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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-161, the Department of Homeland Security versus Thuraissigiam.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

Congress established the expedited removal system in 1996 for aliens who arrive at our borders or enter illegally and have no entry documents. Such aliens are clearly inadmissible and have no right to be in this country.

Congress reasonably concluded that a full-blown removal hearing was not necessary to make that determination. Congress was also concerned, however, for -- about the possibility for delay and abuse of the asylum system if every time such a clearly inadmissible alien sought asylum. What it did then was to provide for a three-tiered administrative screening system to first determine whether the alien had 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 king's or the president's 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 -- a  
25 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, for -- again,  
20 asylum is discretionary. He does not have a  
21 right under -- under the asylum statute. And  
22 Congress, in affording a right to go through  
23 this screening process, was not required to  
24 attach to it 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 try 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 fact -- application of facts  
24 to law.

25 And I know you'll dispute that, mixed

1 questions, but assuming there's a mixed question  
2 or there's an error of law, are you still saying  
3 that habeas relief is unwarranted, cannot be  
4 given? Because, as I understand this statute,  
5 there are only three reasons that you can get  
6 judicial review, and none of them have to do  
7 with errors of law.

8 MR. KNEEDLER: Yes. We think Congress  
9 is not required by the Suspension Clause to  
10 provide for review of errors of law --

11 JUSTICE SOTOMAYOR: So how -- how do  
12 you --

13 MR. KNEEDLER: -- in this -- in this  
14 context.

15 JUSTICE SOTOMAYOR: All right. So how  
16 do you deal with the finality -- the era cases?  
17 You're absolutely right that they said that  
18 fact-finding by the executive could be done by  
19 the executive. But all of them presume that  
20 there was still a habeas right to challenge  
21 errors of law.

22 MR. KNEEDLER: Well, those cases don't  
23 actually hold in our view that the Suspension  
24 Clause required that. But putting it to one  
25 side, they did not involve the situation here

1 where what a person is -- is seeking is review  
2 not of a statutory right to come into the  
3 country because of domestic -- satisfying  
4 domestic requirements but review of a desire not  
5 to be sent to another country because of  
6 conditions here -- there.

7 And we think that --

8 JUSTICE SOTOMAYOR: I'm sorry. The  
9 whole idea of freedom -- life, liberty, and  
10 freedom, is -- and what the finality area -- era  
11 cases showed, is that you have a right to remain  
12 if you have a right to remain.

13 And so, if they have a right, a legal  
14 right, a legal error's been committed with  
15 respect to asylum, it doesn't matter whether  
16 they're seeking release here or not to be turned  
17 back somewhere else, your freedom has been  
18 stopped. That's what all of these Chinese  
19 exclusion cases were about, people at the shore,  
20 people who were stopped at a border. The shore  
21 is equivalent to a border, so I -- I -- I -- I'm  
22 having trouble with your argument because you're  
23 turning around what the idea of habeas is.

24 MR. KNEEDLER: No.

25 JUSTICE SOTOMAYOR: It's when the

1 government stops your liberty of remaining --

2 MR. KNEEDLER: Well --

3 JUSTICE SOTOMAYOR: -- if you have a  
4 right to remain. You have a right not to go  
5 someplace else.

6 MR. KNEEDLER: -- I -- I -- I don't  
7 think the Court can look just at the finality  
8 cases, although we think they answer the  
9 question here because this is a fact-laden  
10 review.

11 The Court also has to --

12 JUSTICE SOTOMAYOR: No, but you're  
13 going further now.

14 MR. KNEEDLER: No, but the Court also  
15 has to consider the rule of non-inquiry cases in  
16 which the Court has repeatedly held, all the way  
17 back to Neely, with a lineage as -- as old as  
18 our immigration laws, that habeas review is not  
19 available to review the conditions or what will  
20 happen to the person when he goes to another  
21 country --

22 JUSTICE SOTOMAYOR: That's not the  
23 issue.

24 MR. KNEEDLER: -- even for questions  
25 of law.

1 JUSTICE SOTOMAYOR: The -- the focus  
2 is -- of habeas is not the issue of where you're  
3 going to be released to. The issue is are you  
4 going to be -- be released here.

5 MR. KNEEDLER: But -- but -- but if  
6 someone --

7 JUSTICE SOTOMAYOR: So you're right.

8 MR. KNEEDLER: -- if someone is sought  
9 for extradition purposes and they are in the  
10 United States and -- and they are claiming don't  
11 send me to another country that has requested my  
12 extradition because of what the procedures will  
13 be there, what treatment I will be -- I will  
14 receive there, the rule of non-inquiry has  
15 sustained the ability of -- of Congress not to  
16 provide for judicial review. And that was true  
17 in *Munaf* --

18 JUSTICE KAGAN: I guess I'm not --

19 MR. KNEEDLER: -- in this Court's  
20 unanimous decision.

21 JUSTICE KAGAN: -- quite understanding  
22 why that would be. If you look at the finality  
23 era cases, these were people who had basically  
24 no connection at all to the United States, some  
25 who had not entered the country, not citizens,

1 not nothing.

