No. 19-161

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

VIJAYAKUMAR THURAISSIGIAM

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

REPLY BRIEF FOR THE PETITIONERS

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In the decision below, the court of appeals held unconstitutional the application of an important federal statute, 8 U.S.C. 1252(e)(2), in circumstances that recur for thousands of aliens every year. Section 1252(e)(2) applies to inadmissible aliens like respondent who are subject to expedited removal under 8 U.S.C. 1225(b)(1) and who are found not to have a credible fear of persecution on a protected ground or a credible fear of torture and thus not to be eligible for asylum. Congress provided that such aliens may seek judicial review in a habeas corpus proceeding only to determine whether they are in fact aliens; whether they were ordered removed under Section 1225(b)(1); or whether they have been lawfully admitted as a permanent resident, refugee, or asylee. 8 U.S.C. 1252(e)(2). The court of appeals erroneously concluded that Section 1252(e)(2) violates the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, as

applied to respondent, an inadmissible alien who was apprehended almost immediately after he surreptitiously crossed the U.S. border.

Respondent does not dispute that the constitutionality of Section 1252(e)(2) is squarely presented here, or that the decision below directly conflicts with the Third Circuit's decision in *Castro* v. *United States Department of Homeland Security*, 835 F.3d 422 (2016), cert. denied, 137 S. Ct. 1581 (2017). Instead, he primarily contends that the decision below is correct (Br. in Opp. 13-24) and that the circuit conflict is narrow and in flux (*id.* at 9-12). Both of those contentions are incorrect. But even if they were debatable, review would still be appropriate: This Court commonly grants certiorari when a lower court holds the application of an Act of Congress unconstitutional, particularly one as important and widely applicable as Section 1252(e)(2).

A. The Court Of Appeals Erroneously Held That The Application Of Section 1252(e)(2) To Respondent Violates The Constitution

As explained in the petition (at 17-29), Section 1252(e)(2) does not violate any rights of respondent under the Suspension Clause. First, because an alien seeking initial admission to the United States "has no constitutional rights regarding his application," *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), the Constitution does not guarantee any procedural protections beyond those that Congress has provided. And because an inadmissible alien apprehended soon after illegally crossing the border is properly treated as an alien seeking initial admission, that same rule applies to respondent. See *Yamataya* v. *Fisher*, 189 U.S. 86, 100 (1903).

Second, even if the Constitution guaranteed respondent some limited procedural rights in connection with his application for admission, the existing framework of administrative procedures and habeas corpus review of expedited-removal orders would satisfy that guarantee.

1. The decision below contradicts this Court's admonition "that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Plasencia*, 459 U.S. at 32. Respondent attempts to cabin that well-established rule, but his proposed distinctions fail.

First, respondent contends (Br. in Opp. 14-16) that the rights protected by the Suspension Clause cannot turn on "one's abstract connection to the country" (*id.* at 14) in light of this Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), and the various finality-era cases mentioned in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). But *Boumediene*, which arose in fundamentally different circumstances, said nothing about the constitutional rights of an alien in seeking admission to this country. Instead, it involved a challenge to ongoing detention under the law of war in a location where "the United States, by virtue of its complete jurisdiction and control * * * , maintains *de facto* sovereignty." 553 U.S. at 755; see *id.* at 732.

The finality-era cases involving aliens' admission to the country also do not support respondent. As an initial matter, although *St. Cyr* suggested that finality-era cases may offer "some support" for a proposed construction of the Suspension Clause, the Court was noncommittal. 533 U.S. at 304. It concluded only that in light of "the ambiguities" and "suggestions" in finality-

era cases—which do not explicitly mention the Suspension Clause—the constitutional questions raised in that case were "difficult" enough to apply the canon of constitutional avoidance. *Ibid.*; see *id.* at 339 (Scalia, J., dissenting) (contending that finality-era cases "pertain[] not to the meaning of the Suspension Clause, but to the content of the habeas corpus provision of the United States Code, which is quite a different matter"). Regardless, none of the finality-era cases on which respondent relies (Br. in Opp. 15-16) actually provided habeas corpus review, other than on pure questions of law not barred from review by the applicable finality statute, to an alien seeking initial admission to the country or effectively treated as such. See *Gegiow* v. *Uhl*, 239 U.S. 3 (1915) (question of law);[1] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (deportation); *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892) (question of law).

