No. 19-161

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

VIJAYAKUMAR THURAISSIGIAM

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

REPLY BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaties, statutes, and regulations:

Treaties, statutes, and regulations—Continued: Page

Miscellaneous: Page

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In 1996, Congress enacted expedited-removal procedures that may be applied to aliens arriving at a port of entry who are inadmissible because of lack of documentation or fraud, or aliens inadmissible on the same grounds who entered the United States illegally and have been unlawfully present for a limited time. 8 U.S.C. 1225(b)(1)(A)(i) and (iii). In order to streamline the removal of such aliens, Congress limited judicial review of final removal orders entered under expedited-removal procedures. It provided that judicial review remains "available in habeas corpus proceedings, but shall be limited to determinations" of whether the habeas petitioner is an alien; was ordered removed under Section 1225(b)(1); and is a refugee, asylee, or lawful permanent resident. 8 U.S.C. 1252(e)(2). And Congress further provided that, "[n]otwithstanding any other provision of law[,] * * * no court shall have jurisdiction to review,"

as relevant here, "the application of [expedited removal] to individual aliens, including the determination" that an alien lacks a credible fear for purposes of asylum, withholding of removal, or protection under regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, 113. 8 U.S.C. 1252(a)(2)(A)(iii); see 8 C.F.R. 208.30, 235.3(b)(4).

Respondent asks this Court to hold Section 1252(e) unconstitutional and to declare for the first time that the Suspension Clause guarantees judicial review of Executive Branch determinations regarding an alien's initial admission to the United States beyond the habeas review that Congress has provided. But for three reasons, respondent has not carried his burden to overcome "the strong presumption of constitutionality due to an Act of Congress." *United States* v. *Di Re*, 332 U.S. 581, 585 (1948).

First, the Constitution does not guarantee any procedures beyond what Congress has authorized relating to an alien's efforts to seek admission to the United States—regardless of what constitutional provision the alien invokes. That is especially so for concededly inadmissible aliens who request affirmative relief or protection from removal.

Second, respondent's claims do not fall within the common-law writ of habeas corpus that the Suspension Clause protects. Respondent does not challenge his detention as such; indeed, he is currently entitled to be returned to his home country. And he does not challenge the determination that he is inadmissible. Rather, he

seeks review of his failure to pass a threshold screening of his potential eligibility for certain forms of relief or protection from removal *notwithstanding* his inadmissibility. That claim falls well outside the historical core of habeas.

Third, even if the Constitution guarantees respondent some limited protections with respect to his admission to the United States, Congress's carefully crafted system of expedited removal satisfies that guarantee. Congress has not eliminated habeas review in the expedited-removal context. To the contrary, Section 1252(e) authorizes habeas review of core questions, and a multilayer administrative process safeguards any other protected interest that respondent may have.

I. THE SUSPENSION CLAUSE DOES NOT GUARANTEE JUDICIAL REVIEW OF RESPONDENT'S CLAIMS

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

1. a. In *Landon* v. *Plasencia*, 459 U.S. 21 (1982), this Court made clear that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Id.* at 32. Rather, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950).

Respondent contends (Br. 33-37) that this principle is irrelevant here, and that the Suspension Clause guarantees judicial review beyond what Congress has provided even if he lacks due process rights. But as *Plasencia* explains, Congress has plenary power to determine the procedures available to an alien seeking initial

admission. 459 U.S. at 32. And "the Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 (1972). It makes no difference what constitutional provision respondent invokes, if he is seeking additional procedures that Congress has not authorized relating to his request for admission. And he plainly is. See J.A. 31-32 (seeking judicial review of adverse credible-fear determination and asserting due process right to additional administrative procedures).

