No. 19-161

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

VIJAYAKUMAR THURAISSIGIAM

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

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

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

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2019. On May 24, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 5, 2019. On June 26, 2019, Justice Kagan further extended the time to and including August 4, 2019, and the petition was filed on August 2, 2019. The petition for a writ of certiorari was granted on October 18, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-39a.

STATEMENT

Respondent is a native and citizen of Sri Lanka who illegally entered the United States by crossing the U.S. border with Mexico without inspection or admission by an immigration officer and without a visa or other required documentation. J.A. 36-40. U.S. Customs and Border Protection (CBP) agents apprehended him almost immediately thereafter, 25 yards north of the border. J.A. 38.

CBP determined that respondent was inadmissible and placed him into the expedited-removal process under 8 U.S.C. 1225(b)(1). J.A. 36-40. Respondent claimed a fear of returning to Sri Lanka. J.A. 39. After a credible-fear screening interview, an asylum officer determined that respondent lacked a credible fear of persecution on a protected ground or a credible fear of torture. J.A. 50-54, 60-89. A supervisory asylum officer reached the same conclusion. J.A. 54. On de novo review, an immigration judge (IJ) took respondent's testimony and again reached the same conclusion. J.A. 97-98.

Respondent thereafter filed a petition for a writ of habeas corpus, which the district court dismissed for lack of jurisdiction under 8 U.S.C. 1252(e)(2). Pet. App. 44a-60a. The court of appeals reversed and remanded, holding that the limitations on habeas review of an expedited-removal order in Section 1252(e)(2) are unconstitutional under the Suspension Clause, U.S. Const.

Art. I, § 9, Cl. 2, as applied to respondent. Pet. App. 1a-43a.

A. Legal Framework

The statutory and regulatory provisions of the expedited-removal system are at the heart of this case. Expedited-removal procedures may be applied to an alien arriving at a port of entry who is inadmissible because he lacks valid documentation or seeks to enter through fraud or willful misrepresentation of a material fact. 8 U.S.C. 1225(b)(1)(A)(i); see 8 U.S.C. 1182(a)(6)(C) and (7). The Secretary of Homeland Security may also designate for the application of expedited-removal procedures any or all aliens who are inadmissible on those grounds, are unlawfully present inside the United States without having been admitted or paroled, and have been continuously present for less than two years. 8 U.S.C. 1225(b)(1)(A)(iii).[1] Under the expedited-removal system, inadmissible aliens may be ordered removed by an immigration officer, without further hearing or review. 8 U.S.C. 1225(b)(1)(A)(i).

Those "streamline[d] rules and procedures" for "deny[ing] admission to inadmissible aliens" include added protections for aliens who claim a fear of return to their home countries or express an intent to apply for asylum. H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 157-158 (1996) (House Report); see 8 U.S.C. 1225(b)(1)(A)(ii) and (B); pp. 7-9, *infra*. "The purpose of these provisions is to expedite the removal from the

[1] The Attorney General once exercised the designation authority, but it has been transferred to the Secretary. See *Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005). The relevant statutory references to the Attorney General are now understood to refer to the Secretary. *Ibid.*

United States of aliens who indisputably have no authorization to be admitted to the United States, while providing an opportunity for such an alien who claims asylum to have the merits of his or her claim promptly assessed by officers with full professional training in adjudicating asylum claims." H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 209 (1996) (Conference Report).

1. Prior to 1996, the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), had "established two types of proceedings in which aliens can be denied the hospitality of the United States: deportation hearings and exclusion hearings." *Vartelas* v. *Holder*, 566 U.S. 257, 261 (2012) (citation and internal quotation marks omitted). Exclusion hearings—which accorded aliens fewer procedural rights than deportation hearings—were for "aliens seeking entry to the United States," while deportation hearings were for "aliens who had already entered this country." *Ibid.* "Under this regime, 'entry' into the United States was defined as 'any coming of an alien into the United States, from a foreign port or place.'" *Ibid.* (quoting 8 U.S.C. 1101(a)(13) (1988)). As a result, "noncitizens who had entered without inspection could take advantage of the greater procedural and substantive rights afforded in deportation proceedings, while non-citizens who actually presented themselves to authorities for inspection were restrained by more summary exclusion proceedings." *Martinez* v. *Attorney Gen.*, 693 F.3d 408, 413 n.5 (3d Cir. 2012) (citation and internal quotation marks omitted).

To eliminate that perverse incentive to enter unlawfully, Congress, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. I, 110 Stat. 3009-546,

replaced the dual "exclusion" and "deportation" procedures with a uniform "removal" procedure. *Vartelas*, 566 U.S. at 262. IIRIRA, however, retained certain elements of the former distinction between exclusion and deportation. In particular, it established the "expedited" removal process to ensure that the Executive Branch could "expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana* v. *Holder*, 558 U.S. 233, 249 (2010).

In establishing procedures for expedited removal, Congress was particularly concerned with abuses of the asylum system. House Report 107. At the time IIRIRA was enacted, "[t]housands of smuggled aliens arrive[d] in the United States each year with no valid entry documents and declare[d] asylum." *Id.* at 117. "Due to lack of detention space and overcrowded immigration court dockets," however, "many ha[d] been released into the general population" and "a majority of such aliens d[id] not return for their hearings." *Ibid.* Without the procedures for expedited removal, those aliens would be placed in full removal proceedings under 8 U.S.C. 1229a and "could reasonably expect that the filing of an asylum application would allow them to remain indefinitely in the United States." House Report 118. Congress designed the expedited-removal system to bypass those more "cumbersome and duplicative" procedures for aliens "who arrive in the United States with no valid documents." *Id.* at 107.

2. In 2004, the Secretary invoked his authority under Section 1225(b)(1)(A)(iii) and designated for application of expedited-removal procedures certain inadmissible aliens who are encountered within 100 air miles of the U.S. border and within 14 days of having unlawfully entered the United States without admission or

parole. 69 Fed. Reg. 48,877, 48,878-48,881 (Aug. 11, 2004).[2] The Secretary designated that category in response to an "urgent need" to "improve the safety and security of the nation's land borders, as well as the need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations." *Id.* at 48,880.

At the time, "nearly 1 million aliens [we]re apprehended each year in close proximity to the borders after illegal entry." 69 Fed. Reg. at 48,878. Application of expedited-removal procedures to such aliens who are inadmissible on covered grounds was necessary, the Secretary explained, because "[i]t is not logistically possible" for the Department of Homeland Security (DHS) to initiate full removal proceedings under 8 U.S.C. 1229a "against all such aliens." 69 Fed. Reg. at 48,878. DHS would often allow Mexican nationals to return home "without any formal removal order," but many of those aliens "s[ought] to reenter the U.S. illegally, often within 24 hours of being voluntarily returned." *Ibid.*

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[2] The Department of Homeland Security recently issued a notice designating an additional category of aliens subject to expedited removal: aliens who are inadmissible on the relevant grounds, are present in the United States without having been admitted or paroled, have been continuously present for less than two years, and are not covered by an existing designation. 84 Fed. Reg. 35,409 (July 23, 2019). A district court enjoined the government from applying that designation. See *Make the Road N.Y.* v. *McAleenan*, No. 19-cv-2369, 2019 WL 4738070 (D.D.C. Sept. 27, 2019). The government has appealed that decision. See *McAleenan* v. *Make the Road N.Y.*, No. 19-5298 (D.C. Cir. filed Oct. 31, 2019). Because that litigation relates to aliens not covered by any prior designation, including the 2004 designation applicable here, it does not affect respondent.

And DHS could not easily effect such voluntary returns to Central America or other non-contiguous countries. See *ibid.* Without a system of expedited removal, DHS was forced to initiate full removal proceedings for those aliens under Section 1229a, but it "lack[ed] the resources to detain" all of them in the interim. *Ibid.* As a result, "many of these aliens [we]re released in the U.S. each year," and many "subsequently fail[ed] to appear for their removal proceedings, and then disappear[ed] in the U.S." *Ibid.*

3. As noted above, the expedited-removal system includes special procedures applicable to an alien who "indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country." 8 C.F.R. 235.3(b)(4); see 8 U.S.C. 1225(b)(1)(A)(ii) and (B). Rather than immediately being ordered removed, such an alien is referred for screening before an asylum officer, who interviews the alien, reviews relevant facts, and determines whether the alien has a credible fear. 8 U.S.C. 1225(b)(1)(A)(ii) and (B); see 8 C.F.R. 208.30(d) and (e). The alien "may consult with a person or persons of the alien's choosing" before the credible-fear screening, so long as it does not unreasonably delay the process. 8 C.F.R. 208.30(d)(4); see 8 C.F.R. 1003.42(c) (consultation before IJ review).

