ORAL ARGUMENT SCHEDULED
JANUARY 25, 2023
No. 22-5071

United States Court of Appeals for the District of Columbia Circuit

I.M.,

Plaintiff-Appellant,

v.

UNITED STATES CUSTOMS & BORDER PROTECTION, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
No.: 20-03576

CORRECTED REPLY BRIEF OF APPELLANT I.M.

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INTRODUCTION

Two unappointed federal employees purported to order I.M. removed from the United States. The district court dismissed I.M.'s claim that their action violated the Appointments Clause on a single basis: that it lacked jurisdiction to consider a petition under 8 U.S.C. § 1252(e)(2) because I.M. was not in custody when he filed suit. JA123-30.

As I.M. explained in his opening brief, that holding was incorrect. There is no custodial requirement in Section 1252(e)(2)—and even if there were, it would be satisfied by the extreme circumstances in this case. Opening Br. at 13-32. The Government does not dispute that diligence in the face of governmental obstruction can satisfy custody requirements. Nor does it deny that it refused I.M.'s repeated requests for a copy of the putative order of removal so that he could determine whether it was issued by an appointed Officer. It argues only that I.M. might have filed his Appointments Clause claim before he knew who was purporting to order him removed and whether that person was appointed pursuant to the Appointments Clause. This argument is meritless. I.M. could not challenge the authority of the people purporting to order him removed until he knew who they were, and the Government withheld that information until putting him on a plane out of the United States. I.M.'s diligent efforts to get that information while in actual custody,

combined with the Government's obstruction, satisfy any custodial requirement. *See infra* Part III. The district court did not even address this basis for jurisdiction.

Perhaps recognizing the vulnerability of the district court's holding, the Government relies principally on an argument that the court did not reach: that the court's jurisdiction under Section 1252(e)(2)(B) to decide "whether the petitioner was ordered removed" does not cover I.M.'s claim that he was never ordered removed because no appointed Officer ordered him removed.[1] This claim, the Government argues, could only be brought under Section 1252(e)(3), which authorizes systemic challenges to the expedited removal statute and its implementing regulations. *See* Brief for Appellees ("Gov't Br.") at 17-21, 25-29.

This argument should be rejected. No appointed Officer ordered I.M. removed, so no order "in fact was issued" against him. 8 U.S.C. § 1252(e)(5). An order issued by employees who "had not been appointed in accordance with the dictates of the Appointments Clause" is "not valid *de facto*," *Ryder v. United States*, 515 U.S. 177, 179 (1995), and "void *ab initio*," *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014). If I.M.'s allegations are

[1] The Government claims the district court resolved this issue in its favor. Gov't Br. at 10 ("The district court correctly held that it lacked jurisdiction to review a challenge to an immigration officer's constitutional authority to issue an expedited removal order under Section 1252(e)(2)."). This is false; the district court never reached the issue. *See* JA115-131.

correct, the "order" that two unappointed federal employees purported to issue is a nullity, and the Executive Branch never ordered I.M. removed. I.M.'s challenge therefore goes directly to whether he was "ordered removed." 8 U.S.C. § 1252(e)(2)(B).

The Court should therefore hold (1) that I.M.'s claim arises under Section 1252(e)(2)(B), and (2) that Section 1252(e)(2) does not contain an extratextual custodial requirement, or, if it does, that extreme circumstances satisfied that requirement.

ARGUMENT

I. SECTION 1252(E)(2) PROVIDES JURISDICTION OVER I.M.'S CLAIM THAT HE WAS NOT IN FACT ORDERED REMOVED

A. I.M. Claims That He Was Not Ordered Removed

Contrary to the Government's repeated assertions, I.M. does not "concede that he … was issued an order of expedited removal." Gov't Br. at 26; *see also id.* at 3, 12, 45. As he has made clear from his first filing, he "challenges 'whether [he] was ordered removed' under 8 U.S.C. § 1225(b)(1)." JA16 (quoting 8 U.S.C. § 1252(e)(2)(B)). I.M.'s central claim is that the Executive Branch may only exercise significant authority through appointed Officers, and no appointed Officer ever ordered I.M. removed. Therefore, he was not in fact ordered removed—the exact inquiry over which Congress provided jurisdiction.

True, an unappointed federal employee signed a piece of paper and handed it to I.M. as he was placed on a plane out of the United States. But the jurisdictional question is not whether "an immigration officer issued [a] piece of paper called an expedited removal order," as the Government would have it. Gov't Br. at 27-28 (quoting *Castro v. DHS*, 835 F.3d 422, 431 (3d Cir. 2016)). The correct question is whether "[an expedited removal] order *in fact was issued*." 8 U.S.C. § 1252(e)(5) (emphasis added).