Respondent cites (Br. 35-36) three cases for the proposition that the Suspension Clause guarantees him habeas review of an adverse credible-fear determination, even if he lacks other constitutional rights in seeking admission. None supports him here. The first two cases, *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Knauff*, *supra*, concerned whether certain aliens were, under their unique circumstances, entitled by statute or due process to procedures beyond those afforded to ordinary aliens excluded from entry. In *Mezei*, the Court reaffirmed that Congress can make "final and conclusive" the Executive Branch's determinations about an alien's admission. 345 U.S. at 212. The Court then rejected a claim by a former longtime resident housed at Ellis Island that his prolonged detention entitled him to additional process. *Id.* at 213, 215-216. Similarly, in *Knauff*, the Court observed that "the decision to admit or to exclude an alien may be lawfully placed with" the Executive Branch, and courts may review that decision only if "expressly authorized by law." 338 U.S. at 543. The Court then rejected a claim that a different statute granted additional procedures to "war

brides." *Id.* at 544-547. In both cases, the habeas petition was simply the vehicle to assess whether the petitioner fell outside the class of aliens for whom the order of exclusion was final.

In the third case, *Boumediene* v. *Bush*, 553 U.S. 723 (2008), the Court determined that the Suspension Clause permitted military detainees to seek judicial review of their ongoing detention, without determining whether due process required the same. See *id.* at 785. But *Boumediene* concluded only that, even in the possible absence of a due process violation, habeas review was available to challenge executive detention "for the duration of hostilities that may last a generation or more." *Ibid.*

b. In any event, the Court need not address the full scope of Congress's plenary power over admission. Even if, in some circumstances, the Constitution, including the Suspension Clause, constrains Congress's ability to limit the procedures governing admissibility determinations, respondent does not challenge the determination that he is inadmissible. Instead, he seeks affirmative relief or protection from removal *notwithstanding* his conceded inadmissibility. Respondent offers no support for the proposition that Congress is required to attach certain procedures, including judicial review, to a decision that an inadmissible alien has failed a threshold screening for potential affirmative relief.

Congress may determine the class of inadmissible aliens to whom it extends an opportunity to seek such relief. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993). Congress has designated asylum a form of discretionary relief, not a right. See 8 U.S.C. 1158(b)(1)(A). And withholding of removal and CAT protection, while

mandatory when the criteria are satisfied, provide only protection from removal to a particular country, not a right to enter and live in the United States. See 8 U.S.C. 1231(b)(3)(A); 8 C.F.R. 208.16(a) and (f), 208.17(a).[1] Congress at a minimum has plenary authority to determine how to screen inadmissible aliens for the limited types of affirmative relief that it has chosen to offer.

2. a. Respondent next contends (Br. 38-45) that because he was apprehended after illegally entering the United States, he enjoys expanded constitutional rights with respect to his request for relief. As support, he cites (Br. 38-40) decisions stating that someone inside the United States is a "person" within the meaning of the Due Process Clause. But the government has never suggested otherwise. Respondent is indeed entitled to the protections of the Due Process Clause while he is in the United States; he could not, for example, be subjected to torture or to infamous punishment without criminal process. See *Wong Wing* v. *United States*, 163 U.S. 228 (1896). The relevant point, however, is that

[1] CAT and Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259, 6276, to which the withholding-of-removal statute was meant to conform, are non-self-executing. See S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 2 (1990) (CAT is non-self-executing); *INS* v. *Stevic*, 467 U.S. 407, 428 n.22 (1984) (1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, through which the United States undertook obligations under the Refugee Convention, is non-self-executing). Accordingly, Congress has the power under domestic law to define the procedures by which it offers such protections.

the Due Process Clause does not guarantee any particular procedures *with respect to a decision concerning his admission*. See *Knauff*, 338 U.S. at 544.[2]

