJ review: Respondent disagrees with the IJ's conclusion on the merits, asserting that he "should have passed the credible fear stage." *Ibid.* But Congress provided that the IJ's determination is final by expressly foreclosing further review. 8 U.S.C. 1252(e)(2) and (5).

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[4] Congress has also provided a channel for courts to review challenges to the constitutionality and legality of the ER system if brought within 60 days of the first implementation of the challenged practice. 8 U.S.C. 1252(e)(3)(A) and (B). Although the 60-day time limit prevents respondent from suing under Section 1252(e)(3), that provision still enables the federal courts to review the most significant questions regarding the validity of the ER system. See *Pena* v. *Lynch*, 815 F.3d 452, 456-457 (9th Cir. 2016) ("[T]he jurisdiction-stripping provisions of the statute retain some avenues of judicial review, limited though they may be."); see also *American Immigration Lawyers Ass'n* v. *Reno*, 18 F. Supp. 2d 38, 54-56 (D.D.C. 1998) (rejecting a challenge under Section 1252(e)(3)), aff'd, 199 F.3d 1352 (D.C. Cir. 2000).

Respondent does not raise any constitutional challenge to the credible-fear screening framework. Instead, he disagrees with the merits of the asylum officer's and IJ's decisions in this particular case, which were heavily factual and focused on the reasons why a group of men attacked him in Sri Lanka. Historical precedent "suggests strongly that the Suspension Clause does not require judicial review of purely factual determinations or mixed fact and law determinations made in the context of alien exclusion." *Castro* v. *U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157, 169 (E.D. Pa.), aff'd, 835 F.3d 422 (3d Cir. 2016), cert. denied, 137 S. Ct. 1581 (2017); see *id.* at 169-171 (collecting cases); *e.g.*, *Zakonaite* v. *Wolf*, 226 U.S. 272, 275 (1912) (stating in the deportation context that it was "entirely settled" that the "inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive").

Respondent also contends that the asylum officer failed to "'elicit all relevant and useful information'" bearing on his claim, and "failed to consider relevant country conditions evidence," which he contends contravened federal regulations. D. Ct. Doc. 1, at 11-12 (quoting 8 C.F.R. 208.30(d) and citing 8 C.F.R. 208.30(e)(2)). But even if respondent were correct, the administrative process provided mechanisms for remedying such claims of procedural error: The asylum officer's determination was reviewed by a supervisory asylum officer, and respondent had the further opportunity to present evidence and information to the IJ, who took respond-

ent's testimony and made a *de novo* credible-fear determination. The IJ's determination, however, "is final and may not be appealed." 8 C.F.R. 1208.30(g)(2)(iv)(A).

c. There are also strong practical reasons for treating an inadmissible alien who surreptitiously crosses the U.S. border the same way, for constitutional purposes, as an alien who arrives at a port of entry. If the alien entering clandestinely were treated more favorably than an alien who arrives at a port of entry, that would create a perverse incentive for aliens to cross the border surreptitiously rather than presenting themselves for inspection. Indeed, one of Congress's purposes in shifting from "entry" to "admission" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, was to eliminate the incentive that had previously existed, when a clandestine entrant would be placed in full deportation proceedings (rather than summary exclusion proceedings) regardless of how quickly or closely he was apprehended after his unlawful entry. See House Report 225.

Furthermore, the judicial procedures respondent demands—"necessitating pleadings, formal court proceedings, evidentiary review, and the like—would make expedited removal of arriving aliens impossible." *Castro*, 163 F. Supp. 3d at 174. "In FY 2013, for instance, 193,032 aliens were subject to expedited removal (36,035 of whom expressed a fear of return to their native lands)." *Ibid.* The number of aliens who are found to lack a credible fear after all three layers of administrative review is also considerable: According to published statistics from the Executive Office for Immigration Review (EOIR), from fiscal years 2014 through

2018, an average of more than 5000 aliens annually have been found—after *de novo* review by an IJ, which itself follows review by an asylum officer and a supervisory asylum officer—to lack a credible fear. See EOIR, U.S. Dep't of Justice, *Adjudication Statistics: Credible Fear Review and Reasonable Fear Review Decisions* 1 (July 24, 2019).[5] Permitting every such alien to seek judicial review and a stay of their removal pending such review would impose a severe burden on the immigration system and threaten to defeat the purposes of the ER system: to remove certain inadmissible aliens expeditiously and prevent abuse of the asylum system, while ensuring full consideration of claims where the alien has been found to have a credible fear. See House Report 116-118.

As the Secretary of Homeland Security explained when promulgating the ER rule here in 2004, there is an "urgent" need for expeditiously removing such aliens. 69 Fed. Reg. at 48,880. Moreover, there has been a recent surge in apprehensions along the southwest border and a "dramatic" increase in the proportion of aliens subject to ER who are claiming a fear of return and thus are placed into credible-fear screening process. 84 Fed. Reg. 33,829, 33,830-33,831, 33,838-33,840 (July 16, 2019). All of this has exacerbated the current crisis at the southwest border. *Ibid.* Allowing

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[5] https://www.justice.gov/eoir/page/file/1104856/download. The relevant figures here are for credible-fear determinations. Determinations of "reasonable fear" arise in different administrative processes for aliens convicted of an aggravated felony or aliens who illegally reenter the United States after being removed (or voluntarily departing under an order of removal) and whose prior removal order is reinstated. See 8 U.S.C. 1228, 1231(b)(3); 8 C.F.R. 208.31.

for habeas corpus review could, therefore, cause the very kinds of real-world problems that Congress designed the ER system to solve.

2. The court of appeals' contrary reasoning lacks merit.

First, contrary to the Ninth Circuit's view, this Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), is fundamentally different. Among other things, *Boumediene* involved a challenge to ongoing detention for the duration of hostilities, pursuant to the law of war. *Id.* at 732. The challengers sought to be released from the government's custody so they could return home or to another country. See *id.* at 788 (discussing "[t]he absence of a release remedy" under the relevant statute).

By contrast, respondent does not challenge his detention as such. Indeed, unlike the petitioners in *Boumediene*, he is free to be returned to his home country: He would be removed to and released in Sri Lanka forthwith absent his habeas petition here. Respondent instead effectively invoked habeas corpus as a vehicle to prevent such release by seeking review of his ER order. Respondent, moreover, concedes he is inadmissible under a statutory provision that properly triggered ER, which fully justifies his exclusion and his detention to effectuate that exclusion. And the only relief he seeks is asylum (which is discretionary) or withholding of removal or protection under the CAT (which is mandatory but merely bars removal to one specific country). Respondent thus seeks judicial review only to challenge the government's determination at the screening stage that he failed to show even a significant likelihood he is eligible for such relief. In short, unlike in *Boumediene*,

where the habeas petitioners sought to be released from the government's custody and returned home, here respondent is seeking to *prevent* the government from releasing him from custody by returning him to his home country. That is starkly different from the law-of-war detention question at issue in *Boumediene*. Cf. *Castro*, 835 F.3d at 450-451 (Hardiman, J., concurring dubitante).

The point is not that clandestine entrants like respondent can never invoke habeas corpus or the Suspension Clause at all: Section 1252(e)(2) preserves habeas to consider three specific issues concerning an ER order, and it does not disturb the ability of such aliens to raise constitutional challenges if they are prosecuted criminally, for example, or arrested and held for reasons unrelated to their immigration status. Rather, consistent with this Court's precedents, such aliens may not invoke the Constitution to demand procedural steps or measures *regarding their applications for admission* beyond those provided by existing statutes and regulations. *Plasencia*, 459 U.S. at 32. Respondent cannot evade this Court's longstanding precedents governing the exclusion and removal of aliens at the border by recasting a due process challenge to existing administrative procedures as a challenge to an alleged suspension of the writ of habeas corpus.

Second, this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), and its finality-era cases also "are not controlling here." *Castro*, 835 F.3d at 447.[6] First,

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[6] The finality era refers to "an approximately sixty-year period" from 1891 until 1952 during which Congress "rendered final (hence, the 'finality' era) the Executive's decisions to admit, exclude, or deport aliens," but the Court permitted aliens to raise some challenges

unlike the "recent clandestine entrant[]" subject to ER in *Castro* and this case, *id.* at 448, *St. Cyr* involved a lawful permanent resident who had lived in the United States for a decade and was subject to full deportation proceedings, see 533 U.S. at 293. Second, unlike this case, *St. Cyr* was a statutory case in which the Court discussed (without deciding) what the Suspension Clause "might possibly protect." *Castro*, 835 F.3d at 446 (quoting Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 Colum. L. Rev. 537, 539 & n.8 (2010)). Indeed, the district court in *Castro* found no finality-era case that "even mention[ed] the Suspension Clause," and described the Court in *St. Cyr* as "non-committal" when discussing their significance to the Suspension Clause analysis. *Ibid.* The Court in *St. Cyr* stated merely that "the *ambiguities* in the scope of the exercise of the writ at common law," and "the *suggestions* in this Court's prior decisions as to the extent to which habeas review could be limited consistent with the Constitution," supported application of the canon of constitutional avoidance in construing the statute at issue. 533 U.S. at 304 (emphases added). Section 1252(e)(2) unambiguously bars habeas review of the claims respondent raises here, however, so that canon does not apply. See App., *infra*, 42a.

The habeas petition in *St. Cyr* also raised a "pure question of law" and did not discuss whether or to what extent an alien could obtain review even of a mixed question of law and fact during the finality era. 533 U.S.

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to their exclusion or deportation through habeas corpus during that time. *Castro*, 835 F.3d at 436; see App., *infra*, 21a n.11.

at 298. By contrast, here, any review of the determination that respondent lacked a credible fear would be highly fact-based, and any review of his assertions that the asylum officer or IJ failed to follow procedures provided for by regulation in one or another respect would require delving into the record-specific circumstances of this particular case.

B. This Case Warrants The Court's Review

In addition to being incorrect, the Ninth Circuit's decision creates a circuit conflict. Indeed, the Ninth Circuit itself recognized that its decision created a conflict with the Third Circuit's decision in *Castro*: The Ninth Circuit stated that *Castro* had decided "the precise question" at issue here, holding that Section 1252(e)(2) did not violate the Suspension Clause as applied to "'recent surreptitious entrants'" who were ordered removed via ER after being found to lack a credible fear. App., *infra*, 13a, 24a (citation omitted). But the Ninth Circuit "disagree[d] with *Castro*'s resolution" of the question, *id.* at 25a, and in particular disagreed with the Third Circuit's reliance on *Plasencia* to hold that aliens like respondent could not invoke the Suspension Clause to demand process beyond that which Congress has provided, *ibid.*

The Ninth Circuit's decision also warrants review because it holds in broadly applicable terms that an Act of Congress cannot constitutionally be applied to respondent, who was apprehended recently after surreptitiously entering the United States and then found, after several layers of administrative review, to lack a credible fear. The court stated that the Suspension Clause guarantees judicial review via habeas of "claims

for statutory as well as constitutional error," "claims that deportation hearings were conducted unfairly," claims regarding "the erroneous application or interpretation of statutes," and "mixed questions of fact and law—those involving an application of law to undisputed fact." App., *infra*, 38a (citations omitted). And the court held that review was available for respondent's claims that "the government denied him a 'fair procedure,' 'applied an incorrect legal standard' to his credible fear contentions," and "'failed to comply with the applicable statutory and regulatory requirements.'" *Id.* at 37a (brackets omitted). Virtually any alien who enters surreptitiously and is found to lack a credible fear after exhausting administrative review could raise similar claims. Accordingly, the court of appeals' decision effectively guts Section 1252(e)(2), depriving it of operative force in its core applications.

As discussed above, see pp. 24-26, *supra*, the court of appeals' ruling has significant practical ramifications and could recur with great frequency. The court's ruling creates a pathway for thousands of inadmissible aliens annually who have failed after several opportunities even to show that there is a "significant possibility" they are eligible for asylum or withholding, 8 U.S.C. 1225(b)(1)(B)(v), nonetheless to be able to delay their removal for potentially extended periods by filing a petition for a writ of habeas corpus and contending that the asylum officer or IJ made a procedural error or made substantive errors in the application of law to fact. Such review would further strain the government's limited resources and prevent expedited removal from being expedited at all. Indeed, the whole point of estab-

lishing the ER system and applying it to aliens like respondent was that there was an "urgent need" for removal to be swift, and the enormous number of aliens arriving at the border made it "not logistically possible" to "initiate formal removal proceedings against all such aliens" or to keep them in custody during that longer period. 69 Fed. Reg. at 48,878.