A credible fear exists when there is a "significant possibility," 8 U.S.C. 1225(b)(1)(B)(v), that the alien could establish eligibility for asylum, withholding of removal under 8 U.S.C. 1231(b)(3), or protection under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988),

1465 U.N.T.S. 85, 114. See 8 C.F.R. 208.30(e)(2) and (3).[3] An alien may be eligible for asylum if he is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see 8 U.S.C. 1158(a). An alien may be entitled to withholding of removal if the Attorney General decides that his life or freedom would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. 1231(b)(3). And an alien may be entitled to CAT protection if it is "more likely than not that he or she would be tortured if removed to the proposed country of removal," either by or with the acquiescence of a public official. 8 C.F.R. 208.16(c)(2); see 8 C.F.R. 208.18(a)(1), 1208.16(c)(2).

The asylum officer must "create a written record of his or her determination" regarding credible fear, including a "summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture." 8 C.F.R. 208.30(e)(1); see

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[3] DHS and the Department of Justice recently adopted an interim final rule that, with limited exceptions, makes ineligible for asylum those aliens who enter or attempt to enter the United States across the U.S.-Mexico border after failing to apply for protection in at least one country through which they transited. 84 Fed. Reg. 33,829, 33,829-33,831 (July 16, 2019). Those aliens must demonstrate a "reasonable possibility" of eligibility for withholding of removal or CAT protection to be referred for full removal proceedings. *Id.* at 33,837 (citation omitted). Because that rule became effective after respondent entered the country, see *id.* at 33,830, the "significant possibility" standard applies here.

8 U.S.C. 1225(b)(1)(B)(iii)(II). If the officer finds that the individual lacks a credible fear, that finding "shall not become final until reviewed by a supervisory asylum officer." 8 C.F.R. 208.30(e)(7). If the supervisory officer agrees that the alien lacks a credible fear, the asylum officer "shall" provide the alien a "written notice of decision" that informs the alien that he can request IJ review. 8 C.F.R. 208.30(g)(1), 235.3(b)(4)(i)(C); see 8 U.S.C. 1225(b)(1)(B)(iii)(III). If the alien requests further review, the IJ—who is part of the Executive Office for Immigration Review (EOIR) in the Department of Justice—reviews de novo the asylum officers' determination. 8 C.F.R. 1003.42(d). The IJ "may receive into evidence any oral or written statement which is material and relevant to any issue in the review." 8 C.F.R. 1003.42(c).

If the asylum officer or IJ finds that the alien has a credible fear, the alien is referred for full removal proceedings under Section 1229a, at which the alien may apply for asylum or other protection from removal. 8 C.F.R. 208.30(e)(5) and (f), 235.6(a), 1208.30(g)(2)(iv)(B); see 8 U.S.C. 1225(b)(1)(B)(ii).[4] If the asylum officer, the supervisory officer, and (if review is sought) the IJ find that the alien lacks a credible fear of persecution on a protected ground or a credible fear of torture, the alien shall be removed without further hearing or review. 8 U.S.C. 1225(b)(1)(B)(iii)(I).

4. In 8 U.S.C. 1252(a)(1), Congress provided for review in the courts of appeals of final removal orders entered at the conclusion of full removal proceedings un-

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[4] DHS may also exercise its discretion to place any other alien into full removal proceedings under Section 1229a. See *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520 (B.I.A. 2011).

der 8 U.S.C. 1229(a). But Congress limited judicial review of final removal orders entered under expedited-removal procedures. Subject to specified exceptions, Congress provided that, "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review": (1) any "cause or claim arising from or relating to the implementation or operation of an [expedited] order of removal"; (2) the government's decision to invoke expedited removal; (3) "the application of [expedited removal] to individual aliens, including the [credible-fear] determination"; or (4) "procedures and policies adopted" to "implement the provisions of section 1225(b)(1)." 8 U.S.C. 1252(a)(2)(A)(i)-(iv).

Section 1252(e) sets forth the exceptions to the jurisdictional bar to review of expedited-removal orders. As relevant here, it provides that judicial review of an expedited-removal order "is available in habeas corpus proceedings," but "shall be limited" to the specific determinations of whether the individual: (1) "is an alien"; (2) "was ordered removed under" Section 1225(b)(1); or (3) can prove that he or she was previously admitted to the United States as a lawful permanent resident, refugee, or asylee, and that such status has not been terminated. 8 U.S.C. 1252(e)(2). "In determining whether an alien has been ordered removed" under the expedited-removal statute, Congress further specified that "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." 8 U.S.C. 1252(e)(5); see Conference Report 220

("[R]eview does not extend to determinations of credible fear and removability in the case of individual aliens.").

In another exception to the jurisdictional bar to judicial review of expedited-removal orders, Congress provided for judicial review of challenges to the legality of the expedited-removal system itself. Specifically, it authorized judicial review of such an order to determine whether the expedited-removal statute, "or any regulation issued to implement" it, "is constitutional," and of whether any expedited-removal "regulation, or a written policy directive, written policy guideline, or written procedure" is inconsistent with the INA or is otherwise unlawful. 8 U.S.C. 1252(e)(3)(A); see *American Immigration Lawyers Ass'n* v. *Reno*, 199 F.3d 1352, 1357-1364 (D.C. Cir. 2000). The District Court for the District of Columbia has exclusive jurisdiction over such challenges, which must be filed within "60 days after the date the challenged section, regulation, directive, guideline, or procedure * * * is first implemented." 8 U.S.C. 1252(e)(3)(B).

B. Factual Background

Respondent was apprehended 25 yards from the U.S.-Mexico border, shortly after illegally entering without inspection or admission and without a valid entry document. J.A. 36-40. He was found inadmissible and was processed for expedited removal. J.A. 36-39. Respondent asserted a fear of return to Sri Lanka, and an asylum officer conducted a credible-fear interview in respondent's native language, through an interpreter. J.A. 39, 50-54, 60-89. At the interview, respondent stated that, while he was working on his farm one day, a group of men approached and beat him, causing him to be hospitalized for 11 days. J.A. 70-74. Respondent

told the asylum officer that he did not know who the men were or why they had beaten him, that they had not said anything to him, and that he did not know why they had chosen him in particular. J.A. 71-74. Respondent also explained that he had not reported the incident to police because they "w[ould] ask who did it," he "d[id] not know who did it," and the police therefore "w[ould] not help [him]." J.A. 72. The asylum officer specifically asked respondent whether he had "ever been" or was "afraid of being harmed because of [his] political opinion," and respondent answered "No." J.A. 76; see J.A. 43 ("Are you a member of any political party? No[.]").

The asylum officer found that respondent was credible, but found "No Nexus" to persecution on a protected ground. J.A. 53; see J.A. 87 ("The applicant provided no testimony indicating that he was or will be targeted [on a protected ground]. It is unknown who these individuals were or why they wanted to harm the applicant."); see also J.A. 89. The asylum officer accordingly determined that respondent had not established a credible fear of persecution on a protected ground, and that there was "not a significant possibility that [respondent] could establish eligibility for" CAT protection. J.A. 53.

A supervisory asylum officer reviewed those determinations and agreed, signing the credible-fear decision. J.A. 54. Respondent was provided a written record of that decision, including Forms I-863 (DHS Notice of Referral to Immigration Judge), I-869 (Record of Negative Credible Fear Finding and Request for Review by Immigration Judge), and I-870 (Record of Determination/Credible Fear Worksheet). J.A. 95; see J.A. 50-89, 90-96. Those forms, which were read and explained to respondent in his native language, made clear that respondent had been found to lack a credible fear

of persecution on a protected ground because "[t]here is no significant possibility" that the harm he feared "is on account of [his] race, religion, nationality, political opinion, or membership in a particular social group." C.A. S.E.R. 48; see J.A. 53.

Respondent requested and received de novo IJ review. J.A. 90. The IJ's order states that such review occurred on March 17, 2017, and that "[t]estimony * * * was * * * taken regarding the background of the Applicant and the Applicant's fear of returning to his[] country of origin or last habitual residence." J.A. 97.[5] The order explains that, "[a]fter consideration of the evidence," the IJ "finds" that respondent "has not established a significant possibility" that he would be persecuted "on the basis of his[] race, religion, nationality, membership in a particular social group, or because of his[] political opinion." *Ibid.* Handwritten notes on the order indicate that the IJ also found that respondent had not established a significant possibility that he was eligible for CAT protection. *Ibid.* The IJ accordingly affirmed the asylum officers' decision, and returned the case to DHS "for removal of the alien." *Ibid.*[6]

C. Procedural History

1. Respondent filed a petition for a writ of habeas corpus in the District Court for the Southern District of California. J.A. 12-34. He contended that his "expedited removal order violated his statutory, regulatory and constitutional rights," sought vacatur of the order, and requested relief in the form of a "new, meaningful

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[5] A transcript of the IJ hearing is available but is not in the record. The government has filed a letter with the Clerk proposing to lodge the transcript, and will do so if requested. See Sup. Ct. R. 32.3.

