

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GUTIERREZ-RUBIO, et al.,

Petitioners,

v.

DEPARTMENT OF HOMELAND  
SECURITY, et al.,

Respondents.

Civil Action Nos. 15-6406, 6404, 6403

**RESPONDENTS' BRIEF ON  
JURISDICTION**

FLORE-PICHINTE, et al.,

Petitioners,

v.

DEPARTMENT OF HOMELAND  
SECURITY, et al.,

Respondents.

ZELAYA ALBERTO, et al.,

Petitioners,

v.

DEPARTMENT OF HOMELAND  
SECURITY, et al.,

Respondents.

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## INTRODUCTION

Defendants respectfully submit this memorandum addressing the Court's jurisdiction to hear Petitioners' habeas petitions and requests for stays of removal.

Petitioners, Kelly Gutierrez-Rubio and G.J.S.G., her minor child, who are citizens and natives of Honduras, and Laura Lisseth Flore-Pichinte and E.S.U.F., her minor child, who are citizens and natives of El Salvador,<sup>1</sup> assert legal claims designed to prevent the Department of Homeland Security's (DHS) execution of their lawful expedited removal orders and threaten to significantly inhibit use of an essential authority to address illegal immigration at the United States' borders and ports of entry for those members of family units who presently being detained by Immigration and Customs Enforcement (ICE) in the Eastern District of Pennsylvania. Their claims have already been rejected by five courts of appeal and several district courts and should similarly be rejected by this Court.

Petitioners are aliens who were applicants for admission who, upon inspection by an immigration officer, became subject to expedited removal orders based on their inadmissibility under 8 U.S.C. § 1182(a)(7). *See* 8 U.S.C. § 1225(b). As required by statute and regulation, after indicating an intention to apply for asylum or expressing a fear of persecution, Petitioners were referred for and received a credible fear interview before an asylum officer. Petitioners received a determination of no credible fear from the asylum officer,<sup>2</sup> as well as upon review of that negative credible fear determination by an immigration judge (IJ). 8 U.S.C. §

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<sup>1</sup> The undersigned understands that Judge Schiller will be participating in the hearing scheduled for Tuesday, December 8, 2015 as well. The case of *Zelaya Alberto v. DHS*, 15-cv-06404 (E.D. Pa. Dec. 2 2015) is pending before Judge Schiller. The aliens in that case, Karen Margarita Zelaya Alberto and S.E.A.Z., her minor son, are natives and citizens of El Salvador, and raise identical claims to those raised in the Rubio and Pichinte petitions.

<sup>2</sup> Notably, a negative credible fear finding before USCIS is a statistical rarity. *See* Ex. 2, Affidavit of John L. Lafferty, ¶ 8. This suggests that Plaintiffs are simply unable to articulate any credible basis for why they are eligible to remain in the United States, not that anything is wrong with that determination.

1 1225(b)(1)(B)(iii)(I) & (III). Alleging habeas jurisdiction and violations of the Immigration and  
2 Nationality Act (INA), the Due Process Clause of the Fifth Amendment, and the Suspension  
3 Clause of the Constitution, Petitioners ask this court to stay and vacate their expedited removal  
4 orders, claiming that they were deprived of statutory and constitutional rights to meaningfully  
5 apply for asylum, withholding of removal under the INA and protection under the regulations  
6 implementing the Convention against Torture (“CAT”) relief. Rubio Petition at ¶¶ 20-61, Prayer  
7 for Relief; Pichinte Petition at ¶¶ 20-73, Prayer for Relief.

9 As explained below, *infra* at 9-16, pursuant to 8 U.S.C. §§ 1252(a)(2), (e)(2), and (e)(5)  
10 “no court has jurisdiction to review expedited removal orders” save for the narrow questions –  
11 not at issue or contested here – of whether petitioners are aliens; whether they were ordered  
12 removed on an expedited basis; and whether they can prove that they are either lawfully admitted  
13 permanent residents, or refugees or asylees whose status has not been terminated. *See, e.g., Smith*  
14 *v. U.S. Customs and Border Prot.*, 741 F.3d 1016, 1021-22 (9th Cir. 2014). Under no set of  
15 circumstances can a court review “whether the alien is actually inadmissible or entitled to any  
16 relief from removal,” 8 U.S.C. § 1252(e)(5), “inquire into whether section 1225(b)(1) was  
17 properly invoked,” *Meng Li v. Eddy*, 259 F.3d 1132, 1134, *opinion vacated as moot*, 324 F.3d  
18 1109 (9th Cir. 2003), or review the propriety of applying the expedited removal statute to  
19 “individual aliens, including the determination made under” 8 U.S.C. § 1225(b)(1)(B)  
20 concerning credible fear determinations. 8 U.S.C. § 1252(a)(2)(A)(iii). These provisions foreclose  
21 any review of the claims at issue in these cases.

22 Any suggestion that the jurisdiction-limiting provisions of the expedited removal statute  
23 violate the Suspension Clause is meritless. *See infra* at 16-34. Petitioners are aliens who were  
24 apprehended almost immediately after illegally entering the United States without inspection,  
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1 never having been admitted. The Supreme Court has long recognized the political branches’  
2 broad power of immigration is “at its zenith at the international border.” *United States v. Flores-*  
3 *Montano*, 541 U.S. 149, 152-53 (2004). It has explained that the power to admit or exclude  
4 aliens is a sovereign prerogative vested in the political branches and “it is not within the province  
5 of any court, unless expressly authorized by law, to review [that] determination.” *United States*  
6 *ex rel Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see also Kleindienst v. Mandel*, 408  
7 U.S. 753, 765-766 & n.6 (1972) (noting that “the Court’s general reaffirmation of the political  
8 Branches’ exclusive authority to admit or exclude aliens “have been legion”). Accordingly, the  
9 Supreme Court “without exception has sustained Congress’ ‘plenary power to make rules for the  
10 admission of aliens and to exclude those who possess those characteristics which Congress has  
11 forbidden.’” *Kleindienst*, 408 U.S. at 766 (quoting *Boitilier v. INS*, 387 U.S. 118, 123 (1967))  
12

13  
14       Petitioners have no Suspension Clause rights or due process rights to vindicate in a  
15 habeas proceeding because aliens seeking admission who were not admitted into the United  
16 States, but instead apprehended at the border almost immediately after entering unlawfully do  
17 not have the same rights as a lawfully admitted aliens subject to removal proceedings after  
18 having entered the United States lawfully, or even an unlawful alien who has lived here for some  
19 period of time sufficient to create substantial voluntary ties to the United States. *See, e.g., United*  
20 *States ex rel Mezei*, 345 U.S. 206 (1953); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Garcia*  
21 *de Rincon v. Dep’t of Homeland Sec.*, 539 F.3d 1133, 1141 (9th Cir. 2014); *AILA v. Reno*, 18 F.  
22 Supp. 2d 38, 60 (D.D.C. 1998) (collecting cases). Thus, expedited removal cases involving non-  
23 admitted aliens and aliens apprehended shortly after illegal entry do “not implicate [Suspension  
24 Clause] issues.” *See de Rincon*, 539 F.3d at 1141; *accord Rodriguez v. U.S. Customs & Border*  
25 *Prot.*, 2014 U.S. Dist. LEXIS 131872, \*8-12 (W.D. La. Sept. 18, 2014); *M.S.P.C. v. U.S.*  
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1 *Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1165-76 (D.N.M. 2014);<sup>3</sup> *Melendez de Segovia v.*  
 2 *Johnson*, 15-2019 (D.D.C. Nov. 19, 2015) (order denying temporary restraining order, attached as  
 3 Ex. 1, adopting and applying reasoning of *M.S.P.C.* and *Rodriguez*).

4 Indeed, the Fifth, Seventh, and Ninth Circuits have held that the expedited removal  
 5 provisions and the limited review provisions of 8 U.S.C. §§ 1225(b)(1), 1252(a)(2)(A) and  
 6 1252(e) do not violate the Suspension Clause. *Pena v. Lynch*, No. 12-72099, 2015 U.S. App.  
 7 LEXIS 17069 at \*9-10, --- F.3d --- (9th Cir. 2015); *Khan v. Holder*, 608 F.3d 325, 329-30 (7th  
 8 Cir. 2010); *de Rincon*, 539 F.3d at 1141; *Brumme v. INS*, 275 F.3d 442, 447-48 (5th Cir. 2001).  
 9 For non-admitted aliens like Petitioners, “[w]hatever the procedure authorized by Congress is, it  
 10 is due process,” and “it is not within the province of any court, unless expressly authorized by  
 11 law, to review the determination of the political branch of the Government to exclude a given  
 12 alien.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950). Given this  
 13 absence of procedural due process rights with respect to applications for admission, there can be  
 14 no Suspension Clause issue, as there is no due process right to vindicate in habeas proceedings.  
 15 *See de Rincon*, 539 F.3d at 1141; *M.S.P.C.*, 60 F. Supp.3d at 1173-76; *cf. Carlson v. Landon*, 342  
 16 U.S. 524, 537, (1952) (holding that Congress can place exclusion decisions entirely within the  
 17 discretion of executive officers, with only the process that Congress sees fit to authorize). Further,  
 18 the limited habeas review permitted by 8 U.S.C. § 1252(e)(2) provides a sufficient judicial forum  
 19 to adjudicate any statutory claims of non-admitted aliens vis-a-vis their admission. *See, e.g.*

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 24 <sup>3</sup> At the telephonic hearing on December 2, 2015, Petitioners suggested *M.S.P.C.* and *Rodriguez*  
 25 lack any persuasive value because they have been vacated. The fact that the case was vacated in  
 26 no way undermines its persuasive authority, given that the basis of *vacatur* was mootness, and  
 27 not a change in law. *See, e.g., de Rincon*, 539 F.3d at 1141 (relying extensively on *Li v. Eddy*,  
 28 259 F.3d 1132 (9th Cir. 2001), a prior case addressing the due process rights of non-admitted  
 aliens, notwithstanding the fact that it “was subsequently vacated on mootness grounds . . .  
 because the case is analytically sound, and because it was vacated on grounds unrelated to its  
 analysis of the constitutionality of the limitations on review of an expedited removal order”).  
 Judge Lamberth certainly found no issue with relying on both cases. *Melendez*, Ex. 1 at 44-45.

1 *Pena*, 2015 U.S. App. LEXIS 17069, at \*10.

2 The implications of the relief Petitioners seek are significant. They ask this Court to stay  
3 their removals, reconsider and vacate their expedited removal orders, and essentially conduct  
4 new credible fear interviews until they secure a favorable result. While this relief is captioned in  
5 terms of Petitioners only, the practical effect of ruling in Petitioners' favor could be  
6 extraordinary in scope. In reality, Petitioners ask this Court to discard the carefully crafted  
7 expedited removal regime, enshrined in statute, which expresses Congress's firm conviction that  
8 the Executive branch requires the discretion to expeditiously remove certain classes of aliens at  
9 or near the border who have no entitlement to enter the United States and who otherwise may  
10 abscond into the interior or consume limited enforcement resources.

13 Congress's intent in this regard is not in doubt. "The decision to adopt an 'expedited  
14 removal' system was prompted by Congress's finding that 'thousands of aliens arrive in the U.S.  
15 at airports each year without valid documents and attempt to illegally enter the U.S.'" *AILA*, 18  
16 F. Supp. 2d at 41 (quoting H.R. Rep. No. 104-469, pt. 1, at 158 (1996)). As noted in the  
17 conference report for the Illegal Immigration Reform and Immigrant Responsibility Act of 1996  
18 ("IIRIRA"), expedited removal was viewed as one of several critical tools to deal with the "crisis  
19 at the land border, allowing hundreds of thousands of illegal aliens to cross each year, and  
20 contributing more than half of the 300,000 to 400,000 annual growth in the illegal alien  
21 population." H.R. Rep. No. 104-469, pt. 1, at 107. The tool was needed in part because  
22 "[t]housands of smuggled aliens arrive in the United States each year with no valid entry  
23 documents and declare asylum immediately upon arrival. Because of the lack of detention space  
24 and overcrowded immigration court dockets, many have been released into the general  
25 population. Not surprisingly, a majority of such aliens do not return for their hearings." *Id.* at  
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1 117. Likewise, “[d]ue to the huge backlog in asylum cases, and the inability of the INS to detain  
2 failed asylum applicants who are deportable from the United States, these aliens could  
3 reasonably expect that the filing of an asylum application would allow them to remain  
4 indefinitely in the United States,” providing further incentive for illegal entry. *Id.* at 117-18.  
5 These Congressional findings demonstrate Congress’s firm determination that the expedited  
6 removal system was necessary to combat the immigration crisis which existed in 1995 and to  
7 provide the Executive Branch the firm tool to address immigration going forward. Those  
8 determinations are entitled to the greatest deference, as “over no conceivable subject is the  
9 legislative power of Congress more complete than it is over the decision of Congress to admit or  
10 to exclude aliens.” *Negusie v. Holder*, 555 U.S. 511, 546 n. 2 (2009).  
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12  
13 In place of this system, Petitioners suggest a review process in which all unadmitted  
14 aliens, in this instance apprehended while seeking to enter unlawfully (which is itself a criminal  
15 act),<sup>4</sup> subject to expedited removal (193,032, or 44 percent of all removals during 2013,<sup>5</sup> *see*  
16 Immigration Enforcement Actions: 2013, at 1, 5, *available at* [https://www.dhs.gov/sites/default/](https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf)  
17 [files/publications/ois\\_enforcement\\_ar\\_2013.pdf](https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf)) can challenge those proceedings in federal  
18 district court, delaying their removal for months, if not years, and tying up enforcement and  
19 judicial resources.<sup>6</sup>  
20

21 Indeed, in this District alone, in roughly a two week’s span, aliens apprehended  
22 unlawfully entering between the ports of entry have filed *thirteen* habeas petitions challenging  
23

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24 <sup>4</sup> *See* 8 U.S.C. §§ 1325, 1326.