Second, respondent contends (Br. in Opp. 16-17) that decisions like *Plasencia*, which make clear Congress's

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[1] In particular, respondent repeatedly relies (Br. in Opp. 15, 16 & n.3) on *Gegiow*, *supra*, for the proposition that aliens seeking admission at the border were entitled to habeas corpus review under the Suspension Clause. But that case involved a pure question of law, which, as the Court observed, fell outside the prohibition on judicial review in the applicable finality statute. See 239 U.S. at 9-10 (explaining that "[t]he conclusiveness of the decisions of immigration officers under [the finality statute]" did not reach the legal question of whether "an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked"). Because the statutory prohibition on judicial review did not reach the question presented, the Court's resolution of that question sheds no light on the scope of any constitutional guarantee of judicial review.

plenary power over admission to this country, are "wholly inapposite" (*id.* at 17) because they involve the Due Process Clause rather than the Suspension Clause. But those decisions confirm that an alien seeking initial admission "has no *constitutional rights* regarding his application"; he is entitled only to whatever process that Congress has afforded. *Plasencia*, 459 U.S. at 32 (emphasis added). And more fundamentally, respondent cannot evade this Court's longstanding precedents governing the exclusion or removal of aliens at the border by recasting what is effectively a due process challenge to existing administrative procedures as a challenge to an alleged suspension of the writ of habeas corpus.

Respondent suggests (Br. in Opp. 17-18) that, under this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), an applicant for admission may lack procedural due process rights yet enjoy a Suspension Clause right to habeas corpus review. That is incorrect. In *Mezei*, the Court reaffirmed the principle that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212 (citation omitted). And the Court *denied* habeas relief for essentially the same reason, concluding that the alien's "continued exclusion" did not "deprive[] him of any statutory or constitutional right." *Id.* at 215.

Third, respondent contends (Br. in Opp. 18) that he is differently situated from initial applicants for admission because he is located in the United States. But in affirming Congress's plenary power over admission, this Court has repeatedly distinguished between an alien who was lawfully admitted and an alien "who has entered the country clandestinely, and who has been here

for too brief a period to have become, in any real sense, a part of our population." *Yamataya*, 189 U.S. at 100. Respondent—who was apprehended 25 yards north of the border almost immediately upon surreptitiously entering, C.A. S.E.R. 3—plainly is the latter. And as the petition explains (at 24), strong practical reasons support that result. In particular, a contrary rule would create a perverse incentive for aliens to cross the border surreptitiously rather than presenting themselves for inspection at a port of entry.

2. In any event, even if the Constitution guarantees some limited procedural rights in connection with an alien's application for admission, the existing framework of administrative procedures and habeas corpus review would be sufficient. That system includes a credible-fear screening by an asylum officer, with the opportunity to submit evidence and a written record of the decision; review by a supervisory asylum officer; de novo review by an immigration judge after a hearing; and habeas corpus review for certain determinations about the alien's identity and legal status. See Pet. 21-22. The review process is thus far from "nearly nonexistent," as respondent characterizes it (Br. in Opp. 20). In addition, Congress has provided a separate channel for courts to review legal challenges to the validity of the expedited-removal system itself, so long as such challenges are brought within 60 days after the challenged provision is implemented. See 8 U.S.C. 1252(e)(3)(A) and (B); Pet. 9 n.2, 22 n.4.

In response, respondent primarily relies (Br. in Opp. 19-21) on *Boumediene*, contending that the Court's decision in that case broadly required the availability of judicial review of questions involving the application of

law to facts. But again, *Boumediene* is inapposite. In that case, the Court accepted that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." 553 U.S. at 779 (citation and internal quotation marks omitted). It recited that principle, however, for prisoners detained under the law of war, for whom "the consequence of error may be detention * * * for the duration of hostilities that may last a generation or more." *Id.* at 785.

Different review structures may satisfy any constitutional guarantees in the fundamentally different context here. Respondent does not challenge his detention as such, but rather invokes habeas corpus in an effort to obtain judicial review of an administrative order of removal. And respondent concedes that he is inadmissible and that his exclusion from the United States is proper; he seeks instead to obtain a discretionary or other form of relief from that exclusion that would alter his immigration status and prevent his return to his home country. Cf. *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008) (noting that habeas review provides "[t]he typical remedy for [executive] detention," which "is, of course, release"). Historical precedent suggests that the Suspension Clause does not require judicial review of respondent's basic claim here: that he "should have passed the credible fear stage," D. Ct. Doc. 1, at 14 (Jan. 19, 2018), and been considered for discretionary asylum relief. See, *e.g.*, *Zakonaite* v. *Wolf*, 226 U.S. 272, 275 (1912) (stating that it was "entirely settled" in the deportation context that "the findings of fact reached by [executive] offi-

cials, after a fair though summary hearing, may constitutionally be made conclusive"); *Yamataya*, 189 U.S. at 102 ("Whether further investigation should have been ordered was for the officers, charged with the execution of the [deportation] statutes, to determine. Their action in that regard is not subject to judicial review.").

B. This Case Warrants The Court's Review

Apart from the merits, this case warrants the Court's review for several reasons. Respondent does not demonstrate otherwise.