[6] On June 14, 2019, respondent was paroled out of custody.

opportunity to apply for asylum and other relief from removal." J.A. 13-14. In particular, respondent alleged that the asylum officer failed to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture" as provided for in 8 C.F.R. 208.30(d), and "failed to consider relevant country conditions evidence." J.A. 27-28. Respondent also alleged that the asylum officer and IJ deprived him of his asserted "due process rights" by failing to provide "a meaningful opportunity to establish his claims, failing to comply with the applicable statutory and regulatory requirements, and in not providing him with a reasoned explanation for their decisions." J.A. 32.

2. The district court dismissed the petition for lack of jurisdiction under Section 1252(e)(2). Pet. App. 59a-60a; see *id.* at 44a-58a. The court determined that Section 1252(e)(2) unambiguously prohibits habeas review of respondent's claims. See *id.* at 49a-53a. The court then held that Section 1252(e)'s restrictions on habeas corpus review are constitutional. *Id.* at 53a-56a. The court "d[id] not dispute that the Suspension Clause applies" to respondent, but it determined that Section 1252(e)'s restrictions on habeas relief do not violate the Suspension Clause, in part because Section 1252(e) "still 'retains some avenues of judicial review, limited though they may be.'" *Id.* at 54a (brackets and citation omitted).

3. The court of appeals reversed and remanded. Pet. App. 1a-43a. The court agreed with the district court that Section 1252(e)(2) bars review of respondent's claims. *Id.* at 9a-12a. But the court held that Section 1252(e)(2) violates the Suspension Clause as applied to respondent. *Id.* at 12a-42a. Relying on *Boumediene* v. *Bush*, 553 U.S. 723 (2008), the court applied

a two-step approach. Pet. App. 28a; see *id.* at 15a-20a. "[A]t step one," the court "examine[d] whether the Suspension Clause applies to the [habeas] petitioner; and, if so, at step two," the court "examine[d] whether the substitute procedure provides review that satisfies the Clause." *Id.* at 18a-19a.

The court of appeals first determined that aliens on U.S. soil, no matter what their mode of entry or how brief their presence, "may invoke the Suspension Clause." Pet. App. 35a. In reaching that conclusion, the court distinguished this Court's decisions holding "that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). The court described those decisions as limited to due process claims, and thus "not relevant" here. Pet. App. 28a; see *id.* at 24a-28a.

The court of appeals next determined that "the Suspension Clause entitles the [habeas] petitioner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." Pet. App. 35a (quoting *Boumediene*, 553 U.S. at 779) (brackets and internal quotation marks omitted). The court concluded that the Suspension Clause guaranteed judicial review of respondent's claims that "the government denied him a 'fair procedure,' 'applied an incorrect legal standard' to his credible fear contentions," and "'failed to comply with the applicable statutory and regulatory requirements.'" *Id.* at 37a (brackets omitted).

The court of appeals then concluded that the existing procedural mechanisms in the expedited-removal system were inadequate to satisfy the Suspension Clause.

Pet. App. 41a. The court believed that judicial review was necessary to "provide[] important oversight of whether DHS complied with the required credible fear procedures." *Id.* at 39a. And it criticized the existing administrative scheme for lacking "rigorous adversarial proceedings prior to a negative credible fear determination." *Ibid.*

The court of appeals recognized that it was creating a conflict with the Third Circuit's decision in *Castro* v. *United States Department of Homeland Security*, 835 F.3d 422 (2016), cert. denied, 137 S. Ct. 1581 (2017). Pet. App. 25a. The court acknowledged that *Castro* decided "the precise question" at issue here, holding that Section 1252(e)(2) did not violate the Suspension Clause as applied to "'recent surreptitious entrants'" who were processed for expedited removal and found to lack a credible fear. *Id.* at 13a, 24a (citation omitted). But the court "disagree[d] with *Castro*'s resolution" of the question, including the Third Circuit's reliance on *Plasencia*, *supra*, to hold that recent surreptitious entrants could not invoke the Suspension Clause to demand additional process beyond what Congress has provided. Pet. App. 25a.

SUMMARY OF ARGUMENT

I. For two reasons, the Suspension Clause does not guarantee judicial review, beyond what Congress has authorized, of claims relating to an alien's efforts to seek admission to the United States.

First, this Court has repeatedly made clear that an alien seeking initial admission to the United States "has no constitutional rights regarding his application." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). To the contrary, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry

is concerned." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950). An applicant for initial admission thus cannot invoke the Suspension Clause to demand procedures beyond what Congress has provided.

That same rule applies to unlawful entrants such as respondent, who are properly treated as applicants for initial admission. This Court has drawn a distinction between an alien who has lawfully entered the country and become part of the population of the United States and an alien "who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population." *Yamataya* v. *Fisher*, 189 U.S. 86, 100 (1903). Respondent falls in the latter category. Congress has made the judgment that aliens unlawfully present for less than two years are not guaranteed full removal proceedings under 8 U.S.C. 1229a. See 8 U.S.C. 1225(b)(1)(A)(iii). And here, respondent was apprehended 25 yards from the U.S.-Mexico border, almost immediately upon surreptitiously entering the country, and he has no preexisting connections to the country. J.A. 38. His momentary unlawful presence does not alter his status as an alien seeking initial admission.

Second, respondent's Suspension Clause claim fails for the independent reason that he does not seek the type of relief that the Clause protects. This Court has indicated that the Suspension Clause protects those habeas corpus actions available under the common-law writ in 1789. See *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001). "Habeas is at its core a remedy for unlawful executive detention." *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008). And the traditional "remedy for such detention is, of course, release." *Ibid.*

The type of habeas relief that respondent seeks falls well outside the historical core of habeas corpus. Respondent does not seek "release"—indeed, he is currently entitled to be returned to his home country. Instead, he seeks additional proceedings relating to his admission to the United States. But no Founding-era evidence supports the use of the writ as a mechanism to challenge decisions relating to an alien's admission, in contrast to challenges to detention as such. And although this Court suggested in *St. Cyr* that the Suspension Clause may require "some judicial intervention in deportation cases," 533 U.S. at 300 (citation and internal quotation marks omitted), it did so only in the context of applying the canon of constitutional avoidance, see *id.* at 299-300. Moreover, *St. Cyr* involved the deportation of a lawful permanent resident, not an admission decision. See *id.* at 293.

The court of appeals nevertheless required more searching judicial review than Section 1252(e)(2) provides, largely on the basis of this Court's decisions in *St. Cyr* and *Boumediene* v. *Bush*, 553 U.S. 723 (2008). See Pet. App. 31a-41a. In so doing, the court overlooked the fundamental distinctions between this case and those. *Boumediene*—the only case in which this Court has found a violation of the Suspension Clause—involved a challenge to the ongoing detention of enemy combatants for the duration of hostilities. See 553 U.S. at 732. Unlike the detainees in *Boumediene*, respondent is free to go: He will be removed to his home country if his habeas petition is dismissed. And unlike the lawful permanent resident in *St. Cyr*, respondent has no arguable constitutional interest in remaining in the United States.

II. In any event, even if the Suspension Clause guarantees respondent some limited protections with respect to his admission to the United States, Congress's carefully crafted system of expedited removal is "neither inadequate nor ineffective." *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977). In *Boumediene*, this Court invoked the flexible balancing test from *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), under which the risk of an erroneous deprivation of liberty should be balanced against the value of additional procedural safeguards and the government's interests. See *Boumediene*, 553 U.S. at 781-782; see also *id.* at 779, 786. A balancing of interests is particularly appropriate here, if the Court determines that the Suspension Clause applies at all, because respondent's claim differs from an ordinary challenge to executive detention.

On one side of the balance, even assuming that respondent has any liberty interest in avoiding removal, that interest is minimal. On the other side of the balance, Congress has created a multilevel administrative review process in which an alien subject to expedited removal receives three opportunities to demonstrate that he has a credible fear of persecution or torture. Moreover, Congress has provided for judicial review of questions relating to an alien's identity or status. See 8 U.S.C. 1252(e)(2). Respondent does not deny that he was provided all the procedures mandated by statute or regulation.

Finally, the government has a compelling interest in preserving the integrity and workability of the expedited-removal system. Congress designed that system as a critical tool for protecting the Nation's borders and enforcing its immigration laws, and the judicial proce-

dures that respondent demands would severely undercut Congress's objectives. The government's interests and the considerable existing procedures outweigh any minimal constitutional interest that respondent may have in additional review of his claims for relief or protection from removal.

