ORAL ARGUMENT NOT YET SCHEDULED

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

BRIEF FOR APPELLANT I.M.

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July 27, 2022

Counsel for Plaintiff-Appellant

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to District of Columbia Circuit Rule 28(a)(1), the undersigned counsel certifies the following:

A. Parties And Amici

Petitioner in the district court, and Appellant here, is I.M. Defendants in the district court, and Appellees here, are United States Customs and Border Protection; United States Department of Homeland Security; Alejandro N. Mayorkas, Secretary of the Department of Homeland Security, in his official capacity; Chris Magnus, Commissioner of U.S. Customs & Border Protection, in his official capacity; Timothy J. Klein, Customs & Border Protection Officer, in his official capacity; Bock,[1] Customs & Border Protection Officer, in his official capacity; and Joseph Chavez, Chief Customs & Border Protection Officer, in his official capacity. There were no other parties, intervenors, or amici before the district court, and no intervenors or amici have appeared in this Court.

[1] Bock's first name is unknown to Petitioner. On official forms provided to Petitioner he is identified as "BOCK, CAR28942."

B. Ruling Under Review

Appellant seeks review of the January 21, 2022 opinion and order of the United States District Court for the District of Columbia.

C. Related Cases

This case has not previously been before this Court or any other court (other than the district court). Counsel for Appellant is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

Date: July 27, 2022

Respectfully submitted,

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant I.M. requests oral argument in this case. This case presents important questions about whether 8 U.S.C. § 1252(e)(2) contains an unwritten "in custody" requirement. If there is such a requirement, the case presents the question whether I.M. constructively satisfied the requirement by diligently seeking relief but being obstructed by intentional Government actions that prevented him from filing until after he had been physically removed from the United States. Appellant believes oral argument would aid the Court in its consideration of these issues.

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GLOSSARY

CBP	United States Customs and Border Protection
ICE	Immigration and Customs Enforcement
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
INA	Immigration and Nationality Act

INTRODUCTION

This appeal is about the Government's claim that it can strip courts of congressionally granted jurisdiction to hear a petition challenging an expedited removal order merely by intentionally withholding service of the order until the moment it removes the noncitizen from the United States. Neither the statute at issue, 8 U.S.C. § 1252, nor the Constitution give the executive branch the power to determine whether an individual may file a petition for judicial review. The district court's decision allowing the Government's maneuvering to foreclose a congressionally authorized pathway to judicial review must be reversed.

Appellant I.M. arrived to the United States with a valid business/tourism visa issued by a Foreign Service Officer appointed by the President and confirmed by the Senate. I.M. had come to the United States at the invitation of United States sponsors to learn sustainable agriculture techniques for his nonprofit work back in his home country, focused particularly on empowering female farmers. Upon his arrival at Chicago O'Hare Airport, I.M. was questioned by an unappointed United States Customs and Border Protection ("CBP") employee, who purported to cancel his visa and order him removed from the United States without any review by a constitutionally appointed Officer.

An unappointed employee purporting to issue a final adjudicative order barring someone from the United States is a straightforward Appointments Clause

violation, one that renders the removal order null *ab initio*. But according to the Government, the judiciary cannot determine whether it violated that "significant structural safeguard[] of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997), because the Government made it impossible for I.M. to file his claim until after the Government removed I.M. to his home country.

In order to pursue this lawsuit, I.M. and his counsel repeatedly requested the purported order of removal while I.M. was in custody. Despite these repeated requests, the Government refused to provide I.M. with the order of removal until they were putting him on a plane back to his country, making it impossible for I.M. to bring this petition while he was still in the Government's custody. Indeed, the Government told I.M.'s attorney that its policy is to withhold final orders of removal until right before the noncitizen boards the plane leaving the United States.

According to the Government, this practice stripped the district court of jurisdiction over I.M.'s claim, because jurisdiction under Section 1252(e)(2) purportedly requires a petitioner to be "in custody" at the time he files a claim. But Section 1252(e)(2) contains no "in custody" requirement. Section 1252(e)(2)'s predecessor statute explicitly required a petitioner to be in custody and to file before departing from the country, but Congress *deleted* those requirements when replacing that statute with Section 1252(e)(2). And even if an atextual "in custody" requirement could be read into Section 1252(e)(2), it would be satisfied where, as

here, the petitioner diligently tried to pursue his claim and was obstructed by the Government's affirmative conduct.

The district court's decision dismissing I.M.'s claim was therefore erroneous in two ways. First, the district court improperly imported an unwritten "in custody" requirement into Section 1252(e)(2), despite the text, history, structure, and purpose of the statute showing that there is no such requirement. Second, the district court failed to consider whether, if Section 1252(e)(2) does contain an unwritten "in custody" requirement, I.M.'s diligent efforts in light of the Government's willful decision to withhold a final removal order from I.M. until putting him on a plane satisfied the "in custody" requirement. Because Section 1252(e)(2) contains no custodial requirement and because, even if it did, such a requirement would be satisfied here, this Court should reverse the District Court's order dismissing the case for lack of jurisdiction.

STATEMENT OF JURISDICTION

The district court had jurisdiction to review I.M.'s petition under 8 U.S.C. § 1252(e)(2). *See* JA142, ¶¶ 7-8. The district court issued its dismissal order on January 21, 2022. *See* JA221. I.M. timely appealed on March 18, 2022. *See* JA132. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether 8 U.S.C. § 1252(e)(2) contains an unwritten "in custody" requirement to challenge an expedited removal order, even though Congress eliminated the "in custody" requirement that existed in Section 1252's predecessor statute and even though a custodial requirement would conflict with the structure of Section 1252 and Congress's purpose in establishing the expedited removal process and its judicial review mechanism.

2. If Section 1252(e)(2) does contain an atextual "in custody" requirement, whether it is satisfied where the petitioner diligently attempts to pursue his claim while in custody and the Government obstructs that effort by refusing to provide the petitioner with a final order of removal until the moment it removes him from the country, thus making it impossible for him to file his petition while in custody.

PERTINENT STATUTES

Relevant statutes are included in an addendum.

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act in 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, to amend certain provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1178

("INA").[1] Under the IIRIRA, noncitizens "arriving in the United States" could now be subjected to a new authority called "expedited removal." 8 U.S.C. § 1225(b)(1)(A)(i). Under expedited removal, Department of Homeland Security employees—acting as investigator, prosecutor, and adjudicator—determine whether a noncitizen lacks valid papers, intends to violate the terms of their otherwise valid papers, or made material misrepresentations in seeking admission; they can then order the noncitizen removed "without further hearing or review." *Id.* Noncitizens subjected to expedited removal order are barred from seeking readmission to the United States for five years. *Id.* § 1182(a)(9)(A)(i).

