No. 19-161

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,

Petitioners,

v.

VIJAYAKUMAR THURAISSIGIAM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF IMMIGRATION LAW REFORM INSTITUTE IN SUPPORT OF PETITIONERS

CHRISTOPHER J. HAJEC
IMMIGRATION REFORM
LAW INSTITUTE
25 Massachusetts Av NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Av NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

QUESTIONS PRESENTED

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules, Regulations and Orders

No. 19-161

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,

Petitioners,

v.

VIJAYAKUMAR THURAISSIGIAM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute[1] ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated both to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of immigration-related cases. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization.

[1] *Amicus* files this brief with all parties' written consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity — other than *amicus* and its counsel — contributed monetarily to preparing or submitting the brief.

STATEMENT OF THE CASE

Vijayakumar Thuraissigiam unlawfully crossed the Mexican border outside of a port of entry and was apprehended moments later, 25 yards from the border. He was screened for a credible fear of torture or persecution on a protected basis pursuant to the Immigration and Naturalization Act, 8 U.S.C. §§ 1101-1537 ("INA"), but he expressed a fear only of random, private violence in his native Sri Lanka. He was processed for expedited removal, with his case going before three tiers of administrative review: an asylum officer, review by a supervisory asylum officer, and *de novo* review by an immigration judge. These layers of review all confirmed that Thuraissigiam is ineligible for asylum and lacks a credible fear of torture on a protected basis. Under 8 U.S.C. § 1252(e)(2), *habeas corpus* challenges to such removal is limited to criteria going to whether a removal order was wrongly issued (*e.g.*, whether the person is an alien and was ordered removed, or whether an INA-recognized exception to removal exists). Unable to meet those criteria for INA-sanctioned *habeas* review, Thuraissigiam initiated this *habeas* action against the Department of Homeland Security and its constituent agencies and officials (collectively, the "Government") to avoid expedited removal and to seek a "meaningful opportunity" to make his case. With that summary, IRLI adopts the facts as stated by the Government. *See* Gov't Br. at 3-16.

SUMMARY OF ARGUMENT

Statutory and constitutional subject-matter jurisdiction are lacking here for several reasons. First,

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), *Landon v. Plasencia*, 459 U.S. 21 (1982), and their progeny deny aliens in Thuraissigiam's position any rights beyond what the INA provides. Without an underlying concrete right, Thuraissigiam lacks not only standing generally (Section I.A.1) but also procedural standing (Section I.A.2) to pursue his claims. Second, because recent illegal entrants like Thuraissigiam can simply leave the United States to pursue their INA proceedings from abroad, any detention represents a "self-inflicted injury" chosen by the alien (*i.e.*, *not caused* by the Government) (Section I.A.3). Third, the availability of an adequate remedy and statutory review means that the Government's sovereign immunity bars this litigation; the *Mezei-Plasencia* line of cases already has held that Thuraissigiam lacks the rights he seeks to assert, which places his claims outside federal-question jurisdiction (Section I.B).

With respect to the INA, it is undisputed that the Government has afforded Thuraissigiam all the rights that the INA provides (Section II.A). Under the *Mezei-Plasencia* line of cases, for recent illegal entrants, the process due under the Due Process Clause is whatever process Congress has provided. Thus, satisfying the INA automatically also satisfies the Due Process Clause (Section II.B). Regarding the due-process merits, challenges that involve neither fundamental rights nor protected classes fall under the rational-basis test; that test is met here because the *Mezei-Plasencia* line of cases has already ratified the choices that Congress has made (Section II.B). Insofar as Congress has plenary power over immigration and

has sought to avoid providing incentives for illegal immigration — such as treating illegal entrants better than lawful entrants — this Court should not rely on a common law writ to set national immigration policy, especially where there is no constitutional violation to warrant the Judiciary's intervention (Section II.C).