ARGUMENT

The system for expedited removal has been in place since 1996 and has applied to inadmissible aliens like respondent since 2004. That system provides for three levels of administrative review of a claim by an alien that he fears persecution or torture. See 8 U.S.C. 1225(b)(1)(B)(iii)(I) and (III); 8 C.F.R. 208.30(e)(7), 235.3(b)(7). As part of that system, Congress also authorized habeas corpus review of questions relating to an alien's status or identity, but it otherwise barred judicial review of administrative officials' determinations. See 8 U.S.C. 1252(e)(2). Congress's judgment about the appropriate framework of administrative review and the scope of habeas review in this context of immigration enforcement, national security, and foreign relations is entitled to great weight. Its determination to limit judicial review in Section 1252(e)(2) does not violate the Suspension Clause of the Constitution, Art. I, § 9, Cl. 2.

I. THE SUSPENSION CLAUSE DOES NOT GUARANTEE JUDICIAL REVIEW OF RESPONDENT'S CLAIMS RELATING TO HIS EFFORTS TO BE ADMITTED TO THE UNITED STATES

Two lines of this Court's decisions separately foreclose respondent's argument that the Suspension Clause protects a right to habeas review, beyond what

is afforded by 8 U.S.C. 1252(e), of the denial of his request for admission to the United States. First, this Court has made clear that an alien seeking initial admission to the United States "has no constitutional rights regarding his application," *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). Second, efforts to use habeas as a mechanism to challenge decisions relating to an alien's admission, in contrast to challenges to detention as such, fall well outside the "historical core" of habeas, *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001), and thus fall outside the protections of the Suspension Clause.

A. Aliens Like Respondent Have No Constitutional Rights Regarding Their Admission

1. Aliens seeking initial admission are entitled to only the process that Congress provides

a. "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 (1972); see *id.* at 767 ("[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.") (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 591 (1952); cf. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). "Congress supplies the conditions of the privilege of entry into the United States." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950). And "[w]hatever the procedure authorized by Congress

is, it is due process as far as an alien denied entry is concerned." *Id.* at 544.

Moreover, Congress may "entrust[]" the "supervision of the admission of aliens into the United States" to the Executive Branch. *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892). If it does so, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law," and it "is not within the province of the judiciary" to disturb them. *Id.* at 660; see, *e.g.*, *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) ("The power to expel aliens * * * may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.'"); *Zakonaite* v. *Wolf*, 226 U.S. 272, 275 (1912) (describing as "entirely settled" that the "inquiry" concerning admission "may be properly devolved upon an executive department or subordinate officials thereof"). The Constitution accordingly does not furnish to an alien seeking initial admission to the United States the right to demand additional procedural protections concerning his admission beyond what Congress has provided, or the right to demand a process outside the Executive Branch.

b. Those well-established principles govern regardless of how respondent frames his challenge to the procedures he was provided. The court below declined to apply the rule of *Plasencia* because that case arose in the context of a due process challenge "and did not address the much different question of" the Suspension Clause's guarantees. Pet. App. 26a; see *id.* at 27a-28a (stating that *Plasencia* does not "hav[e] any bearing on the application of the Suspension Clause" and "is not relevant"). But *Plasencia* makes clear that an alien

seeking initial admission "has no *constitutional rights*" regarding his application, which necessarily includes rights asserted under the Suspension Clause. 459 U.S. at 32 (emphasis added).

In any event, the Suspension Clause protects the writ of habeas corpus, which "is simply a mode of procedure." *Fay* v. *Noia*, 372 U.S. 391, 401 (1963), overruled in part on other grounds by *Wainwright* v. *Sykes*, 433 U.S. 72, 87-88 (1977). Habeas review provides "a mode for the redress of denials of due process of law," *id.* at 402; it does not prescribe substantive protections beyond what Congress has provided. See, *e.g.*, *Heikkila* v. *Barber*, 345 U.S. 229, 236 (1953) (explaining that habeas corpus "has always been limited to the enforcement of due process requirements"); *Zakonaite*, 226 U.S. at 275 (rejecting due process challenge, then dismissing Suspension Clause challenge as "without substance, and requir[ing] no discussion"); see also *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 555-556 (2004) (Scalia, J., dissenting) ("The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses.").

2. Unlawful entrants like respondent are properly classified as applicants for initial admission

a. This Court has repeatedly indicated that, for constitutional purposes, an alien apprehended after illegally entering the country is properly classified as an alien seeking initial admission, at least unless he has been here long enough to develop sufficiently meaningful ties to the country. For example, in *Yamataya* v. *Fisher*, 189 U.S. 86 (1903), the Court explained that due

process required an alien in the United States to have some "opportunity to be heard upon the questions involving his right to be and remain in the United States" (including through administrative proceedings before an executive officer) before removal. *Id.* at 101. But the Court expressly left "on one side the question" whether an alien "*who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population*," can "rightfully invoke the due process clause of the Constitution." *Id.* at 100 (emphasis added). The import of that language is that aliens apprehended after surreptitiously crossing the U.S. border cannot lay the same claim to constitutional protections in connection with their admission as aliens who were lawfully admitted may thereafter claim in seeking to remain. Rather, such clandestine entrants may be treated as applicants for initial admission.

The distinction that *Yamataya* drew between aliens who have become part of the population of the United States and more recent clandestine entrants has repeatedly appeared in this Court's decisions. Even before *Yamataya*, the Court observed that Congress enjoyed plenary power to determine the processes afforded to those "foreigners who have never been naturalized, nor acquired any domicil[e] or residence within the United States, nor even been admitted into the country pursuant to law." *Ekiu*, 142 U.S. at 660. And the Court later described *Yamataya* as holding that a "deportation statute must provide a hearing *at least for aliens who had not entered clandestinely and who had been here some time* even if illegally." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950) (emphasis added).

In addition, the Court has often stated that constitutional protections in the application of the immigration laws are not conferred instantaneously upon the alien's illegal entry into the country, but instead require lawful admission and residence for some meaningful period. See, *e.g.*, *Plasencia*, 459 U.S. at 32 ("[O]nce an alien gains admission to our country *and begins to develop the ties that go with permanent residence*, his constitutional status changes accordingly.") (emphasis added); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) ("[O]nce an alien *lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our borders.") (emphasis added; citation omitted); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904) (An alien "does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law.").

In designing the expedited-removal system, Congress built upon the distinction that this Court has drawn between lawful residents and surreptitious entrants. IIRIRA established more streamlined procedures in an expedited-removal system for those aliens who have no meaningful ties to the country because they have been neither lawfully admitted into the United States nor continuously present in the United States for two years. 8 U.S.C. 1225(b)(1)(A)(iii). It also addressed the strong practical justifications for treating an inadmissible alien who surreptitiously crosses

the U.S. border the same way, for constitutional purposes, as an alien who arrives at a port of entry. If the alien entering clandestinely were treated more favorably than an alien who arrives at a port of entry, that would create a strong perverse incentive for aliens to cross the border surreptitiously rather than presenting themselves for inspection. Yet in shifting from "entry" to "admission" in IIRIRA, Congress sought to eliminate such an incentive. See House Report 225; see also pp. 4-5, *supra*.

The functional analysis described above is not unique to this context. In other areas, Congress and the courts have similarly recognized that a clandestine entrant does not become part of our population immediately upon crossing the border, and that the government's authority in controlling the border can extend beyond an alien's immediate crossing into U.S. territory. For example, Congress has authorized (and this Court has upheld) warrantless immigration searches at checkpoints within 100 miles of the U.S. border. See 8 U.S.C. 1357(a)(3); 8 C.F.R. 287.1(a); see also *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 553 n.8, 561 (1976). Similarly, the courts of appeals have upheld criminal prosecutions for aiding and abetting an unlawful entry into the United States, in violation of 8 U.S.C. 1324(a)(2), or analogous removability determinations under 8 U.S.C. 1182(a)(6)(E)(i), when all of the defendant's conduct occurred within U.S. territory after the border crossing itself. See, *e.g.*, *Dimova* v. *Holder*, 783 F.3d 30, 40 (1st Cir. 2015); *Soriano* v. *Gonzales*, 484 F.3d 318, 320-321 (5th Cir. 2007); *United States* v. *Aslam*, 936 F.2d 751, 755 (2d Cir. 1991). And this Court has adopted various doctrines under which an alien's physical presence in the United States does not trigger the accumulation of

legal rights. See, *e.g.*, *Mezei*, *supra* (detention pending immigration determination); *Kaplan* v. *Tod*, 267 U.S. 228 (1925) (parole from immigration detention).

b. Under those precedents, a clandestine entrant like respondent is properly treated, for constitutional purposes, as an alien seeking initial admission to the country. No dispute exists that respondent entered the country surreptitiously, without inspection or admission by an immigration officer and without a visa or other required documentation. J.A. 36-40. Respondent, moreover, had never previously lived in the United States. J.A. 40-43. And while Congress has made the judgment that an alien unlawfully present for up to two years does not develop the necessary legitimate ties to the country, that judgment applies *a fortiori* to respondent: He was apprehended 25 yards from the U.S.-Mexico border, almost immediately upon crossing that border. J.A. 38. His sole connection to the United States was that he had been physically present for the time that it takes to walk 25 yards—by any measure insufficient "to have become, in any real sense, a part of our population." *Yamataya*, 189 U.S. at 100; see *Castro* v. *United States Dep't of Homeland Sec.*, 835 F.3d 422, 445-446 (3d Cir. 2016) (explaining that aliens "apprehended within hours of surreptitiously entering the United States" were appropriately treated as applicants for initial admission), cert. denied, 137 S. Ct. 1581 (2017).