Federal district courts may review expedited removal orders "in habeas corpus proceedings" to determine (1) "whether the petitioner is [a noncitizen]," (2) "whether the petitioner was ordered removed," or (3) "whether the petitioner can prove . . . that the petitioner . . . has been granted asylum." *Id.* § 1252(e)(2). In reviewing whether a petitioner was ordered removed, "the court's inquiry is limited to whether such an order in fact was issued and whether it relates to the petitioner." *Id.* § 1252(e)(5).

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[1] IIRIRA replaced and amended, among other provisions, INA § 106 (codified at 8 U.S.C. § 1105a). *See* IIRIRA, Pub. L. No. 104–208, § 306(a)-(b), 110 Stat. 3009–546, 607-612 (in consecutive subsections, enacting 8 U.S.C. § 1252 (INA § 242) and repealing former 8 U.S.C. § 1105a (1994)).

Unlike traditional habeas corpus proceedings, Section 1252(e) does not allow a court to order a petitioner's release from custody. Instead, a court that finds that an expedited removal order is unlawful must order that "the petitioner be provided a hearing in accordance with Section 1229a," *i.e.*, placement in regular removal proceedings before an immigration judge to determine whether the individual is admissible to or removable from the country. *Id.* §§ 1252(e)(4), 1229a(a)(3).

B. Factual Background

I.M. is a non-citizen who has devoted his career to sustainable farming and has founded education-based non-profits in his home country. JA144, ¶¶ 20-21. On August 23, 2019, he received a two-year B1/B2 business/tourism visa to visit the United States, granted by a constitutionally appointed Foreign Service Officer in the State Department. JA145, ¶ 24. Soon thereafter, I.M. visited the United States at the invitation of a personal mentor and development specialist with the Department of Agriculture, and spent time learning from the founders of Midwest Permaculture in Illinois. JA144-45, ¶ 22-23, 25. All three supported I.M.'s visa application. JA145, ¶ 24. I.M. fully complied with the terms of his visa. JA145, ¶ 25.

Following his first visit, in late October 2020, I.M. planned a second trip to the United States to gain "hands-on experience" in regenerative agriculture techniques from a U.S. agriculturalist located in Connecticut, who had agreed to host him. JA145, ¶¶ 27-28.

When I.M. arrived at Chicago O'Hare airport, his port of entry to the United States, a CBP agent placed him in secondary inspection. Once in secondary inspection, Defendant Timothy J. Klein interrogated I.M. and unilaterally determined that he was inadmissible to the United States (despite possessing a valid, unexpired visa) because Klein (erroneously) concluded that I.M. was going to "be[] paid by" an American farmer. JA145-46, ¶¶ 29-31.

Defendants then placed I.M. in the custody of Immigration and Customs Enforcement (ICE). While in ICE's custody, I.M. "urgently" requested *four times*, using an official ICE Detainee Request Form, his "Form 1-860 Notice and Order of Expedited Removal" so he could determine whether he was "validly ordered removed." JA185, ¶ 8-10; JA189; JA191-92; JA194. The Government simply ignored the first request, which I.M. sent on November 21, 2020. JA185, ¶ 8. A day later, I.M. submitted two more. JA185, ¶ 9, JA191-92. ICE responded by stating that it had "spoken to your attorney" and "will not be able to serve/execute the form on you. Your file will be returned to CBP at the airport." JA192. On November 23, 2020, I.M. repeated his request to receive the removal order, and the Government again refused to provide it, reiterating that I.M.'s "file has been returned to CBP at the airport and CBP will complete and execute the completed I-860 Order of Expedited Removal." JA185, ¶ 10, JA194.

I.M.'s counsel also diligently sought the removal order—and still the Government refused to provide it. Counsel first requested "a copy of all of I.M.'s immigration documents" on November 19, 2020 to "determine whether the order was a valid final order of removal" and to "advise I.M. on his rights." JA196-97, ¶ 6. Counsel received no response. Counsel followed up by phone and email the next day, specifically requesting the "fully signed I-860 expedited removal order." JA196-97, ¶¶ 6-7. The agent responded by informing counsel that "for individuals initially stopped and arrested by [CBP] at the airport, Form I-860 typically is not executed until the individual is transferred back into CBP custody for deportation." JA197, ¶ 8. A few days later, on November 23, 2020, the agent confirmed by voicemail that "ICE would not be able to serve I.M. . . . that week," and "typically CBP executes and serves [removal orders] on an individual when transferred back into their custody for deportation." JA197, ¶ 9.

Counsel then requested contact information for CBP at the airport and called there to speak to a supervisor about the status of I.M.'s removal order. JA198, ¶ 11. On the call, counsel again requested "a copy of a fully executed Form I-860." JA198, ¶ 11. The supervisor stated that counsel "would have to get the [order] from [I.M.] or file a Freedom of Information Act (FOIA) request." JA198, ¶ 11. When counsel pointed out that I.M. had never received the order (and therefore counsel could not get the order from him), the supervisor acknowledged that I.M. "would be

served the signed Form I-860 when he [is] transferred to the airport for deportation, and that [counsel] would have to get [the order] from [I.M.] once [I.M.] arrived back in his home country." JA198, ¶ 11. Despite counsel's best efforts during this time, counsel heard nothing else from the Government, except a voicemail on November 27, 2020, stating that CBP had already "picked up I.M. and transferred him to O'Hare for deportation." JA198, ¶ 13.

The Government did not provide I.M. with a valid final removal order until the moment it placed him on the plane back to his home country. JA147, ¶ 39. By withholding the final order of removal until the moment of embarkation to the airplane for deportation, the Government prevented I.M. from even informing his counsel of his removal order until he landed in his home country the next day. JA147, ¶ 39; JA185-86, ¶¶ 10-12; JA198, ¶ 14. This made it impossible for I.M. to challenge his invalid removal order before he was deported. *See* 8 U.S.C. § 1252(e)(2)(B). Only upon receiving the final order of removal did I.M. and his counsel learn that Defendants Bock and Chavez, neither of whom was appointed by the President or a Head of Department, purported to issue the order. JA180.

C. Procedural History

I.M. filed a habeas petition in the United States District Court for the District of Columbia on December 8, 2020. He argued that the unappointed employees who purported to order him removed acted in violation of the Appointments Clause,

which requires anybody exercising significant authority of the United States in a continuing position to be appointed by the President or a Head of Department. *See generally Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). Because the employees who purported to order him removed were not appointed, his removal order was void *ab initio*. *See* JA155-60, ¶¶ 69-83.