2           And you're saying that they were  
3 entitled to a kind of proceeding that this  
4 person is not just because he has, you know,  
5 sort of the -- the best kind of claim you can  
6 make to stay in this country, which is that, if  
7 we turn you back, you'll be subject to torture  
8 or persecution? Why should that be -- person be  
9 treated less well in terms of the kinds of  
10 procedures he can invoke than the person in the  
11 finality era cases which had no connection at  
12 all and -- and -- and who had no fear of  
13 persecution or torture?

14           MR. KNEEDLER: Again, in the finality  
15 era -- era cases, the courts did not review the  
16 fact-based determination about whether someone  
17 came within the statute. And they specifically  
18 did not include the situation where the -- where  
19 the claim is about conditions in another  
20 country. In the -- in this Court's decision in  
21 *Munaf*, it might have been claimed that the  
22 Secretary of State was somehow misinterpreting  
23 CAT when he decided that the -- that the person  
24 should be -- or the Department of Defense,  
25 whoever -- stayed in an extradition case might

1 be misunderstanding the interpretation of the  
2 treaty.

3 JUSTICE KAGAN: But your --

4 MR. KNEEDLER: But the Court didn't  
5 suggest --

6 JUSTICE KAGAN: -- your view, you  
7 know, does not only speak to pure factual  
8 matters. Your view applies to legal matters and  
9 mixed questions as well.

10 MR. KNEEDLER: But there's no  
11 statutory interpretation question here. But --  
12 but just -- just to --

13 JUSTICE KAGAN: Well, there's a view  
14 as to whether the hearing officer filed the --  
15 followed the appropriate procedures.

16 MR. KNEEDLER: But that is a  
17 fact-laden review that would require unpacking  
18 what happened, would require the -- the -- the  
19 -- the record --

20 JUSTICE KAGAN: Usually, we don't  
21 think that, you know, did you follow the law as  
22 to the procedural requirements that the law  
23 states as a fact-laden review.

24 MR. KNEEDLER: But --

25 JUSTICE KAGAN: We think it's a pretty

1 common thing for courts to do.

2 MR. KNEEDLER: No --

3 JUSTICE KAGAN: It's like, did this  
4 executive officer follow the procedures that he  
5 was supposed to follow?

6 MR. KNEEDLER: No, the courts -- there  
7 are no decisions in the finality era that are  
8 pointed to that -- that provide for that kind of  
9 review. But, again, in *Munaf*, in -- in --

10 JUSTICE KAGAN: But why should that  
11 kind of review be so different? I mean, that's  
12 a pretty basic question. Did the executive  
13 officer follow the rules that he was supposed to  
14 follow?

15 MR. KNEEDLER: If I could just step  
16 back for a moment, the -- the -- the common law,  
17 the finality era cases, all the sources that are  
18 looked at, nothing affirmatively establishes a  
19 right of judicial review of this sort of  
20 screening determination that Congress decided  
21 could be attached to the expedited removal  
22 system. And Congress's judgment in those -- in  
23 that situation should be entitled to great  
24 respect --

25 CHIEF JUSTICE ROBERTS: Mister --

1           MR. KNEEDLER:  -- especially against  
2 the background of the rule of non-inquiry.

3           CHIEF JUSTICE ROBERTS:  I -- I think  
4 you've been trying to make a point about Munaf,  
5 and I --

6           MR. KNEEDLER:  Yes.

7           CHIEF JUSTICE ROBERTS:  -- I wonder if  
8 you could tell me what it is.

9           MR. KNEEDLER:  Yes.  No -- no, the --  
10 the point is that there was no review in habeas  
11 of the determination that the person should be  
12 turned over to Iraqi authorities where the claim  
13 was, if I'm turned over there, that person --  
14 you know, I may -- I may -- may be mistreated.

15           CHIEF JUSTICE ROBERTS:  Right.  So  
16 what is -- what is the analogy to this  
17 situation?

18           MR. KNEEDLER:  The same thing here,  
19 where the person is saying:  Don't -- don't -- I  
20 want a court to determine whether -- to review  
21 an executive determination as to whether I will  
22 be tortured in another country.

23           And in Munaf, the Court didn't try to  
24 separate whether the executive had decided a  
25 question of law, a question of fact.  It was

1 sufficient that the executive had made a  
2 determination regarding conditions in another  
3 country.

4 Here, there's even less review because  
5 it's an initial preliminary screening to see  
6 whether the person has even made a credible-fear  
7 showing about conditions in another country.

8 And we think that that is squarely  
9 within the realm of things that habeas corpus  
10 does not have to be available to second-guess  
11 the executive's determination.

12 Otherwise, you could have considerable  
13 delay. There are 9,000 -- as we point out in  
14 our brief, there are 9,000 negative  
15 credible-fear determinations that have been made  
16 in recent years, 100,000 credible --  
17 credible-fear referrals.

18 If judicial review is added on top of  
19 this, with close parsing of the limited  
20 administrative record that this process provides  
21 for, it would really bog down the system. And  
22 we think Congress's judgment that that is not  
23 constitutionally required is entitled to great  
24 respect.

25 Otherwise, you will have protracted

1 proceedings. It could -- it could lead to  
2 aliens being released into the country. That,  
3 in turn, could create an incentive to come to  
4 the country and -- and be released and undermine  
5 the whole point of Congress enacting the  
6 expedited removal system.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Gelernt.