The court of appeals' ruling also creates a perverse incentive for aliens to cross the border illegally rather than present themselves at a port of entry, because the ruling appears to apply only to aliens, like respondent, who were apprehended after an illegal entry and placed into ER. And because it is a constitutional ruling, it is not clear that Congress could modify the ER system to allow for prompt screening of asylum or withholding claims and expeditious removal of those aliens whose claims fail to pass the screening standard.

This case is an excellent vehicle for deciding the question presented. The district court here relied on Section 1252(e)(2) to dismiss respondent's habeas petition, App., *infra*, 55a, and the only basis for the court of appeals to reverse that determination was its holding that Section 1252(e)(2) is unconstitutional under the Suspension Clause. The question presented is accordingly outcome dispositive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-55313
D.C. No. CV 18-135 AJB

VIJAYAKUMAR THURAISSIGIAM,
PETITIONER-APPELLANT

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CUSTOMS AND BORDER PROTECTION; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; KIRSTJEN NIELSEN, SECRETARY OF DHS; WILLIAM, P. BARR, ATTORNEY GENERAL; KEVIN K. MCALEENAN, ACTING COMMISSIONER OF CBP; THOMAS HOMAN; L. FRANCIS CISSNA, DIRECTOR OF USCIS; PETE FLORES, SAN DIEGO FIELD DIRECTOR, CBP; GREGORY ARCHAMBEAULT, SAN DIEGO FIELD OFFICE DIRECTOR, ICE; FRED FIGUEROA, WARDEN, OTAY MESA DETENTION CENTER, RESPONDENTS-APPELLEES

Argued and Submitted: May 17, 2018
Portland, Oregon
Filed: Mar. 7, 2019

Appeal from the United States District Court
for the Southern District of California
Anthony J. Battaglia, District Judge, Presiding

OPINION

Before: A. WALLACE TASHIMA, M. MARGARET MCKEOWN, and RICHARD A. PAEZ, Circuit Judges.

Opinion by Judge TASHIMA

TASHIMA, Circuit Judge:

Vijayakumar Thuraissigiam filed a habeas petition in district court pursuant to 8 U.S.C. § 1252(e)(2) to challenge the procedures leading to his expedited removal order. The court dismissed the petition for lack of subject matter jurisdiction. We reverse. Although § 1252(e)(2) does not authorize jurisdiction over the claims in Thuraissigiam's petition, the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, requires that Thuraissigiam have a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)). Because § 1252(e)(2) does not provide that meaningful opportunity, the provision violates the Suspension Clause as applied to Thuraissigiam.

BACKGROUND

I. Statutory Background

When a U.S. Customs and Border Protection ("CBP") officer determines that a noncitizen arriving at a port of entry is inadmissible for misrepresenting a material fact or lacking necessary documentation,[1] the officer must

[1] *See* 8 U.S.C. § 1182(a)(6)(C) (misrepresentation bar); *id.* § 1182(a)(7) (documentation bar).

place the noncitizen in so-called "expedited removal" proceedings. 8 U.S.C. § 1225(b)(1)(A)(i). By regulation, the Department of Homeland Security ("DHS"), of which CBP is a constituent agency, also applies expedited removal to inadmissible noncitizens arrested within 100 miles of the border and unable to prove that they have been in the United States for more than the prior two weeks. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01, 48879-80 (Aug. 11, 2004);[2] *see also* 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

DHS removes noncitizens eligible for expedited removal "without further hearing or review," subject to only one exception. 8 U.S.C. § 1225(b)(1)(A)(i). If, in an interview with a CBP officer, the noncitizen indicates an intent to apply for asylum or a fear of persecution, DHS must refer the noncitizen for an interview with an asylum officer. *Id.* § 1225(b)(1)(A)(ii); 8 C.F.R. § 208.30. If that asylum officer determines that the noncitizen's fear of persecution is credible, the noncitizen is referred to non-expedited removal proceedings, in which the noncitizen may apply for asylum or other forms of relief from

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[2] Congress gave the Attorney General the authority to extend expedited removal to some or all inadmissible noncitizens who cannot prove that they have been in the United States for more than two years prior; thus, the current regime does not represent the full exercise of executive authority permitted by statute. 8 U.S.C. § 1225(b)(1)(A)(iii). DHS also applies expedited removal to noncitizens who entered the United States by sea and who have not been in the United States for two years. *See* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924-25 (Nov. 13, 2002). The current regime may, however, expand; a January 2017 executive order instructs the Secretary of DHS to apply expedited removal to the fullest extent of the law. *See* Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

removal. *See* 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f); 8 C.F.R. § 1003.42(f). If the asylum officer finds no credible fear of persecution, the noncitizen will be removed. 8 U.S.C. § 1225(b)(1)(B)(iii). A supervisor reviews the asylum officer's credible fear determination, 8 C.F.R. §§ 208.30(e)(7), 235.3(b)(2), (b)(7), and a noncitizen may also request de novo review by an immigration judge ("IJ"). 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42. In 2016, DHS conducted over 141,000 expedited removals. *See* Refugee and Human Rights Amicus Br. 10. All individuals placed in expedited removal proceedings are subject to mandatory detention pending a final determination of credible fear of persecution or until they are removed. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

Congress sharply circumscribed judicial review of the expedited removal process. "[N]o court shall have jurisdiction to review . . . any individual determination [or] . . . the application of [§ 1225(b)(1)] to individual aliens" outside of the review permitted by the habeas review provision, § 1252(e). 8 U.S.C. § 1252(a)(2)(A)(iii). Under § 1252(e)(2), a person in expedited removal proceedings may file a habeas petition in federal district court to contest three DHS determinations: whether the person is a noncitizen, whether he "was ordered removed" via expedited removal, and whether he is a lawful permanent resident or has another status exempting him from expedited removal. *Id.* § 1252(e)(2)(A)-(C). Review of whether a petitioner "was ordered removed" is "limited to whether such an order in fact was issued and whether it relates to the petitioner. *Id.* § 1252(e)(5). "There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." *Id.*; *see also* 8 C.F.R. § 1003.42(f) ("No appeal shall lie

from a review of an adverse credible fear determination made by an immigration judge.").[3]

II. Factual Background

Thuraissigiam is a native and citizen of Sri Lanka and a Tamil, an ethnic minority group in Sri Lanka. *See* Scholars of Sri Lankan Politics Amicus Br. 3. Thuraissigiam fled his home country in June 2016 and made his way to Mexico. On February 17, 2017, Thuraissigiam crossed the border into the United States. Late that night, he was arrested by a CBP officer four miles west of the San Ysidro, California, port of entry, 25 yards north of the border.

DHS placed Thuraissigiam in expedited removal proceedings. Pursuant to 8 U.S.C. § 1225(b)(1)(A)(ii), CBP referred Thuraissigiam for an interview with an asylum officer after he indicated a fear of persecution in Sri Lanka. On March 9, an asylum officer from the United States Citizenship and Immigration Services ("USCIS") interviewed Thuraissigiam and determined that he had not established a credible fear of persecution. A supervisor approved the decision. Thuraissigiam then requested review by an IJ, who affirmed the negative

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[3] Under 8 U.S.C. § 1252(e)(3), a person may challenge the constitutionality and legality of the expedited removal provisions, regulations implementing those provisions, or written policies to implement the provisions. Such challenges, however, must be brought within 60 days after implementation and only in the District of Columbia. *Id.* § 1252(e)(3)(A)-(B). Various expedited removal provisions and implementing regulations survived a § 1252(e)(3) challenge in *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998), although the plaintiffs did not raise a Suspension Clause argument about the extent of habeas review. *See id.* at 41.

credible fear finding in a check-box decision and returned the case to DHS for Thuraissigiam's removal.

III. District Court Proceedings

In January 2018, Thuraissigiam filed a habeas petition in federal district court, naming as respondents DHS, several of its constituent agencies, and individual agency officials. Thuraissigiam argued that his "expedited removal order violated his statutory, regulatory, and constitutional rights," sought to vacate the order, and requested relief in the form of a "new, meaningful opportunity to apply for asylum and other relief from removal." Thuraissigiam alleged that in Sri Lanka he had been harassed for supporting a Tamil political candidate. In 2007, he was "detained and beaten" by Sri Lankan army officers, and told not to support the candidate. In 2014, after Thuraissigiam continued to support the candidate, government intelligence officers kidnapped, bound, and beat him during an interrogation about his political activities. Thuraissigiam alleged that he "was lowered into a well, simulating drowning, threatened with death, and then suffocated, causing him to lose consciousness."

Thuraissigiam also made various factual allegations about the expedited removal procedures to which he was subject after being apprehended. For one, he alleged that the asylum officer failed to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture" in violation of 8 C.F.R. § 208.30(d) and "failed to consider relevant country conditions evidence" in violation of 8 U.S.C. § 1225(b)(1)(B)(v) and 8 C.F.R. § 208.30(e)(2). Thuraissigiam also alleged that there were "communication problems" between the asylum officer, Thuraissigiam, and

the translator, in violation of 8 C.F.R. § 208.30(d)(1)-(2). Thuraissigiam alleged that the IJ hearing included the same procedural and substantive flaws, and that at both hearings, he was unaware whether "information he offered would be shared with the Sri Lankan government." Thuraissigiam's petition asserted two causes of action:

First, DHS' credible fear screening deprived Thuraissigiam "of a meaningful right to apply for asylum" and other forms of relief, in violation of 8 U.S.C. § 1225(b)(1), its implementing regulations, and the United States Convention Against Torture, implemented in the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G., Title XXII, § 2242, 112 Stat. 2681 (1998). The asylum officer and IJ also violated those statutes "by applying an incorrect legal standard" to Thuraissigiam's credible fear application.

Second, the asylum officer and IJ violated Thuraissigiam's rights under the Due Process Clause of the Fifth Amendment by "not providing him with a meaningful opportunity to establish his claims, failing to comply with the applicable statutory and regulatory requirements, and in not providing him with a reasoned explanation for their decisions."

The district court dismissed the habeas petition for lack of subject matter jurisdiction. *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 287 F. Supp. 3d 1077 (S.D. Cal. 2018). Relying on our precedents, the district court concluded that 8 U.S.C. § 1252(e) did not authorize jurisdiction over the claims in Thuraissigiam's petition. *Id.* at 1082. Next, the court rejected Thuraissigiam's Suspension Clause arguments. Although the court concluded that Thuraissigiam could invoke the

Suspension Clause, it held that the statute's "strict restraints" on habeas review of expedited removal orders did not effectively suspend the writ of habeas corpus and were therefore constitutionally sound. *Id.* at 1082-83.[4]

Thuraissigiam timely appealed the district court's dismissal and moved for a stay of removal pending appeal. A motions panel of our court initially denied Thuraissigiam's stay motion, but later vacated that order and stayed Thuraissigiam's removal pending appeal.

STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal of Thuraissigiam's habeas petition for lack of subject matter jurisdiction. *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1151 (9th Cir. 2017); *see also Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1136 (9th Cir. 2008).

DISCUSSION

We must decide whether a federal district court has jurisdiction to review the claims in Thuraissigiam's petition. We first inquire whether 8 U.S.C. § 1252(e)(2) authorizes jurisdiction over Thuraissigiam's petition. Concluding that § 1252(e)(2) does not authorize jurisdiction, we then address whether the provision restricting habeas review violates the Suspension Clause.

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[4] The district court also denied various stay motions that Thuraissigiam had filed, concluding that they were moot due to the petition's dismissal. 287 F. Supp. 3d at 1078.

I. Jurisdiction Under 8 U.S.C. § 1252(e)(2)

Thuraissigiam contends that 8 U.S.C. § 1252(e)(2)(B) authorizes review of the statutory, regulatory, and constitutional claims raised in his habeas petition. We disagree. Section 1252(e)(2), including Subsection (B), limits a district court to reviewing three basic factual determinations related to an expedited removal order. Because Thuraissigiam's petition does not challenge any of those determinations, § 1252(e)(2) does not authorize jurisdiction over the petition.

A court applying habeas review under § 1252(e)(2) is limited to determining:

> (A) whether the petitioner is an alien,
>
> (B) whether the petitioner was ordered removed under such section, and
>
> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title . . . .