The Government moved to dismiss on February 26, 2021. *See* Resp'ts-Defs.' Mot. to Dismiss for Lack of Jurisdiction & Mem. in Supp., *I.M. v. U.S. Customs & Border Prot.*, No. 20-3576 (D.D.C. Feb. 26, 2021), ECF No. 23 ("Mot. to Dismiss"). In its motion, the Government argued that custody is a prerequisite of a habeas corpus proceeding under Section 1252(e)(2), and, since I.M. filed his petition after the Government removed him, the court lacked jurisdiction to hear it. Mot. to Dismiss at 11-14. I.M. opposed the motion, arguing that the text of Section 1252(e)(2) contains no custodial requirement, and that, if it did, that requirement was satisfied by the "extreme circumstances" presented by this case. Opp'n to Resp'ts/Defs.' Mot. to Dismiss at 9-17, *I.M. v. U.S. Customs & Border Prot.*, No. 20-3576 (D.D.C. Mar. 26, 2021), ECF No. 25 ("Opp'n to Mot. to Dismiss").

The district court dismissed I.M.'s petition on January 21, 2022. It agreed with the Government that, because I.M. was removed from the country before his

filing, he could not establish jurisdiction for his petition.[2] JA213-21. The district court did not address I.M.'s "extreme circumstances" claim. *See id.*

SUMMARY OF ARGUMENT

The district court erred in two ways: First, the court inserted an unwritten "in custody" requirement into Section 1252(e)(2). Second, assuming there is such a requirement, the court failed to consider whether the extreme circumstances in this case constructively satisfied it.

First, the plain text of Section 1252(e)(2) does not state that a petitioner must be "in custody" to file a petition for review of a removal order. That should end the interpretive exercise. But if the Court were to look beyond the plain text, other interpretive tools, including the statutory history, structure, and purpose of Section 1252(e)(2), as well as the longstanding presumptions favoring judicial review of administrative action and construing ambiguous deportation statutes in favor of noncitizens, all point the same way. Indeed, there was an "in custody" requirement in Section 1252's predecessor statute that was left out of the language of Section 1252(e)(2), strongly suggesting that Congress's intent was not to include such a requirement. Despite all this textual evidence against judicially reinstating

[2] I.M. also brought an Administrative Procedure Act challenge to the revocation of his visa, which the court dismissed for lack of federal question jurisdiction under 28 U.S.C. § 1331. I.M. does not challenge that decision on appeal. The district court did not reach the merits of I.M.'s Appointments Clause argument.

the congressionally deleted "in custody" requirement, the district court imported such a custodial requirement based solely on Congress's use of the term "habeas corpus proceedings." Were this Court to follow suit, it would be the first court of appeals to add such a requirement to Section 1252(e)(2) and would open up a circuit split. This Court should not do so.

Second, even if there were an unwritten "in custody" requirement in the statute, the district court failed to consider whether that requirement was constructively satisfied by the extreme circumstances in this case. It was. As multiple sister circuits have held, extreme circumstances arise when a petitioner makes diligent efforts to bring a habeas petition while "in custody," but the Government stops them from filing until after they are released. Under those extreme circumstances, the "in custody" requirement is constructively satisfied. Here, I.M. needed a final order of removal in order to bring this habeas petition, and he made diligent efforts to obtain it. Over nearly two weeks, he and his attorney made eight separate requests, using official forms, phone calls, and emails. But the Government refused to provide the final order of removal until I.M. was boarding a plane out of the United States. In doing so, the Government blocked I.M. from bringing this petition until he was no longer physically detained—a move that ICE officials admitted was standard practice. Under these circumstances, the Government's obstructive acts constituted extreme circumstances under which

I.M.'s diligent efforts constructively satisfied the "in custody" requirement in Section 1252(e)(2), to the extent one exists.

STANDARD OF REVIEW

The Court reviews questions of law, including whether Section 1252(e)(2) contains an unwritten "in custody" requirement, and whether any such requirement was satisfied by the "extreme circumstances" in this case, de novo. *Piersall v. Winter*, 435 F.3d 319, 321 (D.C. Cir. 2006) ("We review *de novo* the district court's grant of a motion to dismiss for lack of subject matter jurisdiction.").

ARGUMENT

I. 8 U.S.C. § 1252(E)(2) HAS NO "IN CUSTODY" REQUIREMENT

The district court erred in holding that Section 1252(e)(2) contains an implicit "in custody" requirement. The plain text of Section 1252 contains no such requirement; to the contrary, Congress chose not to retain the custodial requirement that had been in Section 1252's predecessor statute. Ignoring this critical omission, the district court concluded that the phrase "habeas corpus proceedings" inherently required custody. But the statute's text, history, structure, purpose, and logic all make the district court's atextual presumption inappropriate. The district court's decision to disregard Section 1252's textual implications and import a concept Congress conspicuously omitted was erroneous.

A. The text, history, and structure of 8 U.S.C. § 1252(e)(2) demonstrate that it contains no "in custody" requirement

In interpreting a statute, a court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). Section 1252(e)(2) provides that "[j]udicial review of any determination made [in expedited removal proceedings] is available in habeas corpus proceedings," with certain limits on what determinations can be reviewed. Conspicuously missing from Section 1252(e)(2)—or any other subsection of Section 1252—are the words "in custody" or any reference to a requirement that an individual be "in custody."

This should end the inquiry. "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it."). And the statute unambiguously does not include an "in custody" requirement.

The statutory history of Section 1252(e)(2) confirms that the exclusion of a custody requirement was no accident. In 1996, Congress repealed an earlier immigration-specific judicial review provision, *see* 8 U.S.C. § 1105a (1994), and replaced it with Section 1252. *See* Act to Amend the Immigration and Nationality

Act, Pub. L. No. 87-301, § 106, 75 Stat. 650, 651-53 (1961) (codified at 8 U.S.C. § 1105a); IIRIRA, Pub. L. No. 104–208, § 306(a)-(b), 110 Stat. 3009–546, 607-612 (in consecutive subsections, enacting Section 1252 (INA § 242) and repealing former Section 1105a). The former Section 1105a provided for judicial review of a removal order "by habeas corpus proceedings," but only if the noncitizen was "held in custody pursuant to an order of deportation" and had not "departed from the United States." 8 U.S.C. § 1105a(a)(10), (b), (c) (1994). While Congress chose to retain some limitations on judicial review from Section 1105a, *compare* 8 U.S.C. § 1105a(d) (1994), *with* 8 U.S.C. § 1252(e)(2), (5), it declined to retain these explicit "in custody" and pre-departure requirements, *compare* 8 U.S.C. § 1105a(a)(10), (c) (1994), *with* 8 U.S.C. § 1252(e)(2).

There is no basis for assuming Congress's deletion of the "in custody" requirement was somehow accidental or unintentional. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-59 (2004)). Congress "removed any mention" of custody, which "more readily suggests that the current version" does not include that requirement. *Id.* Thus, saying that the statute here is "silent" about a custodial requirement "is just another way of saying Congress

chose not to include [that] requirement." *Julmice v. Garland*, 29 F.4th 206, 208 (4th Cir. 2022).