The Supreme Court has repeatedly held that an adjudicative order purportedly issued by an official who "had not been appointed in accordance with the dictates of the Appointments Clause" is "not valid *de facto*." *Ryder*, 515 U.S. at 179; *see also, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). As this Court has explained, a putative order issued by unappointed federal employees is not just invalid, it is "void *ab initio*." *Noel Canning*, 705 F.3d at 493.[2] Just as a presidential pardon "issued" by a Cabinet secretary would be a nullity, so is an order purportedly "issued" by

[2] *See also, e.g.*, *Risser v. Saul*, No. 18-cv-4758, 2020 WL 354923, at *1 (E.D. Pa. Jan. 17, 2020) ("[I]n finding that Plaintiff's Appointments Clause claim was meritorious, the Court deemed the ALJ's decision a legal nullity because the ALJ lacked the legal authority to decide Plaintiff's case in the first place."); *Lee v. Berryhill*, No. 18-cv-214, 2018 WL 8576604, at *1 (E.D. Va. Dec. 20, 2018) (an action by an unappointed employee that imposes a sanction is "a nullity").

unappointed federal employees, if the Constitution limits the power to issue that order to appointed Officers.[3]

Thus, I.M.'s claim that the Appointments Clause prohibits unappointed federal employees from issuing expedited removal orders is a claim that the putative order that unappointed federal employees purported to issue against him was "not valid *de facto*," *Ryder*, 515 U.S. at 179, and "void *ab initio*," *Noel Canning*, 705 F.3d at 493. If the only purported order against I.M. was void *ab initio* and not valid *de facto*, then no expedited removal order "in fact was issued," 8 U.S.C. § 1252(e)(5), and he was not "ordered removed," *id.* § 1252(e)(2)(B). His claim therefore falls squarely within the jurisdiction Congress granted to consider whether a petitioner was in fact ordered removed.

Dugdale v. Customs & Border Protection ("*Dugdale I*"), 88 F. Supp. 3d 1 (D.D.C. 2015), is instructive. There, a petitioner was removed on the basis of a putative expedited removal order. He argued that the order never actually issued because it was not reviewed by a Customs and Border Protection ("CBP") supervisor, which is a regulatory requirement for issuance of an expedited removal

[3] While the question at this stage of the case is only whether the district court possesses jurisdiction to hear I.M.'s claim, it bears noting that the Government has never suggested it can or will dispute the merits issue. For more detail on why the Appointments Clause clearly requires that expedited removal orders be issued by appointed Officers, *see* JA22-23, 30-35.

order. *Id.* at 6-7 (citing 8 C.F.R. § 235.3(b)(7)). The *Dugdale I* court "conclude[d] 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.* at 6. Like I.M., the *Dugdale I* petitioner argued that the "issuing" employees' lack of authority made the document through which they purported to remove him legally inoperative. Therefore, his challenge fell within the court's jurisdiction to determine whether an expedited removal order "in fact was issued." *Id.* (quoting 8 U.S.C. § 1252(e)(5)).

As illustrated by *Dugdale I*, Congress authorized district courts to review whether someone with authority to order the petitioner removed ever did so, and, conversely, whether a putative order issued by an employee who lacked authorization had no legal force. The case for review is even *stronger* here, where the lack of authorization comes not from a regulatory requirement created by the Executive but a *constitutional* requirement that even Congress cannot modify. *See Freytag v. Comm'r*, 501 U.S. 868, 880 (1991) ("Neither Congress nor the Executive can agree to waive this structural protection.").

The Government's argument to the contrary is unavailing. According to the Government, when Congress gave courts jurisdiction to determine "whether an [expedited removal] order in fact was issued," 8 U.S.C. § 1252(e)(5), it authorized them to inquire only whether an immigration officer "issued [a] piece of paper called

an expedited removal order," not whether that employee actually had authority to issue such an order. Gov't Br. at 27-28 (quoting *Castro*, 835 F.3d at 431). Under this reading, a federal employee could hand out a "removal order" signed by a summer intern, and the Court would have no power to consider whether the Executive Branch had in fact ordered the petitioner removed.

The Government's cases do not support its argument. Its principal case, *Castro*, dealt with claims that a "removal order resulted from a procedurally erroneous credible fear proceeding." 835 F.3d at 430. The *Castro* petitioners did not dispute whether the Executive Branch had actually issued an expedited removal order against them; they claimed only that various procedural rights were violated during their credible fear interviews. *Id.* at 428. The *Castro* court had no reason to consider what it means for an order in fact to issue. Indeed, the *Castro* court explicitly distinguished that case from *Dugdale I*, acknowledging that the question presented in *Dugdale I* "was at least arguably related to the question whether a removal order 'in fact was issued.'" *Castro*, 835 F.3d at 433.

The Government's reliance on *Smith v. Customs & Border Protection*, 741 F.3d 1016 (9th Cir. 2014), is similarly misplaced. *See* Gov't Br. at 37 n.7. Smith did not argue that the person purporting to issue his expedited removal order lacked authority to do so, but rather that he was not removable. *Smith*, 741 F.3d at 1019, 1021. This is the exact type of claim Section 1252(e)(5) precludes: a challenge to

"whether the alien is actually inadmissible." Unlike *Smith*, I.M. does not challenge the determinations that led the CBP officers in this case to find him inadmissible (faulty as they were, *see* JA18-20), but whether the particular officers were constitutionally authorized to issue an expedited removal order—and, thus, whether such an order in fact issued. *See Ryder*, 515 U.S. at 179; *Noel Canning*, 705 F.3d at 493.

