No. 03-1085

In the Supreme Court of the United States

SABRI I. SAMIRAH, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
JOHN ANDRE
DOUGLAS E. GINSBURG
Attorneys

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

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that 8 U.S.C. 1252(a)(2)(B) precluded the district court's assertion of jurisdiction, other than habeas corpus jurisdiction, to review the Attorney General's discretionary decision to revoke petitioner's parole.

2. Whether the court of appeals correctly held that the district court lacked jurisdiction over petitioner's habeas corpus petition because petitioner was at liberty outside of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 335 F.3d 545. The order of the district court (Pet. App. 17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2003. A petition for rehearing was denied on October 30, 2003 (Pet. App. 16a). The petition for a writ of certiorari was filed on January 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, enacted a number of

immigration-reform measures, one of which is codified at 8 U.S.C. 1252(a)(2)(B). That provision states:

> **Denials of discretionary relief**
>
> Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> * * * * *
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title [pertaining to political asylum].

In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that another jurisdictional bar enacted by IIRIRA, 8 U.S.C. 1252(a)(2)(C), does not preclude a district court from exercising habeas corpus jurisdiction under 28 U.S.C. 2241 to consider a pure question of law presented in connection with a challenge to a final order of removal. See 533 U.S. at 300, 305, 314 n.38. The legal issue involved in *St. Cyr* was whether certain criminal aliens were statutorily ineligible for a discretionary waiver of deportation. In a related case, *Calcano-Martinez* v. *INS*, 533 U.S. 348 (2001), the Court held that Section 1252(a)(2)(C) deprived a court of appeals of jurisdiction to consider the same issue.

2. Petitioner Sabri Samirah is a citizen of Jordan who entered the United States in September 1987 on a student visa. C.A. App. 43. He violated the terms of his visa by failing to maintain his student status. The status violation made it necessary for him to apply to

the Immigration and Naturalization Service (INS)[1] for reinstatement to his student status, which the INS granted in January 1988. *Ibid.* After dropping out of school again (and therefore out of lawful immigration status) for more than two years, petitioner was again reinstated to student status on October 9, 1992. *Id.* at 49. Nine years later, in December 2001, petitioner obtained a Doctor of Philosophy degree from the University of Illinois-Chicago. Gov't C.A. Br. 3-4.

In August 1994, an organization known as the American Middle Eastern League (AMEL) filed a visa petition seeking to classify petitioner as a Special Immigrant Religious Worker. C.A. App. 51. On September 21, 1994, the INS approved the visa petition, *ibid.*, and on September 29, 1994, petitioner filed an application for adjustment of status to that of permanent resident alien, *id.* at 52. Gov't C.A. Br. 4. The INS denied that application on March 29, 1995, on the ground that petitioner had engaged in unauthorized employment and was not in lawful status. C.A. App. 56.

On May 14, 1998, the INS issued AMEL a notice of intent to revoke the approved visa petition on the grounds that petitioner had not proven that he had worked full-time at a religious occupation for two years and that AMEL had not established that it was a bona fide religious organization. C.A. App. 64. On December 8, 1999, the INS revoked AMEL's visa petition approval. *Id.* at 69. AMEL appealed that denial to the

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[1] Certain functions of the INS, including the parole functions discussed in this case, have since been transferred to the Department of Homeland Security and assigned to United States Immigration and Customs Enforcement in that Department. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)).

INS Office of Administrative Appeals, which dismissed the appeal on October 11, 2001. *Id.* at 74.

On October 28, 2002, petitioner applied for adjustment of status to that of permanent resident alien. C.A. App. 81. He based that application on a visa petition filed for his wife, Sima Srouri, which was based on her employment as a special education teacher at an Arabic School in Bridgeview, Illinois. *Id.* at 89. The visa petition for petitioner's wife was approved on July 13, 2002. *Id.* at 92. In his application for adjustment of status, petitioner stated: "Please note that my wife and I are eligible to apply for adjustment of status in the United States under INA Sect. 245(i), *based on my prior approved petition*, as well as based on the approved labor certification that was filed on behalf of my wife." *Id.* at 85 (emphasis added). That statement was false because the visa petition of which petitioner was the beneficiary had been revoked and AMEL's administrative appeal of that revocation had been denied a year earlier.

