ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5071

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

I.M.,
Plaintiff-Appellant,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
No. 1:20-cv-3567
The Hon. Dabney L. Friedrich

BRIEF FOR THE APPELLEES

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

WILLIAM C. PEACHEY
Director

EREZ REUVENI
Assistant Director

BRIAN C. WARD
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel.: (202) 616-9121
Email: brian.c.ward@usdoj.gov

Counsel for Defendants-Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Appellant.

(B) Rulings under Review

The ruling under review is the opinion entered on January 28, 2022 (ECF No. 39, Apx.115-131).

(C) Related Cases

This case has not previously been before this Court. Appellees are not aware of any related cases.

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GLOSSARY OF ABBREVIATIONS

AILA	*Am. Immigration Lawyers Ass'n v.* Reno, 199 F.3d 1352 (D.C. Cir. 2000) or *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 46 (D.D.C. 1998)
APA	Administrative Procedure Act
Apx.	Joint Appendix
Board	Board of Immigration Appeals
CBP	Customs and Border Protection
DHS	Department of Homeland Security
DOJ	Department of Justice
INA	Immigration and Nationality Act
Op.	District Court's Opinion, ECF No. 39, Apx.115-131

INTRODUCTION

Appellant I.M. is a noncitizen who was placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1) when he attempted to enter the United States because immigration officers determined that he did not have a valid visa, thus rendering him inadmissible. After he was issued an expedited removal order and removed from the United States, he filed a petition for a writ of habeas corpus under 8 U.S.C. § 1252(e)(2) to challenge the constitutional authority of U.S. Customs and Border Protection ("CBP") officers to issue expedited removal orders. The district court correctly dismissed I.M.'s petition for lack of jurisdiction because 8 U.S.C. § 1252(e)(2) does not provide jurisdiction to challenge an expedited removal order after the petitioner has already been removed.

In 8 U.S.C. § 1252(a)(2)(A), Congress broadly limited jurisdiction over "review relating to section 1225(b)(1)"—the statute governing expedited removal—and provided that no court shall have jurisdiction to review, among other things, any claim arising from or relating to an expedited removal order, or to the procedures or policies used to implement the expedited removal statute, except to the extent Congress specifically authorized jurisdiction for a particular type of challenge in 8 U.S.C. § 1252(e). The expedited removal statute authorizes detention of individuals immigration officials determine should be subject to expedited removal proceedings, *see e.g.*, 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), and in Section 1252(e)(2), the section

under which I.M. sought to raise his claim, Congress provided that these individuals could raise a very limited set of challenges to determinations made in the expedited removal proceedings "in habeas corpus proceedings," 8 U.S.C. § 1252(e). Congress did not require all challenges related to the expedited removal system to be raised in habeas corpus proceedings, *see* 8 U.S.C. § 1252(e)(3), but it did specifically limit the challenges available under Section 1252(e)(2) to habeas proceedings.

The district court correctly held that it lacked jurisdiction over I.M.'s claims under Section 1252(e)(2) because he had already been removed and was no longer in custody at the time he filed his habeas petition. As a result, the district court properly concluded that there was no relief that the court could grant him under that provision.

Moreover, even if I.M. were detained when he filed his habeas petition, Section 1252(e)(2) provides jurisdiction for only three specific types of challenges, namely challenges to the determinations as part of expedited removal proceedings that "the petitioner is an alien," and has not "been admitted" as a lawful permanent resident, refugee, or granted asylum, *see* 8 U.S.C. § 1252(e)(2)(A), (C), and habeas challenges to "whether the petition was ordered removed under" Section 1225(b)(1), *id.* § 1252(e)(2)(B). "In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner." *Id.*

§ 1252(e)(5). I.M. does not dispute that he was issued an expedited removal order, and Section 1252(e)(2) does not provide jurisdiction to review issues beyond whether the order was issued to the petitioner or claims such as I.M.'s challenging the underlying constitutional authority of immigration officers to issue expedited removal orders. *See Castro v. DHS*, 835 F.3d 422, 431 (3d Cir. 2016) (collecting cases). Accordingly, even if I.M.'s custody status was not an issue, the district court was still correct to dismiss this case for lack of jurisdiction under Section 1252(e)(2).

This Court should affirm the district court's decision and dismiss this case for lack of jurisdiction.

STATEMENT OF JURISDICTION

I.M. invoked 28 U.S.C. § 1331 and 8 U.S.C. § 1252(e)(2) in the district court as the basis for jurisdiction. Apx.16. The district court issued its decision granting the government's motion to dismiss for lack of jurisdiction on January 28, 2022. Apx.114 (Order); Apx.115-131 (Op.). I.M. filed a notice of appeal on March 18, 2022. Apx.132. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

All relevant statutes and regulations are included in the addendum to the Brief for Appellant.

STATEMENT OF THE ISSUE

Did the district court correctly dismiss this case for lack of jurisdiction because Section 1252(e)(2) does not provide jurisdiction for habeas corpus proceedings for individuals who are not detained or make available any form of relief for such individuals, nor does it provide jurisdiction to challenge the constitutional authority of an immigration officer to issue an expedited removal order?

STATEMENT OF THE CASE

Legal Background. Congress has plenary power to make policies and rules for the admission and exclusion of noncitizens. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977). The Supreme Court has recognized the political branches' broad power over immigration is "at its zenith at the international border," including "the entry of unwanted person and effects." *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004). It has explained that the power to admit or exclude noncitizens is a sovereign prerogative vested in the political branches and "it is not within the province of any court, unless expressly authorized by law, to review [that] determination." *United States ex rel Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see also Kleindienst v. Mandel*, 408 U.S. 753, 765-66 & n.6 (1972) (noting that "the Court's general reaffirmations [of the political Branches' exclusive authority to admit or exclude noncitizens] have been legion"). Accordingly, the Supreme Court "without exception has sustained Congress' plenary power to make

rules for the admission of aliens and to exclude those who possess the characteristics which Congress has forbidden." *Kleindienst*, 408 U.S. at 766.

Exercising that plenary authority, in 1996, Congress created the "expedited removal" system. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress authorized the Department of Homeland Security ("DHS") to summarily remove certain inadmissible noncitizens who are arriving in the United States or who illegally cross the border. *See* 8 U.S.C. § 1225(b)(1).[1] Under this summary-removal mechanism—known as expedited removal—certain noncitizens who lack valid entry documentation or make material misrepresentations shall be "order[ed] … removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution." *Id.* § 1225(b)(1)(A)(i); *see id.* § 1182(a)(6)(C), (a)(7); *accord DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1964-67 (2020) (discussing expedited removal).

Implementing regulations establish procedures the agency uses before implementing an expedited removal order. Immigration officers must, among other things, "advise the alien of the charges against him or her," provide "an opportunity to respond to those charges in the sworn statement," and provide an interpreter if

[1] Immigration officers must assess admissibility at the time of entry even for individuals who have been issued a visa. *See Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 57 (D.D.C. 1998), *aff'd* 199 F.3d 1352 (D.C. Cir. 2000).

needed. 8 C.F.R. § 235.3(b)(2)(i). And "any removal order," the "sworn statement," and any claims concerning a noncitizen's status "must be reviewed and approved by the appropriate supervisor before the order is considered final." *Id.* § 235.3(b)(7).

If the noncitizen "indicates either an intention to apply for asylum … or a fear of persecution," or torture, the inspecting officer must "refer the alien for" an interview conducted by an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii). At the interview, an asylum officer assesses whether the noncitizen has a "credible fear of persecution." *Id.* § 1225(b)(1)(B)(v).[2] A credible-fear interview assesses whether there is a significant possibility the noncitizen could establish eligibility for asylum, which would allow the noncitizen to remain in the United States for that purpose despite his inadmissibility. *See id.*; *id.* § 1158.

