SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF HOMELAND SECURITY,)
ET AL.,)
Petitioners,)
v.) No. 19-161
VIJAYAKUMAR THURAISSIGIAM,)
Respondent.)

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4 ET AL.,)

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6 v.) No. 19-161

7 VIJAYAKUMAR THURAISSIGIAM,)

8 Respondent.)

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10

11 Washington, D.C.

12 Monday, March 2, 2020

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14 The above-entitled matter came on for

15 oral argument before the Supreme Court of the

16 United States at 11:07 a.m.

17

18 APPEARANCES:

19 EDWIN S. KNEEDLER, Deputy Solicitor General,

20 Department of Justice, Washington, D.C.;

21 on behalf of the Petitioners.

22 LEE GELERNT, ESQ., New York, New York;

23 on behalf of the Respondent.

24

25

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear

4 argument next in Case 19-161, the Department of

5 Homeland Security versus Thuraissigiam.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONERS

9 MR. KNEEDLER: Mr. Chief Justice, and

10 may it please the Court:

11 Congress established the expedited

12 removal system in 1996 for aliens who arrive at

13 our borders or enter illegally and have no entry

14 documents. Such aliens are clearly inadmissible

15 and have no right to be in this country.

16 Congress reasonably concluded that a

17 full-blown removal hearing was not necessary to

18 make that determination. Congress was also

19 concerned, however, for -- about the possibility

20 for delay and abuse of the asylum system if

21 every time such a clearly inadmissible alien

22 sought asylum. What it did then was to provide

23 for a three-tiered administrative screening

24 system to first determine whether the alien had

25 a credible fear -- fear of persecution.

1 Respondent contends that the
2 Suspension Clause requires a fact-laden judicial
3 review of the negative fear -- credible-fear
4 determination made in that screening process.
5 Congress, however, while it preserved
6 habeas corpus, tailored it to the special
7 circumstances of expedited removal by limiting
8 it to whether the alien is eligible for
9 expedited removal and whether such an order was
10 entered.
11 Congress's judgment that that approach
12 was necessary for the control of immigration and
13 control of the borders is entitled to great
14 weight and it is consistent with the Suspension
15 Clause.
16 First, Congress has repeatedly said
17 that an alien seeking admission is entitled only
18 to the procedures Congress has provided. And it
19 has held for more than 100 years that Congress
20 may vest the determination of whether an
21 individual alien is excludable in an executive
22 officer. Indeed, it said that a determination
23 by such an officer acting within his
24 jurisdiction is due process for purposes of the
25 Constitution. And when such an order is issued

1 under this system, that expedited removal order
2 establishes the government's right to detain
3 him.
4 A fortiori, that is true when what --
5 when you have a situation involving an
6 inadmissible alien who seeks review of a
7 negative screening determination for possible
8 relief from removal, notwithstanding his
9 inadmissibility.
10 JUSTICE SOTOMAYOR: Mr. Kneedler, it's
11 one thing when an alien comes and has no
12 protected ground to stay here. There's no legal
13 right to stay. And so expedited proceedings are
14 okay because they have no right to be here.
15 But, when someone's seeking asylum,
16 they have a statutory right to stay if they meet
17 the elements of the statute. So that's a vastly
18 different question of whether the Suspension
19 Clause -- which predated the Due Process Clause
20 by 100 years -- the Suspension Clause, at the
21 time, it was viewed as permitting anyone who had
22 a legal claim to stay to file a habeas petition.
23 I don't know how that right all of a
24 sudden gets transformed merely because there's a
25 second constitutional right to due process.

1 MR. KNEEDLER: Well --

2 JUSTICE SOTOMAYOR: Meaning those are

3 two different provisions of the Constitution,

4 one predated the other, and the finality era

5 cases were very clear, if you have a claimed

6 right to be in the United States, whether you're

7 on the shore from a boat that's landed or you're

8 from Puerto Rico and you think that your

9 citizenship gives you a right to come in, a

10 whole slew of cases from the finality era under

11 the Suspension Clause who said you have a habeas

12 right.

13 So I don't know how that's the same

14 thing. You assume the person has no clear

15 right, but they do have a right to stay if they

16 meet the criteria of the Asylum Act.

17 MR. KNEEDLER: Several responses to

18 that. Those finality -- those finality era

19 cases all uniformly hold that a court may not

20 review a -- the determination in an individual

21 case whether the alien has satisfied the

22 conditions for removal.

23 And -- and so -- and -- and the Court

24 has held that Congress may vest that

25 determination in an executive officer and that

1 that is sufficient. And for habeas corpus
2 purposes, that sufficient determination
3 establishes the executive's power to detain the
4 individual.
5 JUSTICE BREYER: Suppose -- suppose
6 that Congress passed a law which said -- we'll
7 make it an alien who has been here for some
8 time, but perhaps illegally, walking down the
9 street and an officer picks him up and puts him
10 in prison.
11 And he would like to say to a court:
12 Judge, the officer was wrong on the law. He has
13 no such right. But we have a statute that says:
14 Judge, you can only review whether he did order
15 him put in prison. Would you say that's
16 consistent with the purpose of habeas, which,
17 after all, since I guess the 17th century, 16th
18 century, 15th century, maybe earlier, has said
19 the purpose of habeas is to review the
20 lawfulness of what the -- of what the officer
21 has done, not to just review whether he ordered
22 him put in jail. And that right became a right
23 of the people, not just the king.
24 The king wanted to see if his officers
25 were following the law. Now they may have a lot

1 of discretion and so forth, but, here, we have a
2 statute which says: Judge, you cannot determine
3 whether the officer has followed the law. All
4 you can determine is whether he issued an order
5 saying keep him in jail or send him wherever or
6 whatever.
7 I mean, the inconsistency with habeas
8 and the right of the people to bring it to see
9 if the kings or the presidents or whoever's
10 officers are following the law would seem fairly
11 seriously undermined, wouldn't it?
12 MR. KNEEDLER: Well, that is -- what
13 you're describing is quite different from what
14 we have here. Again, Respondent, like any --
15 almost any alien in expedited removal, does not
16 challenge the fact that he has no right to be in
17 the country.
18 What he -- what he seeks is review of
19 a -- of a screening determination that he is --
20 doesn't have a credible fear entitling him to or
21 enabling him to get relief, notwithstanding his
22 inadmissibility.
23 JUSTICE BREYER: Yeah, he's saying I
24 have a right to be here because I have a -- I
25 have a claim for asylum.

1 MR. KNEEDLER: But it's -- it's very
2 -- it's very different. And there -- and no one
3 has pointed to any -- anything at -- at -- at
4 common law or in the finality determination
5 cases of a situation where a person is
6 inadmissible, concededly, but wants to receive
7 relief from removal. And that's significant.
8 Asylum, for example, is the --
9 JUSTICE KAGAN: I guess I just don't
10 understand this, Mr. Kneedler, because, on
11 certain conditions, if he shows certain things,
12 he has a right to asylum. And what he's trying
13 to get is a hearing that adequately determines
14 whether he can show those things.
15 MR. KNEEDLER: Well --
16 JUSTICE KAGAN: So, you know, on
17 certain conditions, he has a right to release.
18 He has a right to live in this country. And
19 that's exactly what he's challenging --
20 MR. KNEEDLER: But --
21 JUSTICE KAGAN: -- is whether -- is --
22 is his getting a fair hearing to determine that
23 question.
24 MR. KNEEDLER: This is a very
25 different context where someone is saying not