Congress also provided express limitations on review under Subsection (B):

> In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

Id. § 1252(e)(5). Nonetheless, Thuraissigiam stakes his claim on Subsection (B).

We considered and rejected a nearly identical argument in *Garcia de Rincon*. The petitioner in *Garcia de Rincon* raised a due process challenge to an expedited removal order. 539 F.3d at 1136. Characterizing § 1252(e) as among the "most stringent" jurisdiction-limiting provisions in the immigration statutes, we held that § 1252(e)(2) permits review only of "habeas petitions alleging that the petitioner is not an alien or was never subject to an expedited removal order." *Id.* at 1135, 1139. We therefore lacked jurisdiction because the petitioner's due process claims were not encompassed by those enumerated grounds. *Id.* at 1139. Likewise, Thuraissigiam's claims of procedural violations are plainly not claims about whether Thuraissigiam "was never subject to an expedited removal order." 8 U.S.C. § 1252(e).

Thuraissigiam contends that such a reading of Subsection (B) renders superfluous the prohibition in § 1252(e)(5) against "review of whether the alien is actually inadmissible or entitled to any relief from removal." However, § 1252(e)(5) functions not to repeat § 1252(e)(2)(B), but to explain it. Moreover, Thuraissigiam's petition is barred by the first sentence in § 1252(e)(5), not the second sentence. Because he asks the district court to review the government's procedures, those claims are beyond the scope of "whether such an [expedited removal] order in fact was issued and whether it relates to the petitioner."[5]

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[5] Thuraissigiam also makes a structural argument, contending that because Congress provided for some review of asylum claims even in expedited removal cases, Congress must not have intended to strip judicial review to "police the boundaries of those limits."

8 U.S.C. § 1252(e); *see also United States v. Barajas-Alvarado*, 655 F.3d 1077, 1082 (9th Cir. 2011) (reaffirming that jurisdiction under § 1252(e)(2) "does not extend to review of the claim that an alien was wrongfully deprived of the administrative review permitted under the statute and applicable regulations").

Thuraissigiam relies on *Smith v. U.S. Customs & Border Protection*, 741 F.3d 1016 (9th Cir. 2014), to contend that we have adopted a more expansive view of Subsection (B). Specifically, he contends that *Smith* reviewed "whether the petitioner belonged in the expedited removal system," and that a court may thus review his petition. *Smith*, however, does not support Thuraissigiam's argument. In *Smith*, CBP placed the petitioner, a Canadian citizen arriving at the border, in expedited removal proceedings for lacking certain documents. *Id.* at 1019. The petitioner alleged that CBP exceeded its authority under the expedited removal statute because certain document requirements are waived for Canadians, and argued that Subsection (B) authorized review. *Id.* at 1019, 1021. "Accepting [petitioner's] theory at face value," we reviewed whether CBP in fact classified him as an "intending immigrant." *Id.* at 1021. Concluding that CBP had done so, we held that § 1252(e)(2) "permit[ted] us to go no further" and did not discuss the merits of CBP's classification. *Id.* at 1021-22 & n.4.[6] Therefore, *Smith* reviewed only how CBP classified the petitioner, which is fairly encompassed by

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This argument ignores the plain language of the statute, which evidences Congress' intent to do just that.

[6] The *Smith* petitioner also contended that § 1252(e)(2) violated the Suspension Clause, but we did not reach the argument because

whether "[the petitioner] was ordered removed" under the expedited removal provision. *Id.* at 1022 (internal quotation marks omitted). By contrast, Thuraissigiam asks the district court to pass judgment on the procedures leading to his removal order. The limited review provided under § 1252(e)(2) does not encompass such claims.[7]

Therefore, in line with our precedents, we conclude that § 1252(e) does not authorize habeas review of Thuraissigiam's petition. We do not here address Thuraissigiam's request that we apply the canon of constitutional avoidance to interpret § 1252(e) to provide jurisdiction over his legal claims. That canon only comes into play if we conclude that § 1252(e) raises serious constitutional questions; thus, we first address Thuraissigiam's Suspension Clause argument before contemplating the application of that canon. *See St. Cyr*, 533 U.S. at 299-300, 314 (explaining constitutional avoidance canon and applying it upon concluding that the statute in question raised serious constitutional questions).

II. Suspension Clause

The Suspension Clause mandates, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety

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we held that the statute permitted limited review of his petition. 741 F.3d at 1022 n.6.

[7] We have held that in appeals from convictions for criminal reentry, a defendant may collaterally attack a removal order that forms the basis for his conviction. *See United States v. Ochoa-Oregel*, 904 F.3d 682, 686 (9th Cir. 2018) (considering collateral attack on expedited removal order). But that rule does not apply to this case.

may require it." U.S. Const. art. I, § 9, cl. 2. Our nation's founders viewed the writ as a "vital instrument" to secure individual liberty. *Boumediene*, 553 U.S. at 743. "The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Id.* at 745 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (opinion of O'Connor, J.)). The Suspension Clause prevents Congress from passing a statute that effectively suspends the writ absent rebellion or invasion. *See Felker v. Turpin*, 518 U.S. 651, 663-64 (1996). Thus, the question in this case is whether 8 U.S.C. § 1252(e)(2) effectively suspends the writ. Put another way, the question is whether the habeas review available to Thuraissigiam under § 1252(e)(2) satisfies the requirements of the Suspension Clause.

The Supreme Court has not yet answered that question. In fact, the Court has rarely addressed who may invoke the Suspension Clause and the extent of review the Clause requires. For example, only in *Boumediene* has the Court concluded that a statute violated the Suspension Clause. Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 Colum. L. Rev. 537, 538 (2010). In the Court's other most recent Suspension Clause case, *St. Cyr*, the Court, after extensive analysis of the Suspension Clause issues at play, interpreted the statute to avoid those issues. 533 U.S. at 336-37. Of the federal courts of appeals, only the Third Circuit has addressed the precise question before us, whether § 1252(e)(2) as applied to noncitizen petitioners in expedited removal violates the Suspension Clause.

See Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422 (3d Cir. 2016) (concluding that, due to their status, such petitioners could not invoke the Suspension Clause), *cert. denied*, 137 S. Ct. 1581 (2017).

Boumediene traced the writ of habeas corpus to its origins as a tool of the English crown, citing the detailed historical account in Paul D. Halliday and G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575 (2008). 553 U.S. at 740. As Halliday and White explain, the writ in England was the vehicle "to determine the rightness of constraints imposed on the bodies of the king's subjects of all kinds." 94 Va. L. Rev. at 607. The writ was on occasion suspended in England. *Id.* at 619; *see Boumediene*, 553 U.S. at 741. According to *Boumediene*, that history "no doubt confirmed [the Framers'] view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power." *Id.* at 742; *see also* Amanda L. Tyler, *A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 Notre Dame L. Rev. 1949, 1985-86 (2016) (describing how suspensions of the writ in colonial America motivated the States' desire to import similar habeas protections after gaining independence); Halliday & White, 94 Va. L. Rev. at 671 (highlighting the Framers' desire to restore "the traditional order of writs and suspensions").

As *Boumediene* summed it up, the Suspension Clause is rooted in the Framers' first-hand experience "that the common-law writ all too often had been insufficient to guard against the abuse of monarchial power." 553 U.S. at 739-40. The Clause, therefore, is "not merely about suspending the privilege of the writ of habeas corpus,

but about the meaning of the 'privilege of the writ' itself." Halliday & White, 94 Va. L. Rev. at 699. "Indeed, common law habeas corpus was, above all, an adaptable remedy . . . [whose] precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779-80 (citing, *inter alia*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2102 (2007)).

In examining how the Supreme Court has defined the Suspension Clause's requirements, *Boumediene* is our starting point, even if it does not provide a direct answer to Thuraissigiam's challenge. *Boumediene* and its predecessors, like *St. Cyr*, do provide an analytical blueprint. We therefore review those precedents before deciding how best to apply their principles to this appeal.

A. *Boumediene v. Bush*

In *Boumediene*, the Supreme Court struck down a War on Terror-era law after detainees at the Guantanamo Bay prison in Cuba brought a Suspension Clause challenge. 553 U.S. at 732-33. In the wake of the September 11, 2001, attacks, the U.S. Department of Defense created Combatant Status Review Tribunals ("CSRTs") to decide if detainees were "enemy combatants." *Id.* at 733. The *Boumediene* petitioners, who had all appeared before CSRTs and been deemed enemy combatants, sought a writ of habeas corpus under the general habeas statute, 28 U.S.C. § 2241. *Id.* at 734. After protracted litigation, Congress passed the Detainee Treatment Act of 2005 ("DTA"), which amended § 2241 to bar judicial review of habeas petitions filed by Guantanamo detainees and to vest review of CSRT decisions exclusively in the D.C. Circuit. *Id.* at 735 (citing DTA § 1005(e), 119 Stat.

2742). Section 7 of the Military Commissions Act of 2006 ("MCA") made those provisions retroactive. *Id.* at 736. *See generally Hamad v. Gates*, 732 F.3d 990, 996-99 (9th Cir. 2013) (describing *Boumediene*'s place in the line of Guantanamo detainee cases). The Court took a two-step approach to evaluating the detainees' challenge to the MCA.

At step one, the Court evaluated whether the Guantanamo detainees—as enemy combatants detained on foreign soil—could even invoke the Suspension Clause. *See Boumediene*, 553 U.S. at 739. In so doing, the Court affirmed that although the writ's protections may have expanded since the Constitution's drafting, "at the absolute minimum," the Clause protects the writ as it existed in 1789. *Id.* at 746 (citing *St. Cyr*, 533 U.S. at 301). The Court therefore examined historical authorities to determine the scope of the writ in 1789, and whether it ran to "an enemy alien detained abroad." *Id.* at 752. Although noting that "at common law a petitioner's status as an alien was not a categorical bar to habeas corpus," the Court concluded that the historical record did not provide a definitive answer. *Id.* at 747, 752. Instead, the Court turned to its extraterritoriality precedents and from them concluded that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. *Boumediene* drew from *Johnson v. Eisentrager*, 339 U.S. 763 (1950), another case about the extraterritorial application of the Suspension Clause, three non-exclusive factors relevant to the Clause's extraterritorial scope:

> (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites

> where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

553 U.S. at 766.[8] Applying those factors, the Court concluded that the detainees could invoke the Suspension Clause. *Id.* at 771.

At step two, the Court considered whether Congress had suspended the writ without an adequate substitute. The Court acknowledged that there are "few precedents addressing what features an adequate substitute for habeas corpus must contain." *Id.* at 772. For example, the Court had previously upheld provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") against a Suspension Clause challenge because the provisions "did not constitute a substantial departure from common-law habeas procedures." *Id.* at 774 (citing *Felker*, 518 U.S. at 664); *see also* Neuman, 110 Colum. L. Rev. at 542 (stating that "what matters is the substance, not the form, of the Great Writ," and that "Congress can rename or reconfigure the procedure by which courts examine the lawfulness of detention," as long as the substitute is adequate).

In *Boumediene*, the Court gleaned from its precedents two "easily identified attributes of any constitutionally adequate habeas corpus proceeding." 553 U.S. at 779. First, the "privilege of habeas corpus entitles

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[8] In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court had first discussed *Eisentrager*'s applicability to the question of who may invoke the Suspension Clause. *Id.* at 487 (Kennedy, J., concurring) ("A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented.").

the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* (quoting *St. Cyr*, 533 U.S. at 302). Second, "the habeas court must have the power to order the conditional release of an individual unlawfully detained." *Id.* Beyond those minimum requirements, "depending on the circumstances, more may be required." *Id.*

The Court further emphasized that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings." *Id.* at 781; *see also id.* at 786 (noting that "habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough"). For that reason, courts sitting in habeas afford deference when reviewing another court's decision, but when a petitioner is "detained by executive order . . . the need for collateral review is most pressing." *Id.* at 783. To be effective, the "habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id.* Applying those principles to the CSRTs and D.C. Circuit review, the Court concluded that the MCA did not provide an adequate substitute because the D.C. Circuit could not "consider newly discovered evidence that could not have been made part of the CSRT record." *Id.* at 790. The Court then concluded that it was not possible to read into the statute provisions for the procedures necessary to satisfy the Suspension Clause, and therefore held it unconstitutional. *Id.* at 792.

