UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

I.M., Petitioner-Plaintiff, v. U.S. CUSTOMS & BORDER PROTECTION, *et al.*, Respondents-Defendants.	Case No. 20-cv-03576-DLF

RESPONDENTS-DEFENDANTS' MOTION TO DISMISS THE PETITION

Respondents-Defendants hereby move this Court under Fed. R. Civ. P. 12(b)(1) to dismiss the combined Petition for writ of habeas corpus and Complaint for lack of subject-matter jurisdiction. Petitioner is a noncitizen who was ordered removed pursuant to an expedited removal order for intending to violate the terms of his visa. Petitioner seeks to invalidate his order of expedited removal and associated determination of inadmissibility, reinstate his visa, and be placed into removal proceedings before an immigration judge. However, the Petition is nothing more than an attempt to get around a long-since lapsed time bar to "systemic" challenges to expedited removal, and must therefore be dismissed. Even under Petitioner's asserted jurisdictional bases, Petitioner is not in custody and therefore cannot seek habeas relief. Further, this Court lacks jurisdiction to consider the Petition and Complaint under either of his asserted bases for jurisdiction, 8 U.S.C. § 1252(e)(2) or 28 U.S.C. § 1331. Petitioner also lacks standing to seek the majority of his requested relief. Accordingly, the Petition must be dismissed.

Dated: February 26, 2021

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RESPONDENTS-DEFENDANTS' MEMORANDUM OF LAW
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I. Introduction.

Petitioner is a noncitizen who was determined to be inadmissible to the United States upon his arrival into the country for intending to violate the terms of his visa.[1] After being interviewed to determine whether he had a credible fear of persecution or torture in his home country, and not demonstrating such a fear, Petitioner was removed to his home country. Now, after his removal from the United States, Petitioner seeks to invalidate his final, executed order of expedited removal, reinstate his visa, return to the United States, and be placed in removal proceedings before an immigration judge ("IJ"). But this Court lacks jurisdiction to hear the Petitioner's claims and, moreover, Petitioner also largely lacks standing to obtain his far-ranging requested relief.

Petitioner asserts jurisdiction under 8 U.S.C. § 1252(e)(2) and 28 U.S.C. § 1331, and raises two claims. *First*, he claims that because the U.S. Customs and Border Protection ("CBP") officers who determined him to be inadmissible and issued him an expedited removal order were not appointed pursuant to the Appointments Clause of the U.S. Constitution, art. II, § 2, cl. 2, he was not "ordered removed," and this Court therefore has jurisdiction to review his expedited removal order under § 1252(e)(2)(B). *See generally* Pet. ¶¶ 90-95. *Second*, he claims that his visa was invalidly revoked under the APA due to a scrivener's error[2] and the allegedly improper appointment of a CBP office under the Appointments Clause. *See generally id*. ¶¶ 96-100.

Petitioner's challenge to the Government's longstanding policies for hiring immigration officers runs headlong into several threshold jurisdictional problems. First among them is that while Petitioner styles his claim as a request for individualized habeas relief under § 1252(e)(2), it

[1] For purposes of this brief, the term noncitizen is used coextensively with the term alien, as used in 8 U.S.C. § 1252.

[2] Petitioner alleges that a CBP officer wrote the wrong regulatory section on his visa when revoking it, but also admits that this was an "apparent scrivener's error." Pet. p. 22, n.11.

is in effect a systemic challenge to the expedited removal system, which may only be brought under § 1252(e)(3). Petitioner does not purport to bring his claim under § 1252(e)(3), *see* Pet. ¶¶ 7-10, in an effort to avoid the time bar for § 1252(e)(3) claims, which plainly precludes his challenge. But his attempts to find jurisdiction elsewhere are unavailing. Petitioner is not—and was not at the time the Petition was filed—in custody, as required for habeas jurisdiction under § 1252(e)(2). Being "in custody" is a basic prerequisite for filing a petition for writ of habeas corpus under 28 U.S.C. § 2241, which governs all habeas petitions in federal court, including those brought under § 1252(e)(2). Furthermore, even if Petitioner was "in custody" for purposes of his habeas claim, his attempt to assert jurisdiction under § 1252(e)(2) fails because the Petition does not fall within any of the limited permissible bases for review under that section: he admits that he is an alien, that he was ordered removed, and that he was never admitted for permanent residency, admitted as a refugee, or granted asylum. *See* 8 U.S.C. § 1252(e)(2)(A)-(C). His attempt to assert jurisdiction under 28 U.S.C. § 1331 fares no better, because any jurisdiction relating to orders of expedited removal must be found in § 1252(e).

Even if Petitioner could overcome these complete jurisdictional deficiencies, Petitioner also lacks standing to seek nearly all of his requested relief because, under 8 U.S.C. § 1252(e)(4), the only available remedy for his claim is a hearing before an IJ. Accordingly, Petitioner cannot show redressability for nearly all of the relief sought in his Prayer for Relief.

II. Background.

Legal Background. Congress has plenary power to make policies and rules for the admission and exclusion of noncitizens. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977). The Supreme Court has recognized the political branches' broad power over immigration is "at its zenith at the international border," including "the entry of unwanted person and effects." *United States v.*

Flores-Montano, 541 U.S. 149, 152–153 (2004). It has explained that the power to admit or exclude noncitizens is a sovereign prerogative vested in the political branches and "it is not within the province of any court, unless expressly authorized by law, to review [that] determination." *United States ex rel Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see also Kleindienst v. Mandel*, 408 U.S. 753, 765–766 & n.6 (1972) (noting that "the Court's general reaffirmations [of the political Branches' exclusive authority to admit or exclude noncitizens] have been legion"). Accordingly, the Supreme Court "without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess the characteristics which Congress has forbidden." *Kleindienst*, 408 U.S. at 766.

Exercising that plenary authority, in 1996 Congress created the "expedited removal" system. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress authorized the Department of Homeland Security ("DHS") to summarily remove certain inadmissible noncitizens who are arriving in the United States or who illegally crosses the border. *See* 8 U.S.C. § 1225(b)(1). Under this summary-removal mechanism—known as expedited removal—certain noncitizens who lack valid entry documentation or make material misrepresentations shall be "order[ed] . . . removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution." *Id.* § 1225(b)(1)(A)(i); *see id.* § 1182(a)(6)(C), (a)(7); *accord DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1964-1967 (2020) (discussing expedited removal).

Implementing regulations establish procedures the agency uses before implementing an expedited removal order. Immigration officers must, among other things, "advise the alien of the charges against him or her," provide "an opportunity to respond to those charges in the sworn statement," and provide an interpreter if needed. 8 C.F.R. § 235.3(b)(2)(i). And "any removal

order," the "sworn statement," and any claims concerning a noncitizen's status "must be reviewed and approved by the appropriate supervisor before the order is considered final." *Id.* § 235.3(b)(7).

