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' REPLY IN SUPPORT OF MOTION TO DISMISS THE PETITION

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INTRODUCTION

Petitioner is unhappy with Respondents' decision to order him removed from the country for intending to violate the terms of his visa and seeks to bring a habeas claim purporting to be a challenge to *his* order of expedited removal. But Petitioner's theory—that he was subject to a "blatant"[1] violation of the Appointments Clause—is improper under his asserted jurisdictional bases, 8 U.S.C. § 1252(e)(2) and 28 U.S.C. § 1331, and time-barred under the only potential basis for jurisdiction—8 U.S.C. § 1252(e)(3). And regardless of his protestations about this alleged violation, determining whether this Court has subject-matter jurisdiction over Petitioner's claims is a threshold issue that must be resolved before proceeding to the merits of the case. *See Martire v. Brinkley*, No. CV 12-970 (RC), 2012 WL 13046337, at *1 (D.D.C. Aug. 29, 2012) ("Prior to reaching the merits of a claim, federal courts must 'assure themselves of jurisdiction'" and "must address subject-matter jurisdiction prior to issuing a ruling on the merits." (quoting *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014)). "Before reaching the merits of plaintiff's claims, then, this Court must decide whether plaintiff is the proper person to bring the constitutional and statutory challenges he asserts, and whether plaintiff's challenges, as framed, state claims within the ambit of the Judiciary to resolve." *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) ("Unfortunately, however, no matter how interesting and no matter how important this case may be . . . we cannot address it unless we have jurisdiction." (quoting *United States v. White*, 743 F.2d 488, 492 (7th Cir. 1984))).

Because this Court lacks jurisdiction to hear Petitioner's claims, the Petition must be dismissed in its entirety.

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[1] Despite the supposed "blatant" nature of the violation that Petitioner alleges, Respondents are unaware of any similar challenge to the manner of hiring immigration officers, even though such officers have been issuing thousands of expedited removal orders annually since 1997.

ARGUMENT

I. This Court lacks jurisdiction under 8 U.S.C. § 1252(e)(2).

Petitioner asserts that his expedited removal order was "a nullity," Opp. at 6, and he was therefore not, in fact, ordered removed under § 1225(b)(1). He claims, as a result, that the Court has jurisdiction over this suit under § 1252(e)(2). Opp. at 6-9.

As explained in Respondents' motion to dismiss ("Mot."), section 1252(e)(2) outlines the basis for the limited jurisdiction for habeas corpus review of expedited removal orders, permitting 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). *See Castro v. DHS*, 835 F.3d 422, 432 (3d Cir. 2016) (under § 1252(e)(2) 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").

Petitioner goes to great lengths to assert that his expedited removal order was "void *ab initio*" and therefore he was not "ordered removed under section 1225(b)(1)," such that this Court can exercise jurisdiction under § 1252(e)(2)(B), but his theory does not square with the plain text of the statute, ignores case law, and has otherwise been rejected in numerous other cases. The statute requires that when "determining whether an alien has been ordered [expeditiously] removed" . . . "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) (emphasis added). The emphasis on the *fact* of issuance is the touchstone of the Court's inquiry. *See* Mot. at 14-16.

Petitioner's theory that his expedited removal order is "void *ab initio*" ignores that it *was in fact issued*. Indeed, he attaches that very order to his Petition, conclusively showing it was "in

fact" issued. *See* ECF No. 7-3 (Expedited Removal Order). Petitioner's argument misapprehends the meanings of the terms "void" and "nullity." Neither of those terms suggest that a deficient legal instrument did not exist *as a matter of fact*, but rather refer to an instrument "[o]f no *legal* effect," *see* Void, Black's Law Dictionary (11th ed.) (emphasis added) or to "[s]omething that is *legally* void," *id.*, Nullity (emphasis added). But section 1252(e)(5) expressly removes the Court's jurisdiction to review the legal efficacy of Petitioner's expedited removal order.

The way courts treat other allegedly "void" actions illustrates the point. While an action taken by an official appointed in violation of the Appointments Clause may be set aside as legally invalid, *see, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018), it does not follow that such an action ceases to exist "in fact," 8 U.S.C. § 1252(e)(5). Courts have upheld agency actions taken in violation of the Appointments Clause under curative doctrines such as the de facto officer doctrine, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (affording "de facto validity" to "past acts" of agency that was invalidly constituted in violation of Appointments Clause), or ratification by a properly appointed official, *see, e.g.*, *Moose Jooce v. FDA*, 981 F.3d 26, 28 (D.C. Cir. 2020) ("This court has repeatedly recognized that ratification can remedy a defect arising from the decision of an improperly appointed official . . . ."); *accord Guedes v. ATF*, 920 F.3d 1, 12-13 (D.C. Cir. 2019); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996). The existence of such doctrines belies Petitioner's claim that an Appointments Clause violation effectively means the action was never taken in the first place. The ability to cure a legally invalid action necessarily presupposes that there is *something* left that can be cured.

For example, the D.C. Circuit has "repeatedly recognized" that actions taken in violation of the Appointments Clause can be ratified. *Moose Jooce*, 981 F.3d at 28. When an action is ratified, the legal defect in the action is cured as of the date when the action was initially taken,

meaning the action "is treated as effective at the time [it] was done." *Advanced Disposal Serv. E., Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) ("[T]he ratification 'relates back' in time to the date of the act by the agent." (citation omitted) (cleaned up)). But a subsequent ratification could not cure an invalid action as of the date it was initially taken if, as Petitioner argues, the initial Appointments Clause violation expunges the initial action "in fact." Indeed, in *Legi-Tech*, the D.C. Circuit rejected a similar argument in the context of a structural separation-of-powers violation in the composition of the FEC's membership. 75 F.3d at 707. The plaintiff argued that an FEC civil enforcement action commenced by an FEC containing unconstitutionally appointed members could not be ratified by a duly constituted FEC because the initial constitutional violation rendered "the FEC's entire investigation and decision to file suit void *ab initio*," such that the FEC would need to "redo the statutorily required procedures in their entirety" to bring suit. *Id.* at 708. The D.C. Circuit disagreed, holding that the FEC could preserve the enforcement action by ratifying it, *id.* at 708—an outcome that would have been impossible had the initial constitutional violation rendered the enforcement action *factually nonexistent*. *See also CFPB v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016); *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 183-84 (D.D.C. 2016).

