No. 16-812

In the Supreme Court of the United States

ROSA ELIDA CASTRO, ET AL., PETITIONERS

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioners in these consolidated cases are inadmissible aliens who surreptitiously crossed the U.S. border and were arrested within a matter of hours (and miles) of that unlawful entry. They were accordingly placed in "expedited removal" proceedings. See 8 U.S.C. 1225(b)(1). An immigration officer conducted a credible fear interview for each petitioner and found that each lacked a credible fear of torture or persecution. Each appealed to an immigration judge who, upon de novo review, reached the same conclusions. Petitioners were ordered removed. Petitioners then filed petitions for writs of habeas corpus, which were dismissed for lack of jurisdiction because they did not raise the kinds of habeas challenges to expedited removal orders that are permitted under 8 U.S.C. 1252(e)(2).

The question presented is whether, as applied to petitioners, Section 1252(e)(2) violates the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 835 F.3d 422. The opinion of the district court (Pet. App. 68a-105a) is reported at 163 F. Supp. 3d 157.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2016. A petition for rehearing was denied on October 28, 2016 (Pet. App. 66a-67a). The petition for a writ of certiorari was filed on December 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are natives and citizens of El Salvador, Honduras, and Guatemala who surreptitiously entered the United States by illegally crossing the U.S. border with Mexico without inspection by an immigration

officer. Pet. App. 13a. "United States Customs and Border Protection (CBP) agents encountered and apprehended each petitioner within close proximity to the border and shortly after their illegal crossing." *Ibid.* "[T]he vast majority were apprehended within an hour or less of entering the country, and at distances of less than one mile from the border." *Ibid.* "[N]o petitioner appears to have been present in the country for more than about six hours, and none was apprehended more than four miles from the border." *Id.* at 13a-14a. None "presented immigration papers upon their arrest, and none claimed to have been previously admitted to the country." *Id.* at 14a.

Petitioners were placed in "expedited removal" proceedings under 8 U.S.C. 1225(b)(1). Each claimed a fear of persecution or torture if they were returned to their native lands. Pet. App. 7a. After a screening interview, an asylum officer determined that each lacked a credible fear. *Ibid.* On de novo review, an immigration judge (IJ) reached the same conclusion, and each case was returned to U.S. Immigration and Customs Enforcement (ICE) to remove petitioners. *Ibid.* Petitioners thereafter filed petitions for writs of habeas corpus, which the district court dismissed for lack of jurisdiction under 8 U.S.C. 1252(e). Pet. App. 7a-8a. The court of appeals affirmed. *Id.* at 8a.

1. a. "The statutory and regulatory provisions of the expedited removal regime are at the heart of this case." Pet. App. 8a. Expedited removal is used for certain aliens who are inadmissible to the United States: (1) aliens arriving at a port of entry who lack valid documentation or who seek to enter via fraud; and (2) categories of aliens designated by the Secretary of Homeland Security who have been present

inside the United States without having been admitted or paroled. 8 U.S.C. 1225(b)(1)(A)(i) and (iii); see 8 U.S.C. 1182(a)(6)(C) and (7). With expedited removal, aliens are ordinarily ordered removed by an immigration officer in the Department of Homeland Security (DHS), 8 U.S.C. 1225(b)(1)(A)(i), without a further hearing by an IJ in the Department of Justice's Executive Office for Immigration Review. See 8 C.F.R. 1001.1(*l*). The expedited removal system includes added protections, however, for aliens with potential asylum or other protection claims. See pp. 5-7, *infra*.

Congress created expedited removal to "streamline[] rules and procedures" for "deny[ing] admission to inadmissible aliens," while ensuring that there is "no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 157-158 (1996) (House Report). Congress was particularly concerned with abuse of the asylum system. *Id.* at 107. At the time, "[t]housands of smuggled aliens arrive[d] in the United States each year with no valid entry documents and declare[d] asylum." *Id.* at 117. "Due to lack of detention space and overcrowded immigration court dockets," however, "many ha[d] been released into the general population" and "a majority of such aliens d[id] not return for their hearings." *Ibid.* Without expedited removal, those aliens would be placed in full removal proceedings before an IJ 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.

b. In 2004, consistent with Congress's grant of authority to designate certain categories of aliens for expedited removal, the Secretary designated aliens

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

At the time, "nearly 1 million aliens [were] apprehended each year in close proximity to the borders after illegal entry." 69 Fed. Reg. at 48,878. Expedited removal is necessary, the Secretary explained, because "[i]t is not logistically possible" for DHS to initiate full IJ removal proceedings under Section 1229a against all such aliens. *Ibid.* For Mexican nationals, DHS would often allow them to return home, "without any formal removal order." *Ibid.* But "many of those who [we]re returned to Mexico [sought] to reenter the U.S. illegally, often within 24 hours of being voluntarily returned." *Ibid.* DHS also could not voluntarily return an alien to Central America or other noncontiguous countries. Without expedited removal, DHS thus would initiate full IJ removal proceedings under Section 1229a for those aliens, but it "lack[ed]

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[1] The Secretary has recently announced that he intends to expand the designation, "to the extent [he] determine[s] is appropriate," beyond "the limitations set forth in the designation currently in force." Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* 7 (Feb. 20, 2017); see Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

the resources to detain" all of them in the interim. *Ibid.* As a result, "many of these aliens [were] released in the U.S. each year," and many "subsequently fail[ed] to appear for their removal proceedings, and then disappear[ed] in the U.S." *Ibid.*

