No. 19-161

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, et al.,

Petitioners,

—v.—

VIJAYAKUMAR THURAISSIGIAM,

Respondent.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Ninth Circuit err in concluding that 8 U.S.C. § 1252 violates the Suspension Clause as applied to a noncitizen apprehended in the United States if it bars all review of his constitutional and legal claims in any court by any means, including habeas corpus?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

STATEMENT

A. The Expedited Removal System

1. Under 8 U.S.C. § 1225(b)(1), certain persons who are seeking admission to the United States (such as noncitizens at ports of entry) may be placed into an "expedited removal" system. Section 1225(b)(1)(A)(iii) also authorizes the Attorney General to apply expedited removal to certain noncitizens apprehended within the United States. Pursuant to that provision, in 2004, the government began applying expedited removal to persons within the United States who are apprehended within 100 miles of the border and who are unable to demonstrate that they have been physically present in the United States for 14 days. *See Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48877-01, 48879 (Aug. 11, 2004).

After the court of appeals rendered the decision at issue here, the Department of Homeland Security ("DHS") announced an expansion of expedited removal to the full extent authorized by statute. *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35409-01, 35412 (July 23, 2019). Under this expanded designation, individuals apprehended anywhere in the country are subject to expedited removal unless they can demonstrate they have been continuously present in the United States for two years. The expanded program has been challenged in district court. *Make The Road New York v. McAleenan*, No. 1:19-cv-02369-KBJ (D.D.C. filed Aug. 6, 2019).

2. Expedited removal proceedings stand in stark contrast to the usual removal process and

drastically limit the administrative and judicial review that is ordinarily available.

In regular removal proceedings under Immigration and Nationality Act ("INA") § 240, 8 U.S.C. § 1229, noncitizens contesting their removal are entitled to a full hearing before an immigration judge, at which they may seek various forms of relief from removal; introduce evidence and testimony; and cross-examine the government's witnesses. *See* 8 C.F.R. §§ 1003.12-1003.47. In the case of an adverse decision, the noncitizen may seek administrative appellate review, followed by judicial review in the federal courts of appeals. 8 C.F.R. § 1003.38; 8 U.S.C. § 1252(a).

Expedited removal proceedings short-circuit this typical process. For those individuals subject to the scheme who lack a fear of return to their home country, the statute provides that an immigration officer "shall order the alien removed from the United States without further hearing or review." 8 U.S.C. § 1225(b).

Those with a fear of return are entitled to an interview with an asylum officer, 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4). The asylum officer conducts a "credible fear interview," the purpose of which is "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d).

The expedited removal statute provides no right to counsel, but permits an applicant to "consult with a person or persons" of their choosing "at no expense to the Government" and without

"unreasonably delay[ing] the process." 8 U.S.C. § 1225(b)(1)(B)(iv); *see also* 8 C.F.R. § 208.30(d)(4) (such a consultant may make a statement only "in the discretion of the asylum officer").

A noncitizen who is found to have a "credible fear" may not be removed until his asylum application is adjudicated. *See* 8 U.S.C. § 1225(b)(1)(B)(ii). Thus, noncitizens who satisfy the credible fear standard are taken out of the expedited removal system altogether and placed into regular removal proceedings. 8 C.F.R. § 208.30(f). Congress thus sought to ensure that credible asylum claims would be developed properly and presented in regular proceedings before an immigration judge, complete with a right to an administrative appeal before the Board of Immigration Appeals ("BIA") should the applicant receive an adverse decision, and to a court of appeals thereafter.