Petitioner's argument that an Appointments Clause violation erases an action from existence rests principally on the solitary use of the phrase "void *ab initio*" in the introduction of the D.C. Circuit's opinion in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014). But there, the court recognized nothing more than the straightforward principle that, if the petitioner was correct that several NLRB Board Members were appointed in violation of the Recess Appointments Clause, then the NLRB order at issue was *legally* ineffective at the time of its issuance. *See id.* at 492-93 (vacating enforcement order as "invalid"). Nothing in *Noel*

Canning stands for the much more sweeping proposition—on which Petitioner's jurisdictional argument necessarily rests—that an Appointments Clause violation means an order "*in fact* was [not] issued." 8 U.S.C. § 1252(e)(5) (emphasis added). Nor could it have, as it would have conflicted with the well-established curative doctrines discussed above, which are necessarily premised on the continued *existence* of actions taken in violation of the Appointments Clause. *See, e.g.*, *Legi-Tech*, 75 F.3d at 707; *Big Spring*, 197 F. Supp. 3d at 182 n.4 (observing, in Recess Appointments Clause challenge, that *Legi-Tech* "*expressly rejected*" argument that every action taken by invalidly appointed officer "is 'void *ab initio*'"); *see also Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (panel has "no 'authority to overturn a decision by a prior panel of this Court" (*quoting La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 390 (D.C. Cir. 2008)).

Furthermore, Petitioner's claim that his removal order was not issued is in tension with his claim that he "does not challenge anything subsequent to the order," Opp. at 8, because that is precisely what his theory of jurisdiction relies on and what fundamentally distinguishes this case from *Dugdale v. U.S. C.B.P.* 88 F. Supp. 3d 1 (D.D.C. 2015). In *Dugdale*, what made the expedited removal order invalid—or not issued, as a factual matter—was a missing signature evident *on the face of the order*. *See id.* at 7 ("[T]here is a space on the order itself for such a signature, as well as a box to indicate if the supervisor's approval was obtained by phone if no supervisor was on duty. . . . The order which CBP served on Dugdale—a copy of which he provided to the Court—does not bear a supervisor's signature or a checked box indicating remote approval."). This did not rely on a *subsequent legal determination*—e.g., the necessary subsequent legal determination that immigration officers must be appointed under the Appointments Clause that would be required here to find Petitioner's order invalid. No defect on the face of Petitioner's order could possibly

be identified under Petitioner's theory, nor does he point to one. In other words, unlike in *Dugdale*, Petitioners' concern is *how* his order was issued, and not *whether* it was issued.

Rather than *Dugdale*, then, this case is more akin to *D.A.M.*, where the petitioners advanced a similar theory that rested on a subsequent legal determination to argue that the Court had jurisdiction under section 1252(e)(2). *D.A.M. v. Barr*, No. 20-CV-1321 (CRC), 2020 WL 5525056 (D.D.C. Sept. 15, 2020). Petitioners there argued that their orders of expedited removal were invalid because they were premised on the interim final third-country transit rule,[2] which was set aside by a judge of this Court *after* their orders were issued, and that the court therefore had jurisdiction under section 1252(e)(2). *Id*. Using language identical to this case, they argued that "the Transit Ban is void *ab initio*, thus the credible fear determinations and subsequent review by an Immigration Judge required for a valid final order of removal, predicated on the heightened standard of the Transit Ban, are similarly void *ab initio.* Because, in effect, . . . Petitioners have no negative credible fear determinations, much less review by an Immigration Judge, their orders of removal are not final or executable, and do not justify removal*." D.A.M.*, 486 F. Supp. 3d at 419.

Judge Cooper (who decided *Dugdale*), rejected this argument, holding that the vacatur of the transit rule "may well provide a basis to argue that petitioners' removal orders were *unlawfully* issued. But section 1252(e)(2), as interpreted in *Dugdale* demands more: petitioners must raise a claim that their removal orders were, as a matter of law, *not* issued." *D.A.M.*, 486 F. Supp. 3d at 419 (first emphasis added). The jump that petitioners in *D.A.M.* asked Judge Cooper to make was even less of a jump than Petitioner asks this Court to make, as in *D.A.M.*, the transit rule—which

[2] The third-country transit rule modified asylum regulations to bar from asylum eligibility, with exceptions, any noncitizen who enters or attempts to enter the United States and has not applied for protection in a third country through which the noncitizen transited en route to the United States. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019). Petitioners in *D.A.M.* referred to this rule as the "Transit Ban."

is what the petitioners argued rendered their orders void—had *already* been ruled unlawful and vacated. Here, Petitioner asks this Court to disregard the clear jurisdictional limitations of section 1252 before there is *any* (subsequent) determination that immigration officers are unlawfully appointed under the Appointments Clause. 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"). Because "Congress really did mean what it said in the first sentence—review should only be for whether an immigration officer issued that piece of paper and whether the Petitioner is the same person referred to in that order" the Petition must be dismissed. *See M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1163–64 (D.N.M. 2014), *motion for relief from judgment granted*, No. CIV 14-769 JCH/CG, 2015 WL 7454248 (D.N.M. Sept. 23, 2015).

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

Petitioner argues that he may file his habeas petition while not in custody for three reasons. *See* Opp. at 9-17. First, he asserts that the text of section 1252(e)(2) does not require him to be in custody. *Id.* at 10-14. Second, he argues that a custody requirement is impractical in light of the requirement to remove noncitizens expeditiously. *Id.* at 14-16. Third, he claims that "custody" is construed liberally. *Id.* at 16-17. None of these arguments succeeds.

In his first argument, Petitioner notes that there is nothing in the text of section 1252(e)(2) that requires a petitioner to be in custody and argues that section 1252 repeatedly says "notwithstanding" 28 U.S.C. § 2241, the general federal habeas statute. *Id.* at 10-11. But Petitioner does not grapple with Respondents' fundamental argument, which is that unless section 1252(e)(2) is an *independent* grant of the right to seek habeas, his Petition must still be rooted in section 2241,

which *does* require the Petitioner to be in custody. *See* Mot. 11-13. Nowhere does Petitioner allege that section 1252(e)(2) provides such an independent grant. So it does not matter that section 1252(e)(2) is silent on "custody" because that is a requirement of the foundational habeas statute—section 2241—and section 1252(e)(2) merely further limits the scope of that statute in the context of expedited removal.