Likewise, *Thuraissigiam v. DHS*, 917 F.3d 1097 (9th Cir. 2019), *rev'd and remanded*, 140 S. Ct. 1959 (2020), did not bar all "review of 'statutory, regulatory, and constitutional claims' challenging expedited removal orders," as the Government suggests. Gov't Br. at 28 (quoting *Thuraissigiam*, 917 F.3d at 1103). The Ninth Circuit was referring to "the statutory, regulatory, and constitutional claims *raised in [Thuraissigiam's] habeas petition*," 917 F.3d at 1103 (emphasis added)—not to any statutory, regulatory, or constitutional claim whatsoever, as the Government's elision suggests. And the specific claims at issue were that the Department of Homeland Security had "deprived [petitioner] 'of a meaningful right to apply for asylum' and other forms of relief," violating the Due Process Clause, the Convention Against Torture, and various statutory and regulatory requirements. *Id.* at 1102. As in *Castro* and *Smith*, these claims had no connection to "whether the petitioner was ordered removed," 8 U.S.C. § 1252(e)(2)(B), and neither the Ninth Circuit nor the Supreme Court suggested that claims that *do* bear on that question—

like both I.M.'s and Dugdale's—fall outside a court's power simply because they have a statutory, regulatory, or constitutional dimension.

B. Because the District Court Had Jurisdiction Under Section 1252(e)(2)(B), Section 1252(e)(3)'s Statute of Limitations Is Inapplicable

Because I.M.'s claim arises under Section 1252(e)(2)(B), the Government's discussion of Section 1252(e)(3) is largely irrelevant. The Government does not contend that a claimant must satisfy both Section 1252(e)(2) *and* (e)(3), nor that the statute of limitations in Section 1252(e)(3)(B) applies to claims brought under Section 1252(e)(2). Rather, its claim is that Section 1252(e)(2) does not apply and Section 1252(e)(3) is "[t]he only possible basis for raising a challenge such as I.M.'s." Gov't Br. at 17. But because I.M.'s claim satisfies Section 1252(e)(2), as just explained, the Court need not consider Section 1252(e)(3).

Moreover, the Government's Section 1252(e)(3) argument fundamentally misunderstands the nature of I.M.'s claim. Section 1252(e)(3) governs claims that Section 1225(b), a regulation implementing it, or a "written policy directive, written policy guideline, or written procedure issued … to implement such section" violates the Constitution or other applicable law. 8 U.S.C. § 1252(e)(3)(A)(i)-(ii). I.M.'s claim does not arise under Section 1252(e)(3) (and he has never invoked Section 1252(e)(3) as a source of jurisdiction) because he does not challenge Section 1225(b) or any regulation, written policy directive, written policy guideline, or written

procedure implementing it. As he has stated throughout this litigation, he assumes the constitutionality of Section 1225(b) and its implementing regulations. *See* Opp. to Mot. to Dismiss, at 18, ECF No. 25. He contends only that he was not "ordered removed" because no constitutionally appointed Officer issued a removal order against him and therefore no such order "in fact was issued." Section 1252(e)(2)(B), (5).[4]

The Government suggests that the mere existence of Section 1252(e)(3) allows courts to construe a challenge to whether a petitioner was ordered removed as a time-barred systemic challenge under Section 1252(e)(3). Gov't Br. at 20-21. But the Government cites only cases that directly challenged the lawfulness of a regulation or Section 1225(b)(1). *See Khan v. Holder*, 608 F.3d 325, 330 (7th Cir. 2010) (challenge to "regulations under which [petitioners'] case had been processed"); *D.A.M. v. Barr*, 486 F. Supp. 3d 404, 407 (D.D.C. 2020) (challenge to "interim rule known as 'Transit Ban'"); *Diaz Rodriguez v. Customs & Border Protection*, No. 14-cv-2716, 2014 WL 4675182, at *1 (W.D. La. Sept. 18, 2014), *vacated sub nom. Diaz-Rodriguez v. Holder*, No. 14-31103, 2014 WL 10965184

[4] *See Agarwal v. Lynch*, No. 21-cv-12688, 2022 WL 2517190, at *13 (E.D. Mich. July 6, 2022) ("The Court disagrees with Respondents' characterization of Agarwal's Appointments Clause claim as a 'systemic challenge.' … He does not contend that the system necessarily violates the Appointments Clause. Instead, he alleged only that Respondents violated the Appointments Clause when they authorized ICE employees Smith and/or Lentz to issue expedited removal orders.").

(5th Cir. Dec. 16, 2014) (allegations of "procedural and substantive defects within the expedited removal process and … a substantial likelihood that [Diaz Rodriguez] could establish a claim under the United Nations Convention Against Torture"). None dealt with a claim that even arguably went to whether an order issued in the first place. *Cf. Castro*, 835 F.3d at 433 (recognizing that a claim that a procedural defect prevented an order from issuing, such as that in *Dugdale I*, is "at least arguably related to the question whether a removal order 'in fact was issued'").

The Government's assertion that "[t]he 60-day limit Congress placed on challenges to the expedited removal system … would have no meaning if such challenges could be raised anew each time the system was applied to someone new," Gov't Br. at 20, ignores the strict limitations Congress placed on Section 1252(e)(2) claims. "[U]nless the petitioner wishes to challenge the 'validity of the system' as a whole rather than as applied to her, the district courts' jurisdiction is limited to three narrow issues." *Castro*, 835 F.3d at 430 (citing 8 U.S.C. § 1252(e)(2)-(3)). Many systemic challenges that could be brought under Section 1252(e)(3) would fall outside the plain language of Section 1252(e)(2) and thus be barred after the 60-day statute of limitations.