If the noncitizen "indicates either an intention to apply for asylum . . . or a fear of persecution," the inspecting officer must "refer the alien for" an interview conducted by an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii). At the interview, an asylum officer assesses whether the noncitizen has a "credible fear of persecution." *Id*. § 1225(b)(1)(B)(v).[3] A credible-fear interview then assesses whether the noncitizen has a plausible basis to pursue asylum, which would allow the noncitizen to remain in the United States for that purpose despite his inadmissibility. *See id.*; *id.* § 1158.

If the asylum officer determines that the noncitizen has a credible fear, the officer refers him for removal proceedings under 8 U.S.C. § 1229a where he may apply for asylum and other protections from removal. *Id.* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). Section 1229a removal proceedings provide more extensive procedures than expedited removal, *compare* 8 U.S.C. § 1229a *with id.* § 1225(b)(1), including a right to appeal to the Board of Immigration Appeals ("Board") and a federal appellate court. *Id.* § 1252(a)(1). If the asylum officer determines that the noncitizen lacks a credible fear, he or she may seek *de novo* review of the credible-fear determination before an IJ. *Id.* § 1225(b)(1)(B)(iii)(I), (III). If the IJ concludes that the noncitizen has established a credible fear, the asylum officer's decision is vacated and the noncitizen is placed in § 1229a removal proceedings. 8 C.F.R. § 1003.42(f). If the IJ finds that the noncitizen lacks a credible fear, the he or she is "removed from the United States without further hearing or review." 8 U.S.C. § 1225(b)(1)(B)(iii)(I); 8 C.F.R. § 1208.30(g)(2)(iv)(A). The Immigration and National

[3] Noncitizens are also screened for eligibility for withholding of removal and protection under the Convention Against Torture (CAT). 8 C.F.R. §§ 208.30(e)(2), 235.3.

Act ("INA") precludes further review by the Board or any court of the credible-fear determination. 8 U.S.C. §§ 1225(b)(1)(C), 1252(a)(2)(A)(iii), 1252(e)(2); 8 C.F.R. § 1003.42(f).

This lawsuit. According to the allegations in the Petition, Petitioner I.M. is a foreign citizen. Pet. ¶ 12. On August 23, 2019, Petitioner was granted a two-year B1/B2 business/tourism visa by a Foreign Service Officer in the U.S. State Department. *Id*. On October 29, 2020, Petitioner flew to the United States. *Id*. ¶ 28. Upon his arrival in the United States, Petitioner was inspected for admission. *Id*. ¶¶ 29-30. After inspection, Respondent Klein determined that Petitioner was inadmissible to the United States, revoked his visa, and ordered him expeditiously removed from the United States. *Id*. ¶¶ 31, 33. Petitioner expressed a fear of return to his home country and was accordingly referred for a credible fear interview. *Id*. ¶ 35. An asylum officer did not find a credible fear of persecution or torture, and an IJ agreed with that determination. *Id*. After the credible fear proceedings concluded, on November 27, 2020, Petitioner was removed from the United States. *Id*. ¶¶ 37, 39. He filed the instant Petition for a writ of habeas corpus on December 8, 2021. *See* ECF No. 3.

III. Legal standard under Rule 12(b)(1).

Federal courts are courts of limited jurisdiction. A federal court is presumed to lack jurisdiction in a particular case unless jurisdiction is affirmatively established. *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 551 (2005); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Dismissal is appropriate under Rule 12(b)(1) when the district court lacks subject matter jurisdiction over the claim. *See* Fed. R. Civ. P. 12(b)(1).

A petitioner invoking the jurisdiction of a federal court bears the burden of establishing that the court has jurisdiction. *See U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-104 (1998)); *see*

also Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) ("[A] Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority."); *Pitney Bowes, Inc. v. USPS*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998). While a court must accept as true all of the Petitioner's factual allegations when reviewing a motion to dismiss under Rule 12(b)(1), *see Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), "'factual allegations . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge*, 185 F. Supp. 2d at 13-14 (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1990)). Additionally, the court may consider material outside the allegations in the complaint in determining whether it has jurisdiction. *See Jerome Stevens Pharmaceuticals, Inc. v. FDA*, 402 F.3d 1249, 1253-1254 (D.C. Cir. 2005); *St. Francis Xavier Parochial Sch.*, 117 F.3d at 624-625 n.3; *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

IV. Argument.

This Court lacks jurisdiction to entertain Petitioner's claims for several reasons. *First*, while Petitioner styles his claim as a request for individualized habeas relief under 8 U.S.C. § 1252(e)(2), it is better understood as an attempt to bring a systemic challenge under § 1252(e)(3). Section 1252(e)(3) offers the only possible basis for jurisdiction over his systemic constitutional claims, but that challenge is time-barred. *Second*, even under his purported basis for jurisdiction, § 1252(e)(2), there is no basis for the Court to exercise jurisdiction because he is not in custody, and does not meet any of the enumerated jurisdictional bases for § 1252(e)(2). There is also no jurisdiction under 28 U.S.C. § 1331 because § 1252(a)(2)(A) strips courts of jurisdiction

to review expedited removal orders outside of the specific review provisions of § 1252(e). Finally, Petitioner lacks standing to seek much of his requested relief.

A. This Court lacks jurisdiction to review the Petition.

Congress has carefully circumscribed the jurisdiction of federal courts to review any matters relating to expedited removal, and this Court lacks jurisdiction to review the Petition.

Section 1252(a)(2), titled "Matters not subject to judicial review," provides that, for "[r]eview relating to section 1225(b)(1)"—including any determination under § 1225(b)(1)—"***[n]otwithstanding any other provision of law*** . . . no court shall have jurisdiction to review . . . ***except as provided in subsection (e)*** [*i.e.*, § 1252(e)]," "any . . . cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)," "a decision . . . to invoke the provisions of such section," or "procedures and policies adopted . . . to implement the provisions of section 1225(b)(1)." 8 U.S.C. § 1252(a)(2)(A)(i), (ii), (iv) (emphases added). Section 1252(a)(2)(A)(iii) further eliminates jurisdiction—without any exception under subsection (e)—to review "the application of [section 1225(b)(1)] to individual aliens, including the determination made under section 1225(b)(1)(B)," that is, the determination whether a noncitizen has a credible fear. Section 1252(a)(2)(A) thus squarely removes from federal courts *any* jurisdiction to review issues "relating to section 1225(b)(1)," other than as explicitly "provided in subsection (e)." *Make the Rd. New York v. Wolf*, 962 F.3d 612, 626 (D.C. Cir. 2020); *see Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 818 (9th Cir. 2004) (§ 1252(a)(2)(A) bars jurisdiction unless § 1252(e) restores it where the underlying claims "ask[s] to nullify the continuing effects of that order"). Section 1252(a)(2)(A) therefore eliminates the general federal question statute, 28 U.S.C. § 1331, as a basis for district court jurisdiction and restricts any challenge to an expedited removal order under § 1225(b)(1) to the means provided in § 1252(e).

See Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (phrase "notwithstanding any other provision of law" in jurisdictional provision encompasses 28 U.S.C. § 1331).

Section 1252(e), in turn, permits two limited types of judicial review of orders of expedited removal. *First*, § 1252(e)(2) provides limited *habeas* jurisdiction to review only three factual issues concerning an expedited removal order: "(A) whether the petitioner is an alien; (B) whether the petitioner was ordered removed under [the expedited removal statute, 8 U.S.C. § 1225], and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee . . . or has been granted asylum[.]" 8 U.S.C. § 1252(e)(2)(A)-(C). The Court's review under subsection (B) is narrow: "In determining whether an alien has been ordered removed under" the expedited removal provisions, "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner," and "[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." *Id*. § 1252(e)(5).

Second, § 1252(e)(3), titled "[c]hallenges on [the] validity of the system," authorizes "[j]udicial review of determinations under section 1225(b) of this title and its implementation" in the United States District Court for the District of Columbia, "limited to determinations of—(i) whether [§ 1225(b)], or any regulation issued to implement such section, is constitutional; or (ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General [or Secretary] to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A). Such suits "must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure . . . is first

implemented." *Id.* § 1252(e)(3)(B). The "60-day requirement is jurisdictional rather than a traditional limitations period." *AILA*, 18 F. Supp. 2d at 47, *aff'd* 199 F.3d at 1356-1357.

1. Section 1252(e)(3) precludes this systemic challenge.

Although Petitioner purports to invoke § 1252(e)(2) as the basis for this Court's jurisdiction, the systemic challenge he raises concerning the expedited removal statute can only properly arise under § 1252(e)(3), if at all. Petitioner alleges that CBP officers lack constitutional authority to issue orders of expedited removal. *See generally* Pet. In other words, Petitioner challenges Congress's provision, through § 1225(b)(1), of authority to immigration officers to inspect applicants for admission to this country and to determine that such applicants are inadmissible or removable through the expedited removal process. *Id*. That is not a claim cognizable under the limited habeas jurisdiction available under § 1252(e)(2), *see infra*, and so Petitioner can only invoke this Court's jurisdiction to raise his systemic challenge to the authority of immigration officers to issue orders of expedited removal if he satisfies the requirements of § 1252(e)(3). That he cannot do.

Petitioner's systemic challenge is flawed at the outset because he does not assert jurisdiction under § 1252(e)(3) and it is therefore not a well-pled basis for jurisdiction. *See* Pet. ¶¶ 7-10; *see also* Fed. R. Civ. P. 8(a)(1) ("A pleading that states a claim for relief must contain . . . (1) a short and plain statement of the grounds for the court's jurisdiction[.]").

Further, any such challenge to Congress's chosen manner for appointing immigration officers is time-barred because a claim that challenges the statutory and regulatory implementation of expedited removal must be brought within 60 days of the date those procedures were "first implemented." 8 U.S.C. § 1252(e)(3)(B). As the D.C. Circuit has affirmed, the "60–day requirement is jurisdictional rather than a traditional limitations period." *AILA*, 18 F. Supp. 2d at

47, *aff'd* 199 F.3d at 1356-1357. That means the 60-day requirement "r[u]n[s] from a fixed point," rather than "from the date of application of [the challenged procedures] to a particular alien," such that when a particular noncitizen's claims "arise" is irrelevant. *See id.* The provision Petitioner challenges here was "first implemented" on April 1, 1997. *See* 8 U.S.C. § 1225(b)(1)(A); *AILA*, 199 F.3d at 1355. Accordingly, Petitioner's systemic challenge has been time-barred since May 31, 1997. *See id.*; *Dugdale v. U.S. C.B.P.*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015) ("[T]he Court finds that it lacks subject matter jurisdiction over Dugdale's constitutional challenge to the expedited removal system because he did not file it within 60 days after the contested provisions were implemented, as required by 8 U.S.C. § 1252(e)(3)."); *Vijender*, 2020 WL 1935556, *3-6 & n.5 (collecting cases); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 11 (D.D.C. 2020).

It is irrelevant that Petitioner raises an as-applied challenge to the provision of § 1225(b)(1) that allows immigration officers to inspect applicants for admission and place them in expedited removal proceedings.[4] A challenge to the application of the statute under which Petitioner's "case has been processed . . . is nothing but a thinly disguised challenge to the validity of the expedited removal system and is untimely under § 1252(e)(3)." *Khan v. Holder*, 608 F.3d 325, 330 (7th Cir. 2010); *see Brumme v. I.N.S.*, 275 F.3d 443, 449 (5th Cir. 2001) (explaining that plaintiff's "facial and as-applied constitutional challenges" to their expedited removal order were subject to "8 U.S.C. § 1252(e)(3)(A)"); *D.A.M. v. Barr*, No. 20-CV-1321 (CRC), 2020 WL 5525056, at *10

[4] Though not relevant to the jurisdictional issue before the Court, the Appointments Clause challenge now made by Petitioner could have been made at the time of the implementation of the expedited removal system. The Appointments Clause is as old as the Constitution itself, and the case law Petitioner cites for his Appointments Clause challenge largely predates the implementation of expedited removal, and thus the basis for his challenge existed within the 60-day period provided by Congress. *See, e.g.*, *Edmond v. United States*, 520 U.S. 651, 659 (1997); *Ryder v. United States*, 515 U.S. 177, 182–186 (1995); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 880–82 (1991). Any such challenge to expedited removal would clearly be time-barred now. *See* 8 U.S.C. § 1252(e)(3)(B) (60-day time bar).

(D.D.C. Sept. 15, 2020) ("§ 1252(e)(3) further bolsters the Court's conclusion that the INA likely bars petitioners' claim. In adopting § 1252(e)(3), Congress created an opportunity for noncitizens to challenge their expedited removal orders based on the alleged illegality of [the statute or] an agency rule—but only within the 60-day limitations period."); *Diaz Rodriguez v. U.S. Customs & Border Prot.*, No. 6:14-CV-2716, 2014 WL 4675182, at *4 (W.D. La. Sept. 18, 2014) ("[T]he court notes that it has no power to determine the constitutionality of the [provisions of § 1225(b)(1)] in general"), *vacated sub nom. Diaz-Rodriguez v. Holder*, No. 14-31103, 2014 WL 10965184 (5th Cir. Dec. 16, 2014).