When petitioner filed his application for adjustment of status to that of permanent resident alien on October 28, 2002, he concurrently filed a request for advance parole. C.A. App. 93. Advance parole allows a resident alien, before leaving the United States, to obtain a travel document facilitating his return, if the grant of advance parole remains effective at the time of reentry and the alien is otherwise admissible. See *Balogun* v. *Attorney General*, 304 F.3d 1303 (11th Cir. 2002); *Navarro-Aispura* v. *INS*, 53 F.3d 233, 235 (9th Cir. 1995). Petitioner sought permission to take multiple trips abroad, indicating that he intended to depart in May 2003 for an expected duration of two weeks. C.A. App. 93-94. The INS approved his request for advance

parole on December 4, 2002. Pet. App. 30a-31a. The approval included the following warning:

> If after April 1, 1997, you depart the United States after you were unlawfully present in the United States for more than 180 days before applying for adjustment of status, you may be found inadmissible under section 212(a)(9)(B)(i) of the Act and may not be permitted to enter when you return to the United States to resume the processing of your application. If found inadmissible, you will need to apply and qualify for a waiver of inadmissibility outside of the United States in order for your adjustment of status application to be approved.

Id. at 31a. Petitioner departed the United States on December 28, 2002, four months earlier than the departure date indicated in his advance parole application. *Id.* at 2a.

On January 17, 2003, while petitioner was outside the United States, Brian R. Perryman, District Director of the INS Office in Chicago, Illinois, revoked petitioner's advance parole. The notice of revocation informed petitioner: "The INS has received information indicating that you are a security risk to the United States and therefore, your advance parole authorization is hereby revoked." Pet App. 29a. The notice was served upon petitioner on January 18, 2003, at the INS preinspection station at Shannon Airport, in Ireland. *Id.* at 2a. The INS then denied petitioner admission to the United States because he had been unlawfully present in the United States for more than one year, and because he had no valid travel document. *Ibid.*; see 8 U.S.C. 1182(a)(7)(A)(i).

3. On February 20, 2003, petitioner filed in the district court a complaint, a habeas corpus petition, and

a motion for preliminary injunction, challenging the INS's refusal to permit him to enter the United States and seeking injunctive relief requiring the government to allow his return. His complaint alleged that, although his lack of a travel document rendered him inadmissible, it was unlawful for the INS to make that inadmissibility determination at a foreign pre-inspection station. He demanded that the government issue him a travel document so that he could enter the United States to have an Immigration Judge review his denial of admission. Gov't C.A. Br. 7.

On March 25, 2002, the district court issued a decision granting petitioner a preliminary injunction and ordering the government to issue any documents necessary to permit petitioner to re-enter the United States. Pet. App. 17a. The court acknowledged that it had no jurisdiction to: (i) reverse the INS's advance parole revocation; (ii) order the commencement of removal proceedings; (iii) review the government's determination that petitioner is a security risk; or (iv) grant petitioner adjustment of status. *Id.* at 20a. The court nonetheless held that petitioner had accrued a sufficient stake in the United States to require the government to allow him to enter the United States so that he could be placed in formal removal proceedings. *Id.* at 22a-23a.

On March 27, 2003, the court of appeals granted a stay of the district court's order pending appeal. Pet. App. 14a.

4. The court of appeals reversed the district court's order. Pet. App. 1a-12a. The court first determined that, apart from petitioner's habeas claim, the district court lacked jurisdiction because of 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 5a. That provision (with one exception not relevant here) divests courts of jurisdiction to review the Attorney General's discretionary

determinations "under this subchapter." 8 U.S.C. 1252(a)(2)(B)(ii). The court of appeals explained that the Attorney General's decision whether to grant or revoke parole is a discretionary determination subject to the jurisdictional bar established by Section 1252(a)(2)(B)(ii). Pet. App. 5a-6a; see 8 U.S.C. 1182(d)(5)(A).