As Respondents explained in the motion to dismiss, the text of section 1252(e)(2) specifically provides that "judicial review" is "available in habeas corpus proceedings." Congress's decision to provide for judicial review in *habeas* proceedings is significant and indicates that Petitioner must comply with the requirements of such proceedings. As Petitioner notes, prior to enactment of IIRIRA, judicial review was available in habeas proceedings of removal orders generally, but availability of habeas review of expedited removal orders was limited by IIRIRA to the bases in section 1252(e)(2). When Congress chose to provide for review of expedited removal orders, it chose to do so in habeas, as opposed to other forms of judicial review, such as an Administrative Procedure Act ("APA") action or a petition for review in the courts of appeal (the method for review of orders issued after immigration court proceedings). Congress chose to provide for review in *habeas*, which has a particular meaning. As the Supreme Court has noted, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263 (1952). "In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Id.* This is, in fact, precisely what the Supreme Court noted when it examined section 1252(e)(2) in the context

whether other parts of section 1252[3] abrogated habeas jurisdiction over certain immigration decisions, and observed that "we do not think, given the longstanding distinction between 'judicial review' and 'habeas,' that § 1252(e)(2)'s mention of habeas in the subsection governing '[j]udicial review of orders under section 1225(b)(1)' is sufficient to establish that Congress intended to abrogate the historical distinction between two terms of art in the immigration context when enacting IIRIRA." *I.N.S. v. St. Cyr*, 533 U.S. 289, 313 n.35 (2001). That historical distinction includes requirements—such as that a Petitioner be "in custody" for habeas—that do not apply to other forms of "judicial review."

Petitioner also asserts that the Government has taken the position that custody is not required under section 1252(e)(2) by quoting two footnotes from decade-old district court briefing in *Smith v. CBP*, which they attach to their response as Exhibits C and D. ECF No. 25-3 and 25-4. In that briefing, the Government quoted from a Ninth Circuit case, *Meng Li v. Eddy*, 259 F.3d 1132, 1134 (9th Cir. 2001), *opinion vacated as moot*, 324 F.3d 1109 (9th Cir. 2003). In that case, the Ninth Circuit observed that "the government agrees there is no 'in custody requirement'" for cases under section 1252(e)(2). But *Li* is not binding on this Court, nor, having been vacated, binding anywhere. *See Orhorhaghe v. I.N.S.*, 38 F.3d 488, 493 n.4 (9th Cir 1994) (vacated opinion "is no longer binding Circuit precedent"). Nor can it be said that the Government has "long agreed" that custody is not a requirement from a total of two cases over the past twenty years, neither of which resulted in binding precedent. And the quote that Petitioner relies on from the Government's petition for certiorari in *DHS v. Thuraissigiam*, *see* Opp. at 13-14, is taken out of context—the

[3] *St. Cyr* considered three IIRIRA provisions, and the Real ID Act was passed in response to the Court's decision in that case. *See Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (noting the "Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L.Ed.2d 347 (2001), and the subsequent enactment of the Real ID Act in response to that decision.").

noncitizen in *Thuraissigiam* was indisputably in custody when he filed his habeas petition. The point that the quotation was making was that Congress has withdrawn authorization for noncitizens subject to expedited removal to file habeas cases under section 2241 outside of the bases in section 1252(e)(2). *See generally DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1963 (2020).

Petitioner also asserts that there is an "incompatibility between a custody requirement and the intended swiftness of expedited removal." Opp. at 10. To the contrary, requiring that petitioners file their habeas claims while in custody promotes the prompt initiation and resolution of their claims—consistent with the directive that removal should be expedited. It is also consistent with the statutory scheme's requirement that noncitizens like Petitioner be detained pending a determination of whether they have a credible fear and, if lacking such a fear, removed from the country. *See* 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV). Ideally, when a Petitioner files his case while still detained in the country, it would allow the claim to be resolved prior to his removal.[4] But importantly, Respondents do not take the position that removal would *moot* a habeas claim under section 1252(e)(2), just that custody is a *prerequisite* to filing suit, thus promoting the expeditious filing of claims. Accordingly, a timely filed habeas petition by a noncitizen in custody would not be prejudiced by their later removal.

[4] Petitioner asserts that section 1252(e)(2) "is the sole means by which an individual can seek judicial review of an expedited removal order on the basis that he or she is not in fact an alien." Opp at 14 n.6. It is undisputed that Petitioner is not a citizen, and courts do not decide cases based on hypothetical questions. This also ignores the regulatory process for anyone claiming to be a citizen, lawful permanent resident, or asylee or refugee at 8 C.F.R. § 235.3(b)(5). However, if a citizen was wrongfully deported—whether or not he or she had filed a habeas petition under section 1252(e)(2)—he or she could apply for a U.S. passport. If denied for a passport, there are provisions in 8 U.S.C. § 1503(a)-(c) to initiate a lawsuit or request a "certificate of identity" to travel to the United States, where the purported citizen would either be paroled into the country for immigration proceedings, or—if subject to expedited removal—file a habeas petition under section 1252(e)(2).

Petitioner also asserts that he was unable to file his Petition while he was in custody because he had not yet received his order of expedited removal, despite asking for it. Opp. at 16-17. But there is nothing in the statute or regulations that require a noncitizen to be in possession of the order of expedited removal in order to file suit. The statute merely refers to "determinations" under section 1225(b)(1). *See* 8 U.S.C. § 1252(e)(2). The Petition itself makes clear that Petitioner was informed of the "determination" that he was to be removed on the day he first arrived in the United States. *See* Pet. ¶ 33.[5] Petitioner, who was in contact with his attorney while detained, could have filed suit alleging "upon information and belief" that he had been ordered expeditiously removed and that under his theory there was jurisdiction under section 1252(e)(2). If needed, he could have amended his Petition after receipt of the piece of paper.