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

c. The expedited removal system includes additional protections for an alien who "indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country." 8 C.F.R. 235.3(b)(4); see 8 U.S.C. 1225(b)(1)(A)(ii) and (B). Such an alien is referred for screening before a U.S. Citizenship and Immigration Services (USCIS) asylum officer. *Ibid.* The asylum officer then interviews the alien, reviews relevant facts, and determines initially whether the alien has a credible fear. 8 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 C.F.R. 208.30(d) (describing procedural safeguards in the interview). A credible fear exists when there is a "significant possibility," taking into account the credibility of the alien's statements and other facts known to the officer, that the alien could establish eligibility for asylum, withholding of removal, or withholding or deferral of removal un-

der the Convention Against Torture (CAT). 8 U.S.C. 1225(b)(1)(B)(v), 1231(b)(3); 8 C.F.R. 208.30(e)(2) and (3).[2]

The asylum officer must "create a written record of his or her determination," including a "summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture." 8 C.F.R. 208.30(e)(1); see 8 U.S.C. 1225(b)(1)(B)(iii)(II). If the officer finds that the individual does not have a credible fear, that finding "shall not become final until reviewed by a supervisory asylum officer." 8 C.F.R. 208.30(e)(7). If the supervisory asylum officer agrees that there is no credible fear, the asylum officer "shall" provide the alien a "written notice of decision," using "Form I-869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge." 8 C.F.R. 208.30(g)(1). The notice informs the alien of the decision and that he can request IJ review. 8 U.S.C. 1225(b)(1)(B)(iii)(III); see 8 C.F.R. 235.3(b)(4)(i)(C).

The IJ's review is de novo. 8 C.F.R. 1003.42(d). The IJ "may receive into evidence any oral or written statement which is material and relevant to any issue in the review." 8 C.F.R. 1003.42(c). If the asylum officer (or IJ) finds that the alien has a credible fear, the alien is referred for full IJ removal proceedings under Section 1229a to consider whether to grant asylum or other relief or protection from removal. 8 C.F.R. 208.30(e)(5), 235.6(a), 1208.30(g)(2)(iv)(B); see 8

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[2] An alien may be eligible for asylum if he is found to be a "refugee," meaning an alien who is unable or unwilling to return "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), 1158(a).

U.S.C. 1225(b)(1)(B)(ii). If the asylum officer (along with the supervisory asylum officer and, if review is sought, the IJ) finds credible fear has not been established, the alien may be removed with no further hearing. 8 U.S.C. 1225(b)(1)(B)(iii)(I).

2. In 8 U.S.C. 1252, Congress has sharply limited judicial review of expedited removal orders. Congress has 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 [the expedited removal statute] to individual aliens, including the [credible fear] determination"; or (4) "procedures and policies adopted * * * to implement the provisions" of the expedited removal statute. 8 U.S.C. 1252(a)(2)(A)(i)-(iv).

Section 1252 further provides that judicial review of an expedited removal order "is available in habeas corpus proceedings," but "shall be limited" to three specific determinations. 8 U.S.C. 1252(e)(2). Those are whether the petitioner: (1) "is an alien"; (2) "was ordered removed under" the expedited removal statute; or (3) can prove that he or she was previously admitted to the United States as a lawful permanent resident, refugee, or asylee, and that such status has not been terminated. *Ibid.* "In determining whether an alien has been ordered removed" under the expedited removal statute, Congress specified, "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petition-

er." 8 U.S.C. 1252(e)(5); see H.R. Rep. No. 828, 104th Cong., 2d Sess. 220 (1996) ("review does not extend to determinations of credible fear and removability in the case of individual aliens"). "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).[3]

3. As set forth above, petitioners are inadmissible aliens who were apprehended within a few hours and miles of illegally crossing the U.S.-Mexico border without inspection. Pet. App. 13a-14a. None presented immigration papers or claimed to have been previously admitted. *Id.* at 14a. Petitioners were placed in expedited removal, which was "clearly" proper. *Ibid.*

Each petitioning family claimed a fear of domestic abuse or gang violence if they were removed, and a credible-fear interview was conducted for each petitioning family. Pet. App. 70a. In each case, the asylum officer found (and a supervisor concurred) that the petitioning family had not established a credible fear of persecution on a protected ground or of torture. Each petitioning family was provided a written record of the decision, including Forms I-863 (DHS Notice of Referral to Immigration Judge), I-869 (Record of Negative Credible Fear Finding and Request for Review by Immigration Judge), and I-870 (Record of Determination/Credible Fear Worksheet). See *id.* at 109a-

[3] Congress has also authorized judicial review of whether the expedited removal statute (or such regulation) "is constitutional," and whether any such regulation, policy, policy guideline, or procedure "is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." 8 U.S.C. 1252(e)(3)(A). Such challenges must be instituted in the United States District Court for the District of Columbia, and filed within 60 days of the first implementation of the challenged "section, regulation, directive, guideline, or procedure." 8 U.S.C. 1252(e)(3)(B).

281a (reproducing only excerpts from the Form I-870s); Gov't C.A. Mot. to File Under Seal, Ex. B (Apr. 4, 2016) (fully reproducing all of the forms, including transcribed notes of the credible fear interviews); Pet. App. 14a n.6 (granting motion).

