No. 19-161

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, et al.,

Petitioners,

—v.—

VIJAYAKUMAR THURAISSIGIAM,

Respondent.

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

BRIEF FOR RESPONDENT

Cody Wofsy
Stephen B. Kang
Adrienne Harrold
Morgan Russell
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Lucas Guttentag
559 Nathan Abbott Way
Stanford, CA 94305

David Loy
Sarah Thompson
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131

Lee Gelernt
Counsel of Record
Omar C. Jadwat
Jonathan Hafetz
Anand V. Balakrishnan
Celso J. Perez
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
lgelernt@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

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INTRODUCTION

For as long as Congress has regulated immigration, this Court has recognized that deportation involves a restraint on liberty triggering habeas corpus. The Court accordingly has *never* permitted a noncitizen's expulsion without affording the opportunity for judicial review over legal and constitutional claims. The Court's fidelity to habeas corpus in the immigration context was starkly tested during the 60-year "finality era" when Congress insulated removal orders from all judicial scrutiny and left courts with only that review "required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 235 (1953). If the government is correct that the Suspension Clause does not guarantee habeas review of deportation at all, then none of the review during the "finality era" could have occurred. Yet this Court consistently reviewed the legality of removal orders – including on behalf of noncitizens who entered unlawfully or were denied initial entry at a port. As the Court explained, "an alien immigrant, prevented from landing . . . and thereby *restrained of his liberty*, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (emphasis added). Notably, and contrary to its current position, the government itself contemporaneously asserted during the finality era that the courts' review was limited to that required by the *Constitution*. More recently, in *INS v. St. Cyr*, 533 U.S. 289, 300 (2001), this Court invoked the finality-era cases in reiterating that the Suspension Clause "unquestionably" guarantees habeas review of deportation orders. The finality-era cases squarely answer the question in this case.

Respondent, Vijayakumar Thuraissigiam, asserts the same type of claims reviewed during the finality era: violations of statutes, regulations, and due process. Yet 8 U.S.C. § 1252(e)(2), the statute governing jurisdiction here, precludes *all* such review, even to ensure that the minimal, but critical, statutory and regulatory procedures are followed. A court is powerless to intervene even if, for instance, asylum officers refused to conduct an interview altogether or to provide translation to non-English speakers, placed an unaccompanied minor into expedited removal in violation of the statute, or based their decisions on race or religion. The statute thus fails to provide even that level of review available in *Boumediene v. Bush*, where a "*court*" could at least review "whether [the] procedures were followed in a particular case." 553 U.S. 723, 811 (2008) (Roberts, C.J., dissenting); *see id.* at 779 (majority opinion) (holding that Suspension Clause requires review of the "'application or interpretation' of relevant law") (quoting *St. Cyr*, 533 U.S. at 302).

The government's new theory that deportation does not constitute the type of restraint triggering habeas corpus is at odds with unbroken case law from this Court, as well as common-law courts that issued the writ to prevent all forms of restraint, including transfers out of the realm. If accepted, it would mean that *no* noncitizen – even a legal permanent resident – could ever invoke the Clause to prevent an illegal deportation. The government's alternative argument – that Mr. Thuraissigiam cannot invoke the Suspension Clause because he lacks due process rights to challenge his removal – would mean that asylum seekers and millions of other noncitizens could be summarily removed

without any process, judicial *or* administrative. It is also doubly wrong. The habeas protection enshrined in the Constitution is not solely about the individual's rights, but about preserving the rule of law by forbidding the Legislature and Executive from restraining liberty without judicial examination. This Court has thus repeatedly made clear that the structural guarantee of habeas corpus is entirely distinct from whether due process applies and that courts must be able to ensure compliance with the governing statutes and regulations even when individuals lack procedural due process rights. In any event, Mr. Thuraissigiam, as a "person" who entered the country and was apprehended inside our borders, *has* procedural due process rights under established doctrine.

Migration has ebbed and flowed throughout the country's history. Vociferous objections to judicial review as an inconvenient obstacle to immigration enforcement led to the finality-era restrictions. Yet even at the height of that effort to stem immigration, this Court never wavered in preserving habeas. Congress has broad substantive latitude over the terms of immigration, but it cannot eliminate habeas review over legal claims challenging removal and oust federal courts from their historic role in our constitutional architecture. Otherwise, people's liberty and lives – including those fleeing persecution – would hinge on the unreviewable decisions of administrative officers.

STATEMENT

A. The Expedited Removal System

Under the summary "expedited removal" process (recently expanded to noncitizens detained within two years of unlawfully entering, *see* Pet. Br. 6 n.2), noncitizens expressing a fear of return are statutorily entitled to a brief "credible fear interview" with an asylum officer, 8 U.S.C. § 1225(b)(1)(B). Meaningful participation by counsel is rare and subject to agency discretion. 8 C.F.R. § 208.30(d)(4). The interview's purpose is to determine whether the applicant has a "significant possibility" of satisfying the ultimate "well-founded fear" asylum standard. 8 U.S.C. § 1225(b)(1)(B)(ii), (v). Applicants who satisfy the credible fear standard are entitled to a full asylum hearing.

Applicants who do not pass the screening interview may request immigration judge review. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). Such reviews are brief, however, and attorneys are not permitted to assist applicants. Under 8 U.S.C. § 1252(e)(2), judicial review is available by habeas in district court, but petitioners are allowed to assert only claims of mistaken identity or that they had previously been granted a specific category of lawful status.[1]

[1] A different provision allows review of "written" expedited removal statutes, regulations, and policies, within 60 days of their "implementation." 8 U.S.C. § 1252(e)(3). It is thus inapplicable here.

B. Factual Background And Administrative Proceedings

1. Mr. Thuraissigiam, a Sri Lankan Tamil, was denied asylum after an interview that violated the requirements imposed by statute, regulations, and due process. The record indicates that Mr. Thuraissigiam failed to fully understand the proceedings. *See, e.g.*, J.A. 66 (Q: "How long were you [in India]?" A: "41 years [Respondent's age]"); J.A. 64 (Q: "Do you have any question about the purpose of today's interview?" A: "Yes." Q: "What is your question?" A: "Yes, I understand."); *see also* 8 C.F.R. § 208.30(d)(2), (5) (mandating interpretation).

The Sri Lankan government has engaged in a long, vicious campaign of abduction and torture against Tamils. J.A. 24-25 ¶ 46 (collecting reports). In particular, there is a well-documented pattern of Sri Lankan security forces kidnapping Tamils in white vans, blindfolding them, and torturing them – widely known as the "white van" abductions. J.A. 25 ¶ 47; *see, e.g.*, U.N. High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 41 n.287, U.N. Doc. HCR/EG/LKA/12/04 (Dec. 21, 2012); *Sri Lanka's Sinister White Van Abductions*, BBC (March 14, 2012), bbc.com/news/world-asia-17356575. Tamils who unsuccessfully seek asylum abroad are especially vulnerable to the risk of torture if returned. *Gaksakuman v. U.S. Att'y Gen.*, 767 F.3d 1164, 1170 (11th Cir. 2014).

2. Both the asylum officer and the immigration judge expressly credited Mr. Thuraissigiam's testimony: that he fled Sri Lanka after men arrived

at the farm where he was working and "arrested" him, by abducting him in a "van," blindfolding him, and beating him with "wooden rods" so severely that he lost consciousness and spent 11 days in the hospital. J.A. 70-71, 73; J.A. 30 ¶ 61. The officer and immigration judge nonetheless concluded that he had not shown a "significant possibility" of establishing asylum eligibility at a later hearing because he did not identify his assailants or the motivation for the attack during his interview, and thus did not show that his abduction was "on account of" a protected ground for asylum, 8 U.S.C. § 1101(a)(42)(A). Accordingly, he was denied the opportunity to pursue asylum, withholding of removal, 8 U.S.C. § 1231(b)(3), and relief under the Convention Against Torture.

C. Proceedings Below

1. Mr. Thuraissigiam's habeas petition did not seek review of factual determinations. It alleged only that his expedited removal order violated statutory and regulatory requirements, and due process. J.A. 31-32. The petition asserted that the failure to find that he had a credible fear constituted a misunderstanding and misapplication of the statute's "significant possibility" standard. Congress purposefully made the statutory standard low, and directed officers to consider potential success in future full proceedings, because interviews would normally take place within days of the applicant's arrival, the applicant would rarely have the benefit of consultation with counsel, and the applicant often would be scared, uneducated, and speak little or no English. *See* U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of*

Asylum Seekers in Expedited Removal 43-45, 50-53 (2016).

The petition additionally alleged that even if the interview testimony was insufficient to meet the "significant possibility" standard as properly understood, the asylum officer violated her essential regulatory duties. Asylum officers must "elicit all relevant and useful information," 8 C.F.R. § 208.30(d), and are also required to understand the "conditions" in the applicant's home country, 8 U.S.C. §§ 1225(b)(1)(B)(v), 1225(b)(1)(E)(i), to know what information will be "relevant and useful" in individual cases.