Boumediene provides an analytical template for evaluating a Suspension Clause challenge: at step one, we examine whether the Suspension Clause applies to the

petitioner; and, if so, at step two, we examine whether the substitute procedure provides review that satisfies the Clause. How more specifically to apply that template is less clear, given that the Court generated its three-factor test at step one in light of the extraterritoriality question in *Boumediene*. *See id.* at 764, 766. Those factors, as both parties acknowledge, do not map precisely onto this case because Thuraissigiam was apprehended and is detained on U.S. soil.[9] Yet, the manner in which the Court divined those factors informs our approach here. *Boumediene* relied on *Eisentrager* and related cases, but also looked to 1789-era application of the writ to determine whether petitioners similarly situated to Guantanamo detainees had been able to invoke the Clause. Although the Court emphasized that the history was not dispositive, it made clear that "settled precedents or legal commentaries in 1789 . . . can be instructive." *Id.* at 739.[10]

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[9] We too have applied the three *Boumediene* factors more readily when asking whether a noncitizen outside the United States—again, unlike Thuraissigiam—can claim the Constitution's protections. *See Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 995 (9th Cir. 2012) (evaluating extraterritoriality in context of First and Fifth Amendment claims).

[10] Indeed, the Supreme Court's proposition that the Suspension Clause at least protects the writ as it existed in 1789 "necessarily invites reference to history when interpreting and applying the Suspension Clause." Amanda L. Tyler, *Habeas Corpus in Wartime* 9 (2017); see also *Omar v. McHugh*, 646 F.3d 13, 19 (D.C. Cir. 2011) (Kavanaugh, J.) ("[H]istory matters: In habeas cases, we seek guidance from history 'addressing the specific question before us.'" (quoting *Boumediene*, 553 U.S. at 746)).

At step two, *Boumediene* held that, at a minimum, the Suspension Clause entitles a petitioner "to a meaningful opportunity to demonstrate he is being held to 'the erroneous application or interpretation' of relevant law." *Id.* at 779 (quoting *St. Cyr*, 533 U.S. at 302). In considering whether the Clause required more in the circumstances of *Boumediene*, the Court impliedly considered the rigor and character of the proceedings preceding habeas review. Also relevant to Thuraissigiam's case, the Court affirmed that the Suspension Clause protects "a right of first importance," even in circumstances —such as national security, in *Boumediene*—where the executive's power is at its zenith. *Id.* at 797-98.

B. *INS v. St. Cyr*

St. Cyr, which predated *Boumediene* by several years, sheds additional light on the Court's approach to Suspension Clause questions. The petitioner, St. Cyr, was a lawful permanent resident admitted to the United States in 1986. 533 U.S. at 293. In 1996, St. Cyr pleaded guilty to a criminal charge that made him removable, although under pre-AEDPA law (applicable at the time of his conviction), he was eligible for a discretionary waiver from the Attorney General. *Id.* After AEDPA was passed, the government began removal proceedings, with the Attorney General interpreting AEDPA to have removed his discretion to grant St. Cyr a waiver. *Id.* St. Cyr filed a habeas petition alleging that the Attorney General's interpretation was erroneous because St. Cyr's conviction predated AEDPA. *Id.* After the district court and Second Circuit agreed with St. Cyr, the government argued to the Supreme Court that the courts lacked jurisdiction to review the Attorney General's interpretation. *Id.* at 297-98.

The Court stated that the government's position had to overcome several presumptions, chief among them the "strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *Id.* at 298 (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869)). To address whether the statute raised serious Suspension Clause questions, the Court started from the principle that "[b]ecause of [the] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *Id.* at 300 (citing *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)). Because "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" the Court looked at the writ's application before and after the drafting of the Constitution. *Id.* at 301 (quoting *Felker*, 518 U.S. at 663-64). Legal and historical authorities indicated that in both England and the United States "the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Id.* Moreover, the writ was available both to "nonenemy aliens as well as citizens" and "encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes." *Id.* at 301-02.

St. Cyr also looked to the so-called "finality era,"[11] during which the statutory scheme precluded judicial in-

[11] The "finality era" refers to "an approximately sixty-year period when federal immigration law rendered final (hence, the 'finality' era) the Executive's decisions to admit, exclude, or deport noncitizens. This period began with the passage of the Immigration Act

tervention in immigration enforcement, except as required by the Constitution. *Id.* at 304-06. Despite that statutory bar, the Court in the finality era "allow[ed] for review on habeas of questions of law." *Id.* at 304. Accordingly, the government's reading of the statute—to prohibit *any* judicial review of the Attorney General's interpretation—raised "Suspension Clause questions that . . . are difficult and significant." *Id.* More directly, "to conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law." *Id.* at 305. After canvassing that historical practice, and noting that it was consistent with the writ's "common-law antecedents," the Court concluded that St. Cyr could have brought his habeas claims under that regime. *Id.* at 308. Thus, due to the serious constitutional questions raised, and because Congress had not provided a "clear, unambiguous, and express" intent to preclude habeas jurisdiction over questions of law, the Court concluded that the statutes at issue did not repeal habeas jurisdiction. *Id.* at 314.

St. Cyr further illuminates how to approach both *Boumediene* steps. Like *Boumediene*, *St. Cyr* looked to the 1789-era historical application of the writ. *St. Cyr* also looked to the finality era because it provides evidence of what degree of habeas review is required under the Suspension Clause and to whom such review is guaranteed in the immigration enforcement context.

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of 1891, ch. 551, 26 Stat. 1084, and concluded when Congress enacted the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, which permitted judicial review of deportation orders through declaratory judgment actions in federal district courts." *Castro*, 835 F.3d at 436.

St. Cyr's resort to prior habeas cases aligns with *Boumediene*'s similar reliance on *Eisentrager* to resolve ambiguities in the 1789-era application of the writ. That *St. Cyr* ultimately avoided the Suspension Clause question does not diminish its wisdom or relevance as an example of the Court's analytical *approach* to Suspension Clause questions. Consistent with *Boumediene* and *St. Cyr*, we conclude that both the common-law history of the writ and the Court's finality era cases are relevant to what and whom the Suspension Clause protects. *See also Flores-Miramontes v. INS*, 212 F.3d 1133, 1141-43 (9th Cir. 2000) (relying on common-law history and finality era cases in addressing Suspension Clause challenge); *see also Trinidad y Garcia v. Thomas*, 683 F.3d 952, 960 (9th Cir. 2012) (en banc) (Thomas, J., concurring) (discussing finality era cases as evidence of rights protected by the Suspension Clause).

C. The Third Circuit's Decision in *Castro*

Before addressing Thuraissigiam's Suspension Clause challenge, we discuss the Third Circuit's decision in *Castro*, which involved an analogous challenge to § 1252(e).[12] The Third Circuit concluded that § 1252(e) does not violate the Suspension Clause as applied to 28 asylum-seeking

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[12] The government's contention that the Second and Seventh Circuits have addressed the question before us is incorrect. Neither case addresses the Suspension Clause. *See Shunaula v. Holder*, 732 F.3d 143, 147 (2d Cir. 2013) (addressing due process challenge to § 1252(e)(2) and § 1252(a)(2)(A)); *Khan v. Holder*, 608 F.3d 325, 328 (7th Cir. 2010) (addressing § 1252(e)(2) in light of that circuit's "safety valve" doctrine for "judicial correction of bizarre miscarriages of justice"). Likewise, the case cited in the government's Rule 28(j) letter, *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018), does not address the Suspension Clause in the context of the procedures leading up to an expedited removal order.

families who, like Thuraissigiam, raised constitutional, statutory, and regulatory claims relating to their negative credible fear determinations. 835 F.3d at 425, 428. The families were all apprehended shortly after entering the country, placed in expedited removal, and found not to have credible fear. *Id.* at 427-28. As we do, the Third Circuit rejected the argument that § 1252(e)(2) provides jurisdiction over claims of legal error. *Id.* at 434.

Turning to the petitioners' Suspension Clause challenge, the court opined that the Supreme Court's habeas cases are "perhaps even competing" with the plenary power doctrine. *Id.* After reviewing *Boumediene* and *St. Cyr*, *Castro* discussed the Court's "commitment to the full breadth of [that] doctrine, at least as to aliens at the border seeking initial admission to the country." *Id.* at 443. *Castro* approached step one of *Boumediene* by reference to the petitioners' status in light of *Landon v. Plascencia*, 459 U.S. 21 (1982), a case addressing due process, not habeas, rights. *Castro* concluded that petitioners, as "recent surreptitious entrants," should be treated for constitutional purposes as "alien[s] seeking initial admission to the United States." 835 F.3d at 448. In *Landon*, the Court stated that such a noncitizen "has no constitutional rights regarding his application" for entry into the country. 459 U.S. at 32. Accordingly, the Third Circuit concluded that the petitioners' challenge failed at step one, and did not address whether § 1252(e) was an adequate habeas substitute. 835 F.3d at 446. The court acknowledged that its discussion of the petitioners' status "appear[ed] to ignore" Supreme Court precedent relating to the due process rights of noncitizens physically present in the country, but concluded

that no case had clearly held that "arriving aliens" were entitled to due process protections. *Id.* at 447-48.[13]

We disagree with *Castro*'s resolution of how *Boumediene* and *St. Cyr* require us to approach a Suspension Clause challenge. As explained at length above, the Court's mode of analysis in both of those cases addressed the scope of the Suspension Clause by reference to the writ as it stood in 1789 and relevant habeas corpus precedents. *Castro* explained that it did not rely on *St. Cyr*'s description of the Court's habeas approach in immigration cases in the finality era by emphasizing that, unlike the *Castro* petitioners, St. Cyr was a lawful permanent resident, and that *St. Cyr* discussed only what the Suspension Clause *might* protect. *Id.* at 446.

That *St. Cyr* did not affirmatively hold that the Suspension Clause was violated does not render its description of the finality era cases incorrect or its approach irrelevant. Moreover, *Castro*'s decision to rely instead on *Landon* is misplaced. *Landon* held that a permanent resident who traveled abroad and was detained when attempting to reenter the United States should be placed in exclusion proceedings rather than deportation.

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[13] After argument, the Third Circuit decided *Osorio-Martinez v. Attorney General*, 893 F.3d 153 (3d Cir. 2018), involving four juvenile petitioners from *Castro*. After their original habeas petitions were dismissed, the juveniles had been granted Special Immigrant Juvenile ("SIJ") status under 8 U.S.C. § 1108(a)(27)(J). *Id.* at 160. Applying Castro, the Third Circuit held that § 1252(e) was an unconstitutional suspension of the writ as applied to the petitioners, by virtue of their "significant ties to this country" and the constitutional and statutory rights flowing to SIJ designees under 8 U.S.C. § 1255(a) & (h)(1). *Id.* at 167.

459 U.S. at 22.[14] Addressing the petitioner's due process challenge to her exclusion proceedings, the Court noted it had "long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Id.* As explained by Judge Hardiman, the Court in *Landon* did not "purport to resolve a jurisdictional question raising the possibility of an unconstitutional suspension of the writ of habeas corpus"; rather it addressed only the due process rights of a permanent resident. *Castro*, 835 F.3d at 450 (Hardiman, J., concurring dubitante); *see Landon*, 459 U.S. at 32-35. *Landon* could not and did not address the much different question of whether a petitioner like Thuraissigiam may invoke the Suspension Clause.[15]

Although often conflated, the rights protected by the Suspension Clause are not identical to those under the Fifth Amendment's guarantee of due process. *See* Lee Kovarsky, *Custodial and Collateral Process: A Response*

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[14] At the time, Congress provided that removable noncitizens in the United States were subject to deportation and those seeking initial entry were subject to exclusion. *Id.* at 25. Now all noncitizens are subject to removal, whether via 8 U.S.C. § 1225(b)(1) expedited removal or the removal procedures under 8 U.S.C. § 1229a.