Each of the Form I-870s is signed by both an asylum officer and a supervisory asylum officer, and states that "there [wa]s not a significant possibility that the [alien] could establish eligibility" for asylum, withholding of removal, or protection under the CAT. See Pet. App. 109a-279a (reproducing each form). Among the 29 families, 27 of the Form I-870s indicate there was "[n]o nexus" between the claimed fear and a protected ground. *Id.* at 109a, 115a, 121a, 127a, 133a, 139a, 151a, 157a, 163a, 169a, 175a, 181a, 187a, 193a, 205a, 211a, 217a, 223a, 229a, 235a, 241a, 247a, 253a, 259a, 265a, 271a, 277a. The remaining two forms identified a nexus to a particular social group (membership in a particular person's family), but found that there was "not a significant possibility" the alien could establish eligibility for asylum or withholding of removal on that ground. *Id.* at 145a-146a, 199a-200a.

Each petitioner requested and received de novo IJ review. In each case, after taking testimony, the IJ found that credible fear was not established. See Pet. App. 109a-281a (reproducing each IJ order). Each alien was thus subject to a final order of removal.

4. Each family thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. Pet. App. 69a-70a. Although their claims varied, each petitioner contended that the asylum officer "failed to 'prepare a written record' of their negative credible fear determinations that included the officers' 'analysis of why . . .

the alien has not established a credible fear of persecution,'" and claimed that "that the officers and the IJs applied a higher standard for evaluating the credibility of their fear of persecution than is called for in the statute." *Id.* at 15a n.8 (quoting 8 U.S.C. 1225(b)(1)(B)(iii)(II)).

The district court consolidated the habeas petitions for pretrial purposes, and dismissed for lack of jurisdiction under Section 1252(e)(2). Pet. App. 68a-105a. The court concluded that Section 1252(e)(2) unambiguously prohibited habeas review of petitioners' claims, because (1) each petitioner is an alien; (2) each was ordered removed via expedited removal; and (3) none claimed to have been previously admitted as a lawful permanent resident, refugee, or asylee. 8 U.S.C. 1252(e)(2)(A)-(C); see Pet. App. 83a-90a; *id.* at 87a ("Congress could not have been clearer.").

The district court then held that Section 1252(e)(2)'s restrictions on habeas corpus review are constitutional as applied to petitioners. "Petitioners' contentions have been rejected by almost every court to address them," the court noted, and it "agree[d] with those uniform rulings." Pet. App. 69a. In reaching that conclusion, the court identified four factors from *Boumediene* v. *Bush*, 553 U.S. 723 (2008), that it found relevant to the Suspension Clause analysis: (1) "historical precedent"; (2) "separation-of-powers principles"; (3) "the gravity of the petitioner's challenged liberty deprivation"; and (4) "a balancing of the petitioner's interest in more rigorous administrative and habeas procedures against the Government's interest in expedited proceedings." Pet. App. 92a.

The district court determined that all four factors weighed against petitioners' claims. Pet. App. 92a-

104a. The court explained that, "[a]lthough [p]etitioners frame their arguments creatively, their challenge to the merits of their negative credible fear determinations is a mixed question of law and disputed fact." *Id.* at 94a. And the court concluded that historic precedent "suggest[ed] 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." *Id.* at 93a.

The district court then determined that the remaining factors also weighed against petitioners' claims. It explained that separation-of-powers principles "weigh heavily" against petitioners, because "[t]he course [they] urge would force the courts into an area traditionally reserved for Congress and the Executive." Pet. App. 100a. The court further noted that petitioners "have lesser liberty interests to vindicate through habeas than did the prisoners in *Boumediene*," because they are "detain[ed] only for as long as necessary to carry out the[ir] exclusion." *Id.* at 101a. And the court concluded that the government's interest in "expedition and finality" outweighed petitioners' interests. *Id.* at 104a. The court noted in this regard that "[t]he Government seeks to employ its resources effectively by accelerating the removal" of those aliens who, "because of their brief presence here," "have the fewest ties and enforceable rights." *Id.* at 103a. Conversely, "[t]he procedures [p]etitioners urge—necessitating pleadings, formal court proceedings, evidentiary review, and the like—would make expedited removal of arriving aliens impossible" and undermine the government's effort "to discourage foreign nationals from exposing themselves to the dangers associated with illegal immigration." *Id.* at 102a-103a.

5. The court of appeals affirmed. Pet. App. 1a-62a. The court first held that Section 1252(e)(2) unambiguously precluded review of petitioners' claims challenging their expedited removal orders, as petitioners did not dispute that they were aliens who had, in fact, been ordered removed via expedited removal and had not been previously admitted. "Petitioners are attempting to create ambiguity where none exists," the court stated. *Id.* at 20a.