10 ORAL ARGUMENT OF LEE GELERNT

11 ON BEHALF OF THE RESPONDENT

12 MR. GELERNT: Mr. Chief Justice, and  
13 may it please the Court:

14 The statute here eliminates any  
15 meaningful role for the courts, even to ensure  
16 that the statutes and regulations were followed.  
17 During the 60-year finality period, Congress  
18 also tried to exclude the courts, leaving only  
19 that review that was "required" by the  
20 Constitution.

21 This Court, nonetheless, continued to  
22 review legal claims in habeas. It did so while  
23 expressly rejecting the government's argument  
24 that deportation was not the type of restraint  
25 that triggers habeas. It did so critically in

1 cases to review statutory and regulatory limits,  
2 even where the Court expressly held that those  
3 particular non-citizens lacked constitutional  
4 procedural due process rights.

5 It did so where the non-citizen was  
6 seeking initial entry, where the non-citizen was  
7 in the country illegally, and, most critically  
8 in response to what the government said, in  
9 cases where the non-citizen was removable and  
10 seeking only to challenge the denial of relief  
11 from removal.

12 The finality era cases are consistent  
13 with the common law and answer each of the  
14 government's arguments. The government has  
15 cited no common law support.

16 Moreover, the government's undefined  
17 meaningful ties test is unworkable. It would  
18 also mean that asylum seekers and potentially  
19 millions of other unknowns, non-citizens, inside  
20 the country could be summarily expelled without  
21 any judicial review or without even any  
22 administrative review.

23 The Suspension Clause is a check on  
24 the political branches. This Court has never  
25 before allowed the elimination of judicial

1 review over the legality of deportations. The  
2 Court once again should preserve habeas review  
3 as it did during the Chinese exclusion era, the  
4 finality era, and throughout the country's  
5 history.

6 The political branches undoubtedly  
7 have enormous power in the immigration area, but  
8 the one thing it cannot do, and this Court has  
9 never allowed them to do, is remove a check on  
10 themselves.

11 So I want to address what I -- what I  
12 see as the government's fundamental point now.  
13 Their opening brief made very broad arguments  
14 about having no habeas at all. What they've  
15 retreated to now is, well, you were found  
16 inadmissible, you're in the country illegally,  
17 and you're only challenging relief, and no  
18 finality era addresses that.

19 That's absolutely wrong. And let me  
20 just give the Court two cases. One is Accardi,  
21 decided the year after Heikkila v. Barber said  
22 the only review under this regime is that which  
23 is required by the 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 airport,  
17 give him a ticket and say, you are released, and  
18 he could leave. That's not what he wants.

19           And the fundamental point of habeas is  
20 to secure release from what's claimed to be  
21 unlawful executive custody.

22           So what is your answer to that?

23           MR. GELERNT: Right. So our client  
24 does ultimately want release, but what he has  
25 asked for is a new hearing, which is consistent

1 with the way immigration works in criminal cases  
2 in habeas, what this called -- Court called  
3 conditional release, which is for the benefit of  
4 the government.

5 He would be thrilled to just be  
6 outright released and have the order vacated.  
7 What he -- then he would be in this country, and  
8 he would apply for asylum affirmatively.

9 JUSTICE ALITO: Well, he wants to be  
10 -- he wants to be released in this country so  
11 that he can remain in this country. He doesn't  
12 simply want to be released. And, therefore, it  
13 does seem like what he wants is review of his  
14 entitlement to remain in this country, not  
15 simply what habeas provides, which is release  
16 from custody.

17 MR. GELERT: Well, absolute, Your  
18 Honor, he wants review of the removal order,  
19 which entails custody. The custody will be  
20 illegal if the removal order is. But let me --  
21 let me offer three points about this.

22 The first is we think the government  
23 is raising an issue that's already ultimately  
24 been decided by this Court. Congress began  
25 regulating immigration in 1875. Soon

1       thereafter, the government made the exact  
2       argument that they're making now.

3               Well, this isn't really habeas. We're  
4       just restraining you from coming in the country  
5       or restraining you from leaving. And the Court  
6       specifically could not have been more specific  
7       in rejecting that argument. That's the  
8       Nishimura Ekiu case in 1892. It was the Chin  
9       Yow case a few years later. And even before  
10      Ekiu was Jung Ah Lung. For the next 60 years in  
11      finality, reviewed those cases.

12              And the other point I would make about  
13      that is, if the government's right that habeas  
14      doesn't even apply to deportation, then even  
15      lawful permanent residents would not be entitled  
16      to habeas --

17              JUSTICE KAVANAUGH: Well --

18              MR. GELERT: -- because the restraint  
19      point would be the same with respect to them.

20              JUSTICE ALITO: In the --

21              JUSTICE KAVANAUGH: -- that's not what  
22      they're saying at all, though. They're --  
23      they're making a very clear distinction between  
24      inadmissibility and deportation in relying on  
25      Landon versus Plasencia and many other cases, so

1 I think that's an overstatement of their  
2 position.

3 MR. GELERNT: So you're absolutely  
4 right, Justice Kavanaugh. And I -- I'm simply  
5 responding to their independent argument, what  
6 they called an independent argument in the  
7 opening brief and trying to respond to Justice  
8 Alito's question that this isn't classic habeas.

9 They do try and get out from under  
10 that by then going to a meaningful ties test and  
11 using Plasencia, so you're absolutely right.