[15] Regardless, we disagree with the government's contention and *Castro*'s conclusion that a person like Thuraissigiam lacks all procedural due process rights. *See* 835 F.3d at 447-48. The Supreme Court has been clear that presence matters to due process. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). And we have held that a noncitizen situated almost exactly like Thuraissigiam had a constitutional right "to expedited removal proceedings that conformed to the dictates of due process." *United States v. Raya-Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014); *see also* Immigration Scholars Amicus Br. (explaining why Thuraissigiam has procedural due process rights).

to Professor Garrett, 98 Cornell L. Rev. Online 1, 1 (2013) ("Due process and the habeas privilege are distinct constitutional phenomena, [but] federal courts almost pathologically confuse them."). It is true that, historically, the Fifth Amendment's due process guarantee and the Suspension Clause have been applied in tandem, as their applicability was rarely disputed. *See* Mary Van Houten, *The Post-*Boumediene *Paradox: Habeas Corpus or Due Process?*, 67 Stan. L. Rev. Online 9, 10 (2014) (observing that these provisions "were almost always jointly applied before *Boumediene*"). But this fact does not mean these rights should be elided, as made clear by the fact that the Constitution, ratified two-and-a-half years before the Fifth Amendment, *see Bute v. People of State of Ill.*, 333 U.S. 640, 650 (1948), presupposed the existence of the writ of habeas corpus, *see Boumediene*, 553 U.S. at 739 ("Protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights."). Indeed, the writ "is almost the only remedy mentioned in the Constitution" as originally ratified. Fallon & Meltzer, 120 Harv. L. Rev. at 2037.

Boumediene itself clearly recognized the distinction between the Fifth Amendment's due process rights and the Suspension Clause—providing further reason not to treat *Landon*'s discussion of due process rights as having any bearing on the application of the Suspension Clause. In *Boumediene*, the Court decided that the Guantanamo detainees could invoke the Suspension Clause without addressing whether they had due process rights or whether the CSRTs satisfied due process. 553 U.S. at 785; *see also id.* at 739 (starting from the proposition that "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified

in a Constitution that, at the outset, had no Bill of Rights[]"); *Flores-Miramontes*, 212 F.3d at 1142 (noting that habeas was available at common law prior to the drafting of the Constitution). The Court in *Boumediene* therefore explicitly declined to link due process rights and Suspension Clause rights. *See Hamad*, 732 F.3d at 999 (noting that *Boumediene* did not address whether the due process clause applied to the Guantanamo detainees); *see also Kiyemba v. Obama*, 555 F.3d 1022, 1027 (D.C. Cir. 2009) (concluding on habeas review that Guantanamo detainees lacked due process rights), *vacated by* 559 U.S. 131 (2010), *reinstated by* 605 F.3d 1046, 1047 (D.C. Cir. 2010). *Landon*, a due process case, is not relevant to whether Thuraissigiam can invoke the Suspension Clause. For that reason, we decline to follow *Castro*'s approach and reject the government's argument that Thuraissigiam's purported lack of due process rights is determinative of whether he can invoke the Suspension Clause.

Instead, in accordance with *Boumediene*, we evaluate Thuraissigiam's Suspension Clause challenge in two steps: First, to determine whether Thuraissigiam may invoke the Suspension Clause, we examine 1789-era practice, the finality era cases, and other relevant precedents. Second, we ask whether § 1252(e)(2) provides Thuraissigiam a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779. At step two, we keep in mind that the character of the earlier proceedings bears on the level of habeas review required. *Id.* at 781.

III. Application

A. *Garcia de Rincon* and *Pena*

At the outset, the government contends that our decisions in *Garcia de Rincon*, 539 F.3d 1133, and *Pena v. Lynch*, 815 F.3d 452 (9th Cir. 2016), require us to affirm. Although in both cases we rejected arguments that § 1252(e)(2) authorized jurisdiction, neither case answered the constitutional question before us today.

In *Garcia de Rincon*, the petitioner was a noncitizen living in the United States who was stopped at the border attempting to reenter after a visit to Mexico, and placed in expedited removal. 539 F.3d at 1135. After rejecting the petitioner's statutory challenge, we dismissed her argument—"although . . . not articulated" as such—that the Suspension Clause required review of her petition. *Id.* at 1141. The precise question considered was whether "the INA provides no adequate substitute for habeas review and therefore suspends the writ"—a *Boumediene* step two question, although *Garcia de Rincon* never addressed *Boumediene*, which had been decided months earlier. *Id.* We concluded that *Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001), *vacated on reh'g as moot*, 324 F.3d 1109 (9th Cir. 2003), discredited the petitioner's "generalized due process argument," the only right she sought to vindicate via her petition. *Id.* *Garcia de Rincon* says nothing about whether Thuraissigiam can invoke the Suspension Clause, whether the Clause requires habeas review of statutory or legal claims, or what the Clause requires for a petitioner like Thuraissigiam who is within the United States. Instead, the case addressed only whether § 1252(e)(2) suspends the writ when a petitioner lacks due process

rights. Put in *Boumediene* step-two terms, the due process clause was not "relevant law" for the *Garcia de Rincon* petitioner.[16]

Pena also did not settle the question before us. In *Pena*, a noncitizen placed in expedited removal filed a petition for review of the Board of Immigration Appeals' dismissal of his appeal from an IJ's decision affirming a negative credible fear determination. 815 F.3d at 454. Because the petition was not brought under § 1252(e)(2), we concluded that we lacked jurisdiction. *Id.* at 457. We went on to note that in *Webster v. Doe*, 486 U.S. 592, 603 (1988), the Court had "suggested that a litigant may be unconstitutionally denied a forum when there is absolutely *no* avenue for judicial review of a colorable claim of constitutional deprivation." 815 F.3d at 456 (emphasis in original). We concluded that Pena's petition did not raise *Webster* concerns because he lacked a colorable constitutional claim,[17] and further noted that § 1252(e)(2) provides "some avenues of judicial review." *Id.* at 456-57. All that *Pena* says, therefore, is that § 1252(e) does not implicate the *Webster* doctrine when a petitioner fails to raise colorable constitutional claims. *Pena* never addressed the Suspension Clause.

Because neither *Garcia de Rincon* nor *Pena* addressed whether § 1252(e)(2) unlawfully suspends the

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[16] In case there were any doubt, *Smith* subsequently reserved the question of whether, as applied to a noncitizen in expedited removal, the Suspension Clause requires review beyond that provided for in § 1252(e)(2). *See* 741 F.3d at 1022 n.6. That reservation necessarily determined that *Garcia de Rincon* had not settled the question.

[17] Pena claimed that the IJ violated due process by failing to elicit a voluntary waiver of his right to counsel, but we noted that that claim was contradicted by the record. *Id.* at 455-56.

writ as applied to a petitioner like Thuraissigiam, we reject the government's argument that those cases alone require us to affirm.

B. Reach of the Suspension Clause

At *Boumediene* step one, we must consider the reach of the Suspension Clause, or, in other words, whether Thuraissigiam is "barred from seeking the writ or invoking the protections of the Suspension Clause . . . because of [his] status. . . . " *Boumediene*, 553 U.S. at 739. In *Boumediene*, the Court answered this question by reference to its precedents and the common law history of the writ. We therefore do the same.[18]

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[18] As described above, the Court in *Boumediene* generated a three-factor test at step one in light of the extraterritoriality question presented. This test does not clearly fit in the present case, given that Thuraissigiam was apprehended and detained in the United States. *See* 553 U.S. at 764, 766. However, even were we to apply *Boumediene*'s three-factor test here, it would, as in *Boumediene*, support application of the Suspension Clause.

The first factor, Thuraissigiam's "citizenship and status" and "the adequacy of the process through which that status determination was made," *Id.* at 766, weighs in favor of applying the Suspension Clause. Thuraissigiam is a foreign national who contests his status—he contends that he has a credible fear of persecution and therefore qualifies as a refugee entitled to asylum. Like the CRST process at issue in *Boumediene*, the determination as to whether a noncitizen has a credible fear is not made via a "rigorous adversarial process to test the legality of [his] detention." *Id.* at 767. The determination is made by an asylum officer, 8 C.F.R. § 208.30(d), and although the noncitizen may consult others and even have them present a statement at the end of the interview, 8 C.F.R. § 208.30(d)(4), other hallmarks of the adversarial process are lacking. If the noncitizen then chooses to contest an asylum officer's negative credible fear determination, the noncitizen is entitled only to cursory review by an IJ. 8 C.F.R. § 208.30(g); 8 C.F.R. § 1208.39(g)(2). Critically,

As explained, in *St. Cyr*, the Court canvassed cases from England and historical accounts to conclude that the writ was available before 1789 to "nonenemy aliens as well as to citizens." 533 U.S. at 301; *accord Boumediene*, 553 U.S. at 747 ("We know that at common law a

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unlike in *Boumediene*, a noncitizen cannot seek review of the credible fear determination in an Article III court. *See* 8 U.S.C. § 1252(e)(2); *cf. Boumediene*, 553 U.S. at 767 ("And although the detainee can seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings."). Accordingly, the procedural protections available to Thuraissigiam and other noncitizens in expedited removal "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." *Boumediene*, 553 U.S. at 767 (internal quotation marks omitted).

As to the second factor, there is no question that Thuraissigiam was apprehended and detained within the sovereign territory of the United States. This factor weighs strongly in favor of finding Thuraissigiam has rights under the Suspension Clause. *See id.* at 768-69. The government insists that the nature and length of a noncitizen's detention is relevant to this factor. Not so. *Boumediene* only invokes these considerations under step two. The second factor (under step one) is wholly focused on the level and duration of control exerted by the United States over the territory—which is not at issue here, where the territory is the United States. *Boumediene*, 553 U.S. at 768-69.

As in *Boumediene*, the third factor is somewhat equivocal: "there are costs to holding the Suspension Clause applicable in a case of [asylum-seekers in expedited removal proceedings.]" *Id.* at 769. But "[c]ompliance with any judicial process requires some incremental expenditure of resources," and direct review by the courts already exists and functions in non-expedited removal proceedings. *Id.* Thus, here, as in *Boumediene*, "[w]hile we are sensitive to [the government's] concerns, we do not find them dispositive." *Id.*

Consequently, *Boumediene*'s extraterritorial step one factors, if they were relevant here, would support application of the Suspension Clause.

petitioner's status as an alien was not a categorical bar to habeas corpus relief."); *Rasul*, 542 U.S. at 481 ("At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm. . . . "); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 989-90 (1998) (collecting cases).

After the adoption of the Constitution and its Suspension Clause, courts in the United States applied the same approach. For example, in *Ex parte D'Olivera*, 7 F. Cas. 853 (C.C.D. Mass. 1813) (No. 3,967), a federal court in Massachusetts permitted an arrested noncitizen seaman to invoke habeas. In later years, the Supreme Court continued to hold that habeas was available to noncitizens—even excluded noncitizens stopped at the border. *United States v. Jung Ah Lung*, 124 U.S. 621, 628-32 (1888); *see also* Neuman, 98 Colum. L. Rev. at 1006. Cases throughout the finality era, from the 1890s to the 1950s, which carry significant weight here, held firm to this constitutional premise. In *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), the Court affirmed that despite the finality law, "[a]n alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." *Id.* at 660.

The Court continued that approach later in the finality era. *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) ("The courts are not forbidden by the [finality] statute to consider whether the reasons, when they are given, agree with the requirements of the act."). In *Gegiow*, for example,

the Court reversed the government's legal conclusion that the petitioner was subject to exclusion as a public charge based on a lack of labor opportunities in his immediate destination. *Id.* at 9-10; *see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212-13 (1953) (stating that even though a noncitizen who had not entered the country lacks due process, he "may by habeas corpus test the validity of his exclusion"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (addressing, but rejecting, noncitizen's "contention that the regulations were not 'reasonable' as they were required to be [under a federal statute]"). In *United States ex rel. Accardi v. Shaughnessy*, the Court granted habeas on legal grounds to a noncitizen who entered from Canada "without immigration inspection and without an immigration visa." 347 U.S. 260, 262, 268 (1954). In *Heikkila*, the Court explained that the Constitution was the source for habeas review during the finality era, 345 U.S. at 234-35, and in *St. Cyr*, the Court clarified that the Suspension Clause was the specific source of such review. *See* 533 U.S. at 304. Indeed, the government points to no alternative reading.