The court of appeals then held that Section 1252(e)(2)'s limitations on habeas corpus review are constitutional as applied to aliens "who, like [p]etitioners, were apprehended very near the border and, essentially, immediately after surreptitious entry into the country." Pet. App. 28a. The court explained that *Boumediene* "contemplates a two-step inquiry whereby courts must first determine whether a given habeas petitioner is prohibited from invoking the Suspension Clause" by assessing their legal status, physical location, and the specific action challenged. *Id.* at 51a. "Only after confirming that the petitioner is not so prohibited," the court stated, may a court determine "whether the substitute for habeas is adequate and effective to test the legality of the petitioner's detention (or removal)." *Ibid.*

The court of appeals concluded that petitioners' claims failed at step one because "the Supreme Court has unequivocally concluded that 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.'" Pet. App. 52a (quoting *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982)). "Petitioners were each apprehended within hours of surreptitiously entering the United States," the court stated, "so we think it

appropriate to treat them as 'alien[s] seeking initial admission to the United States.'" *Ibid.* (brackets in original). "And since the issues that [p]etitioners seek to challenge all stem from the Executive's decision" to deny their applications for admission and order them removed, the court stated, they "cannot invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them" in Section 1252. *Ibid.*

The court of appeals explained that its decision was consistent with this Court's precedents. In particular, the court found support in cases holding that aliens who were physically inside the United States, but had not effectuated an "entry," lacked constitutional rights in connection with their admission. Pet. App. 56a; *e.g.*, *Leng May Ma* v. *Barber*, 357 U.S. 185, 186 (1958) (arriving alien allowed into the country on parole pending admission determination). And the court of appeals found support in decisions suggesting that "recent clandestine entrants like [p]etitioners do not qualify for constitutional protections based merely on their physical presence alone." Pet. App. 57a. For example, the court noted that in *Yamataya* v. *Fisher*, 189 U.S. 86 (1903), this Court "withh[eld] judgment on [the] question 'whether an alien can rightfully invoke the due process clause of the Constitution 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, before his right to remain is disputed.'" Pet. App. 57a (quoting *Yamataya*, 189 U.S. at 100-101); see *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950) (similar).

Judge Hardiman joined the majority, but wrote a separate concurrence *dubitante*. Pet. App. 63a-64a.

He expressed doubt that *Plasencia* resolved the case, but remained "convinced that [the court] would reach the same result under step two of *Boumediene*'s framework." *Ibid.* He stated that, "[u]nlike the petitioners in *Boumediene*—who sought their release in the face of indefinite detention—[p]etitioners here seek to alter their status in the United States in the hope of *avoiding* release to their homelands." *Id.* at 64a. In his view, that request for relief "dooms the merits of [petitioners'] Suspension Clause argument that 8 U.S.C. § 1252(e) provides an 'inadequate or ineffective' habeas substitute." Pet. App. 64a (quoting *United States* v. *Hayman*, 342 U.S. 205, 223 (1952)).

Petitioners sought rehearing en banc, which was denied by a vote of 8-4. Pet. App. 66a-67a.

ARGUMENT

Petitioners contend (Pet. 20-21) that this Court and other courts of appeals have established that "individuals who have entered the country cannot be treated as noncitizens arriving at the border and thereby denied constitutional rights, particularly habeas corpus rights," and that the court of appeals below "broke with" that position. But the court of appeals' decision is far narrower than petitioners suggest, and creates no conflict with any decision of this Court or any other circuit. The court of appeals held that Section 1252(e)(2)'s scope of review on habeas corpus is constitutional as applied to petitioners, who surreptitiously crossed the U.S. border, were arrested within a matter of hours (and miles) of that unlawful clandestine entry, concede that they are inadmissible, were found after several layers of administrative review to lack a credible fear of persecution or torture, and were ordered removed. Pet. App. 7a-8a. That holding does not

conflict with any decision of this Court or the decision of any other court of appeals.

The court of appeals' judgment is also correct, although the government pressed a somewhat different rationale. This Court has repeatedly indicated that aliens do not instantaneously gain constitutional rights in connection with their admission the moment they cross the border clandestinely. See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50 (1950); *Yamataya* v. *Fisher*, 189 U.S. 86, 100-101 (1903); see also *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). Rather, such an alien is appropriately treated as an "alien seeking initial admission to the United States," who "requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. The court of appeals' judgment is consistent with those long-standing precedents.

Moreover, even if the Constitution guaranteed some minimal procedural protections for recent clandestine entrants like petitioners in connection with their applications for admission, the existing framework would more than suffice. Petitioners illegally crossed the U.S. border, do not dispute that they were inadmissible, and have no meaningful contacts with the United States. Yet Congress has ensured that such aliens are afforded "extensive Executive Branch process." Pet. App. 69a. They were provided a credible fear screening interview by a USCIS asylum officer, supervisory review of the negative determination, and de novo IJ review. Congress has also ensured that appropriately tailored habeas corpus review of expedited removal orders is available. 8 U.S.C. 1252(e)(2). This Court's review is unwarranted.

1. The court of appeals correctly held that Section 1252(e)(2) does not violate the Suspension Clause as applied to petitioners.

a. The court of appeals reasoned that petitioners "cannot invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them." Pet. App. 52a. In reaching that conclusion, the court explained that, because "[p]etitioners were each apprehended within hours of surreptitiously entering the United States," it was "appropriate to treat them as 'alien[s] seeking initial admission to the United States.'" *Ibid.* (brackets in original) (quoting *Plasencia*, 459 U.S. at 32).

"This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 (1972); see *id.* at 767 ("[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.") (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 591 (1952); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892). Therefore, the court of appeals reasoned, because "the issues that [p]etitioners seek to challenge all stem from the Executive's decision" to deny their applications and order them removed, the Constitution did not furnish them with any additional procedural pro-

tections beyond those provided by Congress and the Executive. Pet. App. 52a.