B. Respondent's Claims Fall Outside The Historical Core Of Habeas Corpus

Respondent's Suspension Clause claim fails for a second reason as well. This Court has stated that "the Suspension Clause protects the writ as it existed in 1789." *St. Cyr*, 533 U.S. at 301 (citation and internal

quotation marks omitted). And in 1789, the writ did not protect the sort of claim that respondent asserts here.

Although the Court has not "foreclose[d] the possibility that the protections of the Suspension Clause have expanded" since 1789, *Boumediene* v. *Bush*, 553 U.S. 723, 746 (2008), it has focused on Founding-era parameters for the scope of the writ, see *id.* at 742-752; *St. Cyr*, 533 U.S. at 301-305. Indeed, the Court has never found that the Suspension Clause protects a right to habeas corpus that it did not believe had some historical support in 1789. See *Boumediene*, 553 U.S. at 746 (relying on "founding-era authorities addressing the specific question"). And it would make little sense to begin now, especially with respect to aliens seeking admission to the United States. Expanding Suspension Clause protections beyond the scope of habeas at common law would risk turning the Clause into a "one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction" that Congress extends by statute. *St. Cyr*, 533 U.S. at 342 (Scalia, J., dissenting). Such a result would contradict this Court's repeated admonition that "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996)).

1. At common law, a writ of habeas corpus was a mechanism for challenging executive detention

"At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301; see *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008) ("Habeas is at its core a remedy for unlawful executive detention."); *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973) ("It is

clear * * * from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody."); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) ("The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause."). And the traditional "remedy for such detention is, of course, release." *Munaf*, 553 U.S. at 693; see 3 William Blackstone, *Commentaries on the Laws of England* 137 (1768) (explaining that the traditional habeas remedy is "removing the injury of unjust and illegal confinement") (emphasis omitted); see also R.J. Sharpe, *The Law of Habeas Corpus* 5 (1976) (recounting that at common law habeas corpus became "a remedy to secure release from imprisonment").

The Court's decision in *Munaf* reflects that longstanding understanding of habeas corpus as a mechanism for challenging executive detention and seeking release from that detention. In *Munaf*, American citizens held in U.S. custody in Iraq filed habeas petitions, seeking to avoid transfer to Iraqi authorities for criminal proceedings. See 553 U.S. at 692. The Court explained that "the last thing [the habeas] petitioners want is simple release; that would expose them to apprehension by Iraqi authorities." *Id.* at 693-694. Instead, what they were "really after is a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders." *Id.* at 694. The Court rejected that request, explaining that "habeas is not a means of compelling the

United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them." *Id.* at 697.

2. The relief that respondent seeks falls well outside the historical core of habeas

a. As in *Munaf*, the relief that respondent seeks here bears no resemblance to the Founding-era function of habeas corpus as a remedy for unlawful detention.

Although respondent was initially detained to effectuate his removal from the country, see 8 U.S.C. 1225(b)(1)(B)(iii)(IV), he does not challenge his detention as such. To the contrary, he is currently entitled to be returned to his home country. Instead, he challenges the Executive Branch's determination that he failed to demonstrate a "significant possibility," 8 U.S.C. 1225(b)(1)(B)(v), that he was eligible for asylum, withholding of removal, or CAT protection, which would have allowed him to pursue those claims in a full removal proceeding under Section 1229a, notwithstanding his inadmissibility. See J.A. 31-32. That requested relief—seeking additional procedures that could result in a decision allowing respondent to lawfully enter or be admitted to the United States—has no parallel in the common-law writ, under which a habeas petitioner challenged his ongoing detention and sought release from custody. See *Castro*, 835 F.3d at 450 (Hardiman, J., concurring dubitante) (rejecting similar Suspension Clause challenge because aliens sought not to be released, but rather "to alter their status in the United States in the hope of *avoiding* release to their homelands"); see also *Hamama* v. *Adducci*, 912 F.3d 869, 875-876 (6th Cir. 2018) (determining that habeas petitioners seeking stay of removal were "not seeking relief

that fits in the 'core remedy' of habeas"), petition for cert. pending, No. 19-294 (filed Aug. 30, 2019). Because there is no basis for concluding that the common-law writ would have afforded such relief, respondent has no protected interest under the Suspension Clause.[7]

b. In *St. Cyr*, the Court indicated that the Suspension Clause may require "some judicial intervention in deportation cases." 533 U.S. at 300 (citation and internal quotation marks omitted). The Court, however, reached that conclusion in a case involving an alien lawfully admitted for permanent residence, see *id.* at 293, and in the course of applying the constitutional-avoidance canon to interpret a statute, not in directly upholding a constitutional claim, see *id.* at 299-300; see also *id.* at 304 (concluding that "the ambiguities in the scope of the exercise of the writ at common law" were sufficient to conclude that the Suspension Clause question was "difficult"). *St. Cyr*'s relevance is limited for those reasons alone.

In any event, *St. Cyr* focused on the question whether habeas corpus historically could have been invoked by aliens *at all*, not whether it could have been invoked by aliens to challenge immigration decisions,

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[7] To be clear, an alien who is "in custody under or by color of the authority of the United States" is permitted *by statute* to seek a writ of habeas corpus, 28 U.S.C. 2241(c)(1), except where—as here—Congress has explicitly withdrawn that statutory authorization, 8 U.S.C. 1252(e)(2) and (5). See, *e.g.*, *Mezei*, 345 U.S. at 213 (explaining that an excluded alien's "movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion"). But because the use of habeas corpus to challenge an alien's denial of admission to the United States falls outside its "historical core," Congress remains free to modify the availability of the writ in that context without running afoul of the Suspension Clause.

including their admission to the country. See 533 U.S. at 300-305. *St. Cyr* explained that "[i]n England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens." *Id.* at 301-302 (footnote omitted). But as the Court noted, and as its supporting citations underscore, those aliens invoked habeas "to challenge Executive and private detention"; they did not invoke it to contest immigration decisions. *Id.* at 302; see *ibid.* (explaining that habeas "was used to command the discharge of seamen who had a statutory exemption from impressment into the British Navy, to emancipate slaves, and to obtain the freedom of apprentices and asylum inmates") (footnotes omitted); see also *id.* at 302 nn.16-22 (citing decisions challenging detention as such).[8] In fact, *St. Cyr* acknowledged that the first U.S. statute regulating immigration was not enacted until 1875, see *id.* at 305, and the earliest habeas decision it cited even arguably analogous to a challenge to an alien's deportation was an 1853 extradition decision (which is, in any event, distinct). *Id.* at 305-306 (citing *In re Kaine*, 55 U.S. (14 How.) 103 (1853)).

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[8] See, *e.g.*, *Somerset* v. *Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 499 (slave "purchased from the African coast" and "detained against his consent"); *The Case of the Hottentot Venus*, (1810) 104 Eng. Rep. 344 (K.B.) 344 ("foreigner" "kept in custody" "against her consent"); *King* v. *Schiever*, (1759) 97 Eng. Rep. 551 (K.B.) 551 ("subject of a neutral power" "detained to serve on board" a ship); *United States* v. *Villato*, 2 U.S. (2 Dall.) 370, 370 (C.C. Pa. 1797) (non-citizen imprisoned for treason); *Commonwealth* v. *Holloway*, 1 Serg. & Rawle 392, 392-393 (Pa. 1815) (deserting foreign seaman imprisoned at request of master of ship); *Ex parte D'Olivera*, 7 F. Cas. 853 (C.C. Mass. 1813) (same).