Importantly, that principle applies to anyone properly classified as seeking initial admission. This Court has repeatedly indicated that an alien cannot circumvent Congress's plenary power over admission merely by stepping across the U.S. border. See *Yamataya* v. *Fisher*, 189 U.S. 86, 100 (1903) (leaving open 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" to challenge his removal); see also, *e.g.*, *Plasencia*, 459 U.S. at 32 (extending due process protections applicable to deportation to an alien who "gains admission to our country and begins to develop the ties that go with permanent residence"); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) (explaining that "[t]he Bill of Rights is a futile authority for the alien seeking admission for the first time," in contrast to an alien who "lawfully enters and resides in this country"); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49-50

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[2] Counsel for the United States explained that important distinction in the oral argument that respondent partially quotes (Br. 39). See Tr. at 24-25, *Clark* v. *Martinez*, No. 03-878 (Oct. 13, 2004) (explaining that "[t]he question is * * * what process is due" and that "there are no constitutional rights in connection with his admission to the United States"). Although counsel also stated without elaboration that an alien who crossed the border illegally is "entitled to procedural due process rights," *id.* at 25, that statement did not address the length of illegal presence after entry (see pp. 7-8, *infra*) or whether the alien would be entitled to any procedures beyond what Congress afforded.

(1950) (observing that due process requires "a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally"). Respondent objects (Br. 40) that the Court in those cases "did not *decide*" that clandestine entrants who have not yet become part of the population are entitled to only the process that Congress affords with respect to their admission to the United States. But while the Court has not yet needed to squarely decide the issue, that is no basis for holding an Act of Congress unconstitutional by repudiating a principle that it has frequently articulated.

To the contrary, strong reasons support adhering to the classification advanced in *Yamataya*. As a matter of the separation of powers, when the Executive apprehends an inadmissible alien—whether at the border or after the alien has illegally entered—and makes the congressionally authorized determination that he should not be granted relief from inadmissibility, a judicial order overturning that decision and compelling additional process would contravene this Court's repeated admonition that "[i]t is not within the province of the judiciary to order that foreigners who have never * * * even been admitted into the country" should "be permitted to enter, in opposition to" the joint decision of the political Branches. *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). And as a matter of common sense, granting broader judicial review to inadmissible aliens who unlawfully cross the border and express a fear of return, as compared to inadmissible aliens who do so at a port of entry, would create perverse incentives to engage in unlawful entry. H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 225 (1996) (House Report). Respondent's only response—that someone at a port of entry

could likewise file a habeas petition challenging the screening of her asylum claim (Br. 44-45)—is both unsupported and indicative of the breadth of his constitutional theory.

b. Respondent offers three objections. First, he contends (Br. 40, 42) that applying the classification articulated in *Yamataya* would "eliminate procedural due process rights * * * for any noncitizen deemed to have entered the country unlawfully." That contention ignores that this Court's statement in *Yamataya* referred to aliens who have *both* "entered the country clandestinely" *and* not yet "become, in any real sense, a part of our population." 189 U.S. at 100; see *Wong Yang Sung*, 339 U.S. at 49-50.

Second, respondent contends (Br. 43, 45) that treating some unlawful entrants as applicants for initial admission would fail to provide a workable rule. But Congress has selected a two-year limit on the period of unlawful presence during which DHS may place an alien in expedited removal. 8 U.S.C. 1225(b)(1)(A)(iii). In any event, respondent—who was apprehended 25 yards from the U.S.-Mexico border, almost immediately upon surreptitiously entering the country, J.A. 38—plainly falls within the class of illegal entrants who may properly be treated as seeking initial admission.

Finally, respondent suggests in passing (Br. 43) that he has "a strong tie to this country—his right to seek relief from persecution." But the potential availability of asylum is not an independent connection to the United States that triggers due process rights. Congress conditioned that availability on, *inter alia*, passing a threshold screening procedure that it deemed adequate and

not subject to judicial review. Under respondent's reasoning, however, any alien who seeks humanitarian protection offered by Congress could claim a constitutional entitlement to more procedures than Congress has attached to that protection. The Constitution does not require such bootstrapping.