If the noncitizen subject to expedited removal does not pass the "credible fear" interview, he is entitled to *de novo* review by an immigration judge. But, unlike regular removal proceedings, this review is brief, often just a few minutes, and is almost always conducted without witnesses. The statute requires the review to "be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after" the asylum officer's determination. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). Thus, the applicant is not permitted additional time, even if it is necessary to develop a record or consult with experts.[1]

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[1] The government has taken the position that there is "no right to representation prior to or during" such immigration judge

3. As noted, a challenge to a regular removal order under INA § 240 is brought by petition for review from the BIA directly to the court of appeals. *See* 8 U.S.C. § 1252(a) (generally granting courts of appeals petition-for-review jurisdiction over challenges to removal orders). In contrast, 8 U.S.C. § 1252(e)(2) provides for only extremely limited challenges to expedited removal orders in district court habeas corpus actions. Section 1252(e)(2) provides jurisdiction to review three types of claims:

> (A) whether the petitioner is an alien,
> (B) whether the petitioner was ordered removed under such section, and
> (C) whether the petitioner . . . is an alien lawfully admitted for permanent residence [or was previously granted refugee or asylee status].

The government has argued, and the court of appeals agreed, that this statute essentially limits review to claims of mistaken identity, and does not provide for review of constitutional or other legal challenges to an expedited removal order. Pet. 21-22, 27; App. 10a-11a, 40a-41a.

In short, the expedited removal process provides drastically truncated administrative procedures, and virtually no judicial review of purely legal claims, and even of claims that the removal would violate the Constitution. By comparison,

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review. Brief of Refugee & Human Rights Organizations and Scholars as Amici Curiae, 9th Cir. Doc. No. 24 at 24; *see also* 1 National Lawyers Guild, *Immigration Law and Defense* § 13:47 (3rd ed. 2019) ("the alien is not represented at the credible fear review") (quoting Immigration Court Practice Manual, Ch. 7.4(d)(iv)(C)).

noncitizens placed in regular removal proceedings are afforded a full immigration hearing, an administrative appeal, and judicial review on a petition for review to the federal court of appeals.

B. Factual Background And Proceedings Below

1. Mr. Thuraissigiam is a Sri Lankan asylum seeker. After fleeing his country and entering the United States, Mr. Thuraissigiam was arrested near the border, placed into expedited removal proceedings, and sought asylum (and withholding of removal and Convention Against Torture relief). His account of being abducted and brutally beaten by a gang of men was found factually credible, but his claims were nonetheless rejected by the asylum officer and immigration judge on the ground that he failed to show a legal nexus between a protected ground under the statute and the harms he had previously suffered and feared he would suffer again if removed. A final expedited removal order therefore issued.

He then filed the habeas petition at issue here. The petition asserted that Mr. Thuraissigiam's abduction and torture were part of a widespread and well-documented pattern of similar abductions of Tamils, like Mr. Thuraissigiam, by Sri Lankan government officials. It further asserted that Tamils are a long-persecuted ethnic minority group in Sri Lanka that has been subject to a campaign of abduction and torture by the government. *See* District Ct. Doc. Nos. 52-3, 52-4 (evidence of extraordinary persecution of Tamils in Sri Lanka). It further asserted that, as two courts of appeals have recognized, "failed asylum seekers" deported to Sri

Lanka from the United States are considered traitors and are "at the risk of being detained and tortured." *Thayaparan v. Sessions*, 688 F. App'x 359, 371 (6th Cir. 2017) (unpublished); *see also Gaksakuman v. U.S. Atty. Gen.*, 767 F.3d 1164, 1170 (11th Cir. 2014).

Mr. Thuraissigiam's habeas petition contended "that the government denied him a 'fair procedure,' 'appl[ied] an incorrect legal standard' to his credible fear contentions, and 'fail[ed] to comply with the applicable statutory and regulatory requirements.'" App. 37a. "The core of his claim is that the government failed to follow the required procedures and apply the correct legal standards when evaluating his credible fear claim." *Id.*

2. The district court dismissed the petition for lack of jurisdiction. It acknowledged that Mr. Thuraissigiam was asserting legal challenges to his expedited removal order, but held that the INA precluded review of those claims. App. 51a-53a. The court "d[id] not dispute" that the Suspension Clause applied to Mr. Thuraissigiam, but concluded that the "narrow" scope of review available by statute (as the court interpreted it) was sufficient to satisfy the Clause by providing an adequate substitute for habeas corpus review. App. 54a.