At most, *St. Cyr* suggests that the Suspension Clause might guarantee some habeas review to challenge an alien's *deportation*, 533 U.S. at 300—in that case the deportation of a lawful permanent resident who had been living in the United States for more than a decade before removal proceedings were commenced, *id.* at 293. Although even a challenge to an alien's deportation remains outside the "historical core" of habeas, the Court in *St. Cyr* might have believed that the liberty interests at stake in removing a lawful permanent resident from his home of more than a decade were sufficiently significant to warrant some degree of the protection afforded to the liberty interests at stake in ongoing executive detention (*i.e.*, the true "historical core" of habeas).

c. Even if the deportation of the lawful permanent resident in *St. Cyr* implicated liberty interests sufficiently akin to those protected by the "historical core" of habeas, the expedited removal of respondent plainly does not.

When an alien is admitted as a lawful permanent resident "and begins to develop the ties that go with permanent residence," her "constitutional status changes accordingly." *Plasencia*, 459 U.S. at 32. That alien has acquired permission to make the United States her home, and she has a legitimate, constitutionally protected interest in being permitted to remain here. See *ibid.* (explaining that "a continuously present resident alien is entitled to a fair hearing when threatened with deportation"). That is not true of an unlawful entrant who seeks to challenge his exclusion from the country in the first instance. Such an alien necessarily has few, if any, legitimate ties to the United States. As a result, he cannot claim a protected constitutional interest in being admitted that is analogous to a lawful permanent

resident's interest in avoiding deportation or, more directly relevant for Suspension Clause purposes, that is analogous to a detainee's interest in avoiding the executive imprisonment at the "historical core" of habeas. At a minimum, Congress has made the judgment that an unlawful entrant does not have sufficient legitimate ties to the United States for two years after the alien enters the country. See 8 U.S.C. 1225(b)(1)(A)(iii). And at the very least, an alien like respondent cannot claim a protected liberty interest in remaining in the United States when he was apprehended 25 yards from the border, almost immediately after unlawfully entering. J.A. 38.

The gulf between a challenge to ongoing executive detention and a challenge to a denial of initial admission to this country is particularly clear in light of the relief that respondent seeks. If respondent's habeas petition succeeds, he will not be freely released into the United States. Indeed, respondent's habeas petition nowhere requests that relief. See J.A. 12-34. And he has never contested that he was appropriately detained during the procedures for expedited removal, as required by statute. See 8 U.S.C. 1225(b)(1)(B)(iii)(IV); *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836-837, 842-846 (2018). Such detention is incident to an alien's removal and is designed to be brief. See 8 U.S.C. 1225(b)(1)(B)(iii)(III) (requiring IJ review of negative credible-fear determination "as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days"). Instead, respondent seeks "a new opportunity to apply for asylum and other applicable forms of relief." J.A. 33. But asylum is a form of discretionary relief, not a right. See 8 U.S.C. 1158(b)(1)(A); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987). And

withholding of removal and CAT protection, while mandatory where the prerequisites are established and no exception applies, provide only protection from removal to a particular country, and not a right to live in the United States. See 8 U.S.C. 1231(b)(3)(A); 8 C.F.R. 208.16(a) and (f), 208.17(a). Those opportunities for relief or protection from removal, afforded by Congress but not the Constitution, do not carry with them a constitutionally protected liberty interest.

At bottom, respondent seeks to invoke habeas both to protect a purported interest (the ability to seek admission to the United States) and to pursue a type of remedy (additional proceedings concerning relief or protection from removal) that would have been unknown at the time of the Founding. Because respondent's habeas petition falls so far outside the "historical core" of the writ, the Suspension Clause does not prevent Congress from confining the scope of habeas review as it has in Section 1252(e)(2).

C. The Court Of Appeals' Contrary Reasoning Lacks Merit

In holding that Section 1252(e)(2) violates the Suspension Clause, the court of appeals primarily relied on three sources: *Boumediene*, *St. Cyr*, and this Court's "finality era" decisions.[9] See Pet. App. 31a-41a. Those sources, either alone or in combination, fail to establish that the Suspension Clause guarantees a right to ha-

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[9] The finality era refers to "an approximately sixty-year period," from 1891 until 1952, during which Congress "rendered final (hence, the 'finality' era) the Executive's decisions to admit, exclude, or deport aliens," but the Court permitted some habeas corpus challenges to an alien's exclusion or deportation. *Castro*, 835 F.3d at 436; see Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084; INA, ch. 477, 66 Stat. 163.

beas corpus review of the Executive Branch's determinations regarding the initial admission of aliens like respondent.

1. First, the court of appeals mistakenly construed *Boumediene* as establishing an absolute requirement that an alien seeking admission receive an opportunity to raise in federal court a claim about "the erroneous application or interpretation of relevant law" in immigration proceedings. Pet. App. 35a (quoting *Boumediene*, 553 U.S. at 779); see *id.* at 15a-20a, 35a-41a. In so doing, the court rejected any distinction between the detainees' claims in *Boumediene* and respondent's use of habeas as an affirmative means of seeking initial admission to this country. See *id.* at 36a (asserting that the circumstances of the habeas petitioner do not alter "the extent of review the Suspension Clause requires"). Contrary to the court's view, *Boumediene* occurred in fundamentally different circumstances, which in fact undermines respondent's asserted entitlement to habeas review here.

Among other things, *Boumediene* involved a challenge to ongoing detention for the duration of hostilities, pursuant to the law of war. 553 U.S. at 732; see *id.* at 785 (noting that "the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more"). The habeas petitioners, moreover, sought to be released from the government's custody so they could return home or to the country where they were captured. See *id.* at 788 (discussing "[t]he absence of a release remedy" under the relevant statute). Under those circumstances, the Court concluded that "the privilege of habeas corpus entitles *the prisoner* to a meaningful opportunity to

demonstrate *that he is being held* pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* at 779 (quoting *St. Cyr*, 533 U.S. at 302) (emphases added). The Court likewise concluded that "the habeas court must have the power to order the conditional *release of an individual unlawfully detained.*" *Ibid.* (emphasis added); see *id.* at 783 ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for *detention* and the Executive's power to *detain*.") (emphases added).

By contrast, respondent does not challenge his detention as such. Instead, as explained above, he seeks to use habeas corpus not to be released to his home country, but to obtain permission *to enter and remain in this country* by seeking relief or protection from removal. See pp. 30-35, *supra*. Thus, unlike the habeas petitioners in *Boumediene*, respondent is free to go: He would be removed to and released in Sri Lanka absent his habeas petition. And also unlike in *Boumediene*, nobody asserts that the habeas court here would "have the power to order [respondent's] conditional release." 553 U.S. at 779; see J.A. 33 (requesting additional asylum procedures); Pet. App. 42a-43a (remanding for district court to consider legal challenges to existing procedures). Those fundamental differences have a dispositive effect on the application of the Suspension Clause.

2. Second, the court of appeals' extension of *St. Cyr* was unwarranted. See Pet. App. 20a-23a, 32a, 35a-36a. As explained above, see pp. 31-33, *supra*, *St. Cyr* involved a lawful permanent resident who had lived in the United States for a decade and was subject to full deportation proceedings, see 533 U.S. at 293. The Court's suggestion (as a matter of constitutional avoidance) that

the Suspension Clause might preserve some right to judicial review in that context does not justify adopting the novel constitutional entitlement asserted here.

In addition, the habeas petitioner in *St. Cyr* raised a "pure question of law"—a question of statutory interpretation concerning whether an alien deportable on the basis of committing an aggravated felony was eligible for discretionary relief. 533 U.S. at 298. By contrast, any judicial review of the determination that respondent lacked a credible fear would be highly fact-based, and any review of his assertions that the asylum officers or IJ failed to follow procedures would require examination of the record and the application of law to the facts and circumstances of this particular case. The Suspension Clause has never required such fact-intensive review, as noted in *St. Cyr* itself. See *id.* at 306 (explaining that in immigration cases "the courts generally did not review factual determinations made by the Executive"); see also U.S. Br. at 42, *Guerrero-Lasprilla* v. *Barr*, No. 18-776 (Oct. 21, 2019) (explaining that the phrase "'application * * * of statutes'" in *St. Cyr*, 533 U.S. at 302, means "the purely legal question of a statute's coverage or scope").

3. Third, the court of appeals' reliance on finality-era decisions was both inapt and inaccurate. See Pet. App. 33a-35a, 38a.