With respect to petitioner's habeas claim, the court found that the "district court lacked jurisdiction under § 2241 for at least two reasons, neither of which involves § 1252(a)(2)(B)(ii)." Pet. App. 6a. First, the court explained, petitioner was not "in custody" for purposes of the habeas corpus statute because "the United States is exercising no ongoing control, restraint or responsibility over him. As far as the government is concerned, [petitioner] may wander the earth, so long as his wanderings do not lead him to the United States." *Id.* at 7a. The court reasoned that, although petitioner is barred from re-entering the United States, "that restraint, such as it is, only puts him on par with the billions of other non-U.S. citizens around the globe who may not come to the United States without the proper documentation." *Ibid.* As "an alternate ground for * * * holding that the district court lacked § 2241 jurisdiction," the court explained that petitioner is required to name as respondent the custodian with day-to-day control over him, but that neither the INS district director named as respondent, "nor any other governmental official, has 'day-to-day' control over, or can produce," petitioner. *Id.* at 11a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any

other court of appeals. Further review therefore is unwarranted.

1. Petitioner argues (Pet. 6-10) that the court of appeals erred in holding "*sub silentio*" that 8 U.S.C. 1252(a)(2)(B)(ii) precludes any judicial review of his constitutional and statutory challenges to the decision to revoke his parole. The court of appeals, however, did not reach any such holding. The court explained that Section 1252(a)(2)(B)(ii) generally divests federal courts of jurisdiction to review the Attorney General's discretionary determination to revoke parole, Pet. App. 4a-6a, but the court specifically left open the question whether courts retain habeas corpus jurisdiction to review such determinations, *id.* at 6a. Although the court found for separate reasons that habeas corpus jurisdiction is lacking in the circumstances of this case (*id.* at 6a-12a), it specifically did not rest that ruling on Section 1252(a)(2)(B)(ii).

Petitioner therefore errs in relying (Pet. 7-8) on this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). The Court held in that case that Section 1252(a)(2)(B)(ii) does not foreclose habeas corpus jurisdiction over statutory and constitutional challenges to detention following a final order of removal. 533 U.S. at 688. The court of appeals here did not hold that Section 1252(a)(2)(B)(ii) divested the district court of habeas corpus jurisdiction.

2. Petitioner argues (Pet. 21-27) that the court of appeals erred in concluding that the district court lacked habeas jurisdiction in this case, and contends further (Pet. 10-21) that, if jurisdiction exists, he must be afforded a hearing before his parole can be revoked. Those claims lack merit and do not warrant review.

a. The court of appeals correctly held (Pet. App. 6a-12a) that the district court lacked habeas jurisdiction

because petitioner is not "in custody" within the meaning of the habeas laws. As the court of appeals explained, the government "is exercising no ongoing control, restraint or responsibility over" petitioner, and he is free—as a matter of United States law—to travel anywhere in the world. *Id.* at 7a.

As petitioner observes (Pet. 23), the court of appeals characterized its ruling as disagreeing with the decision of the Ninth Circuit in *Subias* v. *Meese*, 835 F.2d 1288 (1987). See Pet. App. 8a. In fact, however, there is no conflict. In *Subias*, the Ninth Circuit held that the district court *lacked* habeas jurisdiction over a petition filed by an alien who alleged that he was in custody in Mexico as the result of actions by federal officers working in concert with Mexican authorities. 835 F.2d at 1288. Although the court stated in *dictum* that "the requirement of custody is broadly construed to include restriction from entry into the United States," the court found that it was "unclear whether Subias is presently in custody," and the holding of the court was that habeas jurisdiction was lacking because it did not "presently appear [that Subias] is being held by an American official." *Id.* at 1289. The court explained that, "[s]ince Subias' custodian and whereabouts are unknown, jurisdiction is lacking." *Ibid.* Here, petitioner, like the alien in *Subias*, is not being held by an American official.

In addition, the Ninth Circuit has since held in another case, consistent with the decision below, that there was no habeas jurisdiction over a petition filed by a deported alien because the alien was "subject to no greater restraint than any other non-citizen living outside American borders." *Miranda* v. *Reno*, 238 F.3d 1156, 1159 (9th Cir.), cert. denied, 534 U.S. 1018 (2001). The court explained that, although the alien was barred

from returning to the United States because of his conviction for an aggravated felony, "[i]mmigrants who have already been removed * * * do not satisfy the 'in custody' requirement of habeas corpus jurisdiction." *Ibid.* Especially in light of that recent holding, the *dictum* in the Ninth Circuit's previous opinion in *Subias* affords no basis for concluding that the decision below conflicts with the view of the Ninth Circuit.