25 <sup>5</sup> The number may be even higher given that the Department of Homeland Security (“DHS”) may also reinstate prior orders of removal, including expedited removal orders, should they  
26 encounter illegal re-entrants in the United States. *See* 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8.

27 <sup>6</sup> Notably, such review would provide asylum seekers apprehended at the border, including those  
28 entering unlawfully, far greater procedural rights than aliens who in fact have due process rights because they have been lawfully admitted to the United States and who apply for asylum within the United States.

1 their expedited removal orders and at least six separate emergency stay motions, all of which  
2 have been granted, significantly undermining the Executive's ability to effect Congress's will  
3 with respect to expedited removal in this District. *See Erazo Anduray v. DHS*, (E.D. Pa. Dec 3,  
4 2015); *Matamoros v. DHS*, (E.D. Pa. Dec. 3, 2015); *Funes v. DHS* (E.D. Pa. Dec. 3, 2015);  
5 *Menjivar v. DHS*, (E.D. Pa. Dec. 3, 2015); *Huezo de Chicas v. DHS*, (E.D. Pa. Dec. 3, 2015);  
6 *Martinez v. DHS*, 15-6411 (E.D. Pa. Dec 3, 2015) (Jones, J.); *Carrasco Gomez v. DHS*, 15-6410  
7 (E.D. Pa. Dec. 3, 2015) (Tucker, J.); *Gutierrez Rubio v. DHS*, 15-6406 (E.D. Pa. Dec. 2 2015)  
8 (Savage, J.); *Flores-Pichinte v. DHS*, 15-6403 (E.D. Pa. Dec. 2 2015) (Pappert, J.); *Zelaya*  
9 *Alberto v. DHS*, 15-cv-06404 (E.D. Pa. Dec. 2 2015) (Schiller, J.); *Ceron-Larios v. DHS*, 15-  
10 6370 (E.D. Pa. Nov. 30, 2015) (Restrepo, J.); *Quinteros v. Johnson*, 15-6279 (E.D. Pa. Nov. 23,  
11 2015) (Schmehl, J.); *Castro v. DHS*, 15-6153 (E.D. Pa. Nov. 16 2015) (Diamond, J.). This  
12 possibility is precisely what Congress sought to avoid in enacting the expedited removal statute,  
13 *see AILA*, 18 F. Supp. 2d at 41; H.R. Rep. No. 104-469, pt. 1, at 107, 117-18, 158, and is  
14 contrary to the plain language of the statute. 8 U.S.C. § 1225.

15  
16  
17  
18 It also bears noting a possible motive in the deluge of stay motions and habeas petitions  
19 suddenly pending in this district: all petitioners are women and children subject to the *Flores*  
20 settlement and a pair of recent orders applying that settlement agreement to accompanied  
21 children and their parents who illegally come to the United States as family units. *See Flores v.*  
22 *Lynch*, No. 85-4544 (C.D. Cal.), Order re: Plaintiffs Motion To Enforce Settlement Of Class  
23 Action And Defendants Motion To Amend Settlement Agreement (July 24, 2015), *modified by*  
24 Order re: Response To Order to Show Cause (Aug. 21, 2015), *appeal pending* No. 15-56434 (9th  
25 Cir.). The U.S. District Court for the Central District of California ruled in those recent orders—  
26 which are still pending appeal—that the *Flores* settlement applies nationwide to accompanied  
27  
28



children and their parents. The order effectively raises the threshold the Government must meet in order to detain accompanied children and their parents; restricts the duration of such detention; limits the types of detention facilities that may be used to house families (of which Berks, at which Petitioners are presently detained, is 1 of only 3 such facilities nationwide); and imposes a legal requirement on the Government to process all members of family units—including adults—as expeditiously as possible. Of course, when their valid removal orders are stayed, the direct effect is to necessarily extend the time required for the Government to process and remove family units, thus prolonging whatever expedition is possible. In other words, the recent rash of stay motions and habeas petitions from the family units here may prolong their processing and detention so as to create the appearance of conflict with the recent *Flores* district court orders in order to gain their release into the United States before being removed, which would also provide them the opportunity to abscond and never show up for their ultimate removal.<sup>7</sup>

In light of the jurisdictional bars to review, the absence of any Suspension Clause issue, and the deference due Congress and the Executive’s determinations concerning admission to and exclusion from the United States, the Court should dismiss the Petitions.

### LEGAL BACKGROUND

Congress has plenary power to make policies and rules for the admission and exclusion

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<sup>7</sup> The ongoing grant of stays of removal in this jurisdiction also places DHS in the position of either (1) keeping aliens who receive stays in detention for longer periods of time when they would otherwise have already been removed, which would prevent DHS from placing any newly arriving aliens into expedited removal because of a lack of detention space; or (2) releasing aliens who receive stays into the general public rather than removing them, which would only encourage further obstruction of removal efforts and would severely drain DHS’s enforcement resources to later re-detain people it already had in custody. *See* EOIR Statistic Yearbook (hereinafter “Yearbook”) at P3, *available at* <http://www.justice.gov/eoir/statspub/fy13syb.pdf> (noting increase from 24% to 33% of removal orders entered in absentia following release of aliens in detention on bond). Either of these outcomes is especially damaging to America’s security at this moment in time, when we are currently experiencing a significant uptick in illegal immigration at our southern border. *See* Ex. 3, Declaration of Woody Lee, at ¶¶ 1-16.

1 of aliens. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Although prior to 1996, aliens could  
2 secure review of some elements of their removal orders in habeas corpus proceedings, *see, e.g.*,  
3 *M.S.P.C.*, 60 F. Supp. 3d at 1167, IIRIRA substantially amended the procedures under the INA  
4 regarding admissions to, and removal from, the United States of aliens arriving in the United  
5 States without proper documentation by streamlining methods for determining admissibility, and  
6 for effectuating removal from the United States. Under IIRIRA, if an arriving alien is  
7 inadmissible under 8 U.S.C. § 1182(a)(7) because he or she lacks proper documentation, an  
8 immigration officer may “order the alien removed from the United States without further hearing  
9 or review unless the alien indicates either an intention to apply for asylum under section 1158 of  
10 this title or a fear of persecution.” 8 U.S.C. § 1225(b)(1)(A)(i).  
11

12  
13 The streamlined removal provision codified at 8 U.S.C. § 1225(b) is known as “expedited  
14 removal.” The statute applies with equal force to arriving aliens and to illegal entrants within 100  
15 miles of the border who cannot show that they have been physically present in the United States  
16 continuously for the fourteen-day period immediately preceding the date of their apprehension. 8  
17 U.S.C. § 1225(b)(1)(A)(iii); 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004). In such circumstances,  
18 the entrants have not developed the ties or property interests that a lawful permanent resident or  
19 even an illegal entrant residing here for a significant period may have developed. *See, e.g.*,  
20 *M.S.P.C.*, 60 F. Supp.3d at 1173-76; *Rodriguez*, 2014 U.S. Dist. LEXIS 131872 at \*8, \*11; *see*  
21 *also Melendez*, Ex. 1 at 44-45.  
22

23  
24 If an alien who is an applicant for admission who is otherwise inadmissible, and, as in  
25 these cases, is apprehended when unlawfully crossing the border, expresses a fear of persecution  
26 or torture, an immigration officer refers the alien for an interview by an asylum officer at the  
27 U.S. Citizenship and Immigration Services (“USCIS”). The asylum officer must interview the  
28

1 alien and determine whether he or she has established a credible fear of persecution. 8 U.S.C. §  
2 1225(b)(1)(B)(ii). A “credible fear” exists if there is a significant possibility, taking into account  
3 the credibility of the statements made by the alien in support of his or her claim and such other  
4 facts known to the officer, that the alien could establish eligibility for asylum. *See* 8 U.S.C. §  
5 1225(b)(1)(B)(v). If the alien receives a negative credible fear determination, he may request a  
6 *de novo* review by an immigration judge (“IJ”). 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R.  
7 § 1003.42(d). The review includes an opportunity for the alien to be heard and questioned by the  
8 IJ, who also may take into evidence any relevant oral or written statement. *Id.*; 8 C.F.R. §  
9 1003.42(c). The alien may consult with a person of his or her own choosing prior to the review. 8  
10 C.F.R. §§ 1003.42(a), (b), (c). The IJ in his or her discretion may also allow the “consulted”  
11 person to be present during the review.  
12

13  
14 If either the asylum officer or the IJ determines that the alien has established a credible  
15 fear of persecution or torture, expedited removal proceedings are terminated and the alien is  
16 granted a full hearing in non-expedited removal proceedings under 8 U.S.C. § 1229a. *See* 8  
17 C.F.R. § 208.30(d), (f)(2). If both the asylum officer and the IJ determine that credible fear has  
18 not been established, the alien is removed from the United States. 8 U.S.C. §§ 1225(b)(1)(B)(iii).  
19 Consistent with the statute, the alien is entitled to no further review of the “no credible fear”  
20 determination, from either the Board of Immigration Appeals (“BIA”) or federal courts. 8 U.S.C.  
21 §§ 1225(b)(1)(C), 1252(a)(2)(A)(iii); 8 C.F.R. § 1003.42(f) (“No appeal shall lie from a review  
22 of an adverse credible fear determination made by an immigration judge.”).  
23  
24

### 25 **FACTUAL BACKGROUND**

26 Petitioners are natives and citizens of El Salvador and Honduras. According their  
27 petitions, they entered the country illegally without inspection and were apprehended shortly  
28

after their illegal entries. *See* Rubio Petition at ¶ 5, Prayer for Relief; Pichinte Petition at ¶ 5. Petitioners expressed a fear of returning to their native countries and were referred to USCIS for a credible fear interviews. Rubio Petition at ¶¶ 46-50, Prayer for Relief; Pichinte Petition at ¶¶ 57-62. After the interviews, the asylum officer made a negative credible fear determination in each case. Rubio Petition at ¶¶ 46-50, Prayer for Relief; Pichinte Petition at ¶¶ 57-62. An IJ reviewed and affirmed each determination. Rubio Petition at ¶¶ 46-50, Prayer for Relief; Pichinte Petition at ¶¶ 57-62.

## ARGUMENT

### I. This Court Lacks Jurisdiction Over the Petitions and the Stay Requests

Petitioners' habeas petitions seek review and *vacatur* of their expedited removal orders. Rubio Petition, Prayer for Relief; Pichinte Petition, Prayer for Relief. Specifically, they allege that (1) Respondents incorrectly applied the credible fear review process because Petitioners' believe they satisfy the credible fear standard, Rubio Petition at ¶¶ 46-50, Prayer for Relief; Pichinte Petition at ¶¶ 57-62, and that (2) their alleged due process rights have been violated because they did not have a "meaningful opportunity to establish their claims" and USCIS and the IJ did not "provi[de] them with a reasoned explanation for their decisions." Rubio Petition at ¶¶ 57-61, Prayer for Relief; Pichinte Petition at ¶¶ 64-68. As relief they ask this Court to (a) declare their expedited removal orders invalid, (b) order Respondents to vacate the expedited removal orders at issue, and (c) order Respondents to provide Petitioners with a new credible fear hearing. *Id.* at Prayer for Relief. However, as at least five separate Courts of Appeals of have unambiguously held, 8 U.S.C. §§ 1225(b) and 1252(a) and (e) preclude federal courts from reviewing expedited removal orders or granting any of the relief Petitioners request.

The plain language of the INA restricts judicial review of expedited removal orders and

1 credible fear determinations made under Section 1225(b). Section 1252(a)(2)(A) provides, in  
2 pertinent part, that notwithstanding any other provision of law, including any habeas provision,  
3 no court shall have jurisdiction to review:

4 (i) except as provided in subsection (e), any individual determination or to  
5 entertain any other cause or claim arising from or relating to the implementation  
6 or operation of an order of removal pursuant to section 235(b)(1) [8 U.S.C. §  
1225(b)],

7 (ii) except as provided in subsection (e), a decision by the Attorney General to  
8 invoke the provisions of such section,

9 (iii) the application of such section to individual aliens, including the  
10 determination made under section 235(b)(1)(B) [8 U.S.C. § 1225(b)(1)(B),  
11 concerning credible fear determinations].

12 (iv) except as provided in subsection (e), procedures and policies adopted by the  
13 Attorney General to implement the provisions of section 235(b)(1) [8 USCS §  
1225(b)(1)].