12 But, with respect to Justice Alito's  
13 question, those cases specifically answer it,  
14 the exact same arguments were made. Ekiu could  
15 not have been more clear. We know that we're  
16 simply -- you're simply asking to remain in the  
17 country, and they said that is nonetheless  
18 proper for habeas.

19 CHIEF JUSTICE ROBERTS: But there's  
20 the -- just following up on Justice Alito's  
21 point and the government's reliance on it, Munaf  
22 does say that there they were not seeking simply  
23 release. They wanted humanitarian protection to  
24 get out of -- out of the country. Release was  
25 the last thing they wanted.

1           And -- and to -- this case is arguably  
2           the same since, again, the release could be  
3           provided under their normal practice to these  
4           individuals by taking them out of the country to  
5           another country. They don't want that to  
6           happen. They want to be released into the --  
7           into the population. And Munaf made, I think,  
8           pretty clear that that type of humanitarian  
9           release was not the purpose of -- of habeas.

10           MR. GELERT: Well, Your Honor, a few  
11           -- a few points on that. I think Munaf was  
12           different because they didn't want to be  
13           released where they were arrested, which was  
14           Iraq. They came to Iraq. They didn't want to  
15           be released there.

16           What they wanted, I think as the  
17           opinion makes clear, is affirmative help from  
18           the United States to fly them back to the United  
19           States. Our client simply wants release where  
20           he was arrested.

21           Now the government says: Well, we can  
22           release him in Sri Lanka, but, of course, that  
23           would be denying him relief on the merits.  
24           That's exactly what he fears.

25           And so I think what the government is

1 sort of implying is: Well, you can get out of  
2 this, just simply give up. I mean, if that were  
3 true, contempt cases wouldn't fall under habeas.

4 CHIEF JUSTICE ROBERTS: I -- I think  
5 that the analogy that they press depends upon  
6 the fact that it's conceded that the individual  
7 does not have a right to be in the United  
8 States.

9 MR. GELERT: Right. And so no  
10 immigrant -- and I want to be clear about  
11 this -- has an absolute, substantive right to be  
12 in the United States. And that's not what  
13 habeas does.

14 The value of the Suspension Clause as  
15 the framers saw it was not to create rights but  
16 to ensure that the grave power of restraint is  
17 never used except in accordance with law. So,  
18 if Congress were to limit, further limit  
19 statutory rights, maybe even take the momentous  
20 step of withdrawing from our refugee treaties,  
21 then they would be reducing -- but habeas would  
22 still lie to make sure that you are not  
23 restrained, except in accordance with positive  
24 law. That's the value for the framers.

25 So the government's discussion about

1 he has no absolute right to be here is -- is  
2 sort of beside the point for habeas. Habeas was  
3 not designed to create substantive rights. It  
4 was to ensure that the -- the law was followed.

5 And so I want to turn to what the  
6 government --

7 JUSTICE KAVANAUGH: But -- but on the  
8 -- on the question of history, you make a point.  
9 But, on the question of precedent in Landon  
10 versus Plasencia -- and I just want to get your  
11 reaction to this, you know what sentence it is  
12 -- Justice O'Connor writing for eight justices  
13 says: "The Court has long held that an alien  
14 seeking initial admission to the United States  
15 requests a privilege and has no constitutional  
16 rights regarding his application."

17 So that's a statement of law for eight  
18 justices. Why is that statement wrong or, if  
19 it's not wrong, why doesn't it control here?

20 MR. GELERT: Well, I -- I think what  
21 the Court was saying there, as we understand it,  
22 was specific to due process. The entire case  
23 was about due process. There was no question of  
24 judicial review or habeas.

25 And I think what the Court was doing

1 was distinguishing between different people at a  
2 port who had procedural due process rights.  
3 That was the context of the sentence. I think  
4 it would be a --

5 JUSTICE KAVANAUGH: For context, the  
6 sentence says no constitutional rights.

7 MR. GELERNT: Right. But I think it  
8 would be a lot in a case that didn't involve  
9 judicial review to take one sentence and say  
10 we're wiping away all the finality era cases.  
11 We're not discussing them.

12 The difference between due process and  
13 habeas is stark. As Justice Sotomayor pointed  
14 out, the Suspension Clause predated due process.  
15 Due process and habeas have never been hinged in  
16 this Court's cases.

17 So you take Mizai and Knauff, which  
18 established no procedural due process for people  
19 at the ports. They expressly held that they  
20 didn't have procedural due process, but then  
21 they went on in habeas to review the statutory  
22 and regulatory claims.

23 They had very few statutory and  
24 regulatory claims on the merits, but the courts  
25 still reviewed them to make sure that the

1 positive law was being followed.

2 JUSTICE ALITO: But wasn't it true in  
3 the -- in the finality era cases that the  
4 individuals, once it was determined that they  
5 had not been properly detained, they did have a  
6 right to be in the United States, because, in  
7 those -- in that era -- for most of that era, or  
8 much of that era, there were not very many  
9 restrictions on immigration to the United  
10 States. And that's the difference between that  
11 case and this case.

12 MR. GELERT: Well, I don't think so,  
13 Your Honor, I think for -- for two reasons. One  
14 is the -- the inadmissibility of relief point,  
15 as I said before, there were finality era cases.  
16 That's the Accardi case, suspension of  
17 deportation, even though they were concededly  
18 removal. That's *Tod v. Waldman*, even though the  
19 refugees were -- were illiterate and therefore  
20 inadmissible. They were excused from that.