If the asylum officer determines that the noncitizen has a credible fear, the officer generally refers him for removal proceedings under 8 U.S.C. § 1229a where he may apply for asylum and other protections from removal. *Id.* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). Section 1229a removal proceedings provide more extensive procedures than expedited removal, *compare* 8 U.S.C. § 1229a *with id.* § 1225(b)(1), including a right to appeal to the Board of Immigration Appeals ("Board") and petition for review by a federal appellate court. *Id.* § 1252(a)(1). If the asylum officer

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

determines that the noncitizen lacks a credible fear, he or she may seek *de novo* review of the credible-fear determination before an immigration judge. *Id.* § 1225(b)(1)(B)(iii)(I), (III). If the immigration judge concludes that the noncitizen has established a credible fear, the asylum officer's decision is vacated and the noncitizen is placed in § 1229a removal proceedings. 8 C.F.R. § 1003.42(f). If the immigration judge finds that the noncitizen lacks a credible fear, the noncitizen is "removed from the United States without further hearing or review." 8 U.S.C. § 1225(b)(1)(B)(iii)(I); 8 C.F.R. § 1208.30(g)(2)(iv)(A). The Immigration and National Act ("INA") precludes further review by the Board or any court of the credible-fear determination. 8 U.S.C. §§ 1225(b)(1)(C), 1252(a)(2)(A)(iii), 1252(e)(2); 8 C.F.R. § 1003.42(f).

This Lawsuit. According to the allegations in the petition, I.M. is a foreign citizen. Apx.17 ¶ 12. On August 23, 2019, he was granted a two-year B1/B2 business/tourism visa by a Foreign Service Officer in the U.S. State Department. *Id.* On October 29, 2020, I.M. flew to the United States. Apx.19 ¶ 28. Upon his arrival in the United States, I.M. was inspected for admission. *Id.* ¶¶ 29-30. After inspection, a CBP officer determined that I.M. was inadmissible to the United States because he was an intending immigrant not in possession of an immigrant visa and ordered him removed from the United States under Section 1225(b)(1). Apx.20 ¶¶ 31, 33. I.M. expressed a fear of return to his home country and was accordingly referred for a

credible fear interview. *Id.* ¶ 35. An asylum officer found that I.M. did not have a credible fear of persecution or torture, and an immigration judge agreed with that determination. *Id.* After the credible fear proceedings concluded, on November 27, 2020, I.M. was removed from the United States. Apx.21 ¶¶ 37, 39.

On December 8, 2020, following his removal, I.M. filed a petition for a writ of habeas corpus with the U.S. District Court for the District of Columbia. Apx.8. On February 26, 2021, the government moved to dismiss arguing, among other things, that the district court lacked jurisdiction to hear the habeas petition because I.M. was not in custody, and even if he were, the court lacked jurisdiction under 8 U.S.C. § 1252(e)(2) or 28 U.S.C. § 1331. Apx.5. On January 28, 2022, the district court granted the government's motion to dismiss and dismissed the case for lack of jurisdiction. Apx.114.

The district court held that I.M. did not have Article III standing to seek habeas corpus relief. Op. 9-10. The court explained that "the writ of habeas corpus serves to test the legality of detention," and "because I.M. is not in custody, the writ cannot grant him any relief." *Id.* "[B]ecause the function of the writ of habeas corpus is to release someone from custody" and I.M. was not in custody, his alleged harm was not redressable in habeas. Op. 10. The district court concluded that I.M. "thus lacks standing to file a petition, and the Court lacks jurisdiction to adjudicate his petition." *Id.*

The district court emphasized that by "making 'habeas corpus … the sole remedy' for judicial review of exclusion orders, 'Congress ensured that only aliens *in custody* could challenge exclusion orders.'" Op. 11 (quoting *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1161 (D.C. Cir. 1999)). The phrase "habeas corpus proceedings" has a well-established common law meaning the essence of which is to allow an individual to challenge the legality of his custody, thus Congress did not need to use the phrase "in custody" in the statute to limit jurisdiction under Section 1252(e)(2) to challenges from detained individuals. Op. 12-13. And the court concluded that I.M. had no basis to argue he was in custody because, under this Court's precedents, transfer to a foreign country is not a collateral consequence sufficient to present a justiciable habeas petition. Op. 14-15.[3]

On March 21, 2022, I.M. appealed.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's decision dismissing this case for lack of jurisdiction.

[3] The district court also dismissed I.M.'s APA claims for lack of jurisdiction, holding that Section 1252(a)(2)(A) forecloses jurisdiction over "challenges related to an expedited removal order" except to the extent specifically authorized under Section 1252(e). Op. 6; *see also* Op. 7-9; 8 U.S.C. § 1252(a)(2)(A)(i) ("Notwithstanding any other provision of law (statutory or nonstatutory) … no court shall have jurisdiction to review (i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title"). I.M. does not appeal the dismissal of his APA claims. Br. at 11 n.2.

I. 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). Section 1252(a)(2)(A), titled "Matters not subject to judicial review," provides that, for "[r]eview relating to section 1225(b)(1)"—including any order of expedited removal issued under Section 1225(b)(1)—"*[n]otwithstanding any other provision of law* ... no court shall have jurisdiction to review ... *except as provided in subsection (e)* [*i.e.*, Section 1252(e)]," "any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)," or any "decision ... to invoke the provisions of such section," or any "procedures and policies adopted ... to implement the provisions of section 1225(b)(1)." 8 U.S.C. § 1252(a)(2)(A)(i), (ii), (iv) (emphasis added). Section 1252(a)(2)(A) thus removes from federal courts *any* jurisdiction to review issues "relating to section 1225(b)(1)," other than as explicitly permitted by Section 1252(e).

II. Section 1252(e)(3) authorizes "[j]udicial review of determinations under section 1225(b) of this title and its implementation" only in the District of Columbia district court, "limited to determinations of—(i) whether [Section 1225(b)], or any regulation issued to implement such section, is constitutional; or (ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General [or

Secretary] to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A). Section 1252(e)(3) does not require habeas corpus proceedings, and is the proper mechanism for raising systemic challenges, including constitutional challenges, to the expedited removal system and its implementation. *See M.M.V. v. Garland*, 1 F.4th 1100, 1106 (D.C. Cir. 2021). However, I.M. did not raise a claim under Section 1252(e)(3) in this case, and even if he had, it would be untimely because such claims "must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure ... is first implemented." *Id.* § 1252(e)(3)(B).

III. Section 1252(e)(2), titled "Habeas Corpus Proceedings," is the only alternative avenue Congress allowed for jurisdiction over challenges "relating to section 1225(b)(1)." As the title of this section indicates, it makes "[j]udicial review … available" only "in habeas corpus proceedings. *Id*. Congress's choice to limit review in Section 1252(e)(2) to habeas proceedings while not limiting review in the immediately following section, Section 1252(e)(3), in the same way, establishes that Congress intended the phrase "habeas corpus proceedings" to have some meaning for claims raised under this section. And as the district court correctly held, the traditional purpose of habeas proceedings is to challenge the legal authority for detention. Thus, if a petitioner is not in custody, there is no relief available under Section 1252(e)(2), and no basis for jurisdiction as a result.

Congress also limited the types of challenges available under Section 1252(e)(2) to challenges to determinations that make an individual eligible for expedited removal under Section 1225(b)(1), and thus subject to Section 1225(b)(1)'s provisions authorizing detention, further supporting the view that Congress intended that challenges under Section 1252(e)(2) would be raised by individuals in custody under the legal authority provided in Section 1225(b)(1). Moreover, Section 1252(e)(2) does not contain the timing and venue limitations Congress placed on systemic challenges to the expedited removal system in Section 1252(e)(3). Allowing petitioners to avoid those limitations by permitting them to instead raise those challenges to how the expedited removal system is implemented in habeas proceedings under Section 1252(e)(2) would prevent those limitations from having any meaning, and would undermine Congress's clear intent to consolidate and quickly resolve any systemic challenges to implementation of the expedited removal process through Section 1252(e)(3).

The text, structure, and purpose of Section 1252 thus all support limiting habeas challenges under Section 1252(e)(2) to claims raised by individuals in custody challenging the specific determinations over which review is authorized in Section 1252(e)(2)(A)-(C).