1. First, and most fundamentally, the court of appeals held an Act of Congress unconstitutional in broadly applicable terms. This Court often grants certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional." *United States* v. *Kebodeaux*, 570 U.S. 387, 391 (2013); see, *e.g.*, *United States* v. *Morrison*, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, [the Court] granted certiorari.").

Respondent observes (Br. in Opp. 8) that the decision below "held only that the statute was unconstitutional as applied to [him]." But the court of appeals framed its holding in terms that may apply to any inadmissible alien who is apprehended after surreptitiously entering the United States and then found to lack a credible fear of persecution or torture. See, *e.g.*, Pet. App. 35a, 38a (concluding that "the Suspension Clause requires review of legal and mixed questions of law and fact related to removal orders, including expedited removal orders," at least for aliens "arrested within the United States"). Respondent does not dispute that every year thousands of inadmissible aliens meet that

description. Indeed, respondent suggests (Br. in Opp. 16 n.3) that the court of appeals' decision should apply even *more* broadly, as he asserts that the same Suspension Clause analysis should also govern for aliens arriving in the United States at a port of entry.

2. Second, the decision below creates a conflict with the Third Circuit's decision in *Castro*, *supra*, as the court of appeals below acknowledged. See Pet. App. 23a-28a. Respondent contends (Br. in Opp. 8-9) that "the conflict between the Ninth and Third Circuits is closing" and that the Third Circuit recently "scale[d] back its ruling in *Castro*." That is incorrect. The decision on which respondent relies, *Osorio-Martinez* v. *Attorney General*, 893 F.3d 153 (3d Cir. 2018),[2] involved a particular application of *Castro*'s reasoning, not a repudiation of it.

In *Castro*, the Third Circuit confronted a Suspension Clause challenge to Section 1252(e)(2) brought by aliens who, like respondent, "were apprehended very near the border and, essentially, immediately after surreptitious entry into the country." 835 F.3d at 434. Relying on Congress's plenary power over admission, the court of appeals concluded that the category of aliens in that case could not invoke the Suspension Clause to demand habeas review beyond what Congress had authorized by statute. *Id.* at 448-449.

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[2] The panel in *Osorio-Martinez* has stayed its mandate and extended the time for seeking rehearing en banc while the parties pursue settlement. See 10/10/18 Order, *Osorio-Martinez*, *supra* (No. 17-2159). On August 12, 2019, the parties informed the panel that they had reached a settlement agreement in principle. See 8/12/19 Joint Statement, *Osorio-Martinez*, *supra* (No. 17-2159).

Osorio-Martinez did not hold otherwise; indeed, it repeatedly reaffirmed *Castro*'s holding. See, *e.g.*, 893 F.3d at 158 ("As we explained in *Castro*, only aliens who have developed sufficient connections to this country may invoke our Constitution's protections."). The court of appeals nevertheless concluded that the aliens in that case, who had been accorded Special Immigrant Juvenile status, see 8 U.S.C. 1101(a)(27)(J), had developed "significant connections to the United States"—in light of their presence in the United States for a considerable period of time under a protective status that offered, for example, access to federally funded educational programming and preferential status when seeking employment-based visas—and thus were no longer properly treated as aliens seeking initial admission. *Osorio-Martinez*, 893 F.3d at 166; see *id.* at 169-172. Because of their unique Special Immigrant Juvenile status, the court concluded that the aliens could invoke the Suspension Clause to demand some habeas corpus review that Section 1252(e)(2) otherwise prohibits. *Id.* at 176-178. But that conclusion did not change the rule in the Third Circuit that applies to inadmissible aliens similarly situated to respondent, as the court of appeals below recognized. See Pet. App. 25a n.13. For that (far larger) class, the rule remains that Section 1252(e)(2)'s limits on habeas corpus review may be constitutionally applied. *Castro*, 835 F.3d at 450.

Respondent also contends (Br. in Opp. 8) that because only two circuits have weighed in, the circuit split is "far from deep or mature." But out of respect for coordinate Branches, this Court often grants certiorari even in the absence of *any* circuit conflict when a lower court finds an Act of Congress unconstitutional. See,

e.g., *United States* v. *Haymond*, 139 S. Ct. 2369 (2019); *Iancu* v. *Brunetti*, 139 S. Ct. 2294 (2019); *Matal* v. *Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076 (2015); *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225 (2015); *United States* v. *Alvarez*, 567 U.S. 709 (2012). That practice is consistent with the Court's recognition that judging the constitutionality of a federal statute is "the gravest and most delicate duty that th[e] Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)).

3. Third, the question presented is outcome-determinative here, which respondent does not dispute. If the Suspension Clause does not preclude the application of Section 1252(e)(2) to respondent, then the court of appeals erred in reversing the district court's judgment dismissing the case for lack of jurisdiction. Pet. App. 43a; see *id.* at 57a.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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SEPTEMBER 2019