This Court's decisions strongly support the court of appeals' conclusion that, for constitutional purposes, an alien apprehended "essentially, immediately" after crossing the border clandestinely may be properly assimilated to the status of an alien seeking initial admission. Pet. App. 28a. For example, in *Yamataya*, the Court addressed a due process challenge brought by an alien who had presented herself for inspection at a port of entry and been allowed to enter, but who was placed into deportation proceedings days later on the ground that she was likely to become a public charge. 189 U.S. at 100-101; see *id.* at 87 (statement of the case) (noting that she was admitted on July 11, 1901, and a warrant for her arrest was issued on July 23, 1901). The court concluded that she could invoke the Due Process Clause—but expressly left "on one side the question" whether an alien "who *has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population*," can "rightfully invoke the due process clause of the Constitution" before "his right to remain is disputed." *Id.* at 100 (emphasis added). That language indicates that an alien arrested shortly after crossing the U.S. border surreptitiously cannot lay the same claim to constitutional protections as aliens who were lawfully admitted or who entered illegally then became, "in a[] real sense, a part of our population"—and instead may be treated as an applicant for initial admission.[4]

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[4] This Court further held in *Yamataya* that, as applied to an alien who was lawfully admitted and thus could claim due process protections, due process was satisfied by summary administrative

The Court's subsequent decisions reinforce the point. In *Wong Yang Sung*, the Court 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*." 339 U.S. at 49-50. And the Court has repeatedly suggested that constitutional protections in connection with admission are not conferred instantaneously, but instead require residence for some period. See *Plasencia*, 459 U.S. at 32 ("[O]nce an alien gains admission to our country *and begins to develop the ties that go with permanent residence*, his constitutional status changes accordingly.") (emphasis added); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) (alien acquires due process rights in connection with his admission once he "enters and resides in this country" (citation omitted)); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.").

b. In the court of appeals, the government argued that the court need not address step one of the *Boumediene* analysis (whether the Suspension Clause applies) because petitioners' claims fail under step two (whether the existing process of administrative and habeas corpus review is adequate under the Suspen-

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procedures consisting of an in-person interview by an immigration officer and the possibility of appeal to the Secretary of Treasury—without any further review. See 189 U.S. at 102. *Yamataya* thus suggests that, even if the Constitution itself guaranteed some minimal protection for the aliens at issue here in connection with seeking admission to the United States, the existing expedited removal framework is sufficient. See pp. 19-20, *infra*.

sion Clause). See Gov't C.A. Br. 48-49.[5] As discussed above, clandestine entrants like petitioners—who were arrested within hours (and miles) of the border—are properly assimilated, for constitutional purposes, to the status of an alien seeking initial admission and thus have no underlying due process rights to vindicate in a habeas corpus challenge to an expedited removal order. Such an alien "has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. Accordingly, the existing framework for obtaining review of removal orders, including the appropriately tailored review in habeas corpus permitted under Section 1252(e)(2), necessarily is adequate under the Suspension Clause.

Indeed, even if petitioners had some limited constitutional rights in connection with their application for admission, the existing framework of administrative and habeas corpus review would be more than sufficient. Petitioners were apprehended "essentially, immediately" after surreptitiously crossing the border and do not dispute that they are inadmissible. Pet. App. 28a. Nonetheless, an asylum officer conducted a credible fear screening interview; they had the opportunity to present evidence and were provided a written record of the decision; the negative credible-fear finding required the concurrence of a supervisory asylum officer; and that negative finding was subject to de novo review by an IJ, who again found after a hearing that no petitioner established a credible fear. *Id.* at 7a. Furthermore, habeas corpus is available to challenge application of expedited removal to a person who is not an alien, not the person ordered removed, or who was

[5] Judge Hardiman appears to have adopted this position in his concurrence. Pet. App. 63a-64a.

previously admitted as a lawful permanent resident, refugee, or asylee, such status not having been terminated. 8 U.S.C. 1252(e)(2). That provision ensures that those entitled to greater process may receive it. See 8 U.S.C. 1225(b)(2)(C), 1252(e)(4) (such aliens are entitled to full IJ removal proceedings under Section 1229a).[6]

The Constitution does not require still further review for aliens in petitioners' position. Indeed, the sufficiency of the existing review framework is particularly clear here, because petitioners' "challenge to the merits of their negative credible fear determinations is a mixed question of law and disputed fact." Pet. App. 94a. As the district court concluded, historic precedent "suggest[ed] 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." *Id.* at 93a; see *id.* at 93a-98a (collecting cases); see also, *e.g.*, *Zakonaite* v. *Wolf*, 226 U.S. 272, 275 (1912) (stating in the deportation context that it was "entirely settled" that the "inquiry may be properly devolved upon an execu-

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

tive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive.").

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

Furthermore, as the district court explained, "[t]he procedures [p]etitioners urge—necessitating pleadings, formal court proceedings, evidentiary review, and the like—would make expedited removal of arriving aliens impossible." Pet. App. 102a. "In FY 2013, for instance, 193,032 aliens were subject to expedited removal (36,035 of whom expressed a fear of return to their native lands)." *Id.* at 102a-103a. Permitting every alien found not to have a credible fear to seek judicial review would impose a severe administrative burden and threaten to defeat the purposes of the expedited removal system: to remove aliens expedi-

tiously and prevent abuse of asylum, while ensuring full consideration of claims where the alien has a credible fear. See House Report 116-118, 157-158.