The court of appeals reversed. It agreed with the district court that the INA purported to strip jurisdiction over Mr. Thuraissigiam's claims. App. 12a. But it held that the Suspension Clause guaranteed review over those claims, and therefore reversed the district court's jurisdictional holding and remanded for further proceedings.

The court applied the two-step Suspension Clause "analytical template" established by this Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). App. 18a. "[A]t step one, we examine whether the Suspension Clause applies to the petitioner; and, if so, at step two, we examine whether the substitute procedure provides review that satisfies the Clause." App. 18a-19a.

At the first step, the court of appeals surveyed this Court's Suspension Clause jurisprudence and the history of habeas, explaining that noncitizens enjoyed broad access to the Writ before and after 1789. App. 32a-33a. It observed that cases during the "finality era"—an "approximately sixty-year period" when immigration statutes eliminated judicial review except as required by the Constitution's Suspension Clause—carried particularly "significant weight." App. 21a & n.11, 33a. And, the court observed, during this finality period the courts, including this Court, had routinely entertained claims by noncitizens challenging their deportation or exclusion—whether apprehended within the country or at the border seeking initial admission. App. 33a. The court of appeals thus concluded that Mr. Thuraissigiam could likewise invoke the Clause.

Turning to the second *Boumediene* step, the court held that the statute was unconstitutional because, in its view, 8 U.S.C. § 1252(e)(2) barred "any judicial review" of Mr. Thuraissigiam's claims, including "whether DHS complied with the [expedited removal] procedures in an individual case, or applied the correct legal standards." App. 40a (emphasis omitted). The court observed that this

Court had been clear that the Suspension Clause required, at a minimum, review of whether an individual "was detained pursuant to the 'erroneous interpretation or application of relevant law.'" App. 40a-41a. The court of appeals thus found it "obvious that the constitutional minimum" scope of habeas review was "not satisfied by" the statutory scheme. *Id*.

Addressing the government's argument that Mr. Thuraissigiam was not entitled to habeas review because he lacked procedural due process rights, the court rejected both the premise and the conclusion. "*Boumediene* foreclosed" the notion that the Suspension Clause ensures only the vindication of due process rights, the court explained. App. 36a. And, in any event, Mr. Thuraissigiam had entered the United States and therefore enjoyed due process protections. App. 26a n.15 (citing *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

REASONS TO DENY THE PETITION

The government contends that review is warranted because the Ninth Circuit declared a federal statute unconstitutional in a decision that conflicts with the Third Circuit's ruling in *Castro v. United States Dep't of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017). But the Ninth Circuit held only that the statute was unconstitutional as applied to Mr. Thuraissigiam. And thus far, only two circuits have even addressed the Suspension Clause issue in this case, making this split far from deep or mature. Moreover, the conflict between the Ninth and Third Circuits is closing, as

the Third Circuit caselaw is in flux and that court has recently issued a precedential decision that scales back its ruling in *Castro*. Yet the government's petition fails even to mention this later Third Circuit ruling, or to explain that in fact the circuits are in agreement that where the Suspension Clause applies, 8 U.S.C. 1252(e)(2) fails to supply an adequate substitute for habeas. Given the narrowness of the conflict in this still-developing area of law, the Court should allow for further percolation within the Third Circuit and among the other circuits before intervening.

The government also argues that the Ninth Circuit's decision was incorrect and warrants review for that reason. But the Ninth Circuit's decision faithfully applied this Court's longstanding precedent. Whatever the reach of the Suspension Clause, it surely does not turn on the manner in which an asylum seeker entered the United States or how many feet over the border the petitioner was when he sought asylum.