Regardless, even if he were in custody, his Petition still does not fall into one of the cognizable bases for jurisdiction under section 1252(e)(2), as discussed above, and therefore it must be dismissed at the outset.[6]

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[5] In fact, *not having* an expedited removal order may have bolstered Petitioner's jurisdictional argument that he was not "ordered removed" under section 1252(e)(2).

[6] It is a bedrock principle that "[a]lthough the definition of custody may be flexible, that flexibility has its limits. . . . [t]he controlling limit 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." *Sadhvani v. Chertoff*, 460 F. Supp. 2d 114, 119 (D.D.C. 2006), *aff'd*, 279 F. App'x 9 (D.C. Cir. 2008); *El-Hadad v. United States*, 377 F. Supp. 2d 42, 47 (D.D.C. 2005) (rejecting the Ninth Circuit's extension of habeas jurisdiction to those who had already been removed and holding that "a nonresident alien living freely abroad is not entitled to habeas relief"). Petitioner cites outlier cases from the Ninth Circuit—which, as noted above, have been rejected in this court as inconsistent with D.C. Cir precedent—to suggest that the custody requirement could be satisfied here, but these cases are unavailing. In *Singh v. Waters*, 87 F.3d 346, 349-50 (9th Cir. 1996), the court found the petitioner was unlawfully deported and that the INS had interfered with his right to counsel and ordered that he be permitted to return to the United States. There is no allegation that the attorney-client relationship was interfered with in this case. In *Carillo v. Ashcroft*, 111 F. App'x 532, 533 (9th Cir. 2004), the court found that the petitioner had never been served with notice of the denial of his motion to rescind the *in absentia* removal order. Petitioner here cannot and does not allege he never received notice of his expedited removal order.

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

Petitioner accuses the Government of misunderstanding his claim because he does not bring a facial challenge to the expedited removal statute. Opp. at 17-19. But regardless of his attempt to shoehorn his claim into something cognizable under the limited habeas jurisdiction available under section 1252(e)(2), his claim is in substance a constitutional challenge to the *systemic* way DHS has implemented expedited removal. That is, Petitioner challenges whether immigration officers can exercise the authority in section 1225(b)(1) to inspect applicants for admission and to determine that such applicants are inadmissible or removable through the expedited removal process. *See, e.g.*, Pet. ¶ 69. That is not an available claim under section 1252(e)(2), regardless of Petitioner's theory that his removal order was "void *ab initio*." Petitioner can only raise his systemic challenge to the authority of immigration officers to issue orders of expedited removal if he satisfies the requirements of section 1252(e)(3), which he makes no effort to do. It is telling that Petitioner has chosen this path to attempt to bring his claims, perhaps recognizing that a challenge under section 1252(e)(3) would be time-barred. *See* 8 U.S.C. § 1252(e)(3)(B) (60-day time bar). The challenged procedures—using immigration officers who are not appointed under the Appointments Clause—are exactly the types of things that Congress imagined would be subject to challenge under section 1252(e)(3). *See* H.R. Rep. No. 104-828, at 220 (1996) (Conf. Rep.) ("Section [1252](e)(3) provides for limited judicial review of the validity of procedures under section [1225](b)(1).").

Indeed, although Petitioner protests that he is not raising a systemic challenge to expedited removal by virtue of purporting to attack only his individual order, as explained, Mot. at 9-11, Petitioner's claim—that CBP officers lack authority to inspect applicants for admission under section 1225(a)(1) and to issue expedited removal orders under section 1225(b)(1)—is not limited

to his individual circumstances and 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. Instead, Petitioner raises a claim that would apply equally to the millions of orders of expedited removal issued in the last 25 years since the inception of the expedited removal system. The potential sweep of that claim shows that it can only be a systemic challenge to the very foundations of a statute that has been in operation for a generation.

Petitioner nevertheless argues that the Government's interpretation of these provisions would "raise serious constitutional questions" and "immunize[]" the Government from future violations of the Appointments Clause. But the 60-day statute of limitations does not "immunize" unconstitutional conduct any more than any other statute of limitations similarly "immunizes" unlawful conduct. As the D.C. Circuit found when examining this deadline, "strict limits" on the time to file suit can cause "obvious obstacles" when individuals seek to bring suit, but "[t]o the extent there were obstacles or hindrances to any of these individuals joining in the cases, they are either imposed by Congress or result from the normal burdens of litigation." *See AILA v. Reno*, 199 F.3d 1352, 1363-64 (D.C. Cir. 2000). The purpose of the 60-day statute of limitations is to have the legality of expedited removal decided quickly, and thereafter restrict expedited removal from review outside of the permissible bases in section 1252(e). *See id.* at 1364 ("Congress imposed the 60–day limit on actions in order to cabin judicial review and to have the validity of the new law decided promptly."). As the D.C. Circuit affirmed, the "60-day requirement is jurisdictional rather than a traditional limitations period." *AILA v. Reno*, 18 F. Supp. 2d 38, 47 (D.D.C. 1998), *aff'd*, 199 F.3d 1352, 1356-57. 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." *See id.*

If Petitioner's theory of jurisdiction were correct, any noncitizen subject to expedited removal would be able to challenge any aspect of *their* particular expedited removal order based on the claim that no one raised their particular systemic constitutional claim within the limitations period. This would render meaningless section 1252(e)(3) and its statute of limitation. The petitioner in *Dugdale* made this exact claim, and it was rejected. *Dugdale*, 88 F. Supp. 3d at 8 ("[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)."); *see also Vijender v. Wolf*, No. 19-CV-3337 (APM), 2020 WL 1935556, *3-6 & n.5 (D.D.C. Apr. 22, 2020) (collecting cases); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 11 (D.D.C. 2020). And Petitioner's claims about the revocation of his visa are no different and have been rejected before. *See Khan v. Holder*, 608 F.3d 325, 330–31 (7th Cir. 2010) (discussing *AILA* and noting that "an inspecting officer can and must refuse admission if a visa holder fails to establish to the inspector's own satisfaction that the visa holder fulfills the requirements for the classification which his visa bears.").