IV. Finally, I.M. does not dispute that he was issued an expedited removal order. Thus, even if his custody status was not a barrier to him invoking jurisdiction

under Section 1252(e)(2), the district court was still correct to conclude that it lacked jurisdiction in habeas proceedings under Section 1252(e)(2) over the specific claim I.M. raised. Congress limited the determinations that could be challenged in those proceedings to "(A) whether the petitioner is an alien; (B) whether the petitioner was ordered removed under [the expedited removal statute, 8 U.S.C. § 1225], and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee … or has been granted asylum." 8 U.S.C. § 1252(e)(2)(A)-(C). A court's review under subsection (B) is narrow: "In determining whether an alien has been ordered removed under" the expedited removal provisions, "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner," and "[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." *Id.* § 1252(e)(5). Section 1252(e)(2) does not provide jurisdiction to review issues beyond whether the order was issued to the petitioner or claims such as I.M.'s challenging the underlying constitutional authority of immigration officers to issue expedited removal orders. *See Castro*, 835 F.3d at 431 (collecting cases); *Mendoza-Linares v. Garland*, No. 20-71582, 2022 WL 13743529, at *10 (9th Cir. Oct. 24, 2022).

The Court should therefore affirm the district court's decision and dismiss this appeal.

STANDARD OF REVIEW

On review of "a motion to dismiss for lack of subject matter jurisdiction," the Court reviews "questions of law" "de novo," and reviews the "district court's factual determinations" under the "clearly erroneous" standard. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

ARGUMENT

I. The District Court Lacked Jurisdiction Over I.M.'s Claims.

The district court correctly held that it lacked jurisdiction under Section 1252(e)(2) to hear I.M.'s claims.

Congress has carefully circumscribed the jurisdiction of federal courts to review any matters relating to expedited removal. Section 1252(a)(2), titled "Matters not subject to judicial review," addresses "[r]eview relating to section 1225(b)(1)"—including any determination under § 1225(b)(1)—and provides that, "*[n]otwithstanding any other provision of law* ... no court shall have jurisdiction to review … *except as provided in subsection (e)* [*i.e.*, § 1252(e)]," "any … cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)," or any "decision … to invoke the provisions of such section," or the "procedures and policies adopted … to implement the provisions of section 1225(b)(1)." 8 U.S.C. § 1252(a)(2)(A)(i), (ii), (iv) (emphases added). Section 1252(a)(2)(A)(iii) further eliminates jurisdiction—

without any exception under subsection (e)—to review "the application of [Section 1225(b)(1)] to individual aliens, including the determination made under section 1225(b)(1)(B)," that is, the determination whether a noncitizen has a credible fear.

Section 1252(a)(2)(A) thus squarely removes from federal courts *any* jurisdiction to review issues "relating to section 1225(b)(1)," other than as explicitly "provided in subsection (e)." *Make the Road New York v. Wolf*, 962 F.3d 612, 626 (D.C. Cir. 2020); *see Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 818 (9th Cir. 2004) (Section 1252(a)(2)(A) bars jurisdiction unless § 1252(e) restores it where the underlying claim "ask[s] to nullify the continuing effects of that order"). Section 1252(a)(2)(A) therefore eliminates the general federal question statute, 28 U.S.C. § 1331, as a basis for district court jurisdiction and restricts any challenge to an expedited removal order under Section 1225(b)(1) to the means provided in Section 1252(e). *See Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (phrase "notwithstanding any other provision of law" in jurisdictional provision encompasses 28 U.S.C. § 1331).

Section 1252(e), in turn, permits two limited types of judicial review related to orders of expedited removal. *First*, Section 1252(e)(2) provides limited *habeas* jurisdiction to review three specific factual issues concerning an expedited removal order: "(A) whether the petitioner is an alien; (B) whether the petitioner was ordered removed under [the expedited removal statute, 8 U.S.C. § 1225], and (C) whether

the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee … or has been granted asylum." 8 U.S.C. § 1252(e)(2)(A)-(C). A court's review under subsection (B) is narrow: "In determining whether an alien has been ordered removed under" the expedited removal provisions, "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner," and "[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." *Id.* § 1252(e)(5).

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

"60-day requirement is jurisdictional rather than a traditional limitations period." *AILA*, 18 F. Supp. 2d at 47, *aff'd* 199 F.3d at 1356-57.

Neither Section 1252(e)(2), nor Section 1252(e)(3) provides jurisdiction in this case.

A. The only possible basis for raising a challenge such as I.M.'s, Section 1252(e)(3), does not provide jurisdiction here.

In Section 1252(e)(3), Congress provided a mechanism for "challenges on the validity of the system" used to implement Section 1225(b) and for issuing expedited removal orders. Specifically, Congress authorized "[j]udicial review of" the "implementation" of "section 1225(b)," including "whether such section, or any regulation issued to implement such section, is constitutional," and "whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued … to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A)(i)-(ii). I.M.'s underlying claim—that CBP officers lack constitutional authority to issue expedited removal orders, *see generally* Apx.35-36—is such a challenge to the validity of the agency's implementation of the expedited removal system. I.M. ultimately challenges Congress's provision, through Section 1225(b)(1), of authority to immigration officers to inspect applicants for admission and determine such applicants are inadmissible to the United States

through the expedited removal process. For the following reasons, however, Section 1252(e)(3), does not provide jurisdiction in this case.

First, I.M. did not raise a claim under Section 1252(e)(3) in his complaint and did not plead that section as a basis for the district court's jurisdiction. It is therefore not a well-pled basis for jurisdiction, and he does not, and cannot, rely on Section 1252(e)(3) in this appeal. *See* Apx.16 ¶¶ 7-10; Fed. R. Civ. P. 8(a)(1) ("A pleading that states a claim for relief must contain … (1) a short and plain statement of the grounds for the court's jurisdiction[.]").

Second, any challenge under Section 1252(e)(3) to the expedited removal system, including to the immigration officers who implement it, is time-barred because a claim challenging the implementation of expedited removal must be brought within 60 days of the date the procedures were "first implemented." 8 U.S.C. § 1252(e)(3)(B). As this Court has affirmed, "the 60-day time limit in section 1252(e)(2)(B) 'is jurisdictional rather than a traditional limitations period.'" *M.M.V.*, 1 F.4th at 1109 (quoting *AILA*, 18 F. Supp. 2d at 47, *aff'd* 199 F.3d at 1356-57). That means the 60 days run "from a fixed point," rather than "from the date of application … to a particular alien," such that when a particular noncitizen's claims "arise" is irrelevant. *AILA*, 18 F. Supp. 2d at 47. The provision I.M. challenges here permitting immigration officers to issue expedited removal orders was "first implemented" in April 1997. *Id.* at 1355. Accordingly, this challenge has been time-

barred since May 1997. *See id.*; *M.M.V.*, 1 F.4th at 1109-10; *Dugdale v. U.S. C.B.P.*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015) ("[T]he Court finds that it lacks subject matter jurisdiction over Dugdale's constitutional challenge to the expedited removal system because he did not file it within 60 days after the contested provisions were implemented, as required by 8 U.S.C. § 1252(e)(3)."); *Vijender v. Wolf*, No. 19-cv-3337, 2020 WL 1935556, *3-6 & n.5 (D.D.C. Apr. 22, 2020) (collecting cases); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 11 (D.D.C. 2020).[4]

As this Court has previously explained in construing Section 1252(e)(3), given the importance of the system "in § 1225(b) and its implementing regulations" to the inspection of noncitizens at or near the border, Congress meant to "cabin judicial review and to have the validity of the new law [or its implementation] decided promptly." *AILA*, 199 F.3d at 1359, 1364; *see also id.* § 1252(e)(3)(D) (providing that cases filed with the District Court for the District of Columbia should be "expedite[d] to the greatest possible extent"). This is also evident in the other limits Congress placed on the available avenues to challenge implementation of

[4] Though not relevant to the jurisdictional issue before the Court, I.M.'s Appointments Clause challenge could have been made when the expedited removal system was first implemented. The Appointments Clause obviously predated expedited removal, and the cases I.M. cited in the district court also largely predate the implementation of expedited removal. Thus the basis for his challenge existed within the 60-day period provided by Congress. *See, e.g.*, *Edmond v. United States*, 520 U.S. 651, 659 (1997); *Ryder v. United States*, 515 U.S. 177, 182-86 (1995); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 880-82 (1991).

Section 1225(b), such as precluding "class actions," *AILA*, 199 F.3d at 1359, limiting declaratory and injunctive relief beyond that permitted specifically by Section 1252(e), *see* 8 U.S.C. § 1252(e)(1)(A), and providing that any implementing procedures would remain operative even as they were being challenged, *see* H.R. Rep. No. 104-469, pt. 1, at 161 (1996) (explaining that "single district courts or courts of appeals do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S."). The statutory text expresses Congress's clear intent to streamline and consolidate review and eliminate successive rounds of challenges to the expedited removal system or policies that have long been used to implement it.