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

Respondent's Suspension Clause claim fails for the additional reason that the common-law writ of habeas corpus at the time of ratification offered a means of seeking relief from unlawful detention as such. Respondent does not dispute that he is inadmissible, that his detention was lawful, and that he is currently entitled to be returned to his home country. Instead, the relief that he seeks—a new decision and additional procedures in his threshold screening for asylum, withholding of removal, or CAT protection—bears no resemblance to the common-law writ.

The question here is not whether respondent was "in custody" for purposes of filing a habeas petition under the general habeas statute, 28 U.S.C. 2241(c)(1); Congress has withdrawn that statutory authorization, 8 U.S.C. 1252(e)(2) and (5). Respondent's repeated insistence (*e.g.*, Br. 1, 25-26, 32) that the denial of initial admission to the United States may generally constitute a restraint sufficient to file a habeas petition is thus beside the point. Instead, the question is whether a habeas petition challenging the denial of admission to the United States—or, more specifically, the alien's failure to pass a threshold screening for potential eligibility for relief notwithstanding his inadmissibility—falls within

the "historical core" of habeas corpus that the Suspension Clause protects. *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001).

Notably, respondent does not advocate (Br. 26 n.12) a "one-way ratchet" theory of the Suspension Clause, under which expansions of the habeas statute similarly expand the Constitution's protections. *St. Cyr*, 533 U.S. at 342 (Scalia, J., dissenting). He instead offers (Br. 11-33) three sources for believing that his habeas petition falls within the common-law scope of habeas corpus. His reliance on those sources is misplaced.

1. Respondent primarily focuses (Br. 11-22) on this Court's finality-era decisions. But those decisions do not once mention the Suspension Clause.[3] Respondent misapprehends both whether the finality-era decisions reveal anything about the Suspension Clause and, if so, whether they support respondent's position here.

a. As an initial matter, this Court's finality-era decisions do not represent a body of precedent about the Suspension Clause. Respondent contends (Br. 13-17) that the finality-era immigration statutes barred the

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[3] One separate opinion for a single Justice did so. See *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 295 (1904) (separate concurring opinion by Brewer, J.). In addition, respondent correctly observes (Br. 17-19) that a finality-era government brief indicated that the Suspension Clause precluded the complete denial of habeas review. See U.S. Br. at 35-36, *Martinez* v. *Neelly*, No. 52-218 (Dec. 13, 1952). But that brief described the Constitution as guaranteeing "limited review in habeas corpus proceedings," *id.* at 36, of questions whether the Executive exceeded its statutory authority, see *id.* at 20, 22, not of individual administrative determinations.

Court from exercising all habeas review, yet the Suspension Clause compelled it to conduct such "review over legal claims in case after case." Resp. Br. 13. That is not how the Court characterized its review. Notwithstanding the admittedly sweeping language in the various statutes (*e.g.*, *id.* at 17), the Court made clear that "courts *are not forbidden by the statute* to consider whether the reasons [for deportation], when they are given, agree with the requirements of the act. * * * The conclusiveness of the decisions of immigration officers under [the finality statute] is conclusiveness upon matters of fact." *Gegiow* v. *Uhl*, 239 U.S. 3, 9 (1915) (emphasis added).

It is true that the Court in *Heikkila* v. *Barber*, 345 U.S. 229 (1953), stated that the finality statutes "had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." *Id.* at 234-235. But that statement does not mean that every time the Court exercised habeas review during the finality era, it did so because it had (silently) concluded that the statute was unconstitutional as applied in that case. More to the point, *Heikkila* did not indicate that the Suspension Clause—which it did not mention—required judicial review of the underlying administrative order in such cases. The Court instead reiterated that courts could not review individual administrative determinations, *id.* at 233-235, and stated that the "function of the courts" in habeas "has always been limited to the enforcement of due process requirements," *id.* at 236.