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

Petitioner insists that the Court has jurisdiction to hear his APA claim under the general federal-question jurisdiction statute, 28 U.S.C. § 1331, because this second claim "does not challenge the purported order of removal under the APA," and thus is beyond the jurisdiction-stripping provisions of section 1252. *See* Opp. at 23. But that argument is flawed on its face. Section 1252 does not merely remove the Court's jurisdiction over claims *directly* challenging an expedited removal order; rather, "[n]othwithstanding any other provision of law (statutory or nonstatutory)," it removes jurisdiction to review "any individual determination ***or*** to entertain ***any cause or claim arising from or relating to the implementation or operation of an order of***

removal pursuant to section 1225(b)(1)." 8 U.S.C. § 1252(a)(2)(A)(i) (emphases added). As Respondents explained in their motion to dismiss, that jurisdiction-stripping language extends to "any cause or claim" under the APA. *See* Mot. at 18-22; *accord Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (jurisdiction-stripping provision that "applies 'notwithstanding any other provision of law,'" includes "the general grant of federal-question jurisdiction, 28 U.S.C. § 1331").

While Petitioner now argues that his APA challenge to the revocation of his visa is distinct from his effort to overturn his expedited removal order, the Petition itself makes abundantly clear that his visa revocation 'arose' from, and 'relates' to, the expedited removal order. The Petition alleges that Petitioner's "visa revocation was . . . ***predicated*** on the improper inadmissibility determination and expedited removal order[.]" Pet. ¶ 69 (emphasis added). Count II—the APA claim—expressly alleges that "the purported visa revocation could not have been authorized" because "the purported removal order was a nullity." *Id.* ¶ 98. The Petition is replete with similar allegations making clear the revocation of Petitioner's visa arose from, and relates to, the expedited removal order. *See, e.g.*, *id.* ¶ 33 ("Respondent Klein informed I.M. that he was being ordered removed from the United States . . . and that his visa would be canceled."); *id.* ¶ 66 ("Together with the purported expedited removal order, Respondents Klein, Bock, and/or Chavez purported to cancel I.M.'s visa."); *id.* ¶ 89 ("[B]ecause the expedited removal order purportedly issued against I.M. was a nullity, Respondents . . . lacked authority to revoke I.M.'s visa . . . and that visa revocation too was unlawful under both the [APA] and the Appointments Clause.").[7]

[7] Further still, the section header in the Petition addressing the APA claim is titled "***Because*** the Expedited Removal Order Purportedly Entered Against I.M. Was Issued By Unappointed Employees in Continuing Position, It Must Be Vacated ***I.M's Visa Must Be Reinstated***." *See* Pet. at 21 (emphases added). Petitioner cannot now argue that his visa revocation is separate and distinct from the expedited removal order after previously arguing the visa revocation must be overturned ***because*** the expedited removal order was improper.

Indeed, even Petitioner's opposition couples the two, arguing that the visa revocation was improper because no relevant regulation "authorized [Klein] to revoke I.M's visa in the absence of a valid order of expedited removal, and no such order existed." Opp. at 25. In other words, Petitioner recognizes that the propriety of his visa revocation rises or falls with his expedited removal order. *Id.*[8] Petitioner nowhere explains how his APA challenge to his visa revocation, which he alleges was "predicated" on the expedited removal order, is not a claim "arising from or relating to the implementation or operation" of the expedited removal order.[9]

Bound by these allegations, Petitioner instead argues that the APA claim is a distinct matter because the "governing regulation, 22 C.F.R. § 41.122, does not implement the expedited removal statute" and was promulgated prior to enactment of IIRIRA. *See* Opp. at 24.[10] But that is not the test. Again, section 1252(a)(2)(A)(i) covers any cause or claim "relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)." The term "relating to" is broader than "arising from" and "sweep[s] within its scope claims with [even] only a remote or attenuated connection to the [underlying] removal of an alien," *Aguilar v. ICE*, 510 F.3d 1, 10 (1st Cir. 2007),

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[8] Further, as explained, when an immigration officer determines that a noncitizen must be removed on an expedited basis, revoking that person's visa is part and parcel with the expedited removal process. *See also Khan*, 608 F.3d at 330-31.

[9] Petitioner mischaracterizes Respondents' argument where he suggests "the Government itself admits that '[t]he issue of *why* [I.M.'s] visa was revoked is distinct from the question of whether an expedited removal was issued." Opp. at 24 (quoting Mot. 17 n.6). That language plainly concerned the scope of section 1252(e)(2)(B), as relevant to Petitioner's claim for habeas relief. And as explained, *see supra* at 2-7, IIRIRA limits the court's inquiry under that provision to "whether such an [expedited removal] order in fact was issued," 8 U.S.C. § 1252(e)(5), and not why it issued, *see also* Mot. at 14-18. Respondents have never suggested Petitioner's APA claim is unrelated to, or did not arise from, his expedited removal order.

[10] This argument that the governing regulation does not "implement" the expedited removal statute is just further evidence that Petitioner's challenge is in fact a systemic attack on the expedited removal statute, rather than a challenge to the individual facts of Petitioner's case. *Compare* Opp. at 24 ("The governing regulation, 22 C.F.R. § 41.122, does not implement the expedited removal statute."), *with* 8 U.S.C. § 1252(e)(3) (setting a statute of limitations for challenges to "implementation" of expedited removal statute).

and thus reaches any claims that "ask[s] to nullify the continuing effects of [an expedited removal] order," *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 818 (9th Cir. 2004). Petitioner's burden is to show that his APA claim does not "relat[e] to" to his expedited order of removal. That is a heavy burden, as courts give this language "a broad, expansive meaning." *Osorio-Martinez v. Att'y Gen. United States of Am.*, 893 F.3d 153, 165 (3d Cir. 2018) (phrase "must be interpreted broadly because we are reading the phrase in the context of a statutory scheme that is" intended to protect Executive discretion); *see also United States v. Dohou*, 948 F.3d 621, 626 (3d Cir. 2020) (explaining § 1252(a)(2)(A)(i) even "reaches claims indirectly connected to an underlying removal order"); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1143 (9th Cir. 2002) (noting the "broad and all inclusive scope of subsection (A)(i)"); *Vijender*, 2020 WL 1935556, at *4 (this subsection "establishes the presumptive rule that courts lack jurisdiction to review any action ***pertaining*** to the expedited removal of arriving aliens" (emphasis added)).