1 that he has a right under domestic law to be in
2 this country but that he -- he doesn't want to
3 be sent back to another country because his --
4 of his fear of conditions there.
5 This is directly like the rule of
6 non-inquiry that has been applied for many, many
7 years in extradition, which is one of the
8 analogies that Respondent draws. A court may
9 not review the determination in the extradition
10 context of the executive's determination about
11 whether a person -- the treatment the person
12 might experience in another country.
13 JUSTICE KAGAN: But you don't contest,
14 do you -- I guess I'm just not really quite
15 understanding this argument, because you don't
16 contest that, under this statute, if he shows
17 certain things, he has a right to remain in this
18 country as a -- per the asylum statute.
19 MR. KNEEDLER: Well, again, asylum is
20 discretionary. He does not have a right under
21 -- under the asylum statute. And Congress, in
22 affording a right to go through this screening
23 process, was not required to attach to it
24 judicial review.
25 If -- if -- if Congress knew that was

1 coming, maybe it wouldn't have provided for
2 asylum at all. And for withholding and CAT
3 protection, as -- as was clear from the prior
4 argument, that does not afford a right to be in
5 this country. It is simply a withholding of
6 being sent to another country.
7 This Court's unanimous decision in
8 Munaf is very much on point in that respect.
9 The Court there held that it is not for a court
10 in habeas corpus, even involving a citizen, to
11 review the conditions of the place where the
12 person would be sent.
13 Here, we have an alien in expedited
14 removal who is assimilated to one at the border,
15 who has no right to be in the country to begin
16 with.
17 JUSTICE BREYER: He might. I mean,
18 there might be circumstances where, even on your
19 argument, the claim is a claim that this
20 particular judge, who is an immigration
21 official, this particular individual behaved
22 unlawfully, contrary to the Constitution.
23 He didn't even come into the room.
24 You've read their brief. He did it for
25 religious reasons. He's against us. He did it

1 because -- I mean, there are certain claims that
2 it's possible Congress cannot take away without,
3 let's say, a hearing, which they've had, and the
4 individual lost it.
5 I'm having a hard time, because I can
6 think of analogies distinguishing it from a case
7 that's like this. But what happened, he's
8 walking down the street and thrown into jail.
9 And -- and there, he claims, you know, do you
10 see the analogies?
11 MR. KNEEDLER: Well --
12 JUSTICE BREYER: Tell me why there are
13 no --
14 MR. KNEEDLER: -- actually, I don't
15 see the analogy because this is a very different
16 and limited and focused context where an alien
17 who -- who has entered illegally has no right to
18 be in the country and, nonetheless, is asking
19 for basically mercy under the statutes that
20 Congress has enacted.
21 JUSTICE BREYER: Maybe that's it.
22 MR. KNEEDLER: But under the -- under
23 the --
24 JUSTICE BREYER: I -- I don't know.
25 You'd have to at least, if he has a right to

1 mercy under the statute -- look --

2 MR. KNEEDLER: It's not -- it's not --

3 JUSTICE BREYER: -- there are all the

4 Chinese cases and so forth, you know, the

5 Chinese exclusion cases and so forth, which

6 analogizes it very much for habeas purposes in

7 terms -- being put into jail, I mean, for habeas

8 purposes. And so, if you accept all those

9 cases, then what?

10 MR. KNEEDLER: Even looking at it in

11 that way, what those courts repeatedly hold, all

12 the way back to the Court's decision in Ekiu

13 more than 100 years ago, is the fact-finding,

14 the -- the -- the -- whether the person as a

15 matter of fact comes within the scope of the

16 statute, may be committed entirely to an

17 executive officer.

18 And that is due process. And once the

19 executive officer acting within his jurisdiction

20 makes that determination, that establishes the

21 executive's ability to detain the person.

22 And that is particularly true, as I

23 say, where the question is not whether the

24 person is entitled to come into this country

25 because of domestic considerations but where the

1 claim is based on please don't send me back to
2 another country because of conditions in that
3 country.
4 And that is squarely, in addition, in
5 the realm of the rule of non-inquiry, where
6 Congress may, if it wants to, after a full
7 removal hearing, it has provided for review of
8 CAT claims and withholding claims.
9 But this is a -- this is a -- a system
10 deliberately designed by Congress to be a quick
11 screening so that the system does not get bogged
12 down in delay in which aliens would be here for
13 a long period of time and maybe get released
14 into the population because there's no
15 sufficient bed space.
16 What Congress did was tried to
17 accommodate the interest in affording a person
18 to at least make a claim of asylum and the need
19 for expedited removal by having the screening
20 system.
21 And what Respondent is seeking here is
22 basically a fact-laden review. No statutory
23 interpretation question is involved here. What
24 he wants is a fact-laden review of the
25 determination that he has not established a

1 credible fear.

2 Even in the context of whether an

3 alien is excludable, that was not reviewable

4 under the long line of this Court's decisions

5 during the finality era, but, in addition,

6 because of the nature of the -- of the screening

7 involved here concerning fears of conditions in

8 another country, a situation in which, again,

9 this Court unanimously in Munaf held was not

10 necessary -- did not have to be reviewed under

11 habeas corpus for a United States citizen to --

12 JUSTICE KAVANAUGH: Does -- does your

13 --

14 MR. KNEEDLER: -- examine the

15 condition --

16 JUSTICE KAVANAUGH: Sorry. Does your

17 constitutional principle change at some point

18 based on how long the non-citizen has been in

19 the country, even though unlawfully?

20 MR. KNEEDLER: Well, we think Congress

21 is entitled to make a judgment about -- about

22 how long the -- that period should be. And

23 Congress has established a two-year limitation.

24 And we think that that judgment is entitled to

25 great respect.

1 Significantly, though, what's at issue
2 here --
3 JUSTICE KAVANAUGH: Is there an outer
4 boundary to that, do you think?
5 MR. KNEEDLER: There -- there may well
6 be, but I -- but, again, this is an act of
7 Congress, and we think Congress's judgment along
8 those lines should be respected.
9 JUSTICE BREYER: I wasn't going to
10 bring it up, but I will. Why? Why? The normal
11 way, I think -- this is just my view -- but the
12 normal way that courts have dealt with the kind
13 of problem you're raising is you say something
14 like: There's tremendous discretion on the part
15 of the Executive Branch or sometimes it's a
16 political question. We won't even review it.
17 But Boumediene says that the detainee
18 has the right to go into court under habeas and
19 to make his claim.
20 Now the judge, which Boumediene didn't
21 really talk about, may have tremendous
22 discretion, may not, may say it's up to the
23 Executive Branch, may say all the things that
24 you said. I don't know.
25 But what you can't do, at least under

1 Boumediene, is to take away his right to go into
2 court and to make his claim to the judge.
3 What is your response?
4 MR. KNEEDLER: My response is Congress
5 did not take away habeas corpus. Congress
6 preserved habeas corpus. And as Boumediene
7 itself said, habeas is a flexible, adaptable
8 remedy.
9 And what Congress did here was tailor
10 it to the specific circumstances of expedited
11 removal. Again, and -- and even -- even in the
12 -- in -- under traditional habeas and
13 immigration contexts --
14 JUSTICE BREYER: I see.
15 MR. KNEEDLER: -- courts did not
16 review factual determinations. And, in
17 particular, they should not be required to
18 review -- Congress doesn't have to provide --
19 JUSTICE SOTOMAYOR: So is your -- so
20 is your position, so I understand it, let's
21 assume -- and I'm borrowing Justice Breyer's
22 assumption -- that there is an error of law,
23 either of law or of application of facts to law.
24 And I know you'll dispute that, mixed
25 questions, but assuming there's a mixed question