D.A.M. illustrates this limitation. The *D.A.M.* petitioners argued that the expedited removal orders issued against them were invalid because their credible fear interviews were conducted under an "interim rule known as the 'Transit Ban,'"

which had already been vacated by another court in a systemic challenge. *D.A.M.*, 486 F. Supp. 3d at 407. Because the Transit Ban's invalidity did not relate to whether petitioners had in fact been ordered removed, their claim could not be brought under Section 1252(e)(2). *Id.* at 419. The narrowness of Section 1252(e)(2)'s bases for jurisdiction allays any concern that Section 1252(e)(3)'s statute of limitations could be improperly circumvented without the Government's novel recharacterization of true Section 1252(e)(2) claims.

Finally, if the Government were right that Section 1252(e)(3)'s statute of limitations barred I.M.'s petition, it would mean that Congress had prospectively immunized future violations of the Appointments Clause, one of the "significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997), from judicial review for all time. This is beyond Congress's power. *See Freytag*, 501 U.S. at 880 ("Neither Congress nor the Executive can agree to waive this structural protection."); *cf. Ryder*, 515 U.S. at 182 (Appointments Clause is a "bulwark against one branch aggrandizing its power at the expense of another branch"). Neither the Constitution in general, nor the Appointments Clause in particular, is so feeble that Congress can render it nonjusticiable through such backdoor means. At a minimum, "serious constitutional doubts" would arise if Section 1252(e) were construed to preclude challenges to the authority of the employee purporting to issue an order of removal. *Clark v. Martinez*, 543 U.S. 371,

381 (2005). Thus, the "competing plausible interpretation[]," *id.*—that Section 1252(e)(2)(B) allows such challenges because they concern "whether such an order in fact was issued," 8 U.S.C. § 1252(e)(5)—is the correct one.

II. SECTION 1252(E)(2) DOES NOT CONTAIN AN IMPLICIT "IN CUSTODY" REQUIREMENT

When it finally turns to the district court's actual reason for decision, the Government has no response to most of I.M.'s points. It does not rebut I.M.'s showing that the D.C. Circuit cases the district court believed controlled the outcome are off-point. *See* Opening Br. at 24-25 (discussing *Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006), and *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999)). It fails to explain the fact that Congress, just five years after enacting Section 1252, explicitly incorporated the requirements of the general habeas statute, 28 U.S.C. § 2241, in another immigration habeas statute after choosing not to do so in Section 1252(e)(2). *See* Opening Br. at 18-19 (discussing 8 U.S.C. § 1226a(b)(2)(B)). It ignores the diverse *non-custodial* settings in which habeas has historically been used, and the requirement that a term be "equated or exclusively dedicated" to a common-law concept for that concept to be implicitly read into a statute. *See id.* at 27-28 & n.6 (quoting *United States v. Turley*, 352 U.S. 407, 411-12 (1957)). Where it has no response, the Government simply pretends I.M.'s arguments do not exist.

At the same time, the Government's affirmative arguments fail to overcome Congress's decision not to include a textual custody requirement in Section 1252.

The Government essentially makes four points: (1) Section 2241 contains custodial limits, Gov't Br. at 22-24; (2) case law is supposedly on the Government's side, *id.* at 24, 36-39; (3) Congress used the phrase "habeas corpus proceedings" in Section 1252(e)(2) but not Section 1252(e)(3), *id.* at 31-32; and (4) the purpose of Section 1252(e)(2) challenges is supposedly to challenge detention, rather than expedited removal orders, *id.* at 35, 39-43.

The Court need not resolve whether Section 1252(e)(2) contains a custodial requirement because any such requirement would be constructively satisfied by the Government's obstruction of I.M.'s ability to file while in custody. *See infra* Part III. Nonetheless, if it does reach this issue, each of the Government's four arguments fails.

1. The Government's principal basis for a supposed custodial requirement is that custody is "required by the federal habeas statute," Section 2241. Gov't Br. at 22. According to the Government, Section 1252(e)(2) "merely limits the scope of habeas relief available under 8 U.S.C. § 2241(c)(1)." *Id.* But, as explained in I.M.'s opening brief, the fact that Congress declined to incorporate Section 2241 in Section 1252(e)(2) while disclaiming its applicability eight separate times in Section 1252 generally, and by contrast *did* incorporate it in another immigration habeas statute just five years later, shows that Section 1252(e)(2) contains no implicit "in custody" requirement. *See* Opening Br. at 18-20.

The Government's reliance on *Thuraissigiam* highlights the flaws in its position. *Thuraissigiam* mentions Section 2241 only once, and only to point out that Section 2241 is not available as a mechanism to challenge expedited removal orders. *See* 140 S. Ct. at 1966. Thus, nothing there suggests that Congress silently adopted the provisions of Section 2241.

2. Beyond *Thuraissigiam*, the Government claims that "courts have … recognized that they lack jurisdiction to review Section 1252(e)(2) claims brought by noncitizens after being released from custody." Gov't Br. at 24. None of its cases does any such thing, and the Government presents no convincing reason why this Court should not follow the three decisions that declined to find a custodial requirement in Section 1252(e)(2). *See* Opening Br. at 23-25.