The 60-day limit Congress placed on challenges to the expedited removal system and its implementation would have no meaning if such challenges could be raised anew each time the system was applied to someone new. A challenge to the application of the statute under which a "case has been processed … is nothing but a thinly disguised challenge to the validity of the expedited removal system and is untimely under § 1252(e)(3)." *Khan v. Holder*, 608 F.3d 325, 330 (7th Cir. 2010); *see Brumme v. I.N.S.*, 275 F.3d 443, 449 (5th Cir. 2001) (explaining that plaintiff's "facial and as-applied constitutional challenges" to their expedited removal order were subject to "8 U.S.C. § 1252(e)(3)(A)"); *D.A.M. v. Barr*, 486 F. Supp. 3d 404, 419 n.6 (D.D.C. 2020) ("§ 1252(e)(3) further bolsters the Court's conclusion that the

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

Because I.M.'s constitutional claim challenges a system that has existed for 25 years, even if he had sought to invoke jurisdiction under Section 1252(e)(3), his claim would be jurisdictionally time barred. Because Section 1252(e)(3) is the only statutory provision under which challenges to the system can be raised, and it was neither raised nor permits suit here, the district court properly dismissed this suit for lack of jurisdiction.

B. The District Court correctly held it lacked jurisdiction under Section 1252(e)(2).

I.M. does not address Section 1252(e)(3) in his brief and instead, as he did in the district court, attempts to fit his claims into the limited review Congress authorized in Section 1252(e)(2). But even assuming I.M.'s claims could be considered an individual habeas challenge, the district court properly concluded that it lacked jurisdiction to grant him any relief under Section 1252(e)(2) because he

was not in custody. Section 1252(e)(2) authorizes judicial review in *"habeas corpus proceedings*," only of whether the "petitioner is an alien," or "was ordered removed under" the provision authorizing expedited removal, or "is an alien lawfully admitted for permanent residence" or "has been admitted as a refugee … or has been granted asylum." (emphasis added). In other words, Section 1252(e)(2) contemplates challenges to the legal authority for detaining an individual on the basis of an expedited removal order. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (authorizing mandatory detention for individuals subject to expedited removal proceedings or orders).

I.M.'s attempt to invoke Section 1252(e)(2) fails because he was not in custody when he filed his petition, nor is he currently in custody, as required by the federal habeas statute. *See* 28 U.S.C. § 2241(c)(3) (explaining that the writ shall not extend to a petitioner unless "in custody"). This facial deficiency in the petition is not remedied by the fact that I.M raises his claim under the provisions of Section 1252(e)(2), as that statute merely limits the scope of habeas relief available under 8 U.S.C. § 2241(c)(1), and does not supersede the "in custody" requirement. Pursuant to 28 U.S.C. § 2241, federal courts have jurisdiction to issue writs of habeas corpus only where the petitioner is "*in custody* in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241(c)(1), (3) (emphasis added); *see Maleng v. Cook*, 490 U.S. 488, 490 (1989) ("The federal habeas statute gives the

United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are 'in custody in violation of the Constitution or laws or treaties of the United States.'").

In 1996, Congress enacted IIRIRA, which created the expedited removal system. *See generally Thuraissigiam*, 140 S. Ct. at 1963. IIRIRA "crafted a system for weeding out patently meritless claims [for admission] and expeditiously removing the aliens making such claims from the country." *Id*. Members of Congress viewed expedited removal as necessary to curtail incentives for noncitizens to come to the country based on an "expect[ation] that" they may "remain indefinitely in the United States," H.R. Rep. No. 104-469 at 225-226, to combat the "crisis" of "hundreds of thousands of illegal aliens" entering each year, *id*. at 107, and "to expedite the removal … of aliens who indisputably have no authorization to be admitted," H.R. Rep. 104-828 at 209; *see also Kucana v. Holder*, 558 U.S. 233, 249 (2010). Relevant to this case, IIRIRA placed "restrictions on the ability" of noncitizens like I.M. "to obtain review under the federal habeas statute." *Thuraissigiam*, 140 S. Ct. at 1963. The limits on habeas relief that Congress enacted in Section 1252(e)—which provide that a court may "order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title" 8 U.S.C. § 1252(e)(4)—modify the scope of proceedings and relief available to noncitizens under the general habeas statute, 28 U.S.C. § 2241.

IIRIRA did not, however, modify the federal habeas statute's jurisdictional requirement that petitioners be "in custody" to file a petition, and courts have accordingly recognized that they lack jurisdiction to review Section 1252(e)(2) claims brought by noncitizens after being released from custody. *See Leal Santos v. Gonzales*, 495 F. Supp. 2d 180, 183 (D. Mass. 2007) (discussing Section 1252(e)(2) and explaining that, when "deportation precedes the habeas petition, courts have held that they lack jurisdiction because the 'in custody' jurisdictional requirement is not satisfied."), *aff'd sub nom. Leal Santos v. Mukasey*, 516 F.3d 1 (1st Cir. 2008); *see also Sadhvani v. Chertoff,* 460 F. Supp. 2d 114, 118-19 (D.D.C. 2006) (collecting cases and finding that "the controlling limit [of custody] in this case is the consistent holding of federal courts that an alien who has already been removed from the United States and who files a habeas petition after his removal cannot satisfy the custody requirement.").

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

"[h]abeas has traditionally provided a means to seek *release* from unlawful detention"). And it is further consistent with Congress's decision to provide limited relief *in habeas* for those noncitizens who want to challenge an order of expedited removal, as such noncitizens are typically subject to detention. *See* 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV) (providing for detention). Indeed, I.M. was detained in the United States for about a month while he underwent credible fear proceedings, and could have filed his petition while he was detained. *See* Apx. 19-21 ¶ 28 (I.M. flew to U.S. on October 29, 2020), ¶¶ 37, 39 (I.M. was removed from the United States on November 27, 2020). Accordingly, because I.M. was not in custody when he filed the petition and is not in custody now, the district court correctly dismissed the petition for lack of jurisdiction.

In addition, even if I.M. was in custody, Section 1252(e)(2) still would not provide jurisdiction over his claim. Section 1252(a)(2)(A) strips jurisdiction over all challenges related to expedited removal except for the specific challenges authorized in Section 1252(e). Because I.M.'s underlying claim does not fall into one of the narrow categories over which Congress restored jurisdiction in Section 1252(e), there is no jurisdiction for his challenge under Section 1252(e)(2) regardless of whether he was in custody.

As explained, Section 1252(e)(2) supplies limited jurisdiction in habeas corpus for review of expedited removal orders, but permits review of only three

issues: "(A) whether the petitioner is an alien; (B) whether the petitioner was ordered removed under [the expedited removal statute, 8 U.S.C. § 1225], and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee … or has been granted asylum." 8 U.S.C. § 1252(e)(2)(A)-(C). "In determining whether an alien has been ordered removed under" the expedited removal provisions, "the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner." *Id.* § 1252(e)(5). Moreover, if Section 1252(e)(2) applies, as I.M. asserts, then Section 1252(e)(1)(A) strips the court of any authority to "enter declaratory, injunctive, or other equitable relief … except as specifically authorized in a subsequent paragraph of this subsection." *Id.* § 1252(e)(1)(A); *see also Grace v. Barr*, 965 F. 3d 883, 907 (D.C. Cir. 2020) (explaining that Section 1252(e)(1)(A) bars any equitable relief, injunctive, declaratory, or otherwise, in any "action[]" arising under § 1252(e)(2) "pertaining to an order to exclude an alien in accordance with section 1225(b)(1)").