More broadly, the government offers no convincing reason to discount the finality era, nor does it offer a competing account of the common-law scope of the writ or of the finality era. The government, citing *Mezei*, 345 U.S. at 214, answers *Boumediene* step one by contending that Thuraissigiam, "as an alien apprehended immediately after crossing the border illegally, is no different from other aliens at the border, and is therefore 'assimilated to [that] status' for constitutional purposes." However, *Mezei* spoke only of such assimilation for the purposes of due process, and it otherwise *affirmed* the principle that habeas is available even when a petitioner

lacks due process rights. *Id.* at 213. And, crucially, *Boumediene* never linked Suspension Clause rights to due process rights. The government provides no authority from *Suspension Clause cases* to support its contention that Thuraissigiam lacks Suspension Clause rights. Because in the finality era the Court permitted even arriving noncitizens to invoke habeas review, we conclude that Thuraissigiam, who was arrested within the United States, may invoke the Suspension Clause.[19]

C. Compliance with the Suspension Clause

Having concluded that Thuraissigiam may invoke the Suspension Clause, we must consider at *Boumediene* step two whether habeas review under § 1252(e) is so limited so as effectively to suspend the writ as applied to Thuraissigiam. At a minimum, the Suspension Clause "entitles the [petitioner] to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation of relevant law.'" *Boumediene*, 553 U.S. at 779 (quoting *St. Cyr*, 553 U.S. at 302).

Congress may modify the scope of habeas review so long as the review "is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *see Crater v. Galarza*, 491 F.3d 1119, 1124-25 (9th Cir. 2007) (noting, in the context of a challenge to AEDPA, that not all restrictions on habeas review effectively suspend the writ). We

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[19] In so doing, we reject any argument that only noncitizens who have "been lawfully admitted" may invoke the Suspension Clause. Because the writ is an indispensable separation of powers mechanism, "[t]he test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene*, 553 U.S. at 765-66.

bear in mind that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 300-01; *see also Boumediene*, 553 U.S. at 783 (noting that in cases of executive detention, "the need for habeas corpus is more urgent"). Therefore, when evaluating whether a substitute is adequate, we consider "the rigor of any earlier proceedings" and "the intended duration of the detention and the reasons for it." *Id.* at 781, 783.

The government urges a different approach to step two. The government contends that Thuraissigiam's status matters to the extent of review the Suspension Clause requires. The government even suggests we should apply the *Boumediene* step one extraterritorial factors to determine whether § 1252(e)(2) provides sufficient review. However, those factors have no bearing on step two; only step one considers the petitioner's status. *See Boumediene*, 533 U.S. at 773-93 (considering, without any reference to Guantanamo detainees' status, whether the DTA was an adequate habeas statute by assessing "the sum total of procedural protections afforded to the detainee at all stages, direct and collateral"). Both logically and as applied in *Boumediene*, the circumstances relevant to step two—the extent of review the Suspension Clause requires—are those relating to the detainer, not the detainee. We also reject the government's contention that because, in its view, Thuraissigiam lacks due process rights, there are no rights for the Suspension Clause to protect. *Boumediene* foreclosed that argument by holding that, whether or not due process was satisfied, the Suspension Clause might require more. 553 U.S. at 785.

As a reminder, Thuraissigiam's petition contends that the government denied him a "fair procedure," "appl[ied] an incorrect legal standard" to his credible fear contentions, and "fail[ed] to comply with the applicable statutory and regulatory requirements." The core of his claim is that the government failed to follow the required procedures and apply the correct legal standards when evaluating his credible fear claim. As Thuraissigiam's brief states: "Petitioner's claims merely assert his right to the meaningful credible fear procedure to which he is entitled under the immigration statute, regulations, and Constitution." We therefore consider whether the Suspension Clause requires review of those claims.[20] We conclude that the Clause requires such review in Thuraissigiam's case and that because § 1252(e)(2) fails to provide a meaningful opportunity for such review, it raises serious Suspension Clause questions.

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[20] Thuraissigiam's petition indicates that he might be asking a federal court to review the agency's credible fear determination, as he contends that he "can show a significant possibility of prevailing on his claims for asylum and other forms of relief." The government accordingly contends that Thuraissigiam's petition instead requests "ultimate application of a legal standard to factual determinations and weighing of evidence underlying the Executive's negative credible-fear findings." However, we read Thuraissigiam's petition to be explaining why, in his view, DHS' procedural errors matter, particularly given his express assertion that he only wants review of the procedural errors. We therefore do not consider here whether the Suspension Clause requires judicial review of DHS' credible fear determination on the merits. *Cf. Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012) (noting, based on *St. Cyr*, that "depriving [petitioner] the opportunity for judicial review of a determination that he lacks a reasonable fear of persecution could raise serious constitutional concerns").

At step two, the finality era again informs our analysis of what the Suspension Clause requires when a removal order is challenged. Finality era precedent establishes that the Court regularly reviewed on habeas "claims for statutory as well as constitutional error in deportation proceedings" and "claims that deportation hearings were conducted unfairly." *Flores-Miramontes*, 212 F.3d at 1143 (citing, *inter alia*, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 8-10 (1948) (interpreting statute on habeas)); *Kessler v. Strecker*, 307 U.S. 22, 33-34 (1939) (same)). In *Gegiow*, the Court also reviewed the executive's application of a legal standard to undisputed facts, concluding that the government had incorrectly determined that the petitioner was likely to become a public charge. 239 U.S. at 9-10. Similarly, we have interpreted the nature of habeas review, encompassing inquiry into "the erroneous application or interpretation of statutes," *St. Cyr*, 533 U.S. at 302, to require that "mixed questions of fact and law—those involving an application of law to undisputed fact . . . be provided meaningful judicial review." *Ramadan v. Gonzales*, 479 F.3d 646, 652 (9th Cir. 2007) (per curiam).

Thuraissigiam and *amici* point us to other examples of the Court reviewing not just pure legal questions like the one at issue in *St. Cyr*, but also the application of a legal standard to undisputed facts. *See, e.g., Hansen v. Haff*, 291 U.S. 559, 562-63 (1934) (rejecting government determination that "petitioner's entry was for the purpose" of immoral relations); *Mahler v. Eby*, 264 U.S. 32, 44 (1924) (holding that the government failed to comply "with all the statutory requirements"). Those cases suggest that the Suspension Clause requires review of legal and mixed questions of law and fact related to removal orders, including expedited removal orders.

As in *Boumediene*, the decision to place a noncitizen in expedited removal and the finding of whether that noncitizen has a credible fear are both executive determinations, meaning that the requirements of habeas are "more urgent." *Cf. Boumediene*, 553 U.S. at 783. While the duration of Thuraissigiam's detention may seem to cut against review, the Court has recognized that an excluded person's "movements are restrained by authority of the United States." *Mezei*, 345 U.S. at 213. Moreover, "it would be difficult to say that [Thuraissigiam] was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to [Sri Lanka]." *Chin Yow v. United States*, 208 U.S. 8, 12 (1908). The finality era cases also demonstrate that habeas is a viable means of reviewing exclusion and removal orders.

Most important, habeas review provides important oversight of whether DHS complied with the required credible fear procedures.[21] Under the existing administrative scheme, there are no rigorous adversarial proceedings prior to a negative credible fear determination. First, the credible fear interview is initiated only after the CBP officer identifies a noncitizen who fears persecution and refers that individual to a USCIS officer. *See* 8 C.F.R. § 235.3(b)(4); *see also* Refugee and Human

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[21] Section 1252(e)(2) also restricts judicial oversight of whether the agency properly placed a person in expedited removal in the first place: "The troubling reality of the expedited removal procedure is that a CBP officer can create the § 1182(a)(7) charge by deciding to convert the person's status from a non-immigrant with valid papers to an intending immigrant without the proper papers, and then that same officer, free from the risk of judicial oversight, can confirm his or her suspicions of the person's intentions and find the person guilty of that charge." *Khan*, 608 F.3d at 329.

Rights Amicus Br. 11-12. A noncitizen can consult with someone at his own expense before his asylum officer interview, but only as long as such consultation does not "unreasonably delay the process and is at no expense to the government." 8 C.F.R. § 208.30(d)(4). Before the IJ hearing, a noncitizen in expedited removal may again consult with someone at his own expense, but the period to obtain such assistance is extremely abbreviated: an IJ "shall conclude the review to the maximum extent practicable within 24 hours" of the supervisory officer's approval of the asylum officer's determination. 8 C.F.R. § 1003.42(c), (e). Such review may take place "in person or via telephonic or video connection." Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 Stan. J. Int'l L. 117, 134-41 (2001). There is also no requirement that the IJ provide reasons for her decision. Indeed, in this case, the IJ simply checked a box on a form stating that the immigration officer's decision was "Affirmed."

These meager procedural protections are compounded by the fact that § 1252(e)(2) prevents any judicial review of whether DHS *complied* with the procedures in an individual case, or applied the correct legal standards.[22] We think it obvious that the constitutional minimum—whether Thuraissigiam was detained pursuant to the

[22] One *amicus* brief describes reports that the agency does not always follow the required procedures. *See* Refugee and Human Rights Amicus Br. 16-27; *see also* Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 Geo. Immigr. L.J. 167, 175-93 (2006) (describing procedural errors commonly committed during the expedited removal process). If true, those reports only underscore the need for judicial review.

"erroneous interpretation or application of relevant law"—is not satisfied by such a scheme.[23] Our conclusion is bolstered by the Third Circuit's recent decision in *Osorio-Martinez*. As *Osorio-Martinez* put it, § 1252(e)(2) fails to provide "even [that] 'uncontroversial' baseline of review" required by *Boumediene*. 893 F.3d at 177. Because the statute prevented the district court from considering whether the agency lawfully applied the expedited removal statute, it *a fortiori* precluded review of "the erroneous application or interpretation of relevant law." *Id.* (citing *Boumediene*, 553 U.S. at 779). So too here, because § 1252(e)(2) prevents a court from reviewing claims of procedural error relating to a negative credible fear determination, it precludes review of the agency's application of relevant law and thus raises serious Suspension Clause questions.[24] Plenary power concerns cannot in all circumstances overwhelm the "fundamental procedural protections of habeas corpus . . . , a right of first importance." *Boumediene*, 553 U.S. at 798.

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[23] A petitioner's perceived ultimate desire—as Judge Hardiman put it in *Castro*, to "alter their status in the United States in the hope of avoiding release to their homelands," 835 F.3d at 450-51 (Hardiman, J., concurring dubitante)—is not relevant where a petitioner challenges the fairness of specific procedures leading to an expedited removal order.

[24] Because Thuraissigiam's petition does not present the question, we do not consider one *amicus*' argument that "there is a compelling case for allowing habeas courts to review factual challenges to an expedited removal order." Scholars of Habeas Corpus Law Amicus Br. 18. "Generally . . . the court will not consider arguments raised only in amicus briefs." *United States v. Wahchumwah*, 710 F.3d 862, 868 (9th Cir. 2013) (citation omitted); *see also Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 n.1 (9th Cir. 1998).

IV. The Canon of Constitutional Avoidance

We further decline to interpret § 1252(e)(2) to avoid the serious Suspension Clause problems engendered by the statute. The constitutional avoidance canon applies "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible.'" *St. Cyr*, 533 U.S. at 299-300 (citation omitted); *see also Ramadan*, 479 F.3d at 654 ("The Supreme Court has been careful to construe statutes in light of the Suspension Clause."). However, for us to apply the canon, the statute in question must be "susceptible of more than one construction." *Clark v. Martinez*, 543 U.S. 371, 385 (2005).

As explained at length above, we and other courts have consistently interpreted § 1252(e)(2) to foreclose review of claims like Thuraissigiam's. Section 1252(a)(2)(A)(i) precludes review of "any other cause or claim arising from or relating to the implementation of or operation of" an expedited removal order, which clearly bars claims relating to procedural error. We do not think the statute can bear a reading that avoids the constitutional problems it creates.

• • •

Therefore, we hold that § 1252(e)(2) violates the Suspension Clause as applied to Thuraissigiam, although we do not profess to decide in this opinion what right or rights Thuraissigiam may vindicate via use of the writ. The district court has jurisdiction and, on remand, should exercise that jurisdiction to consider Thuraissigiam's legal challenges to the procedures leading to his expedited removal order.