Petitioner cannot meet this heavy burden because, regardless of how he frames his APA challenge, the visa revocation he seeks to overturn is indisputably "related to," and "arises from," his expedited removal order. His Petition asks this Court (*see* Pet. ¶¶ 33, 66, 69, 89, 98) "to nullify the continuing effects of that [expedited removal] order." *Avendano-Ramirez*, 365 F.3d at 818 (finding no jurisdiction to hear direct appeal of denial of application for cancellation of removal where granting such relief required nullifying an existing expedited removal order); *see also id.* (recognizing § 1252(a)(2)(A)(i) as an example of where Congress "unequivocally and unambiguously" removed "jurisdiction over all matters relating to any immigration order or decision" (quoting *Montero-Martinez*, 277 F.3d at 1143)). Reinstating Petitioner's visa here would nullify his expedited removal order, which bars his reentry to the United States until well past the expiration of his visa. *See* Pet. ¶¶ 1, 33, 63. Petitioner's APA claim is moot if he does not also

prevail on his habeas challenge to the expedited removal order, as he would otherwise be barred from reentering the United States, regardless of visa status. *Id.* This further demonstrates that the APA claim "pertain[s]" to his habeas claim. *Vijender*, 2020 WL 1935556, at *4.

Rather than grapple with the text of section 1252(a)(2)(A), Petitioner claims that the cases relied upon in Respondents' motion to dismiss are irrelevant because they dealt exclusively with direct review of an expedited removal order. *See* Opp. at 23. That, too, is wrong on its face. For example, in *Rodrigues v. McAleenan*, a plaintiff subject to expedited removal brought a traditional APA claim alleging that the third-country transit rule was arbitrary and capricious. *See* 435 F. Supp. 3d 731, 734 (N.D. Tex. 2020). The court acknowledged that other district courts had found that the challenged rule violated the APA in cases involving organizational plaintiffs, but nonetheless explained that "[b]ecause § 1252(a)(2)(A) strips the courts of jurisdiction to review claims relating to the expedited removal statute except as provided in § 1252(e), . . . the APA, INA, and 28 U.S.C. § 1331 (the federal question jurisdiction statute) cannot be an alternative basis for jurisdiction here." *Id.* at 736. The plaintiff in *Nianga v. Wolfe* likewise brought an APA claim against the third-country transit rule. *See* 435 F. Supp. 3d 739, 742 (N.D. Tex. 2020). The court acknowledged that he "raise[d] legitimate concerns about the adequacy of the procedural protections that he was afforded during his expedited removal proceedings, as well as the validity of the [rule] under the APA." *Id.* at 744. But "the fact remain[ed] that at bottom, each of the plaintiff's claims asks this court to engage in '[j]udicial review of [the] determination made under section 1225(b)(1)' that the plaintiff is subjected to expedited removal." *Id.* The same is true here—Petitioner's APA claim, at bottom, asks the court to review his expedited removal order to determine if his visa was lawfully revoked. *See supra* 14-16. "This the court cannot do." *Nianga*, 435 F. Supp. 3d at 742 (citing 8 U.S.C. § 1252(e)(2)); *cf. Dijamco v. Wolf*, 962 F.3d 999, 1003

(7th Cir. 2020) ("Put most simply, the APA cannot be used to sidestep the highly specific limitations on judicial review enacted in the INA."); *Bultasa Buddhist Temple of Chicago v. Nielsen*, 878 F.3d 570, 574 (7th Cir. 2017) ("Appellants cannot avoid the jurisdictional bar established by 8 U.S.C. § 1252 simply by raising a claim under that section of the APA.").

Petitioner conspicuously does not even try to distinguish the many cases cited by Respondents where courts found they lacked jurisdiction to hear APA claims brought by challengers subject to expedited removal due to the jurisdiction-stripping provisions of section 1252(a). *See generally* Opp. at 23-25. In addition to *Rodrigues*, and *Nianga*, several of the other cases cited in Respondents' motion also concerned a challenger subject to expedited removal making a collateral, rather than direct, attack on their expedited removal order under the APA, as Petitioner attempts to do here. *See, e.g.*, *Mohit v. DHS*, 478 F. Supp. 3d 1106, 1109, 1112 (D. Colo. 2020) ("§ 1252(e) . . . precludes federal question jurisdiction under 28 U.S.C. § 1331" to hear APA challenge to credible fear procedures); *Arandi v. Morgan*, No. CV 19-12351-RGS, 2020 WL 1891949, at *1 (D. Mass. Apr. 16, 2020) (no jurisdiction under § 1252(a)(2)(A) where plaintiff "did not contest the validity of the [expedited] removal order" but "claim[ed] a right under the [APA] . . . to a more fulsome explanation from CBP of its reasons for ordering her expedited removal"); *Shah v. Dir., Jackson Par. Correctional Ctr.*, No. 3:19-CV-1164, 2019 WL 4254139, at *3 (W.D. La. Sept. 6, 2019) (no jurisdiction to hear APA challenge claiming, *inter alia*, "Respondents did not follow the correct legal procedures and applied an incorrect legal standard in finding that he had not demonstrated credible fear"). By contrast, Petitioner does not cite a ***single*** case where a court found that it had jurisdiction to entertain an allegedly unrelated APA claim

brought by a petitioner subject to expedited removal.[11]

In a last ditch effort to save his APA claim, Petitioner contends Respondents did not meaningfully dispute the Court's jurisdiction to hear his second claim. *See* Opp. at 23-24. As an initial matter, this argument is predicated on the false claim that every case cited in the motion to dismiss "deals [exclusively] with the reviewability of an expedited removal order." *Id.* at 23. As shown, that is simply wrong. *See supra* 18-19. And contrary to Petitioner's argument, Respondents did not present this argument in "one conclusory sentence." Opp. at 23.[12] Rather, over four pages of analysis (*see* Mot. at 18-22), Respondents explained that the APA does not supply an independent source of jurisdiction in view of the jurisdiction-stripping provisions of section 1252(a)(2)(A)(i), and as a result Petitioner is limited to pursuing claims under section 1252(e). Because "Petitioner's APA claim does not fall within the narrow exceptions to [section

[11] As Respondents explained in their motion (at 18 & n.7), *Thuraissigiam* itself involved an APA claim, which the Ninth Circuit found barred under section 1252. *See 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 section 1252(e)(2)); *accord Singh v. Barr*, 982 F.3d 778, 783 (9th Cir 2020) (holding that section 1252(a)(2)(A)(iii) foreclosed "jurisdiction to review expedited removal orders and related matters affecting those orders, including underlying negative credible fear determinations and rulings on the regulations implementing the expedited removal statute"). Fundamentally, in the expedited removal context, section 1252 "prohibit[s] a claim by an alien, however it is framed." *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1269 (9th Cir. 2020) (discussing section 1252's limitation on claims in "the APA context").