14 Section 1252(e)(2) in turn permits review of only three issues: “(A) whether the  
15 petitioner is an alien; (B) whether the petitioner was ordered removed under [the expedited  
16 removal statute, 8 U.S.C. § 1225], and (C) whether the petitioner can prove by a preponderance  
17 of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been  
18 admitted as a refugee . . . , or has been granted asylum[.]” 8 U.S.C. § 1252(e)(2)(A)-(C). Courts  
19 lack jurisdiction to consider any collateral challenge to an expedited removal order beyond these  
20 three permissible bases for review. *See, e.g., de Rincon.*, 539 F.3d at 1141. Moreover, the statute  
21 specifically provides that “no court may--(A) enter declaratory, injunctive, or other equitable  
22 relief in any action pertaining to an order to exclude an alien in accordance with section [8  
23 U.S.C. § 1225(b)(1)] except as” established by 8 U.S.C. § 1252(e)(1)(D), 8 U.S.C. §  
24 1252(e)(1)(A), which in turn states that “the court may order no remedy or relief other than to  
25 require that the petitioner be provided a hearing in accordance with section 240 [8 U.S.C. §  
26  
27  
28

1229a],” should the alien satisfy one of the three permissible bases for review.

Section 1252(e)(5) defines the scope of the inquiry in 8 U.S.C. § 1252(e)(2)(B), stating that “[i]n 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.” The statute unambiguously states that “[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal,” in habeas, or otherwise.<sup>8</sup> See 8 U.S.C. § 1252(e)(5); *Brumme*, 275 F.3d at 447-48 (rejecting claim that § 1252(e) permits habeas review of whether § 1225(b)(1) was applicable to petitioner); *Li*, 259 F.3d at 1134 (“Were there any doubt of congressional intent, it is resolved by [§ 1252(e)(5)], that expressly declares that judicial review does not extend to actual admissibility.”).

Thus, “[b]y the clear operation of these statutes,” federal courts “are jurisdictionally barred” from hearing direct challenges to expedited removal orders. *de Rincon*, 539 F.3d at 1139. Every circuit court to address this issue has so concluded. See *Smith*, 741 F.3d at 1021-22; *Shunaula v. Holder*, 732 F.3d 143, 147 (2d Cir. 2013); *Khan v. Holder*, 608 F.3d 325, 329-30 (7th Cir. 2010); *de Rincon*, 539 F.3d at 1139; *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007); *Vaupel v. Ortiz*, 244 F. App’x 892, 894 (10th Cir. 2007); *Brumme*, 275 F.3d at 447-48; *Li*, 259 F.3d at 1134.<sup>9</sup>

Moreover, every circuit to specifically address the issue has concluded that courts may not review whether the statute was properly invoked, but only whether it was invoked at all. See

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<sup>8</sup> To the extent that Petitioners argue that section 1252(e) should be construed as to avoid a constitutional question—i.e., the applicability of the Suspension Clause—canon of constitutional avoidance may be applied only when a statute is “susceptible to more than one construction” because it provides “a means of choosing between” multiple constructions. *Clark v. Martinez*, 543 U.S. 371, 385 (2005). As the weight of authority indicates, the unequivocal terms of section 1252(e) leave no ambiguity as to Congressional intent, thus foreclosing a plausible alternative reading. See, e.g., *Li*, 259 F.3d at 1134.

<sup>9</sup> Petitioners appear to acknowledge this by burying citation to these cases with a “but see” in a footnote. See Rubio Stay Memo at 17; Pichinte Stay Memo at 20.

1 *Shunaula*, 732 F.3d at 147 (court lacks “jurisdiction to inquire whether the expedited removal  
 2 procedure to which [plaintiffs] were subjected was properly invoked”); *Khan*, 608 F.3d at 330  
 3 (same); *Vaupel*, 244 F. App'x at 894 (no review of whether “statute was lawfully applied to the  
 4 alien”); *Brumme*, 275 F.3d at 447-48 (no review of whether statute “was applicable in the first  
 5 place”); *Li*, 259 F.3d at 1134 (section 1252(e) “does not appear to permit the court to inquire into  
 6 whether section 1225(b)(1) was properly invoked, but only whether it was invoked at all.”);  
 7 accord *Al Khedri v. Sedlock*, No. 09 C 6483, 2009 WL 3380681, \*2 (N.D. Ill. Oct. 20 2009)  
 8 (holding that INA does not permit review of “whether the expedited removal process was  
 9 lawfully applied to a particular alien.”).

10  
 11  
 12 Given this overwhelming weight of authority, the Court should similarly hold that it lacks  
 13 jurisdiction to address Petitioners’ claims. The relief Petitioners seek – vacatur of their expedited  
 14 removal orders, an order requiring a new credible fear interview, and a declaration that  
 15 Respondents’ implementation of the credible fear process in their case is contrary to law such  
 16 that their expedited removal orders are invalid – is simply not cognizable in federal court.<sup>10</sup> See 8  
 17 U.S.C. §§ 1252(a)(2)(a)(i)-(iii), (e)(2), (e)(5).

18  
 19 Nevertheless, Petitioners argue that the Court must somehow retain jurisdiction because  
 20 they “should have prevailed in establishing a credible fear.” Rubio Petition at ¶¶ 68; Pichinte  
 21 Petition at ¶ 56. Focusing exclusively on language in section 1252(e)(5), they claim the INA only  
 22 precludes review of whether Petitioners are “actually inadmissible” or “entitled to relief from  
 23

24 <sup>10</sup> Separately, the District Court for the District of Columbia has exclusive jurisdiction to review  
 25 claims generally attacking the legality of the credible fear regulations in the expedited removal  
 26 context. See, e.g., *de Rincon*, 539 F.3d at 1141 n.5 (noting separate statutory sub-section at 8  
 27 U.S.C. § 1252(e)(3) that allows a “systemic” challenge to the expedited removal process and its  
 28 implementing regulations, but only in the United States District Court for the District of  
 Columbia, and that the regulations were sustained against such a challenge in *AILA v. Reno*, 18  
 F. Supp. 2d 38, 54-56 (D.D.C. 1998)). Thus, to the extent Plaintiffs challenge the expedited  
 removal system generally, rather than their individual expedited removal orders and credible fear  
 determinations, they must file suit in the District of Columbia.

1 removal.” Rubio Stay Memo at 16-17; Pichinte Stay Memo at 18-19. As they see it, the  
2 foregoing review provisions in fact permit a court to review and vacate an expedited removal  
3 order because they claim they did “not receive a fair credible fear interview and that they should  
4 have passed their credible fear screening,” which in their view is different than whether they are  
5 inadmissible are entitled to relief from removal. *Id.* This appears to be an argument that  
6 notwithstanding the jurisdictional stripping provisions of the INA, the court retains jurisdiction  
7 to review the asylum officer and the IJ’s credible fear determinations in order to ascertain  
8 whether an expedited removal order should have been issued at all. That is, Petitioners  
9 essentially argue that the Court must retain jurisdiction to review the *merits* of USCIS’s and the  
10 IJ’s determinations that Petitioners did not establish a credible fear of persecution or torture and  
11 the immigration officer’s conclusion that they are otherwise inadmissible and subject to  
12 expedited removal.  
13

14  
15 This claim is misguided. First, it ignores the rest of 8 U.S.C. § 1252, which explicitly  
16 forecloses review of whether Petitioners should have passed their credible fear screening or the  
17 application of the expedited removal statute to any individual alien. *See* 8 U.S.C. §  
18 1252(a)(2)(A)(i-iv). Second, it ignores the clear import of section 1252(e)(5), which is “to clarify  
19 that Congress really did mean what it said in the first sentence [of section 1252(e)(5)] — review  
20 should only be for whether an immigration officer issued [an expedited removal order] and  
21 whether the Petitioner is the same person referred to in that order.” *M.S.P.C.*, 60 F. Supp. 3d at  
22 1164.  
23  
24

25 Third, Petitioners fail to acknowledge the weight of authority indicating that their claim  
26 in fact requires reviewing precisely what 8 U.S.C. § 1252(a)(2)(A) precludes – the application of  
27 the expedited removal procedures to a specific alien, the decision to invoke such procedures, the  
28



1 credible fear determination, or any cause or claim arising from or relating to the implementation  
 2 or operation of an expedited order of removal.<sup>11</sup> 8 U.S.C. § 1252(a)(2)(A); *accord Smith*, 741  
 3 F.3d at 1020-22 (no jurisdiction to review CBP's classification of alien as intending immigrant  
 4 lacking entry documents); *see Li*, 259 F.3d at 1132 (no jurisdiction to review CBP's  
 5 determination that alien's facially valid visa was invalid); *Khan*, 608 F.3d at 327, 330 (same);  
 6 *AILA*, 18 F. Supp. 2d at 56-57 (same).

8 Petitioners also claim that *Smith v. U.S. Customs and Border Protection*, 741 F.3d 1016  
 9 (9th Cir. 2014) supports them, as it “found that it had jurisdiction to decide whether the  
 10 noncitizen was properly in the expedited removal system at all.” Rubio Stay Memo at 16-17;  
 11 Pichinte Stay Memo at 19. As the two courts to address this argument previously have observed,  
 12 this is a misreading of *Smith*. *See M.S.P.C.*, 60 F. Supp. 3d at 1164; *Rodriguez*, 2014 U.S. Dist.  
 13 LEXIS 131872 at \*7-8.

15 In *Smith*, the petitioner argued that as a non-intending immigrant of Canadian citizenship,  
 16 he was not subject to the documentary requirements to which any other visitor to the United  
 17 States is subject. 741 F.3d at 1019. In particular, Smith claimed “that the CBP unlawfully applied  
 18 the statute to him, on the grounds that documentary requirements for entry into the United States  
 19 are waived for Canadians, and that the CBP violated his due process rights in issuing the  
 20 expedited removal order.” *Id.*

22 Rejecting this argument, the Ninth Circuit pointed out that Smith had conceded that he  
 23 was an alien and that he was not a lawful permanent resident, or an alien who already had been  
 24

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25 <sup>11</sup> One district court decision has read section 1252(e)(2) & (5) to permit narrow review. *See*  
 26 *American-Arab Anti-Discrimination Comm. v. Ashcroft*, 272 F. Supp. 2d 650, 662-63 (E.D.  
 27 Mich. 2003). However, that holding is at odds with the statute, and has been expressly rejected  
 28 by subsequent court decisions. *See Vaupel*, 244 F. App'x at 895; *Wei Chen v. Napolitano*, 2012  
 U.S. Dist. LEXIS 160525, \*9 (S.D.N.Y. Nov. 8, 2012) (similar); *Al Khedri*, 2009 U.S. Dist.  
 LEXIS 96856 at \*5.

1 determined to be an asylee or refugee. The Court focused on the second category of permissible  
2 review: “whether the petitioner was removed under the expedited removal statute.” *Id.* at 1021.

3 The Court construed Smith’s argument as follows:

4       Smith’s argument, in effect, is that he was a Canadian to whom the documentary  
5 requirements for admission did not apply, and that since he was exempt from the  
6 requirements, the CBP exceeded its authority. In other words, Smith argues that he was  
7 not “ordered removed under [8 U.S.C. § 1225]” because the CBP could not lawfully  
remove him under that statute.

8 *Id.* at 1022.

9       Contrary to Petitioners’ reliance on *Smith*, the Ninth Circuit did not review whether  
10 Smith belonged in expedited removal. Instead, the Court “[a]ccept[ed] his theory at face value,”  
11 but, nevertheless, concluded that Smith “cannot prevail because he was in fact removed under §  
12 1225.” The Court reviewed the relevant law applicable to aliens seeking admission and noted  
13 that it was entirely within CBP’s discretion to determine for itself whether it believed Smith was  
14 an intending immigrant or a non-intending immigrant not subject to documentary requirements.  
15 *Id.* Because CBP determined that he was an intending immigrant, that was the end of the inquiry.  
16 “Smith was ‘ordered removed,’ under § 1225”; therefore, the Court lacked jurisdiction to inquire  
17 further. *Id.* at 1022. The Ninth Circuit expressly rejected the similar claim Petitioners advance  
18 here, that there must be jurisdiction to review the Government’s discretionary determination that  
19 Smith was properly subject to an expedited removal order. As the Court noted, “[w]e do not  
20 evaluate the merits of the CBP’s decision to classify Smith as an intending immigrant” because 8  
21 U.S.C. § 1252(e)(5) bars judicial review of “whether the alien is actually inadmissible or entitled  
22 to any relief from removal.”<sup>12</sup> *Id.*

23  
24  
25  
26  
27 <sup>12</sup> Indeed, as discussed *infra*, the Court also rejected the very due process claim Petitioners raise  
28 here, holding that any claim that “the procedures at issue here violate the Due Process Clause are  
foreclosed by *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).” *Smith*,  
741 F.3d at 1022.