Indeed, the Supreme Court has recognized that Section 1252's omission of former Section 1105a's pre-departure requirement—another jurisdictional requirement that prevented review after removal—was intentional. *See Nken v. Holder*, 556 U.S. 418, 424 (2009) ("Congress lifted the ban on adjudication . . . once an alien has departed."). There is no textual or logical reason to conclude that Congress's deletion of the pre-departure requirement intentionally "lifted the ban on adjudication . . . once an alien has departed," *id.*, yet its deletion of the "in custody" requirement was unintentional and lifted nothing.

Additionally, prior to these amendments, Section 1105a provided both that one path to judicial review of a removal order was "by habeas corpus proceedings" *and* that the noncitizen needed to be "held in custody" to obtain that review. 8 U.S.C. § 1105a(a)(10) (1994) ("[A]ny alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."). If, as the district court believed, the phrase "habeas corpus proceedings" necessarily implied that a claim under the statute could only be brought by someone in custody, the inclusion of the phrase "in custody" in Section 1105a(a)(10) would have been superfluous. But in statutes, "words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936). It is therefore a

"basic interpretive canon that a 'statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Genus Med. Tech. LLC v. FDA*, 994 F.3d 631, 638 (D.C. Cir. 2021) (alteration in original) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

So too in 28 U.S.C. § 2241, the general habeas statute. That statute contains *four* textually explicit "in custody" requirements in explaining to whom the "writ of habeas corpus" extends. 28 U.S.C. § 2241(c)(1)-(4).[3] Again, if simply saying "habeas corpus" was enough to imply an "in custody" requirement, all those times that Section 2241(c) says "in custody" would be wholly superfluous. Congress thus understood that the general habeas statute would not contain a custodial requirement without an explicit provision. *See Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (locating Section 2241's "limit[ation] to those 'in custody'" not in the background principles of habeas corpus at common law but in "the statute" itself). That, in turn, strongly suggests that it viewed the reference to "habeas corpus proceedings" in

[3] Similar explicit custodial requirements that would be superfluous if the term "habeas corpus" implied a custodial requirement appear in other habeas statutes. *See, e.g.*, 28 U.S.C. § 2244(c) (referring to "a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court . . ."); *id.* § 2254(a) ("The Supreme Court . . . or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or the laws or treaties of the United States."); *id.* § 2254(d) (referring to "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court").

1252(e)(2) the same way—and consciously chose not to include a custodial requirement. *See Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a 'later act can . . . be regarded as a legislative interpretation of (an) earlier act . . . in the sense that it aids in ascertaining the" usage of words or phrases "in their contemporary setting,' and 'is therefore entitled to great weight in resolving any ambiguities and doubts.'" (quoting *United States v. Stewart*, 311 U.S. 60, 64-65 (1940)); Scalia & Garner, *supra* 14, at 173 (explaining that "the more connection the cited statute has with the statute under consideration, the more" weight it has in interpreting the statute under consideration).

Similarly, Congress could have chosen to incorporate Section 2241's custody requirement by reference, but chose not to. In fact, Congress *did* incorporate parts of Section 2241 when enacting a different immigration habeas statute five years later. *See* 8 U.S.C. § 1226a(b)(2)(B) (2001) ("Section 2241(b) . . . shall apply to an application for a writ of habeas corpus described in [Section 1226a(a)]."). Congress thus knew how to cross-reference Section 2241 and chose not to do so in Section 1252(e)(2). "If, as the Government supposes, Congress had wanted to borrow" the custody requirement from Section 2241(c), "it could have easily cross-referenced" that requirement, and its decision to do the opposite makes the Government's interpretation "a most unlikely reading." *Azar v. Allina Health Servs.*,

139 S. Ct. 1804, 1813 (2019); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) (explaining that courts "presum[e] that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of language (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

Indeed, Congress was well aware of the general habeas statute, and chose *not* to adopt it in this circumstance. Section 1252 prohibits the application of Section 2241 eight separate times. *See* 8 U.S.C. § 1252(a)(2)(A); *id.* § 1252(a)(2)(B); *id.* § 1252(a)(2)(C); *id.* § 1252(a)(4); *id.* § 1252(a)(5); *id.* § 1252(b)(9); *id.* § 1252(g). And specifically regarding challenges to expedited removal orders, Section 1252 could not be any clearer that Section 2441 does not apply:

> Notwithstanding any other provision of law (statutory or nonstatutory), *including section 2241 of title 28*, or any other habeas corpus provision, . . . no court shall have jurisdiction to review . . . except as provided in section (e) any individual determination or to entertain any other cause or claim arising from [an expedited removal order].

8 U.S.C. § 1252(a)(2)(A) (emphasis added). In short, Congress knew about the general habeas statute; it knew its requirements, including the "in custody requirement"; and far from copying or incorporating them, it expressly directed courts *not* to follow Section 2241. Because Congress created "an explicit exception to the general applicability of the [general habeas statute], . . . it must be construed

as creating a procedure different from normal procedure under the [statute]." *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995).

Congress's decision not to adopt the "in custody" requirement in Section 1252(e)(2) is thus clear. This statute "was evidently drawn with care," and "[t]he particularization and detail with which the scope of each provision" was drawn indicates that Congress included all they wished to include. *Iselin v. United States*, 270 U.S. 245, 250 (1926). Congress knew how to detail what exactly was needed to seek relief under this statute, and went to great lengths to detail the requirements it wanted, *see* 8 U.S.C. § 1252(b)-(e), but chose to omit an "in custody" requirement, *see United States v. Jumaev*, 20 F.4th 518, 551 (10th Cir. 2021) ("[C]ommon sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of [one requirement] implies the exclusion of others." (citation omitted)). Where Congress decided not to include a requirement from the predecessor statute, it chose to "lift[]" that requirement. *Nken*, 556 U.S. at 424. That choice must be respected. *Allegheny Def. Project v. FERC*, 964 F.3d 1, 17 (D.C. Cir. 2020) (en banc) (Congress "is both qualified and constitutionally entitled to weigh the costs and benefits of different approaches and make the necessary policy judgment." (citation omitted)).