Here, the officer demonstrated a fatal lack of knowledge. And, coupled with the translation difficulties, the officer's failure to ask obviously pertinent questions about the nature of the abduction all but guaranteed that the firm factual basis of Mr. Thuraissigiam's asylum claim would not be revealed. The officer faulted Mr. Thuraissigiam for not explaining who his abductors were and why they kidnapped him. But asylum applicants frequently will fear disclosing the identity of government persecutors or will not understand what information is required. *Balasubramanrim v. INS*, 143 F.3d 157, 163 (3d Cir. 1998). The officer did not take obvious steps to "elicit" that information or to explain that such information was essential. She did not, for instance, ask Mr. Thuraissigiam why he believed he had been "arrested," J.A. 70-71 – something only government officials generally do – or the color of the "van," despite the widely known campaign of "white van" abductions, J.A. 71. Nor did the officer probe whether he had ever been involved in any political activity, except to ask a boilerplate

question about previous harm due to his "political opinion." J.A. 76. In fact, Mr. Thuraissigiam had been politically active and his abductors interrogated him about his political activities. J.A. 23 ¶ 42 (habeas petition).[2]

2. The district court acknowledged that Mr. Thuraissigiam's petition raised legal claims, but dismissed for lack of jurisdiction. The court did not dispute that the Suspension Clause applied to Mr. Thuraissigiam's challenge but concluded that the statutory scope of judicial review, although limited to essentially mistaken identity claims, satisfied the Clause. Pet. App. 53a-55a.

3. The court of appeals reversed, concluding that under this Court's precedents the statute's restriction on judicial review violated the Suspension Clause because it bars "any judicial review of whether DHS complied with the [expedited removal] procedures" or "applied the correct legal standards." Pet. App. 40a (emphasis omitted). The court further concluded that "*Boumediene* foreclosed" the notion that the Suspension Clause hinges on due process rights, Pet. App. 36a, but noted that, in any event, Mr. Thuraissigiam had procedural due process rights to challenge his removal under longstanding doctrine because he had entered the country. Pet. App. 26a n.15.

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[2] The government cites a question asked by a border agent (who has no role in the credible fear assessment), not the asylum officer, regarding membership in a political party. Pet. Br. 12.

SUMMARY OF ARGUMENT

I. The forcible removal of a noncitizen is a restraint on liberty triggering habeas corpus. The Suspension Clause therefore "unquestionably" guarantees judicial habeas review of legal challenges to deportation orders. *St. Cyr*, 533 U.S. at 300. Indeed, during the finality era, Congress eliminated all review, leaving courts with jurisdiction to review immigration orders only to the extent required by the Constitution. Yet this Court consistently reviewed removals via habeas corpus to ensure their legal validity. The government's argument that deportation falls outside of constitutional habeas is therefore foreclosed by this Court's precedent, as well as inconsistent with common-law habeas. Nor is this constitutionally guaranteed review negated by Mr. Thuraissigiam's recent unlawful entry. Finality-era courts exercised jurisdiction where noncitizens had entered unlawfully or were at a port of entry seeking initial admission.

These principles were reaffirmed in *St. Cyr*, where the Court construed a statute to preserve review of legal challenges to deportation in order to avoid Suspension Clause problems, and in *Boumediene*, where the Court extended the Suspension Clause to noncitizens held as "enemy combatants" at Guantanamo Bay. If "enemy combatants" who have never entered are constitutionally entitled to habeas corpus, then Mr. Thuraissigiam is as well.

II. The government's contention that Mr. Thuraissigiam cannot invoke the Suspension Clause because he lacks due process rights to challenge his removal is wrong. The Suspension Clause is an

essential structural check on the unlawful use of coercive executive power, which Congress cannot abridge "unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9. Because habeas is triggered by restraints on liberty, and is designed to ensure that those restraints conform to all applicable law, including statutory and regulatory requirements, it applies even where one lacks procedural due process rights.

In any event, under longstanding doctrine that the government has accepted for decades, Mr. Thuraissigiam *has* procedural due process rights as a "person" who entered the country. U.S. Const. amend. V. The government now radically suggests that the Court expand the controversial "entry fiction" doctrine – historically applicable only to those stopped at ports – to cover any noncitizen who has not been lawfully admitted. That would deny *both* procedural due process and constitutional habeas to millions of people living in the United States, and allow their summary removal, without either administrative or judicial review, even to challenge legal errors apart from due process, such as compliance with statutory requirements. The government's alternative contention – that only those who can satisfy an ill-defined "meaningful ties" test are entitled to procedural due process – is equally unprecedented, and would result in endless litigation given the standard's indeterminacy.

III. The statute, which bars review of constitutional and legal claims, is not an adequate substitute under the Suspension Clause. Whatever else the Suspension Clause requires, it is "uncontroversial" that there must be review of the

"application or interpretation of relevant law." *Boumediene*, 553 U.S. at 779 (internal quotation marks omitted). The government's contention that judicial review of legal claims can be eliminated because there is sufficient administrative review is wrong: The expedited removal process is patently insufficient, and, more fundamentally, the Suspension Clause's separation-of-powers requirement that legal claims be *judicially* reviewable is not affected by the amount of administrative process. Nor can the political branches eliminate the constitutionally required judicial oversight based on the perceived burdens of habeas review – the same concerns raised during the finality era. The Suspension Clause expressly prohibits the elimination of habeas in the name of expediency.

ARGUMENT

I. THE SUSPENSION CLAUSE REQUIRES REVIEW OF MR. THURAISSIGIAM'S REMOVAL.

A. The Finality-Era Cases Demonstrate That The Suspension Clause Guarantees Judicial Review Of The Legality Of Mr. Thuraissigiam's Removal Order.

This Court has already determined that the Suspension Clause guarantees judicial review of the legality of removal orders, even if a noncitizen has not yet developed ties to the nation. The history of this Court's response to congressional efforts to eliminate judicial review of removal orders demonstrates that the Suspension Clause mandates a minimum level of judicial review to ensure that the

Executive complies with the law in effectuating removal. The Court recounted that history in *St. Cyr*, reviewing a different jurisdictional bar enacted by the same Congress that enacted the statute here. From the decades of finality-era cases establishing the constitutionally minimal habeas review over removals, to *St. Cyr*'s conclusion that the Suspension Clause "unquestionably" demands such review, to *Boumediene*'s confirmation that constitutionally minimal habeas must provide review of legal claims, the Court has made clear for over a century that Congress cannot eliminate judicial review of the legality of removal orders.

1. Until 1891, Congress permitted full judicial review of immigration orders, including all factual and legal questions. *United States v. Jung Ah Lung*, 124 U.S. 621, 632 (1888). Congress became dissatisfied, however, with the growing number of immigrants arriving at the border (especially from China) and with what it viewed as the increasing interference of courts in overturning immigration decisions. *See, e.g.*, H.R. Rep. No. 51-3807, at 2 (1891) (discussing "[t]he inadequacy of the laws" to deal with "the increased number" of "undesirable immigrants").

As Congress noted at the time, court challenges were initially quite successful. Select Comm. on Immigration & Naturalization, *Chinese Immigration*, H.R. Rep. No. 51-4048, at 272-73 (1891) (federal district court in San Francisco reversed exclusion orders in 86% of cases). The result was a public outcry against the courts for hindering the implementation of restrictive immigration policies. Lucy Salyer, *Laws as Harsh as Tigers* 20 (2000). Newspapers called for "curbs on the courts;"

community groups, "incensed by the court decisions, called for the impeachment of the judges;" and even some of the judges who had been granting habeas petitions themselves supported "sterner measures," "primarily out of their despair over their crushing caseload." *Id.* at 20-21, 97. Indeed, an administrative immigration inspector concluded that "landing the Chinese under the writ of habeas corpus by the United States courts" was the primary impediment to implementing the Chinese Exclusion Act. H.R. Rep. No. 51-4048, at 272; *see also id.* at 274-75 (noting a single attorney had 27 immigration cases pending before *this Court*).

In response, Congress enacted a series of statutes that governed from 1891 to 1952, eliminating judicial review by making administrative immigration orders "final" (hence the term "finality era"). *See* Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085; Act of Aug. 18, 1894, ch. 301, 28 Stat. 252, 372, 390; Immigration Act of 1907, ch. 1134, § 25, 34 Stat. 898, 906-07; Immigration Act of 1917, ch. 29, § 17, 39 Stat. 874, 887.