I.M. does not raise a challenge on any of the three bases permitted by Section 1252(e)(2), and the Court therefore lacks jurisdiction over the petition. I.M. concedes that he is a noncitizen and was issued an order of expedited removal, and he makes no claim that he is an "alien lawfully admitted for permanent residence … a refugee … or [was] granted asylum." 8 U.S.C. § 1252(e)(2)(A)-(C). That dooms

his petition because federal courts lack jurisdiction to consider *any* collateral challenge to an expedited removal order—including to whether a noncitizens is "entitled to any relief from removal," *id.* § 1252(e)(5)—beyond these three permissible bases. *See Garcia de Rincon*, 539 F.3d 1133, 1140 (9th Cir. 2008) (petitioner "does not contest her expedited removal order on any of the enumerated permissible grounds in § 1252(e)—this court therefore has no jurisdiction to hear it." (collecting cases)); *see also Castro*, 835 F.3d at 432 (under Section 1252(e) only "two issues were properly before the district court: whether the order removing the petitioner was in fact issued, and whether the order named the petitioner"); *Brumme*, 275 F.3d at 448 (no jurisdiction under Section 1252(e)(2)(B) to determine whether the expedited removal statute "was applicable in the first place"); *Shunaula v. Holder*, 732 F.3d 143, 145-47 (2d Cir. 2013) (similar); *Khan v. Holder*, 608 F.3d at 329–30 (similar); *Diaz Rodriguez*, 2014 WL 4675182, at *2 (similar).

Had Congress intended to permit challenges to the constitutional or statutory authority for issuing an order of expedited removal under Section 1252(e)(2), it would have stated as much. *Thuraissigiam v. DHS*, 917 F.3d 1097, 1103, 1116, 1118-19 (9th Cir. 2019) (concluding that "statutory, regulatory, and constitutional claims" fell beyond the scope of review permitted under Section 1252(e)(2)) *rev'd and remanded on other grounds*, 140 S. Ct. 1959 (2020). But it did not do so. Rather, Congress limited review to "whether an immigration officer issued [a] piece of

paper" called an expedited removal order "and whether the Petitioner is the same person referred to in that order." *Castro*, 835 F.3d at 431 (collecting cases). Here, there is no question "that [a] piece of paper" called an order of expedited removal was issued and that "Petitioner is the same person referred to in the order." *Id.*

Accordingly this case, "is about whether the government may lawfully implement the removal orders it has issued, not whether it issued those orders at all." *D.A.M.*, 486 F. Supp. 3d at 419 (further concluding that "Section 1252(e)(2)(B) provides no jurisdiction over such a claim"). The Supreme Court's decision in *Thuraissigiam* left undisturbed the Ninth Circuit's conclusion that Section 1252(a)(2)(A) and (e)(2) bar review of "statutory, regulatory, and constitutional claims" challenging expedited removal orders. *Thuraissigiam*, 917 F.3d at 1103, 1116, 1118-19; *East Bay Sanctuary Covenant v. Barr*, No. 19-CV-04073-JST, 2020 WL 6588737, at *7 (N.D. Cal. Nov. 10, 2020) (same). *Thuraissigiam* reaffirms that Section 1252(a)(2)(A), read with Section 1252(e)(2), bars "review of an expedited removal order, including … related matters affecting those orders." *Singh v. Barr*, 982 F.3d 778, 782, 784 (9th Cir. 2020); *accord Castro*, 835 F.3d at 428 n.8, 430-34 (collecting cases and explaining the prevailing view that Sections 1252(a)(2)(A) and (e)(2) bar habeas petitions seeking to block expedited removal where immigration officers allegedly committed procedural errors or applied the wrong substantive standard); *Mendoza-Linares*, 2022 WL 13743529, at *10.

Accordingly, I.M. cannot raise a claim under Section 1252(e)(2) because he is not custody, and even if he could, the district court was still correct to dismiss for lack of jurisdiction because Section 1252(e)(2) does not provide jurisdiction over a claim challenging CBP officers' constitutional authority to issue expedited removal orders.

C. I.M.'s arguments against a custody requirement in Section 1252(e)(2) lack merit.

I.M. makes a range of arguments against a custody requirement. Br. at 14-36. None of them have merit.

I.M. first argues that the text of Section 1252(e) cannot be read to have an "in custody" requirement because the statute does not use the words "in custody." Br. at 14. He argues that this should end the Court's inquiry with respect to whether custody is a prerequisite to jurisdiction under Section 1252(e). *Id*. But he does not dispute that the review provided by Section 1252(e)(2) "is available in habeas corpus proceedings," *Id*., and he offers no plausible reading of the statute that accounts for Congress's choice to make the review under Section 1252(e)(2) available only through such proceedings.

I.M. argues the Court's inquiry begins with the statutory text, and ends there if the text is unambiguous. Br. at 14 (citing *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004)). The government agrees with that well-established principal. Where the parties disagree is on how a statutory provision that is titled "Habeas

Corpus Proceedings" and provides that the available "review" is "available in habeas corpus proceedings" can be read to *unambiguously* provide review in circumstances unrelated to how those proceedings have been traditionally understood—and as the Congress that enacted IIRIRA would have understood them—by permitting suit where the petitioner is not detained.

I.M. makes much of the fact that Section 1252(e)(2) says habeas proceedings but does not take the additional step of also saying that the petitioner must be "in custody." Br. at 14-15. And he notes that, unsurprisingly, Congress has at other times and in other contexts discussed "custody" in statutes addressing habeas proceedings. *Id*. For example, in an earlier statute, Section 1105a(a)(10), Congress used the words "Habeas corpus" *and* "in custody." Br. at 14-15 (citing 8 U.S.C. § 1105a (1996)). But Section 1105a(a)(10) used the phrase "in custody" not to distinguish between detention and some sort of non-detention habeas claims, but rather to define the legal authority for the detention that would be challenged in those proceedings. It contemplated habeas proceedings for "any alien held in custody *pursuant to an order of deportation*" that would allow the individual to "obtain judicial review" of the removal order providing authority for the detention. 8 U.S.C. § 1105a(a)(10) (emphasis added).[5]

[5] I.M. is thus incorrect that the words "in custody" would be superfluous unless read to distinguish between habeas claims brough by detained and non-detained

Even if this "in custody" language could be read as I.M. urges to distinguish between custodial and non-custodial habeas claims, Congress did not simply amend the existing statute to remove an "in custody" requirement such that this change could fairly be read as specifically aimed at removing that requirement. He acknowledges that Congress instead completely repealed Section 1105a and replaced it with a new statute, Section 1252. Br. at 14. When it did so, Congress nonetheless chose to use habeas corpus proceedings for the challenges listed in Section 1252(e)(2). I.M. offers no explanation for why Congress would have chosen to use habeas proceedings if it was not contemplating challenges raised by individuals who are detained during the expedited removal process. His argument is that Congress could have included the words "in custody" if it really meant habeas corpus proceedings to carry their traditional meaning as a vehicle to challenge detention. Br. at 14. But Congress could just as easily not have used "habeas corpus proceedings" in the statute if it was not concerned with challenges from detained individuals. Congress plainly knew how to do so. This is evident from the immediately following section.

In Section 1252(e)(3), Congress provided that "[j]udicial review of any determination made under section 1225(b)(1) of this title and its implementation is

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individuals. Br. at 16-17. This phrase describes the source of the legal authority for detention that would be challenged in the habeas proceedings, rather than modifies the type of habeas proceedings.

available *in an action*" in the District of Columbia. 8 U.S.C. § 1252(e)(3)(A) (emphasis added). This language stands in stark contrast to Section 1252(e)(2), which states that "[j]udicial review of any determination made under section 1225(b)(1) of this title is available *in habeas corpus proceedings*." *Id.* § 1252(e)(2) (emphasis added). Congress's use of "habeas corpus proceedings" in one section and "action" in the immediately following section, in statutory provisions enacted at the same time, is strong evidence that Congress meant the term "habeas corpus proceedings" to have some meaning. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."). And the only plausible meaning here is that traditionally ascribed to habeas proceedings. The text of the statute compels the conclusion the district court reached—that Section 1252(e)(2) permits jurisdiction only where the petitioner is still in custody.