To begin, the finality-era decisions shed little light on the scope of the Suspension Clause. The cases on which the court of appeals relied do not mention the Suspension Clause at all. Instead, the court's reliance on those cases required a chain of inferences: that this Court extended habeas review to certain immigration decisions that Congress had precluded from judicial review, that it did so because the Constitution required

habeas review to be available in those circumstances, that the most relevant constitutional mandate was the Suspension Clause, and that the Court's finality-era decisions thus represent a body of precedent about the Suspension Clause. To be sure, *St. Cyr* remarked that the finality-era decisions contain "suggestions * * * as to the extent to which habeas review could be limited" under the Suspension Clause, relying on *Heikkila*, *supra*. *St. Cyr*, 533 U.S. at 304. *Heikkila*, in turn, observed that the finality-era immigration statutes "had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." 345 U.S. at 234-235. But that statement in *Heikkila*, which "was pure dictum," did not specifically "refer to the Suspension Clause, so could well have had in mind the due process limitations upon the procedures for determining deportability." *St. Cyr*, 533 U.S. at 339 (Scalia, J., dissenting).

In any event, even assuming that the finality-era habeas decisions provide some guidance about the meaning of the Suspension Clause in circumstances like those in *St. Cyr*, they do not support respondent here. In all of the decisions on which the court of appeals relied involving an alien who was seeking initial admission to the country, see Pet. App. 33a-34a, this Court reached legal questions that fell *beyond* the scope of the applicable finality statute—which does not suggest that the Constitution guaranteed that review. See *Ekiu*, 142 U.S. at 662-664 (reasoning that the immigration official had been validly appointed and had conducted the exclusion proceeding required by statute, and that the official's decision was therefore "final and conclusive"); *Gegiow* v. *Uhl*, 239 U.S. 3, 9-10 (1915) (determining that "[t]he conclusiveness of the decisions of immigration officers

under the [finality statute]" did not reach the legal question whether "an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked"); *Mezei*, 345 U.S. at 211-212 (explaining that the Attorney General "made the necessary determinations" required by statute and that "courts cannot retry the determination[s]"); *Knauff*, 338 U.S. at 542-543 (rejecting contention that the statute and regulations "contain unconstitutional delegations of legislative power" because "the decision to admit or to exclude an alien may be lawfully" delegated to an executive officer whose "authority is final and conclusive"). If anything, those decisions demonstrate that this Court has not disturbed Congress's determinations about the scope of habeas review available to aliens seeking initial admission.

II. EVEN IF THE SUSPENSION CLAUSE GUARANTEES SOME LIMITED PROTECTIONS, THE STATUTORY FRAMEWORK FOR EXPEDITED REMOVAL SATISFIES ANY SUCH REQUIREMENTS

Even if respondent may properly invoke the Suspension Clause to challenge the limitations on habeas corpus review in the context of a denial of initial admission to the United States, he is not entitled to relief. Congress may provide by statute alternative processes, so long as those processes are "neither inadequate nor ineffective." *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977); see *United States* v. *Hayman*, 342 U.S. 205, 223 (1952). And the expedited-removal framework of administrative and judicial review is more than adequate and effective to safeguard any minimal liberty interests that respondent may have.

This Court instructed in *Boumediene*, *supra*, that an assessment of the adequacy of a statutory review scheme is highly dependent on context. The Court explained that "common-law habeas corpus was, above all, an adaptable remedy" whose "precise application and scope changed depending upon the circumstances." 553 U.S. at 779; see *id.* at 814 (Roberts, J., dissenting) (observing that the "scope of federal habeas review is traditionally more limited in some contexts than in others, depending on the status of the detainee and the rights he may assert"). Indeed, the Court invoked the flexible balancing test from the due process context, *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), under which the risk of an erroneous deprivation of liberty is balanced against the probable value of additional procedural safeguards and the government's interest. See *Boumediene*, 553 U.S. at 781-782; see also *id.* at 779 (noting that, "depending on the circumstances, more may be required"); *id.* at 786 (explaining that "habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough").

A balancing of interests is particularly suitable here, because respondent's claim falls outside the historical core of habeas corpus that the Suspension Clause could have been thought to guarantee, and because this Court has repeatedly held that an alien seeking admission has no due process right to procedures beyond what Congress has provided. See pp. 21-35, *supra*. To the extent the Constitution recognizes respondent's asserted liberty interests at all, the expedited-removal system that Congress has adopted—which involves three layers of administrative review, along with judicial review of key questions—more than suffices under the Suspension Clause to protect them.

A. Again, any interest respondent may have in challenging his expedited-removal order is minimal, and he has no recognized due process right to procedures beyond what Congress has provided. See pp. 21-35, *supra*. Unlike the enemy combatant in *Boumediene*, who might have been detained for the duration of hostilities, 553 U.S. at 785, respondent does not contest his detention as such, and detention incident to the expedited-removal proceedings is designed to be brief. Indeed, respondent would have been promptly removed to his home country were it not for this suit. And unlike the lawful permanent resident in *St. Cyr*, respondent has no substantial ties to this country that could establish a liberty interest in avoiding removal even arguably analogous to the liberty interest in avoiding ongoing detention.

Meanwhile, Congress and the Executive have furthered the compelling interest in protecting the Nation's borders by creating an expedited-removal system tailored to the circumstances of aliens seeking admission without valid documents or inspection. They have done so through a multilevel administrative-review process and circumscribed judicial review of core questions. That process more than suffices to satisfy whatever minimal constitutional interests respondent may have.

1. An alien subject to expedited removal receives three opportunities to demonstrate that he has a credible fear of persecution on a protected ground or torture in his country. First, an alien has an interview with an asylum officer, who makes a determination whether the alien has shown a credible fear of persecution or torture. 8 U.S.C. 1225(b)(1)(B); 8 C.F.R. 208.30. Second,

a supervisory asylum officer must review and, if appropriate, approve the negative credible-fear determination. 8 C.F.R. 208.30(e)(7); see 8 C.F.R. 235.3(b)(7). Third, if the alien requests additional review, he is entitled to have an independent IJ conduct a hearing, which "shall include an opportunity for the alien to be heard and questioned by the" IJ. 8 U.S.C. 1225(b)(1)(B)(iii)(III). If the IJ concurs, on de novo review, with the determination of the asylum officers, the "decision is final and may not be appealed." 8 C.F.R. 1208.30(g)(2)(iv)(A). DHS, however, may reconsider the negative credible-fear determination. *Ibid.* The alien thus has the opportunity for several decisionmakers to independently assess whether he may be a viable candidate for asylum or other protection.

Moreover, the credible-fear screening process is just that: A screening process Congress deemed adequate for weeding out claims of asylum or protection from removal that are least likely to succeed on the merits. Thus, asylum officers and the IJ may determine that an alien lacks a credible fear of persecution or torture only where the alien has failed to put forth a "significant possibility" that he "could establish eligibility for asylum" or other protection. 8 U.S.C. 1225(b)(1)(B)(v); 8 C.F.R. 1003.42(d). If the alien is found to have a credible fear, the alien is placed in full removal proceedings under Section 1229a to consider the asylum, withholding, or CAT claim, see 8 U.S.C. 1225(b)(1)(B)(iii); may appeal to the Board of Immigration Appeals, 8 U.S.C. 1229a(c)(5); and from there may seek review in a court of appeals, 8 U.S.C. 1252(a).

2. Congress also provided for judicial review of expedited-removal orders through a writ of habeas corpus. In such a proceeding, the court may review the petitioner's claim that he is not in fact an alien; that he has

not been ordered removed under Section 1225(b)(1); or that he has been admitted as a lawful permanent resident, refugee, or asylee and retains such status. 8 U.S.C. 1252(e)(2). As a result, habeas review remains available to ensure that an expedited-removal order "in fact was issued and * * * relates to the" particular alien. 8 U.S.C. 1252(e)(5). That review protects those individuals who assert that they have a legal status that reflects substantial connections to the United States.

Section 1252(e) also provides for judicial review of broader legal challenges to the constitutionality or legality of the expedited-removal system. 8 U.S.C. 1252(e)(3). That provision enables the District Court for the District of Columbia, in a timely suit brought by an alien subject to an expedited-removal order, to review the most significant questions regarding the validity of the Executive Branch's implementation of the expedited-removal system. See *American Immigration Lawyers Ass'n* v. *Reno*, 18 F. Supp. 2d 38, 54-56 (D.D.C. 1998) (rejecting challenge to various expedited-removal provisions), aff'd, 199 F.3d 1352 (D.C. Cir. 2000).

3. Respondent was subject to the threshold screening procedures applicable to aliens who claim a fear of returning to their own countries. He was provided a credible-fear screening interview by an asylum officer, with the opportunity to present evidence. J.A. 45-89. That officer found that respondent lacked a credible fear of persecution on account of a protected ground, or a credible fear of torture, if removed to Sri Lanka. J.A. 53. A supervisory asylum officer agreed with that determination. J.A. 54. Respondent then received de novo review by an IJ, who after taking respondent's tes-

timony and asking him questions, again found that respondent lacked a credible fear of persecution or torture. J.A. 97-98.