21 But the other point is that the Court  
22 throughout the finality era always reviewed  
23 whether they fell within the statute or not.  
24 That's the *Gegiw* case, *Ekiu*. All of those  
25 finality era cases were looking at whether they

1 fell within the statute.

2           There were restrictions. I mean,  
3 obviously, there weren't as many as now, but  
4 there absolutely were restrictions on all the  
5 cases we cite on pages 13 through 15 of our  
6 brief, are all cases where the Court is looking  
7 at did they fall within the statute or the  
8 regulations.

9           JUSTICE ALITO: In any of those cases  
10 -- and it's -- it's -- did the court say  
11 anything more than -- when relief was granted,  
12 did they -- was the relief anything other than  
13 you are released?

14           MR. GELERNT: Well, absolutely. And  
15 so the relief --

16           JUSTICE ALITO: Other than Accardi and  
17 the other case you cited.

18           MR. GELERNT: Right.

19           JUSTICE ALITO: Which are -- which are  
20 in a -- perhaps in a category of their own. But  
21 in -- for most of those finality era cases,  
22 wasn't the relief just you are released?

23           MR. GELERNT: No, Your Honor. Those  
24 cases established the principle in immigration  
25 that the government would get the benefit of a

1 new hearing, that they didn't simply have to  
2 release the person and let them go, that there  
3 would be a new hearing where there was a legal  
4 defect the government could potentially fix.

5 So that's in addition to the cases --

6 JUSTICE ALITO: Yeah. Okay. But at  
7 the end of that --

8 MR. GELERNT: -- Muler, Johnson.

9 Right.

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 -- that's  
16 what would happen here, Your Honor. So we would  
17 -- if we had a new hearing and passed, we would  
18 be able to apply in a full hearing for asylum or  
19 withholding. And if we won, he would be allowed  
20 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. GELERT: 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 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 inappropriate

1 since the court of appeals and district court  
2 didn't unpack our particular claims.

3 But I want to address two -- two other  
4 points that you made. One is in the Martinez  
5 brief, which was -- Martinez was the companion  
6 case to Heikkila v. Barber -- and I would just  
7 refer the Court to the -- to the SG's brief in  
8 that case -- the government was very clear that  
9 the Suspension Clause requires some review, that  
10 the finality era statutes limited review to the  
11 constitutional requirement. The government  
12 says, well, we conceded only statutory claims.  
13 That's even more than I understand them to be  
14 conceding now. But they also lopped off part of  
15 the quote, which was "anything contrary to law."  
16 That's on page 20 of their brief.

17 The point about the facts, I think, is  
18 a critical one, because Mr. Kneedler kept saying  
19 "fact-laden." So I think that's conspicuous in  
20 that he's not saying historical facts. He knows  
21 we are not challenging the historical facts. We  
22 don't claim a right to challenge the historical  
23 facts.

24 Our position is twofold. One is that,  
25 during the finality or contrary to what the

1 government said respectfully, the courts  
2 routinely reviewed mixed questions. That's the  
3 Rowoldt case, where the Court said: Look, you  
4 have to be meaningfully associated with the  
5 Communist Party, and then went on to look  
6 extensively at the facts. What did he do at the  
7 Communist bookstore? What was the purpose?  
8 Those are the cases on page 50 of our brief,  
9 mixed questions.

10 But the -- the more fundamental point  
11 I want to make is we are okay if the Court wants  
12 to reserve whether all application of law to  
13 fact is reviewable. Our -- our point here is  
14 that there has to be review at least for gross  
15 misapplications of the statute because, at that  
16 point, where no one reasonably could conclude  
17 that on these historical facts you didn't meet  
18 the statutory standard, at that point, what  
19 you're seeing is really a misunderstanding of  
20 the legal standard.

21 JUSTICE GINSBURG: What are the  
22 concrete issues that could be raised on habeas  
23 in this case?

24 MR. GELERNT: So, Your Honor, our two  
25 principal claims are statutory and regulatory.

1 And let me -- let me deal with the statutory  
2 claim.

3           What we're saying is, on these  
4 historical facts, no asylum officer could  
5 reasonably have concluded that he did not meet  
6 the low significant possibility standard, the  
7 very low standard, which is a significant  
8 possibility of ultimately satisfying the asylum  
9 standard, which in itself is just a one-in-ten  
10 chance.

11           And I'm going into the merits now, but  
12 the reason we say that we are okay with a  
13 standard that says egregious error, clear error,  
14 no reasonable adjudicator, because, at that  
15 point, you are reaching a legal error, is  
16 because the asylum officer, by statute, is  
17 required to look at the reports on country  
18 conditions.

19           Every report, as the amicus briefs  
20 from the asylum experts and the Sri Lanka  
21 experts point out, there is an exact M.O. in how  
22 Tamil people are persecuted in Sri Lanka. They  
23 -- men arrive in a white van. They abduct the  
24 person. They blindfold the person. They beat  
25 and torture him. The asylum officer in our case

1 accepted every one of those historical facts but  
2 yet 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 and that --

17 JUSTICE SOTOMAYOR: Okay.

18 MR. GELERNT: -- there was not review  
19 of historical facts. And we are not pressing  
20 that. Nor the exercise of discretion. We  
21 believe mixed questions, legal claims and  
22 constitutional claims, but, again, even if this  
23 Court wants to narrow it to only egregious --  
24 egregious application, because I'm still --

25 JUSTICE SOTOMAYOR: Why are you using

1 the word "egregious"? Where -- that almost  
2 seems like whole cloth. It's either mixed or  
3 not.