B. A custodial requirement would be inconsistent with Congress's purpose in creating expedited removal

Congress's decision not to include a custodial requirement in Section 1252(e) flowed naturally from its purpose in drafting the judicial review provision. Congress enacted Section 1225(b) and its judicial review provision in Section 1252(e) to provide for *expedited* removal. *See* H.R. Conf. Rep. No. 104–828, at 209 (1996) ("The purpose of these provisions is to expedite the removal from the United States of aliens . . . ."). An individual who, like I.M., arrives at a port of entry and is issued a final expedited removal order must be "removed immediately" if practicable. 8 U.S.C. § 1231(c)(1). Similarly, where an individual expresses a fear of persecution and an immigration officer determines that that claim is not credible, Congress directed immigration judges to review that claim "as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days." 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

Given Congress's intention to remove people as quickly as possible, a custodial requirement would have made little sense. Establishing an avenue for review—even one limited to certain determinations, *see* 8 U.S.C. § 1252(e)(2)—that could only be exercised in the minutes, hours, or, at best, days between issuance of an order and physical removal would be absurd. Courts "should not 'lightly conclude' that Congress enacted such a 'self-defeating statute.'" *Allen v. Dist. of Columbia*, 969 F.3d 397, 404 (D.C. Cir. 2020) (quoting *Quarles v. United States*,

139 S. Ct. 1872, 1879 (2019)); *see also Stone*, 514 U.S. at 397 (rejecting a construction under which a provision "would have effect only in the rarest of circumstances"). Where such an absurd construction can be avoided, it should be—and especially when it can be avoided simply by applying "[t]he preeminent canon of statutory interpretation"; the presumption that the "legislature says in a statute what it means and means in a statute what it says there." *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020) (alteration in original) (quoting *Janko v. Gates*, 741 F.3d 136, 139-40 (D.C. Cir. 2014)).

The absurd and troubling consequences of holding that Section 1252(e) petitions are jurisdictionally barred if filed after removal are especially clear when Section 1252(e)(2)(A) is considered. That subsection allows a petitioner to challenge a determination that "the petitioner is an alien," 8 U.S.C. § 1252(e)(2)(A)—as opposed to, say, a U.S. citizen. If a citizen is wrongly issued a removal order, Section 1252(e) is the *only* means to challenge that order. Under the district court's construction, a citizen wrongly determined to be an inadmissible alien by an unappointed CBP agent would be precluded from challenging their removal as long as CBP got them on a plane quickly enough (or, if entering by land, by turning around their car). This would present significant constitutional concerns, because Congress has no power to "abridge, affect, restrict the effect of, [or] take away citizenship." *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967) (internal quotation

marks and ellipsis omitted). Where a statute can reasonably support "competing plausible interpretations," the Court should presume that "Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).[4]

C. Courts have recognized that Section 1252(e) contains no "in custody" requirement

Section 1252's text, structure, history, and purpose all point to one outcome: that Congress did not intend to create an "in custody" requirement to challenge an expedited removal order. It is no surprise, therefore, that—until this case—courts consistently declined to read an "in custody" requirement into Section 1252(e). *See Smith v. CBP*, 741 F.3d 1016, 1018 (9th Cir. 2014) (even though petitioner was never in custody, court has "jurisdiction under the limited review provisions of 8 U.S.C. § 1252(e)(2) to consider whether [petitioner] was 'ordered removed' under the expedited removal statute"); *Li v. Eddy*, 259 F.3d 1132, 1135 (9th Cir. 2001) (per curiam) ("[T]here is no 'in custody' requirement for the limited review provisions of section 1252(e)."), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003); *Dugdale v.*

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[4] The fact that I.M. is not himself a citizen is irrelevant to the significance of the constitutional concerns raised by the district court's construction. *See Clark*, 543 U.S. at 380-83. "If one of [two plausible statutory constructions] would raise a multitude of constitutional problems, the other should prevail—whether or not the constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81. And the possibility of a citizen erroneously being removed under Section 1225 is no fanciful hypothetical. *See, e.g.*, *Lyttle v. United States*, 867 F. Supp. 2d 1256 (M.D. Ga. 2012).

CBP, 88 F. Supp. 3d 1, 3-4, 6-8 (D.D.C. 2015) (finding jurisdiction over petitioner's 1252(e)(2) petition where petitioner was not in custody and had received discretionary permission to enter the country); *cf. Dugdale v. CBP*, 300 F. Supp. 3d 276, 278 (D.D.C. 2018) (stating that petitioner "cannot bring a habeas petition under § 2241" because he was not in custody, then proceeding to deny claims brought under Section 1252(e)(2) on unrelated grounds), *aff'd*, No. 18-5249, 2019 WL 2157423 (D.C. Cir. May 1, 2019).

The district court suggested that the D.C. Circuit had resolved this issue in the opposite direction in *Qassim v. Bush*, 466 F.3d 1073, 1078 (D.C. Cir. 2006) (per curiam). JA 214-15. This is incorrect. *Qassim* did not involve Section 1252; indeed, it was not an immigration case at all. Rather, it involved persons captured on the battlefield and held as enemy combatants, who filed habeas petitions under the general habeas statute. *See Qassim v. Bush*, 407 F. Supp. 2d 198, 199 (D.D.C. 2005); *see also id.* at 201 (referring to 28 U.S.C. § 2243); *Sadhvani v. Chertoff*, 460 F. Supp. 2d 114, 118 (D.D.C. 2006) (also cited by the district court, JA214, and also discussing jurisdiction under the general habeas statute), *aff'd*, 279 F. App'x 9 (D.C. Cir. 2008). As explained above, the general habeas statute has multiple explicit "in custody" requirements. *See* 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody."). *Qassim*'s discussion says nothing at all about how Section 1252(e) should be interpreted.

The district court also cited dicta in *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1161 (D.C. Cir. 1999), a case about a consular denial of a visa application, for the proposition that noncitizens must be in custody to challenge their exclusion orders. JA215-16. But *Saavedra Bruno* was not interpreting Section 1252(e)(2). Instead, it was discussing former Section 1105a, *see* 197 F.3d at 1161—which, as explained above, contained an explicit custodial requirement. It therefore does not suggest that Section 1252(e)(2) has an "in custody" requirement. And regardless, that discussion is dicta, and is not binding on this Court. *Gersman v. Grp. Health Ass'n, Inc.*, 975 F.2d 886, 897 (D.C. Cir. 1992) ("Binding circuit law comes only from the holdings of a prior panel, not from its dicta.").

Tellingly, neither the district court nor the Government in its briefing below identified *any* case that had found a custodial requirement in Section 1252(e)(2). Affirming the district court here would make this Court the first court of appeals to insert an "in custody" requirement into Section 1252(e)(2) and create a circuit split with the Ninth Circuit, all despite the plain text, history, structure, and purpose of the statute. The Court should decline to do so.