1 Accordingly, courts lack jurisdiction to determine whether the expedited removal statute  
2 should not have applied in the first place, as such review is inextricably intertwined with review  
3 of the merits of USCIS's and the IJ's conclusions regarding credible fear and CBP's conclusions  
4 concerning Petitioners' inadmissibility finding. Because Petitioners raise none of the permissible  
5 bases for review in their petitions, they fail to state any claim for relief under section 1252(e)(2).  
6 Consequently this Court lacks jurisdiction over their claims.  
7

8 **II. The Limited Review Provisions of 8 U.S.C. §§ 1252(a)(2), (e)(2), and (e)(5) do not**  
9 **Violate the Suspension Clause**

10 Notwithstanding the foregoing, Petitioners contend that if the INA is read – as every  
11 circuit court to address the issue has read it – to foreclose their claims, the statute violates the  
12 Suspension Clause. Rubio Stay Memo at 18-21; Pichinte Stay Memo at 21-23. Although the  
13 jurisdictional analysis above is sufficient to dispose of the petitions, out of an abundance of  
14 caution, Respondents address the issue, noting initially that every court to specifically address  
15 this argument expressly or implicitly has rejected it.  
16

17 The Suspension Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall  
18 not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require  
19 it.” U.S. Const. art. I, § 9, cl. 2. Petitioners contend that even if section 1252(e)(2) forecloses  
20 review of their claims, they must be able to raise their legal claims concerning whether the  
21 expedited removal and credible fear process as applied to them violate due process in some  
22 forum. In support of this claim they primarily rely on *INS v. St. Cyr*, 533 U.S. 289 (2001) and  
23 *Boumediene v. Bush*, 553 U.S. 723 (2008). Rubio Stay Memo at 18-21; Pichinte Stay Memo at  
24 21-23.  
25

26 As an initial matter, several courts, including four circuit panel decisions have upheld the  
27  
28

1 expedited removal regime after the Supreme Court’s *Boumediene* decision. *See, e.g., Pena v.*  
 2 *Lynch*, 2015 U.S. App. LEXIS 17069, --- F.3d --- (9th Cir. 2015) (“Because the jurisdiction-  
 3 stripping provisions of the statute retain some avenues of judicial review, limited though they  
 4 may be, Pena has not been unconstitutionally denied a judicial forum.”); *Khan*, 608 F.3d at 329-  
 5 30 (rejecting argument that statute must be read to permit review under a “‘safety valve’  
 6 established for substantial constitutional questions”); *de Rincon*, 539 F.3d at 1141 (“narrow  
 7 habeas review of expedited removal orders does not raise the constitutional problems” alluded to  
 8 in *St. Cyr*); *Brumme*, 275 F.3d at 447-48 (rejecting Suspension Clause claim alluded to in *St.*  
 9 *Cyr*); *accord M.S.P.C.* 60 F. Supp. 3d at 1170-71 (rejecting this claim); *Rodriguez*, 2014 U.S.  
 10 Dist. LEXIS 131872 at \*8-12 (similar); *De La Torre-Flores v. Napolitano*, 11-2698, 2012 U.S.  
 11 Dist. LEXIS 104432, \*16 n.9 (S.D. Cal. July 25, 2012) (unpublished) (similar); *Melendez*, Ex. 1  
 12 at 44-45 (applying *M.S.P.C.*); *see also Li*, 259 F.3d at 1134-35 (stating, before *Boumediene*, but  
 13 after *St. Cyr*, that “with respect to expedited removal orders, ... the statute could not be much  
 14 clearer in its intent to restrict habeas review”); *Vaupel*, 244 App’x. at 895 (holding, prior to  
 15 *Boumediene*, “[n]or is there an exception in § 1252(e) providing authority to review  
 16 constitutional claims related to the application of § 1225(b)(1).”).

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 20 Moreover, Petitioners’ assertions concerning the holdings and applicability of *St. Cyr* and  
 21 *Boumediene* – that, in Petitioners’ words, “noncitizens have always had access to judicial review  
 22 to challenge their deportation orders . . . and the [] absence of such review would violate the  
 23 Suspension Clause,” Rubio Stay Memo at 18; Pichinte Stay Memo at 21 – is not a correct  
 24 interpretation of either case. Unlike the present case, the petitioner in *St. Cyr* was a lawful  
 25 permanent resident lawfully admitted and physically present in the United States, who, after  
 26 pleading guilty to selling a controlled substance, was ordered removed and subjected to physical  
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1 detention pending removal. 533 U.S. at 292-93, 304-05. At issue in *St. Cyr* was whether district  
2 courts retained habeas jurisdiction under then-applicable sections of the INA to review the legal  
3 question of whether INA section 212(c) abrogated any authority the Attorney General had “to  
4 waive deportation for aliens previously convicted of aggravated felonies.” *Id.* at 297. The  
5 Government argued that portions of 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), and (b)(9) as then  
6 codified, which concerned judicial review of non-expedited removal orders generally, and of  
7 removal orders against criminal aliens specifically, deprived the district court of habeas  
8 jurisdiction to decide that issue. *Id.* at 293-98.

10 The Court first reiterated “the longstanding rule requiring a clear statement of  
11 congressional intent to repeal habeas jurisdiction.” *Id.* at 298. Examining sections 1252(a)(1),  
12 (a)(2)(C), and (b)(9) as then codified, the Court noted the lack of a plain statement, let alone any  
13 mention of habeas – in each of the provisions cited by the Government.<sup>13</sup> *Id.* at 310-14. The  
14 focus of those provisions, as the Court explained, was “judicial review” or “jurisdiction to  
15 review,” as opposed to “habeas corpus.” *Id.* at 310-11. Because “judicial review,” or  
16 “jurisdiction to review,” and “habeas corpus” have historically distinct meanings, the  
17 Government could not satisfy the plain statement rule. *Id.* at 310-14. Consequently, those  
18 provisions did not deprive the district court of jurisdiction under the general habeas statute, 28  
19 U.S.C. § 2241.

22 The Ninth Circuit analyzed the applicability of *St. Cyr* in the expedited removal context  
23 in *Li*. 259 F.3d at 1133-36. Li, a native and citizen of China, sought entry to the United States via  
24 Anchorage, Alaska. *Id.* at 1133. Although she alleged that she presented a facially valid visa, the  
25 former Immigration and Naturalization Service (“INS”) determined that she sought to enter the  
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27 <sup>13</sup> 8 U.S.C. §§ 1252(a)(2)(C) and (b)(9) have since been amended by the REAL ID act to  
28 expressly limit habeas review. *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231  
(May 11, 2005).

1 United States by engaging in fraud or misrepresentation, and issued an expedited removal order.

2 *Id.* On appeal, Li argued that the court retained jurisdiction to determine whether the  
3 Government correctly invoked the expedited removal procedure and that Congress did not intend  
4 to circumscribe habeas jurisdiction. *See Li*, 259 F.3d at 1134.

5 The Ninth Circuit rejected both claims, observing that “subsection (e)(2) does not appear  
6 to permit the court to inquire into whether section 1225(b)(1) was properly invoked, but only  
7 whether it was invoked at all.” *Li*, 259 F.3d at 1134. Stating that “[w]ith respect to review of  
8 expedited removal orders, however, the statute could not be much clearer in its intent to restrict  
9 habeas review,” the Court held that other than the permitted avenues for review under section  
10 1252(e)(2), courts lacked jurisdiction to review the merits of an expedited removal order or the  
11 Government’s application of the relevant statute in the first place. *Id.* at 1134-35.

12 The Court then expressly distinguished the expedited removal context from *St. Cyr*,  
13 observing that the “case does not implicate the jurisdictional issues that would be raised had  
14 [petitioner] been *lawfully admitted* to this country” as the plaintiff in *St. Cyr* was. *Id.* at 1135  
15 (emphasis added). Although reserving the issue for another day, the Court opined that if  
16 petitioner was in fact a lawfully admitted alien the Court might have “jurisdiction to determine  
17 whether an individual in such a situation is lawfully ordered removed under” the expedited  
18 removal statute. *Id.* (citations omitted). As for aliens who have not been lawfully admitted to the  
19 United States, the Court held that such aliens are “clearly of the type of case for which expedited  
20 removal provisions of 8 U.S.C. § 1225(b) and the limited review provisions of section 1252(e)(2)  
21 were designed.” *Id.* at 1136 (citing H.R.Rep. No. 104-518 (1995), U.S. CODE CONG. AND  
22 ADM. NEWS, at 924); *see also, Khan*, 608 F.3d at 329-30 (distinguishing *St. Cyr* in the  
23 expedited removal context); *de Rincon*, 539 F.3d at 1141 (same, citing *Li* favorably); *Brumme*,

1 275 F.3d at 447-48 (same). Thus, non-admitted aliens lack Suspension Clause rights in relation  
2 to their admission and the Suspension Clause is not implicated by applying section 1252(e)'s  
3 limited habeas review to petitioners. *See Li*, 259 F.3d at 1135-36; *accord Pena*, 2015 U.S. App.  
4 LEXIS 17069 at \*9-10.

5 *Boumediene* is similarly inapposite, given its specific factual circumstances. In  
6 *Boumediene*, certain enemy combatants physically detained at the United States naval base at  
7 Guantánamo Bay, Cuba brought an action challenging their indefinite detention. 553 U.S. at 732.  
8 The Supreme Court concluded that Boumediene and his fellow petitioners were under *de facto*  
9 United States' jurisdiction while at Guantánamo Bay, and therefore could challenge their  
10 physical detention through a writ of habeas. 533 U.S. 758-71. In the specific context of aliens  
11 detained indefinitely in *de facto* U.S. sovereign territory, the Court concluded "that at least three  
12 factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and  
13 status of the detainee and the adequacy of the process through which that status determination  
14 was made; (2) the nature of the sites where apprehension and then detention took place; and (3)  
15 the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 766.  
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19 Petitioners' reliance on *Boumediene* is misplaced, as this argument confuses the physical  
20 detention issue in *Boumediene* with the denial of a credible fear finding that resulted in an  
21 expedited removal order at issue here. As the Supreme Court in *Boumediene* observed, "the  
22 privilege of habeas corpus entitles [a] *prisoner* to a meaningful opportunity to demonstrate that  
23 he is being held pursuant to the erroneous application or interpretation of relevant law." 533 U.S.  
24 at 779 (emphasis added); *see also id.* at 745 (discussing the historical origins of the writ and  
25 noting that "[t]he Clause protects the rights of the detained by affirming the duty and authority of  
26 the Judiciary to call the *jailer* to account") (emphasis added); *St. Cyr*, 533 U.S. at 305-06 ("The  
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writ of habeas corpus has always been available to review the legality of executive detention.”). Here, Petitioners are not challenging their detention, indefinite or otherwise, but rather their classification as aliens who lacked a credible fear of persecution and the issuance of expedited removal orders.

The fact that Petitioners do not expressly challenge their detention renders their situation different from the physical detention at issue in *Boumediene*.<sup>14</sup> In the physical detention context, “the protections of due process and habeas corpus are inextricably intertwined” because a court reviewing the propriety of executive detention must “ensure the minimum requirements of due process are achieved.” *See Omar v. McHugh*, 646 F.3d 13, \*20 & n.5 (D.C. Cir. 2011) (citing *Munaf v. Green*, 553 U.S. 674, 685-88 (2008)); *Hamdi v. Rumsfeld*, 542 U.S. 507, 525-29 (2004) (plurality opinion); *id.* at 555-58 (Scalia, J., dissenting); *Fay v. Noia*, 372 U.S. 391, 402 (1963)). That is, for a detainee in federal custody who challenges that custody, habeas corpus is the mechanism by which the detainee may challenge whether his detention complies with due process. *See Hamdi*, 542 U.S. at 525-29; *Omar*, 546 F.3d at \*20 n.5.

But in the context of non-admitted aliens detained at the border who challenge only the

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<sup>14</sup> Even if they were challenging their detention, which is mandatory under 8 U.S.C. 1225(b)(1)(B)(iii)(IV), it is undisputable that “[d]etention during removal proceedings is a constitutionally permissible part of that process,” *Demore v. Kim*, 538 U.S. 510, 533 (2003), particularly here, where Petitioners have only been detained a short time pending execution of their expedited removal. *See* 8 U.S.C. § 1225 (requiring mandatory detention pending a final determination of credible fear of persecution and removability). In any event, even assuming that *Boumediene* might apply to Petitioners, they have no viable Suspension Clause claim under *Boumediene*. The court there held that the right of an alien under the *de facto* sovereignty of the United States to potentially assert constitutional claims assuming the Suspension Clause applied was based on “objective factors and practical concerns” rather than “formalism.” 553 U.S. at 764. Accordingly, in determining the constitutional rights of aliens under the *de facto* or *de jure* sovereignty of the United States, the Court applies a “functional approach” rather than a bright-line rule. *Id.* Under this functional approach, aliens apprehended shortly after crossing the border and who had no previous substantial ties with the United States do not have a “significant voluntary connection” to claim a right to any due process beyond that prescribed by Congress. *See id.*; accord *Verdugo-Urquidez*, 494 U.S. 259, 271.