The Government's first two cases are not about expedited removal at all. *Leal Santos v. Gonzales*, 495 F. Supp. 2d 180 (D. Mass. 2007), *aff'd sub nom. Leal Santos v. Mukasey*, 516 F.3d 1 (1st Cir. 2008), was a case about review of a non-expedited removal order under 8 U.S.C. § 1252(b)(5), not an expedited removal order under Section 1252(e)(2). *Leal Santos* includes just a single passing reference to Section 1252(e)(2). *See* 495 F. Supp. 2d at 183. It did not and could not hold that Section 1252(e)(2) incorporates Section 2241's custodial requirement. *Sadhvani v. Chertoff,* 460 F. Supp. 2d 114 (D.D.C. 2006), which similarly dealt with a petitioner

who had been removed through ordinary removal rather than expedited removal proceedings, is even further afield; it does not even *mention* Section 1252(e)(2).

The Government also asserts that a more recent Ninth Circuit case, *Mendoza-Linares v. Garland*, 51 F.4th 1146 (9th Cir. 2022), finds a custodial requirement in Section 1252(e)(2). It does no such thing. *Mendoza-Linares*, like *D.A.M.*, is a case in which the petitioner alleged that his expedited removal order was unlawful because it was issued pursuant to the unlawful Transit Ban. *Id.* at 1153. To the extent *Mendoza-Linares* discusses Section 1252(e)(2) in any depth, it explains (like *D.A.M.*) that such a challenge falls outside the bases for jurisdiction outlined in Section 1252(e)(2), and says nothing about custody. *Id.* at 1157-59. The Government suggests that the Ninth Circuit dismissed the case "in part for failing to follow the requirement under Federal Rule of Appellate Procedure 22 to file in the district of confinement." Gov't Br. at 38. But the Ninth Circuit said nothing about the "district of confinement"; it cited Rule 22 only to show that the petitioner should have filed in a district court, rather than in the court of appeals. *Mendoza-Linares*, 51 F.4th at 1156.[5]

[5] To the extent the Government argues that any reference to Rule 22 is a reference to the "district of confinement" rule, that's incorrect; that rule comes from the federal habeas statute, not Rule 22. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) (citing 28 U.S.C. §§ 2242, 2243). And the Supreme Court has been clear that the rule applies "in habeas challenges to present physical confinement," *id.* at 435, and

Thus, the Government cites *zero* cases holding that Section 1252(e)(2) has a custodial requirement. The district court opinion in this case is, as far as either party has found, the first decision ever to bar a Section 1252(e)(2) petition on the basis of an implicit custodial requirement.

In stark contrast, I.M. has presented three cases reviewing petitions filed under Section 1252(e)(2) that declined to apply a custodial requirement to claims brought under that section. *See* Opening Br. at 23-24. The Government's attempts to dismiss those cases, Gov't Br. at 26-29, are unconvincing at best and disingenuous at worst.

Start with *Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003). While that opinion was vacated as moot, vacated opinions still have persuasive (and in some cases, precedential) effect. *See Action All. of Senior Citizens of Greater Phila. v. Sullivan*, 930 F.2d 77, 83-84 (D.C. Cir. 1991); *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998). In fact, the Ninth Circuit has relied on *Li* since its vacatur, *see Garcia de Rincon v. DHS*, 539 F.3d 1133, 1141 (9th Cir. 2008), and cited *Li* in *Smith* for its relevant holding that there is no "in custody" requirement in Section 1252(e)(2). *Smith*, 741 F.3d at 1021 n.3.

As for *Smith*, the Government's assertion that "whether Section 1252(e)(2) requires petitioner to be 'in custody' was not even briefed," Gov't Br. at 37, is simply

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"does not apply when a habeas petitioner challenges something other than his present physical confinement," *id.* at 438.

false. The issue was briefed in the district court—where the Government *explicitly conceded* the point. *Smith*, 741 F.3d at 1020 n.3 ("[T]he government argued, before the district court, that there is no 'in custody' requirement for the limited review provisions of § 1252(e)(2) … ."); *see also* JA94, 107 (showing the Government's relevant filings in *Smith*). It is thus disingenuous to dismiss *Smith* as assuming the correctness of *Li*'s holding when the Government itself conceded the point.

Finally, the Government notes that *Dugdale I* and *Dugdale v. Customs & Border Protection* ("*Dugdale III*"), 300 F. Supp. 3d 276 (D.D.C. 2018), did not "directly address" custody in relation to Section 1252(e)(2). Gov't Br. at 38-39. But it cannot get around the fact that *Dugdale III* dismissed the petitioner's claim under Section 2241 for lack of custody, and in the very next paragraph decided petitioner's Section 1252(e)(2) claims without mentioning custody. *See Dugdale III*, 300 F. Supp. 3d at 278; *Dugdale I*, 88 F. Supp. 3d at 5.

At best, the Government seems to be suggesting that both it and the *Dugdale* court missed this supposed jurisdictional bar to a Section 1252(e)(2) claim, while simultaneously applying it to a Section 2241 claim. The reality is quite a bit worse for the Government: not only was it aware of the custodial issue, it took the exact opposite position from the one it takes here. In an earlier filing, the Government explicitly stated that "[t]he Government recognizes that core habeas challenges can only be brought by an individual who was in custody at the time the habeas petition

was filed, *but does not believe this holding applies in the present context in which an individual is challenging an order of expedited removal under 8 U.S.C. § 1252(e)(2)(A)*." Mot. to Remand, *Dugdale v. Customs & Border Protection* ("*Dugdale II*"), No. 13-1976, ECF No. 21 (6th Cir. Jan. 30, 2014), Addendum at 1 (emphasis added). Thus, as in *Smith*, the Government in the *Dugdale* proceedings disavowed the theory on which it relies in this case.