D. The district court erred in importing a putative common-law custodial requirement

The district court's sole basis for rejecting the text, history, structure, and purpose of Section 1252 was that, in using the term, "habeas corpus proceedings," Congress supposedly intended to import a custodial requirement. JA214. This is

incorrect. An implicit common-law concept should not "be applied in defiance of a statute's overriding purposes and logic," which is exactly what the district court did here. *United States v. Locke*, 471 U.S. 84, 98 (1985). All of the facts discussed above—Congress's omission of the explicit "in custody" requirement it used in a predecessor statute and elsewhere, its inclusion of other detailed prerequisites to suit, and its purpose of expediting removal from the country as swiftly as practicable—all weigh against inferring a tacit custodial requirement. And Congress's decision to prohibit courts from ordering petitioners released from custody as a remedy under Section 1252(e)(2) proves that it did not intend Section 1252(e)(2) petitions to be traditional common-law habeas petitions.[5]

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[5] The district court also erred by treating the custodial issue as one of redressability (and therefore standing), rather than subject matter jurisdiction. *See* JA213-15. Neither party below had discussed the custodial issue as one of redressability or standing, and the court was incorrect to do so. *Cf. Diop v. ICE/Homeland Security*, 656 F.3d 221, 226 n.4 (3d Cir. 2011) ("Standing must be distinguished from the separate and distinct inquiry into whether a petitioner is 'in custody,' as required under the habeas statutes."), *overruled on other grounds as stated in Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274, 278 (3d Cir. 2018); *Dhinsa v. Krueger*, 917 F.3d 70, 78 (2d Cir. 2019) ("[O]ur standing analysis in the habeas context differs from the question whether a habeas petitioner is 'in custody' when he files his petition."). The district court's reasoning that custody goes to redressability because "the function of the writ of habeas corpus is to release someone from custody," JA214, would mean that *no* Section 1252(e)(2) petitioner would ever have standing, because Section 1252(e) does not authorize release from custody even for petitioners who are in physical custody when filing their petitions. *See* 8 U.S.C. § 1252(e)(4).

Against all that statutory and contextual evidence, the district court's reliance on the term "habeas corpus" in isolation cannot bear the weight it put on it. As an initial matter, courts import common-law definitions only where they are "universal," *Moskal v. United States*, 498 U.S. 103, 115-16 (1990), and the common-law term is "equated or exclusively dedicated to" the corresponding concept, *United States v. Turley*, 352 U.S. 407, 411-12 (1957) (quoting *Boone v. United States*, 235 F.2d 939, 940 (4th Cir. 1956)). While "the traditional function of the writ is to secure release from illegal custody," *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973), that is not its only purpose. "[H]abeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through form and procedural mazes." *Hensley v. Mun. Ct.*, 411 U.S. 345, 349-50 (1973) (citations omitted). As the Supreme Court explained just two years after Congress enacted former Section 1105a, the writ of habeas corpus has historically been used in a variety of situations that are unrelated to executive or judicial custody. *See Jones*, 371 U.S. at

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Putting the custody question aside, I.M.'s injury is clearly redressable: if he succeeds on his claim, he will be entitled to, at a minimum, a new hearing before an immigration judge under Section 1229a to determine whether he is admissible or removable. *See* 8 U.S.C. §§ 1252(e)(4), 1229a. Moreover, the ordering of a new hearing would "restore[] [I.M.] to the status he enjoyed before the . . . removal order went into effect." *Kabenga v. Holder*, No. 14-9084, 2015 WL 728205, at *5 n.55 (S.D.N.Y. Feb. 19, 2015). In any event, nothing in this case turns on whether the putative "in custody" requirement is treated as going to redressability or rather to the existence of subject matter jurisdiction under Section 1252(e).

238-40.[6] Thus, while the common-law requirement the district court inferred may be commonly applicable in "habeas corpus proceedings," the term is not "exclusively dedicated" to it. *Turley*, 352 U.S. at 411-12.

But even assuming that "habeas corpus" invariably required custody at common law, the common-law meaning presumption would not apply "[i]f the context makes clear that a statute uses a common-law term with a different meaning." Scalia & Garner, *supra* 14, at 318; *see also Locke*, 471 U.S. at 98 ("While reference to common-law conceptions is often a helpful guide to interpreting . . . statutory terms, this principle is a guide to legislative intent, not a talisman of it, and the principle is not to be applied in defiance of a statute's overriding purposes and logic.").

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[6] The Supreme Court collected examples as diverse as the emancipation of "an indentured 18-year-old girl" subject to "no restraint . . . other than the covenants of the indenture"; a petition by a woman "being constrained by her guardians to stay away from her husband against her will"; a parent's suit to "obtain his children from the other parent, even though the children were 'not under imprisonment, restraint, or duress of any kind'"; and a challenge to "the legality of an induction or enlistment into the military service." *Jones*, 371 U.S. at 238-40 (citations omitted); *see also, e.g.*, James Oldham & Michael J. Wishnie, The Historical Scope of *Habeas Corpus* and *INS v. St. Cyr*, 16 GEO. IMMIGR. L.J. 485, 492 (2002) (citing 18th-century commentary discussing "the present practice . . . of compelling the production of a wife[,] child or ward [using the writ of habeas corpus] tho' such child, wife or ward is not actually confined but lives with any other person by his or her free will and consent" (alteration in original) (citation omitted)).

As shown above, Section 1252's "context makes clear that [the] statute uses a common-law term with a different meaning." Scalia & Garner, *supra* 14, at 318. *See supra* 14-23. All of the facts discussed in Part I.A and I.B are equally relevant here. The federal habeas corpus statutes that existed when Congress enacted Section 1252, such as Section 2241 (disavowed in Section 1252) and former Section 1105a (abrogated by Section 1252), explicitly included a custodial requirement—suggesting that that Congress believed the term "habeas corpus" to be insufficient on its own to establish a custodial requirement without a specific textual provision. Congress chose neither to retain the "in custody" requirement of former Section 1105a nor to incorporate by reference the "in custody" requirement of Section 2241; to the contrary, it excluded Section 2241's procedures. At the same time, it included numerous other prerequisites to suit, suggesting that it included all the prerequisites it meant to include. And a custodial requirement would eviscerate the path to judicial review that Congress created, given Congress's purpose and Section 1225's design to make removal as expedited as possible.

Equally important, the statutory remedies that Congress allows courts to grant when reviewing expedited removal orders also show a mismatch between Section 1252(e) habeas corpus proceedings and an "in custody" requirement. If a court concludes that relief is appropriate under Section 1252(e)(2), "the court may order no remedy or relief other than to require that the petitioner be provided a

hearing in accordance with" Section 1229a. 8 U.S.C. § 1252(e)(4). In that hearing under Section 1229a, an immigration judge "determin[es] whether an alien may be admitted to" or "removed from the United States," 8 U.S.C. § 1229a(a)(3), not whether they must be released from detention. Thus, Congress expressly precluded the most common habeas remedy, that of release from custody. Congress could not have intended to incorporate a common-law definition of habeas corpus that invariably required custody and release therefrom, as the district court believed, while foreclosing that release. This "contrary direction," *Morissette v. United States*, 342 U.S. 246, 263 (1952), weighs heavily against the presumption that Congress meant to incorporate a common-law custody requirement.