1 statutory process provided them by Congress concerning their applications for admission to the  
2 United States, there are no due process minimums to achieve through habeas, as there is no  
3 federal custody to test for compliance with minimal due process. As the Supreme Court has long  
4 held, in those circumstances, “[w]hatever the procedure authorized by Congress is, it is due  
5 process as far as an alien denied entry is concerned” and “it is not within the province of any  
6 court, unless expressly authorized by law, to review the determination of the political branch of  
7 the Government to exclude a given alien.” *Knauff*, 338 U.S. at 543-44; *see Carlson*, 342 U.S. at  
8 537 (“The power to expel aliens is essentially a power of the political branches of government,  
9 which may be exercised entirely through executive officers, with such opportunity for judicial  
10 review of their action as Congress may see fit to authorize or permit.”). That is, because  
11 unadmitted aliens lack due process rights regarding their admission beyond those provided by  
12 Congress, there is no due process right to vindicate through habeas. *See de Rincon*, 539 F.3d at  
13 1141-42.

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16 Ultimately, Petitioners reliance on *St. Cyr* and *Boumediene* fails because their argument  
17 assumes they retain some due process right to vindicate in a habeas proceeding. Petitioners  
18 appear to suggest that because they, in their words, “effected entry” into the United States, albeit  
19 illegally and without inspection at a port of entry, they are therefore “present in the United States  
20 and entitled to the protections of the Due Process Clause,” and, thus, have more rights  
21 concerning their applications to remain in the United States than an arriving alien standing at the  
22 threshold of entry. Rubio Petition at ¶ 59; Gutierrez Petition at ¶ 71. In other words,  
23 notwithstanding the fact that Petitioners illegally entered the United States by purposefully  
24 avoiding a port of entry and inspection, or the fact that they were apprehended almost  
25 immediately after crossing the border illegally, they claim this illegal entry entitles them to  
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1 procedural due process rights that aliens who lawfully present themselves for inspection at the  
2 border lack.

3 This argument is misguided for a number of reasons. First, it is untenable considering  
4 Congress's intent when amending the INA through the IIRIRA. In 1996, Congress passed  
5 IIRIRA, 110 Stat. 3009, at \*3009-546, which amended INA § 101(a)(13) to replace the term  
6 "entry" as previously used in the INA, which was defined as "any coming of an alien into the  
7 United States, from a foreign port or place," *see* 8 U.S.C. § 1101(a)(13) (1988 ed.); *Vartelas v.*  
8 *Holder*, --U.S.--, 132 S. Ct. 1479, 1484 (2012), with the terms "admission" and "admitted,"  
9 defined as the "lawful entry of the alien into the United States after inspection and authorization  
10 by an immigration officer." 8 U.S.C. § 1101(a)(13)(A); IIRIRA, 110 Stat. 3009, at \*3009-546.  
11 IIRIRA further amended INA § 212(a)(6)(A) to provide that "[a]n alien present in the United  
12 States without being admitted or paroled, or who arrives in the United States at any time or place  
13 other than as designated by the Attorney General, is inadmissible." 8 U.S.C. § 1182(a)(6)(A)(i).  
14 These amendments demonstrate Congress's "inten[tion] to replace certain aspects of the current  
15 [as of 1996] 'entry doctrine,' under which illegal aliens who have entered the United States  
16 without inspection gain equities and privileges in immigration proceedings that are not available  
17 to aliens who present themselves for inspection at a port of entry." H.R. Rep. 104-469(1), at 225  
18 (1996). Memorandum from David Martin, INS General Counsel, to Michael L. Aytes, Ass't  
19 Comm'r, Office of Benefits (Feb. 19, 1997) (discussing, *inter alia*, the amendment to section  
20 101(a)(13) of the Act), reprinted in 74 Interpreter Releases, No. 11, Mar. 24, 1997, app. II at  
21 516-22. "Hence, the pivotal factor in determining an alien's status will be whether or not the  
22 alien has been lawfully admitted," and not, whether the alien is physically present in the United  
23 States. *Id.*

Second, Petitioners' contention over-reads precedent suggesting entry, even illegal entry, (notwithstanding IIRIRA) converts the alien from one standing at the threshold, and therefore lacking any due process rights as to their admission, into a person subject to the full protections of the Fifth Amendment and no different than citizens. Although some Supreme Court cases suggest the mere fact of physical presence affords illegal entrants some due process rights, other Supreme Court cases reject this conception. *Compare Zadvydas*, 533 U.S. at 693 ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"), *with Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("once an alien *gains admission to our country and begins to develop the ties* that go with permanent residence, his constitutional status changes accordingly") (emphasis added); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien *lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our borders") (emphasis added); *see also Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1440 (5th Cir.1993), *amended in part*, 997 F.2d 1122 (recognizing prior to IIRIRA that "aliens subject to deportation generally are granted greater substantive rights than are excludable aliens").<sup>15</sup> But even the cases that suggest illegal entry provides some due process protection make clear that "the nature of that protection may vary depending upon status and circumstance." *Zadvydas*, 533 U.S. at 693. As *Zadvydas* itself noted, "we deal here [in *Zadvydas*] with aliens who were admitted to the United States but subsequently ordered removed," and that "aliens who have not yet gained initial admission to this country

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<sup>15</sup> "[A]n arriving alien, is in the same position as those aliens termed 'excludable' before the permanent changes to IIRIRA took effect in 1997." *See, e.g., Sevilla v. I.N.S.*, 33 F. App'x 284, 286 (9th Cir. 2002).

would present a very different question.”<sup>16</sup> *Id.* at 682.

*Zadvydas* follows from earlier Supreme Court decisions clarifying that Congress may treat aliens, even aliens within the United States, differently. For example, in *Mathews v. Diaz*, 426 U.S. 67 (1976) the Supreme Court explained that while the Fifth Amendment may apply to some aliens, it does not apply to all classes of aliens equally, and Congress may properly distinguish between classes of aliens:

The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.

426 U.S. at 78-79.

Petitioners’ failure to acknowledge this background law causes them to overlook the relevant constitutional issue: the Due Process Clause does not apply equally to all illegal aliens in the United States. *See Mathews*, 426 U.S. at 78. While “non-admitted aliens” physically present in the United States might retain some substantive due process rights, *see* footnote 10

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<sup>16</sup> Mere entry into the United States does not afford an alien “the same liberty interest as admission.” *Wilson v. Zeithern*, 265 F. Supp. 2d 628, 633 (E.D. Va. 2003). Rather, “the liberty interest of an alien present within the country only by virtue of illegal, surreptitious entry into the country is more attenuated than that of an alien who has entered the country through official channels and been granted legal permanent resident status.” *Id.* For example, aliens within the interior and subject to the criminal justice system, illegally or not, may not be punished prior to an adjudication of guilt in conformance with due process of law, a Fifth and Sixth Amendment safeguard available to citizens and aliens alike. *See Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 & n.6 (9th Cir. 1991). Such aliens may be entitled to Miranda warnings prior to custodial interrogations, *see, e.g., United States v. Moya*, 74 F.3d 1117, 1119 (11th Cir. 1996), are protected from physical abuse or torture, *see, e.g., Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987), and in certain circumstances may invoke the equal protection clause. *See Kwai Fun Wong v. United States INS*, 373 F.3d 952, 972 (9th Cir. 2004). Indeed, even *Zadvydas*, which suggested illegal entrants may have some constitutional rights, made that observation in the narrow context of a substantive due process challenge to the legality of indefinite detention. 533 U.S. at 682.

1 *infra*, they do not retain the same level of procedural due process available to aliens who have  
2 been lawfully admitted or even those rights which may be enjoyed by those who have lived in  
3 the United States for some period of time and developed ties to the community. *See Landon*, 459  
4 U.S. at 32; *Kwong*, 344 U.S. at 597 n.5. As the Supreme Court has explained “aliens receive  
5 constitutional protections when they have come within the territory of the United States and  
6 developed substantial connections with this country.” *United States v. Verdugo–Urquidez*, 494  
7 U.S. 259, 271 (1990). For non-admitted aliens lacking such ties, such as those here who were  
8 apprehended almost immediately after their unlawful evasion of inspection at the border, the so-  
9 called “entry fiction” applies. That is, although aliens seeking admission into the United States  
10 who lack such connections “may physically be allowed within its borders pending a  
11 determination of admissibility, such aliens are legally considered to be detained at the border and  
12 hence as never having effected entry into this country.” *Gisbert*, 988 F.2d at 1440; *accord AILA*,  
13 18 F. Supp. 2d at 59. The doctrine has been affirmed time and again by the Supreme Court. *See*,  
14 *e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]n alien on the  
15 threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by  
16 Congress is, it is due process as far as an alien denied entry is concerned.’”); *Sale v. Haitian Ctrs.*  
17 *Council*, 509 U.S. 155, 175 (1993) (discussing entry fiction).

21 The entry fiction applies to all non-admitted aliens, both at the border, and those like  
22 Petitioners who have made illegal entry and are apprehended shortly thereafter. Although an  
23 alien may be “physically present in the United States,” absent actual lawful admission into the  
24 United States or proof of prolonged ties to the community, such an alien is “legally considered to  
25 be detained at the border and hence as never having effected entry into this country.” *Gisbert*,  
26 988 F.2d at 1440. Indeed, as early as 1903 the Supreme Court made the very distinction the  
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Government draws here, “[l]eav[ing] on one side the question whether an alien can rightfully invoke the due process clause of the Constitution *who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population*, before his right to remain is disputed.,” and contrasting that situation from one where the Government “arbitrarily [causes] an alien who has entered the country, *and has become subject in all respects to its jurisdiction, and a part of its population*, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.” *Kaoru Yamataya*, 189 U.S. at 100-01; *accord Wong Yang Sung*, 339 U.S. at 49-50 (describing earlier decision as stating that “an antecedent deportation statute must provide a hearing *at least for aliens who had not entered clandestinely and who had been here some time even if illegally*) (emphasis added); *accord Landon*, 459 U.S. at 32 (noting due process may increase “once an alien *gains admission to our country and begins to develop the ties that go with permanent residence*”) (emphasis added); *Kwong Hai Chew*, 344 U.S. at 597 (stating that alien acquires greater due process rights once he “*lawfully enters and resides in this country*”) (emphasis added); *cf. Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (describing sliding scale and distinguishing between unlawful presence, lawful presence, and lawful presence accompanied by other ties to the United States like “preliminary declaration of intention to become a citizen”).

Accordingly, “for purposes of the constitutional right to due process, [Petitioners’] status is assimilated to that of an arriving alien.” *M.S.P.C.*, 2014 U.S. Dist. LEXIS 164782 at \*47 (collecting and analyzing Supreme Court precedent addressing when aliens are “assimilated” to the status of an arriving alien although technically within the jurisdiction of the United States); *accord Kwong Hai Chew*, 344 U.S. at 591-92, 598-99 (finding regulation permitting exclusion

without hearing constitutional by limiting reach of regulation to “entrant aliens and to those assimilated to their status”) (emphasis added); *accord Mezei*, 345 U.S. 206, 214 (1953) (upholding 19-month detention of arriving alien who was lawful permanent resident (LPR) when he left the United States because “[i]n such circumstances we have no difficulty in holding respondent an entrant alien or assimilated to that status for constitutional purposes”); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1449 (9th Cir. 1995) (describing *Mezei* as a case where the Supreme Court treated a returning lawful permanent resident as “an entrant alien or assimilated to that status for constitutional purposes”); *see also Melendez*, Ex. 1 at 44-45 (applying *M.S.P.C.*).<sup>17</sup>

<sup>17</sup> This proposition follows from the more general proposition that entry does not occur for purposes of an illegal reentry prosecution if an alien is apprehended shortly after entering illegally. *See United States v. Gonzalez-Torres*, 309 F.3d 594, 598 (9th Cir. 2002). As the Ninth Circuit has explained:

Since 1908, federal courts have recognized that “entering” the United States requires more than mere physical presence within the country. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1163-64 (9th Cir. 2000). To “enter,” an alien must cross the United States border free from official restraint. *Id.* at 1164. An alien is under “official restraint” if, after crossing the border without authorization, he is “deprived of [his] liberty and prevented from going at large within the United States.” *Id.* (quoting *Ex parte Chow Chok*, 161 F. 627, 628-29 (N.D.N. Y.), *aff’d*, 163 F. 1021 (2d Cir. 1908)). An alien does not have to be in the physical custody of the authorities to be officially restrained; rather, the concept of official restraint is interpreted broadly. *Ruiz-Lopez*, 234 F.3d at 448. “The restraint may take the form of surveillance, unbeknownst to the alien.” *Id.* (quoting *Matter of Pierre*, 14 I. & N. Dec. 467 (1973)). When under surveillance, the alien “has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population.” *Id.* On the other hand, if an alien is not discovered until some time after exercising his free will within the United States, he has entered free from official restraint. *United States v. Martin-Plascencia*, 532 F.2d 1316, 1317 (9th Cir. 1976).