1 or there's an error of law, are you still saying
2 that habeas relief is unwarranted, cannot be
3 given? Because, as I understand this statute,
4 there are only three reasons that you can get
5 judicial review, and none of them have to do
6 with errors of law.
7 MR. KNEEDLER: Yes. We think Congress
8 is not required by the Suspension Clause to
9 provide for review of errors of law --
10 JUSTICE SOTOMAYOR: So how -- how do
11 you --
12 MR. KNEEDLER: -- in this -- in this
13 context.
14 JUSTICE SOTOMAYOR: All right. So how
15 do you deal with the finality -- the era cases?
16 You're absolutely right that they said that
17 fact-finding by the executive could be done by
18 the executive.
19 But all of them presume that there was
20 still a habeas right to challenge errors of law.
21 MR. KNEEDLER: Well, those cases don't
22 actually hold in our view that the Suspension
23 Clause required that. But putting it to one
24 side, they did not involve the situation here
25 where what a person is -- is seeking is review

1 not of a statutory right to come into the
2 country because of domestic -- satisfying
3 domestic requirements but review of a desire not
4 to be sent to another country because of
5 conditions here -- there.
6 And we think that --
7 JUSTICE SOTOMAYOR: I'm sorry. The
8 whole idea of freedom -- life, liberty, and
9 freedom, is -- and what the finality area -- era
10 cases showed, is that you have a right to remain
11 if you have a right to remain.
12 And so, if they have a right, a legal
13 right, a legal error has been committed with
14 respect to asylum, it doesn't matter whether
15 they're seeking release here or not to be turned
16 back somewhere else, your freedom has been
17 stopped. That's what all of these Chinese
18 exclusion cases were about, people at the shore,
19 people who were stopped at a border. The shore
20 is equivalent to a border, so I -- I -- I -- I'm
21 having trouble with your argument because you're
22 turning around what the idea of habeas is.
23 MR. KNEEDLER: No.
24 JUSTICE SOTOMAYOR: It's when the
25 government stops your liberty of remaining --

1 MR. KNEEDLER: Well --
2 JUSTICE SOTOMAYOR: -- if you have a
3 right to remain. You have a right not to go
4 someplace else.
5 MR. KNEEDLER: -- I -- I -- I don't --
6 I don't think the Court can look just at the
7 finality cases, although we think they answer
8 the question here because this is a fact-laden
9 review.
10 The Court also has to --
11 JUSTICE SOTOMAYOR: No, but you're
12 going further now.
13 MR. KNEEDLER: No, but the Court also
14 has to consider the rule of non-inquiry cases in
15 which the Court has repeatedly held, all the way
16 back to Neely, with a lineage as -- as old as
17 our immigration laws, that habeas review is not
18 available to review the conditions or what will
19 happen to the person when he goes to another
20 country --
21 JUSTICE SOTOMAYOR: That's not the
22 issue.
23 MR. KNEEDLER: -- even for questions
24 of law.
25 JUSTICE SOTOMAYOR: The -- the focus

1 is -- of habeas is not the issue of where you're
2 going to be released to. The issue is are you
3 going to be -- be released here.
4 MR. KNEEDLER: But -- but -- but if
5 someone --
6 JUSTICE SOTOMAYOR: So you're right.
7 MR. KNEEDLER: If someone is sought
8 for extradition purposes and they are in the
9 United States, and -- and they are claiming
10 don't send me to another country that has
11 requested my extradition, because of what the
12 procedures will be there, what treatment I will
13 be -- I will receive there, the rule of
14 non-inquiry has sustained the ability of -- of
15 Congress not to provide for judicial review.
16 And that was true in Munaf --
17 JUSTICE KAGAN: I guess I'm not --
18 MR. KNEEDLER: -- in this Court's
19 unanimous decision.
20 JUSTICE KAGAN: -- quite understanding
21 why that would be. If you look at the finality
22 era cases, these were people who had basically
23 no connection at all to the United States, some
24 who had not entered the country, not citizens,
25 not nothing.

1 And you're saying that they were
2 entitled to a kind of proceeding that this
3 person is not just because he has, you know,
4 sort of the -- the best kind of claim you can
5 make to stay in this country, which is that if
6 we turn you back, you'll be subject to torture
7 or persecution? Why should that person be
8 treated less well in terms of the kinds of
9 procedures he can invoke than the person in the
10 finality era cases which had no connection at
11 all and -- and -- and who had no fear of
12 persecution or torture?
13 MR. KNEEDLER: Again, in the finality
14 era -- era cases, the courts did not review the
15 fact-based determination about whether someone
16 came within the statute. And they specifically
17 did not include the situation where the -- where
18 the claim is about conditions in another
19 country. In -- in this Court's decision in
20 Munaf, it might have been claimed that the
21 Secretary of State was somehow misinterpreting
22 CAT when he decided that the -- that the person
23 should be -- or the Department of Defense,
24 whoever -- stayed in an extradition case might
25 be misunderstanding the interpretation of the

1 treaty.

2 JUSTICE KAGAN: But your --

3 MR. KNEEDLER: But the Court didn't

4 suggest --

5 JUSTICE KAGAN: -- your view, you

6 know, does not only speak to pure factual

7 matters. Your view applies to legal matters and

8 mixed questions as well.

9 MR. KNEEDLER: But there's no

10 statutory interpretation question here. But --

11 but just --

12 JUSTICE KAGAN: Well, there's a view

13 as to whether the hearing officer filed the --

14 followed the appropriate procedures.

15 MR. KNEEDLER: But that is a

16 fact-laden review that would require unpacking

17 what happened, would require the -- the -- the

18 -- the record --

19 JUSTICE KAGAN: Usually, we don't

20 think that, you know, did you follow the law as

21 to the procedural requirements that the law

22 states as a fact-laden review.

23 MR. KNEEDLER: But --

24 JUSTICE KAGAN: We think it's a pretty

25 common thing for courts to do.

1 MR. KNEEDLER: No --
2 JUSTICE KAGAN: It's like, did this
3 executive officer follow the procedures that he
4 was supposed to follow?
5 MR. KNEEDLER: No, the courts -- there
6 are no decisions in the finality era that are
7 pointed to that -- that provide for that kind of
8 review. But, again, in Munaf, in -- in --
9 JUSTICE KAGAN: But why should that
10 kind of review be so different? I mean, that's
11 a pretty basic question. Did the executive
12 officer follow the rules that he was supposed to
13 follow?
14 MR. KNEEDLER: If I could just step
15 back for a moment, the -- the -- the common law,
16 the finality era cases, all the sources that are
17 looked at, nothing affirmatively establishes a
18 right of judicial review of this sort of
19 screening determination that Congress decided
20 could be attached to the expedited removal
21 system. And Congress's judgment in those -- in
22 that situation should be entitled to great
23 respect --
24 CHIEF JUSTICE ROBERTS: Mister --
25 MR. KNEEDLER: -- especially against

1 the background of the rule of non-inquiry.

2 CHIEF JUSTICE ROBERTS: I -- I think

3 you've been trying to make a point about Munaf,

4 and I --

5 MR. KNEEDLER: Yes.

6 CHIEF JUSTICE ROBERTS: -- I wonder if

7 you could tell me what it is.

8 MR. KNEEDLER: Yes. No -- no, the --

9 the point is that there was no review in habeas

10 of the determination that the person should be

11 turned over to Iraqi authorities where the claim

12 was, if I'm turned over there, that person --

13 you know, I may -- I may -- may be mistreated.

14 CHIEF JUSTICE ROBERTS: Right. So

15 what is -- what is the analogy to this

16 situation?

17 MR. KNEEDLER: Same thing here, where

18 the person is saying: Don't -- don't -- I want

19 a court to determine whether -- to review an

20 executive determination as to whether I will be

21 tortured in another country.