b. In any event, even if this Court looks to finality-era decisions for guidance, those decisions do not support respondent. The only relevant decisions that could

suggest that the Court (again, silently) applied the Suspension Clause to require habeas review are those in which (1) the statute foreclosed such review; and (2) the habeas petitioner sought initial admission. Respondent does not cite (Br. 14-16, 21-22) a single decision that meets both criteria. In every case, the Court confronted a legal question of the sort that it had treated as falling outside the finality statutes, addressed a habeas petitioner who was not applying for initial admission, or both. See *Ekiu*, 142 U.S. at 662-664 (concluding that immigration official had been validly appointed and his decision was within his statutory authority, and was therefore "final and conclusive"); *Gegiow*, 239 U.S. at 9-10 (determining that "[t]he conclusiveness of the decisions of immigration officers under [the finality statute]" did not reach the question whether someone could be deemed a public charge because of market conditions); *Mezei*, 345 U.S. at 211-212 (challenge in effect to continued confinement to Ellis Island); *Knauff*, 338 U.S. at 542-543 (challenge to statute and regulations and their application to war brides); *United States ex rel. Johnson* v. *Shaughnessy*, 336 U.S. 806, 808-809 (1949) (challenge to another agency's medical determination); *United States ex rel. Polymeris* v. *Trudell*, 284 U.S. 279, 280 (1932) (question of legal requirements for reentry); *Yee Won* v. *White*, 256 U.S. 399, 400-402 (1921) (question whether statute and treaty provided right of entry for wife and minor children of Chinese laborer); *Gonzales* v. *Williams*, 192 U.S. 1, 7 (1904) (question whether native of Puerto Rico was an "alien" under the statute); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 262 (1954) (deportation after 15 years' residence);

United States v. *Vanbiervliet*, 284 U.S. 590 (1931) (per curiam) (deportation after six years' residence).

Respondent contends (Br. 21-22) that, in particular, the Court in *Ekiu* exercised habeas review that Congress had barred by statute but that the Court considered "constitutionally required." That is incorrect. In *Ekiu*, the Court explained that when

> a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reëxamine or controvert the sufficiency of the evidence on which he acted.

142 U.S. at 660. The Court then determined that the finality statute "manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise." *Id.* at 663-664. The Court reviewed particular purely legal questions—not covered by the finality statute—about whether the inspector had been appointed in violation of the law and whether the statute required testimony. *Id.* at 662-663. But once it found that the entry determination was within the inspector's statutory authority, it concluded that his "decision was final and conclusive." *Id.* at 664. *Ekiu* thus illustrates that, in the finality era, the Court did not exercise habeas review to second-guess the Executive's case-specific decisions regarding an alien's admission. And at a minimum, the Court did not exercise habeas review to review decisions whether

to grant affirmative relief to a concededly inadmissible alien. See pp. 5-6, *supra*.

2. Respondent next turns (Br. 23-25) to this Court's decisions in *St. Cyr* and *Boumediene*. For the reasons explained at greater length in the government's opening brief (at 31-33, 36-38), neither decision suggests that the Suspension Clause guarantees judicial review of respondent's claims.

a. *St. Cyr* stated that the Suspension Clause requires "some judicial intervention in deportation cases." 533 U.S. at 300 (citation and internal quotation marks omitted). But that was not a constitutional holding with respect to the issue in *St. Cyr*. The Court instead construed the relevant statutory provision to avoid "serious constitutional questions." *Id.* at 314.