In *Heikkila v. Barber*, the Court explained that these finality provisions eliminated all review "except insofar as it was required by the *Constitution*." 345 U.S. 229, 235 (1953) (emphasis added). The Court expressly acknowledged that "Congress had intended to make these administrative [immigration] decisions nonreviewable to the fullest extent possible under the Constitution." *Id.* at 234. Yet the Court emphasized that, despite these statutory bars, the courts, including this Court, continued to exercise habeas review over legal claims in case after case. *See id.* at 235.

Because the courts could exercise review during the finality period *only* if it was "required by the Constitution," an examination of the dozens of cases decided during this 60-year span maps the constitutional floor set by the Suspension Clause. Critically, courts in this era exercised habeas review even where noncitizens had *unlawfully* entered the country or were seeking *initial admission at a port of entry*. While the Court did not review factual determinations (except to satisfy the due process requirement that there be "some evidence" supporting the factual finding), it routinely reviewed legal claims that the Executive's decisions did not comply with the Constitution, statutes, and regulations. This history demonstrates that immigration expulsion orders constitute a "restraint" for purposes of habeas corpus and that review of legal claims is required.

This principle was established in the very first case decided under the finality scheme, *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), which involved an immigrant seeking initial admission at a port of entry. The Court observed that Congress had previously authorized full judicial review of both facts and law. *See id.* at 660. Given the 1891 provision making immigration decisions "final," the Court held that it could no longer review "the facts on which the right to land depends," because such *factual* determinations could constitutionally be "entrusted by congress to executive officers." *Id.* Nevertheless, the Court reviewed legal challenges to the exclusion order, explaining: "An 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.* (emphasis added). It therefore reviewed, though rejected on the merits, the petitioner's legal claims. *Id.* at 663.

Similarly, in *Gegiow v. Uhl*, 239 U.S. 3 (1915), the Court exercised review over legal claims despite the finality provision. The Court reversed the exclusion orders of "Russians seeking to enter the United States" at the border, explaining that when "a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus." *Id.* at 8-9 (holding that the officers' decision was inconsistent with statute). Thus, although these petitioners had not entered at all, the Court underscored that they were entitled to habeas review of the legality of their exclusion. Nor did the possibility that they could voluntarily turn back to their countries alter the availability of that jurisdiction.

Throughout the 60-year finality period, this Court (and lower courts) continued to exercise habeas review in cases involving noncitizens seeking initial admission at a port of entry. *See, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539 (1950); *United States ex rel. Johnson v. Shaughnessy*, 336 U.S. 806, 808, 815 (1949); *United States ex rel. Polymeris v. Trudell*, 284 U.S. 279, 280 (1932); *Yee Won v. White*, 256 U.S. 399, 399-400 (1921); *Gonzales v. Williams*, 192 U.S. 1, 7, 15 (1904).

Likewise, courts during the finality era reviewed cases where the petitioners challenging their deportation had entered the country *illegally*.

In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 262 (1954), decided under the pre-1952 finality statute, the Court overturned a deportation order on regulatory grounds, despite acknowledging that the petitioner "entered the United States . . . without immigration inspection and without an immigration visa." *See also, e.g.*, *United States v. Vanbiervliet*, 284 U.S. 590 (1931) (mem.) (answering certified question regarding merits claim of habeas petitioner who "entered without inspection"); *Kanaszczyc v. Mathews*, 30 F.2d 573, 573 (6th Cir. 1929) (granting habeas to petitioner who entered unlawfully); *MacKusick v. Johnson*, 3 F.2d 398, 399 (1st Cir. 1924) (denying habeas on the merits to petitioner who entered unlawfully).[3]

2. The government argues that (a) notwithstanding *Heikkila*'s unambiguous conclusion that the finality provisions eliminated all review except that "required by the Constitution," the provisions *may* not have done so, and that in any event *Heikkila*'s conclusion was only "dictum"; (b) the courts during the finality era did not specifically state that they were exercising constitutionally mandated review; and (c) even if the courts exercised constitutionally required review, that review may

[3] The government (at 22) cites *Zakonaite v. Wolf*, but there the Court reviewed the legal claims, and refused only to review "findings of fact." 226 U.S. 272, 274-75 (1912). The government's reliance (at 22) on *Carlson v. Landon* is similarly misplaced, because the Court noted only that full judicial review of law and facts was not required, but stated that deportation "is, of course, subject to judicial intervention under the 'paramount law of the constitution.'" 342 U.S. 524, 537 (1952) (citing habeas decision in *Ekiu*).

have been mandated by a provision other than the Suspension Clause. Pet. Br. 38-40.

a. The government first suggests that the finality provisions *may* simply have been intended to preclude review of only factual questions, thereby allowing the courts to continue reviewing legal challenges. Pet. Br. 39-40. But the text of the finality provisions nowhere distinguished between law and fact, instead categorically providing that: "All decisions made by the inspection officers . . . touching the right of any alien to land . . . shall be final . . . ." Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085.[4]

Indeed, the government told this Court at the time that the finality provisions reduced review to the constitutional minimum: "The clear purpose of this provision was to preclude judicial review of the Attorney General's decisions in alien deportation cases *insofar as the Congress could do so under the Constitution*." U.S. Br. 19, *Martinez v. Neelly*, 344 U.S. 916 (1953) (No. 52-218), 1952 WL 82610 ("*Martinez* Br.") (emphasis added); *see id.* at 13-14 (stating that "the finality provision . . . had long been construed as making the Attorney General's decision in deportation cases 'final' so far as Congress may do under the Constitution").[5] This Court agreed.

The government now argues (at 39) that *Heikkila*'s conclusion that the finality provisions

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[4] The subsequent finality provisions used materially identical language.

[5] In *Heikkila*, the government adopted the discussion of this issue from its *Martinez* brief. *See* U.S. Br. 10-11, 14, *Heikkila*, 1953 WL 78378. *Martinez* was affirmed by an equally divided Court. 344 U.S. 916 (1953).

reduced review to that "required by the Constitution" was merely dictum. But this Court subsequently endorsed *Heikkila*'s reading of the finality provisions, over the dissenting opinion on which the government now relies. *St. Cyr*, 533 U.S. at 301. In any event, the conclusion that the finality provisions reduced review to the constitutional minimum was necessary to the Court's ultimate holding in *Heikkila* – as the government itself explained at the time. *Martinez* Br. at 35.

The issue in *Heikkila* was whether the plaintiff could challenge his deportation on legal grounds in an Administrative Procedure Act ("APA") action. Because the APA was inapplicable "so far as" Congress sought to "preclude judicial review" in other statutes, 345 U.S. at 231 n.3 (internal quotation marks omitted), the case turned on the proper interpretation of the governing finality provision. If that provision precluded review only "so far as" one sought review of facts, then the plaintiff could have brought his *legal* claim under the APA. *See id*. at 240 (Frankfurter, J., dissenting). But because the Court held that Congress had eliminated *all* review, leaving only that jurisdiction "required by the Constitution," the plaintiff was barred from bringing an APA action to raise even his legal claim.

The government said precisely this at the time:

> Where the Congress, in an area where it may constitutionally do so, provides that administrative findings of fact shall be conclusive, the [APA] . . . will govern the review of questions of law. Where, as in the Immigration Act . . . Congress

> deliberately provides that the administrative decisions shall be "final," the only review permitted . . . is that required by the Constitution—in habeas corpus proceedings.

Martinez Br. at 35. This Court adopted the government's view that the finality provisions barred all review, not just of factual questions, and for that reason held that the plaintiff could not proceed under the APA. 345 U.S. at 235. The Court's conclusion that the finality provisions barred the courts from exercising *any* review except that "required by the Constitution" was therefore a holding necessary to the judgment.

b. The government alternatively argues that even if the finality provisions did reduce review to the constitutional minimum, courts during that era *may* not have understood that limitation. That argument is wrong for several reasons.

First, it conflicts with this Court's explanation in *Heikkila* that "[d]uring [the finality era], the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution." *Id.* at 234. The government's contention that the courts failed to grasp the significance of the finality provisions is also at odds with its own view during that period: "[T]he *courts have long recognized*" the finality provisions "restrict[] review of deportation orders *as far as the Constitution permits*." *Martinez* Br. at 33 (emphasis added).

Second, *Heikkila* itself obviously understood that the finality provisions reduced review to that required by the Constitution. Yet the Court did not

suggest that the plaintiff was therefore unable to challenge the legal grounds for his deportation by any means. Rather, the Court expressly affirmed: "Now, as before, [the plaintiff] may attack a deportation order only by habeas corpus." 345 U.S. at 235.[6] And, indeed, the Court thereafter continued to exercise the habeas review that *Heikkila* held was constitutionally required – including in *Mezei*, 345 U.S. 206, decided the very same day as *Heikkila*, and *Accardi*, 347 U.S. 260, decided one year later.[7]

Third, any suggestion that the finality-era review was authorized by the habeas *statute* is untenable. If that were the case, the finality-era courts would have had jurisdiction not just over legal claims, but over facts as well, because the extant habeas statute, the 1867 Habeas Corpus Act, expressly provided for review of both. *See* Habeas Corpus Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 386 (a "court or judge shall proceed in a summary way to determine the facts of the case"); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 987 (1998) ("Neuman") (cited in *St. Cyr* and *Boumediene*); *In re Neagle*, 135 U.S. 1, 72, 75 (1890) (explaining that the 1867 Act was an "extension of the powers of the court under the writ of *habeas corpus*" to "examine into the facts"). Yet, as the government concedes (at 23), courts did not review facts under

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[6] The fact that Heikkila was seeking to raise a constitutional claim is of no significance because the government is arguing that Mr. Thuraissigiam cannot invoke the Suspension Clause at all, even for constitutional claims.