E. Any doubt should be resolved in favor of reviewability

Finally, even if the question were a close one, two longstanding presumptions would counsel against the district court's holding: the presumption in favor of judicial review of administrative action, *see Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020), and the presumption construing ambiguous deportation statutes in favor of noncitizens, *see I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

First, there is a "'well-settled' and 'strong presumption' . . . 'favor[ing] judicial review of administrative action.'" *Guerrero-Lasprilla*, 140 S. Ct. at 1064 (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 498 (1991) and *Kucana v. Holder*, 558 U.S. 233, 251 (2010)). This presumption has been explicitly

and "'consistently applied' . . . to immigration statutes." *Id.* at 1069 (quoting *Kucana*, 558 U.S. at 251). As a result, courts reviewing agency action in an immigration case should presume that "it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review." *McNary*, 498 U.S. at 496. When an immigration statute "is reasonably susceptible to divergent interpretation, [courts] adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Guerrero-Lasprilla*, 1240 S. Ct. at 1069 (quoting *Kucana*, 558 U.S. at 251).

Second, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449; *see also, e.g.*, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment of exile. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."). Congress explicitly created a path for review of certain types of defects in expedited removal orders, and the Court should not place limitations on that pathway unless clearly instructed to do so by Congress.

As discussed above, an "in custody" requirement would often completely foreclose review given the *expedited* nature of expedited removal. *See supra* 20-23.

Absent clear evidence of Congressional intent, the Court should not infer an implicit limitation that would make judicial review available "only in the rarest of circumstances." *Stone*, 514 U.S. at 397.

II. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER WHETHER EXTREME CIRCUMSTANCES JUSTIFY FINDING THE PUTATIVE "IN CUSTODY" REQUIREMENT SATISFIED

For all the reasons shown in Part I, Congress intended to omit an "in custody" requirement when it enacted the system for judicial review of expedited removal orders. Even if the district court had correctly inferred an atextual custodial requirement, however, it erred on a second front by failing to consider whether the Government's conduct obstructing I.M. from filing suit while in custody rendered any custodial requirement constructively satisfied. *See* Opp'n to Mot. to Dismiss at 16-17. As multiple courts have recognized, the custody requirement is met in "extreme" circumstances in which a petitioner diligently attempts to initiate a petition while in custody, but is thwarted due to conduct outside his control. *See, e.g.*, *Singh v. Waters*, 87 F.3d 346, 349-50 (9th Cir. 1996); *Gutierrez v. Gonzales*, 125 F. App'x 406, 413-16 (3d Cir. 2005).

That is exactly what happened here: while in custody, both I.M. and his counsel attempted repeatedly to obtain a final removal order, but the Government refused to provide it to him until the very moment it was placing him on a plane out of the country. *See supra* 7-9. When the Government makes it impossible to file

suit prior to departure, despite the petitioner's diligent attempts to do so, even a textually explicit custodial requirement is satisfied. Accordingly, this Court should reverse the district court.

A. Custodial requirements are satisfied where the petitioner attempts to pursue judicial review while in custody but the Government affirmatively obstructs a petitioner from filing suit

The Supreme Court has "consistently rejected interpretations of . . . habeas corpus statute[s] that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley*, 411 U.S. at 350. The Court has therefore found statutory jurisdictional requirements to be satisfied in "unique circumstances" when the Government prevents a person from meeting the requirement as it might otherwise be understood. In *Houston v. Lack*, 487 U.S. 266, 272 (1988), the Supreme Court addressed a statutorily explicit jurisdictional requirement that a notice of appeal be "filed" within thirty days of the entry of a final judgment. *Id.* While this requirement normally must be satisfied by filing with the court, the Court explained that, in the special circumstances of *pro se* prisoners, a notice of appeal by a *pro se* prisoner was "filed . . . at the moment it is delivered to prison officials for forwarding to the clerk of the district court," not when the clerk received it. *Id.* This was because a *pro se* prisoner's ability to file depends on "[Government actors] whom [the prisoner] cannot control or supervise and who may have every incentive to delay." *Id.* at 271.

Thus, as opposed to their own actions, a *pro se* prisoner's failure to meet the filing deadline "might instead be attributable to the prison authorities' failure to forward the notice promptly." *Id.* at 276. And the Court would not permit "the prison's failure to act promptly" to "bind a *pro se* prisoner." *Id.*

Consistent with this understanding, multiple courts of appeals have recognized that the statutory "in custody" requirement in Section 2241 is satisfied where a petitioner made diligent efforts to pursue a suit but was prevented from filing while physically detained in extreme circumstances. *See, e.g.*, *Singh*, 87 F.3d at 349-50 (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); *Carrillo v. Ashcroft*, 111 F. App'x 532, 533-34 (9th Cir. 2004) (custodial requirement satisfied where Government failed to notify petitioner before deportation that an immigration judge denied his motion to rescind a removal order, preventing him from "fil[ing] either a timely appeal with the Board of Immigration Appeals or a timely petition for habeas corpus"); *Gutierrez*, 125 F. App'x at 415-16 (custodial requirement satisfied where petitioner was "in INS custody based on an error of law by the agency" and sought to appeal while in custody "but was effectively prevented from doing so by his counsel's affirmative misrepresentations").

As the Third Circuit put it, courts may "consider practical realities in determining whether a habeas petitioner can be constructively in custody

notwithstanding his release from government detention." *Gutierrez*, 125 F. App'x at 415. Even in a statute with a textually explicit "in custody" requirement, the phrase "in custody" should not be read to "represent[] a clear intent to preclude the exercise of jurisdiction when faced with [extreme circumstances]." *Id.* at 413.

Other circuits have similarly recognized the possibility that a custodial requirement may be satisfied when extreme circumstances prevent the filing of a habeas petition until the petitioner has been released from physical confinement. *See, e.g.*, *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 'extreme circumstances' exception in evaluating whether a district court retains jurisdiction over a noncitizen's habeas petition. While we do not rule out the possibility that a district court could use the 'extreme circumstances' exception to retain habeas jurisdiction, we also do not need to decide whether to adopt the 'extreme circumstances' exception at this time . . . ." (footnote omitted)); *Merlan v. Holder*, 667 F.3d 538, 539 (5th Cir. 2011) (per curiam) ("Because [the petitioner] has failed to show that his deportation was the result of any extreme circumstances . . . he has not shown that he is 'in custody' within the meaning of § 2241."); *cf.* *Mejia-Ruiz v. INS*, 51 F.3d 358, 363 (2d Cir. 1995) (refusing to "condon[e] forced departures by the agency as a technique to avoid judicial review of its actions").