I. THIS COURT'S REVIEW IS NOT WARRANTED BECAUSE THE CONFLICT IS NARROW AND THE THIRD CIRCUIT'S LAW IS IN FLUX.

In *INS v. St. Cyr*, this Court construed various provisions addressing judicial review of removal orders in light of the "serious Suspension Clause issue" that would be raised by the elimination of habeas. 533 U.S. 289, 305 (2001). But in the years since, courts applied the INA's stringent jurisdictional limits regarding expedited removal without confronting the Suspension Clause

implications of foreclosing all review over legal and constitutional claims to an expedited removal order. *See* App. 23a n.12. Thus, lower courts have only begun to engage with the core problem presented in this case—whether Congress can eliminate all review in any court of an expedited removal order.

Only two circuits have even addressed the issue. And insofar as there is a conflict between the Third and Ninth Circuits, the gap is narrow, and has shrunk due to the Third Circuit's post-*Castro* law. In this case, the Ninth Circuit reached two conclusions. First, it held that the Suspension Clause guarantees review of expedited removal orders for those who have entered the United States, regardless of the individual's connections to the United States or the manner of his entry. App. 35a. Second, it held that the scope of review provided by the expedited removal statute is inconsistent with the Suspension Clause because it bars jurisdiction over legal and constitutional challenges to individual orders. App. 40a-41a.

Since its decision in *Castro*, the Third Circuit now disagrees only in part with the first conclusion, and expressly *agrees* with the second holding. In *Castro*, the Third Circuit addressed only the first issue, concluding that the Suspension Clause did not apply to asylum seekers who entered illegally and were arrested immediately after entry. 835 F.3d at 448-49. As a result, *Castro* did not address the scope of review guaranteed by the Suspension Clause where it does apply, and was accordingly silent on one of the two issues decided below. *Id.* at 446.

Moreover, the Third Circuit's law is still developing. In a subsequent decision, *Osorio-*

Martinez v. Att'y Gen., 893 F.3d 153 (3d Cir. 2018), the Third Circuit significantly scaled back its ruling in *Castro* on the first issue and agreed with the Ninth Circuit on the second question, regarding the scope of review required by the Suspension Clause. *Osorio-Martinez* involved subsequent habeas petitions filed by some of the *very same individuals* as in *Castro*, and the Third Circuit held that they *could* invoke the Suspension Clause to challenge their removal orders, and that the INA's restrictions on the scope of review were an unconstitutional suspension as applied to them. *Id.* at 158.

On the threshold issue of whether the Suspension Clause was implicated, the Third Circuit held that, although the petitioners entered unlawfully and were apprehended immediately upon entering the United States—the basis of *Castro*'s holding barring their earlier petitions—they could now raise the Suspension Clause because of an intervening change in their circumstances. Specifically, the Third Circuit held the Suspension Clause now applied because the petitioners had been granted an interim statutory "status" for juveniles, which set them on the path to permanent residency. *Id.* at 163, 167 (noting petitioners had been granted Special Immigrant Juvenile Status). The court emphasized the limits of *Castro*'s holding, indicating, for example, that no particular period of presence in the county was necessarily required to invoke the Suspension Clause. *See id.* at 166-67, 170 n.13, 175 n.20.

Having determined that the petitioners could invoke the Suspension Clause, the Third Circuit then went on to hold—consistent with the Ninth Circuit's

decision here—that the narrow review available under 8 U.S.C. § 1252(e)(2) was an inadequate substitute for habeas. *Id*. at 177-78. Indeed, the court noted the "starkness of the jurisdiction-stripping statute's deficiency" compared to the "'uncontroversial' baseline of review" identified in Supreme Court precedents. *Id*. at 177 & n.22 (quoting *Boumediene*, 553 U.S. at 779).

There is thus no circuit conflict on the question of the scope of review guaranteed by the Suspension Clause. The two circuits to have considered the issue—the Ninth and Third—have both held that where § 1252 bars judicial review of constitutional and legal challenges to expedited removal orders, it plainly violates the Suspension Clause as applied. The only disagreement concerns the circumstances under which noncitizens seeking to challenge their removal are covered by the Suspension Clause's protections, and in particular what "connections" one must have to the United States (beyond presence on U.S. soil) to come within the Clause's guarantee of judicial review over removal orders. That is a question that may turn on myriad factual scenarios, yet the courts below have addressed only a handful of many possible situations. Further percolation on this issue may narrow the split further, but in any event, would be beneficial to this Court's review of the issue.