[7] Both were decided under the same pre-1952 finality provision *Heikkila* addressed.

the finality provisions. Thus, although petitions were brought pursuant to the habeas statute, the *scope* of review was only that "required by the Constitution."

Fourth, the government suggests that the four finality-era cases cited by the Ninth Circuit – which, as noted, are far from the only finality-era cases – exercised review only because they interpreted "the scope of the applicable finality statute" to preserve review of legal claims, and not because they viewed review of legal claims as constitutionally required. Pet. Br. 39-40 (citing *Ekiu*, *Gegiow*, *Knauff*, and *Mezei*). That argument is again inconsistent with the position the government took at the time – and this Court's holding in *Heikkila*. Nor do any of the four cases remotely suggest that the statute's categorical term "final" could be construed to differentiate between facts and law, and to preclude review of only the former.

As noted, *Ekiu* reviewed legal claims brought by a noncitizen prevented from landing, and did so because that review was constitutionally required. The Court explained that the finality provision was "manifestly intended to prevent the question of an alien immigrant's right to land . . . from being impeached or reviewed, in the courts or otherwise." 142 U.S. at 663. Contrary to the government's position, the Court did not suggest that the provision's text allowed legal conclusions, but not facts, to be "impeached or reviewed." Instead, the Court focused on Congress's *constitutional* power to limit judicial review, holding that although "the final determination of . . . *facts* may be *entrusted by congress* to executive officers," the petitioner was "doubtless entitled" in habeas to test whether the order was "lawful." *Id*. at 660-61 (emphasis added).

The other three cases all cited *Ekiu* and reiterated this same understanding. *Gegiow*, 239 U.S. at 9 (explaining that although "matters of fact" were unreviewable, noncitizens could challenge the legality of their exclusion); *Mezei*, 345 U.S. at 212-13 (explaining that although the courts could not "retry the determination of the Attorney General," a noncitizen "may by habeas corpus test the validity of his exclusion"); *Knauff*, 338 U.S. at 543-44, 546-47 (similar).

c. Finally, the government argues that even if the courts in the finality-era cases were exercising constitutionally required review, they may have believed the constitutional source was not the Suspension Clause. Pet. Br. 39. The government offers no basis for that suggestion, and the government itself contemporaneously viewed the Suspension Clause as the constitutional source of review. *See Martinez* Br. at 18 (explaining that the finality provisions "precluded judicial review of deportation orders except for *the collateral review in habeas corpus which the Constitution prescribes in cases of personal detention*") (emphasis added). Moreover, as noted *infra, St. Cyr* relied specifically on the Suspension Clause in its analysis of the finality-era decisions. 533 U.S. at 300.

Thus, the finality-era cases establish that the Suspension Clause extends to Mr. Thuraissigiam, and guarantees him judicial review of his legal claims.

B. The Court's Decisions In *St. Cyr* And *Boumediene* Confirm That The Suspension Clause Guarantees Review Of The Legality Of Mr. Thuraissigiam's Removal Order.

This Court, in *St. Cyr* and *Boumediene,* has twice recently reaffirmed that the Suspension Clause, at a minimum, guarantees judicial review of legal challenges to executive restraints on liberty. As the Court stated in *St. Cyr,* "[b]ecause of that Clause, some 'judicial intervention in deportation cases' is *unquestionably* 'required by the Constitution.'" 533 U.S. at 300 (emphasis added) (quoting *Heikkila*, 345 U.S. at 235).[8] *St. Cyr* also made clear that the baseline level of review required by the Suspension Clause includes constitutional and legal claims. *Id.* at 302-08 (collecting cases).

The government dismisses *St. Cyr* as involving only "constitutional avoidance." Pet. Br. 18. But the Court's position that the Constitution "unquestionably" requires some judicial review of deportation orders was the predicate for its subsequent conclusion, necessary to the judgment, that a "serious constitutional question" would be raised if there were no review of the *particular* claim at issue: namely, a legal claim regarding a *discretionary* form of relief. 533 U.S. at 304-05.[9] The

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[8] The government acknowledges this sentence but omits the word "unquestionably." Pet. Br. 18, 31.

[9] Here, officers have no discretion to reject a credible fear claim if the significant possibility standard is met and must place the individual into full removal proceedings. 8 C.F.R. § 208.30(f). Additionally, the credible fear proceeding includes screening for mandatory forms of relief like withholding of removal. *See Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013).

Court was able to characterize the latter question, regarding discretionary relief, as "serious" only because it first concluded that the Suspension Clause "unquestionably" applies to deportation.[10]

The government additionally dismisses *St. Cyr* because it involved a lawful permanent resident. Pet. Br. 18, 33, 37. But this fact was irrelevant to the Court's analysis. Rather, the Court relied interchangeably on finality-era cases in which noncitizens had entered lawfully, or unlawfully (such as in *Accardi*), or were seeking initial admission at a port (such as in *Ekiu* and *Gegiow*). 533 U.S. at 306-08. Thus, while *St. Cyr* itself did not involve a recent unlawful entrant, it endorsed the finality-era cases, which draw no such distinction and resolve the instant case.

The government also notes (at 38) that *St. Cyr* involved a *pure* legal question. But *St. Cyr* concluded that habeas has historically covered both the "interpretation" and "application" of the law. 533 U.S. at 302; *see also infra* Section III. In any event, the government's threshold argument is that the Suspension Clause does not provide Mr. Thuraissigiam with the right to challenge his removal on *any* grounds.

Most recently, *Boumediene* unambiguously reaffirmed that the Suspension Clause requires review of "'the erroneous application or interpretation' of relevant law." 553 U.S. at 779

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[10] Moreover, even if the Suspension Clause analysis is viewed entirely as constitutional avoidance, this Court has stressed that such analysis should "guide" the subsequent resolution of the constitutional question. *Shelby County v. Holder*, 570 U.S. 529, 542 (2013).

(quoting *St. Cyr,* 533 U.S. at 302). And it did so in holding that the Suspension Clause applied even to alleged enemy combatants held at Guantanamo, who had never set foot in the United States. The government dismisses *Boumediene* on the ground that it was not a removal case, but *Boumediene* relies on *St. Cyr* for the proposition that legal claims must be reviewable. *Boumediene* thus reaffirms the conclusion of both the finality-era cases and *St. Cyr*: Review of legal claims is an indispensable feature of the constitutional writ.[11]

C. The Common Law Reinforces That The Suspension Clause Guarantees Habeas Here.

1. Not long after Congress enacted the first immigration statutes in 1875, this Court rejected the notion that a noncitizen at a port of entry "was not restrained of his liberty" for purposes of invoking habeas corpus. *Jung Ah Lung*, 124 U.S. at 626. In rejecting the government's argument that "the only restraint of the party was that he was not permitted to enter the United States," the Court explained that the petitioner was in reality restrained at the direction of the U.S. government. *See id*. It did not matter that he sought only to challenge the lawfulness of his exclusion order, or that the detention would end after deportation. The petitioner was restrained of his liberty, and habeas was therefore available to test the lawfulness of that restraint. *See also Chin Yow v. United States*, 208

[11] Citing *Felker v. Turpin*, 518 U.S. 651 (1996), the government suggests Congress controls the writ's scope. Pet. Br. 28. But Congress's power is limited by the Suspension Clause – as *Boumediene*, *St. Cyr*, and the finality-era cases demonstrate.

U.S. 8, 12-13 (1908) (explaining that, "niceties" aside, "it would be difficult to say that [the petitioner] 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 China"); *Ekiu*, 142 U.S. at 660 (a noncitizen prevented from "landing" is "restrained" for purposes of habeas corpus).

Those holdings reflected the long tradition of common-law habeas as it existed at the time of the Framing.[12] As this Court has recognized, in 1789 habeas was a powerful tool for judicial examination of the lawfulness of restraint in a wide range of contexts. *St. Cyr*, 533 U.S. at 301-02 & nn.16-22 (collecting cases). The writ was particularly robust where, as here, petitioners challenged *executive* restraint, "where there had been little or no previous judicial review of the cause for detention." *Boumediene*, 553 U.S. at 780; *see also St. Cyr*, 533 U.S. at 301.