I.M. cites the Supreme Court's decision in *Nken v. Holder*, 556 U.S. 418, 424 (2009), and argues that case acknowledges the passage of Section 1252 eliminated the requirement that the noncitizen has not yet been removed. Br. at 16. *Nken*, however, addressed an entirely different statutory provision that applies to review of removal orders issued in immigration court rather than through the expeditated removal process. *Nken* discusses review of removal orders covered by Section

1252(a)(5), which governs "judicial review of an order of removal entered or issued under any provision of this chapter, *except as provided in subsection (e)*." 8 U.S.C. § 1252(a)(5) (emphasis added). I.M. is correct, as *Nken* explained, that such review is permitted even after a noncitizen is removed, but it allows that review through a "petition for review" rather than habeas corpus proceedings. That section does not mention habeas, and so its meaning sheds no light on Section 1252(e)(2) and its use of habeas proceedings. Moreover, as the Supreme Court noted in *Nken*, "[w]hen Congress passed IIRIRA, it "repealed the old judicial-review scheme set forth in [8 U.S.C.] § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252." 556 U.S. at 424 (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999)) (alterations in original). Far from broadening judicial review, as I.M. argues, *Nken* explains that Section 1252's "new review system *substantially limited* the availability of judicial review." *Id*. (emphasis added).

I.M. notes the general habeas statute, 28 U.S.C. § 2241, also uses "in custody" language that would be superfluous if the use of habeas proceedings was alone enough to indicate custody is necessary to raise a claim. Br. 17-18. But as with Section 1105a, the use of "in custody" in Section 2241 merely describes the various sources of legal authority for detention that can be challenged in habeas under that section. For example, the "writ of habeas corpus shall not extend to a prisoner unless

he is in custody under or by color of authority of the United States," or he "is in custody for an act done or omitting in pursuance of an Act of Congress," or he "is in custody in violation of the Constitution or laws or treaties of the United States." 8 U.S.C. § 2241(c)(1)-(3). Moreover, even if Section 2241 did use the terms "in custody" to define the scope of habeas proceedings, that still would not mean that Congress, having long ago defined habeas in Section 2241, could not have used the phrase "habeas corpus proceedings" in other later contexts to connote detention challenges unless it also used the phrase "in custody" each and every time.

I.M. also argues that Congress chose not to incorporate the general habeas statute into Section 1252 because Section 1252(a)(2)(A) says that no court shall have jurisdiction to review expedited removal orders or the system for implementing the expedited removal statute "[n]otwithstanding any other provision of law … including section 2241 of title 28, or any other habeas corpus provision." Br. at 19. But he fails to acknowledge an important caveat to this language. Congress provided that there would be no such jurisdiction under Section 2241 or any other habeas provision "except as provided in subsection (e)." 8 U.S.C. § 1252(a)(2)(A)(i); *id.* § 1252(a)(2)(A)(ii); *id.* § 1252(a)(2)(A)(iv). As noted above, Sections 1252(a)(2)(A) and (e)(2) limit the scope of habeas relief that is available, but there is nothing in the statute that can be read as a wholesale rejection of the general habeas statute or the traditional requirements for raising a habeas claim.

I.M. next argues, Br. at 21-23, that narrowly limiting review under Section 1252 would be inconsistent with Congress's purpose in creating expedited removal. He argues expedited removal was designed to remove covered individuals as quickly as possible, thus, in his view it would be "absurd" to create a statute intended to allow some review and then limit it to the window of time before the individual is removed when Congress also indicated that window should be as short as possible, thus limiting the opportunity for review. *Id*. at 21. But the limited window of time during which Section 1252(e)(2) permits review corresponds directly to the window during which an individual is detained as a result of being placed in the expedited removal process. If, as the statutory text indicates, the purpose of Section 1252(e)(2) is to allow an individual to test the legal authority for detaining him as an individual subject to expedited removal, then it makes perfect sense to limit such challenges to the time period when there is detention to challenge.

I.M. appeals to the canon of constitutional avoidance, Br. at 22, arguing the statute should be read to allow broader review to avoid speculative constitutional concerns that he concedes are not even raised by this case, *id*. at 23 n.4. In any event, "[t]he avoidance doctrine 'has no application in the absence of ambiguity.'" *Thuraissigiam*, 140 S. Ct. at 1979 (quoting *Warger v. Shauers*, 574 U.S. 40, 50 (2014)) (holding that, because Section 1252(e)(2) "unequivocally bars habeas review of respondent's claims," there was no ambiguity that could be construed to

avoid the constitutional concerns he raised); *see also M.M.V.*, 1 F.4th at 1107. I.M. does not argue the phrase "habeas corpus proceedings" in Section 1252(e)(2) is ambiguous, he simply argues the Court should treat Congress's choice to describe the proceedings that are permitted in this way as having no meaning or effect whatsoever. Moreover, even if this phrase were ambiguous, there is no plausible reading of the statute that gives no effect to Congress's choice to limit one section to habeas proceedings but not the immediately following section, or to Congress's choice to place limits in Section 1252(e)(3) on where and when systemic challenges can be raised. And, by basing his argument on challenges to the validity of the system generally based on issues that are not raised by this case, I.M. only confirms that his claims are ones that can be raised, if at all, only under Section 1252(e)(3) ("Challenges on Validity of the System").[6]

I.M. next argues other courts have recognized that Section 1252(e) does not have an "in custody" requirement. Br. at 23-25. A close reading of the cases he cites shows otherwise. I.M. first cites *Smith v. CBP*, 741 F.3d 1016 (9th Cir. 2014). But the Ninth Circuit in *Smith* merely "[a]ssum[ed], without deciding, that there is no

[6] As to I.M.'s concerns about expedited removal orders being issued to individuals to whom the statute should not apply, individuals subject to the bars to admission to the United States in Section 1182(a)(9)(A)(i) that are triggered when they are removed do have an avenue to apply for a waiver under Section 1182(a)(9)(A)(iii) and thus limit the effects of the determinations in the removal order.

custody requirement under § 1252(e)(2)." *Id.* at 1020; *see Castro*, 835 F.3d at 432 (criticizing *Smith* for "assum[ing] *hypothetical* jurisdiction in order to dispose of the appeal" on easier grounds). The issue of whether Section 1252(e)(2) requires petitioner to be "in custody" was not even briefed in *Smith*. 741 F.3d at 1020 n.3.[7] I.M. also cites *Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001), but as he acknowledges, that decision was vacated. Br. at 23; *See Li v. Eddy*, 324 F.3d 1109 (9th Cir. 2003) (vacating opinion following a petition for rehearing).[8] I.M. is thus incorrect to argue based on these cases that "[a]ffirming the district court here would … create a circuit split with the Ninth Circuit." Br. at 25.

[7] The Ninth Circuit in *Smith* simply concluded that even if custody was not a requirement under Section 1252(e)(2) the court still lacked jurisdiction to review CBP's authority to issue an expedited removal order. Smith, like I.M., did not dispute that he was issued an expedited removal order. 741 F.3d at 1021. Rather, he argued that "CBP exceeded its authority" in issuing an expedited removal order to him and that "CBP could not lawfully remove him under the statute." *Id.* The Ninth Circuit held that once it determined the agency had "ordered [Smith] removed" under an expedited removal order, the "jurisdiction stripping statute, § 1252(e)(2) … permit[ed the court] to go no further." *Id.* at 1022. Accordingly, *Smith* does not hold that custody is irrelevant under Section 1252(e)(2), but it does hold the statute provides no jurisdiction for challenges such as I.M.'s to CBP officers' authority to issue expedited removal orders.

[8] And, like in *Smith*, the Ninth Circuit in *Li* determined that Section 1252(e)(2) would not provide jurisdiction regardless of custody status because "only two issues were properly before the district court: whether the order removing the petitioner was in fact issued, and whether the order named Li." 259 F.3d at 1135. "Because these issues were not contested in the case, the district court properly dismissed the petition for failure to raise any issue within its jurisdiction to review." *Id.*

In fact, the Ninth Circuit just dismissed a challenge to an expedited removal order in part for failing to follow the requirement under Federal Rule of Appellate Procedure 22 to file in the district of confinement. *Mendoza-Linares v. Garland*, No. 20-71582, 2022 WL 13743529, at *9-10 (9th Cir. Oct. 24, 2022). Moreover, the court determined that it could not transfer the case to the district where the petitioner was confined, the Southern District of California, because there was no basis to "invoke the habeas jurisdiction of the Southern District." *Id*. at *10-11. As was the case in *Smith* and *Li*, the Ninth Circuit noted that, "[b]ecause it is clear that the agency entered an expedited removal order," "overwhelming precedent confirms" that "the limitations in § [1252](e) bar judicial review of" issues "underlying that order." *Id*. at 11. Ninth Circuit law thus does not hold that custody is irrelevant, so there is no possibility of creating a circuit split. And Ninth Circuit precedent supports the government's alternative argument that Section 1252(e)(2) does not provide jurisdiction anyway over challenges to the process or authority underlying an expedited removal order.