4 MR. GELERT: Well, Your Honor, I  
5 think if you wanted to say for this -- purposes  
6 of this case only legal claims and reserve  
7 whether mixed questions. I'm simply saying that  
8 when it becomes so egregious, when no  
9 adjudicator could reasonably have concluded on  
10 these facts that it met the standard, I think at  
11 that point, it would be a legal error because it  
12 would be a misunderstanding, because I think  
13 what this Court has pointed out in the past is  
14 you can't just have the adjudicator put  
15 boilerplate language for the standard, because  
16 then you really don't know. I mean, someone  
17 who's writing an opinion over and over about the  
18 same things will get the standard -- at least  
19 boilerplate, get it right.

20 Here, it's even worse because these  
21 are preprinted forms with the standard. So  
22 you'll really never actually know if the asylum  
23 officer is understanding what these statutory  
24 terms mean, except through the application.

25 And at some point, where the

1 application is so -- either no reasonable  
2 adjudicator, clear error, egregious, I think  
3 that does rise to a legal error.

4 I -- I want to also make a point about  
5 --

6 JUSTICE GINSBURG: May I just ask you,  
7 if you're not trying to get any mileage out of  
8 the fact that the alien was on U.S. soil, he  
9 didn't have any documentation, he  
10 surreptitiously got here, you're not  
11 distinguishing him because he managed to get to  
12 U.S. soil from somebody who never got here, who  
13 was never in the United States in the first  
14 place?

15 MR. GELERT: We -- we are  
16 distinguishing them, Your Honor.

17 JUSTICE GINSBURG: You are?

18 MR. GELERT: We -- we believe someone  
19 outside the country, unless for some reason U.S.  
20 forces were overseas restraining him, and that  
21 would be a different situation. That's not the  
22 typical deportation.

23 I think if they were outside the  
24 country, they wouldn't be restrained because  
25 they would have -- and there might also be

1 extraterritoriality issues.

2 We're simply saying where the person  
3 is on U.S. soil and the body controls. And so  
4 --

5 JUSTICE GINSBURG: And does that --  
6 that cover the person who comes to the port of  
7 entry and is stopped there?

8 MR. GELERNT: Yes, Your Honor. And so  
9 I -- I may have misunderstood.

10 CHIEF JUSTICE ROBERTS: Yes what?  
11 Your concession or -- or not?

12 MR. GELERNT: I'm sorry, Your Honor?

13 CHIEF JUSTICE ROBERTS: I -- I didn't  
14 understand your "yes." Is it that the person at  
15 the port of entry is covered or not covered by  
16 your position?

17 MR. GELERNT: They are covered by  
18 habeas, and the reason is because the ports of  
19 entry are typically on U.S. soil. An airport or  
20 even a land port will generally be 100 feet or  
21 so into U.S. soil.

22 JUSTICE KAGAN: Do you think there's a  
23 way of distinguishing that case from yours?

24 MR. GELERNT: I think, historically,  
25 the Court has not for habeas. I think the Court

1 could reserve questions about people at ports  
2 because our person entered the country.

3           Historically, the Court has said  
4 habeas applies when you're in U.S. soil. At  
5 ports, it's a different procedure, for  
6 procedural due process, because that's more  
7 context-specific, and the Court has drawn a line  
8 for due process purposes at least between people  
9 who have entered and people at the port. I  
10 think Your Honor could reserve that question on  
11 habeas for this case because our person did  
12 enter --

13           CHIEF JUSTICE ROBERTS: But -- but --

14           MR. GELERT: -- the country and it  
15 wasn't at a port.

16           CHIEF JUSTICE ROBERTS: -- that's a  
17 significant expansion, it seems to me, from  
18 someone who's here, and anybody can get to a  
19 port of entry, right?

20           MR. GELERT: Well, Your Honor, so --  
21 so that goes to, I think, the burden. I mean,  
22 there are 9,000 cases in the universe that could  
23 have been in habeas. The government points out,  
24 in their -- in their reply, they go to 100,000.  
25 Well, those are people who -- who didn't need

1 habeas because they passed. So we're talking  
2 about 9,000 -- 9,000 people. I -- I was --

3 CHIEF JUSTICE ROBERTS: That includes  
4 the people at -- at a port of entry?

5 MR. GELERT: 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 three percent. It's much harder  
20 at 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'll get to  
6 stay --

7 JUSTICE KAVANAUGH: Can I --

8 MR. GELERT: -- in the country.

9 JUSTICE KAVANAUGH: -- can I pick up  
10 on the Chief Justice's question? You're saying  
11 a non-citizen who arrives at a port of entry,  
12 has never been in the United States, not  
13 lawfully admitted to the United States,  
14 nonetheless has a right under the U.S.  
15 Constitution to judicial review of the  
16 executive's decision to say they're not  
17 admissible?