In any event, the critical point is not that this Court should reject *St. Cyr*'s statement that the Suspension Clause requires some judicial review of deportation orders; the critical point is that the Court should not *extend* that statement to an order denying initial admission. *St. Cyr* involved a lawful permanent resident with a significant liberty interest in remaining in this country, and the Court noted the existence of constitutional concerns about the deportation of such a resident without access to judicial review. 533 U.S. at 300. But the Court did not suggest that aliens seeking initial admission (let alone relief notwithstanding their inadmissibility), who have no protected liberty interest in entering or remaining in the United States, have a comparable constitutional entitlement.

b. *Boumediene* arose in dramatically different circumstances. As respondent notes (Br. 24-25), *Boumediene* reaffirmed that the Suspension Clause, within

its traditional scope, guarantees review of certain legal claims, see 553 U.S. at 779. But that does not answer the question concerning application of the Suspension Clause here. Nor does it matter, as respondent urges (Br. 25), that the enemy combatants held at Guantanamo "had never set foot in the United States." *Boumediene* reasoned that the detainees were held by the United States in a location over which it exercised de facto sovereignty. 553 U.S. at 755. And the case otherwise involved a classic application of habeas corpus: a petition for relief from ongoing, allegedly unlawful, executive detention. *Id.* at 732, 785, 788.

3. Finally, respondent contends (Br. 25-33) that the common-law writ of habeas, as it existed in 1789, would have recognized a claim like the one he asserts here. Respondent's support for that contention falls well short of carrying his burden to demonstrate Section 1252(e)'s unconstitutionality.

As the government's opening brief explains (at 27-35), "the common-law history of the writ" makes clear "that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody." *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973); see 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1333 (1833) (explaining that habeas is "the appropriate remedy to ascertain[] whether any person is rightfully in confinement" and "is entitled to his immediate discharge"). The historical "remedy for such detention is, of course, release." *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008). Yet respondent does not challenge his detention upon unlawfully entering the country or seek release from any wrongful confinement. Nor does he challenge the determination that he is inadmissible because

he has no valid entry document. Instead, he seeks review of the decision made under proceedings for screening inadmissible aliens for possible eligibility for asylum, withholding of removal, or CAT protection. J.A. 33.

Respondent nevertheless seeks to bring this case within the common-law writ. First, he contends (Br. 26-27) that habeas was used to test the lawfulness of a variety of physical restraints, from imprisonment to indentured servitude. That illustrates the government's point: Habeas traditionally involved challenges to "illegal confinement" itself. 3 William Blackstone, *Commentaries on the Laws of England* 131 (1768).

Second, respondent contends (Br. 27-28) that "the common-law courts used habeas to assess the lawfulness of transfers outside the country." Resp. Br. 27. But his historical support for this point is extremely thin. Respondent identifies only two cases, *Murray's Case* and *Somerset* v. *Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 499, that he believes involved challenges to transfers. The government has been unable to locate any report of *Murray's Case*, and the basis for the challenge is unclear from respondent's description (Br. 27). In *Somerset*, although the ultimate effect of the court's holding was to protect a slave from a transfer out of England, the court's analysis asked "whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws," not whether a transfer was proper. 98 Eng. Rep. at 509. And the court ordered that the habeas petitioner "be discharged" from custody, not that he merely not be transferred. *Id.* at 510.

Respondent also briefly draws an analogy (Br. 28) to extradition. As one source cited by respondent explains, however, no tradition of challenging extradition via habeas existed at the Founding, as England was not at that time a party to any extradition treaty and the U.S. government extradited just one person before the mid-nineteenth century. See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 994-996 (1998). Respondent's other source relies on an 1814 English case that did not appear to involve extradition. See *Richard Blake's Case*, (1814) 105 Eng. Rep. 440 (K.B.) (assessing permissibility of delay in holding court martial where key witnesses had deployed overseas). Moreover, later challenges to extradition often focused—consistent with traditional habeas—on the authority to arrest and detain the prisoner, not the propriety of a foreign transfer itself. See, *e.g.*, *In re Sheazle*, 21 F. Cas. 1214, 1217 (C.C.D. Mass. 1845) (No. 12,734) (Woodbury, J., on circuit) (rejecting challenge to arrest warrant); cf. *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (C.C.D. Mass. 1813) (No. 3967) (Story, J., on circuit) (finding no jurisdiction to detain deserting seamen, but "direct[ing] an officer to deliver them to the master on board of his vessel"). And in any event, the analogy to extradition undermines respondent's position here: Under the rule of non-inquiry, questions about the conditions an individual might face upon transfer are "to be addressed by the political branches, not the Judiciary." *Munaf*, 553 U.S. at 700.