Habeas corpus, moreover, is a procedural vehicle to avoid a detention that is unlawful under some other substantive law; since Thuraissigiam's claim is not such a vehicle, his attempt at systemic reform of the INA is not *habeas* relief (Section III). Insofar as the Suspension Clause applies only to the writ of *habeas corpus*, Thuraissigiam's attempt at systemic reform is not subject to the Clause (Section IV.A). Finally, the Ninth Circuit's invocation of *Boumediene v. Bush*, 553 U.S. 723, 765 (2008), *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001), and this Court's "finality-era" immigration cases to support the Ninth Circuit's Suspension Clause analysis is misplaced: (1) *Boumediene* involved extraterritorial application of *habeas* relief to aliens detained abroad, and relied on a pre-constitutional common law writ of *habeas corpus* that has no bearing here (Section IV.B.1); (2) *St. Cyr* concerned a lawful permanent resident ("LPR") who had resided here for more than a decade before his deportation proceedings, which placed him outside the *Mezei-Plasencia* line of cases (*i.e.*, the LPR in *St. Cyr* had due-process rights that Thuraissigiam — as a recent illegal entrant — lacks) (Section IV.B.2); and (3) while arguably not even applicable to the Suspension Clause, the "finality-era" cases concerned longer-term residents with due-process rights (*i.e.*, like *St.*

Cyr, the cases are inapposite to recent illegal entrants like Thuraissigiam) (Section IV.B.3).

ARGUMENT

I. THE LOWER FEDERAL COURTS LACKED SUBJECT-MATTER JURISDICTION FOR THIS CASE.

Appellate courts must determine not only their own appellate jurisdiction, but also the lower courts' jurisdiction. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 95 (1998). Appellate courts must do so even if the parties concede jurisdiction: "Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case." *Demore v. Kim*, 538 U.S. 510, 516 (2003) (interior quotation marks omitted); *cf. Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991) (jurisdictional arguments are an exception to rule that courts ordinarily do not consider issues raised only by an *amicus*). Jurisdiction poses several barriers that this Court should resolve before reaching the merits.

A. Thuraissigiam lacks Article III standing to challenge detention.

Under Article III, a "bedrock requirement" is that federal courts are limited to hearing cases and controversies. U.S. CONST. art. III, § 2; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 471 (1982). As relevant here, courts assess Article III standing under a tripartite test for an "injury in fact": judicially cognizable injury to the plaintiff, causation by the challenged conduct, and redressability by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62

(1992). Thuraissigiam lacks both a cognizable injury and causation; given that lack of substantive standing, he also lacks procedural standing needed to challenge the INA procedures.

1. Thuraissigiam lacks an injury in fact because he has no cognizable right.

This Court has made it abundantly clear that recent illegal entrants like Thuraissigiam have no right to be in the United States: "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. Excluding an alien seeking admission is an act of sovereignty. *Id.* Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). Finally, "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523. Quite simply, due-process claims cannot succeed here because the INA already provides the process due.

Although INA detainees understandably resent detention pending completion of their immigration proceedings, they simply have no right to be in the United States until those proceedings resolve. *Plasencia*, 459 U.S. at 32; *Demore*, 538 U.S. at 523. Moreover, detainees can avoid detention by leaving the United States. *See* Section I.A.3, *infra*. A detainee's ability to end his or her detention by simply leaving the United States distinguishes detainees from dissimilarly situated citizens and long-term residents in civil and criminal detentions. As this

Court has explained, "in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." *Reno v. Flores*, 507 U.S. 292, 305-06 (1993) (interior quotation marks omitted); *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) ("in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act").

2. Without an underlying substantive right, Thuraissigiam suffers no procedural injury.

As shown in Section I.A.1, *supra*, Thuraissigiam lacks an independent right to be in the United States while his INA proceedings resolve. Attempting to sidestep the Government's plenary authority over admission, he attempts to challenge INA procedures. Because Thuraissigiam lacks a substantive right to be in the United States, however, he lacks procedural rights to challenge the procedures under which the Government proceeds.

Under Article III, Thuraissigiam cannot have a procedural due-process right without having an underlying substantive right first: "the procedures in question [must be] designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," and which is "apart from his interest in having the procedure observed." *Defenders of Wildlife*, 504 U.S. at 573 n.8; *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in*

vacuo — is insufficient to create Article III standing"); *cf. Christopher v. Harbury,* 536 U.S. 403, 414-15 (2002) (denial-of-access rights are "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court"). The Due Process Clause does not afford Thuraissigiam the right to be released into the United States pending resolution of his immigration proceedings. *Plasencia*, 459 U.S. at 32; *Mezei*, 345 U.S. at 212; *Demore*, 538 U.S. at 523 ("detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process"). He lacks a procedural right to challenge the INA process because he lacks a concrete right to be released into the United States pending the end of his INA removal procedures.