Because Petitioner's claims on constitutional and APA grounds challenge a system that has existed for 24 years, Petitioner's suit is jurisdictionally barred and must be dismissed.

2. The Court lacks jurisdiction even under Petitioner's asserted jurisdictional bases.

Even assuming Petitioner's claims are properly understood as an individual habeas challenge, they fail because Petitioner is not in custody, a prerequisite for any habeas challenge, and because his claims are not cognizable under § 1252(e)(2). As explained, § 1252(e)(2) authorizes judicial review of such orders in "habeas corpus proceedings," limited only to the issues of whether the "petitioner is an alien," "was ordered removed under" the provision authorizing expedited removal, or "is an alien lawfully admitted for permanent residence" or "has been admitted as a refugee . . . or has been granted asylum . . . such status not having been terminated." Petitioner's challenge is not within the scope of this limited judicial review.

i. Petitioner is not in custody and cannot seek habeas relief.

Petitioner's assertion of habeas jurisdiction under § 1252(e)(2) fails because Petitioner was not "in custody" when he filed his Petition, nor is he currently in custody, as required by the federal habeas statute. *See* 28 U.S.C. § 2241(c)(3) (explaining that the writ shall not extend to a petitioner

unless "in custody"). This facial deficiency in the Petition is not remedied by the fact that Petitioner's claim arises under the provisions of § 1252(e)(2), as that statute merely limits the scope of habeas relief available under 8 U.S.C. § 2241(c)(1) and does not supersede the "in custody" requirement.

Pursuant to 28 U.S.C. § 2241, federal courts have jurisdiction to issue writs of habeas corpus only where the petitioner is "*in custody* in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241(c)(1), (3) (emphasis added); *see Maleng v. Cook*, 490 U.S. 488, 490 (1989) ("The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are 'in custody in violation of the Constitution or laws or treaties of the United States.'").

In 1996, Congress enacted IIRIRA, which created the expedited removal system. *See generally Thuraissigiam*, 140 S. Ct. at 1963. IIRIRA "crafted a system for weeding out patently meritless claims [for admission] and expeditiously removing the aliens making such claims from the country." *Id*. Members of Congress viewed expedited removal as necessary to curtail incentives for noncitizens to come to the country based on an "expect[ation] that" they may "remain indefinitely in the United States," H.R. Rep. No. 104-469 at 225-226, to combat the "crisis" of "hundreds of thousands of illegal aliens" entering each year, *id*. at 107, and "to expedite the removal . . . of aliens who indisputably have no authorization to be admitted," H.R. Rep. 104-828 at 209; *see also Kucana v. Holder*, 558 U.S. 233, 249 (2010). Relevant to this case, IIRIRA placed "restrictions on the ability" of noncitizens like Petitioner "to obtain review under the federal habeas statute." *Thuraissigiam*, 140 S. Ct. at 1963. In other words, the limits on habeas relief that Congress enacted in § 1252(e)—which provide that a court may "order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title" 8

U.S.C. § 1252(e)(4)—modify the scope of proceedings and relief available to noncitizens under the general habeas statute, 28 U.S.C. § 2241.

IIRIRA did not, however, modify the federal habeas statute's jurisdictional requirement that petitioners be "in custody" to file a petition, and courts have accordingly recognized that they lack jurisdiction to review § 1252(e)(2) claims brought by noncitizens after being released from custody. *See Leal Santos v. Gonzales*, 495 F. Supp. 2d 180, 183 (D. Mass. 2007) ("Courts do retain a tiny sliver of habeas jurisdiction with respect to petitioners claiming that they are citizens. 8 U.S.C. § 1252(e)(2)(A) . . . When, however, deportation precedes the habeas petition, courts have held that they lack jurisdiction because the 'in custody' jurisdictional requirement is not satisfied."), *aff'd sub nom. Leal Santos v. Mukasey*, 516 F.3d 1 (1st Cir. 2008);[5] *see also Sadhvani v. Chertoff*, 460 F. Supp. 2d 114, 118-119 (D.D.C. 2006) (collecting cases and finding that "the controlling limit [of custody] in this case is the consistent holding of federal courts that an alien who has already been removed from the United States and who files a habeas petition after his removal cannot satisfy the custody requirement.").

This custodial requirement is consistent with the traditional understanding of habeas relief. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("It is clear . . . from the common-law history of the writ . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody"); *cf. Thuraissigiam*, 140 S. Ct. at 1963 (holding that the Suspension Clause did not extend to petitions for habeas corpus seeking an additional opportunity to claim asylum

[5] The Ninth Circuit, in *Smith v. U.S. Customs & Border Prot.*, "[a]ssum[ed], without deciding, that there is no custody requirement under § 1252(e)(2)." *See* 741 F.3d 1016, 1020 (9th Cir. 2014). That determination was, by the panel's own admission, *dicta*. The issue of whether § 1252(e)(2) requires the petitioner to be "in custody" for purposes of the federal habeas statute was, moreover, not briefed in that case. *See id.* at 1020 n.3.

because "[h]abeas has traditionally provided a means to seek *release* from unlawful detention"). And it is further consistent with Congress's decision to provide limited relief *in habeas* for those noncitizens who want to challenge an order of expedited removal, as such noncitizens are typically subject to mandatory detention. *See* 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV) (providing for detention). Indeed, Petitioner was detained in the United States for about a month while he underwent credible fear proceedings, and could have filed his Petition while he was detained. *See* Pet. ¶ 28 (Petitioner flew to U.S. October 29, 2020), ¶¶ 37, 39 (Petitioner was removed from the United States November 27, 2020).

Accordingly, because Petitioner was not in custody when he filed the Petition—nor in custody now—the Petition must be dismissed.

ii. Even if Petitioner was in custody when he filed this suit, this Court would lack jurisdiction under 8 U.S.C. § 1252(e)(2) and 28 U.S.C. § 1331.

Even if Petitioner were in custody when he filed his habeas petition, this Court still lacks jurisdiction to review his claims due to the jurisdiction stripping provisions of 8 U.S.C. § 1252(a)(2)(A). That provision removes this Court's jurisdiction to hear Petitioner's claims under his purported bases for jurisdiction: § 1252(e)(2)(B) and general federal question jurisdiction under 28 U.S.C. § 1331. Pet. ¶¶ 7-10. Neither section provides jurisdiction here and the Petition therefore must be dismissed.