As the Secretary of Homeland Security explained when designating the 14-day/100-mile category of aliens eligible for expedited removal, there is an "urgent" need for expeditiously removing such aliens. 69 Fed. Reg. at 48,880. At the time, "nearly 1 million aliens [were] apprehended each year in close proximity to the borders after illegal entry," *id.* at 48,878, and the Secretary found that it was "not logistically possible" to "initiate formal removal proceedings against all such aliens." *Ibid.* As the district court found, Pet. App. 102a, the procedures petitioners demand would create similar real-world problems.

Petitioners' contrary position is also highly formalistic. Although petitioners had crossed the U.S. border, for all practical purposes they were arrested while they were still in the process of effectuating their initial entry: They were still making their way to their initial inland destinations and had not yet become, "in any real sense, a part of our population" when they were arrested. *Yamataya*, 189 U.S. at 100.

In other contexts, Congress and the courts have recognized that a clandestine entrant does not become part of our population immediately upon crossing the border, and thus that the government's authority in controlling the border extends a reasonable distance into the interior. For example, Congress has authorized (and this Court has upheld) warrantless immigration searches at checkpoints within 100 miles of the U.S. border. 8 U.S.C. 1357(a)(3); 8 C.F.R. 287.1(a); see *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. 1182(a)(6)(E)(i), when all of the defendant's conduct occurred within U.S. territory after the border crossing itself. See *Dimova* v. *Holder*, 783 F.3d 30, 40 (1st Cir. 2015); *United States* v. *Aslam*, 936 F.2d 751, 755 (2d Cir. 1991) (smuggling "does not end at the instant the alien sets foot across the border"). The court of appeals' decision accords with this same practical reality.

2. Contrary to petitioners' contentions (Pet. 21-35), the court of appeals' decision does not conflict with any decision of this Court or another court of appeals, and does not warrant further review. As the court of appeals recognized, this case involves the question whether Section 1252(e)(2)'s provisions channeling habeas review are consistent with the Suspension Clause as applied to aliens who were arrested shortly after crossing the U.S. border clandestinely and ordered removed via expedited removal. This Court has not addressed that question, and no other circuit court has squarely addressed it either—and much less held that Section 1252(e)(2) is unconstitutional.

In *Pena* v. *Lynch*, 815 F.3d 452 (2016), the Ninth Circuit held that Section 1252(e)(2) was consistent with due process as applied to a recent clandestine entrant who challenged an expedited removal order, at least where the alien does not raise an underlying constitutional claim that is colorable. *Id.* at 455-456; see *id.* at 454 (Pena was placed into expedited removal "[w]ithin days" of illegally crossing the border). That decision is fully consistent with the court of appeals' decision in this case. And every circuit court to address Section 1252(e)(2) as applied to arriving aliens (rather than

recent clandestine entrants like petitioners) has held that it is constitutional in that context as well. *Shunaula* v. *Holder*, 732 F.3d 143, 146 (2d Cir. 2013); *Khan* v. *Holder*, 608 F.3d 325, 329-330 (7th Cir. 2010); *Garcia de Rincon* v. *Department of Homeland Sec.*, 539 F.3d 1133, 1141-1142 (9th Cir. 2008). No court of appeals has held Section 1252(e)(2) unconstitutional in either context, and accordingly there is no circuit conflict.

a. Petitioners nonetheless contend (Pet. 21-25) that the court of appeals' decision conflicts with this Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008). But *Boumediene* was fundamentally different. Among others things, *Boumediene* involved a challenge to indefinite detention under the law of war. *Id.* at 732. By contrast, petitioners here do not challenge their detention as such. They concede that they are inadmissible, which fully justifies their detention, and they seek judicial review only to challenge the government's decision to deny their applications for admission and to order them removed.[7] Accordingly, unlike the challengers in *Boumediene*, "here the last thing petitioners want is simple release." *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008). Rather, petitioners "seek to alter their status in the United States in the hope of *avoiding* release to their homelands." Pet. App. 64a.

Petitioners also contend (Pet. 21-25) that the court of appeals' rationale is inconsistent with *Boumediene*, but that argument appears to be premised on interpreting

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[7] Although not at issue here, detention during expedited removal proceedings is inherently temporary, not indefinite. See *Demore* v. *Kim*, 538 U.S. 510, 529 (2003); *Zadvydas* v. *Davis*, 533 U.S. 678, 697 (2001); see also Pet. App. 101a (noting record evidence that asylum officers completed 90% of credible-fear determinations from October 2014 through June 2015 in 14 days or less).

the decision below to establish broadly that Congress may entirely foreclose the ability of recent clandestine entrants like petitioners to access the federal courts at all, in any circumstances. See Pet. 21 ("[T]he Suspension Clause protects all individuals within U.S. legal territory."). The court of appeals' rationale is far narrower. The court held that petitioners have "no constitutional rights *regarding [their] applications*" for admission to the United States. Pet. App. 52a (emphasis added) (quoting *Plasencia*, 459 U.S. at 32). That is, because "the issues that [p]etitioners seek to challenge all stem from the Executive's decision" to deny their applications and order them removed, "they cannot invoke the Constitution, including the Suspension Clause, *in an effort to force judicial review beyond what Congress has already granted them*." *Ibid.* (emphasis added).