3. <u>Detention and other restrictions are self-inflicted injuries, and thus raise no Article III case or controversy.</u>

Detention while a detainee tries to gain entry to or avoid removal from the United States is a part of the entry and removal process. Each detainee is free to pursue that legal issue — entry or removal — from abroad. The only thing that keeps such detainees in detention is their own decision to remain here while the process resolves. Thus, immigration detainees like Thuraissigiam cannot analogize their circumstances to compelled detention in the criminal or civil contexts for residents. Unlike compelled resident detainees, immigration detainees like Thuraissigiam "carry the keys of their prison in their own pockets." *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947) (interior quotation marks omitted). A detainee's ability to escape detention by simply leaving the United States

undermines any liberty claim in two respects, one going to the equities and the other to jurisdiction.

First, because such detainees choose detention over the other perfectly viable and lawful choice — leaving the United States — they cannot credibly ask a court to compare them to lawful residents facing compelled civil or criminal detention. Since no one is keeping them here, they cannot challenge the legislative grace that allows them to stay at the taxpayers' expense. It does not matter whether detainees knew the law prior to coming here: "We have long recognized … that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010) (interior quotation marks omitted).

Second, under standing's causation requirement, a "self-inflicted injury" cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). *Amicus* IRLI does not dispute that the detainees may have an Article III case or controversy with the United States on whether the detainees qualify to enter the United States, but "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). A detainee cannot bootstrap a *Due Process claim* to release into the United States when their actual case involves only an *immigration claim* on whether they can enter or remain in the United States. Until their immigration claims resolve, such detainees must choose between detention and leaving. The choice they make does not

entitle them to raise new claims, premised only on their own choice.

Simply put, these aliens have no right to remain in or be at large in the United States, *Plasencia*, 459 U.S. at 32, and they cannot manufacture that right by *coming* here illegally and then protesting the terms of *being* here. *Clapper*, 133 S.Ct. at 1152-53. Having the right to an INA determination of admissibility or removability does not create the right to reside at large here while the system resolves the INA issue. If an alien wants the certainty of avoiding detention while immigration proceedings resolve, the alien must apply for admission or non-removability from abroad.

B. The lower federal courts lack statutory and constitutional subject-matter jurisdiction.

In addition to lacking Article III jurisdiction, *see* Section I.A *supra*, Thuraissigiam also asserts claims outside the lower federal courts' constitutional and statutory subject-matter jurisdiction.

First, as a sovereign, the Government is immune from suit except to the extent that it consents to suit. Although the Administrative Procedure Act ("APA") waives sovereign immunity for prospective injunctive or declaratory relief, 5 U.S.C. § 702, that waiver comes with limitations: (1) except where judicial review is expressly provided, APA review is not available if the plaintiff has an adequate remedy, *id.* § 704; and (2) if the underlying statute precludes review or provides a statutory review procedure, nonstatutory review like the APA does not apply. *Compare id.* §§ 702, 701(a)(1) *with* 8 U.S.C. § 1252(e)(2). Here, the INA's statutory-

review and preclusion-of-review provisions block the APA's waiver of sovereign immunity.[2]

Second, federal-question jurisdiction is lacking here because Thuraissigiam asked the lower courts to address a settled question. When this Court has answered a question, that question ceases to present a federal question for jurisdictional purposes: "federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit," where a claim is "plainly unsubstantial … [when] its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hagans v. Lavine,* 415 U.S. 528, 537 (1974) (interior quotations omitted); *Goosby v. Osser,* 409 U.S. 512, 518 (1973). This Court has long held that recent illegal entrants like Thuraissigiam have no constitutional rights at issue here, *see* Section I.A.1, *supra*, which forecloses federal-question jurisdiction altogether.