The landscape on this issue is thus undeveloped, with only a narrowing disagreement between two circuits. The courts of appeals, including the Third Circuit, should be given time to consider how best to resolve the issues presented in this case.

II. THE COURT OF APPEALS' DECISION WAS CORRECT.

The court of appeals' Suspension Clause ruling was correct: If 8 U.S.C. § 1252 eliminates all judicial review of Mr. Thuraissigiam's claims in any court, including by habeas corpus, then the statute violates the Suspension Clause.

As the Ninth Circuit noted, in assessing whether and how the Suspension Clause applies to foreign nationals detained outside the United States as "enemy combatants," this Court in *Boumediene* applied a two-step analysis, first inquiring whether the petitioners could invoke the Suspension Clause and then examining whether the review provided by statute was an adequate and effective substitute for constitutionally required habeas. The court of appeals faithfully applied this framework and held that: (1) Mr. Thuraissigiam could invoke the Suspension Clause to challenge his removal order; and (2) the scope of review guaranteed by the Suspension Clause encompassed his constitutional and legal claims. Both of those conclusions were correct.

A. The Ninth Circuit Correctly Held That Mr. Thuraissigiam Could Invoke The Suspension Clause To Challenge His Removal Order.

1. Mr. Thuraissigiam's apprehension occurred on U.S. soil, after he crossed the border and physically entered the country. As a person detained within U.S. borders, he was entitled to invoke the Suspension Clause to challenge his expedited removal order. App. 31a-35a. That he was not

legally admitted into the country does not alter that result, nor does the fact that he was apprehended only a short distance over the border.

The government does not question that the Suspension Clause applies to removal orders. Indeed, in *St. Cyr*, this Court surveyed the history of habeas immigration law in this country and concluded that "[b]ecause of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" 533 U.S. at 300.[2]

The government argues, however, that *St. Cyr* is inapposite because it involved a lawful permanent resident. The government maintains that *St. Cyr* therefore provides no support for Mr. Thuraissigiam, because he entered illegally and had no substantial connection to the country when apprehended. But one's abstract connection to the country cannot be the test for whether the Suspension Clause applies. The petitioners in *Boumediene* were noncitizens, detained as enemy combatants in Guantanamo, who had never set foot in the United States, and yet this Court found that the Suspension Clause extended to them. A fortiori, it must apply to all persons detained within the United States.

Nor can it be dispositive to the Suspension Clause question whether an individual was legally in

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[2] The government seeks to dismiss *St. Cyr* as a "statutory case." Pet. 28. But the Court's holding rested on a lengthy constitutional avoidance analysis that was critical to the outcome. *See* App. 25a. Indeed, this Court specifically and repeatedly relied on *St. Cyr*'s constitutional analysis in *Boumediene*. 553 U.S. at 746, 779, 787 (citing *St. Cyr* four times).

the country, or how many feet inside the U.S. border he was at the time of arrest. The Court's opinion in *St. Cyr* relied on historical immigration habeas cases reviewing claims by individuals apprehended after entering without inspection, stopped at the border or ports of entry, and without any legal status under U.S. law. *St. Cyr*, 533 U.S. at 306-07 (citing, *e.g.*, *Gegiow v. Uhl,* 239 U.S. 3, 9 (1915) (arriving at the border); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 262 (1954) (unlawful entrant)). The common element tying these varied cases together was the availability of habeas review.