22 And in Munaf, the Court didn't try to

23 separate whether the executive had decided a

24 question of law, a question of fact. It was

25 sufficient that the executive had made a

1 determination regarding conditions in another
2 country.
3 Here, there's even less review because
4 it's an initial preliminary screening to see
5 whether the person has even made a credible-fear
6 showing about conditions in another country.
7 And we think that that is squarely
8 within the realm of things that habeas corpus
9 does not have to be available to second-guess
10 the executive's determination.
11 Otherwise, you could have considerable
12 delay. There are 9,000 -- as we point out in
13 our brief, there are 9,000 negative
14 credible-fear determinations that have been made
15 in recent years, 100,000 credible --
16 credible-fear referrals.
17 If judicial review is added on top of
18 this, with close parsing of the limited
19 administrative record that this process provides
20 for, it would really bog down the system. And
21 we think Congress's judgment that that is not
22 constitutionally required is entitled to great
23 respect.
24 Otherwise, you will have protracted
25 proceedings. It could -- it could lead to

1 aliens being released into the country. That,
2 in turn, could create an incentive to come to
3 the country and -- and be released and undermine
4 the whole point of Congress enacting the
5 expedited removal system.
6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.
8 Mr. Gelernt.
9 ORAL ARGUMENT OF LEE GELERNT
10 ON BEHALF OF THE RESPONDENT
11 MR. GELERNT: Mr. Chief Justice, and
12 may it please the Court:
13 The statute here eliminates any
14 meaningful role for the courts, even to ensure
15 that the statutes and regulations were followed.
16 During the 60-year finality period, Congress
17 also tried to exclude the courts, leaving only
18 that review that was "required" by the
19 Constitution.
20 This Court, nonetheless, continued to
21 review legal claims in habeas. It did so while
22 expressly rejecting the government's argument
23 that deportation was not the type of restraint
24 that triggers habeas. It did so critically in
25 cases to review statutory and regulatory limits,

1 even where the Court expressly held that those
2 particular non-citizens lacked constitutional
3 procedural due process rights.
4 It did so where the non-citizen was
5 seeking initial entry, where the non-citizen was
6 in the country illegally, and, most critically
7 in response to what the government said, in
8 cases where the non-citizen was removable and
9 seeking only to challenge the denial of relief
10 from removal.
11 The finality era cases are consistent
12 with the common law and answer each of the
13 government's arguments. The government has
14 cited no common law support.
15 Moreover, the government's undefined
16 meaningful ties test is unworkable. It would
17 also mean that asylum seekers and potentially
18 millions of other unknowns, non-citizens, inside
19 the country could be summarily expelled without
20 any judicial review or without even any
21 administrative review.
22 The Suspension Clause is a check on
23 the political branches. This Court has never
24 before allowed the elimination of judicial
25 review over the legality of deportations. The

1 Court once again should preserve habeas review
2 as it did during the Chinese exclusion era, the
3 finality era, and throughout the country's
4 history.
5 The political branches undoubtedly
6 have enormous power in the immigration area, but
7 the one thing it cannot do, and this Court has
8 never allowed them to do, is remove a check on
9 themselves.
10 So I want to address what I -- what I
11 see as the government's fundamental point now.
12 Their opening brief made very broad arguments
13 about having no habeas at all. What they've
14 retreated to now is, well, you were found
15 inadmissible, you're in the country illegally,
16 and you're only challenging relief, and no
17 finality era addresses that. That's absolutely
18 wrong.
19 And let me just give the Court two
20 cases. One is Accardi, decided the year after
21 Heikkila v. Barber said the only review under
22 this regime is that which is required by the
23 Constitution.
24 Accardi came into court and said, yes,
25 I'm in the country illegally, but I'd like to

1 apply for a discretionary form of relief that
2 will allow me to stay in the country, suspension
3 of deportation. The Court reviewed it in
4 habeas, found a regulatory violation, and sent
5 the case back for a new hearing.
6 Let me give you one other that
7 involves refugees, Tod v. Waldman. They came to
8 this country seeking initial entry. The general
9 admissibility rule was you had to be literate.
10 The Jewish refugees in that case said: But I'm
11 -- we are refugees; therefore, we can stay,
12 notwithstanding being illiterate. The Court
13 found that that was true on the merits and sent
14 the case back for a new hearing.
15 The critical conceptual point and the
16 reason those cases are right -- and I think the
17 government will concede this when they get up on
18 reply -- is that the predicate for removing
19 someone is both you have to find that they are
20 removable and you have to find that the CFI
21 process was conducted legally and they were
22 legally denied the forms of relief to which they
23 were applying in the CFI process.
24 You may not remove a person until the
25 CFI process is concluded. The government

1 will -- I think, has never disputed and will
2 concede again that Mr. Thuraissigiam could not
3 be removed based just on the inadmissibility.
4 Congress has set up a system where you are
5 allowed to apply for asylum, withholding, and
6 Convention Against Torture relief.
7 And I would -- I would note,
8 importantly, that those latter two forms of
9 relief are mandatory --
10 JUSTICE ALITO: Well, what --
11 MR. GELERNT: -- not discretionary.
12 JUSTICE ALITO: -- what's unusual
13 about this situation is that your client really
14 doesn't want to be released. And the government
15 makes this point over and over in its brief.
16 The government could take him to the
17 airport, give him a ticket and say, you are
18 released, and he could leave. That's not what
19 he wants.
20 And the fundamental point of habeas is
21 to secure release from what's claimed to be
22 unlawful executive custody. So what is your
23 answer to that?
24 MR. GELERNT: Right. So our client
25 does ultimately want release, but what he has

1 asked for is a new hearing, which is consistent
2 with the way immigration works in criminal cases
3 in habeas, what this called -- Court called
4 conditional release, which is for the benefit of
5 the government.
6 He would be thrilled to just be
7 outright released and have the order vacated.
8 What he -- then he would be in this country, and
9 he would apply for asylum affirmatively.
10 JUSTICE ALITO: Well, he wants to be
11 -- he wants to be released in this country so
12 that he can remain in this country. He doesn't
13 simply want to be released. And, therefore, it
14 does seem like what he wants is review of his
15 entitlement to remain in this country, not
16 simply what habeas provides, which is release
17 from custody.
18 MR. GELERNT: Well, absolute, Your
19 Honor, he wants review of the removal order,
20 which entails custody. The custody will be
21 illegal if the removal order is. But let me --
22 let me offer three points about this.
23 The first is we think the government
24 is raising an issue that's already ultimately
25 been decided by this Court. Congress began

1 regulating immigration in 1875. Soon
2 thereafter, the government made the exact
3 argument that they're making now.
4 Well, this isn't really habeas. We're
5 just restraining you from coming in the country
6 or restraining you from leaving. And the Court
7 specifically could not have been more specific
8 in rejecting that argument. That's the
9 Nishimura Ekiu case in 1892. It was the Chin
10 Yow case a few years later. And even before
11 Ekiu was Jung Ah Lung. For the next 60 years in
12 finality, reviewed those cases.
13 And the other point I would make about
14 that is, if the government's right that habeas
15 doesn't even apply to deportation, then even
16 lawful permanent residents would not be entitled
17 to habeas --
18 JUSTICE KAVANAUGH: Well --
19 MR. GELERNT: -- because the restraint
20 point would be the same with respect to them.
21 JUSTICE ALITO: In the --
22 JUSTICE KAVANAUGH: -- that's not what
23 they're saying at all, though. They're --
24 they're making a very clear distinction between
25 inadmissibility and deportation in relying on

1 Landon versus Plasencia and many other cases, so
2 I think that's an overstatement of their
3 position.
4 MR. GELERNT: So you're absolutely
5 right, Justice Kavanaugh. And I -- I'm simply
6 responding to their independent argument, what
7 they called an independent argument in the
8 opening brief and trying to respond to Justice
9 Alito's question that this isn't classic habeas.
10 They do try and get out from under
11 that by then going to a meaningful ties test and
12 using Plasencia, so you're absolutely right.
13 But, with respect to Justice Alito's
14 question, those cases specifically answer it,
15 the exact same arguments were made. Ekiu could
16 not have been more clear. We know that we're
17 simply -- you're simply asking to remain in the
18 country and they said that is nonetheless proper
19 for habeas.
20 CHIEF JUSTICE ROBERTS: But there's
21 the -- just following up on Justice Alito's
22 point and the government's reliance on it, Munaf
23 does say that there they were not seeking simply
24 release. They wanted humanitarian protection to
25 get out of -- out of the country. Release was

1 the last thing they wanted.