The writ's "central premise" was that it "empower[ed] the justices to examine detention in all forms," meaning that "the court might inspect imprisonment orders made at any time, anywhere, by any authority." Paul D. Halliday, *Habeas Corpus: From England to Empire* 160, 176 (2010) ("Halliday"). Habeas "was appropriate," for example, to test whether a woman "was being constrained by

[12] To the extent the government is asking the Court to decide whether the scope of the Clause has expanded since 1789 – an issue the Court has been "careful" to reserve, *Boumediene*, 553 U.S. at 746 – there is no reason to do so here. The Clause as the Court has interpreted it, and the writ as it existed in 1789, guarantee review in this case.

her guardians to stay away from her husband," or the lawfulness of covenants of indentured servitude. *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (citing cases). "The test used was simply whether she was 'at her liberty to go where she please(d).'" *Id.* (quoting *R. v. Clarkson,* 93 Eng. Rep. 625 (K.B. 1722)). Habeas was, as Blackstone put it, "efficacious . . . in all manner of illegal confinement." 3 William Blackstone, Commentaries on the Laws of England 131 (1st ed. 1768).

Consistent with this general conception of habeas as available to test all forms of physical restraint, the common-law courts used habeas to assess the lawfulness of transfers outside the country. In *Murray's Case*, for example, a Scot was imprisoned in 1677 on two occasions "in order to his being sent into Scotland to be tried there according to law for several crimes." Halliday at 236 (internal quotation marks omitted). The King's Bench issued the writ, and ultimately prevented his removal to Scotland. *Id.*

Similarly, in *Somerset's Case*, 98 Eng. Rep. 499 (K.B. 1772), the King's Bench issued the writ to prevent an individual allegedly bound to slavery from being sent to Jamaica. *See* Halliday at 174-76; *St. Cyr*, 533 U.S. at 302 n.16. Notably, Chief Justice Mansfield avoided the question of the lawfulness of slavery per se, instead ruling only that there was no authority under English law to force a slave to *leave the country* against his will. John Baker, An Introduction to English Legal History 514 (5th ed. 2019). Thus, "the Somerset judgment did not free a slave so much as it protected him from deportation." Halliday at 175; *see also id.* at 255-56 (explaining that in 1793 Parliament deemed it "necessary" to

suspend habeas for aliens detained "as a prelude to deportation") (citing 33 Geo. 3 c.4).

Habeas was similarly available to challenge the legality of extradition. *See* Neuman at 994-1004; Halliday at 165-66 (describing English soldier's 1814 use of habeas to "avoid being sent to court martial in the Netherlands").[13]

2. The government argues – without citation – that the common-law writ applied only to a category of claims it identifies as challenges to "detention as such," and that the custody and forcible restraint involved in deportation and the denial of admission fall outside that category. Pet. Br. 30.

The government's position has extraordinary implications. On its view, no immigration removal order would be subject to Suspension Clause review, no matter how legally erroneous. Individuals subject to the nationwide expanded expedited removal procedures – who have been in the country up to two years – would not be entitled to challenge their removal orders, even if the orders were patently in violation of the governing law. Indeed, under the government's argument, Congress could eliminate review even for lawful permanent residents who have been residing in the United States for decades, served in the armed forces, and raised U.S. citizen children. Recognizing that such a result would be untenable, the government suggests that because such individuals have stronger "liberty interests," they might still be entitled to habeas protection. Pet. Br. 33. But that concession is irrelevant to its

[13] The government does not explain why it views extradition transfers as "distinct." Pet. Br. 32.

contention that a common-law habeas court lacked the power to issue the writ to block an unlawful removal. The government is simply trying to hide the transformative sweep of its unprecedented position – which would allow for the summary arrest and detention of lawful permanent residents without *any* judicial review, on the say-so of an administrative officer.

The government's argument also misreads common-law precedent and offers no basis for undoing this Court's decisions. The government appears to be making two arguments why the common-law writ would not apply: (a) Mr. Thuraissigiam is seeking a new hearing, not unconditional release; and (b) common-law courts could not issue the writ to block a removal. Both are wrong.

a. The government suggests (at 34, 37) that habeas is not available because Mr. Thuraissigiam seeks a new asylum interview, not an order categorically prohibiting his removal or vacating the removal order with prejudice. But he requests an entirely ordinary habeas remedy: conditional release pending a lawful adjudication. J.A. 33.

If the government is arguing that the writ applies only where the petitioner seeks *unconditional* release, that argument is foreclosed by *Boumediene* (as well as the finality-era cases). In *Boumediene,* the Court explained that one of the "easily identified attributes of any constitutionally adequate habeas corpus proceeding" is that "the habeas court must have the power to order the *conditional* release of an individual unlawfully detained." 553 U.S. at 779 (emphasis added). Release must be available, but

"need not be the exclusive remedy." *Id.* In thus allowing for *conditional* release, the Court in *Boumediene* accepted the *government's* argument in that case that it should be afforded another opportunity to obtain a lawful order justifying detention. *See* U.S. Supp. Br. 9, *Boumediene*, 2008 WL 877874 (arguing that "even if courts are recognized to have the authority to order release, in the ordinary case, remand, rather than release, would be the appropriate remedy"); *see also* U.S. Br. 60-61, *Boumediene*, 2007 WL 2972541 (urging remand "to allow the application of appropriate procedures").

This same rule has always applied "in *habeas corpus* proceedings to test the legality of confinement under the decision of an administrative tribunal . . . in deportation cases." *Mahler v. Eby*, 264 U.S. 32, 46 (1924); *see also, e.g.*, *Tod v. Waldman*, 266 U.S. 113, 120 (1924); *Chin Yow*, 208 U.S. at 13. That is the essence of the habeas claim in countless of this Court's cases: a reprieve from expulsion pending a new hearing.

b. The government also suggests (at 32) that a common-law habeas court could not block a transfer. The government recognizes that Mr. Thuraissigiam spent two years in detention and does not dispute that he will again be detained and forcibly relocated if his removal order is executed. The government appears to argue, however, that because the ultimate *purpose* of that custody and restraint is not to imprison him, but to remove him, it falls outside the common-law writ. But, as noted, common-law courts blocked transfers, and physical restraints more generally, regardless of the purpose. *See also, e.g.*, *R. v. Nathan*, 93 Eng. Rep. 914 (K.B. 1724) (habeas

review of restraint intended to coerce financial disclosure). The government offers no authority that deportation and the associated physical restraint are an exception to this otherwise sweeping common-law power to inquire into the legality of any restraint (including forcible transfers), whatever its purpose or context.[14]

Similarly, the government's suggestion (at 18, 34, 37, 42) that Mr. Thuraissigiam's removal falls outside of habeas because the corresponding detention "is designed to be brief," and he will be "released" upon return to Sri Lanka, has no basis in the common law. There is no temporal exemption to habeas, permitting lawless restraints if they are brief. Nor did the length of one's prior presence in the country limit access to habeas, which was available "the moment a man land[ed]" in England. *R. v. Thames Ditton*, (K.B. 1785), *reprinted in* 2 Francis Const, Laws Relating to the Poor 331 (3d ed. 1793) (discussing *Somerset's Case*).

The government emphasizes that this Court's habeas cases often refer to "executive detention." Pet. Br. 28-29 (citing, e.g., *St. Cyr*). But the language the government cites simply drew the fundamental distinction between habeas challenges to criminal convictions (where there has already been full judicial review and often a jury trial) and habeas

[14] The government notes that there was no federal immigration regulation before 1875. But there need not, of course, be common-law precedent addressing the precise circumstances for the Suspension Clause to apply. *See Boumediene*, 553 U.S. at 752 (conducting exhaustive search of English precedent but concluding that "the common-law courts simply may not have confronted cases with close parallels to this one").

challenges to *executive* detention (where there has been none). *See, e.g., Boumediene*, 553 U.S. at 780. In any event, the inescapable reality, recognized in *Ekiu* and numerous other cases, is that removal requires a restraint of physical liberty – including detention. *Ekiu*, 142 U.S. at 660.

Finally, the government's reliance on *Munaf v. Geren*, 553 U.S. 674 (2008), is misplaced. *Munaf* addressed the unique wartime circumstances where the United States was holding prisoners on Iraqi soil who sought to avoid Iraqi criminal process. The petitioners were not asking the Court to prohibit their transfer out of the territory but to compel it. The Court thus observed that "the 'release' petitioners seek is nothing less than an order commanding our forces to smuggle them out of Iraq." *Id*. at 697. As the D.C. Circuit explained, *Munaf*'s holding has no bearing on the kind of claim in this case:

> None of this means that the Executive Branch may detain or transfer Americans or individuals in U.S. territory at will, without any judicial review of the positive legal authority for the detention or transfer. In light of the Constitution's guarantee of habeas corpus, Congress cannot deny an American citizen or detainee in U.S. territory the ability to contest the positive legal authority (and in some situations, also the factual basis) for his detention or transfer unless Congress suspends the writ because of rebellion or invasion.