18 MR. GELERT: Right. So let me -- let  
19 me make two points.

20 JUSTICE KAVANAUGH: Is that correct?

21 MR. GELERT: Yeah, I think it's --  
22 yes, Your Honor, sorry, the answer is yes. The  
23 reason is from the finality era cases, that's  
24 the very first finality era case. And, in fact,  
25 most of the cases, someone at a port of entry --

1 that's Nishimurh/Ekiu -- comes by boat, gets  
2 here, wants to be admitted. The Court says no  
3 review of facts, which is the part of the  
4 opinion that the government was quoting, doesn't  
5 quote the second part, which is undoubtedly  
6 there has to be habeas for the -- for the review  
7 of the legality.

8 The point I want to point out -- the  
9 reason I'm using the 9,000 number and the reason  
10 the government's using that is because those are  
11 the asylum numbers. People who come here as a  
12 tourist reach a port and say, I'd like to go to  
13 Disneyland, they're not going to sit in  
14 detention and file a habeas if someone says, no,  
15 you're a tourist visa. That's why judicial  
16 review has been available forever at a port, but  
17 you don't see mountains of -- of habeas cases.

18 CHIEF JUSTICE ROBERTS: Well, I don't  
19 think this concerns --

20 MR. GELERT: There's just no grounds  
21 --

22 CHIEF JUSTICE ROBERTS: I don't think  
23 the concern is people who come here to go to  
24 Disneyland.

25 MR. GELERT: Well, I -- I think the

1 people who come here and don't have asylum  
2 claims or those type of claims and are clearly  
3 inadmissible are not going to file habeas  
4 petitions. No one's going to file them because  
5 there's not going to be a ground to stay here.

6 That's the reason in asylum cases  
7 people file them, but it's all -- it's -- again,  
8 as a practical matter, it's not very many, 30  
9 out of 9500, since the Ninth Circuit. That's  
10 the country-wide, 30 out of 9500.

11 The other point I want to make about  
12 the burden is the district courts will be able  
13 to dispose of these very quickly. They don't  
14 have to review credibility determinations.  
15 They're not reviewing historical facts.

16 The administrative record is puny. In  
17 -- in the printed booklets here, it's 28 pages.  
18 It's about a seven-minute read. The only other  
19 thing they would look at, which is subsumed  
20 within the record, is the few pages of country  
21 reports on Sri Lanka, which would have told them  
22 if someone's abducted in a van and blindfolded,  
23 that is almost certainly by the government  
24 forces seeking to persecute Tamils on -- on  
25 political grounds.

1 JUSTICE KAVANAUGH: You're -- you're  
2 reviewing mixed questions, though, correct?

3 MR. GELERNT: But only as part of the  
4 record, which, again, is very, very small.

5 JUSTICE KAVANAUGH: That's very --  
6 that's very difficult in many cases, though. I  
7 don't know that that's going to be that easy.

8 MR. GELERNT: Well, I think certainly  
9 there's going to be deference, but I think, Your  
10 Honor, even to decide our case, we are -- we are  
11 okay with you saying not every mixed question  
12 where we have a difference of judgment needs to  
13 be reversed.

14 But at least where it's so egregious  
15 that you can't possibly have under -- understood  
16 the standard, we believe we go back to district  
17 court and the district court looks at the few  
18 pages from the U.S. State Department reports on  
19 Sri Lanka, there is no way that the -- the  
20 district court could say, well, the asylum  
21 officer clearly understood what was going on.

22 Maybe the asylum officer didn't think  
23 he could use circumstantial evidence and,  
24 therefore, made dispositive our client not  
25 telling him who persecuted him. If that's true,

1 that's a pure error of law.

2 But either way, at some point, the  
3 egregious standard, because I don't think the  
4 government gave you a clear answer on even --  
5 and this goes back to Justice Breyer's question  
6 to me on exactly what's reviewable.

7 The government's talking about  
8 fact-laden questions, but what if they just  
9 didn't give you a hearing at all? What if they  
10 didn't give you a translator? What if they said  
11 we're not going to give you asylum because of  
12 your religion, your race?

13 The government is taking the position  
14 that even those errors are not reviewable. That  
15 cannot possibly be. The Suspension Clause --  
16 sorry.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 MR. GELERT: Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Five minutes,  
21 Mr. Kneedler.

22 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER  
23 ON BEHALF OF THE PETITIONERS

24 MR. KNEEDLER: Yes, several points.

25 First of all, by our count, since the

1 Ninth Circuit's decision, there have been 100  
2 habeas cases filed, and the -- the potential for  
3 a flood would be, of course, far greater if this  
4 Court holds that there is a right to file a  
5 habeas seeking review of a negative  
6 credible-fear determination.

7 This Court's decision in *St. Cyr*  
8 referred to review of pure questions of law and  
9 constitutional claims, in other words, statutory  
10 interpretation. And the -- the finality era  
11 cases really fit into that mold even -- even  
12 where they do apply.

13 There's no suggestion that when the  
14 Court said that Congress could vest the  
15 determination of -- of inadmissibility, much  
16 less a -- not passing a credible-fear screening  
17 for somebody who's inadmissible, but even --  
18 even for determining excludability, Congress  
19 didn't -- or the Court didn't suggest there was  
20 an exception for something that might be  
21 characterized as an egregious misapplication or  
22 -- or review of the facts.