All of the habeas review that occurred in the wide range of cases this Court cited in *St. Cyr* was *constitutionally* required, because they were decided during the "finality period" beginning with the passage of the 1891 Immigration Act and running through the 1952 Immigration and Nationality Act. As the Court explained, Congress made immigration decisions "final" during this roughly 60-year period (hence the finality period). During that period, "Congress had intended to make these administrative [immigration] decisions nonreviewable to the fullest extent possible under the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234 (1953); *see St. Cyr,* 533 U.S at 311-12 (citing habeas cases reviewing the legality of removal orders during era in which "the finality provisions . . . 'preclud[ed] judicial review' to the maximum extent possible under the Constitution") (quoting *Heikkila*, 345 U.S. at 235)). Therefore, the only challenges to removal orders that courts could decide on the merits at that time were those where review was *required* by the Suspension Clause; otherwise, the finality statutes barred all review. *See* App. 35a.

Thus, it does not matter for purposes of the Suspension Clause that Mr. Thuraissigiam entered the country without inspection. Even if, as the government proposes, he were "properly treated as an alien seeking initial admission," Pet. 18, he could invoke the Suspension Clause. During the finality era, even noncitizens who had never entered the country and were seeking initial admission at the border were constitutionally entitled to seek habeas. *See, e.g.*, *Gegiow*, 239 U.S. at 8-9 (exercising habeas jurisdiction despite the finality provision and granting petition brought by "Russians seeking to enter the United States"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (exercising jurisdiction over habeas petition by noncitizen stopped at the border and placed in "exclusion" proceedings, emphasizing that "[a]n alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful").[3]

2. The government relies heavily on the statement in this Court's due process decision, *Landon* v. *Plasencia,* that "'an alien seeking initial admission to the United States' has 'no constitutional

[3] The government asserts that the court of appeals' decision "appears to apply only to aliens . . . who were apprehended" after entering the country, and therefore establishes "a perverse incentive" by granting them more rights than noncitizens arriving at a port of entry. Pet. 31. But the court of appeals did not decide whether the Clause's protection includes individuals arriving at a port of entry, *see* App. 29a-31a, and the finality period cases indicate that the Clause does apply to such individuals, *see*, *e.g.*, *Gegiow,* 239 U.S. at 8-9.

rights regarding his application.'" Pet. 17 (quoting 459 U.S. 21, 32 (1982)). But as the Ninth Circuit correctly explained, *Plasencia* is wholly inapposite, as it did not address the Suspension Clause at all. App. 25a-26a. Indeed, as Judge Hardiman noted in his *Castro* concurrence, *Plasencia* did not "purport to resolve a jurisdictional question raising the possibility of an unconstitutional suspension of the writ of habeas corpus." *Castro*, 835 F.3d at 450 (Hardiman, J., concurring dubitante).[4]

More generally, the government wrongly conflates habeas rights under the Suspension Clause with due process under the Fifth Amendment. As the Court explained in *Boumediene*, the Suspension Clause predates the Fifth Amendment. *Boumediene*, 553 U.S. at 739 (explaining that "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights"). Indeed, in *Boumediene* the Court found a Suspension Clause violation while explicitly declining to address whether detainees had Fifth Amendment due process rights. *Id.* at 785 ("we make no judgment whether the [existing review procedures] . . . satisfy due process standards").

Moreover, the cases the government cites, Pet. 17-20, do not remotely say that those who are arriving at the border or recently entered are unprotected by the Suspension Clause. To the

[4] *Yamataya v. Fisher*, 189 U.S. 86 (1903), on which the government relies, was likewise a due process decision, and therefore inapposite for the same reason. The court of appeals therefore properly applied this Court's more recent controlling Suspension Clause decisions.

contrary, in *all* of the finality-era cases it cites, noncitizens were entitled to seek habeas corpus, even if they lacked procedural due process rights on the ground that they were seeking initial entry. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210-13 (1953), for example, this Court exercised habeas review over non-constitutional claims while also holding that the petitioner in that case, an arriving noncitizen stopped at a port of entry, lacked procedural due process rights.