*Id.* at 598; *accord Dimova v. Holder*, 783 F.3d 30, 40 (1st Cir. 2015) (same); *United States v. Villanueva*, 408 F.3d 193, 198 n.5 (5th Cir. 2005) (similar). This reasoning parallels the “assimilation” body of cases discussed *supra*, particularly, where, as here, Petitioners effectively sought out immigration officials in order to apply for asylum. *See*



Therefore, even assuming Petitioners crossed the border—albeit it illegally and without presenting themselves for inspection as required by law—they are entitled to no further procedural rights than those authorized by Congress for nonadmitted aliens. As noted, non-admitted aliens who are not challenging their detention, but only their expedited removal orders, lack any due process minimums to vindicate through habeas. *Knauff*, 338 U.S. at 543-44; *de Rincon*, 539 F.3d at 1141-42. Thus, in the non-admitted alien context, no Suspension Clause issue arises at all, as non-admitted arriving aliens lack Suspension Clause rights in relation to their admission. *See Li*, 259 F.3d at 1135-36. The limited review provided by 8 U.S.C. § 1252(a) and (e) is all the process Plaintiffs are due.<sup>18</sup> *Cf. Diaz Rodriguez*, U.S. Dist. LEXIS 131872 at \*11 (“Significantly, although *de Rincon* and *Brumme* involved individuals stopped at the border, both of those individuals had significant ties to the United States. . . . The pertinent distinction, as described in *Li*, is whether the petitioner is a lawfully admitted alien. *Diaz Rodriguez* has not shown that he has been lawfully admitted, so the due process rights of a lawfully admitted citizen are not implicated here.”).

Finally, Petitioners’ citation to a parade of cases they suggest require the Court to

*In re Matter of G---*, 20 I. & N. Dec. 764, 772 (BIA 1993) (no entry if, among other things, there is “evidence suggesting that the applicant deliberately surrendered himself to the authorities for immigration processing, or that, once ashore, he sought them out, voluntarily awaited their arrival, or otherwise acted consistently with a desire to submit himself for immigration inspection.”).

<sup>18</sup> Alternatively, the Court could rely on *M.S.P.C.*’s statement that “any rights the petitioner may have under the Suspension Clause are not violated in this case.” 60 F. Supp. 3d at 1166; *accord Rodriguez*, 2014 U.S. Dist. LEXIS 131872 at \*8, \*11. This follows from a separate body of Supreme Court case law which, in a plurality, applies an “ascending scale” to the question of the due process of rights of recent arrivals, illegal or otherwise, to the United States. *See Eisentrager*, 339 U.S. at 770 (describing sliding scale and distinguishing between unlawful presence, lawful presence, and lawful presence accompanied by other ties to the United States like “preliminary declaration of intention to become a citizen”). Aliens entering the United States illegally without inspection, and apprehended almost immediately thereafter, by any sensible definition, are on the lowest end of this “ascending scale,” such that *M.S.P.C.* is correct that any rights such aliens may have under the Suspension Clause are not violated in this context. *See also e.g., Gonzalez-Torres*, 309 F.3d at 598.



1 exercise jurisdiction on Suspension Clause grounds misses the mark. Rubio Stay Memo at 19-21;  
 2 Pichinte Stay Memo at 21-24. First, Petitioners rely on Supreme Court cases over 100 years old,  
 3 like *United States v. Jung Ah Lung*, 124 U.S. 621 (1888); *Chin Yow v. United States*, 208 U.S. 8  
 4 (1908); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Gegiow v. Uhl*, 239 U.S. 3  
 5 (1915)). See Rubio Stay Memo at 19-21; Pichinte Stay Memo at 21-24. But these cases are cases  
 6 where the court exercised habeas jurisdiction over aliens in *physical custody* or otherwise  
 7 restrained for traditional habeas corpus purposes in an era where Congress permitted greater  
 8 review for non-admitted aliens. As *M.S.P.C.* recognized in distinguishing these cases, they  
 9 involve review of “whether the petitioner could be lawfully detained under the then-existing  
 10 immigration statutes that only limited review within the Executive Branch of an inspection  
 11 officer’s decision ‘touching the right of any alien to land, when adverse to such right.’” 60 F.  
 12 Supp. 3d at 1171-72 (citing *Ekiu*, 142 U.S. at 662-63 & n.1). “[A]t that time, Congress had not in  
 13 the immigration statute expressly removed jurisdiction to consider whether the officer acted in  
 14 accordance with the statute,” *id.* (citing *Ekiu*, 142 U.S. at 663-64), and “[t]here was thus nothing  
 15 to show that Congress intended the process due such an arriving alien not to include the power of  
 16 the courts to review whether the congressionally prescribed process was followed.”<sup>19</sup> *Id.* As the  
 17 Supreme Court has since explained, “the power to expel aliens is essentially a power of the  
 18 political branches of government, which may be exercised entirely through executive officers,  
 19 with such opportunity for judicial review of their action as Congress may see fit to authorize or  
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 24 <sup>19</sup> This readily distinguishes the Third Circuit case *Sandoval v. Reno*, 166 F.3d 225 (3d Cir.  
 25 1999) on which Petitioners may rely. That case, while addressing pre IIRIRA precedents, clearly  
 26 acknowledges that *Ekiu* and progeny stand for the limited proposition that an alien has “the right  
 27 to petition for a writ of habeas corpus to challenge the legal basis of his or her detention by the  
 28 Executive Branch.” *Id.* at 234. As the Third Circuit has separately acknowledged, the REAL ID  
 Act did not change that. See *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005) (“An  
 alien challenging the legality of his detention still may petition for habeas corpus. See H.R. Conf.  
 Rep. No. 109-72, at 175 (2005).”).

1 permit.”<sup>20</sup> *See Carlson*, 342 U.S. at 537; *accord M.S.P.C.*, 60 F. Supp. 3d at 1172 (recognizing  
2 and applying *Carlson*).

3 Second, Petitioners cite a number of more recent appellate decisions discussing the  
4 Suspension Clause generally in the context of *deportation* and *removal* cases. *See* Rubio Stay  
5 Memo at 18-19; Pichinte Stay Memo at 21-22. None of the string of appellate cases Plaintiffs  
6 cite involve *non-admitted* aliens in *exclusion* proceedings (pre-1996) or what are now *expedited*  
7 *removal* proceedings. Rather, they involve review of deportation or removal proceedings,  
8 primarily through the petition for review process required by 8 U.S.C. § 1252(a)(5). The analysis  
9 in these cases thus stems from the fact, to cite but one example, that aliens in  
10 *deportation/removal* proceedings have a “due process” right to a “fundamentally fair”  
11 proceeding. *See, e.g., Sewak v. INS*, 900 F.2d 667, 672 (3d Cir. 1990) (stating uncontroversial  
12 proposition that “alien subjected to *deportation* proceedings is entitled to due process of law”)  
13 (emphasis added). Moreover, post *REAL ID*, in such proceedings 8 U.S.C. § 1252(a)(2)(D)  
14 explicitly vests courts of appeal with jurisdiction to review constitutional claims or questions of  
15 law. And unlike deportation hearings that are reviewable on a petition for review, “[w]ith respect  
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19 <sup>20</sup> The logical conclusion of Petitioners’ argument appears to be that the Suspension Clause is a  
20 one-way ratchet in that if Congress once permitted greater review, it can never permit less,  
21 notwithstanding its plenary authority over the issue. That is not the law. *See Prost v. Anderson*,  
22 636 F.3d 578, 583 n.4 (10th Cir. 2012) (“such a reading would become ‘a one-way ratchet that  
23 enshrines in the Constitution every grant of habeas jurisdiction’ by Congress, meaning that  
24 Congress would unconstitutionally ‘suspend’ the writ ‘whenever it eliminates any prior ground  
25 for the writ that it adopted,’ a result that leaves Congress with little incentive to extend the  
26 availability of collateral relief”) (quoting *St. Cyr*, 533 U.S. 289, 341-42 (2001) (Scalia, J.,  
27 dissenting)); *M.S.P.C.*, 60 F. Supp. 3d at 1172 (“That Congress by statute once permitted greater  
28 judicial review and procedural rights to arriving aliens does not mean that the Suspension Clause  
prohibits Congress from providing arriving aliens fewer procedural protections, so long as the  
writ still lies to determine whether a sufficient ground of removal and detention appears”);  
*accord Mezei*, 345 U.S. at 212-15 (holding that entering alien detained on Ellis Island, while able  
to test validity of his exclusion by habeas corpus, did not have right to retry determination of  
Attorney General in courts, to have a hearing, or to have evidence disclosed to him upon which  
determination rested).

1 to review of expedited removal orders, however, the statute could not be much clearer in its  
2 intent to restrict habeas review.” *Li*, 259 F.3d at 1134-35.

3       These distinctions are crucial, given the Supreme Court’s repeated mandate that for non-  
4 admitted aliens not subject to deportation or removal proceedings, “[w]hatever the procedure  
5 authorized by Congress is, it is due process,” and “it is not within the province of any court,  
6 unless expressly authorized by law, to review the determination of the political branch of the  
7 Government to exclude a given alien.” *Knauff*, 338 U.S. at 543-44. In any event, following  
8 IIRIRA and REAL ID, all such review must occur in the Courts of Appeal. *See* 8 U.S.C. §§  
9 1252(a)(5), (b)(9); *Bonhometre*, 414 F.3d at 446. Under that same regime, exclusion  
10 proceedings, which are now expedited removal proceedings, are exclusively reviewable under  
11 the limited habeas review provisions of 8 U.S.C. § 1252(e) in district court. “Because the  
12 jurisdiction-stripping provisions of the statute retain some avenues of judicial review, limited  
13 though they may be, [Petitioners have] not been unconstitutionally denied a judicial forum.”  
14 *Pena*, 2015 U.S. App. LEXIS 17069 at \*10. That is precisely what *M.S.P.C.* and the similar case  
15 of *Rodriguez* in the Western District of Louisiana concluded, *see M.S.P.C.*, 60 F. Supp. 3d at  
16 1173-76; *Rodriguez*, 2014 U.S. Dist. LEXIS 131872 at \*8, \*11; *accord Melendez*, Ex. 1 at 44-45,  
17 rebutting any suggestion by Petitioners that habeas cases preceding 1952 or recent suspension  
18 clause cases hold to the contrary.

19       Accordingly, as every court to squarely address the jurisdictional issue in this case has  
20 found, any Suspension Clause claim fails on the merits and must be dismissed.<sup>21</sup> *See M.S.P.C.*,

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<sup>21</sup> To the extent Petitioners suggest that some independent due process right to apply for asylum or to remain in this country if they allege that they face persecution in their home countries, that claim is foreclosed by the entry doctrine. *See Jean v. Nelson*, 727 F.2d 957, 981-82, 984 (11th Cir. 1984) (en banc) (holding that inadmissible Haitians had “no constitutional rights with respect to their applications for admission, asylum, or parole”), *aff’d on other grounds*, 472 U.S. 846 (1985); *accord AILA*, 18 F. Supp. 2d at 59 (collecting cases).

1 60 F. Supp. 3d at 1173-76 (“[T]his Court cannot thwart Congressional intent and find jurisdiction  
2 under the Suspension Clause to second-guess in habeas the administrative decisions of the  
3 executive officers to exclude her. The substitute habeas procedures are sufficient to ensure the  
4 legality of Petitioner’s exclusion, and thus the restrictions on habeas review do not offend  
5 Petitioner’s rights under the Suspension Clause.”); *Rodriguez*, 2014 U.S. Dist. LEXIS 131872 at  
6 \*8, \*11 (holding that “any rights the petitioner may have under the Suspension Clause are not  
7 violated in this case” and “the legislatively imposed limitation on review of his expedited removal  
8 order in his particular case does not run afoul of the Suspension Clause”); *accord Pena*, 2015  
9 U.S. App. LEXIS 17069 at \*9-10; *Khan*, 608 F.3d at 329-30; *Brumme*, 275 F.3d at 447-48; *see*  
10 *also Li*, 259 F.3d at 1134-35; *Vaupel*, 244 F. Appx. at 895; *Melendez*, Ex. 1 at 44-45 (applying  
11 *M.S.P.C.* and *Rodriguez*).

#### 14 CONCLUSION

15 For the foregoing reasons, the Court should conclude that it lacks jurisdiction over  
16 Petitioners’ claims and that the Suspension Clause is not implicated in this case

17 //

18 //

1 Dated: December 3, 2015

Respectfully submitted

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3  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 3, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

/s/ Erez Reuveni  
EREZ REUVENI  
Senior Litigation Counsel  
United States Department of Justice

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

KEIRY MELANY MELENDEZ DE  
SEGOVIA,

Plaintiff,

vs.

JEH CHARLES JOHNSON,

Defendant.

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CA No. 15-2019

Washington, DC  
November 19, 2015  
4:30 p.m.

TRANSCRIPT OF MOTION FOR TEMPORARY RESTRAINING ORDER  
BEFORE THE HONORABLE ROYCE C. LAMBERTH  
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription



1 into the question of whether the process the executives put  
2 into place and implemented crosses the threshold of a  
3 violation. The underlying determination there is was this  
4 person admissible and entitled to asylum? That is  
5 inextricably intertwined, precisely what they're asking you to  
6 do here, and that is expressly foreclosed by the statute.

7 And unless and until -- you'd have to find the  
8 statute -- a potential suspension clause violation to reach  
9 that issue, but before you do we would respectfully request an  
10 opportunity to brief that issue. Thank you.