Omar v. McHugh, 646 F.3d 13, 24 (D.C. Cir. 2011) (Kavanaugh, J.).

In short, from the common law through the finality era to *Boumediene*, the courts have reaffirmed the availability of the writ to those, like Mr. Thuraissigiam, who challenge the legality of a restraint on their liberty. To deny habeas here would be the first time in this Court's history that it denied habeas review of a challenge to deportation.

II. THE SUSPENSION CLAUSE DOES NOT HINGE ON DUE PROCESS RIGHTS AND, IN ANY EVENT, MR. THURAISSIGIAM IS ENTITLED TO PROCEDURAL DUE PROCESS REGARDING HIS REMOVAL.

The Suspension Clause, as a structural safeguard against the unlawful restraint of liberty by the political branches, guarantees Mr. Thuraissigiam judicial review of whether his removal is in violation of the governing statute and regulations, regardless of whether he also has procedural due process rights in contesting his removal. In any case, Mr. Thuraissigiam is entitled to procedural due process because he entered the country. The government's proposal to adopt an entirely new due process test is contrary to precedent, unworkable, and ultimately beside the point, because the Suspension Clause applies independently of due process.

A. The Suspension Clause Does Not Hinge On Due Process Rights.

Habeas and due process are distinct constitutional safeguards appearing in different clauses of the Constitution. The Suspension Clause does not provide the legal standards for restraints on

liberty, but guarantees a mechanism – court review – to ensure that restraints comport with positive law, including, where applicable, constitutional law. Thus, even where one lacks due process rights (or due process is satisfied), the Suspension Clause guarantees a judicial forum to ensure that custody complies with statutory and regulatory law. Indeed, the Framers could not have intended the Suspension Clause to guarantee habeas corpus only where one could invoke the Due Process Clause given that the Bill of Rights was adopted four years *after* the Suspension Clause. *Boumediene*, 553 U.S. at 739 (stressing chronology).

To conceive of access to habeas as turning on the *rights* one can claim fundamentally misunderstands its role. At common law, habeas was a "high prerogative writ," *Ex parte Watkins*, 28 U.S. 193, 202 (1830), meaning that it served to enforce "the *King's* prerogative to inquire into the authority of a jailer to hold a prisoner," *Boumediene*, 553 U.S. at 741 (emphasis added). Thus, "the writ's strength arose less from its concern with the rights of prisoners than with the wrongs of jailers, the wrongs committed by someone commissioned to act in the king's name." Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 644 (2008) (cited in *Boumediene*).

When the Framers enshrined the writ into our Constitution, they did so as part of "the constitutional plan that allocated powers among three independent branches." *Boumediene*, 553 U.S. at 742. In place of a King's prerogative to call any jailer to account, they dictated that *judges* would always be empowered to inquire into the legality of

physical restraint by the other branches, except during formal, and carefully circumscribed, suspensions. *Id*. at 743; *see also id*. at 744 (noting that Alexander Hamilton had "explained that by providing the detainee a judicial forum to challenge detention, the writ preserves limited government"). The Suspension Clause thus serves as a structural constraint on the power of the Executive and Legislature.

For the Framers, this "separation-of-powers" check was an essential feature of non-arbitrary government based on the rule of law. *Id*. at 742-44. Like other structural constraints, the Suspension Clause in no way hinges on whether one has – or is asserting – other constitutional rights. *See id*. at 743 ("foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles") (citing *INS v. Chadha*, 462 U.S. 919, 958-59 (1983)). Indeed, common-law habeas courts routinely enforced the requirements of positive statutory law. *St. Cyr*, 533 U.S. at 302-03 (noting that habeas was not "only available for constitutional error," and collecting cases).

Consistent with this history, the Court's decisions leave no doubt the reach of the Suspension Clause does not hinge on whether one has due process rights. In *Boumediene*, for instance, the Court enforced the Suspension Clause without deciding whether the detainees also had Fifth Amendment due process rights. *See* 553 U.S. at 801 (Roberts, C.J., dissenting) (noting that the majority had not decided "what due process rights the detainees possess").

Likewise, in *Mezei* – which, as noted, was decided the same day as *Heikkila* – the Court expressly held that the petitioner lacked procedural due process rights regarding his denial of entry, yet exercised habeas review *required by the Suspension Clause* to ensure that the exclusion order was consistent with the governing statutes and regulations. *Mezei*, 345 U.S. at 212-13 (stating that, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" but that "he may by habeas corpus test the validity of his exclusion") (internal quotation marks omitted); *id.* at 211 (holding on the merits that the Attorney General had "proceeded in accord with" the relevant statutory and regulatory provisions and "made the necessary determinations"); *see also Knauff*, 338 U.S. at 542-47 (similar).

The government mistakenly relies on *Heikkila* to suggest that habeas is limited to the "enforcement of due process requirements." Pet. Br. 23. But the Court there merely described the minimal constitutionally required review of *facts* – namely, the due process requirement that there be "some evidence" to support a factual determination. Facts were therefore reviewable to that limited extent under a regime otherwise permitting review of only legal and constitutional claims. *See* Neuman at 1018-19 & n.363.[15]

[15] The government's reliance on *Fay v. Noia*, 372 U.S. 391 (1963), is also misplaced. *Fay* was a collateral criminal habeas case, and in no way limited the rights that one could assert in habeas review of *executive* actions.

The government also incorrectly relies on language in *Landon v. Plasencia* that "an alien seeking initial admission . . . requests a privilege and has no constitutional rights regarding his application." 459 U.S. 21, 32 (1982). *Plasencia* did not involve any question regarding habeas or judicial review. *See id.* at 26 (noting that petitioner was entitled to judicial review by statute). The only constitutional issue was whether the petitioner was entitled to procedural due process even though she was at a port of entry. *Id.* at 32. The Court noted that noncitizens at a port generally do not have procedural due process rights in contesting the denial of entry, but held that Plasencia, as a returning lawful permanent resident, was entitled to procedural due process. *Id.* at 32-34. The government misreads the language "no constitutional rights" to have decided issues far beyond the due process claim at issue there. That language cannot be understood to have decided a momentous *Suspension Clause* question not even presented. *See Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 450 (3d Cir. 2016) (Hardiman, J., concurring dubitante) (acknowledging that *Plasencia* did not "purport to resolve" any jurisdictional or Suspension Clause question).

That constitutional habeas does not hinge on due process is unremarkable given their very different objectives and histories. Indeed, the fewer one's constitutional rights, the *more* critical habeas becomes.

B. In Any Event, Mr. Thuraissigiam Is Entitled To Procedural Due Process In Contesting His Removal.

1. Mr. Thuraissigiam is entitled to due process, because he *entered* the United States, and was not at a port of entry when arrested. That rule flows from the text of the Fifth Amendment: "No *person* shall . . . be deprived of . . . liberty . . . without due process of law." U.S. Const. amend. V (emphasis added). Every person within U.S. territory is entitled to due process.

The only exception to this rule is the controversial "entry fiction" doctrine originating in a pair of 1950s Cold War national security cases. Under that doctrine, those stopped at a port before entering the country – and only those stopped at a port – are deemed to be outside the county and not entitled to procedural due process rights to challenge their exclusions. *See Mezei*, 345 U.S. at 213; *Knauff*, 338 U.S. at 544; *see also Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001) (refusing to expand the scope of the entry fiction doctrine, and reiterating that "once an alien enters the country," he is entitled to due process in his removal proceedings because "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").[16]

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[16] The circuits have adhered to this due process line for decades. *See*, *e.g.*, *Rios-Berrios v. INS*, 776 F.2d 859, 860, 862-63 (9th Cir. 1985) (noncitizen apprehended same day as unlawful entry entitled to procedural due process); *Maldonado-Perez v. INS*, 865 F.2d 328, 329-30, 332 (D.C. Cir. 1989) (same, apprehended day after unlawful entry); *Zheng v. Mukasey*, 552 F.3d 277, 279,

The government itself has long recognized the limited scope of the entry fiction doctrine:

> JUSTICE BREYER: A person who runs in illegally, a person who crosses the border illegally, say, from Mexico is entitled to these rights when you catch him.
>
> [Government Counsel]: He's entitled to procedural due process rights.

See Tr. Oral Arg. at *25, *Clark v. Martinez*, 543 U.S. 371 (2005) (Nos. 03-878, 03-7434), 2004 WL 2396844. That unequivocal answer accurately reflected the government's longstanding and consistent position. *See, e.g.*, U.S. Reply Br. 6-7, *Clark*, 2004 WL 2006590 (recognizing the "continuing vitality" of "the fundamental distinction . . . in the Constitution between aliens stopped at the border and those who have entered"); U.S. Br. 30-31, *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (No. 52-17), 1952 WL 82372 (noting "the well-established doctrine that an alien who is actually in this country, whether he entered legally or illegally, is under the mantle of the Constitution, and hence that proceedings against him are subject to due process limitations").