The government's reliance on due process cases is actually doubly flawed in this case. Not only do habeas rights not hinge on one's right to due process, but Mr. Thuraissigiam *is* entitled to due process protections under this Court's longstanding case law. Indeed, the Court has repeatedly stated that while a noncitizen at a port of entry does not enjoy certain procedural due process rights with respect to admission, *Mezei,* 345 U.S. at 212, noncitizens inside the country do enjoy those protections, regardless of legal status. "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, *unlawful, temporary*, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (emphasis added). Due process protects every person who has entered the United States, "[e]ven one whose presence in this country is unlawful, involuntary, or transitory." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). A noncitizen like Mr. Thuraissigiam, who entered the country rather than being stopped at a port of entry, does therefore enjoy procedural due process rights.

In short, whether Mr. Thuraissigiam has due process rights on the merits is irrelevant to the Suspension Clause analysis, just as it was in *Boumediene*. Even if he lacked due process rights on the merits (and as this Court's precedents make clear, he did not), the Suspension Clause would still guarantee review of his non-constitutional legal claims.

B. The Ninth Circuit Correctly Held That The Scope of Review Guaranteed By The Suspension Clause Covers Mr. Thuraissigiam's Constitutional And Legal Challenges.

The Ninth and Third Circuits have both held that the expedited removal statute is unconstitutional if it is limited to mistaken-identity claims and does not permit constitutional and legal challenges to an expedited removal order. As the Ninth Circuit observed, the application of *Boumediene*'s second analytical step is "obvious" in this case. App. 40a-41a.[5]

The Suspension Clause does not demand the formal availability of statutory habeas corpus per se, so long as Congress provides an adequate and effective substitute. *St. Cyr*, 533 U.S. at 314 & n.38. And while this Court has declined to set forth all the requisites of such a substitute, *Boumediene*, 553 U.S.

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[5] Mr. Thuraissigiam argued below that the statute in fact provides jurisdiction for his claims, particularly as construed in light of the grave constitutional question that would otherwise be presented. The court of appeals rejected that argument, in reliance on its prior precedents. App. 12a, 42a. However, if this Court grants review, that argument would provide an alternative basis to affirm the judgment of the court of appeals.

at 772, certain irreducible requirements are clear. Habeas or a substitute must provide for review of "errors of law, including the erroneous application or interpretation of statutes." *St. Cyr*, 533 U.S. at 302 (explaining that the traditional scope of habeas review has always encompassed such legal errors); *see also id.* at 305 ("The writ of habeas corpus has always been available to review the legality of Executive detention.").

Indeed, *Boumediene*, relying squarely on *St. Cyr*'s Suspension Clause analysis, explained that review of legal claims is one of "the easily identified attributes of any constitutionally adequate habeas corpus proceeding." 553 U.S. at 779. This Court thus deemed it "uncontroversial" that the Suspension Clause requires review of the proper "application or interpretation" of the law. *Id.* (quoting *St. Cyr*, 533 U.S. at 302).

The nearly nonexistent review provided by statute here, as construed by the government and the court of appeals, falls far short of this minimum level of review. Indeed, construed to authorize essentially only mistaken-identity type claims, the statute bars *all* claims of legal error. And, in this regard, the contrast with *Boumediene* is stark: There, this Court assumed the statute could be construed to authorize judicial review of legal claims, but still found it inadequate because it did not go *further* in affording habeas review. *Id.* at 789, 792 (statute denied petitioners "an opportunity . . . to present relevant exculpatory evidence").[6]

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[6] *Boumediene* made clear that the Suspension Clause will sometimes require review of factual as well as legal claims,