As explained, § 1252(e)(2) supplies limited jurisdiction in habeas corpus for review of expedited removal orders, but permits review of only three issues: "(A) whether the petitioner is an alien; (B) whether the petitioner was ordered removed under [the expedited removal statute, 8 U.S.C. § 1225], and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee . . . or has been granted asylum[.]" 8 U.S.C. § 1252(e)(2)(A)-(C). "In determining whether an alien

has been ordered removed under" the expedited removal provisions, "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner." *Id.* § 1252(e)(5). Moreover, if § 1252(e)(2) applies, as Petitioner asserts, then § 1252(e)(1)(A) strips the court of any authority to "enter declaratory, injunctive, or other equitable relief . . . except as specifically authorized in a subsequent paragraph of this subsection." *Id.* § 1252(e)(1)(A); *see also Grace v. Barr*, 965 F. 3d 883, 907 (D.C. Cir. 2020) (explaining that § 1252(e)(1)(A) bars any equitable relief, injunctive, declaratory, or otherwise, in any "action[]" arising under § 1252(e)(2) "pertaining to an order to exclude an alien in accordance with section 1225(b)(1)").

The Petition does not raise a challenge on any of the three bases permitted by § 1252(e)(2), and the Court therefore lacks jurisdiction over the Petition. Petitioner concedes that he is an alien, that he was issued an order of expedited removal, and makes no claim that he is an "alien lawfully admitted for permanent residence . . . as a refugee . . . or [] granted asylum[.]" 8 U.S.C. § 1252(e)(2)(A)-(C). That dooms his Petition because federal courts lack jurisdiction to consider *any* collateral challenge to an expedited removal order—including whether noncitizens are "entitled to any relief from removal," *id.* § 1252(e)(5)—beyond these three permissible bases. *See Garcia de Rincon*, 539 F.3d 1133, 1140 (9th Cir. 2008) (petitioner "does not contest her expedited removal order on any of the enumerated permissible grounds in § 1252(e)—this court therefore has no jurisdiction to hear it." (collecting cases)); *see also Castro v. DHS*, 835 F.3d 422, 432 (3d Cir. 2016) (under § 1252(e) only "two issues were properly before the district court: whether the order removing the petitioner was in fact issued, and whether the order named the petitioner"); *Brumme*, 275 F.3d at 448 (characterizing argument that courts have jurisdiction under § 1252(e)(2)(B) to determine whether the expedited removal statute "was applicable in the first place" as an attempt to make "an end run around" the "clear" language of § 1252(e)(5)); *Shunaula v. Holder*, 732 F.3d

143, 145-147 (2d Cir. 2013) (similar); *Khan v. Holder*, 608 F.3d at 329–330 (similar); *M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F.Supp.3d 1156, 1163–1164 (D.N.M. 2014) (similar), *vacated as moot*, No. 14–769, 2015 WL 7454248 (D.N.M. Sept. 23, 2015); *Diaz Rodriguez*, 2014 WL 4675182, at *2 (similar).

Petitioner also asserts jurisdiction under 28 U.S.C. § 1331. But as explained, if jurisdiction exists for "judicial review 'relating to section 1225(b)(1),'" it exists only "as provided in subsection (e)." *Make the Rd.*, 962 F.3d at 626; *accord Castro*, 835 F.3d at 430, 432 (collecting cases) ("The expedited removal statutes are express and unambiguous. The clarity of the language forecloses acrobatic attempts at interpretation" and "makes abundantly clear that if jurisdiction exists to review any claim related to an expedited removal order, it exists only under subsection (e) of the statute."); *see also L.M.-M.*, 442 F. Supp. 3d 1 (similar); *Vijender v. Wolf*, No. 19-CV-3337 (APM), 2020 WL 1935556, *5 (D.D.C. Apr. 22, 2020) (same, collecting cases). Petitioner's claims are therefore barred by § 1252.

The Petition suggests jurisdiction may exist based on the reasoning of *Dugdale v. U.S. Customs and Border Protection*, 88 F.Supp.3d 1 (D.D.C. 2015), *see* Pet. ¶ 8, but the facts of this case are very different. In *Dugdale*, a noncitizen who had lived for extended periods in the United States was ordered expeditiously removed under § 1225(b)(1) after trying to return to the country following a visit to Canada. *Dugdale*, 88 F. Supp. 3d at 5-6. He filed a habeas petition challenging his removal order under § 1252(e)(2). In his Petition he claimed that because his removal order was not signed by the supervisor of the issuing immigration officer, as required by regulation, he was not actually "ordered removed" under § 1225(b)(1). *See id.* at 6. While recognizing that the "[c]ase law on this question is scarce," the Court concluded "that a determination of whether a removal order 'in fact was issued' fairly encompasses a claim that the order was not lawfully issued

due to some procedural defect." *Id.* (quoting 8 U.S.C. § 1252(e)(5)). Because the claim that the supervisor failed to sign the removal order at issue "f[ell] within that category of claims," *id.*, the court exercised jurisdiction and ordered further briefing to determine if the CBP had complied with its own regulations in issuing his removal order.

Petitioner's case is different from *Dugdale* because there is no reasonable dispute that the expedited removal order here "in fact was issued." 8 U.S.C. § 1252(e)(5). In *Dugdale*, the issue of whether the order was actually signed "was at least arguably related to the question whether a removal order 'in fact was issued'" to the noncitizen in question. *Castro*, 835 F.3d at 433. As Judge Cooper (who decided *Dugdale*) has subsequently observed, even where there is a "basis to argue that petitioners' removal orders were ***unlawfully issued***" . . . "*Dugdale* demands more: petitioners must raise a claim that their removal orders were, as a matter of law, *not* issued." *D.A.M.*, 2020 WL 5525056, at *11 (first emphasis added).

Petitioner cannot claim that his expedited removal order was, "as a matter of law, *not* issued."[6] *Id.* The alleged flaw he points to—that his order of expedited removal was issued by officers who are not properly appointed under the Appointments Clause—does not represent a procedural or substantive flaw in his case demonstrating that his removal order was "*not* issued." Section 1252(e)(5) makes clear that review under § 1252(e)(2) is limited to whether the order "***in fact was issued***," 8 U.S.C. § 1252(e)(5) (emphasis added), not whether some *subsequent* determination of a legal defect might have later impacted the order. *See also id.* §§ 1252(e)(2)(C),

[6] Petitioner is mistaken to the extent he suggests that the alleged "apparent scrivener's error" on his revoked visa, *see* Pet. p. 22, n.11, creates a question as to whether his order of removal "was issued" under *Dugdale*. The issue of *why* his visa was revoked is distinct from the question of whether an order of expedited removal was issued, and, further, he admits that "the Court need not decide whether Respondents' apparent scrivener's error has any consequences for the legality of their purported revocation." Pet. p. 22 n.11.