This Court should follow the *Singh* line of cases and hold that the custodial requirement (assuming *arguendo* that Section 1252(e) contains such a requirement) is constructively satisfied where the petitioner makes diligent efforts to seek relief, but the Government takes affirmative steps to obstruct the petitioner's ability to initiate suit while in custody.[7] Section 1252(e) was enacted to preserve judicial review over certain types of errors, even while Congress otherwise sought to streamline the removal and review process. Congress's purpose would be thwarted if the Government had the power to permanently forestall review by willfully impeding a petitioner from filing suit while in the Government's custody. Even where Congress explicitly established an "in custody" requirement, as in Section 2241, its purpose was not to give the executive "a technique to avoid judicial review of its actions," *Mejia-Ortiz*, 51 F.3d at 363; where it was silent on the issue, the case for construing any implicit custodial requirement to rule out Governmental interference is even stronger.

B. Extreme circumstances justify holding that I.M. satisfied any implied "in custody" requirement

Extreme circumstances justify holding that I.M. satisfied any implied "in custody" requirement. Any such requirement would indisputably have been

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[7] That is not to suggest that Government interference is the *only* circumstance that might constitute constructive satisfaction. *Cf. Gutierrez*, 125 F. App'x at 413-16 (relying principally on the "egregious behavior of [petitioner's] counsel). But it is the only one the Court needs to consider for the purposes of this case.

satisfied if I.M. had filed the Petition while still physically confined by the Government. But I.M. could not challenge an expedited removal order that the Government had not issued, and the Government refused to give him an order until the moment it put him on a plane to his home country. Given I.M.'s repeated efforts to obtain an expedited removal order so that he could file suit while in custody and the Government's obstruction of those efforts, this is the exact type of situation in which courts should find a custodial requirement constructively satisfied. *See, e.g.*, *Singh*, 87 F.3d at 349-50; *Carrillo*, 111 F. App'x at 533–34.

While in ICE custody between November 19, 2020, and November 27, 2020, I.M. requested a copy of his final order of removal *four times* so he could determine whether he was "validly ordered removed" and file a habeas petition under Section 1252(e)(2) if not. *See supra* 7-8. Similarly, I.M.'s attorney repeatedly contacted ICE and CBP in efforts to obtain the final order of removal. *See supra* 8. The Government first ignored, then flatly refused these requests. *See supra* 7-9; *see also* JA185, ¶¶ 8-10; JA189; JA191-92; JA194. Instead, despite knowing that I.M. and his attorney were trying to obtain the final order of removal, the Government refused to provide it until literally moments before forcibly removing I.M. from the country. This was no inadvertent mistake; rather, CBP planned while I.M. was in custody to serve him the order only "when [he] was transferred to the airport for deportation," and knew "that [counsel] would have to get it from [I.M.] once he

arrived back in his home country." JA198, ¶ 11. And once I.M. arrived at the airport, CBP finally gave him the order only "as [he] was instructed to board the airplane," not giving him any "opportunity to contact [his] attorney or to provide him with the [order]." JA185-86, ¶ 11.

The Government claims that this series of events, where I.M. attempted to obtain a final, challengeable order of removal while in the Government's custody and the Government refused to provide the order until forcibly removing him from the country and its custody, forever strips this Court of the authority to adjudicate I.M.'s claim that the purported order of removal violated the Appointments Clause. But the Constitution does not give the executive branch the power to determine when judicial review is available against it. *See* U.S. Const., art. III, § 1 (giving Congress the authority to vest judicial power in inferior courts). If the executive's conscious decision to withhold an order until the moment it removed a petitioner from the country stripped the courts of jurisdiction, the separation of powers and Congress's judicial review system would both be seriously compromised. Therefore, the Court should refuse to bless the Government's stratagem "as a technique to avoid judicial review of its actions." *Mejia-Ruiz*, 51 F.3d at 363.

The Government's conduct here is similar to conduct the Ninth Circuit has held constructively satisfied the explicit custodial requirements of Section 2241 and former Section 1105a. In *Carrillo*, the petitioner had filed a motion to rescind his

removal order, which an immigration judge denied. 111 F. App'x at 532. The Government never provided Carrillo with a copy of the order denying his motion; instead, he learned of it only when he showed up for a check-in, "was informed that his motion had been rejected [three weeks earlier], and . . . was promptly taken into custody and removed to Mexico." *Id.* at 532-33. Because "there [was] no question that he could have filed either a timely appeal with the Board of Immigration Appeals or a timely petition for habeas corpus" if he had received notice of the denial, the court found the custodial requirement constructively satisfied. *Id.* at 533.

The case for constructive satisfaction is even stronger here than in *Carrillo*. *Carrillo* does not describe any efforts the petitioner took to obtain a copy of the order denying his motion, nor a conscious decision by the Government not to serve a copy. By contrast, I.M. and his counsel made no fewer than *eight* requests for the final order needed to challenge removal and the Government—by formal request through ICE's Immigration Detainee Request Form, by email, and by phone—and the Government willfully refused. *See supra* 7-9.

In *Singh*, counsel "requested Singh's file from the INS," and the INS indicated that it "could not locate the file but would contact him if it was found." 87 F.3d at 347. It then deported him without providing the file, "effectively scuttl[ing] the right to counsel." *Id.* at 349. An immigration judge issued a stay of deportation, but Singh's plane had apparently already departed by the time the stay was issued, and

the Government declined to turn the plane around. *Id.* at 347, 349. The immigration judge and then the Ninth Circuit held that Singh had not departed and was constructively "in custody" when he filed his habeas petition some months later, because "he was removed in violation of the immigration judge's order and after interference with his right to counsel," and because "the [INS] by physically removing him made the full reopening of his case impossible." *Id.* at 349–50.

Here, although there was no stay of deportation while I.M. was in transit, the other facts the Ninth Circuit relied on are all present. The Government denied I.M. and counsel the order of removal needed to file the habeas petition. JA185-86, ¶ 11. As soon as they finally provided I.M. with the order, the Government "by physically removing him made [filing a petition while in custody] impossible." *Singh*, 87 F.3d at 350; JA198, ¶¶ 13-14. Moreover, in *Singh*, there was no evidence that the Government's conduct was intentional, as opposed to the result of internal disorganization; here, by contrast, the Government made a premeditated decision to withhold the critical document from I.M. and his counsel until it was physically removing him. JA198, ¶¶ 11, 14.

Accordingly, if the Court has any question about whether Section 1252(e) contains an unstated "in custody" requirement, it should hold that I.M.'s diligence in seeking the final order of removal, combined with the Government's refusal to

provide it and decision to remove him simultaneously with its provision, satisfied any putative custodial requirement.

CONCLUSION

The judgment of the District Court should be reversed.

Date: July 27, 2022

Respectfully submitted,

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