[12] The cases cited by Petitioner on this point are markedly different from this case. In *Fling v. Martin*, the plaintiff raised an argument for the first time in his reply, offering only a single sentence of explication and no legal authority. *See Fling v. Martin*, No. 1:19-CV-00693 (CJN), 2020 WL 4569335, at *2 (D.D.C. Aug. 7, 2020); *see also Fling*, No. 19-cv-693, ECF No. 17 at 10-11. Likewise, in *Johnson v. Panetta*, the defendant "fail[ed] to address, in any manner whatsoever, why th[e] [Declaratory Judgment] Act is not applicable to Plaintiff's claim." 953 F. Supp. 2d 244, 250 (D.D.C. 2013). By contrast, Respondents identified the statute barring Petitioner's APA claim (§ 1252(a)(2)(A)), explained that the claim did not fall into the limited exceptions provided under § 1252(e), further explained that the APA did not supply an alternative source of jurisdiction, and cited numerous cases where courts dismissed APA claims similar to the one raised by Petitioner. *See* Mot. at 18-22.

1252(a)(2)(A)] . . . [t]he APA therefore offers no basis for hearing Petitioner's second claim." *Id.* at 22; *see also id.* at 19 (Petitioner's "claim for statutory relief under the APA falls outside the limited habeas jurisdiction provided in § 1252(e)(2)"); *id.* at 20 ("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."); *id.* at 21-22 ("Petitioner's APA claim does not fall within the scope of § 1252(e)(3)").[13] The APA claim repeatedly referred to in this section is, of course, Petitioner's claim that "the purported visa revocation could not have been authorized" by regulation "[b]ecause the purported removal order was a nullity," and thus "not in accordance with law" under the APA. Pet. ¶ 98 (citing 22 C.F.R. § 41.122(e)(2)).[14] The Court should reject Petitioner's effort to circumvent the jurisdictional flaw with his second claim.

V. Petitioner lacks standing to seek relief beyond a new hearing before an Immigration Judge.

[13] Respondents' motion also made clear elsewhere that Petitioner's APA claim concerned a challenge to the revocation of his visa. *See e.g.*, Mot. at 1 ("*Second*, he claims that his visa was invalidly revoked under the APA due to a scrivener's error and the allegedly improper appointment of a CBP officer under the Appointments Clause.").

[14] Respondents' motion did not address whether Petitioner's APA claim arises from, or relates to, his habeas challenge because nothing in the Petition suggests anything to the contrary. *See supra* 15-16. Only in his opposition did Petitioner, for the first time, claim his visa revocation challenge is "a separate matter from expedited removal." Opp. at 24. Respondents are entitled in their reply to explain why, on the face of the Petition, that argument is not correct. *See Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 188 (D.D.C. 2012) ("Courts consistently observe, when arguments raised for the first time in reply fall 'within the scope of the matters [the opposing party] raised in opposition,' . . . the reply 'does not expand the scope of the issues presented[.]'" (quoting *Crummey v. SSA*, 794 F. Supp. 2d 46, 63 (D.D.C. 2011), *aff'd*, 2012 WL 556317 (D.C. Cir. Feb. 6, 2012)). Further, even if Respondents' jurisdictional challenge to Count II was raised for the first time in reply—and it plainly was not, *see* Mot. at 18-22—the court would be obliged to consider the argument to ensure itself of jurisdiction. *See Ragsdale v. Holder*, 668 F. Supp. 2d 7, 17 (D.D.C. 2009) ("While a party ordinarily is not permitted to raise an argument for the first time in its reply filing, because the argument pertains to whether the Court has federal jurisdiction to entertain this challenge, the Court is obliged to consider the question." (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977))); *Falicia v. Advanced Tenant Servs., Inc.*, 235 F.R.D. 5, 11 (D.D.C. 2006) ("[O]ne of the arguments [raised in reply] challenges the jurisdiction of this Court to issue the subpoena, and a challenge of this nature cannot be dismissed without considering whether it has merit.").

Respondents' motion to dismiss explained that Petitioner lacks standing to obtain most of his requested relief. As noted, Petitioner's real claim—the systemic challenge to the operation of the expedited removal system—is time-barred, and so no relief is available at all. But even were section 1252(e)(2) available as a jurisdictional basis, section 1252(a)(2)(A) limits Petitioner to raising a habeas petition under the grounds in section 1252(e)(2) and, if successful, receiving "a hearing in accordance with section 1229a of this title." 8 U.S.C. § 1252(e)(4)(B). The Court therefore lacks the power to award most of the relief he seeks. *See* Mot. at 22-26.

Petitioner argues that Respondents are improperly seeking to dismiss or strike his Prayer for Relief. *See* Opp. at 25-30. But Respondents' motion seeks neither of those things, and Petitioner's arguments on this are largely beside the point. Rather, as the motion explained, "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 [Immigration Judge]." Mot. at 26. In other words, to the extent any of Petitioner's claims are not statutorily barred (and they all are), they must be construed going forward solely as claims for a new hearing before an Immigration Judge, rather than for the far-ranging relief sought in the Petition.

The point is not academic, as Petitioner seeks to circumvent the limitations of section 1252 by reframing part of his challenge to the expedited removal order (and ensuing visa revocation) as an APA claim. *See supra* 14-16. Moreover, the Petition does not identify which request for relief is attributable to which of Petitioner's two claims. *See generally* Pet. ¶¶ 90-11, Prayer for Relief. The motion therefore makes clear the limited standing Petitioner even potentially has to pursue ***any*** claim for relief, regardless of how he chooses to frame such a challenge. *See* Mot. at 25 ("Section 1252(e)(4)'s statutory restriction on relief limits the Petitioner's standing to seek relief beyond that provided by the statute.").