Third, respondent contends (Br. 29-32) that he is in fact challenging a wrongful detention. But respondent admits that he entered the country unlawfully

and was therefore lawfully detained during the pendency of expedited-removal procedures. See 8 U.S.C. 1225(b)(1)(B)(iii)(IV); see also *Demore* v. *Kim*, 538 U.S. 510, 531 (2003). Contrary to his assertion (Br. 29), his habeas petition nowhere requests "conditional release pending a lawful adjudication." Rather, it seeks "a writ of habeas corpus * * * directing [the government] to provide [him] a new opportunity to apply for asylum and other applicable forms of relief." J.A. 33; see J.A. 31-32. That request has no parallel in the common-law uses of habeas to challenge unlawful detention as such. See *Castro* v. *United States Dep't of Homeland Sec.*, 835 F.3d 422, 450 (2016), cert. denied, 137 S. Ct. 1581 (2017) (Hardiman, J., concurring dubitante) (explaining that similarly situated habeas petitioners sought not to be released, but rather "to alter their status in the United States in the hope of *avoiding* release to their homelands"). Indeed, respondent's suggestion (Br. 49) that he could be removed to his home country pending the adjudication of his habeas petition underscores that his concern is not with avoiding unlawful confinement but with obtaining additional review of his request for relief.

Finally, respondent attempts (Br. 32-33) to distinguish *Munaf*. But in both *Munaf* and this case, the habeas petitioners did not request outright release. See 553 U.S. at 692. Instead, they effectively sought "a court order requiring the United States to shelter them from [a foreign] government." *Id.* at 694; see *Omar* v. *McHugh*, 646 F.3d 13, 15 (D.C. Cir. 2011) (Kavanaugh, J.) (rejecting argument that Suspension Clause entitled petitioner "to judicial review of conditions in the receiving country"). To be sure, the habeas petitioners in *Munaf* were located outside the United States. See 553 U.S. at

679. But because respondent is seeking initial admission to the United States and is not challenging his inadmissibility or his detention upon his unlawful entry, the basic point remains the same: He wishes to use habeas review to acquire humanitarian protection that the Executive Branch has determined is unwarranted, not to contest executive detention as such. If that sort of request fell outside the scope of the habeas statute in *Munaf*, *id.* at 692, 702, it *a fortiori* falls outside the scope of the narrower common-law habeas right guaranteed by the Suspension Clause.

II. THE EXPEDITED-REMOVAL FRAMEWORK SATISFIES ANY CONSTITUTIONAL CONSTRAINTS

Even if respondent may properly invoke the Suspension Clause to challenge the limitations on habeas corpus review in the context of his denial of initial admission to the United States, he is not entitled to relief. Section 1252(e) does not eliminate habeas review; it merely restricts review to questions about whether the habeas petitioner is statutorily subject to expedited removal, 8 U.S.C. 1252(e), and thus is appropriately detained, see 8 U.S.C. 1225(b)(1)(B)(iii)(IV). And the multilayer administrative system that Congress has designed to screen inadmissible aliens who may be eligible for affirmative relief effectively safeguards whatever other interest they may have.

A. Contrary to respondent's contention (Br. 46-47), the government has not argued that an administrative process can entirely displace judicial review to the extent the Suspension Clause actually guarantees such review. *Boumediene* explained that, where the Suspension Clause applies, it guarantees judicial review of "the

cause for detention and the Executive's power to detain." 553 U.S. at 783. In the context of expedited removal, Section 1252(e) authorizes habeas review of both.