The court of appeals' decision thus does not disturb the ability of recent clandestine entrants like petitioners to challenge the conditions of their confinement or to raise constitutional challenges if they are prosecuted criminally, for example. Rather, the court simply held that such aliens may not invoke the Constitution to demand procedural steps or measures regarding their applications for admission beyond those provided by existing statutes and regulations. See Pet. App. 52a; *Plasencia*, 459 U.S. at 32. To put it another way, petitioners cannot evade this Court's longstanding precedents governing the exclusion and removal of aliens at the border by recasting their due process challenge to existing administrative and habeas procedures as a challenge to an alleged suspension of the writ of habeas corpus.

b. Petitioners contend (Pet. 25-29) that the court of appeals' decision conflicts with *INS* v. *St. Cyr*, 533 U.S. 289 (2001), and cases from what they call this Court's "finality era."[8] But as the court of appeals explained, those cases "are not controlling here." Pet. App. 55a. First, unlike the "recent clandestine entrants" subject to expedited removal in this case, *id.* at 53a, *St. Cyr* involved a lawful permanent resident who had lived in the United States for a decade and was subject to full deportation proceedings before an IJ, see 533 U.S. at 293. Second, unlike this case, *St. Cyr* was a statutory case in which the Court discussed (without deciding) what the Suspension Clause "might possibly protect." Pet. App. 53a (quoting Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 Colum. L. Rev. 537, 539 (2010)).

Indeed, as the court of appeals recognized, "none" of the finality era cases "even mentions the Suspension Clause"—and the Court in *St. Cyr* was "non-committal" when discussing their significance to the Suspension Clause analysis. Pet. App. 53a-54a. The Court stated that "the *ambiguities* in the scope of the exercise of the writ at common law," "and the *suggestions* in this Court's prior decisions as to the extent to which habeas review could be limited consistent with the Constitution," supported application of the canon of constitu-

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[8] The "finality era" refers to decisions "during an approximately sixty-year period" from the passage of the Immigration Act of 1891, ch. 551, 26 Stat. 1084, to the passage of the Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952). Pet. App. 32a. During that period, Congress rendered "final (hence, the 'finality' era) the Executive's decisions to admit, exclude, or deport aliens," but the Court permitted aliens to raise some challenges to their exclusion or deportation through habeas corpus during that time. *Id.* at 32a-33a.

tional avoidance. *St. Cyr*, 533 U.S. at 304 (emphases added). "[A]mbiguities" and "suggestions" do not create a conflict.

The habeas petition in *St. Cyr* also raised a "pure question of law." 533 U.S. at 298. By contrast, "[a]lthough [p]etitioners frame their arguments creatively, their challenge to the merits of their negative credible fear determinations is a mixed question of law and disputed fact." Pet. App. 94a. Thus, the district court concluded that petitioners "challenge the *evidentiary sufficiency* underlying their negative credible fear determinations," and it properly concluded that "the Act [did] not permit [it] to reweigh the evidence presented to DHS." *Id.* at 95a. *St. Cyr* did not discuss the extent to which review of such mixed questions was available in habeas during the finality era. Instead, the Court stated that courts had engaged in review of "the Executive's legal determinations"—but "other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive." 533 U.S. at 306 (footnote omitted). There is accordingly no conflict with *Boumediene* or *St. Cyr*, or any decision of another court of appeals. See also Pet. App. 93a-98a (discussing historical precedent indicating that habeas review of such mixed questions was unavailable absent congressional authorization).

3. Petitioners also contend (Pet. i, 30-35) that the Court should grant certiorari to determine whether an alien who entered the United States may be "assimilated" to the status of an alien seeking initial admission. This question does not appear to be meaningfully different from the first question they present, and it does not warrant further review.

"The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law," and it is well settled that the Due Process Clause protects an alien who effected entry, even illegally, "though the nature of that protection may vary depending upon status and circumstance." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001). But as set forth above, see pp. 17-18, *supra*, this Court's cases indicate that an alien who clandestinely crosses the U.S. border is not treated, for constitutional purposes, as having effected an entry triggering such constitutional protections the instant he makes it across the boundary line. *E.g.*, *Plasencia*, 459 U.S. at 32; *Wong Yang Sung*, 339 U.S. at 49-50; *Yamataya*, 189 U.S. at 100-101. see Pet. App. 57a-58a ("[T]hese cases call into serious question the proposition that even the slightest entrance into this country triggers constitutional protections [in connection with admission] that are otherwise unavailable to the alien outside its borders.").

Petitioners rely (Pet. 31-34) on a variety of court of appeals decisions indicating that aliens who entered unlawfully have constitutional rights, but none involved expedited removal—and much less the constitutionality of applying Section 1252(e)(2) to aliens arrested essentially immediately after crossing the border clandestinely. And the only other circuit to address a similar issue held that Section 1252(e)(2) is constitutional. See *Pena*, 815 F.3d at 456.