Petitioner also errs in relying (Pet. 23) on this Court's decision in *Jones* v. *Cunningham*, 371 U.S. 236 (1963). Although the Court observed in *dictum* in that case that the Court had previously held that habeas corpus is available to an alien alleging an entitlement to enter the United States, the habeas cases cited by the Court involved aliens who were at the United States' borders and were being detained there under federal law. See *id.* at 239 & n.9; Pet. App. 10a. Petitioner, by contrast, seeks entry into the United States from abroad without a visa or travel document. In that respect, his claim "only puts him on par with the billions of other non-U.S. citizens around the globe who may not come to the United States without the proper documentation." *Id.* at 7a. As the court of appeals explained, "a proper reading of *Jones* leads to the conclusion that an alien abroad who seeks entry into the United States must * * * suffer some unique restraint that would, in light of historical precedent, constitute custody for the purposes of habeas jurisdiction." *Id.* at 9a. Petitioner is under no such restraint.[2]

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[2] Because the court of appeals correctly found that petitioner is not in custody for purposes of the habeas statute, there is no warrant for considering (Pet. 24-27) whether petitioner has named as respondent a proper custodian who is within reach of the district court's habeas jurisdiction. The court of appeals decisions cited by petitioner (Pet. 26) involved persons who, unlike petitioner, were

b. Because the court of appeals found that the district court lacked habeas jurisdiction, the court did not address petitioner's constitutional and statutory claims on the merits. Accordingly, petitioner's arguments on the merits (Pet. 10-21) afford no basis for review. See, *e.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."). Petitioner's arguments are incorrect in any event.

Petitioner contends (Pet. 10-14) that the Due Process Clause entitles him to a hearing before he may be denied re-entry into the United States. This Court, however, has long held that "an alien who seeks admission to this country may not do so under any claim of right." *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Moreover, the nine courts of appeals that have considered the issue have held that aliens have no protected liberty interest in the grant or denial of discretionary immigration relief such as adjustment of status or parole. See *Munoz* v. *Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003); *Bazuaye* v. *INS*, 79 F.3d 118, 120 (9th Cir. 1996); *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 219 (5th Cir. 2003); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 808 (8th Cir. 2003); *Smith* v. *Ashcroft*, 295 F.3d 425, 429 (4th Cir. 2002); *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699-700 (6th Cir. 2001);

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physically detained and therefore in custody. Because petitioner is not in custody, this case does not squarely raise the question whether (Pet. 25-26) the Attorney General is a proper habeas respondent. There thus is no need to hold the petition pending the Court's decision in *Rumsfeld* v. *Padilla*, cert. granted, No. 03-1027 (Feb. 20, 2004), which raises the question whether the Secretary of Defense is a proper habeas respondent to a petition filed on behalf of a detained enemy combatant.

Tefel v. *Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999); *Ahmetovic* v. *INS*, 62 F.3d 48, 53 (2d Cir. 1995); *Adras* v. *Nelson*, 917 F.2d 1552, 1558 (11th Cir. 1990); *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1264 (7th Cir. 1985). Accordingly, once the INS revoked petitioner's advance parole, he had no right to enter the United States, for he did not have a valid travel document and in any event he had been unlawfully present in the United States for more than one year. See Pet. App. 31a (citing 8 U.S.C. 1182(a)(9)(B)(i) and warning petitioner that he may be found inadmissible if he attempted to re-enter the United States after having been unlawfully present here for more than 180 days).