11 THE COURT: Okay. The Court having considered the  
12 arguments of counsel and the papers before the Court on the  
13 Motion for Temporary Restraining Order will deny the Motion  
14 for Temporary Restraining Order. I'm not satisfied that it's  
15 likely that I will ultimately conclude I have jurisdiction,  
16 particularly in light of the really thorough opinion of Judge  
17 Herrera in the District of New Mexico and the other opinion  
18 from Louisiana.

19 But it looks to me like there's a really  
20 fundamental problem with how the Court can interpret this  
21 jurisdiction's tripping provision to allow this kind of a case  
22 to go forward under these circumstances. So I think in light  
23 of the virtually nonexistent, it looks like to me, likelihood  
24 that ultimately I would conclude that I have jurisdiction over  
25 this matter, I have to deny the Temporary Restraining Order.

1 I'll issue a written order to that effect.

2 Nicely presented, Counsel. Not an easy case. And  
3 it's troubling, if in fact there's a different Agency  
4 interpretation. If it is ultimately subject to review, that's  
5 going to count against the Agency because changes like that  
6 and well-settled interpretations are not something that the  
7 Court in any event looks upon with favor.

8 But I don't think I'm really at a point to getting  
9 to where I think I really have authority to decide that  
10 question without jurisdiction to decide it. Thanks very much,  
11 Counsel.

12 COURT CONCLUDED AT 5:40 P.M.

13  
14 C E R T I F I C A T E

15 I, Lisa M. Foradori, RPR, FCRR, certify that  
16 the foregoing is a correct transcript from the record of  
17 proceedings in the above-titled matter.

18  
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20  
21 Date:\_\_\_\_\_

\_\_\_\_\_

22 Lisa M. Foradori, RPR, FCRR

23  
24  
25

JENNY LISETTE FLORES; *et al.*, ) Case No. CV 85-4544-DMG  
)  
Plaintiffs, )  
)  
v. )  
)  
LORETTA E. LYNCH, Attorney )  
General of the United States; *et al.*, )  
)  
Defendants. )

I, John L. Lafferty, hereby make the following declaration with respect to the above captioned matter:

1. I am Chief of the Asylum Division in U.S. Citizenship and Immigration Services (USCIS), in the U.S. Department of Homeland Security (DHS).

2. I make this declaration based on my personal knowledge and my review of official documents and records maintained by USCIS. If called to testify, I could and would do so competently.

3. In my capacity as Chief of the Asylum Division, I oversee the division within USCIS generally responsible for adjudicating asylum and certain other claims and conducting screenings required by law. Specifically, the USCIS Asylum Division is responsible for: (a) adjudication of applications for asylum pursuant to section 208 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1158; (b) the screening determination of whether particular individuals subject to

1 expedited removal have a “credible fear” of persecution or torture upon return to their countries  
2 of origin pursuant to 8 U.S.C. § 1225(b)(2)(B) and the regulations at 8 C.F.R. § 208.30; (c) the  
3 screening determination of whether particular individuals subject to “reinstatement of removal”  
4 or “administrative removal” have a “reasonable fear” of persecution or torture pursuant to the  
5 regulations at 8 C.F.R. § 208.31; and (d) the adjudication of applications for relief under section  
6 203 of the Nicaraguan Adjustment and Central American Relief Act, enacted as title 2 of Pub. L.  
7 No. 105-100, 111 Stat. 2160, 2193 (1997) (as amended by Technical Corrections to the  
8 Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-139, 111 Stat. 2644  
9 (1997)). The “credible fear” and “reasonable fear” screening determinations described in (b) and  
10 (c) above are intended to ensure compliance in “streamlined” removal proceedings (*i.e.*,  
11 expedited removal, reinstatement of removal, and administrative removal) with U.S. treaty  
12 obligations under the 1951 Convention Relating to the Status of Refugees and the Convention  
13 Against Torture.  
14

15  
16 4. The Asylum Division is presently composed of a cadre of approximately 340 Asylum  
17 Officers, who receive extensive training on U.S. and international refugee law and principles  
18 required under 8 C.F.R § 208.1(b), in addition to the basic immigration law training that all  
19 USCIS adjudicators receive. Asylum Officers receive extensive training on children’s issues,  
20 including the unique considerations involved in interviewing children, as well as training on  
21 sensitivity toward victims of torture or other trauma. The Asylum Division uses this single pool  
22 of Asylum Officers to adjudicate each of the four types of caseloads described above in  
23 paragraph 3.  
24  
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#### 26 **Credible and Reasonable Fear Screenings**

27 5. The Asylum Division is responsible for processing certain individuals, including those in  
28

1 the family residential centers described below, who are referred by ICE for a credible fear or  
2 reasonable fear screening.

3 6. Credible fear screening is intended to identify individuals in the expedited removal  
4 process under 8 U.S.C. § 1225(b) who may be eligible for certain types of relief or protection  
5 from removal. Congress established the expedited removal process in 1996 to streamline the  
6 removal of aliens apprehended at or near the border without authorization to enter the United  
7 States. 8 U.S.C. § 1225. Congress contemporaneously included the credible fear process within  
8 the expedited removal process to ensure compliance with certain U.S. treaty obligations. 8  
9 U.S.C. § 1225(b)(1). The Foreign Affairs Reform and Restructuring Act of 1998 further directed  
10 agencies to ensure compliance with the Convention Against Torture, which resulted in certain  
11 additions to the credible fear regulations and the reasonable fear regulations applicable to cases  
12 involving reinstatement of removal and administrative removal. Since 1998, the credible fear  
13 process has been intended to identify individuals in expedited removal with claims for asylum  
14 under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), or withholding of  
15 removal or deferral of removal under the Convention Against Torture under 8 C.F.R. §§  
16 208.16(c) or 208.17.

17 7. When DHS personnel at either U.S. Customs and Border Protection (CBP) or U.S.  
18 Immigration and Customs Enforcement (ICE) encounter an individual subject to expedited  
19 removal, but who expresses a fear of return to his or her country, the case must be referred to the  
20 Asylum Division for a credible fear screening. If, after the interview, the Asylum Officer  
21 determines that the individual has a credible fear of persecution or torture, the Asylum Officer  
22 vacates the expedited removal order under 8 U.S.C. § 1125(b) by issuing a Notice to Appear  
23 (NTA). Doing so initiates standard removal proceedings under 8 U.S.C. § 1229a before an  
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1 immigration judge, who is within the Department of Justice's Executive Office of Immigration  
2 Review (EOIR). In such removal proceedings, the individual may apply for a variety of forms of  
3 relief or protection, including asylum, withholding of removal, and Convention Against Torture  
4 protection. If the Asylum Officer makes a negative credible fear determination after supervisory  
5 review, the individual remains subject to expedited removal. However, under 8 U.S.C. §  
6 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.30(g), the individual is entitled to request review by an  
7 immigration judge of the Asylum Officer's negative credible fear determination before the  
8 expedited removal order can be effectuated.  
9

10 8. Historically, only a relatively small number of individuals placed in expedited removal  
11 proceedings expressed a fear of return. However, that number has risen significantly over time.  
12 From FY 2006 through FY 2009, the annual number of individuals in expedited removal who  
13 expressed a fear of return was approximately 5,250 per year. From FY 2010 through FY 2014,  
14 the annual number of individuals placed in expedited removal who expressed a fear of return –  
15 and hence were subsequently referred to the Asylum Division for a credible fear determination –  
16 rose from 8,959 in FY 2010; to 11,217 in FY 2011; 13,880 in FY 2012; 36,035 in FY 2013;  
17 51,001 in FY 2014; and 31,569 in FY 2015 to date. This amounts to an 850% increase in  
18 credible fear referrals from FY 2009 to FY 2014. With respect to individuals residing in ICE's  
19 family residential centers, the number of credible fear referrals for such individuals rose from 51  
20 in FY 2013; to 1,508 in FY 2014; to 5,538 through July 31 of FY 2015. In July 2015, 86.9% of  
21 credible fear referrals in the family residential centers received a positive determination from an  
22 asylum officer.  
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26 9. In contrast to the credible fear screening process, the reasonable fear process is intended  
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28

1 to screen individuals who have prior removal orders reinstated under 8 U.S.C. § 1231(a)(5).<sup>1</sup>

2 10. When individuals with reinstated or final administrative removal orders assert a fear of  
3 returning to their country of removal, they are referred to the Asylum Division for a reasonable  
4 fear screening to determine whether they may be entitled to withholding of removal under 8  
5 U.S.C. § 1231(b)(3) or withholding of removal or deferral of removal under the Convention  
6 Against Torture, pursuant to 8 C.F.R. §§ 208.16(c) or 208.17. If the Asylum Officer determines  
7 that the individual has a reasonable fear of persecution or torture, after supervisory review the  
8 Asylum Officer refers the individual to an immigration judge for withholding and/or deferral of  
9 removal proceedings. If the Asylum Officer, after supervisory review, makes a negative  
10 reasonable fear determination, the individual may request review of that determination by an  
11 immigration judge. 8 C.F.R. § 208.31(g).  
12  
13

14 11. DHS regulations require that the Asylum Division conduct a reasonable fear  
15 determination within 10 days of referral, absent exceptional circumstances. 8 C.F.R. §  
16 208.31(b). Similar to the experience in the credible fear determination process, there has also  
17 been a significant increase in the number of individuals annually referred to the Asylum Division  
18 for a reasonable fear interview and determination, rising from only several hundred referrals a  
19 year prior to FY 2009 to 9,084 referrals in FY 2014. From FY 2013 to July 31 of FY 2015, the  
20 number of reasonable fear referrals for individuals in family residential centers rose from 17 in  
21 FY 2013; to 85 in FY 2014; to 203 through July 31 of FY 2015.  
22  
23

24 12. In both credible fear and reasonable fear processing, once the Asylum Officer completes  
25 the interview, he or she prepares a decision and seeks review by a Supervisory Asylum Officer.  
26 Supervisory review is generally completed within 24 hours. A random sample of cases is also  
27

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28 <sup>1</sup> The reasonable fear process also screens individuals with a final administrative removal order under 8 U.S.C. § 1225(b) who express a fear of return to their country of removal.

1 forwarded to Asylum Headquarters (HQ) in Washington, D.C., for quality assurance purposes.

2 HQ review is generally completed within 24 hours. Thereafter, the individual, and any attorney  
3 or accredited representative, is served with the decision.

4 13. The time it takes for USCIS to process an individual case once it has been referred by  
5 ICE depends on many factors, including the volume of referrals submitted to USCIS, the number  
6 of asylum officers available, whether a rare language is involved, whether the individual requests  
7 additional time to confer with counsel, and other factors. USCIS does not charge fees to make  
8 credible or reasonable fear determinations or to adjudicate asylum applications, nor does the  
9 agency receive appropriations to fund such activity. The cost of conducting these screenings and  
10 adjudicating asylum applications is covered by fees paid by other applicants for immigration  
11 benefits, and the agency is required to carefully calibrate the allocation of staff and resources to  
12 process such cases under a reasonable timeframe.  
13  
14

15 **Credible and Reasonable Fear Screenings of Families**

16 14. The Asylum Division sends officers to conduct credible fear and reasonable fear  
17 screenings at three family processing centers: the South Texas Family Residential Facility at  
18 Dilley, TX (South Texas facility); the Karnes County Residential Center, TX (Karnes facility);  
19 and the Berks Family Residential Center in PA (Berks facility). The Asylum Division currently  
20 deploys 10-15 officers to the South Texas facility and 2-6 officers to the Karnes facility on a  
21 continual, full-time basis. Depending on the caseload, the Asylum Division currently deploys as  
22 many as 4 officers at a time to the Berks facility.  
23  
24

25 15. The Asylum Division's involvement in the expedited removal, reinstatement of removal,  
26 and administrative removal processes begins with the referral of a case from ICE that requires a  
27 credible fear or reasonable fear determination. The Asylum Program has a long-standing policy  
28



1 of allowing a minimum of 48 hours to transpire between the arrival of an alien at a detention site  
2 and any credible fear interview. This 48-hour period provides an alien an opportunity to rest,  
3 collect his or her thoughts, and contact a relative, representative, attorney, or friend to be present  
4 at the interview, as appropriate.