In *Rasul v. Bush*, 542 U.S. 466, 482-84 (2004), this Court found jurisdiction over custodians of detainees because of ongoing violations of federal law, but that does not provide universal federal question jurisdiction in all *habeas* actions. *See id.* at 505 n.6 (Scalia, J., dissenting) (disputing jurisdiction in *Rasul*);

---

[2] The "officer suit" exception in *Ex parte Young*, 209 U.S. 123 (1908), provides a limited exception to sovereign immunity, but only for ongoing violations of federal law. *Green v. Mansour,* 474 U.S. 64, 66-67 (1985). As explained, there is no ongoing violation of federal law here. *See* Sections II-IV, *infra*.

Lehman v. Lycoming Cty. Children's Servs. Agency, 458 U.S. 502, 519 n.4 (1982) (Blackmun, J., dissenting) (collecting *habeas* actions dismissed for lack of federal-question jurisdiction). As indicated above, there is neither a federal question nor a federal violation here under this Court's precedents.

II. THURAISSIGIAM LACKS RIGHTS UNDER THE INA OR THE DUE PROCESS CLAUSE.

Before addressing the writ of *habeas corpus* and the Suspension Clause, *see* Sections III-IV, *infra*, IRLI first establishes that the proceedings here did not violate any of Thuraissigiam's rights under the INA or Due Process Clause.

A. Thuraissigiam received the three tiers of review to which the INA entitles him.

There is no dispute that the Government provided Thuraissigiam the three tiers of review that the INA provides. Thus, the Government has not violated the INA.

B. Illegal entrants like Thuraissigiam have no due-process rights beyond the INA rights Congress provided them.

Recent illegal entrants like Thuraissigiam have no due-process rights. INA detainees understandably prefer release to detention while immigration proceedings remain pending, but they simply have no right to be in the United States until the proceeding resolves. *See* Section I.A.1, *supra*. Indeed, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). If the Government complies with INA — and

that is conceded — the Government has satisfied the Due Process Clause.

Under *Mezei*, detainees do not suffer injury to a liberty interest because they lack a Due Process liberty interest. But even if detainees had a cognizable liberty interest, restricting that interest would not necessarily violate Due Process. If injuries implicate neither fundamental rights nor protected classes, due-process analysis proceeds under the rational-basis test. *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993). Under that test, detention does not violate a constitutional command or entitlement: "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. While good policy arguments may support programs like supervised release for some detainees, those policy arguments do not suffice for rational-basis review.

Under the rational-basis test, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *Beach Communications,* 508 U.S. at 315. Consequently, rational-basis petitioners must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the Government plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotations omitted). Such petitioners cannot prevail even by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" *vis-à-vis* the legislative purpose, but must instead negate

"the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). For example, the Government may have believed that supervised release would act as a magnet for further illegal immigration (*i.e.*, the policy would equate to a billboard reading "come to the United States illegally and get released"). Contrary to the message such a policy would send, "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). And that *possible* rationale alone suffices to rebut arguments against detention.

C. Federal courts should not create perverse incentives to treat illegal entrants better than aliens who lawfully seek admission.

Even if this Court finds that the lower courts had jurisdiction, this Court should reject the attempt to set national immigration policy by common-law writs. *Amicus* IRLI respectfully submits that there is too thin a reed of potential constitutional violation at issue here for this Court to trench the plenary power of Congress over immigration.

As the Government explains, Congress adopted the expedited removal provisions in 1996 to avoid the perverse incentives of treating illegal border crossers better than aliens who entered at ports of entry under the applicable INA requirements. *See* Gov't Br. at 4-5. It would provide just such perverse incentives to cross the border illegally for this Court to give recent illegal

entrants like Thuraissigiam a more robust form of judicial review than that available to lawful entrants.

In *Boumediene*, this Court found that a common-law right to *habeas corpus* in favor of aliens abroad may have antedated ratification of the Constitution. 553 U.S. at 765. While both novel and *sui generis*, that does not dispute that the concept of sovereignty also antedates the Constitution. *Alden v. Maine,* 527 U.S. 706, 728-29 (1999). As sovereign with plenary control over immigration, *Plasencia*, 459 U.S. at 32 (controlling immigration an act of sovereignty); U.S. CONST. art. I, § 8, cl. 4, Congress had the power to enact the INA process that Thuraissigiam challenges: "Power to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica,* 424 U.S. 351, 354 (1976). Insofar as the *Mezei-Plasencia* line of cases has long held that due process for recent illegal entrants is whatever Congress has provided, there is little basis for this Court to contemplate overruling Congress on the record here.