On the merits of the issue, Petitioner argues the "Court has authority to issue all of the relief requested by I.M., and thus there is no redressability issue." Opp. at 27. He further contends that if his expedited removal order is a nullity, then the Court is permitted to grant his full range of requested relief. *Id.* But that misreads the statutory scheme. Section 1252(a)(2)(A) limits any challenge to an expedited removal order to the specific grounds for habeas relief in section 1252(e). *See Make the Rd. New York v. Wolf*, 962 F.3d 612, 626 (D.C. Cir. 2020). If the challenger *prevails* under section 1252(e)(2), and the "court determines that the petitioner—(A) is an alien who was not ordered removed under section 1225(b)(1) of this title" then "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. § 1252(e)(4). Petitioner contends that the limitation in section 1252(e)(4) does not apply because in his case no expedited removal order ever lawfully issued. *See* Opp. at 27-28. But whether an expedited removal issued is the precise inquiry permitted by section 1252(e)(2) that allows a petitioner to, at most, obtain a new hearing. *See* 8 U.S.C. § 1252(e)(2), (4). Petitioner's reading would swallow section 1252(e)(4) altogether and essentially read it out of existence for all challenges raised under section 1252(e)(2).

Petitioner offers no other plausible reading of section 1252(e)(4), and instead argues that limiting his relief to a new hearing would result in "an expedited order of removal [] remain[ing] in effect even after it was found to be void *ab initio*." Opp. at 28. But that is not correct. The entire point of a challenge under section 1252(e)(2) is to show that no such expedited removal "order in fact was issued." 8 U.S.C. § 1252(e)(5). Accordingly, if the court determines the noncitizen "was not ordered removed under section 1225(b)(1)," the noncitizen is entitled to a new hearing free and clear of any expedited removal order precisely ***because*** he has successfully shown no such order issued. Petitioner notes that "[s]ection 1229a does not authorize immigration judges to vacate

expedited removal orders issued under Section 1225(b)(1)" and that therefore "under the Government's reading, the petitioner would still be subject to an operative expedited removal order even if the immigration judge declined to order the petitioner removed[.]" Opp. at 28. But these arguments just further show the fundamental tension in Petitioner's claim for relief under section 1252(e)(2), as the purpose of subsection is to provide relief to noncitizens who ***in fact*** were not ordered removed. *See* Mot. at 14-18; *see supra* 2-7. Petitioner's acknowledgment that he might still be subject to an expedited removal order, and would need to seek expungement of that order, only reinforces that such an order "in fact was issued" to him. 8 U.S.C. § 1252(e)(5) (limiting the court's inquiry into whether a noncitizen was ordered removed); *see also Castro*, 835 F.3d at 431 (holding § 1252(e)(5) limits review to "whether an immigration officer issued that piece of paper and whether the Petitioner is the same person referred to in that order").

Petitioner also misreads Judge Scheindlin's opinion in *Kabenga*. *See* Opp. at 29. In that case, a noncitizen legal permanent resident ("LPR") was removed from the United States in 2012 due to a prior conviction for a crime of violence. *See Kabenga v. Holder*, 76 F. Supp. 3d 480, 483 (S.D.N.Y. 2015). He returned two years later to seek asylum, but was given an expedited removal order. *Id.* He filed a habeas petition arguing that his *2012 removal order*—not his 2014 expedited removal order—was a "legal nullity" because his underlying criminal conviction was not a crime of violence. *Id.* at 481-82. The court agreed that the "2012 removal, as executed, was a legal nullity." *See Kabenga v. Holder*, No. 14 CIV. 9084 SAS, 2015 WL 728205, at *5 n.55 (S.D.N.Y. Feb. 19, 2015). But because Kabenga's challenge was related to his 2014 expedited removal order, the court "lack[ed] the power to grant Kabenga any relief apart from [] a hearing." *Id.* Contrary to Petitioner's repeated assertion (Opp. at 29), the court did ***not*** declare the expedited removal order a nullity, nor did it provide any relief to him "apart from a [new] hearing." *Kabenga*, 2015 WL

728205, at *5 n.55 (citing 8 U.S.C. § 1252(e)(4)(B)). *Kabenga* therefore did not provide the sort of relief Petitioner seeks, but rather did precisely what the statute required—limited its grant of relief to a new hearing before an Immigration Judge. *Id.*[15]

Finally, Petitioner argues that several items in his Prayer for Relief "go to the visa revocation in Count Two," and that section 1252 "has no bearing whatsoever on I.M.'s claim regarding the purported revocation of his visa." Opp. at 29-30. But as explained, *supra* at 2-7, section 1252 removes this Court's jurisdiction to hear claims arising from, or related to, an expedited removal order. As the Petition itself repeatedly alleges, Petitioner's visa revocation arose as a direct result of the expedited removal order. *See supra* at 15-16. Petitioner altogether fails to explain how his APA claim does not arise from, or relate to, his expedited removal order. *Id.* Because this claim falls within the scope of section 1252(a)(2)(A), Petitioner may only pursue it under the limited habeas exceptions in section 1252(e), and even then—if successful—would only be entitled to the remedy of a new hearing.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the petition for writ of habeas corpus and complaint.

[15] Petitioner's efforts to distinguish *East Bay Sanctuary Covenant v. Trump* and *Sissoko v. Rocha* are beside the point. *See* Opp. at 29. While those cases both concerned different factual scenarios, the point is that both decisions recognized the statutory limitation on relief that courts can provide under section 1252(e)(2). *Sissoko* in particular could not be more plain: "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.'" 509 F.3d 947, 950 (9th Cir. 2007) (quoting 8 U.S.C. § 1252(e)(4)). That hearing affords "the first step of full administrative and judicial review of an alien's inadmissibility determination." *Id. East Bay Sanctuary Covenant* similarly recognized that section 1252(e)(4) restricts courts from providing any "'remedy or relief other than to require that the petitioner be provided a hearing' before an immigration judge." 932 F.3d 742, 759 (9th Cir. 2018) (quoting 8 U.S.C. § 1252(e)(4)(B)). Petitioner offers no explanation as to how these decisions misinterpreted the plain text of section 1252(e)(4).

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