The government contends that the existence of an administrative process means no judicial review of Mr. Thuraissigiam's legal claims is necessary. But the whole point of the Suspension Clause is to guarantee *judicial* review. "The writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers." *Boumediene*, 553 U.S. at 765. *Boumediene* itself is illustrative. There, the statutory scheme provided for both an administrative process and judicial review in the court of appeals. *Id.* at 771-72, 787-90. This Court did not ask whether the *administrative* process provided an adequate substitute for habeas, but whether the statute permitted "the Court of Appeals to conduct a proceeding meeting" the requirements of constitutional habeas. *Id.* at 787. Rather than allowing the existence of an administrative process to undercut the need for the "uncontroversial" and "easily identified" baseline of "any constitutionally adequate habeas corpus proceeding," this Court held that weaknesses in the administrative procedures required review *beyond* that baseline. *Id.* at 779; *see id.* at 779, 786 (observing that, "depending on the circumstances, more may be required," and holding more was required in that case given the limits of the underlying administrative process afforded the detainees). Here, the statute, as interpreted, does

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where the underlying administrative review is truncated. The court of appeals declined to decide whether such review of facts is available in the expedited removal context, because Mr. Thuraissigiam's complaint did not challenge the underlying historical facts in his case. App. 41a n.24; *see* App. 37a ("The core of his claim is that the government failed to follow the required procedures and apply the correct legal standards when evaluating his credible fear claim.").

not even provide for the constitutionally required baseline. Thus, even if the underlying administrative procedures were robust, which they are not, the Suspension Clause demands habeas review in some court.[7]

The court of appeals followed this Court's clear precedents and reached the correct conclusion: As the statute has been interpreted by the court of appeals (and the government), it violates the Suspension Clause as applied here, and Mr. Thuraissigiam is entitled to review of his constitutional and legal claims in some court.

* * *

The government's argument, at bottom, is that Congress has plenary power over immigration and that Congress believed that expediting removals was important. But the whole point of the Suspension Clause was to provide a check against the political branches' incentives to streamline procedures and eliminate judicial scrutiny. The Framers, well versed in the history of the suspension of habeas

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[7] As noted above, the expedited removal procedures are extraordinarily truncated and leave many applicants, who are not permitted to have retained counsel except in a "consultation" capacity (8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. § 208.30(d)(4)) and who generally do not speak English, unable even to understand what is happening. Witnesses are rarely called before either the asylum officer or the immigration judge; and applicants have virtually no time to gather evidence to support their claim and, having fled persecution and violence, rarely have evidence with them. After cursory interviews, officers and immigration judges then render a "check-box decision" with no legal analysis, and subject to no review by the BIA. App. 6a.

corpus for reasons of expediency, took care to enshrine the Writ in our Constitution subject to only the narrowest explicitly enumerated exceptions. *See Boumediene*, 553 U.S. at 745 ("the Suspension Clause is designed to protect against these cyclical abuses"). This Court has thus rejected such arguments from expediency before, explaining that "[c]ompliance with any judicial process requires some incremental expenditure of resources." *Id*. at 769; *see* App. 31a-32a n.18.[8]

As the Framers predicted, Congress has often attempted to limit or eliminate habeas review over executive detention in general and removals in particular. But this Court has been steadfast in exercising and ensuring the Judiciary's core function of habeas review, so that the political branches are not entirely unchecked when they deprive individuals of liberty—from the finality era cases, to *St. Cyr*, to *Boumediene*. *See Trinidad y Garcia v. Thomas*, 683 F.3d 952, 960 (9th Cir. 2012) (en banc) (Thomas, J., concurring) ("There have been numerous occasions in our history when Congress has limited statutory access to judicial relief in the immigration context. However, the Supreme Court has repeatedly rebuffed arguments that these

[8] In any event, the government overstates how many expedited removal habeas cases the courts will likely entertain. *See* Pet. 24-25. As a practical matter, few noncitizens have been or will be in a position to file such habeas petitions; review of legal claims will not require extended litigation once these jurisdictional issues are resolved; rulings on the legality of certain practices will reduce the need for further cases; and the district courts will have the ability to streamline procedures. *See Boumediene*, 553 U.S. at 796 (emphasizing courts' latitude to fashion habeas procedures).

statutes foreclosed habeas corpus relief.") (citations omitted). The court of appeals honored that commitment to the Great Writ and correctly held there is jurisdiction in this case.

CONCLUSION

The Court should deny the petition.

Respectfully Submitted,

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