23 JUSTICE SOTOMAYOR: We're still going  
24 to my basic question to you earlier. Putting  
25 aside his claim, let's talk about a pure legal

1 claim, they didn't hold any interview with me at  
2 all.

3 MR. KNEEDLER: I'm sorry? I -- I  
4 didn't --

5 JUSTICE SOTOMAYOR: They didn't hold  
6 an interview with me at all.

7 MR. KNEEDLER: The --

8 JUSTICE SOTOMAYOR: Is there habeas  
9 relief in that case? A pure matter of law. The  
10 statute requires --

11 MR. KNEEDLER: Well, it's not a pure  
12 matter of law. The question of whether there  
13 was a hearing is -- there's a factual element to  
14 that. But there -- this system at the  
15 administrative level builds in protections for  
16 that. There's supervisory review. There --

17 JUSTICE SOTOMAYOR: Counsel --

18 MR. KNEEDLER: -- there are forms for  
19 notice.

20 JUSTICE SOTOMAYOR: -- you're  
21 nitpicking. Get to the point.

22 MR. KNEEDLER: No, I don't think --

23 JUSTICE SOTOMAYOR: Which is a pure --

24 MR. KNEEDLER: -- I don't think --

25 JUSTICE SOTOMAYOR: -- question of

1 law.

2 MR. KNEEDLER: I -- I don't think  
3 there --

4 JUSTICE SOTOMAYOR: Would there --

5 MR. KNEEDLER: No.

6 JUSTICE SOTOMAYOR: -- be habeas  
7 relief?

8 MR. KNEEDLER: I -- I think the answer  
9 is no. And one could say the same thing in --  
10 with respect to the finality --

11 JUSTICE SOTOMAYOR: So why --

12 MR. KNEEDLER: -- era cases.

13 JUSTICE SOTOMAYOR: -- bother doing  
14 anything? What -- what good is the statutes?  
15 What good are the regulations?

16 MR. KNEEDLER: Congress determined  
17 that -- that habeas should be limited in -- in  
18 -- in this context, again, for credible --  
19 specifically with respect to credible-fear  
20 determinations.

21 There's no common law precedent for  
22 this. There's no finality era precedent for  
23 this. And in that context, Congress's judgment  
24 should count for something.

25 Now I also want to point out that, as

1 I understand Respondent's claim --

2 JUSTICE SOTOMAYOR: Shouldn't the  
3 Court count for something? Hasn't it been under  
4 --

5 MR. KNEEDLER: This Court has never --  
6 has never --

7 JUSTICE SOTOMAYOR: -- under --

8 MR. KNEEDLER: -- has never --

9 JUSTICE SOTOMAYOR: -- under the  
10 habeas?

11 MR. KNEEDLER: This Court has never  
12 said that. And, again, Munaf --

13 JUSTICE SOTOMAYOR: Mr. Kneedler?

14 CHIEF JUSTICE ROBERTS: I'm sorry.  
15 Could you answer, Mr. Kneedler?

16 JUSTICE SOTOMAYOR: Mr. Kneedler, let  
17 me finish my question.

18 MR. KNEEDLER: Yeah, sorry.

19 JUSTICE SOTOMAYOR: We have the great  
20 writ. It was there to ensure that the executive  
21 acts according to law. What's left if you tell  
22 me that there are laws, but there's no judicial  
23 review of whether those laws are being followed  
24 or not? That's my question.

25 MR. KNEEDLER: And -- and -- and my

1 answer is Munaf and -- and -- and the  
2 100-year-old precedent that Munaf stood for,  
3 where a determination about whether somebody  
4 should return to another country because of  
5 conditions there is simply a --

6 JUSTICE SOTOMAYOR: It's not  
7 returning. He was there. The question was a  
8 legal one, which was whether or not he should be  
9 turned over by the American forces or not. The  
10 court said, even if he should have been, we're  
11 not going to step in in this situation.

12 MR. KNEEDLER: But the -- but the  
13 court drew on the rule of non-inquiry, which  
14 applies in the extradition context, which is  
15 about sending someone out from the United States  
16 to another country.

17 I want to make another point. When  
18 Respondent talks about review for egregious  
19 errors, I think he's talking about bringing in  
20 stuff that is outside the administrative record  
21 and trying to demonstrate to the Court that if  
22 only the review -- the asylum officer or the IJ  
23 had looked at this, it would have reached a  
24 different conclusion.

25 That is -- that goes far beyond even

1 traditional administrative review. But the  
2 administrative proceedings in this case, for  
3 example, the asylum officer's record are just  
4 notes. They're not a verbatim transcript. They  
5 are there to assist the immigration judge in  
6 this self-contained internal review of whether  
7 someone has made even the showing necessary for  
8 a threshold credible-fear screening.

9           They are not designed for judicial  
10 review. And the suggestion that there would be  
11 judicial review in habeas corpus, unprecedented  
12 under this Court's decisions or the common law,  
13 would -- would require effectively to change the  
14 administrative system as well, but Congress  
15 determined that the -- that the three-tier  
16 screening that it provided and limited judicial  
17 review is necessary, is essential to get control  
18 of the nation's borders.

19           CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel. The case is submitted.

21           (Whereupon, at 12:08 p.m., the case  
22 was submitted.)

23

24

25

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