Although respondent contends that he was deprived "of a meaningful right to apply for asylum," J.A. 31, he does not dispute that he was provided all the procedural steps in the screening process described above, including de novo IJ review. Respondent merely disagrees with the asylum officers' and IJ's conclusion on the merits, asserting that he "should have passed the credible fear stage." J.A. 30. But while respondent may disagree with the asylum officers' and IJ's decision, historical precedent "suggests strongly that the Suspension Clause does not require judicial review of purely factual determinations or mixed fact and law determinations made in the context of alien exclusion." *Castro* v. *U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157, 169 (E.D. Pa.), aff'd, 835 F.3d 422 (3d Cir. 2016), cert. denied, 137 S. Ct. 1581 (2017); see, *e.g.*, *Zakonaite*, 226 U.S. at 275 (stating that it was "entirely settled" in the deportation context that "the findings of fact reached by [executive] officials, after a fair though summary hearing, may constitutionally be made conclusive").

Respondent also contends that the asylum officer failed to "'elicit all relevant and useful information'" bearing on his claim, and "failed to consider relevant country conditions evidence," which he contends contravened federal regulations. J.A. 27-28 (quoting 8 C.F.R. 208.30(d) and citing 8 C.F.R. 208.30(e)(2)). But the administrative process established by Congress and the Executive is designed to address procedural errors that may occur at a single stage: The asylum officer's determination was reviewed by a supervisory asylum officer, and respondent had the further opportunity to testify

before and present evidence to the IJ. Congress reasonably determined that, having provided three levels of administrative review, judicial review of a negative credible-fear determination was not a necessary procedural safeguard. See *Yamataya*, 189 U.S. at 101-102 (explaining that due process was satisfied by summary administrative proceedings consisting of an in-person interview with an immigration officer and the possibility of appeal to the Secretary of Treasury, without judicial review).

B. The government's interest in preserving the integrity and workability of the expedited-removal system—a critical tool Congress found necessary for controlling the Nation's borders when it enacted IIRIRA in 1996—is also substantial. Cf. *Mathews*, 424 U.S. at 347-348; see *Boumediene*, 553 U.S. at 769 (observing that the Court was "sensitive to" concerns about the diversion of government resources, though those concerns were not "dispositive"); *Munaf*, 553 U.S. at 693 (noting that "prudential concerns, such as comity and the orderly administration of criminal justice, may require a federal court to forgo the exercise of its habeas corpus power") (citations and internal quotation marks omitted).

The judicial procedures respondent demands—"necessitating pleadings, formal court proceedings, evidentiary review, and the like—would make expedited removal of arriving aliens impossible." *Castro*, 163 F. Supp. 3d at 174. Unlike in *Boumediene*, broader habeas review thus would seriously "compromise[]" the government's "mission." 553 U.S. at 769. The number of aliens who are found to lack a credible fear after all three layers of administrative review is considerable: According to published statistics from EOIR, in fiscal year 2019 almost 9000 aliens were found—after de novo

review by an IJ, which follows review by an asylum officer and a supervisory asylum officer—to lack a credible fear. See EOIR, U.S. Dep't of Justice, *Adjudication Statistics: Credible Fear Review and Reasonable Fear Review Decisions* 1 (Oct. 23, 2019).[10] The court of appeals' ruling thus creates a pathway for thousands of inadmissible aliens annually who have failed after several opportunities even to show a "significant possibility" that they are eligible for asylum or withholding, 8 U.S.C. 1225(b)(1)(B)(v), to nonetheless seek to delay their removal for potentially extended periods by filing a habeas petition and contending that the asylum officer or IJ failed to properly conduct the expedited-removal proceedings. That result would impose a severe burden on the immigration system and would threaten to defeat the purposes of expedited removal: to remove certain inadmissible aliens expeditiously and prevent abuse of the asylum system, while ensuring full consideration of claims where the alien has been found to have a credible fear. See House Report 116-118.

As the Secretary explained in 2004 when promulgating the designation applied here, there is an "urgent need" for expeditiously removing recent unlawful entrants. 69 Fed. Reg. at 48,880. At the time, "nearly 1 million aliens [we]re apprehended each year in close proximity to the borders after illegal entry," and the Secretary found that it was "not logistically possible" to "initiate formal removal proceedings against all such aliens." *Id.* at 48,878. Moreover, there has recently been a "sharp increase" in both the absolute number and the percentage of aliens who are claiming a fear of return and thus who receive credible-fear screening. 84 Fed.

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[10] https://www.justice.gov/eoir/page/file/1104856/download.

Reg. 33,829, 33,830-33,831 (July 16, 2019). The unprecedented influx of asylum claims, including a "large number of meritless asylum claims," "places an extraordinary strain on the nation's immigration system" and has exacerbated the current crisis at the southwest border. *Id.* at 33,831. Allowing for broader habeas review would contribute to the real-world problems that Congress designed the expedited-removal system to address.

The conclusions of Congress and the Secretary that the expedited-removal framework's "streamline[d] rules and procedures" satisfy an urgent practical need while providing a suitable screening process to identify aliens with credible claims to protection, House Report 157-158, are entitled to "substantial weight," *Mathews*, 424 U.S. at 349. That framework was enacted in 1996 and has been applied to aliens in respondent's position for 15 years. Absent a firm basis in precedent or history for invoking the Suspension Clause to require more in this context, the Court should respect Congress's judgment and decline after all these years to mandate broader habeas review for aliens subject to expedited removal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2019

APPENDIX

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

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

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

Definitions

(a) As used in this chapter—

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include

any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

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

Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

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

(B) Time limit

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

(C) Previous asylum applications

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

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of

the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

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

(3) Limitation on judicial review

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

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within

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

(ii) Sustaining burden

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

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and

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

(2) Exceptions

(A) In general

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

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

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

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

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

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

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

(B) Special rules

(i) Conviction of aggravated felony

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

(ii) Offenses

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

(C) Additional limitations

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

(D) No judicial review

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

(3) Treatment of spouse and children

(A) In general

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

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction

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

(c) Asylum status

(1) In general

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

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

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

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

(2) Termination of asylum

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

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

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

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

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

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

(3) Removal when asylum is terminated

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

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

the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

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

(2) Employment

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

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to

limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

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

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

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

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

(5) Consideration of asylum applications

(A) Procedures

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

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the

asylum application shall commence not later than 45 days after the date an application is filed;

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

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

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

(B) Additional regulatory conditions

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

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible

for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

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

(e) Commonwealth of the Northern Mariana Islands

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

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

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

(a) Inspection

(1) Aliens treated as applicants for admission

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

(2) Stowaways

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

(3) Inspection

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

(4) Withdrawal of application for admission

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

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of

stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of applicants for admission

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

(A) Screening

(i) In general

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

(ii) Claims for asylum

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

(iii) Application to certain other aliens

(I) In general

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

(II) Aliens described

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

(B) Asylum interviews

(i) Conduct by asylum officers

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

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the

alien shall be detained for further consideration of the application for asylum.

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

(I) In general

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

(II) Record of determination

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

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection.

Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

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

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) "Credible fear of persecution" defined

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

(C) Limitation on administrative review

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

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) "Asylum officer" defined

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

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

(ii) is supervised by an officer who meets the condition described in clause (i) and has had

substantial experience adjudicating asylum applications.

(F) Exception

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

(G) Commonwealth of the Northern Mariana Islands

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

(2) Inspection of other aliens

(A) In general

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

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

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

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

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

(3) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

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

(1) Removal without further hearing

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

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

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

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

(2) Review of order

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

(B) If the Attorney General—

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

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

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

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

(3) Submission of statement and information

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

(d) Authority relating to inspections

(1) Authority to search conveyances

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

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

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

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

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

(3) Administration of oath and consideration of evidence

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

(4) Subpoena authority

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

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

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

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by

chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

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

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

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

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

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

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

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

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

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

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their

date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

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

(3) Treatment of certain decisions

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

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections

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

(b) Requirements for review of orders of removal

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

(1) Deadline

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

(2) Venue and forms

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

(3) Service

(A) In general

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

(B) Stay of order

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

(C) Alien's brief

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

(4) Scope and standard for review

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

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

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

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

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

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

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

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

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer

the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

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

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

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

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

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

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

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

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

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

(C) Consequence of invalidation

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

(D) Limitation on filing petitions for review

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

(8) Construction

This subsection—

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

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

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

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

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

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

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of

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[1] See References in Text note below.

the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

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

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

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

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

(1) Limitations on relief

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

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

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

(2) Habeas corpus proceedings

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

(A) whether the petitioner is an alien,

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

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

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

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

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority

of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

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

(C) Notice of appeal

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

(D) Expeditious consideration of cases

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

(4) Decision

In any case where the court determines that the petitioner—

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

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has

been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

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

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

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

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.