The judgment of the district court is **REVERSED** and the case is **REMANDED** for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 18-cv-00135-AJB-AGS

VIJAYAKUMAR THURAISSIGIAM, PETITIONER

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL., RESPONDENTS

[Filed: Mar. 8, 2018]

ORDER:

(1) DISMISSING CASE WITH PREJUDICE FOR LACK OF JURISDICTION;
(2) DENYING PETITIONER'S EMERGENCY MOTION TO STAY;
(3) DENYING RESPONDENTS' MOTION TO DISMISS AS MOOT;
(4) DENYING PETITIONER'S EX PARTE APPLICATION FOR TEMPORARY STAY AS MOOT; AND
(5) DENYING THE JOINT MOTION TO SHORTEN TIME FOR PETITIONER'S EMERGENCY MOTION FOR STAY OF REMOVAL AS MOOT

(Doc. No. 1, 25, 52, 53, 54)

There are several motions currently pending before the Court. Most notable is Petitioner Vijayakumar Thuraissigiam's emergency motion for stay of his removal, (Doc. No. 52), and its related motions—Petitioner's ex parte application for a temporary stay pending his emergency motion for stay of removal, (Doc. No. 53), and the joint motion to shorten time for Petitioner's emergency motion for stay of removal, (Doc. No. 54). Pursuant to Civil Local Rule 7.1.d.1, the Court finds these matters suitable for determination on the papers and without oral argument. As will be explained in great detail below, the Court finds that it does not have jurisdiction to hear the instant habeas petition and thus **DISMISSES** the Petition. (Doc. No. 1.) Consequently, Petitioner's motion for stay of removal is **DENIED** and the remainder of the pending motions on the docket are **DENIED AS MOOT**. (Doc. Nos. 25, 52, 53, 54.)

I. BACKGROUND

Petitioner is a forty-six year old Sri Lankan Tamil man. (Doc. No. 1 ¶¶ 34, 35.) Tamil is an ethnic minority group in Sri Lanka. (*Id.* ¶ 35.) Beginning in the 1980s, a civil war between government forces and the Tamil separatist group, Liberation Tigers of Tamil Eelam ("LTTE"), began. (*Id.*) In 2002, a cease fire was declared, however the cease fire collapsed in 2006. (*Id.* ¶¶ 36, 38.)

In 2004, during the political elections, Petitioner worked on behalf of M.K Shivajilingam, a candidate for parliament with the Tamil National Alliance. (*Id.* ¶ 37.) In 2007, Petitioner was then ordered to report to a Sri Lankan Army camp where he was detained and beaten, but was eventually released. (*Id.* ¶ 38.) Subsequently in 2009, the Sri Lankan government defeated the LTTE ending the civil war. (*Id.* ¶ 39.)

Thereafter in 2013, Petitioner again assisted Mr. Shivajilingam in his run as a candidate for provincial election. (*Id.* ¶ 40.) Petitioner's responsibilities were similar to those he held in 2004 and they included arranging public meetings in support of Mr. Shivajilingam. (*Id.* ¶¶ 37, 40.)

In 2014, Petitioner was approached by men on his farm who identified themselves as government intelligence officers and called Petitioner by his name. (*Id.* ¶ 41.) Petitioner was then pushed into a van where he was bound, beaten, and interrogated about his political activities and connection to Mr. Shivajilingam. (*Id.* ¶¶ 41, 42.) Petitioner then endured additional torture before he woke up in a hospital where he spent several days recovering. (*Id.* ¶¶ 42, 43.) Currently, Petitioner still suffers from numbness in his left arm and has scars from his beatings. (*Id.* ¶ 43.)

After these events, Petitioner went into hiding in Sri Lanka and India, and then in 2016 he fled the country. (*Id.* ¶ 44.) Petitioner then made his way through Latin America, where he was finally able to reach the U.S.-Mexico border. (*Id.*)

On February 17, 2017, Petitioner entered the United States where he was apprehended by a Border Patrol Agent patrolling the area of "Goats Canyon" four miles west of the San Ysidro Port of Entry.[1] (*Id.* ¶ 45; Doc. No. 25-1 at 15.) According to Petitioner, he was then afforded only a "cursory administrative asylum hearing" and then was issued an expedited removal order pursuant to 8 U.S.C. § 1225(b)(1) after the government

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[1] The Court notes that Respondents state that Petitioner was apprehended on February 18, 2017. (Doc. No. 25-1 at 15.)

determined that he did not have a credible fear of persecution. (Doc. No. 1 at 3, 13.) Petitioner argues that absent court intervention, he will be deported to Sri Lanka, where he will no doubt face further beatings, torture, and death because of his political associations. (*Id.* at 3.) Petitioner is currently detained at the Otay Mesa Detention Center in San Diego, California. (*Id.*)

Petitioner filed his petition on January 19, 2018.[2] (Doc. No. 1.) On March 5, 2018, Respondents filed their motion to dismiss. (Doc. No. 25.) Briefing has not yet been completed on this motion. Thereafter, on March 7, 2018, in short succession, and after Court operating hours, Petitioner filed his emergency motion for stay of removal, his ex parte application, and both parties filed their joint motion to shorten time. (Doc. Nos. 52, 53, 54.)

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[2] Petitioner's Petition alleges that the process that led to his expedited removal order was "wholly inadequate." (Doc. No. 1 at 13.) Specifically, Petitioner contends that (1) the asylum officer violated his duty "to elicit all relevant and useful information bearing on whether [he] has a credible fear of persecution or torture[]"; (2) there were communication problems throughout the interview; (3) there were a number of legal errors, including the asylum officers' failure to consider relevant country conditions evidence that Tamils are subject to torture; (4) the asylum officer should have been aware of the widespread country conditions evidence; and (5) the hearing before the immigration judge was procedurally and substantively flawed. (*Id.* at 13-15.) Thus, Petitioner requests an order directing Respondents to show cause why the writ should not be granted, declare Petitioner's expedited removal order contrary to law, direct Respondents to vacate the expedited removal order, and issue a writ directing Respondents to provide Petitioner a new opportunity to apply for asylum and other applicable forms of relief. (*Id.* at 18.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) allows a motion to dismiss where a court lacks subject-matter jurisdiction. Because "[f]ederal courts are courts of limited jurisdiction[,]" a court "presume[s] that a cause [of action] lies outside this limited jurisdiction[.]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A Rule 12(b)(1) motion "can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). No presumption of truthfulness attaches to the allegations of the plaintiff's complaint as the plaintiff bears the burden of establishing subject matter jurisdiction. *Thornhill Publ'g. Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Thus, the court must presume it lacks jurisdiction until subject matter jurisdiction is established. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Any party may raise a defense based on lack of subject matter jurisdiction at any time. *See Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996).

III. DISCUSSION

Cognizant that Respondents' motion to dismiss is based solely on arguing that this Court has no jurisdiction to hear his claims, Petitioner's emergency motion for a stay of removal devotes an entire section to asserting that this Court has jurisdiction to hear his Petition under 8 U.S.C. § 1252(e)(2)(B) and the Suspension Clause. (Doc. No. 52-1 at 24.) Regrettably, despite all of the arguments produced and the urgency and nature of the Petition and motions, the Court finds that it does not

have subject matter jurisdiction over Petitioner's habeas claims.

Congress expressly deprived courts of jurisdiction to hear a direct appeal from an expedited removal order. *See* 8 U.S.C. § 1252(a)(2) (limiting review of expedited removal orders to habeas review under § 1252(e)). Section 1252(e) states that:

> Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title[.]

8 U.S.C. § 1252(e)(2).[3] The Ninth Circuit holds that this statute "strictly circumscribes the scope of review of expedited removal orders to the grounds enumerated in § 1252(e)." *Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1138 (9th Cir. 2008). Thus, "[b]y the clear

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[3] As currently pled, the Court notes that the three asserted bases for habeas review under § 1252(e) have already been conceded by Petitioner. Petitioner's petition states that he is a native and citizen of Sri Lanka who fled to the United States in February of 2017. (Doc. No. 1 ¶ 4.) Second, it is uncontested that Petitioner was ordered removed. (*Id.* ¶ 51.) Finally, Petitioner does not provide any evidence to demonstrate that he has been admitted to the United States as a permanent resident, or was granted asylum prior to his expedited removal. (*See generally* Doc. No. 1.)

operation of these statutes, federal courts are jurisdictionally barred from hearing direct challenges to expedited removal orders." *Torre-Flores v. Napolitano*, No. 11-CV-2698-IEG (WVG), 2012 WL 3060923, at *2 (S.D. Cal. July 25, 2012) (citation and internal quotation marks omitted).

Despite the Act's narrow, limited, and explicit terms, Petitioner seeks to have this Court review his habeas petition under the second factor—whether Petitioner was ordered removed. (Doc. No. 52-1 at 28.) Petitioner contends that § 1252(e)(2)(B) "permits review of the type of threshold question presented here: whether Petitioner was 'ordered removed[.]'" (*Id.* at 29.) Furthermore, Petitioner states that "there must be review of whether the negative credible fear determination was properly made—a prerequisite for issuing the expedited removal order." (*Id.*)

Unfortunately, the preceding assertions are not only wholly unsupported by applicable case law, but they also amount to nothing more than Petitioner's own self-serving assumptions. First, the Court notes that in determining whether an alien has been removed under § 1252(e)(2)(B), "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner." 8 U.S.C. 1252(e)(5). The Court declines to broaden and expand the clear writing of this section of the Act to include the characterization Petitioner impresses on the Court. Moreover, the Court rejects Petitioner's contention that § 1252(e)(2)(B) is ambiguous. (Doc. No. 52-1 at 30.) There could be nothing further from the truth.

Next, and most importantly for purposes of the instant Petition, the clear case law from this circuit forecloses this Court's ability to evaluate the negative credible fear determination that resulted in Petitioner's expedited removal order. *See Galindo-Romero v. Holder*, 621 F.3d 924, 928 n.4 (9th Cir. 2010) (noting that "§ 1252(e) permits review of expedited removal orders only in a habeas corpus petition, and even then review is strictly limited to the three discrete inquiries set forth in § 1252(e)[.]"); *see also Garcia de Rincon*, 539 F.3d at 1140 (finding that both the circuit court and the district court were jurisdictionally barred from hearing the habeas petition challenging an expedited removal order); *Brumme v. INS*, 275 F.3d 443, 447-48 (5th Cir. 2001) (rejecting claim that section 1252(e) permits habeas review of whether section 1225(b)(1) was applicable to petitioner); *Vaupel v. Ortiz*, 244 F. App'x 892, 895 (10th Cir. 2007) ("The language of the statute clearly and unambiguously precludes review in a habeas proceeding of 'whether the alien is actually inadmissible or entitled to any relief from removal.'").

Further, the Court notes that Petitioner's use of *Smith v. U.S. Customs and Border Protection*, 741 F.3d 1016 (9th Cir. 2014), to argue that this Court has jurisdiction to decide whether he received a fair and credible fear interview is misplaced. (Doc. No. 52-1 at 30.) Explicitly, Petitioner argues that *Smith* addresses a claim "conceptually similar" to his own. (*Id.*)

In *Smith*, the petitioner, a native and citizen of Canada, drove his motor home to the Port of Entry at Oroville, Washington and sought entry into the United States. *Smith*, 741 F.3d at 1018. Ultimately, the CBP determined that Smith was seeking to enter the United States

to work and thus classified him as an "intending immigrant" under § 212(a)(7)(A)(i)(l) of the Immigration and Nationality Act ("INA"). *Id.* at 1018-19. However, as Smith lacked documentation permitting him to work in the United States, the CBP found him inadmissible and placed him in expedited removal proceedings. *Id.* at 1019. Smith was removed to Canada the same day and never gained entry to the United States. *Id.*

Smith then filed a petition for writ of habeas corpus arguing that the CBP exceeded its authority under the removal statute. *Id.* The district court dismissed Smith's petition for lack of subject matter jurisdiction. *Id.* The Ninth Circuit also denied the petition. *Id.* However, it noted that if there was no custody requirement to adhere to, that it had limited jurisdiction under § 1252(e)(2)(B) to consider whether Smith was "ordered removed[.]" *Id.* at 1020. However, Smith was still not entitled to the relief he sought as § 1252(e)(2) did not permit the court to "consider any further collateral challenge." *Id.* at 1018.