2 And -- and to -- this case is arguably

3 the same, since, again, the release could be

4 provided under their normal practice to these

5 individuals by taking them out of the country to

6 another country. They don't want that to

7 happen. They want to be released into the --

8 into the population. And Munaf made, I think,

9 pretty clear that that type of humanitarian

10 release was not the purpose of -- of habeas.

11 MR. GELERNT: Well, Your Honor, a few

12 -- a few points on that. I think Munaf was

13 different because they didn't want to be

14 released where this were arrested, which was

15 Iraq. They came to Iraq. They didn't want to

16 be released there.

17 What they wanted, I think as the

18 opinion makes clear, is affirmative help from

19 the United States to fly them back to the United

20 States. Our client simply wants release where

21 he was arrested.

22 Now the government says: Well, we can

23 release him in Sri Lanka, but, of course, that

24 would be denying him relief on the merits.

25 That's exactly what he fears.

1 And so I think what the government is
2 sort of implying is: Well, you can get out of
3 this, just simply give up. I mean, if that were
4 true, contempt cases wouldn't fall under habeas.
5 CHIEF JUSTICE ROBERTS: I -- I think
6 that the analogy that they press depends upon
7 the fact that it's conceded that the individual
8 does not have a right to be in the United
9 States.
10 MR. GELERNT: Right. And so no
11 immigrant -- and I want to be clear about
12 this -- has an absolute, substantive right to be
13 in the United States. And that's not what
14 habeas does.
15 The value of the Suspension Clause as
16 the framers saw it was not to create rights but
17 to ensure that the grave power of restraint is
18 never used except in accordance with law. So,
19 if Congress were to limit, further limit
20 statutory rights, maybe even take the momentous
21 step of withdrawing from our refugee treaties,
22 then they would be reducing -- but habeas would
23 still lie to make sure that you are not
24 restrained, except in accordance with positive
25 law. That's the value for the framers.

1 So the government's discussion about
2 he has no absolute right to be here is sort of
3 beside the point for habeas. Habeas was not
4 designed to create substantive rights. It was
5 to ensure that the law was followed.
6 And so I want to turn to what the
7 government --
8 JUSTICE KAVANAUGH: But -- but on the
9 -- on the question of history, you make a point.
10 But on the question of precedent in Landon
11 versus Plasencia, and I just want to get your
12 reaction to this, you know what sentence it is,
13 Justice O'Connor writing for eight justices
14 says: "The Court has long held that an alien
15 seeking initial admission to the United States
16 requests a privilege and has no constitutional
17 rights regarding his application."
18 So that's a statement of law for eight
19 justices. Why is that statement wrong or, if
20 it's not wrong, why doesn't it control here?
21 MR. GELERNT: Well, I think what the
22 Court was saying there, as we understand it, was
23 specific to due process. The entire case was
24 about due process. There was no question of
25 judicial review or habeas.

1 And I think what the Court was doing
2 was distinguishing between different people at a
3 port who had procedural due process rights.
4 That was the context of the sentence. I think
5 it would be --
6 JUSTICE KAVANAUGH: For context, the
7 sentence says no constitutional rights.
8 MR. GELERNT: Right. But I think it
9 would be a lot in a case that didn't involve
10 judicial review to take one sentence and say
11 we're wiping away all the finality era cases.
12 We're not discussing them.
13 The difference between due process and
14 habeas is stark. As Justice Sotomayor pointed
15 out, the Suspension Clause predated due process.
16 Due process and habeas have never been hinged in
17 this Court's cases.
18 So you take Mizai and Knauff, which
19 established no procedural due process for people
20 at the ports. They expressly held that they
21 didn't have procedural due process, but then
22 they went on in habeas to review the statutory
23 and regulatory claims.
24 They had very few statutory and
25 regulatory claims on the merits, but the courts

1 still reviewed them to make sure that the
2 positive law was being followed.
3 JUSTICE ALITO: But wasn't it true in
4 the -- in the finality era cases that the
5 individuals, once it was determined that they
6 had not been properly detained, they did have a
7 right to be in the United States, because in
8 those -- in that era -- for most of that era, or
9 much of that era, there were not very many
10 restrictions on immigration to the United
11 States. And that's the difference between that
12 case and this case.
13 MR. GELERNT: Well, I don't think so,
14 Your Honor, I think for -- for two reasons. One
15 is the -- the inadmissibility of relief point,
16 as I said before, there were finality era cases.
17 That's the Accardi case, suspension of
18 deportation, even though they were concededly
19 removal. That's Tod v. Waldman, even though the
20 refugees were -- were illiterate and therefore
21 were inadmissible. They were excused from that.
22 But the other point is that the Court
23 throughout the finality era always reviewed
24 whether they fell within the statute or not.
25 That's the Gegiow case, Ekiu. All of those

1 finality era cases were looking at whether they
2 fell within the statute.
3 There were restrictions. I mean,
4 obviously, there weren't as many as now, but
5 there absolutely were restrictions on all the
6 cases we cite on pages 13 through 15 of our
7 brief, are all cases where the Court is looking
8 at did they fall within the statute or the
9 regulations.
10 JUSTICE ALITO: In any of those cases
11 -- and it's -- it's -- did the court say
12 anything more than -- when relief was granted,
13 did they -- was the relief anything other than
14 you are released?
15 MR. GELERNT: Well, absolutely. And
16 so the relief --
17 JUSTICE ALITO: Other than Accardi and
18 the other case you cited.
19 MR. GELERNT: Right.
20 JUSTICE ALITO: Which are -- which are
21 in a -- perhaps in a category of their own. But
22 in -- for most of those finality era cases,
23 wasn't the relief just you are released?
24 MR. GELERNT: No, Your Honor, those
25 cases established the principle in immigration

1 that the government would get the benefit of a
2 new hearing, that they didn't simply have to
3 release the person and let them go, that there
4 would be a new hearing where there was a legal
5 defect the government could potentially fix.
6 So that's in addition to the cases --
7 JUSTICE ALITO: Yeah. Okay. But at
8 the end of that --
9 MR. GELERNT: -- Muler, Johnson.
10 JUSTICE ALITO: -- at the end of that,
11 the relief -- is there any indication at the end
12 of the whole process, what the person would get,
13 what the alien would get, is anything other than
14 release, which is what habeas provides?
15 MR. GELERNT: Well, that's what --
16 that's what would happen here, Your Honor. So
17 we would -- if we had a new hearing and passed,
18 we would be able to apply in a full hearing for
19 asylum or withholding. And if we won, he would
20 be allowed to remain in the country.
21 The reason we're not asking for full
22 release is not because for -- it's for our
23 benefit. It's for the government's benefit.
24 What this Court said in Boumediene is the Court
25 doesn't have to, in habeas, permit -- permit