(e)(4) (phrasing permitted review in the past tense). Had Congress intended to permit challenges to the constitutional or statutory authority for issuing an order of expedited removal under § 1252(e)(2), it would have stated as much. *Thuraissigiam v. DHS*, 917 F.3d 1097, 1103, 1116, 1118, 1119 (9th Cir. 2019) (concluding that "statutory, regulatory, and constitutional claims" fell beyond the scope of review permitted under § 1252(e)(2)) *rev'd and remanded on other grounds*, 140 S. Ct. 1959 (2020). But it did not do so. Rather, it limited review to "whether an immigration officer issued [a] piece of paper" called an expedited removal order "and whether the Petitioner is the same person referred to in that order." *Castro*, 835 F.3d at 431 (collecting cases). Here, there is no question "that [a] piece of paper" called an order of expedited removal was issued to Petitioner and that "Petitioner is the same person referred to in the order." *Castro*, 835 F.3d at 431. Accordingly this case, "[u]nlike *Dugdale* . . . is about whether the government may lawfully implement the removal orders it has issued, not whether it issued those orders at all." *D.A.M.*, 2020 WL 5525056, at *11 (further concluding that "Section 1252(e)(2)(B) provides no jurisdiction over such a claim").[7]

3. The APA does not provide jurisdiction to hear Petitioner's claims.

The APA does not change the jurisdictional analysis. The APA "is not a jurisdiction-

[7] While Petitioner's claim fails even under the more lenient approach adopted in *Dugdale*, that approach is also an outlier view. *See Castro*, 835 F.3d at 433. Moreover, the Supreme Court's recent decision in *Thuraissigiam* left undisturbed the Ninth Circuit's conclusion that § 1252(a)(2)(A) and (e)(2) bar review of "statutory, regulatory, and constitutional claims" challenging expedited removal orders. *Thuraissigiam*, 917 F.3d at 1103, 1116, 1118-1119; *East Bay Sanctuary Covenant v. Barr*, No. 19-CV-04073-JST, 2020 WL 6588737, at *7 (N.D. Cal. Nov. 10, 2020) (same). *Thuraissigiam* reaffirms that § 1252(a)(2)(A), read with § 1252(e)(2), bars "review of an expedited removal order, including . . . related matters affecting those orders." *Singh v. Barr*, 982 F.3d 778, 782, 784 (9th Cir. 2020); *accord Castro*, 835 F.3d t 428 n.8, 430-434 (collecting cases and explaining the prevailing view that §§ 1252(a)(2)(A) and (e)(2) bar habeas petitions seeking to block expedited removal where immigration officers allegedly committed procedural errors or applied the wrong substantive standard).

conferring statute." *Trudeau v. FTC*, 456 F.3d 178, 183 (D.C. Cir. 2006) (citing *Califano v. Sanders*, 430 U.S. 99, 107 (1977)). Rather, jurisdiction to hear APA claims is typically granted under the general federal-question statute, 28 U.S.C. § 1331. *See id.* at 185. Petitioner here invokes § 1331 as the basis for his APA claim, *see* Pet. ¶¶ 7, 10, but the APA itself explains that it does not apply "to the extent that . . . statutes preclude judicial review." 5 U.S.C. § 701(a)(1); *accord Webster v. Doe*, 486 U.S. 592, 599 (1988) ("Section 701(a) . . . limits application of the entire APA to situations in which judicial review is not precluded by statute."). IIRIRA is just such a statute, and accordingly the APA itself disclaims any jurisdiction to hear I.M's claim under § 706. *See supra* 7-8.

As explained, IIRIRA removes the Court's jurisdiction to review an order of removal pursuant to § 1225(b)(1) "except as provided in" § 1252(e). 8 U.S.C. § 1252(a)(2)(A)(i). Subsection (e), in turn, removes the Court's jurisdiction to provide relief, "[w]ithout regard to the nature of the action or claim," save for two specific carve outs: (1) limited habeas corpus proceedings under § 1225(e)(2); and (2) limited systemic challenges under § 1225(e)(3). *See id.* § 1225(e)(1)-(3); *see also Grace*, 965 F.3d at 909 (Henderson, J., dissenting) (explaining that § 1252(a)(2)(A) "sharply circumscribed the availability of judicial review related to expedited removal . . . providing only a narrow path for challenges to the expedited removal system…and for limited habeas review").

Petitioner's APA claim falls into neither of these narrow exceptions. *First*, his claim for statutory relief under the APA falls outside the limited habeas jurisdiction provided in § 1252(e)(2). That section provides judicial review of limited factual issues "in habeas corpus proceedings." 8 U.S.C. § 1252(e)(2). As the Ninth Circuit has explained, § 1252(e)(2) does not "authorize[] review of the statutory, regulatory, and constitutional claims raised in [a] habeas

petition." *Thuraissigiam*, 917 F.3d at 1103;[8] *cf. United States v. Barajas-Alvarado*, 655 F.3d 1077, 1082 (9th Cir. 2011) ("[A] court's habeas jurisdiction [under § 1252(a)(2)(A) and § 1252(e)(2)] does not extend to review of the claim that an alien was wrongfully deprived of the administrative review permitted under the statute and applicable regulations"). Petitioner's claim that the revocation of his visa was "in excess of statutory authority" under the APA (Pet. ¶ 98) is therefore beyond the scope of such habeas proceedings. *See supra* 11-18.

Courts routinely decline to hear APA and other statutory challenges where jurisdiction is precluded under IIRIRA. For example, in *Mohit v. DHS*, the district court determined it lacked jurisdiction to hear a challenge to an expedited removal order under the jurisdiction-stripping provisions of § 1252(a)(2)(A) and § 1252(e)(2). *See* 478 F. Supp. 3d 1106, 1110-1112 (D. Colo. 2020). The petitioner argued the Court still had jurisdiction to hear his challenge under both the APA and the Declaratory Judgment Act. *Id.* at 1113. The court rejected that argument, explaining that neither statute provided an "independent basis of jurisdiction," and that the APA expressly disclaimed jurisdiction where another statute precludes judicial review. *Id.* (citing 5 U.S.C. § 701(a)). The court therefore dismissed those claims for lack of jurisdiction. *Id.* Myriad other district courts, specifically in the context of § 1252(e)(2), have dismissed APA claims on similar grounds.[9] *See, e.g.*, *E. Bay Sanctuary*, 2020 WL 6588737, at *7 (concluding § 1252(a)(2)(A) and

[8] Although the Ninth Circuit panel determined that § 1252(e)(2) stripped jurisdiction to hear such statutory, regulatory, and constitutional claims, it went on to hold that § 1252(e)(2) violated the Suspension Clause of the U.S. Constitution. *See Thuraissigiam*, 917 F.3d at 1118. The Supreme Court reversed that determination, concluding that § 1252(e)(2) did not violate the Suspension Clause under the facts presented. *See Thuraissigiam*, 140 S. Ct. at 1983.