The government now suggests (contrary to its prior recognition) that the rule is unsettled as to recent unlawful entrants, pointing to *Yamataya v. Fisher*, 189 U.S. 86 (1903). *Yamataya* held, however, that the petitioner *was* entitled to procedural due

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286 (2d Cir. 2009) (same, noncitizen apprehended one week after entry); *see also United States v. Campos-Asencio*, 822 F.2d 506, 507, 509 (5th Cir. 1987) (same, apprehended same day as unlawful re-entry).

process despite being arrested only four days after she was illegally admitted. *Id.* at 101. The government cites the Court's statement that it was putting "on one side" the case of a noncitizen "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." *Id.* at 100. But the Court plainly did not *decide* that those who enter "clandestinely" are *not* entitled to procedural due process, and since that time the Court has regularly reiterated that the entry fiction doctrine has no application to unlawful entrants. *See, e.g.*, *Zadvydas*, 533 U.S. at 693-94; *Mezei*, 345 U.S. at 212 (noncitizens who have "passed through our gates, even illegally" are entitled to due process); *see also Mathews v. Diaz,* 426 U.S. 67, 77 (1976) (due process protects "[e]ven one whose presence in this country is unlawful, involuntary, or transitory").

2. The government's submission is ultimately that the Court should radically rewrite constitutional doctrine and expand the entry fiction to eliminate procedural due process rights not just for those stopped at a port of entry but for any noncitizen deemed to have entered the country unlawfully. Doing so, however, would contravene decades of settled doctrine and practice and mean that even those in the country for years could be summarily removed without *any* administrative process (and, because the government links habeas to due process, without *any* judicial review).

The government bases its proposal on changes in the 1996 legislation, under which those at a port of entry *and* those who entered unlawfully are now treated for statutory purposes as seeking "admission." The government suggests that the

constitutional line should be derived from the *statutory* line, and that Congress's decision to treat unlawful entrants as seeking "admission" should be constitutionalized. Pet. Br. 25-27. But Congress's decision to change the statutory line cannot dictate the Constitution's applicability.[17]

The government also seeks support for its new constitutional line from *Plasencia*, Pet. Br. 21-23, but that decision demonstrates the opposite: The Court specifically *declined* to tether due process to Congress's statutory lines. The petitioner argued that although she was at a port of entry, she should have been placed into deportation proceedings as a returning lawful permanent resident, and not into exclusion proceedings, the typical procedure dictated by statute for those stopped at the border. The Court held that, *as a statutory matter*, she belonged in exclusion proceedings, 459 U.S. at 30-32, but that, *as a constitutional matter*, she was entitled to due process beyond that normally afforded to those in exclusion proceedings, *id.* at 32.

Moreover, the language on which the government relies from *Plasencia* – that "an alien seeking *initial admission* . . . has no constitutional rights regarding his application" – offers no support for its new due process "admissions" test. *Id.* (emphasis added). The government contends that the

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[17] The government suggests (at 26) that *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), adopted a "functional analysis" regarding the Fourth Amendment's applicability near the border, but there the Court merely held that the "quite limited" intrusion of suspicionless checkpoints was reasonable under the Fourth Amendment, not that the Fourth Amendment was inapplicable – much less that Congress could determine when the Constitution applies. *Id.* at 557-58, 562-63.

Court's reference to those "seeking admission" sweeps in unlawful entrants. But that attempts to take advantage of the 1996 statutory change, which made "admission," rather than entry, the statute's defining concept. *See Vartelas v. Holder*, 566 U.S. 257, 262 (2012). The government cannot read the 1996 statutory terminology changes back into this Court's pre-1996 decisions. And *Plasencia* itself makes clear that the Court (in 1982) used "seeking admission" to refer to noncitizens at a port seeking entry, not to those who had already entered. 459 U.S. at 25 (contrasting deportation proceedings for those "already physically in the United States" and exclusion proceedings for those "outside the United States *seeking admission*") (emphasis added). Additionally, *Plasencia*'s constitutional analysis had no reason to address the Due Process Clause's application to those who had entered, because the petitioner was at a port. The Court's reference to those "seeking initial admission" was simply distinguishing between a returning lawful permanent resident seeking re-admission at a port of entry and those at ports seeking admission for the first time.

The consequences of the government's admission-based test cannot be overstated: Congress could constitutionally eliminate *all* administrative process *and all* judicial review for anyone who the government claims was not lawfully admitted, and summarily deport them, no matter how many decades they have lived here, how settled and integrated they are, or how many members of their family are U.S. citizens. That mistakes will occur where there is no judicial or administrative oversight hardly needs elaboration.

3. Perhaps recognizing the extraordinary reach of its novel due process "admissions" test, the government alternatively proposes that the Court abandon the current bright-line border rule for a "meaningful ties" test and hold that Mr. Thuraissigiam lacks such ties. Other than repeating that Mr. Thuraissigiam was in the country only 25 yards, the government does not explain the criteria the Court should use: How long would one have to be here or how far into the country before due process attached? Would it matter if the individual had U.S. citizen family in the country? Participation in the community's civic, economic, or religious life? Professional or educational ties? The government's open-ended, destabilizing test invites endless litigation. And, critically, Mr. Thuraissigiam does have a strong tie to this country – his right to seek relief from persecution. Congress has expressly provided for humanitarian protection for those fearing return, even after illegal entry, *see* 8 U.S.C. § 1158(a)(1), including a mandatory prohibition on removal for those who meet certain criteria, *see Moncrieffe*, 569 U.S. at 187 n.1.

The cases the government cites for its view that a noncitizen must live here for a "meaningful period" before receiving due process protection, Pet. Br. 25, are inapposite. As noted, *Plasencia expanded* the rights of lawful permanent residents at a port of entry and cut back on the controversial entry fiction doctrine. It did not address the Due Process Clause's applicability to those who have actually entered, unlawfully or not. *See also Kwong Hai Chew v.*

Colding, 344 U.S. 590, 596 n.5 (1953) (Pet. Br. 25) (same).[18]

At bottom, the government's "meaningful ties" test is not only inconsistent with settled due process doctrine, but is also an attempted end run around this Court's conclusion that the Suspension Clause applies regardless of a noncitizen's ties to the country. In *Boumediene*, 553 U.S. at 771, for example, the Court applied the Suspension Clause to noncitizen enemy combatants with *no* ties to the United States. Surely Mr. Thuraissigiam is entitled to no less. Because the government cannot claim that Mr. Thuraissigiam's recent unlawful entry on its own places him outside the ambit of the Suspension Clause, it tries to reach the same result by arguing that *procedural due process* requires meaningful ties and that the Suspension Clause applies only where noncitizens have procedural due process rights to challenge their removal. But both the premise – that Mr. Thuraissigiam has no due process rights – and the conclusion – that habeas applies only where due process does – are incorrect.

4. The government objects that this Court's longstanding doctrine guaranteeing due process to all persons who entered the United States creates a "perverse incentive" for noncitizens to enter surreptitiously. Pet. Br. 26. But the Court's *habeas* doctrine does not create any such incentive, because

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[18] The government's reliance on "substantial connections" language in extraterritoriality decisions is particularly misplaced given that this case takes place wholly on U.S. soil. Pet. Br. 25 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), involving the Warrant Clause's application to a search conducted in Mexico).

habeas is equally available for *both* those at a port and those who entered, lawfully or unlawfully.

In any event, in suggesting that after 70 years the Court now radically expand the due process entry fiction doctrine, the government offers the Court no workable line that would prevent agencies from summarily removing countless noncitizens without *any* process whatsoever. Bright line rules can provide clarity and administrability that avoid endless litigation, but can always be criticized for their application in certain cases. On the one hand, the line this Court has drawn at the border excludes from due process protections those seeking entry who have significant family or other ties and who might be entitled to due process under a "meaningful ties" test. On the other the hand, the line recognizes the longstanding significance of territorial presence and provides a measure of protection to recent entrants who could otherwise be removed in violation of law. The Court should decline the government's invitation to dramatically destabilize the rights of millions of "persons" in this country, long protected by procedural due process.

III. THE STATUTE'S SCOPE OF REVIEW DOES NOT PROVIDE AN ADEQUATE SUBSTITUTE FOR HABEAS UNDER THE SUSPENSION CLAUSE.

To fulfill the core constitutional requirement of habeas corpus, a court must be able to ensure that the government exercises physical restraint only as authorized by law. That requirement was recognized and enforced for centuries under the common law and by this Court from the finality-era cases through *St. Cyr* and *Boumediene*. The expedited removal

statute blatantly violates this baseline requirement by eliminating judicial review of all legal claims.