1 full release. It can give the government
2 another chance.
3 So the cases are legion in -- on our
4 brief of where they sent it back for a new
5 hearing. Maybe the person failed and then was
6 deported. Maybe they passed and were allowed to
7 stay. But it would be a new hearing.
8 JUSTICE BREYER: Doesn't --
9 JUSTICE SOTOMAYOR: Counsel --
10 JUSTICE BREYER: Just on -- on that
11 particular thing, it seemed to me in the
12 discussion, not so much from the brief, that the
13 government, taking the Chinese cases and so
14 forth, was saying, but of course he can seek a
15 writ of habeas corpus. Of course, he can.
16 Now we're before the judge on the
17 writ. What's your argument, the judge says.
18 And then I think their point is that he can't
19 argue that there was a factual mistake below.
20 Now, if you read the statute, it says
21 he can't argue anything.
22 MR. GELERNT: Right.
23 JUSTICE BREYER: It says all he can
24 say is, was there or was there not a notice. So
25 that can't be right, I don't think, but as

1 applied to your case, maybe there is some kind
2 of -- of limitation on the extent to which the
3 judge can look at the factual findings, et
4 cetera. That's quite different from saying none
5 at all.
6 All right. If we take that view,
7 should we then send it back to the Ninth Circuit
8 -- or was it the Ninth? Yeah. Okay. Send it
9 back to whatever circuit, in order for them to
10 determine whether, under this statute, how it
11 applies, does it mean since nobody can make any
12 argument, no matter how outlandishly the service
13 acted, let them work out in the first instance
14 whether there's room for limitations on what
15 kinds of arguments you can make. How much
16 discretion.
17 MR. GELERNT: Right.
18 JUSTICE BREYER: What -- what would --
19 what do you think of that?
20 MR. GELERNT: Yeah. So -- so I think
21 you -- I want to answer it all the different --
22 JUSTICE BREYER: Yeah.
23 MR. GELERNT: -- things packed into
24 your question. I think a remand to flesh out
25 our particular claims would not be

1 inappropriate, since the court of appeals and
2 district court didn't unpack our particular
3 claims.
4 But I want to address two -- two other
5 points that you made. One is in the Martinez
6 brief, which was -- Martinez was the companion
7 case to Heikkila v. Barber, and I would just
8 refer the Court to the -- to the SG's brief in
9 that case -- the government was very clear that
10 the Suspension Clause requires some review, that
11 the finality era statutes limited review to the
12 constitutional requirement. The government
13 says, well, we conceded only statutory claims.
14 That's even more than I understand them to be
15 conceding now. But they also lopped off part of
16 the quote, which was "anything contrary to law."
17 That's on page 20 of their brief.
18 The point about the facts, I think, is
19 a critical one, because Mr. Kneedler kept saying
20 "fact-laden." So I think that's conspicuous in
21 that he's not saying historical facts. He knows
22 we're not challenging the historical facts. We
23 don't claim a right to challenge the historical
24 facts.
25 Our position is twofold. One is that,

1 during the finality or contrary to what the
2 government said respectfully, the courts
3 routinely reviewed mixed questions. That's the
4 Rowoldt case, where the Court said: Look, you
5 have to be meaningfully associated with the
6 Communist Party, and then went on to look
7 extensively at the facts. What did he do with
8 the Communist book store? What was the purpose?
9 Those are the cases on page 50 of our brief,
10 mixed questions.
11 But the -- the more fundamental point
12 I want to make is we are okay if the Court wants
13 to reserve whether all application of law to
14 fact is reviewable. Our -- our point here is
15 that there has to be review at least for gross
16 misapplications of the statute because at that
17 point where no one reasonably could conclude
18 that on these historical facts, you didn't meet
19 the statutory standard, at that point what
20 you're seeing is really a misunderstanding of
21 the legal standard.
22 JUSTICE GINSBURG: What are the
23 concrete issues that could be raised on habeas
24 in this case?
25 MR. GELERNT: So, Your Honor, our two

1 principal claims are statutory and regulatory.
2 And let me -- let me deal with the statutory
3 claim.
4 What we're saying is, on these
5 historical facts, no asylum officer could
6 reasonably have concluded that he did not meet
7 the low significant possibility standard, the
8 very low standard, which is a significant
9 possibility of ultimately satisfying the asylum
10 standard, which in itself is just a one-in-ten
11 chance.
12 And I'm going into the merits now, but
13 the reason we say that we are okay with a
14 standard that says egregious error, clear error,
15 no reasonable adjudicator, because at that point
16 you are reaching a legal error, is because the
17 asylum officer by statute is required to look at
18 the reports on country conditions.
19 Every report, as the amicus briefs
20 from asylum experts and Sri Lanka experts point
21 out, there is an exact M.O. on how Tamil people
22 are persecuted in Sri Lanka. They -- men arrive
23 in a white van. They abduct the person. They
24 blindfold the person. They beat and torture
25 him. The asylum officer in our case accepted

1 every one of those historical facts, but yet
2 still said he didn't even meet the low
3 significant possibility standard. That's
4 impossible.
5 So if this Court were to send it back
6 and say, at least where there's a legal error,
7 which means the misapplication was so egregious
8 that there had to be a misunderstanding of the
9 legal standard, that would satisfy us. We would
10 prevail. We do believe that the historical
11 cases show application of law to fact was
12 routinely reviewed, always even where they were
13 fact-laden, but that is not necessary in our
14 case.
15 JUSTICE ALITO: But the -- see, what
16 you've just said illustrates how far-reaching
17 the argument that you are making is, because, as
18 I understand it, there was nothing in the
19 administrative record -- now maybe your client
20 didn't understand what was going on, but all he
21 said was that people drove up and they beat me.
22 And that's it.
23 And he -- the officer said: Are you a
24 member of a political party? And he said no.
25 So that -- you're saying that, on those facts,

1 knowing nothing more than the fact that he was
2 beaten up in Sri Lanka and he's a Tamil, that
3 that's enough to provide that -- that provides a
4 sufficient basis for asylum?
5 MR. GELERNT: Right. Well, so -- so
6 two -- two things, Justice Alito. One is that,
7 of course, the merits are not up here, and if we
8 lose, we lose. But I do want to point out that
9 there were far more facts that showed he
10 precisely fit the pattern.
11 And I would also say, just to put a
12 pin in it, that the amicus briefs show why
13 people from Sri Lanka or other countries would
14 not either understand what was being asked or
15 want to reveal that it was the government.
16 But it was much more specific than
17 that. It was men in a van. That's -- that's
18 what's always used. It's called the white van
19 phenomena. He repeatedly said he thought he was
20 arrested. He was blindfolded. That's part of
21 the M.O.
22 So it was the exact pattern. That's
23 why we think we could prevail. But, ultimately,
24 this Court just needs to decide is there habeas
25 review and at least for legal errors where the

1 egregious -- the application was so egregious
2 that there had to be a misunderstanding of this
3 thing.
4 I want to focus also on --
5 JUSTICE SOTOMAYOR: Can I -- can I
6 just --
7 MR. GELERNT: Yes.
8 JUSTICE SOTOMAYOR: -- I want to
9 understand the limits of your theory. I thought
10 the court below said there had to be habeas
11 relief for review of facts and law. Are you
12 disavowing the broadness of my understanding of
13 what the -- the court below said?
14 MR. GELERNT: I would just put it as I
15 read the court of appeals' decision differently.
16 JUSTICE SOTOMAYOR: Okay.
17 MR. GELERNT: And that there was not
18 review of historical facts. And we are not
19 pressing that. Nor the exercise of discretion.
20 We believe mixed questions, legal claims and
21 constitutional claims, but, again, even if this
22 Court wants to narrow it to only egregious --
23 egregious application, because I'm still --
24 JUSTICE SOTOMAYOR: Why are you using
25 the word "egregious"? Where -- that almost