[9] Other courts have found a lack of jurisdiction to hear APA claims, on essentially identical reasoning, concerning reinstated expedited removal orders under 8 U.S.C. § 1231(a)(5). *See, e.g.*, *Delgado v. Quarantillo*, 643 F.3d 52, 55-56 (2d Cir. 2011); *Wei Chen v. Napolitano*, No. 12 CIV. 4620 JMF, 2012 WL 5458064, at *3 (S.D.N.Y. Nov. 8, 2012); *Ying Lin v. DHS*, No. 15-CV-5588

§ 1252(e)(2) removed jurisdiction to hear APA claim under general federal-question statute); *Rodrigues v. McAleenan*, 435 F. Supp.3d 731, 736-37 (N.D. Tex. 2020) (concluding "8 U.S.C. § 1252(e)(2) 'preclude[s] judicial review' of Mr. Rodrigues's APA claims."); *Nianga v. Wolfe*, 435 F. Supp. 3d 739, 744 (N.D. Tex. 2020) (concluding § 1252(a)(2)(A) and § 1252(e)(2) removed jurisdiction to hear claims under 28 U.S.C. § 1331, the APA, the INA, the Habeas Statute, and the Suspension Clause); *Singh v.USCIS*, No. C19-1873JLR-MLP, 2020 WL 3163225, at *2 (W.D. Wash. June 12, 2020) (similar); *Arandi v. Morgan*, No. CV 19-12351-RGS, 2020 WL 1891949, at *1 (D. Mass. Apr. 16, 2020) (similar); *Shah v. Dir., Jackson Par. Correctional Ctr.*, No. 3:19-CV-1164, 2019 WL 4254139, at *3 (W.D. La. Sept. 6, 2019) ("Given the applicability of § 1252(e)(2), under which this Court has no jurisdiction to review or set aside Shah's order of expedited removal, judicial review under the APA is also unavailable."); *Hidalgo-Mejia v. Pitts*, 343 F. Supp. 3d 667, 673 (W.D. Tex. 2018) ("As § 1252(e)(2) strips this Court of jurisdiction to review or set aside Petitioner's order of expedited removal, judicial review under the APA is not available. Accordingly, this Court also lacks jurisdiction to consider Petitioner's claims pursuant to the APA.").[10]

Second, for essentially the same reasons explained *supra*, Petitioner's APA claim does not

(PKC), 2017 WL 818416, at *6 (E.D.N.Y. Mar. 1, 2017) (collecting cases), *aff'd sub nom. Ying Lin v. DHS*, 699 F. App'x 44 (2d Cir. 2017).

[10] A number of magistrate judges have also reached the same conclusion and, in each case, had their reports and recommendations adopted by district courts. *See, e.g., Quintero-Prieto v. Barr*, No. CV2001168PHXDLRDMF, 2020 WL 6216949, at *6 (D. Ariz. Sept. 29, 2020) ("Because 8 U.S.C. § 1252(a)(2)(A) precludes judicial review of claims relating to expedited removal orders except as provided in § 1252(e)(2), the APA does not provide an alternative basis for subject-matter jurisdiction."); *Kumar v. Wolf*, No. CV2000814PHXSPLESW, 2020 WL 5505418, at *4 (D. Ariz. Aug. 17, 2020) (same); *Singh v. Wolf*, No. 20-CV-0539, 2020 WL 3424850, at *4 (W.D. La. May 13, 2020) (similar); *Mehta v. Gillis*, No. 5:20-CV-80-KS-MTP, 2020 WL 6792676, at *2 (S.D. Miss. May 29, 2020) (similar); *Reyes v. Nielsen*, No. CV H-18-3971, 2020 WL 1442349, at *4 (S.D. Tex. Feb. 6, 2020) ("[T]he Court lacks jurisdiction to consider Plaintiff's APA claim [under § 1252(a)(2)(A)].").

fall within the scope of § 1252(e)(3). The Petition does not purport to bring a claim under § 1252(e)(3), and the jurisdictional section of the Petition identifies only § 1252(e)(2)(B) and 28 U.S.C. § 1331 as grounds for jurisdiction. *See* Pet. ¶ 7. The Petition also makes no effort to demonstrate compliance with the 60-day time bar established for claims brought under § 1252(e)(3). *See* 8 U.S.C. § 1252(e)(3)(B) (providing deadlines for bringing such actions).

IIRIRA therefore "precludes judicial review" as contemplated by the APA, and Petitioner's APA claim does not fall within the narrow exceptions to that jurisdiction-stripping statute. The APA therefore offers no basis for hearing Petitioner's second claim.

V. Petitioner lacks standing to seek relief beyond a new hearing before an immigration judge.

Petitioner also lacks standing to seek most of the relief requested in his Petition. Standing requires the Petitioner to establish the irreducible constitutional minimum of injury-in-fact, causation, and redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). But Petitioner cannot establish redressability for most of his requested relief because IIRIRA cabins any possible remedy to "a hearing in accordance with section 1229a of this title." 8 U.S.C. § 1252(e)(4)(B). Even if Petitioner brought a proper and meritorious habeas claim under § 1252(e)(2)—and he has not, *see supra* 7-22—he would not be entitled to the various declaratory relief he seeks or the reinstatement of his visa.

Petitioner brings his habeas claim under § 1252(e)(2)(B), *see* Pet. ¶ 7, which permits a noncitizen to challenge "whether [he] was ordered removed" under the expedited removal provisions of § 1225(b). *See* 8 U.S.C. § 1252(e)(2)(B). IIRIRA prescribes the specific remedy available for a claim brought under that subsection: "In any case where the court determines that the petitioner . . . (A) ***is an alien who was not ordered removed under section 1225(b)(1) of this title*** . . . (B) . . . the Court ***may order no remedy or relief other than to require that the petitioner***

be provided a hearing in accordance with section 1229a of this title." 8 U.S.C. § 1225(e)(4)(A)-(B) (emphases added). Section 1229a, in turn, provides that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. 1229a(a)(1).[11] In other words, when a Petitioner chooses to challenge an expedited removal order through § 1252(e)(2)(B), as Petitioner has done here, relief is statutorily limited to a hearing before an IJ. *See Grace*, 965 F.3d at 908 (explaining that in the context of claims under subsection (e)(2), "[s]ubsection (e)(4), in turn, specifies the relief available in such cases, namely, 'a hearing in accordance with section 1229a.'"); *Singh*, 2020 WL 872666, at *4 ("If a violation [of subsection (e)(2)(B)] is found, the only allowable relief is a removal hearing pursuant to 8 U.S.C. § 1229a."); Neuman, *Federal Courts Issues in Immigration Law*, 78 Tex. L. Rev. 1661, 1701 & n.77 (2000) (explaining the permissible challenges under § 1252(e)(2)(A)-(C) and that "Section 1252(e)(4) then provides that the only remedy for error with regard to (B) or (C) is to require a full administrative removal hearing under 8 U.S.C. § 1229a."); *see generally Thuraissigiam*, 140 S. Ct. at 1966 (explaining that "§ 1252(e)(2)[] limits the review that an alien in expedited removal may obtain via a petition for a writ of habeas corpus" and that "if a removal order has not 'in fact'