The government seeks to save the statute by incorrectly arguing that (1) the available administrative review adequately compensates for the virtually complete absence of judicial review; (2) the government's interest in conducting expedited proceedings outweighs the right to judicial review of legal claims; and (3) Mr. Thuraissigiam is raising only factual claims.

1. The government characterizes the available administrative process as more than sufficient and argues that judicial review of legal claims is therefore not required. Pet. Br. 41. On its view, sufficient administrative procedure warrants elimination of judicial review, even though the lack of judicial review means the agency could, in turn, ignore those very procedures with impunity. Here, the summary procedures provided in expedited removal offer little protection against legal errors. *See supra* Statement. More fundamentally, habeas requires review by *courts*, to ensure that the administrative rules are followed. "[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme" precisely because it is a *judicial* check on executive and legislative authority. *Boumediene*, 553 U.S. at 743; *see also id.* at 744 (noting that Hamilton emphasized the importance of "a *judicial* forum") (emphasis added); *accord id.* at 808 (Roberts, C.J., dissenting) (emphasizing that, "[b]ecause the central purpose of habeas corpus is to test the legality of executive detention, the writ requires most fundamentally an Article III court able to hear the prisoner's claims").

In *St. Cyr,* for example, the petitioners were entitled to full administrative hearings and administrative appellate review, yet the Court concluded that a serious constitutional question would have been raised by the lack of *judicial* review. 533 U.S. at 300-05. Similarly, in *Boumediene*, the Court did not ask whether the *administrative process* provided an adequate substitute for habeas, but whether the statute permitted "the *Court of Appeals* to conduct a proceeding meeting" the requirements of constitutional habeas. 553 U.S. at 787 (emphasis added). The finality provisions even included administrative appeal all the way to a cabinet Secretary, yet this Court still required court review of legal claims.

A habeas theory that would permit Executive Branch oversight over its own actions to displace judicial review is patently inconsistent with the Suspension Clause as an "indispensable mechanism for monitoring the separation of powers." *Id.* at 765.

2. The government relatedly argues that the Court should employ a balancing test, as it does in the due process context, to determine whether legal claims must be judicially reviewable. The government relies on *Boumediene*, but the Court there directly stated that the two fundamental requirements – review of legal claims and authority to release – were the "easily identified attributes of *any* constitutionally adequate habeas corpus proceeding." *Id.* at 779 (emphasis added). The Court did not suggest that those fundamental requirements could be balanced away. Rather, it stated that "depending on the circumstances, *more* may be required." *Id.* at 779 (emphasis added). Only in addressing what "more" beyond review of legal

claims might be required did the Court analogize to due process balancing and hold that, under the circumstances of that case, review of *facts* was *also* required. *Id*. at 780-81, 786.

The Framers included express language governing the very limited circumstances under which Congress could suspend the writ – invasion or rebellion – precisely to ensure that its protections would not be "balanced" away whenever the political branches deemed it inconvenient or burdensome. If a balancing of policy interests were enough to justify reducing habeas to an empty shell, the "care" the Framers took to define the circumstances when habeas could be suspended would be meaningless. *Id.* at 743; *cf. Chadha*, 462 U.S. at 959 (invalidating the one-House veto and stating that "the Framers ranked other values higher than efficiency").

The government states that the 1996 Congress believed that providing habeas would be a burden. That was also true of the finality-era Congress. *See supra* Section I. Yet even in the face of clear congressional intent to hasten removal proceedings, the Court ensured that constitutionally required habeas remained available. Whatever other measures Congress may take in the immigration area to limit rights, habeas must remain.[19]

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[19] In other contexts, the burdens of judicial review likewise cannot override a constitutional command. *See Stern v. Marshall*, 564 U.S. 462, 501 (2011) (rejecting argument based on burdens of court review, explaining that "[i]t goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'") (quoting *Chadha,* 462 U.S. at 944). That is only

Moreover, even if balancing were proper in the habeas context, the government understates the interests for an asylum seeker. Mr. Thuraissigiam faces a very real risk of being beaten, tortured, and killed if returned to Sri Lanka. *See* J.A. 83 (crediting his testimony). Indeed, Mr. Thuraissigiam spent two years in detention rather than face return to Sri Lanka.

The government also overstates the burdens. Few noncitizens will be in a position to file habeas petitions given how quickly they are removed and the difficulty of doing so pro se; and, of course, even those in a position to file will not necessarily choose to do so (just as many who receive ordinary removal orders, including those who have applied for asylum, do not appeal). Moreover, review of *legal* claims will not require prolonged litigation. Likewise, rulings on the legality of certain practices can definitively address entire categories of future cases through precedent, and also provide needed guidance to asylum officers, reducing errors and the need for litigation. The government's assertion that the availability of review would make expedited removal "impossible," Pet. Br. 46 (internal quotation marks omitted), is also wrong. The availability of habeas jurisdiction does not guarantee a stay of removal while courts adjudicate the habeas petition. *Cf. Nken v. Holder*, 556 U.S. 418, 425 (2009).

3. Finally, the government suggests (at 38, 45) that Mr. Thuraissigiam raises only factual claims. The district court and court of appeals accepted, however, that Mr. Thuraissigiam's petition alleged

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more true here, because the Constitution precisely specifies when habeas can be suspended.

legal and constitutional claims. Pet. App. 37a, 47a n.2, 53a. If this Court finds that Mr. Thuraissigiam can invoke the Suspension Clause to raise legal claims, it is appropriate for the district court to initially assess the precise nature of his claims.

In any event, Mr. Thuraissigiam is not challenging historical facts, such as whether or where he was beaten. Insofar as any of his claims raise mixed questions, those claims are also reviewable because, as noted, the Suspension Clause mandates review of "'the erroneous application or interpretation' of relevant law." *Boumediene,* 553 U.S. at 779; *see also St. Cyr*, 533 U.S. at 302-03, 306-07 & nn.18-23, 27-29 (collecting common-law and finality-era cases). Indeed, finality-era courts routinely considered mixed questions. *See, e.g.*, *Rowoldt v. Perfetto*, 355 U.S. 115, 120-21 (1957) (holding that the facts did not show petitioner had the "meaningful association" with the Communist Party required by the statute); *Bridges v. Wixon*, 326 U.S. 135, 145-47 (1945) (holding particular circumstances of applicant's association with the Communist party constituted cooperation, not affiliation); *Hansen v. Haff*, 291 U.S. 559, 560 (1934) (determining noncitizen did not enter for prostitution or "any other immoral purpose," based on her extramarital relationship, employment history, and travel outside the country); *see also Johnson*, 336 U.S. at 812-14; *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947); *Mahler*, 264 U.S. at 43.

With judicial review, statutes and regulations may ultimately receive sufficient elaboration that at some point only the routine application of settled standards remains, resulting in few incorrect decisions. But on the government's view, even the

most basic elaboration of the statutory and regulatory requirements, and the correction of flagrant legal errors, are prohibited.

Here, for example, the asylum officer and immigration judge plainly misunderstood or misapplied the statute's purposefully low "significant possibility" standard and the regulatory requirement that the asylum officer "elicit all relevant and useful information." *See supra* Statement. They concluded that Mr. Thuraissigiam had not met the screening standard even though they accepted that he was a Tamil who had been "arrested," abducted in a "van," and severely beaten. *Id.* They reached that conclusion only by treating the wrong question as dispositive: Whether, at the time of the interview, there was testimony identifying who abducted Mr. Thuraissigiam. But the statute directs officers to assess the case an applicant may be able to marshal at a *future* full asylum hearing, after consultation with lawyers and time to gather facts and witnesses. With that proper understanding, no asylum officer charged with knowing the conditions in each country could have concluded that Mr. Thuraissigiam – whose account of the abduction fit precisely the well-documented *government* tactics used against Tamils – lacked a "significant possibility" of establishing that government forces were responsible. *Id.* Relatedly, no asylum officer charged with knowing the conditions in Sri Lanka could have properly understood the elicitation requirement and not asked Mr. Thuraissigiam follow-up questions when he said he had been "arrested" and abducted in a "van." *Id.*

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For habeas corpus to serve its time-tested structural function, the meaning of the law cannot be insulated from judicial scrutiny. The Court should not allow the legality of deportations to go untested for the first time ever.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully Submitted,

Cody Wofsy
Stephen B. Kang
Adrienne Harrold
Morgan Russell
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

Lucas Guttentag
559 Nathan Abbott Way
Stanford, CA 94305

David Loy
Sarah Thompson
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, CA 92138-7131

Lee Gelernt
Counsel of Record
Omar C. Jadwat
Jonathan Hafetz
Anand V. Balakrishnan
Celso J. Perez
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
212-549-2500
lgelernt@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

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