1 seems like whole cloth. It's either mixed or
2 not.
3 MR. GELERNT: Well, Your Honor, I
4 think if you wanted to say for this -- purposes
5 of this case only legal claims and reserve
6 whether mixed questions. I'm simply saying that
7 when it becomes so egregious, when no
8 adjudicator could reasonably have concluded on
9 these facts that it met the standard, I think at
10 that point, it would be a legal error because it
11 would be a misunderstanding, because I think
12 what this Court has pointed out in the past is
13 you can't just have the adjudicator put
14 boilerplate language for the standard, because
15 then you really don't know. I mean, someone
16 who's writing an opinion over and over about the
17 same things will get the standard -- at least
18 boilerplate, get it right.
19 Here, it's even worse because these
20 are preprinted forms with the standard. So
21 you'll really never actually know if the asylum
22 officer is understanding what these statutory
23 terms mean, except through the application.
24 And at some point, where the
25 application is so -- either no reasonable

1 adjudicator, clear error, egregious, I think
2 that does rise to a legal error.
3 I -- I want to also make a point about
4 --
5 JUSTICE GINSBURG: May I just ask you,
6 if you're not trying to get any mileage out of
7 the fact that the alien was on U.S. soil, he
8 didn't have any documentation, he
9 surreptitiously got here, you're not
10 distinguishing him because he managed to get to
11 U.S. soil from somebody who never got here, who
12 was never in the United States in the first
13 place?
14 MR. GELERNT: We -- we are
15 distinguishing them, Your Honor.
16 JUSTICE GINSBURG: You are?
17 MR. GELERNT: We -- we believe someone
18 outside the country, unless for some reason U.S.
19 forces were overseas restraining him, and that
20 would be a different situation. That's not the
21 typical deportation.
22 I think if they were outside the
23 country, they wouldn't be restrained because
24 they would have -- and there might also be
25 extraterritoriality issues.

1 We're simply saying where the person
2 is on U.S. soil and the body controls. And so
3 --
4 JUSTICE GINSBURG: And does that --
5 that cover the person who comes to the port of
6 entry and is stopped there?
7 MR. GELERNT: Yes, Your Honor. And so
8 I -- I may have misunderstood.
9 CHIEF JUSTICE ROBERTS: Yes what?
10 Your concession or -- or not?
11 MR. GELERNT: I'm sorry, Your Honor?
12 CHIEF JUSTICE ROBERTS: I didn't
13 understand your "yes." Is it that the person at
14 the port of entry is covered or not covered by
15 the --
16 MR. GELERNT: They are covered by
17 habeas. And the reason is because the ports of
18 entry are typically on U.S. soil. An airport or
19 even a land port will generally be 100 feet or
20 so into U.S. soil.
21 JUSTICE KAGAN: Do you think there's a
22 way of distinguishing that case from yours?
23 MR. GELERNT: I think historically the
24 Court has not for habeas. I think the Court
25 could reserve questions about people at ports

1 because our person entered the country.
2 Historically the Court has said habeas
3 applies when you're in U.S. soil. At ports,
4 it's a different procedure, for a procedure of
5 due process, because that's more
6 context-specific, and the Court has drawn a line
7 for due process purposes, at least, between
8 people who have entered and people at the port.
9 I think Your Honor could reserve that question
10 on habeas for this case because our person did
11 enter --
12 CHIEF JUSTICE ROBERTS: But -- but --
13 MR. GELERNT: -- the country and it
14 wasn't at a port.
15 CHIEF JUSTICE ROBERTS: -- that's a
16 significant expansion, it seems to me, from
17 someone who is here, and anybody can get to a
18 port of entry, right?
19 MR. GELERNT: Well, Your Honor, so --
20 so that goes to I think the burden. I mean,
21 there are 9,000 cases in the universe that could
22 have been in habeas. The government points out,
23 in their -- in their reply, they go to 100,000.
24 Well, those are people who -- who didn't need
25 habeas because they passed.

1 So we're talking about 9,000 -- 9,000
2 people.
3 CHIEF JUSTICE ROBERTS: That includes
4 the people at -- at a port of entry?
5 MR. GELERNT: Yes, it does, Your
6 Honor. And so what I would -- give the Court a
7 couple of statistics about that. Since the
8 Ninth Circuit issued its ruling, and that's
9 basically a year ago now, there have been as our
10 count 9500 people who failed their CFI and who
11 could have filed a habeas under our rule. Only
12 30 have. One-third of one percent, three out of
13 every thousand.
14 The reasons are practical. People are
15 removed so quickly. They're at the border.
16 They can't find lawyers. Even in regular
17 immigration proceedings, pro se from an
18 immigration judge to the Board of Immigration
19 Appeals is only 3 percent. It's much harder at
20 the border.
21 The other thing that will happen is
22 the district courts will lay down some
23 standards. Whatever non-profits are filing
24 habeas will know we can't challenge historical
25 facts. We can't challenge credibility. Your --

1 your claim is frivolous. We're not going to
2 file it.
3 And you get no mileage out of filing
4 because there's no automatic stay of removal.
5 So just by filing doesn't mean you will get to
6 stay --
7 JUSTICE KAVANAUGH: Can I --
8 MR. GELERNT: -- in the country.
9 JUSTICE KAVANAUGH: -- pick up on the
10 Chief Justice's question? You are saying a
11 non-citizen who arrives at a port of entry, has
12 never been in the United States, not lawfully
13 admitted to the United States, nonetheless has a
14 right under the U.S. Constitution to judicial
15 review of the executive's decision to say
16 they're not admissible?
17 MR. GELERNT: Right, so let me -- let
18 me make two points.
19 JUSTICE KAVANAUGH: Is that correct?
20 MR. GELERNT: Yeah, I think it's --
21 yes, Your Honor, sorry, the answer is yes. The
22 reason is from the finality era cases, that's
23 the very first finality era case. And, in fact,
24 most of the cases, someone at a port of entry,
25 that's Nishimurh/Ekiu, comes by boat, gets here,

1 wants to be admitted. The Court says no review
2 of facts, which is the part of the opinion that
3 the government was quoting, doesn't quote the
4 second part, which is undoubtedly there has to
5 be habeas for -- for the review of the legality.
6 The point I want to point out -- so
7 the reason I'm using the 9,000 number and the
8 reason the government is using that is because
9 those are the asylum numbers. People who come
10 here as a tourist reach a port and say I'd like
11 to go to Disneyland, they're not going to sit in
12 detention and file a habeas if someone says, no,
13 you're a tourist visa. That's what -- judicial
14 review has been available forever at a port, but
15 you don't see mountains of habeas cases.
16 CHIEF JUSTICE ROBERTS: Well, I don't
17 think this concerns --
18 MR. GELERNT: There's just no ground
19 --
20 CHIEF JUSTICE ROBERTS: I don't think
21 the concern is people who come here to go to
22 Disneyland.
23 MR. GELERNT: Well, I think the people
24 who come here and don't have asylum claims or
25 those type of claims that are clearly

1 inadmissible are not going to file habeas
2 petitions. No one's going to file them because
3 there's not going to be a ground to stay here.
4 That's the reason in asylum cases
5 people file them but it's -- it's, again, as a
6 practical matter, it's not very many, 30 out of
7 9500, since the Ninth Circuit. That's the
8 country-wide, 30 out of 9500.
9 The other point I want to make about
10 the burden is the district courts will be able
11 to dispose of these very quickly. They don't
12 have to review credibility determinations.
13 They're not reviewing historical facts.
14 The administrative record is puny. In
15 -- in the printed booklets here, it's 28 pages.
16 It's about a seven-minute read. The only other
17 thing they would look at, which is subsumed
18 within the record, is the few pages of country
19 reports on Sri Lanka which would have told them
20 is someone is abducted in a van and
21 blind-folded, that is almost certainly by the
22 government forces seeking a persecute Tamil's on
23 -- on political grounds.
24 JUSTICE KAVANAUGH: You're -- you're
25 reviewing mixed questions, though, correct?