I.M. also cites *Dugdale v. CBP*, 88 F. Supp. 3d 1 (D.D.C. 2015), Br. at 23-24, but that case does not directly address whether a petitioner must be in custody to raise a habeas petition under Section 1252(e)(2). And to the extent the petitioner in that case sought relief under the habeas statute, both the District Court for the District of Columbia and the Sixth Circuit held there was no jurisdiction over the petition

because the petitioner was not in custody. *Dugdale v. CBP*, 300 F. Supp. 3d 276, 278 (D.D.C. 2018).

I.M. next attempts to distinguish the other cases the district court cited holding that custody is a necessary precondition for habeas jurisdiction. Br. at 24-25. But his argument here is again that Congress rejected in Section 1252 the general habeas statute's approach to habeas proceedings. *Id*. That argument fails for the reasons previously noted. As does his argument that the district court erred by importing the common law understanding of habeas in interpreting the term in Section 1252(e)(2). Br. at 25-30. I.M. argues that a common-law concept should not be applied to override a statute's overriding purpose and logic, *id.* at 26, but as explained, limiting challenges under Section 1252(e)(2) to the time period when an individual is detained pursuant to the expedited removal process is consistent with the statutory text, Congress's purpose in providing strictly limited avenues for review related to expedited removal, and with the traditional understanding of habeas proceedings as a means to challenge the legal authority for detention.

I.M. next argues "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." Br. at 26. He notes that 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." Br. at 29-30 (citing 8 U.S.C. § 1252(e)(4)). Thus, in his view, Congress "precluded the most common habeas remedy, that of release from custody," and "could not have intended to incorporate a common-law definition of habeas corpus" in Section 1252(e)(2). Br. at 30. However, this limitation on habeas relief is consistent with Congress's decision to provide different legal authority for detention for noncitizens in expedited removal under Section 1225(b)(1), and those whose removability is being determined in a hearing before an immigration judge under Section 1229a. A challenge under Section 1252(e)(2) to whether an individual is subject to expedited removal under Section 1225(b)(1) as opposed to proceedings under Section 1229a is thus necessarily a challenge to whether the individual is properly subject to the detention provisions that apply to individuals in the expedited removal process. *See* 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV).

Under Section 1225(b)(1), if "an immigration officer determines that an alien … who is arriving in the United States" is "inadmissible" under certain provisions, the officer can issue an expedited removal order. Various subsections of Section 1225(b)(1) provide that such individuals "shall be detained." 8 U.S.C. §§1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV). Section 1252(e)(2) in turn allows for certain challenges to the underlying determinations the immigration officer must make under Section 1225(b)(1) when placing the individual in expedited removal.

Compare 8 U.S.C. § 1225(b)(1) (authorizing expedited removal "[i]f an immigration officer determines" that the individual is "an alien") *with* § 1252(e)(2)(A) (authorizing judicial review "of any determination made under section 1225(b)(1)" that "the petitioner is an alien"); *compare also* § 1225(b)(1) (authorizing expedited removal "[i]f an immigration officer determines" that the individual is "arriving in the United States") *with* § 1252(e)(2)(C) (authorizing judicial review of the "determination made under section 1225(b)(1)" that the individual is arriving in the United States and has not already "been admitted" or granted status as "an alien lawfully admitted for permanent residence" or already been "granted asylum.").

If the petitioner succeeds on a habeas claim under Section 1252(e)(2), the result is that the district court determines he was not correctly placed in expedited removal proceedings, and he is thus no longer subject to the "detention" provisions that apply to an "alien subject to the procedures under this clause … pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). The challenges under Section 1252(e)(2) are thus challenges to the legal authority for detention under Section 1225(b)(1), the core purpose of habeas corpus proceedings as they have traditionally been understood. *See Thuraissigiam*, 140 S. Ct. at 1963 (explaining that habeas has traditionally been a means to challenge the lawfulness of detention).

In the immigration context, however, a ruling that a noncitizen is not subject to detention under the expedited removal provisions does not mean that there is *no* legal authority for detention and the individual necessarily must be released. The individual is still potentially subject to non-expedited removal proceedings before an immigration judge under Section 1229a. That is what Section 1252(e)(4) authorizes as relief for a successful habeas claim under Section 1252(e)(2), "a hearing in accordance with section 1229a." *See also Thuraissigiam*, 140 S. Ct. at 1966 (explaining that "§ 1252(e)(2)[] limits the review that an alien in expedited removal may obtain via a petition for a writ of habeas corpus" and that "if a removal order has not 'in fact' been 'issued,'" then "the court may order a removal hearing, § 1252(e)(4)(B)").

Section 1229a provides an alternative "procedure for determining whether an alien may be admitted … or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3). And Congress provided separate legal authority for detention and governing release "pending a decision on whether the alien is to be removed from the United States" in removal proceedings under Section 1229a. *See* 8 U.S.C. § 1226. Such individuals can, if they satisfy certain criteria, seek release on bond, *id*., and barring that, could challenge their detention in a separate habeas action. But for purposes of this case, the important point is that Section 1252(e)(2) does provide for traditional habeas relief by authorizing release from

detention under the authority set out in the expedited removal provisions of Section 1225(b). Whether the individual is ultimately released when transferred to removal proceedings before an immigration judge under Section 1229a is a separate issue that must be determined during those proceedings. Ultimately, it makes sense that the same Congress that enacted the expedited removal system for certain individuals because, in Congress's view, "releasing them would present an undue risk that they would fail to appear for removal proceedings" before an immigration judge, *Thuraissigiam*, 140 S. Ct. at 1963, would not authorize immediate release of these individuals, even if it was determined that they must instead be placed in Section 1229a proceedings before an immigration judge, before an immigration official or immigration judge could apply the separate detention provisions associated with Section 1229a proceedings.[9]

[9] I.M. also argues in a footnote that the district court erred in treating the custody issue as one of redressability. Br. at 26 n.5. But whether treated as a question of Article III jurisdiction or statutory jurisdiction, the result is the same—courts lack jurisdiction under Section 1252(e)(2) to grant relief to individuals who are not detained. Courts routinely find statutory bars on relief act not only to restrict jurisdiction under the statute, but also as limitations on standing. "In cases involving statutory rights, 'the particular statute and the rights it conveys [] guide the standing determination'" *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1114-15 (9th Cir. 2014) (quoting *Donoghue v. Bulldog Investors Gen. P'ship,* 696 F.3d 170, 178 (2d Cir. 2012)); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Judicial Watch v. Nat'l Archives*, 845 F. Supp. 2d 288, 301 (D.D.C. 2012); *Taylor v. McCament*, 875 F.3d 849, 854 (7th Cir. 2017); *Brooklyn Union Gas Co. v. Exxon Mobil Corp.*, 478 F. Supp. 3d 417, 432 (E.D.N.Y. 2020).

The Court should thus conclude that Section 1252(e)(2) does not provide jurisdiction for habeas proceedings by individuals who have already been removed and are no longer in custody as a result.

D. There is no basis to find that I.M. is "in custody."

There is no dispute that I.M. had been removed and was thus no longer detained when he filed his habeas petition. Apx.21 ¶ 39. He argues that the Court should consider the custodial requirement nonetheless satisfied because he attempted to pursue judicial review while in custody and argues he was obstructed from doing so. Br. at 32-35. He maintains 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." Br. at 35. But contrary to I.M.'s argument, the government did not "obstruct [his] ability to initiate suit while in custody." Br. at 36. Nothing prevented him from filing a habeas petition under Section 1252(e)(2) while he was detained. He argues that he could not challenge his expedited removal order until he received a copy of the order, Br. at 37, but he does

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I.M. also argues in the same footnote that the district court's reading would mean that no habeas petition under Section 1252(e)(2) would be redressable because Section 1252(e) does not authorize release from detention. This is incorrect because Section 1252(e) does permit a detained individual to challenge the government's legal authority to continue detaining him *under Section 1225(b)*. And his argument that his claim is redressable because he could be granted a hearing under Section 1229a fails 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.

not explain why this prevented him from filing a habeas petition. Indeed, one of the bases for seeking habeas relief under Section 1252(e)(2) is to obtain review of whether the petitioner has been ordered removed under the expedited removal statute, Section 1225(b)(1), *id.* § 1252(e)(2)(A), and challenge "whether such an order in fact was issued … to the petitioner," *id.* § 1252(e)(5).