Li, *Smith*, and the *Dugdale* opinions are not controlling in this Court, of course. But the fact remains that at least three decisions, including two from a court of appeals, have declined to apply an extratextual custodial requirement to Section 1252(e) claims—a position that the Government, in multiple cases and multiple jurisdictions, has endorsed. On the other side of the ledger, *no* cases before the district court's decision below have read such a requirement into Section 1252(e)(2). Caselaw thus squarely supports I.M.[6]

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[6] These cases, and the Government's previous view that there is no "in custody" requirement in Section 1252(e)(2), demonstrate that Section 1252(e)(2) is at a minimum ambiguous, contrary to the Government's assertions. Gov't Br. at 49-50. And as I.M. explained in his opening brief, if the statute is ambiguous, three basic canons counsel against interpreting it to include a custodial requirement: the presumption in favor of judicial review of administrative action, the principle that ambiguity in a deportation statute is decided in favor of the alien, and the doctrine of constitutional avoidance. Opening Br. at 22-23, 30-32. The Government does not dispute that, in the face of ambiguity, these presumptions would weigh against an implied custodial requirement.

3. Third, the Government places great emphasis on the fact that Section 1252(e)(2) uses the phrase "habeas corpus proceedings," while Section 1252(e)(3) does not. Gov't Br. at 31-32. It maintains that the use of "habeas corpus proceedings" in Section 1252(e)(2) has to mean *something*, particularly since Section 1252(e)(3) just uses the term "action." Thus far, the parties agree. The Government's insistence that this meaning has to be a custodial requirement, however, is unsupported.

"Habeas corpus proceedings" are different from ordinary civil actions in a number of ways that have nothing to do with custody. Habeas corpus proceedings are "unique" and "conform[] with civil practice only in a general sense." *O'Brien v. Moore*, 395 F.3d 499, 506 (4th Cir. 2005) (quoting *Harris v. Nelson*, 394 U.S. 286, 293-94 (1969)). They change the entire "procedural sequencing" of the normal civil action, among other significant differences. *Id.* at 506-07 (collecting cases differentiating habeas procedure from normal civil procedure).[7]

There is thus no need to infer a custodial requirement to give effect to Congress's choice to structure Section 1252(e)(2) petitions as "habeas corpus

[7] *See also* R. Governing Section 2254 Cases 1(b) (allowing district courts to apply the procedural rules governing habeas corpus petitions filed under 28 U.S.C. § 2254 to all other habeas corpus petitions); Charles Alan Wright, Procedure for Habeas Corpus, 77 F.R.D. 227 (1978) (discussing sources of procedural rules for habeas proceedings).

proceedings" and Section 1252(e)(3) claims as "actions." The former are suits between one person and the government, concerning only orders issued against that one person; the latter are broader challenges to an entire statute or regulation. It makes at least as much sense to say that Congress had the most suitable *procedures* for each claim in mind when choosing the technical word, rather than a substantive "in custody" requirement. This is particularly so in light of the textual and contextual evidence suggesting that Section 1252(e)(2) contains no such requirement—much of which, again, the Government leaves unrebutted. *See supra* at 13; Opening Br. at 13-30.

4. Finally, the Government claims that the purpose of Section 1252(e)(2) is to allow petitioners to challenge detention, rather than expedited removal orders. *See* Gov't Br. at 35, 39-43. This is a curious reading of a provision providing "[j]udicial review of *orders* under section 1225(b)(1)." 8 U.S.C. § 1252(e) (emphasis added). And it is a remarkable interpretation of a statute that authorizes only the grant of a new hearing, not release from custody. *Id.* § 1252(e)(4).

The Government argues that had I.M. been granted a hearing under 8 U.S.C. § 1229a, he would have been eligible for release on bond before an immigration judge under 8 U.S.C. § 1226(a) and no longer subject to the mandatory detention provisions of Section 1225(b)(1). Gov't Br. at 42-43. That is incorrect. Under federal regulations, immigration judges are barred from considering release on bond

for "arriving aliens in removal proceedings." 8 C.F.R. § 1003.19(h)(2)(B). As an "applicant for admission … into the United States at a port-of-entry," I.M. would remain an "arriving alien" subject to the mandatory detention provision of Section 1225(b)(1). 8 C.F.R. § 1001.1(q). The Supreme Court has made clear in an analogous context that Section 1225(b)(1)'s mandatory detention provision remains applicable throughout an individual's Section 1229a proceedings. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842-44 (2018). Contrary to the Government's assertions, then, Section 1226's more permissive detention and bond provisions would not apply if a court granted relief under Section 1252(e)(4). *See* Gov't Br. at 42. Accordingly, while it would certainly be welcome if a person who wins a Section 1252(e)(2) claim could be released on bond, that is not the law.[8]