III. THURAISSIGIAM IS NOT ASSERTING *HABEAS* RIGHTS

Leaving aside unusual extraterritorial cases like *Boumediene*, where the Court's majority hypothesized that a common law right to *habeas corpus* for aliens abroad that may have predated ratification of the Constitution, *habeas* is a due-process procedural device to prevent detention in violation of other substantive laws. Here, the relevant substantive laws are the INA and the Due Process Clause, and the Government has not violated either of them. *See* Sections II.A-II.B, *supra*. *Habeas* seeks *release*, not systemic review.

Habeas petitioners cannot cherrypick their rights: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Mezei*, 345 U.S. at 212 (interior quotation marks omitted). As this Court recognized, Congress found that "'aliens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others.'" *Demore*, 538 U.S. at 518 (*quoting* S. REP. NO. 104-249, at 7 (1996)). As a sovereign with plenary control over immigration, *Plasencia*, 459 U.S. at 32; *DeCanas,* 424 U.S. at 354, Congress had every right to remove recent illegal entrants — subject to the INA protections such as credible fear of torture and asylum — via the expedited removal provisions at issue here. By contrast, Thuraissigiam does not have every right to challenge the INA procedures.

First, to the extent that Thuraissigiam challenges INA procedures and not detention, he seeks judicial review of the INA, not *habeas* relief. The INA provides procedures for systemic judicial review, *see* 8 U.S.C. § 1252(e)(3), but Thuraissigiam has not followed those procedures.

Second, the writ of *habeas corpus* has never been held to promise *more than* due process, and the INA provisions at issue here are due process. *See* Section II.B, *supra*. The argument that the INA violates the Suspension Clause by denying *habeas* relief is a *non sequitur*, given that to the INA *per se* qualifies as due process under the *Mezei-Plasencia* line of cases.

Thuraissigiam cannot take the right to be here — detained, unless released by discretion, and subject to INA removal — and then pare away detention or

removal via *habeas* or other systemic challenges to the INA. The rights Congress afforded him are the rights that he gets. And the Government has not violated those rights.

IV. THURAISSIGIAM LACKS RIGHTS UNDER THE SUSPENSION CLAUSE.

The Ninth Circuit attempts to avoid the obvious result that Thuraissigiam did not suffer the violation of any INA, due-process, or *habeas* rights, *see* Sections I-III, *supra*, by pressing this Court's decisions under the Suspension Clause. Pet. App. 31a-41a. That Clause offers Thuraissigiam no help beyond the writ of *habeas corpus*, which — as indicated — offers no help.

A. The Suspension Clause does not extend beyond *habeas corpus*.

With exceptions not relevant here, the Suspension Clause prevents suspending the writ of *habeas corpus*:

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

U.S. CONST. art. I, § 9, cl. 2. By its terms, the Clause extends only to *habeas corpus*, not to other rights. And this Court has never expanded the Clause to extend to other rights. Under the circumstances, the fact that Thuraissigiam does not seek a writ of *habeas corpus*, *see* Section III, *supra*, is dispositive of the Suspension Clause issue: Thuraissigiam has no rights under the Clause, and the INA neither facially nor as applied violates the Suspension Clause here.

B. The Ninth Circuit's arguments under the Suspension Clause lack merit.

Rather than follow the *Mezei-Plasencia* line of cases to hold that recent illegal entrants like Thuraissigiam lack due-process rights under the Constitution beyond the rights that Congress has afforded them, the Ninth Circuit built its Suspension Clause argument on an amalgam of reasoning from *Boumediene*, *St. Cyr*, and some "finality-era" decisions. In doing so, the Ninth Circuit failed to follow this Court's binding applicable precedents under the *Mezei-Plasencia* line of cases.

1. The *Boumediene* decision provides no support for Thuraissigiam.

With respect to the Suspension Clause, the *Boumediene* majority found the historical reach of the common law writ of *habeas corpus* uncertain *vis-à-vis* aliens abroad and gave the aliens the benefit of the doubt as to whether the challenged statute suspended the writ of *habeas corpus* for enemy combatants imprisoned abroad. 553 U.S. at 765. That geographic extension has no bearing to illegal aliens apprehended *within* the United States.