1 MR. GELERNT: But only as part of the
2 record, which, again, is very, very small.
3 JUSTICE KAVANAUGH: That's very --
4 that's very difficult in many cases, though. I
5 don't know that that's going to be that easy.
6 MR. GELERNT: Well, I think certainly
7 there's going to be deference, but I think, Your
8 Honor, even to decide our case, we are -- we are
9 okay with you saying not every mixed question
10 where we have a difference of judgment needs to
11 be reversed.
12 But at least where it's so egregious
13 that you can't possibly have under -- understood
14 the standard, we believe we go back to district
15 court and the district court looks at the few
16 pages from the U.S. State Department reports on
17 Sri Lanka, there is no way that the -- the
18 district court could say, well, the asylum
19 officer clearly understood what was going on.
20 Maybe the asylum officer didn't think
21 he could use circumstantial evidence and,
22 therefore, made dispositive our client not
23 telling him who persecuted him. If that's true,
24 that's a pure error of law.
25 But either way at some point the

1 egregious standard, because I don't think the
2 government gave you a clear answer on even --
3 and this goes back to Justice Breyer's question
4 to me, on exactly what's reviewable.
5 The government is talking about
6 fact-laden questions, but what if they just
7 didn't give you a hearing at all? What if they
8 didn't give you a translator? What if they said
9 we're not going to give you asylum because of
10 your religion, your race?
11 The government is taking the position
12 that even those errors are not reviewable. That
13 cannot possibly be. The suspension clause --
14 sorry.
15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.
17 MR. GELERNT: Thank you, Your Honor.
18 CHIEF JUSTICE ROBERTS: Five minutes,
19 Mr. Kneedler.
20 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER
21 ON BEHALF OF THE PETITIONERS
22 MR. KNEEDLER: Yes, several points.
23 First of all, by our count, since the Ninth
24 Circuit's decision, there have been 100 habeas
25 cases filed, and the -- the potential for a

1 flood would be, of course, far greater if this
2 Court holds that there is a right to file a
3 habeas seeking review of a negative credible
4 fear determination.
5 This Court's decision in St. Cyr
6 referred to review of pure questions of law and
7 constitutional claims, in other words, statutory
8 interpretation. And the finality era cases
9 really fit into that mold even -- even where
10 they do apply.
11 There is no suggestion that when the
12 court said that Congress could vest the
13 determination of -- of inadmissibility, much
14 less a -- not passing a credible fear of
15 screening for somebody who is inadmissible, but
16 even -- even for determining excludability,
17 Congress didn't -- or the Court didn't suggest
18 there was an exception for something that might
19 be characterized as an egregious misapplication
20 or -- or review of the facts.
21 JUSTICE SOTOMAYOR: We're still going
22 to my basic question to you earlier. Putting
23 aside his claim, let's talk about a pure legal
24 claim, they didn't hold any interview with me at
25 all.

1 MR. KNEEDLER: I'm sorry? I -- I --
2 JUSTICE SOTOMAYOR: They didn't hold
3 an interview with me at all.
4 MR. KNEEDLER: The --
5 JUSTICE SOTOMAYOR: Is there habeas
6 relief in that case? A pure matter of law. The
7 statute requires --
8 MR. KNEEDLER: Well, it's not a pure
9 matter of law. The question of whether there
10 was a hearing is -- there is a factual element
11 to that. But there -- this system at the
12 administrative level builds in protections for
13 that.
14 There's supervisory review.
15 JUSTICE SOTOMAYOR: Counsel --
16 MR. KNEEDLER: There's forms for
17 notice.
18 JUSTICE SOTOMAYOR: -- you're
19 nitpicking. Get to the point.
20 MR. KNEEDLER: No, I don't think --
21 JUSTICE SOTOMAYOR: Which is a pure --
22 MR. KNEEDLER: -- I don't think --
23 JUSTICE SOTOMAYOR: -- question of
24 law.
25 MR. KNEEDLER: I -- I don't think

1 there --

2 JUSTICE SOTOMAYOR: Would there --

3 MR. KNEEDLER: No.

4 JUSTICE SOTOMAYOR: -- be habeas

5 relief?

6 MR. KNEEDLER: I -- I think the answer

7 is no. And one could say the same thing with

8 respect to the finality --

9 JUSTICE SOTOMAYOR: So why --

10 MR. KNEEDLER: -- era cases.

11 JUSTICE SOTOMAYOR: -- bother doing

12 anything? What -- what good is the statutes?

13 What good are the --

14 MR. KNEEDLER: Congress determined

15 that -- that habeas should be limited in -- in

16 -- in this context, again, for credible --

17 specifically with respect to credible fear

18 determinations.

19 There is no common law precedent for

20 this. There is no finality era precedent for

21 this. And in that context, Congress's judgment

22 should count for something.

23 Now, I also want to point out that as

24 I understand Respondent's claim --

25 JUSTICE SOTOMAYOR: Shouldn't the

1 Court count for something? Hasn't it --
2 MR. KNEEDLER: This Court has never --
3 has never --
4 JUSTICE SOTOMAYOR: Under the --
5 MR. KNEEDLER: -- has never --
6 JUSTICE SOTOMAYOR: Under the habeas?
7 MR. KNEEDLER: This Court has never
8 said that. And, again, Munaf --
9 CHIEF JUSTICE ROBERTS: I'm sorry.
10 Could you answer, Mr. Kneedler?
11 JUSTICE SOTOMAYOR: Mr. Kneedler, let
12 me finish my question.
13 MR. KNEEDLER: Yes, sorry.
14 JUSTICE SOTOMAYOR: We have the great
15 writ. It was there to ensure that the executive
16 acts according to law. What's left if you tell
17 me that there are laws but there's no judicial
18 review of whether those laws are being followed
19 or not? That's my question.
20 MR. KNEEDLER: And -- and -- and --
21 and my answer is Munaf. And the 100-year-old
22 precedent that Munaf stood more, where a
23 determination about whether somebody should
24 return to another country because of conditions
25 there is simply --

1 JUSTICE SOTOMAYOR: It's not
2 returning. He was there. The question was a
3 legal one, which was whether or not he should be
4 turned over by the American forces or not.
5 The court said even if he should have
6 been, we're not going to step in in this
7 situation.
8 MR. KNEEDLER: But the -- but the
9 court drew on the rule of non-inquiry, which
10 applies in the extradition context, which is
11 about sending someone out from the United States
12 to another country.
13 I want to make another point. When
14 Respondent talks about review for egregious
15 errors, I think he's talking about bringing in
16 stuff that is outside the administrative record
17 and trying to demonstrate to the Court that if
18 only the review -- the asylum officer or the IJ
19 had looked at this, it would have reached a
20 different conclusion.
21 That is -- that goes far beyond even
22 traditional administrative review, but the
23 administrative proceedings in this case, for
24 example, the asylum officer's record are just
25 notes. They're not a verbatim transcript. They

1 are there to assist the immigration judge in
2 this self-contained internal review of whether
3 someone has made even the showing necessary for
4 a threshold credible fear screening.
5 They are not designed for judicial
6 review. And the suggestion that there would be
7 judicial review in habeas corpus unprecedented
8 under this Court's decisions or the common law
9 would -- would require effectively to change the
10 administrative system as well, but Congress
11 determined that the -- that the three-tiered
12 screening that it provided and limited judicial
13 review is necessary, is essential to get control
14 of the nation's borders.
15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.
17 (Whereupon, at 12:08 p.m., the case
18 was submitted.)
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