It is undisputable to the Court that *Smith* has no bearing on the current matter. Unlike *Smith*, Petitioner gained entry into the United States and is still currently being held in the United States. (Doc. No. 1 ¶ 45.) Most importantly, the underlying reasons for the petition in *Smith* and the instant case are completely dissimilar. In *Smith*, the petitioner argued that he was a "Canadian to whom the documentary requirements for admission did not apply." *Smith*, 741 F.3d at 1021. Thus, he alleged that the CBP exceeded its authority as it could not lawfully remove him. *Id.* In direct contrast, the instant petition involves Petitioner's claims that his negative credible fear determination was based off of

numerous legal errors. (Doc. No. 1 at 14.) Accordingly, the blatant factual dissimilarities between the instant case and *Smith* render Petitioner's argument that *Smith* stands for the proposition that the expedited removal statute permits the type of "narrow legal claim" that he raises in his Petition meritless. (Doc. No. 52-1 at 30.)

In sum, the Court follows the clear precedent set forth by the Ninth Circuit and its sister circuits and concludes that it does not have subject matter jurisdiction to hear Petitioner's claims challenging his removal order. *See Rodaz v. Lynch*, 656 F. App'x 860, 861 (9th Cir. 2016) ("To the extent Ramirez Rodaz challenges the underlying 2010 expedited removal order, we lack jurisdiction to consider this collateral attack.") (citation omitted); *see also United States v. Barajas-Alvarado*, 655 F.3d 1077, 1082 (9th Cir. 2011) (holding that the INA "precludes meaningful judicial review of the validity of the proceedings that result in an expedited removal order.").

Further, the Court disagrees with Petitioner's characterization and application of the Suspension Clause in his case. Petitioner argues that the Suspension Clause would be violated if immigration statutes precluded this Court from reviewing his claims. (Doc. No. 52-1 at 24.) Additionally, from what the Court can discern, Petitioner attempts to assert that by dismissing his Petition for lack of jurisdiction, the Court is in essence denying him "judicial review over [all of his] legal claims[, which] violates the Suspension Clause[.]" (*Id.* at 26.) Petitioner then refers to a litany of cases to support the broad contention that the Suspension Clause applies to him. (*Id.* at 26-27.)

Regrettably, Petitioner's arguments miss the mark. The Court does not dispute that the Suspension Clause applies to Petitioner. Instead, the Court finds that the strict restraints on this Court's jurisdictional reach to review expedited removal orders does not violate the Suspension Clause. As discussed in *Pena v. Lynch*, 815 F.3d 452, 456 (9th Cir. 2015), both the Supreme Court and this Circuit "have suggested that a litigant may be unconstitutionally denied a forum when there is absolutely *no* avenue for judicial review of a colorable claim of constitutional deprivation." Here, § 1252(e) still "retain[s] some avenues of judicial review, limited though they may be." *Id.* Thus, the Suspension Clause remains intact. *See Garcia de Rincon*, 539 F.3d at 1141-42 (finding the narrow habeas review under the expedited removal regime does not violate the Suspension Clause); *see also Castro v. U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157, 169 (E.D. Pa. 2016) (finding that § 1252's restrictions on judicial review do not offend a petitioner's rights under the Suspension Clause).

Further, Petitioner's reliance on *INS v. St. Cyr*, 533 U.S. 289 (2001), is erroneous. (Doc. No. 52-1 at 25.) Petitioner claims that per *St. Cyr*, noncitizens always have judicial review to challenge their deportation orders, that the scope of the review must include both constitutional and legal challenges to deportation orders, and that the absence of such review would violate the Suspension Clause. (*Id.*) However, unlike the instant matter, *St Cyr* did not involve an alien subject to a removal order. Instead, the petitioner in *St Cyr* was a lawful permanent resident of the United States who pled guilty in state court to the selling of a controlled substance. *St Cyr*, 533 U.S. at 293. Additionally, *St Cyr* analyzed the impact of the Antiterrorism and Effective Death Penalty

Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amendments and their availability under habeas corpus jurisdiction—28 U.S.C. § 2241. *Id.* at 292. This issue is not present in Petitioner's case, which solely deals with the expedited removal provisions restricting § 2241 habeas corpus jurisdiction. *See Li v. Eddy*, 259 F.3d 1132, 1135 (9th Cir. 2001) (explaining that the restricted habeas review of expedited removal orders "does not implicate the jurisdictional issues" raised in *St Cyr*), *vacated on other grounds by* 324 F.3d 1109 (9th Cir. 2003).

Finally, if Petitioner's challenge can be read as a generalized challenge to his expedited removal, jurisdiction is specifically limited to actions "instituted in the United States District Court for the District of Columbia[.]" 8 U.S.C. § 1252(e)(3)(A). The Ninth Circuit has repeatedly recognized this explicit jurisdictional interdiction. *E.g., United States v. Barragan-Camarillo*, 460 F. App'x 637, 639 (9th Cir. 2011) ("[S]ystemic constitutional challenges to the expedited removal statute or its implementing regulations . . . may [only] be brought in limited circumstances in the United States District Court for the District of Columbia."); *Li*, 259 F.3d at 1136 (same).

Accordingly, based on the foregoing, the Court rejects Petitioner's claims that the jurisdictional limitations of § 1252(e) violate the Suspension Clause.

On a final note, the Court points Petitioner to *Castro v. U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157 (E.D. Pa. 2016), to further support the Court's conclusion that it lacks subject matter jurisdiction to hear the current Petition. The Court is cognizant that this case is not dispositive, however, as the factual background

and habeas claims are identical to the present matter, its analysis and ultimate conclusion are incredibly persuasive to the Court.

In *Castro*, twenty-nine Central American women were seized after their illegal entry into the United States. *Castro*, 163 F. Supp. 3d at 158. Finding that none of them had a credible fear of torture upon returning to Central America, DHS ordered their expedited removal. *Id.* They then sought habeas relief arguing that the Act's credible fear evaluation process was inadequate and resulted in erroneous negative credible fear determinations. *Id.*

Taking each of the petitioners' arguments in turn, the district court held that the INA precluded the court's review of their negative credible fear determinations, that there is no ambiguity to the Act's jurisdictional requirements and "[t]o find otherwise would require [the court] to do violence to the English language to create an 'ambiguity' that does not otherwise exist[,]" and that the petitioners had limited habeas rights to challenge the "procedural and substantive soundness of their negative credible fear determinations and expedited removal orders," thus, the Act's limitations did not offend any Suspension Clause rights. *Id.* at 165-69.

In light of the clear holdings from this circuit and others, holdings that have not yet been disturbed, the Court concludes that it cannot analyze Petitioner's expedited removal order or his claims that his negative credible fear determination was in error. Thus, the Court **DISMISSES** the Petition for lack of subject matter jurisdiction.

IV. CONCLUSION

The Court does not downplay the important role courts across the nation have in safeguarding the reliability and fairness of the immigration process. However, no matter how credible Petitioner's claims of fear may be and the purported harsh consequences that may come to him if he is removed to his native country, the limited scope of this Court's judicial review over expedited removal orders restricts it from hearing Petitioner's claims.

Accordingly, the Petition is **DISMISSED WITH PREJUDICE** for lack of subject matter jurisdiction. As a result, as there is no likelihood of success on the merits to support Petitioner's emergency motion for stay of removal, this motion is **DENIED**. (Doc. No. 52 (*see Nken v. Holder*, 556 U.S. 418, 426 (2009)). Thus, Respondents' motion to dismiss, Petitioner's ex parte application for a stay of removal pending his emergency motion, and the joint motion to shorten time for Petitioner's emergency motion for stay of removal are **DENIED AS MOOT**.[4] (Doc. Nos. 25, 53, 54.) The Clerk of Court is **DIRECTED** to **CLOSE** this case.

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[4] The Court notes that Respondents were not given time to respond to Petitioner's motion to stay removal and ex parte application. However, the Court finds that Respondents' motion to dismiss fully addressed the jurisdictional issues. Therefore, it is tantamount to a reply to the various motions filed on March 7, 2018.

IT IS SO ORDERED.

Dated: Mar. 8, 2018

/s/ HON. ANTHONY J. BATTAGLIA
HON. ANTHONY J. BATTAGLIA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 18-cv-0135-AJB-AGS

VIJAYAKUMAR THURAISSIGIAM, PLAINTIFF

v.

U.S. DEPARTMENT OF HOMELAND SECURITY ("DHS"); U.S. CUSTOMS AND BORDER PROTECTION, (CBP); U.S. CITIZENSHIP AND (SEE ATTACHMENT FOR ADDT'L DEFENDANTS), DEFENDANT

[Filed: Mar. 8, 2018]

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

The Petition is DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction. As a result, as there is no likelihood of success on the merits to support Petitioner's emergency motion for stay of removal, this motion is DENIED. (Doc. No. 52 (see Nken v. Holder, 556 U.S. 418, 426 (2009)). Thus, Respondents' motion to dismiss, Petitioner's ex parte application for a stay of removal pending his emergency motion, and the joint

motion to shorten time for Petitioner's emergency motion for stay of removal are DENIED AS MOOT.4 (Doc. Nos. 25, 53, 54.) The Clerk of Court is DIRECTED to CLOSE this case.

Date: 3/8/18

CLERK OF COURT
JOHN MORRILL, Clerk of Court

By: /s/ A. CORSELLO
A. CORSELLO, Deputy

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 18-cv-0135-AJB-AGS

(ATTACHMENT)

Immigration Services, (USCIS); U.S. Immigration and Customs Enforcement, (ICE); Kirtjen Nielsen, Secretary of DHS; Jefferson Beauregard Sessions, III, Attorney General of the United States; Kevin K. McAleenan, Acting Commissioner of CBP; Thomas Homan, Acting Director of ICE; L. Francis Cissna, Director of USCIS; Pete Flores, San Diego Field Director, CBP; Gregory Archambeault, San Diego Field Office Director, ICE; Fred Figueroa, Warden, Otay Mesa Detention Center,

Defendants.

APPENDIX D

1. U.S. Const. Art. I, § 9, Cl. 2 (Suspension Clause) provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. 8 U.S.C. 1101(a)(42)(A) provides:

Definitions

(a) As used in this chapter—

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

3. 8 U.S.C. 1158 provides:

Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an

alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney Gen-

eral under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality,

membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section

1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction

An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(c) Asylum status

(1) In general

In the case of an alien granted asylum under subsection (b) of this section, the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) of this section does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) of this section owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2) of this section;

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section[1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's

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[1] So in original. Probably should be "sections".

costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall—

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures

The procedure established under paragraph (1) shall provide that—

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the

alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Commonwealth of the Northern Mariana Islands

The provisions of this section and section 1159(b) of this title shall apply to persons physically present in the Commonwealth of the Northern Mariana Islands or arriving in the Commonwealth (whether or not at a designated port of arrival and including persons who are brought to the Commonwealth after having been interdicted in international or United States waters) only on or after January 1, 2014.

4. 8 U.S.C. 1225 provides:

Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

(2) Stowaways

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B) of this section. A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B) of this section. In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy

of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations pre-

scribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) "Credible fear of persecution" defined

For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear any

claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) "Asylum officer" defined

As used in this paragraph, the term "asylum officer" means an immigration officer who—

(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and

(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

(F) Exception

Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

(G) Commonwealth of the Northern Mariana Islands

Nothing in this subsection shall be construed to authorize or require any person described in section 1158(e) of this title to be permitted to apply for asylum under section 1158 of this title at any time before January 1, 2014.

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

(3) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an

immigration judge for a proceeding under section 1229a of this title.

(c) Removal of aliens inadmissible on security and related grounds

(1) Removal without further hearing

If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, the officer or judge shall—

(A) order the alien removed, subject to review under paragraph (2);

(B) report the order of removal to the Attorney General; and

(C) not conduct any further inquiry or hearing until ordered by the Attorney General.

(2) Review of order

(A) The Attorney General shall review orders issued under paragraph (1).

(B) If the Attorney General—

(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, and

(ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security,

the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

(C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.

(3) Submission of statement and information

The alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.

(d) Authority relating to inspections

(1) Authority to search conveyances

Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.

(2) Authority to order detention and delivery of arriving aliens

Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States—

(A) to detain the alien on the vessel or at the airport of arrival, and

(B) to deliver the alien to an immigration officer for inspection or to a medical officer for examination.

(3) Administration of oath and consideration of evidence

The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.

(4) Subpoena authority

(A) The Attorney General and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States.

(B) Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

5. 8 U.S.C. 1252 provides:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

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 review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

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, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

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, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered

in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

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, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

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, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court

of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is

presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate

motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

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. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or

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[1] See References in Text note below.

nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section

1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States

District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall

have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

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.