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[8] In a footnote, the Government suggests that I.M.'s claim is not redressable "because the purpose of a hearing under Section 1229a is to determine whether the noncitizen is removable from the United States, and I.M. has already been removed." Gov't Br. at 43 n.9. This is a change from the Government's position in the district court, where it acknowledged that the court would have the power to order a new hearing before an immigration judge if it ruled for I.M. *See* Mot. to Dismiss at 22-26, ECF No. 23. The Government's new position also ignores the continuing effect on I.M. of the putative order. If I.M. prevails and is given a hearing in accordance with Section 1229a, his expedited removal order will be nullified and an immigration judge will decide whether I.M. is inadmissible. *See Kabenga v. Holder*, No. 14-cv-9084, 2015 WL 728205, at *5 n.55 (S.D.N.Y. Feb. 19, 2015) (explaining that a successfully challenged expedited removal order becomes "a legal nullity"); *see also* 8 U.S.C. § 1229a(a)(1), (c) (authorizing immigration judges to determine inadmissibility and removability, which must be based only on the evidence presented at the 1229a hearing). Accordingly, if granted the relief available under

The Government's claim that the purpose of Section 1252(e)(2) is to challenge *detention* is also hard to credit given the absurd consequences of such an interpretation. Since a final expedited removal order "typically is not executed until the individual is transferred back into CBP custody for deportation," JA197, many people in Immigration and Customs Enforcement custody as part of the expedited removal process have not yet been ordered removed. On the Government's interpretation of Section 1252(e)(2), every one of them could bring a Section 1252(e)(2)(B) claim and escape the expedited removal process for the more favorable (and more burdensome to the Government) Section 1229a hearing. *See* 8 U.S.C. § 1252(e)(4) ("In any case where the court determines that the petitioner … was not ordered removed under section 1225(b)(1) … the court may order … that the petitioner be provided a hearing in accordance with section 1229a … ."). That cannot be the Government's actual view of Section 1252(e)(2)(B), but it is the logical outcome of its position.

Rather, Section 1252(e)(2)'s purpose is exactly what it appears to be: a vehicle for challenging *orders under Section 1225(b)(1)*, which Congress intended to be issued and executed as expeditiously as possible—without delay for court proceedings. *See* Opening Br. at 21-23. That purpose weighs against an extratextual

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Section 1252(e)(4), the invalidity of the putative expedited removal order would be confirmed and I.M. would no longer be subject to the five-year admission ban under 8 U.S.C. § 1182(a)(9)(A)(i).

custodial requirement, as courts typically reject constructions under which a statute "would have effect only in the rarest of circumstances." *Stone v. INS*, 514 U.S. 386, 397 (1995).[9]

III. EVEN IF SECTION 1252(E)(2) REQUIRES CUSTODY, EXTREME CIRCUMSTANCES JUSTIFY FINDING THAT I.M. SATISFIES THE CUSTODY REQUIREMENT

Even if Section 1252(e)(2) did contain a custodial requirement, the Court would still have jurisdiction to hear I.M.'s petition, because the Government's obstruction of I.M.'s ability to file his claim, combined with I.M.'s diligent efforts, satisfies any custody requirement. *See* Opening Br. at 32-41.

As explained in I.M.'s opening brief, custody can be satisfied when a petitioner diligently attempts to initiate a petition while in custody, but is obstructed from doing so. *See* Opening Br. at 32-36; *see, e.g.*, *Singh v. Waters*, 87 F.3d 346, 349-50 (9th Cir. 1996) (custodial requirement satisfied where, inter alia, Government had petitioner's file but failed to provide it to petitioner's counsel while he was in custody); *Ortiz v. Mayorkas*, No. 20-7028, 2022 WL 595147, at *3-4 (4th Cir. Feb. 28, 2022) ("Since *Singh*, several sister circuits have recognized the

[9] Although the Government is right that Congress intended to limit review of expedited removal orders in certain respects, *see, e.g.*, Gov't Br. at 46, that merely begs the question of *what* limitations it intended. Congress's inclusion of several explicit restrictions suggests that they did not leave a significant custodial restriction unstated. *See* Opening Br. at 20.

'extreme circumstances' exception in evaluating whether a district court retains jurisdiction over a noncitizen's habeas petition.").

Here, the Government refused to provide I.M. with a copy of the purported expedited removal order while he was detained, making it impossible for him to challenge that order until after he was removed from the country. *See* Opening Br. at 26-41. These extreme circumstances satisfy any custody requirement that might exist in Section 1252(e)(2).

Significantly, the Government does not dispute that a showing of extreme circumstances satisfies a custody requirement. Nor does it contest that extreme circumstances exist when the government obstructs a habeas petitioner from filing while they are still physically detained. Nor does it deny that it refused repeated requests by I.M. and his counsel for a copy of the purported expedited removal order. Instead, the Government's *only* response is that withholding the order did not "prevent[] him from filing a habeas petition under Section 1252(e)(2) while detained," Gov't Br. at 44-45, because he theoretically could have filed suit without knowing who was purporting to order him removed.

This argument—which the Government did not present to the district court—is unconvincing. I.M.'s claim is that no appointed Officer ordered him removed. *See, e.g.*, JA14. Without the putative final removal order, he could not determine who signed it and thus who purported to order him removed. *See* JA197 (explaining

that I.M.'s counsel "asked for I.M.'s expedited removal order so as to review the order, as I.M.'s counsel, to be able to determine whether the order was a valid final order of removal and to advise I.M. on his rights"). It was not until the moment the Government placed I.M. on a plane to his home country that it served him with the Form I-860, which revealed that the purported final removal order and final determination of inadmissibility had been made by two unappointed federal employees. JA 198. In other words, the Government refused to tell I.M. under whose authority he was purportedly ordered removed—the key issue in this case—until releasing him from custody. The Government thus ensured that I.M. lacked the information he needed to file suit until the moment custody ended.