In any event, though I.M. takes issue with the timing of his expedited removal order, he does not dispute that he did receive an expedited removal order. Br. at 9, 37. Section 1252(e)(2) provides jurisdiction to review whether an individual was given an expedited removal order, but it does not provide any jurisdiction to review challenges to the procedures for issuing the order or the officer's authority to do so. *See supra* at 25-28. Accordingly, even if this Court were to find that Section 1252(e)(2) does not have an "in custody" requirement or, if it does, that this requirement was somehow satisfied here, the Court would still have to find that the district court correctly determined that it lacked jurisdiction under Section 1252(e)(2) to review the specific claims I.M. raises.

E. Permitting review of I.M.'s claims under Section 1252(e)(2) is inconsistent with the structure and purpose of the statute.

Many of I.M.'s arguments assume—and depend on—Congressional intent to allow broader review related to expedited removal. That assumption is inconsistent with the plain language of Section 1252, in particularly Section 1252(a)(2), which strictly limits "review related to section 1225(b)(1)" and does so "[n]otwithstanding

any other provision of law (statutory or nonstatutory)," subject to the narrow exceptions in Section 1252(e). Consolidating and limiting review of challenges to the expedited removal process was precisely what Congress intended when it enacted IIRIRA. In fact, early versions of the expedited removal legislation completely "denie[d] all courts jurisdiction to review the procedures established to implement" expedited removal, *see* Hearing on S. 667, at 50, 111 (May 28, 1993), further supporting the conclusion that the review authorized in Section 1252(e), while limited, was intended to be the only permitted avenues of review for any challenge to procedures for implementing Section 1225(b)(1).

The statute Congress ultimately enacted does, as discussed, provide for some judicial review. And, notably, not all the review Congress allowed requires detention, or for a suit to necessarily be brought or conclude prior to removal. In Section 1252(e)(3), Congress authorized "review of determinations under section 1225(b)" in the United States District Court for the District of Columbia, including challenges such as I.M.'s to whether the process used for issuing an expedited removal order was constitutional or otherwise in violation of law. As noted above, unlike Section 1252(e)(2), which states that "[j]udicial review … is available in habeas corpus proceedings," 8 U.S.C. § 1252(e)(2), Section 1252(e)(3) provides that "[j]udicial review … is available in an action" in the District of Columbia, 8 U.S.C. § 1252(e)(3)(A). Because Section 1252(e)(3) is not limited to habeas proceedings,

I.M.'s removal and the associated end of his time in custody is not a barrier to him bringing a challenge to the constitutionality of the expedited removal system under Section 1252(e)(3), and that section is clearly the manner in which Congress contemplated challenges to the system would be brought. I.M.'s problem, however, is that Congress set strict "[d]eadlines for bringing actions" under Section 1252(e)(3) which he cannot meet. 8 U.S.C. § 1252(e)(3)(B). Perhaps for this reason, I.M. did not seek to invoke jurisdiction under Section 1252(e)(3)—nor has he raised any sort of challenge to the limits Congress placed on challenges in that section. But it would misread the statute to allow I.M. to avoid those limitations in Section 1252(e)(3) by raising the type of challenge Congress set out in Section 1252(e)(3) instead under Section 1252(e)(2).

I.M. argues that statutes cannot be read in a manner that renders certain words meaningless. Br. at 16-17. But that is what he asks this Court to do in urging it to adopt a reading of Section 1252(e)(2) that would permit not only challenges to detention as an individual subject to expedited removal, but also the challenges to the expedited removal system that Congress channeled instead to Section 1252(e)(3). Doing so would make the limits Congress placed on review of the expedited removal system in Section 1252(e)(3) meaningless, and not just the 60-day limit on bringing claims. Section 1252(e)(3), unlike Section 1252(e)(2), also consolidates all review in the District of Columbia. Section 1252(e)(2) has no such

limit, which makes sense as a provision aimed at allowing habeas challenges, which should instead be brought in the district of confinement. As this Court has noted, "[t]he purpose" of consolidating all review under Section 1252(e)(3) in D.C. "is obvious." *AILA*, 199 F.3d at 1359. "By confining judicial review to one venue, Congress avoids conflicting decisions about the validity of particular regulations or statutes." *Id*.

Congress wanted any challenges to the expedited removal system raised and resolved quickly and in one district. Allowing those same challenges to be raised at any time in any district by permitting them to proceed as challenges to an expedited removal order under Section 1252(e)(2) would subvert that intent. For example, this Court ruled in *M.M.V* that a "district court correctly held that the plaintiffs' challenge to the use of CBP agents to conduct asylum interviews was untimely" under Section 1252(e)(3) because it was not raised within 60 days of when the policy was first implemented. *M.M.V.*, 1 F.4th at 1109. Under I.M.'s reading of the statute, however, there would be no barrier to those plaintiffs raising the exact same challenge to an officer's authority to take actions as part of the expedited removal process instead under Section 1252(e)(2), regardless of when the claim was filed or whether it was filed in D.C. That reading reduces strict limits Congress placed on jurisdiction in Section 1252(e) to nothing more than a requirement that plaintiffs artfully plead their claims to avoid the limitations.

I.M. argues that any doubt should be resolved in favor of reviewability and in favor of the noncitizen. Br. at 30-32. However, as the Supreme Court and this Court recently reaffirmed, the presumption of reviewability is "overcome by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020); *see also M.M.V.*, 1 F.4th at 1107 ("presumption, like all presumptions used in interpreting statutes, may be overcome by specific language that is a reliable indicator of congressional intent"). And as explained, there is nothing ambiguous about Section 1252 that can be read to permit review beyond what is specifically authorized in Section 1252(e), subject to the express limitations of that section. *Thuraissigiam*, 140 S. Ct. at 1966. "The expedited removal statutes are express and unambiguous." *Castro*, 835 F.3d at 432. The "clarity of the language forecloses acrobatic attempts at interpretation," and "makes abundantly clear that if jurisdiction exists to review any claim related to an expedited removal order, it exists only under subsection (e) of the statute." *Id.* at 430, 432. Taken together, these provisions mean if jurisdiction exists for "judicial review 'relating to section 1225(b)(1)," it exists only "as provided in subsection (e)." *Make the Road.*, 2020 WL 3421904, at *7.

None of the cases I.M. cites holds that where Congress has provided an avenue of review for a particular type of challenge, such as Congress did for systemic challenges to the expedited removal system in Section 1252(e)(3), but the plaintiff

does not or cannot pursue that avenue, that courts should create some alternative avenue for review of the same claims under a different statutory provision. In fact, "when a statute provides a detailed mechanism for judicial consideration of particular issues," "judicial review of those issues" through other mechanisms "may be found impliedly precluded." *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Thus, the "presumption favoring judicial review of administrative action" does not apply where a contrary congressional intent can "be inferred" from "the collective import of the legislative and judicial history behind a particular statute," or "inferences of intent drawn from the statutory scheme as a whole." *Id*.

Here, the text, structure, and purpose of Section 1252 all support limiting habeas challenges under Section 1252(e)(2) to claims raised by individuals in custody challenging the specific determinations over which review is authorized in Section 1252(e)(2)(A)-(C).

CONCLUSION

The Court should affirm the district court's order dismissing this case for lack of jurisdiction under Section 1252(e)(2).

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Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

WILLIAM C. PEACHEY
Director

EREZ REUVENI
Assistant Director

By: */s/ Brian C. Ward*
BRIAN C. WARD
Senior Litigation Counsel
U.S. Department of Justice, Civil Division
Office of Immigration Litigation, District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel.: (202) 616-9121
Email: brian.c.ward@usdoj.gov

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32 because it contains 12,318 words, including footnotes. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32 because it has been prepared in a proportionally-spaced typeface using Microsoft Word 14-point Times New Roman font.

/s/ Brian C. Ward
BRIAN C. WARD
U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, I electronically filed the foregoing with the Clerk of Court by using the appellate CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

/s/ Brian C. Ward
BRIAN C. WARD
U.S. Department of Justice