Section 1252(e)(2) provides for habeas review of the three basic attributes underlying an alien's expedited removal: whether the habeas petitioner is in fact an alien; whether he has been ordered removed under Section 1225(b)(1); and whether he is a refugee, asylee, or lawful permanent resident. 8 U.S.C. 1252(e)(2). That provision thus allows for judicial review of the underlying "cause for detention," *Boumediene*, 553 U.S. at 783—*i.e.*, whether an alien is properly subject to expedited removal under Section 1225(b)(1). And because Congress may commit the determination of whether an individual alien will be admitted exclusively to the Executive, the issuance of an expedited-removal order pursuant to that statutory grant of authority establishes the lawfulness of the alien's detention for purposes of removal.

In addition, Section 1252(e) provides for judicial review of challenges to the constitutionality or legality of the expedited-removal system itself, if brought in a timely suit by an appropriate party. 8 U.S.C. 1252(e)(3). That provision too allows for some judicial review of "the Executive's power to detain." *Boumediene*, 553 U.S. at 783.

B. Respondent seeks something more: judicial review of the case- and fact-specific application of the statutory screening framework to his particular claim for asylum. J.A. 33. But to the extent respondent has any protected liberty interest here, but see pp. 3-10, *supra*, the administrative procedures that Congress has crafted

are more than sufficient to protect such an interest. Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

1. As the government's opening brief explains (at 7-9, 42-43), the expedited-removal procedures—although streamlined in comparison to removal proceedings under 8 U.S.C. 1229a—contain significant protections against legal and factual errors. The statute provides three opportunities for an alien to demonstrate that he has a credible fear, including before an independent immigration judge within a different agency. 8 U.S.C. 1225(b)(1)(B)(iii)(III). Respondent briefly suggests (Br. 4, 46) that those procedures offer few protections, but he provides no explanation and does not contest the government's description of the process required by statute and regulation.

2. As for the parties' respective interests, respondent asserts (Br. 49) that he has an interest in avoiding return to Sri Lanka. But respondent fails to offer any relevant, constitutionally protected interest in admission to the United States. On the other side of the balance, respondent attempts to downplay the government's strong interest in maintaining a functioning expedited-removal system. But respondent's speculation (*ibid.*) that few habeas claims would be filed, that they would not require prolonged litigation, and that habeas petitioners would not seek a stay of removal is unsupported. In reality, Congress made precisely the opposite judgment: that without an efficient expedited-removal system, inadmissible aliens would delay their removal long enough to be released into the general population and remain indefinitely. See House Report 117-118. In addition, the number of aliens in expedited removal who are referred for credible-fear screenings has increased

over the last decade from fewer than 5000 aliens a year to nearly 100,000. 84 Fed. Reg. 33,829, 33,838-33,839 (July 16, 2019). Meanwhile, the backlog of cases in the administrative immigration courts has increased to 900,000. *Id.* at 33,839. The harms that respondent's position would cause are real.

3. Finally, to the extent respondent contends (Br. 5-6, 46, 51) that his credible-fear proceedings demonstrate a need for judicial review, the record refutes that contention. From the moment respondent was apprehended, he never gave any indication that his attackers in Sri Lanka were motivated by a protected ground. See 8 U.S.C. 1101(a)(42)(A). He told an asylum officer that he did not know who had beaten him or why they had chosen him, despite a series of questions eliciting information about the attack. J.A. 71-74. And he expressed no reluctance to seek police protection, except that he could not identify his attackers. J.A. 72; see J.A. 89. Respondent also specifically denied any fear of harm on the basis of his political opinion. J.A. 76-77. The asylum officer explained to respondent that no nexus existed between the beating and a protected ground. C.A. S.E.R. 48. Still, in testimony before an immigration judge, J.A. 97, respondent maintained that he did not know who had beaten him and gave no reason to believe that any such nexus existed. This case thus exemplifies the appropriate functioning of the administrative screening process and illustrates why Congress deemed a costly additional layer of judicial review both unnecessary and unwise.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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