Petitioner's reliance (Pet. 12) on *Landon* v. *Plascencia*, 459 U.S. 21 (1982), is misplaced. *Landon* found that a lawful permanent resident (LPR) alien returning from a brief trip abroad was "assimilated" to the status of an alien continuously residing and physically present in the United States, such that the alien had due process rights concerning his return to the United States. See *id.* at 32-34. The "assimilation" doctrine has only been applied to LPRs, and petitioner cites no authority for assimilating a non-LPR (let alone an alien, such as petitioner, who was unlawfully present in the United States) to the status of a continuously present lawful permanent resident alien. Petitioner fails to identify any statutory basis for expanding the assimilation doctrine to nonresident aliens. The statutory "entry" exception described in *Landon* v. *Plasencia*, 459 U.S. at 28-29, applies only to LPRs, and 8 U.S.C. 1101(a)(13)(C), as amended in 1996, fortifies the point by providing that only certain LPRs seeking re-entry to the United States are not treated as seeking admission for the first time.

Moreover, when petitioner applied for student status, and reinstatement to that status, he represented to the INS that he was "an alien having a residence in a foreign country which he has no intention of abandoning." 8 U.S.C. 1101(a)(15)(F). To the extent that petitioner's proposed assimilation for nonresident aliens is based on supposed permanent ties here, it is predicated on a fraud on the immigration system—or at least on a basis that is fundamentally inconsistent with his last lawful status in the United States. See *Patel* v. *INS*, 811 F.2d 377, 382-383 (7th Cir. 1987). An alien's status only becomes "more extensive and secure when he makes preliminary declaration of intention to become a citizen"—that is, at the earliest, when he becomes an LPR, the preliminary and requisite step to citizenship. *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950); *Landon* v. *Plasencia*, 459 U.S. at 32. Petitioner has neither LPR status nor even lawful presence in the United States. Cf. *Kleindienst* v. *Mandel*, 408 U.S. 753, 760 (1972) ("[A]n unadmitted and nonresident alien had no constitutional right of entry to this country as a nonimmigrant or otherwise.").

Petitioner likewise errs in relying (Pet. 12, 28) on *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953). In that case, a permanent resident alien was denied entry upon his return to the United States from a voyage during which his immigration status was revoked. *Id.* at 594-595. The Court held that he was entitled to a hearing to determine his admissibility to the United States. *Id.* at 600-602. The Court pointed out, however, that Kwong's protection under the Fifth Amendment arose from his prior admission to permanent residence, which had established that he did not present a danger to the United States. *Id.* at 602. By contrast, petitioner was never admitted to the United States as a lawful

permanent resident, and his only prior admission was as a student, which status he subsequently violated. Additionally, Kwong was detained by the United States at Ellis Island, New York, which established habeas jurisdiction in the district court. Petitioner, by contrast, is not detained in any location.

Petitioner additionally contends (Pet. 14-21) that he is entitled to a removal proceeding in the United States under 8 U.S.C. 1229a(a)(3). There is no support for petitioner's claim that a returning non-resident alien en route to the United States who is found inadmissible during pre-inspection at a foreign airport must be transported to the United States for removal proceedings. Congress, in 8 U.S.C. 1225a(a)(1), directed the Attorney General to establish "preinspection stations" in certain foreign airports identified "as serving as last points of departure for the greatest numbers of inadmissible alien passengers who arrive from abroad by air at ports of entry within the United States." The purpose of the preinspection process is to "reduce the number of aliens who arrive from abroad by air at points of entry within the United States who are inadmissible to the United States." 8 U.S.C. 1225a(a)(4). The statute provides no procedure for aliens who lack a visa or other valid travel document—and who are therefore denied access to United States territory at preinspection stations—to challenge that denial. Cf. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 214 (1953) (Attorney General may lawfully exclude, without a hearing, alien who formerly resided lawfully in the United States.). Petitioner's recourse, like that of all aliens outside the United States seeking admission, is to submit a visa application to the ap-

propriate United States consulate abroad. See *id.* at 213.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
JOHN ANDRE
DOUGLAS E. GINSBURG
Attorneys

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[3] Contrary to petitioner's suggestion (Pet. 29-30), there is no reason to hold the petition in this case pending the Court's decisions in *Al Odah* v. *United States*, cert. granted, No. 03-343 (Nov. 10, 2003), and *Rasul* v. *Bush*, cert. granted, No. 03-334 (Nov. 10, 2003). *Al Odah* and *Rasul*, unlike this case, involve habeas petitions filed by aliens who are physically detained and are therefore "in custody" for purposes of the habeas laws.