As explained in I.M.'s opening brief, this is squarely within the range of conduct that courts have found constructively satisfies a custodial requirement. Opening Br. at 36-41. The Government's argument that I.M. should simply have filed a habeas petition before he or his attorney were able to determine whether the putative final removal order was valid is no more credible than an argument that the petitioner in *Singh* should have filed his petition while the Government was withholding his INS file from him. *See Singh*, 87 F.3d at 347, 349.[10]

[10] Moreover, it appears that the putative order was not "executed until [I.M.] [was] transferred back to CBP for deportation." JA197. Had I.M. filed suit before Defendants Bock and Chavez purported to issue that ersatz order, Defendants

CONCLUSION

For the foregoing reasons and those in I.M.'s opening brief, the judgment of the district court should be reversed.

Date: December 16, 2022 Respectfully submitted,

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presumably would have argued that his claim was unripe. *See, e.g.*, *Am.-Arab Anti-Discrimination Comm. v. Ashcroft*, 272 F. Supp. 2d 650, 660 (E.D. Mich. 2003) (dismissing claims as unripe where "[o]rders of expedited removal have not been entered against" petitioners).

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/s/ James H. Barker
James H. Barker

ADDENDUM

INDEX TO ADDENDUM

No. 13-1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY DUGDALE, *pro se*,
Appellant,

v.

CUSTOMS AND BORDER PATROL, *et al.*,
Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
CIVIL ACTION NO. 13-3453

MOTION TO REMAND

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NO ORAL ARGUMENT REQUESTED

The Government recently learned of this pending appeal. Construing *pro se* Petitioner Timothy Dugdale's Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 ("Petition") liberally, he is challenging, under 8 U.S.C. § 1252(e)(2)(A), the order of expedited removal that was entered against him on the grounds that he claims to be a U.S. citizen. *See* Petition, Dkt. 1, p. 8 ("I want habeas hearing to determine alienage and to contest the validity of the signed statement and the subsequent removal"); *see also* Dugdale Opening Br., p. 5 ("Rebutting alienage is the ultimate relief from an expedited removal and one of three acceptable 'attacks' on it under 252(e)(2)").

Such a challenge is properly brought in district court. 8 U.S.C. § 1252(e)(2)(A). Thus, the district court's decision *sua sponte* dismissing his petition should be vacated and the matter remanded to the district court on the sole question of whether Mr. Dugdale can establish that he is a U.S. citizen.[1] Mr. Dugdale should be ordered to properly serve the Government Respondents by a date certain so that litigation on this narrow issue may proceed.

The Government recognizes that core habeas challenges can only be brought by an individual who was in custody at the time the habeas petition was filed *Roman v. Ashcroft*, 340 F.3d 314, 327 (6th Cir. 2004), but does not believe

[1] For the sake of completeness, the Government notes that Mr. Dugdale is not claiming that he is a lawful permanent resident; only that he would like to be one.

this holding applies in the present context in which an individual is challenging an order of expedited removal under 8 U.S.C. § 1252(e)(2)(A).

The district court's decision to dismiss Mr. Dugdale's claim was understandable given that: (i) Mr. Dugdale's failed to cite 8 U.S.C. § 1252(e)(2) in his Petition, (ii) he was far from clear that he was claiming to be a U.S. citizen, (iii) he referenced a sworn statement he executed admitting he was a citizen of Canada and Great Britain (rather than the U.S.) and (iv) in almost all other circumstances challenges to orders of removal cannot properly be brought in district court. *See* 8 U.S.C. § 1252(b)(9) ("Except as otherwise provided in this section, no court shall have jurisdiction . . . to review such an order or such questions of law."). Notwithstanding the above, this matter should be remanded to district so that it may properly decide on the merits whether he has established that he is a U.S. citizen.

To be clear, the fact that the Government agrees that an individual can properly bring a claim in district court under 8 U.S.C. § 1252(e)(2) asserting a claim of citizenship, does not mean that the Government believes Mr. Dugdale is a U.S. citizen. To the contrary, the Government continues to believe that his claim of citizenship is without merit. *See Timothy Dugdale v. Eric H. Holder, Jr.*, No. 13-4102 in the U.S. Court of Appeals for the Sixth Circuit. It only means that the

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See Dugdale Opening Br., pp. 5-6.

Government agrees that the district court is the proper forum for such a claim. Moreover, the Government's Motion for Remand does NOT mean that Mr. Dugdale will be able to enter the country or that he is entitled to any rights or privileges associated with U.S. citizenship.

WHEREFORE, the Government respectfully requests that: (i) the district court's order be vacated, (ii) the case remanded to district court on the sole issue of whether Mr. Dugdale can establish that he is a U.S. citizen, and (iii) that Mr. Dugdale be ordered to properly serve the Government by a date certain so that litigation can process on this sole and narrow issue.

January 30, 2014

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I hereby certify that on January 30, 2014, I caused a copy of the foregoing to be mailed First Class Mail, postage prepaid to:

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