Furthermore, all of the cases petitioners cite are distinguishable for additional reasons. For example, some involved aliens who were admitted and lived inside the United States for years. *Bayo* v. *Napolitano*, 593 F.3d 495, 498 (7th Cir. 2010) (four years after obtaining ad-

mission via fraud); *Ali* v. *Mukasey*, 529 F.3d 478, 480 (2d Cir. 2008) (lawful permanent resident for more than 15 years). Others involved aliens placed into full IJ removal proceedings shortly after a clandestine entrance, where the court stated that the alien had due process rights—but did not actually find a due process violation. *Hussain* v. *Gonzales*, 424 F.3d 622, 627 (7th Cir. 2005); *Calero* v. *INS*, 957 F.2d 50, 51-52 (2d Cir. 1992); *Maldonado-Perez* v. *INS*, 865 F.2d 328, 337 (D.C. Cir. 1989); see *Flores-Chavez* v. *Ashcroft*, 362 F.3d 1150, 1162 (9th Cir. 2004) (applying the canon of constitutional avoidance); see also *United States* v. *Campos-Asencio*, 822 F.2d 506, 509-510 (5th Cir. 1987) (remanding for factfinding without finding a statutory or constitutional violation in a criminal prosecution for unlawful reentry after a prior deportation).[9]

Zheng v. *Mukasey*, 552 F.3d 277 (2d Cir. 2009), was a case involving an alien put into full IJ removal proceedings, where it was disputed when he had initially crossed the border clandestinely: That may have been only one week before his arrest, but the IJ found that his application for asylum was untimely because he had been in the United States for more than one year. *Id.* at 279, 285. The Second Circuit appeared to as-

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[9] The Ninth Circuit recently held, in the context of an unlawful reentry prosecution, that a recent clandestine entrant "suffered no due process violation when he was denied counsel in his expedited removal hearing." *United States* v. *Peralta-Sanchez*, 847 F.3d 1124, 1139 (2017). The court concluded that the alien had some due process rights because he had entered, but found that his interest was "limited" and that "[t]o hold otherwise would create perverse incentives for aliens attempting to enter the United States to further circumvent our immigration laws by avoiding designated ports-of-entry." *Id.* at 1136. The court did not cite *Pena* or discuss the limitations on review of expedited removal orders.

sume that due process applied regardless, without mentioning the fact that the alien claimed to be a recent clandestine entrant, and found a violation because he had not been given notice that the date of his arrival would be at issue. *Ibid.* Neither Section 1252(e) nor the Suspension Clause was implicated.

Petitioners also cite several decisions that affirmatively support the government. In *Borrero* v. *Aljets*, 325 F.3d 1003 (2003), abrogated on other grounds by *Clark* v. *Martinez*, 543 U.S. 371 (2005), the Eighth Circuit held that indefinite detention of a Mariel Cuban did not violate the Constitution, notwithstanding that he had lived inside the United States for more than a decade, because he had been paroled and thus he had not effectuated an entry. *Id.* at 1005. And in *Jean* v. *Nelson*, 727 F.2d 957 (1984) (en banc), aff'd, 472 U.S. 846 (1985), the Eleventh Circuit stated that "resident aliens, regardless of their legal status," are "entitled to at least limited due process rights" but that aliens who have not "'acquired any domicile o[r] residence within the United States, nor even been admitted into the country pursuant to law' stand in a very different posture": "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." *Id.* at 968 (quoting *Nishimura Ekiu*, 142 U.S. at 660). Here, by contrast, petitioners never lived inside the United States at all, and they are clearly not U.S. "residents." There is accordingly no circuit conflict.

In any event, this would be a poor vehicle for resolving the abstract questions raised in the petition (Pet. i) regarding whether petitioners have *any* constitutional rights in connection with their applications

beyond those provided by statute or regulation, because those rights would be at best minimal given their exceptionally limited connections to the United States. "[N]o petitioner appears to have been present in the country for more than about six hours, and none was apprehended more than four miles from the border." Pet. App. 13a-14a. And as set forth above, see pp. 19-20, *supra*, the existing administrative framework is more than adequate even if due process rights attached: It provides notice, the opportunity to be heard, supervisory review, de novo IJ review, and appropriately tailored habeas corpus review.

4. Petitioners briefly assert (Pet. 35-36) that the Court should review whether Section 1252(e)(2) can be construed not to preclude review of their claims. But petitioners do not identify (Pet. i) this as a question presented, and do not contend that the court of appeals' interpretation of Section 1252(e)(2) conflicts with any decision of this Court or any other court of appeals. To the contrary, every court of appeals to address the issue has interpreted the statute the same way. See *Pena*, 815 F.3d at 456 ("Our sister circuits have rejected the same argument."); *Shunaula*, 732 F.3d at 145-147; *Khan*, 608 F.3d at 329-330; *Lorenzo* v. *Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007); *Brumme* v. *INS*, 275 F.3d 443, 447-448 (5th Cir. 2001).

Petitioners are "attempting to create ambiguity where none exists." Pet. App. 20a. Section 1252(e)(2) limits habeas corpus review of determine (1) "whether the petitioner is an alien"; (2) "whether the petitioner was ordered removed under [expedited removal]"; and (3) whether the petitioner has been lawfully admitted as a permanent resident, refugee, or asylee, such status not having been terminated. 8 U.S.C. 1252(e)(2).

Congress also reinforced that Section 1252(e)(2) means what it says. "In determining whether an alien has been ordered removed under [expedited removal]," Congress stated, "the court's inquiry shall be limited to *whether such an order in fact was issued and whether it relates to the petitioner*." 8 U.S.C. 1252(e)(5) (emphasis added). Petitioners do not dispute that an expedited removal order in fact was issued, that it relates to them, or that they are aliens who have never been admitted. The court of appeals therefore correctly held that Section 1252(e)(2) precludes further habeas review here. See Pet. App. 87a ("Congress could not have been clearer.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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