[11] Petitioner also has remaining routes for potential relief, and therefore this Petition is premature. Noncitizens like Petitioner who are "arriving aliens" and have been ordered removed following proceedings "initiated upon the aliens' arrival in the United States" are inadmissible if they "seek admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony)." 8 U.S.C. § 1182(a)(9)(A)(i). However, 8 U.S.C. § 1182(a)(9)(A)(iii) allows Petitioner to request a waiver of any inadmissibility based on the existence of a prior removal order. Specifically, an admissibility bar premised on a prior order of removal, including an order of expedited removal, "shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the [Secretary]" "has consented to the alien's reapplying for admission." *Id.* § 1182(a)(9)(A)(iii). A consented-to waiver therefore would allow Petitioner to seek admission to the United States regardless of his prior order of removal. Petitioner has not sought such a waiver, nor explained why he has failed to seek one, rendering his lawsuit premature.

been 'issued,'" then "the court may order a removal hearing, § 1252(e)(4)(B)").

Courts have recognized in similar contexts that § 1252(e)(4) limits their ability to grant relief beyond a hearing before an IJ. For example, in *Kabenga v. Holder*, the petitioner challenged his expedited removal under § 1252(e)(2)(C) and sought various forms of relief, including several declarations as to his lawful permanent resident status and also injunctive relief barring the government from finding him inadmissible. *See* No. 1:14-cv-9084-ER, ECF No. 1 at 12 (S.D.N.Y. Nov. 14, 2014). Although the court granted his petition for a writ of habeas corpus, it ordered only that the Petitioner receive a "hearing . . . in accordance with section 1229a of the INA and the Due Process Clause of the United States Constitution." *Kabenga v. Holder*, No. 14 CIV. 9084 SAS, 2015 WL 728205, at *5 (S.D.N.Y. Feb. 19, 2015). The court explained that "[u]nder section 1252(e) of the INA," it "lack[ed] the power to grant Kabenga any relief apart from such a hearing." *Id.* at *5 n.55 (citing 8 U.S.C. § 1252(e)(4)(B)). Similarly, the Ninth Circuit has explained, in reviewing claims of asylum under 8 U.S.C. § 1158, that § 1252(b)(4)(D) grants federal courts the jurisdiction to determine whether the decision to deny asylum is "manifestly contrary to the law and an abuse of discretion," but that under § 1252(e)(4) courts "may order no remedy or relief other than to require that the petitioner be provided a hearing" before an IJ and thus "do not have authority to award asylum." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 759 (9th Cir. 2018) (explaining that a court reviewing an asylum decision "may order no remedy or relief other than to require that the petitioner be provided a hearing" before an IJ); *see also Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) ("If the district court had determined in such a habeas action that Sissoko was not 'ordered removed' under the expedited removal section . . . the statutory remedy would have been for the district court 'to require that the petitioner be provided a [regular removal] hearing.'" (quoting § 1252(e)(4))).

Section 1252(e)(4)'s statutory restriction on relief limits the Petitioner's standing to seek relief beyond that provided by the statute. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "Rather, a plaintiff must demonstrate standing for each claim he seeks to press and ***for each form of relief that is sought***." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (cleaned up and emphasis added). Establishing standing for each form of relief sought "rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377. Where, as here, the statute under which Petitioner seeks relief expressly limits the available kinds of relief, standing does not exist to seek other forms of redress. *See Chicago Dist. Council of Carpenters Pension Fund v. Zerth*, No. 00 C 6326, 2002 WL 485346, at *2 (N.D. Ill. Mar. 29, 2002) (explaining that "[i]n reality," the issues of standing and availability of statutory relief are "directly related" because "Plaintiffs only have standing to the extent that the statute provides them with a remedy").

Courts routinely find that statutory bars on relief act not only to restrict the remedies available on the merits, but also as limitations on standing. "In cases involving statutory rights, 'the particular statute and the rights it conveys [] guide the standing determination'" *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1114-1115 (9th Cir. 2014) (quoting *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170, 178 (2d Cir. 2012)); *accord Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[T]he standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."). Thus, for example, the district court in *Judicial Watch v. Nat'l Archives & Records Admin.* dismissed a claim for lack of standing where the relief sought—to declare certain audiotapes presidential records and to compel the National Archivist to take custody over them—was unavailable under the Presidential Records Act. *See* 845 F. Supp. 2d 288, 301 (D.D.C. 2012) (concluding "any injury plaintiff claims it suffered as a result would not

be redressable because there is nothing under the statute that the Court can compel the Archivist to do"); *see also Taylor v. McCament*, 875 F.3d 849, 854 (7th Cir. 2017) (concluding plaintiff could not establish redressability where statute precluded requested remedy); *Brooklyn Union Gas Co. v. Exxon Mobil Corp.*, 478 F. Supp. 3d 417, 432 (E.D.N.Y. 2020) (dismissing claim for lack of redressability where "requested relief" was "not available under the statute"); *Brown v. Berhndt*, No. 1:12-CV-00024-KGB, 2013 WL 1704877, at *5 (E.D. Ark. Apr. 19, 2013) (dismissing claim where the plaintiff's "injury cannot be redressed by a favorable decision because there is no remedy available to him on his claims under Title III of the ADA").

Because "the Court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title," 8 U.S.C. § 1225(e)(4)(A)-(B), the Petitioner cannot show standing "for each form of relief that is sought." *Davis*, 554 U.S. at 734. Accordingly, even if Petitioner could surmount the numerous jurisdictional defects *supra*, the Petition should be dismissed save as to any claim for a new hearing before an IJ.

VI. Conclusion.

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Petition for writ of habeas corpus and complaint. A proposed order is attached.

Dated: February 26, 2021

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