Right or wrong, *Boumediene* merely extended the scope of U.S. sovereignty from "formal" sovereignty over U.S. territory also to include "*de facto*" sovereignty over a military base in Cuba for which the United States has permanent "complete jurisdiction and control" under a lease, even though Cuba retained "ultimate sovereignty." 553 U.S. at 753. In doing so, this Court did not extend that novel concept to a military prison abroad where the United States lacked "absolute" control because it held the prison

"under the jurisdiction of the combined Allied Forces." 553 U.S. at 768 (citing *Eisentrager* and *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948)); *see also id.* at 754, 765 (U.S. had "plenary control" over Guantanamo Bay); *id.* at 771 ("complete and total control"). As interesting as the *Boumediene* discussion of a pre-Constitution, common-law writ of *habeas corpus* for aliens abroad might be, it does not apply here unless the Court wants to conclude that all aliens like Thuraissigiam have *habeas corpus* rights *before* they cross our border illegally.

For citizens and aliens detained *within* the United States, the writ of *habeas corpus* is well understood and, on the facts here, inapplicable. *See* Section II, *supra*. *Boumediene* has no bearing here.

2. The *St. Cyr* decision provides no support for Thuraissigiam.

Similarly, *St. Cyr* is inapposite because it involved a *habeas* petition by an LPR who became deportable by pleading guilty to a crime that appeared to justify revoking LPR status, with no possibility for a form of discretionary relief terminated by the then-recent INA amendments. The substantive legal issue in *St. Cyr* concerned the retroactivity of the INA amendment to convictions — like St. Cyr's — that occurred before the INA amendment.

In recognizing that a decade-plus LPR had liberty interests under the Constitution that support *habeas corpus*, this Court did not *sub silentio* create similar rights in illegal entrants, especially ones like Thuraissigiam, who was apprehended moments after crossing the border illegally. A future case may give this Court the opportunity to draw a line between St.

Cyr's decade-plus lawful stay and Thuraissigiam's momentary unlawful presence here, *cf.* 8 U.S.C. § 1225(b)(1)(A)(iii) (suggesting a line at two years), but this is not that case.

Like Congress, this Court "does not alter the fundamental details of [the constitutional] scheme in vague terms or ancillary provisions — it does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). While LPRs have constitutional liberty interests, illegal entrants like Thuraissigiam do not. The Ninth Circuit erred in supplanting the *Mezei-Plasencia* line of cases relevant to recent illegal entrants like Thuraissigiam with the *St. Cyr* authority relevant to LPRs:

> "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989)). As relied on by the Ninth Circuit, *St. Cyr* is inapposite here.[3]

---

[3] *St. Cyr* is further inapposite because Congress responded by amending 8 U.S.C. § 1252(g) in the REAL ID Act of 2005, PUB. L. NO. 109-13, Tit. I, Div. B, § 106(a)(3), 119 Stat. 231, 311, to bar resort to the *habeas* statute, as well as to all other non-INA forms of statutory and nonstatutory review. *Compare id. with* 8 U.S.C. § 1252(g).

3. The "finality-era" decisions provide no support for Thuraissigiam.

As the Government explains, the "finality-era" cases on which the Ninth Circuit relied do not address the Suspension Clause, and the Ninth Circuit relied instead on a chain of inferences to find those cases relevant. *See* Gov't Br. at 38-40. Like *St. Cyr*, however, those cases do not address recent illegal entrants like Thuraissigiam who lack due-process rights beyond the rights that Congress provided. Therefore, as with *St. Cyr*, *see* Section IV.B.2, *supra*, the Ninth Circuit should have followed the *Mezei-Plasencia* line of cases relevant to recent illegal entrants like Thuraissigiam. *See Agostini,* 521 U.S. at 237. The Ninth Circuit's failure to do so was error, and this case presents no circumstance for this Court to reconsider the *Mezei-Plasencia* line of cases.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

December 16, 2019

Respectfully submitted,

CHRISTOPHER J. HAJEC
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Av NW
Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Av NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com