5 16. The process is slightly different for cases involving families in detention. At the Karnes  
6 and South Texas facilities, Asylum Division personnel generally conduct an orientation  
7 regarding the credible/reasonable fear screening process for the referred individuals within one  
8 day of referral from ICE. Although an orientation on the fear screening process is generally  
9 conducted with the individual prior to referring them to the Asylum Division for a screening  
10 interview, by March 2015 the Asylum Division added the additional post-referral orientation at  
11 both Texas facilities in response to concerns raised by the advocacy community that additional  
12 information was needed for individuals to fully understand the credible fear and reasonable fear  
13 processes.  
14

15  
16 17. At the Karnes and South Texas facilities, an Asylum Officer will conduct an interview at  
17 least 72 hours after this USCIS orientation. The 72-hour delay is designed to allow individuals  
18 an opportunity to prepare for the interview and obtain counsel if desired. The delay was  
19 extended at these facilities from the previous 48-hour period in response to requests from the  
20 advocacy community. At the interview, the Asylum Officer will confirm whether the individual  
21 has counsel or a consultant, whether the individual would like more time to seek counsel, or  
22 whether he or she would like to proceed with the interview. Many individuals at the family  
23 residential centers request an opportunity to consult with counsel, so additional time is generally  
24 granted.  
25  
26

27 18. For cases at the Berks facility, an Asylum Officer generally conducts a credible fear or  
28

1 reasonable fear interview within four to five days of the referral to USCIS. At the beginning of  
2 that interview, the Asylum Officer will ask if the individual has received the M-444 (Information  
3 About Credible Fear Interview) or the M-488 (Information About Reasonable Fear Interview). If  
4 the answer is in the affirmative, the Asylum Officer will conduct the interview. If the answer is  
5 in the negative, the officer will explain the credible fear or reasonable fear process at that time.  
6 If, following this orientation, the individual asks for more time to prepare or to seek counsel or a  
7 consultant, the request will generally be granted.  
8

9 19. Each applicant for admission to the United States is considered to have made his or her  
10 own application for admission independently. Therefore, each applicant for admission subject to  
11 expedited removal who has been referred for a credible fear interview has the right to have his or  
12 her credible fear claim considered independently. The regulations do provide, however, that a  
13 spouse or child of an alien may be included in another alien's credible fear determination if such  
14 spouse or child arrived in the United States concurrently with the principal alien and desires to be  
15 included in the principal alien's determination. 8 C.F.R. § 208.30(b). Consequently, though  
16 many children residing in family residential centers are included as part of their parent's credible  
17 fear claim, USCIS also directly interviews children – particularly those who are older – if they  
18 wish to pursue their own claim or the parent is unable to establish a credible fear of persecution  
19 or torture.  
20  
21

22 20. The Asylum Division has a longstanding practice of applying a child-friendly approach to  
23 interviewing children. This approach is guided by the principle of the "best interest of the child,"  
24 as presented in international guidance such as the Universal Declaration of Human Rights, the  
25 Convention on the Rights of the Child, and United Nations High Commissioner for Refugees  
26 Policies and Guidelines. In keeping with the best interests of the child, Asylum Division  
27  
28

1 guidance provides that it is usually appropriate for a trusted adult to attend an asylum interview  
2 with the minor applicant in order to establish the interview conditions most likely to elicit a full  
3 story. USCIS recognizes that a child's age and other vulnerabilities can make testifying difficult,  
4 particularly when discussing traumatic events. Asylum Officers allow the adult to provide  
5 clarification where appropriate, but also ensure that children able to speak for themselves are  
6 given an opportunity to present their claim in their own words.  
7

### 8 **Challenges in Credible and Reasonable Fear Processing for Families**

9 21. As noted above, over the past six years, there has been a tremendous increase in the  
10 actual number of individuals referred for credible and reasonable fear screenings. In FY 2015 to  
11 date, DHS has so far received over 31,569 credible fear referrals and 5,632 reasonable fear  
12 referrals.  
13

14 22. The caseload increase notwithstanding, the goal of the USCIS Asylum Division is to  
15 complete all credible fear cases within a reasonable period of time. For credible fear cases  
16 screened from October 2014 through June 2015, the Asylum Division has completed more than  
17 90% of the cases in 14 calendar days or less. Recently, DHS has entered into a settlement  
18 agreement in a class action lawsuit filed in the U.S. District Court for the Northern District of  
19 California currently pending approval by the District Court judge under which USCIS agrees to  
20 complete all detained reasonable fear cases within a national average of 10 business days (and no  
21 single case within longer than 20 business days).<sup>2</sup>  
22  
23  
24

---

25 <sup>2</sup> *Alfaro Garcia, et al. v. Johnson, et al.*, 14 CV 01775 (YGR) (N.D. Cal.). That case is a class action seeking to  
26 enforce the regulatory time limits for reasonable fear determinations at 8 C.F.R. § 208.31(b) (providing that "in the  
27 absence of exceptional circumstances, this determination will be conducted within 10 days of the referral"). Under  
28 the pending settlement agreement, USCIS has agreed to achieve a national average of 10 business days for  
completing reasonable fear determinations for detained individuals, with no single reasonable fear determination  
taking more than 20 business days. USCIS has agreed to meet that completion timeframe by November 2, 2015, or  
30 days after the District Court approves the settlement and enters a final judgment, whichever is later. By  
agreement, the reasonable fear determination period is tolled if the individual requests to postpone the reasonable

23. Credible fear and reasonable fear interviews and determinations at the family residential facilities may be delayed beyond the normal or targeted processing times for a number of reasons outside the control of USCIS officials, including:

- mental or physical health issues of the applicants;
- general health emergencies at the facility (for example, a chicken pox outbreak);
- an individual's request to delay an interview to obtain representation or supporting evidence;
- an attorney requesting time to prepare;
- interpreter issues, including the unavailability of rare language interpreters; and
- anomalies in the referral documents that must be resolved before interview.

#### **DHS Efforts To Streamline Screening**

24. In order to achieve the above goals in screening timelines, the Asylum Division has instituted a number of procedures to accelerate and streamline the credible fear and reasonable fear screening processes. Examples of such efficiencies include:

- streamlining decision preparation through the implementation of credible fear and reasonable fear checklists;
- changing the requirements for Asylum Division headquarters review of credible fear and reasonable fear determinations (while maintaining quality assurance by requiring supervisory officer review of all cases); and
- no longer requiring sworn statements to be taken in all reasonable fear screenings.

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fear interview, if an attorney requests to postpone the interview, if an individual refuses to participate in the interview, or if the individual refuses to accept service of the reasonable fear determination. Furthermore, the reasonable fear determination period may also be tolled for exceptional circumstances, as prescribed by 8 C.F.R. § 208.31(b).

1       25. In light of the above-noted challenges in credible fear and reasonable fear processing, and  
2 the efforts that USCIS has already taken to streamline its screening processes, I believe that  
3 USCIS is currently processing individuals in credible and reasonable fear cases in a reasonable  
4 period with appropriate timeframes for procedural safeguards. If the Court's order goes into  
5 effect, and if it is understood to require the release of individuals in a period of time substantially  
6 shorter than an average of approximately 20 days, the Asylum Division would be forced to  
7 review and consider making adjustments to its procedures, especially as they relate to  
8 supervisory and quality assurance review, to orientation and time for the applicant to prepare, to  
9 seek counsel, or for counsel to participate in the interview, in an attempt to complete the  
10 screening processes in the shorter timeframe. But notwithstanding such efforts, it is expected  
11 that the Asylum Division would be unable to conduct credible fear and reasonable fear  
12 screenings for this population in a satisfactory manner under such a shortened time frame.  
13  
14

15  
16 I declare under penalty of perjury that the foregoing is true and correct.  
17

18  
19 Dated: AUG - 6 2015

20  
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27  
28  
  
JOHN L. LAFFERTY

No. 15-56434

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JENNY LISETTE FLORES, et al.,  
Plaintiffs-Appellees,

v.

LORETTA E. LYNCH, Attorney General of the United States, et al.,  
Defendants-Appellants.

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ON APPEAL FROM A FINAL JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR THE  
CENTRAL DISTRICT OF CALIFORNIA  
D.C. No. 2:85-cv-04544-DMG-AGR

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**MOTION PURSUANT TO CIRCUIT RULES 27-12 AND 34-3 TO  
EXPEDITE BRIEFING AND HEARING SCHEDULE FOR APPEAL**

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*Attorneys for Defendants-Appellants*

Defendants-Appellants (“Appellants” or the “Government”), through undersigned counsel, respectfully move to expedite the briefing and hearing of this appeal pursuant to Ninth Circuit Rules 27-12 and 34-3. Counsel for Plaintiffs-Appellees have stated that they anticipate opposing this motion but have reserved decision until they have the opportunity to review it.<sup>1</sup>

This case implicates the United States’ ability to respond nimbly and effectively to a potential surge of migrants traveling as family units seeking to cross the southwest border. Migrant flows over the last 90 days suggest a significant surge of accompanied and unaccompanied migrant children.<sup>2</sup> The Government has a compelling interest in being prepared for and addressing such a surge, and in having available—if necessary—all of the legal authorities that Congress and the Constitution provide the Executive Branch to meet the substantial challenge that such a surge would present. Because the District Court

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<sup>1</sup> On December 1 2015, in accordance with Ninth Circuit Rule 27-12, counsel for the Government spoke with counsel for the Plaintiffs-Appellees (“Appellees”) who stated that they anticipate opposing the Government’s motion to expedite this appeal, but will make a final determination upon being provided and reviewing the motion. This Court authorizes expedited consideration upon a showing of good cause, including a showing of irreparable harm. *See* Circuit Rule 27-12(3).

<sup>2</sup> *See* Declaration of Woody Lee, Chief of the U.S. Border Patrol’s Strategic Planning and Analysis Directorate (attached as Ex. A). *See also* Julia Preston, *Number of Migrants Illegally Crossing Rio Grande Rises Sharply*, New York Times, November 26, 2015, available at [http://www.nytimes.com/2015/11/27/us/number-of-migrants-illegally-crossing-rio-grande-rises-sharply.html?\\_r=0](http://www.nytimes.com/2015/11/27/us/number-of-migrants-illegally-crossing-rio-grande-rises-sharply.html?_r=0).

Order significantly constrains that authority and flexibility based on what the Government submits is legal error, we respectfully request expedited consideration of this appeal.

### **BACKGROUND AND PROCEDURAL HISTORY**

On August 21, 2015, the District Court held that the 1997 settlement agreement in this case—which resolved Appellees’ legal challenge to the authority of the legacy Immigration and Naturalization Service to hold *unaccompanied* minors in *discretionary* detention pending the outcome of their removal proceedings—must also be interpreted to govern and severely restrict the detention of family units during their removal proceedings, even if they are in statutorily mandated immigration detention. *See* Order, Aug. 21, 2015, District Court ECF No. 189. Although the District Court’s August 21, 2015 Order provides “some latitude” for the Government to detain family units for brief periods at its family residential facilities, the Order’s ruling that the 1997 Settlement now also applies to *accompanied* children, and thereby to their parents, creates significant operational burdens that impair the Government’s flexibility to respond to changing circumstances. For instance, the Order raises the threshold the Government must meet in order to detain accompanied children and their



parents; restricts the duration of such detention; limits the types of detention facilities that may be used for families; and imposes a legal requirement on the Government to process all members of family units—including adults—“as expeditiously as possible.” *Id.* at 10 n.7.<sup>3</sup>

Since the District Court’s Order was entered, the Government has come into compliance with the Court’s new requirements through a major undertaking to process and either release or return family units as expeditiously as possible. To do so, the Government has employed significant additional personnel and resources to the Southwest Border to complete interviews and assessments for credible and reasonable fear in a highly expedited manner. For the Government to sustain that level of expedition in the face of a new surge of children and families would almost certainly require the Department of Homeland Security (DHS) to divert substantial resources away from other critical immigration, humanitarian, national security, and border security-related operations.

### **ARGUMENT**

Since the Government filed its notice of appeal on September 18, 2015, the number of family units apprehended while illegally crossing the Southwest Border has increased to a level that makes expedited resolution of this appeal imperative.

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<sup>3</sup> In response to the Court’s initial ruling on July 24, 2015, the Government unsuccessfully sought modification of

Accompanying this brief is the declaration of Woody Lee, Chief of the U.S. Border Patrol's Strategic Planning and Analysis Directorate. *See generally* Lee Decl., attached as Ex. A. As Chief Lee describes—and as the charts accompanying his Declaration show—the number of apprehensions on the Southwest Border has been rising steadily, and this rise has been the most pronounced when it comes to families. *See id.* ¶ 6; *see also generally id.* (including attached charts). While still lower than during the highest surge period of last summer (from approximately April to July 2014), the number of family units began to rise in July and August 2015, and has continued rising at a substantial rate through the date of filing of this motion. *See id.* at ¶ 7.

In August 2015, the number of individuals in family units apprehended while illegally crossing the Southwest Border was 5,159. *See id.* at ¶ 8. This was approximately 57% higher than August 2014, when the number was 3,296. In September 2015, the number of individuals in family units apprehended illegally crossing the Southwest Border increased further to 5,273, and this represented more than a doubling (approximately 129%) over September 2014, when the number was 2,301. *See id.* at ¶ 9. In October 2015, the number of individuals in family units apprehended illegally crossing the Southwest Border

again increased further to 6,026, which is approaching a 200% (nearly a 179%) increase from October 2014, when the number was 2,162. *See id.* at ¶ 10. Finally, through November 28, 2015, the number of individuals in family units apprehended illegally crossing the Southwest Border was approximately 6,000, which is nearly 165% more than the same period in 2014, when those apprehensions totaled 2,274. *See id.* at ¶ 11.

Even more concerning is that, within the last 15-20 days, there have been multiple days in which the number of individuals in family units apprehended at the Southwest Border has surpassed 300 in a single day. *See id.* at ¶ 12. On November 21, the number apprehended was 344, the highest single day number since July 2014. *See id.* at ¶ 13. This is especially concerning to the Government because it is typically the case that in fall/winter months, illegal migration on the Southwest Border is lower than spring/summer. If historical patterns continue, these numbers will only increase in the spring.

This case warrants expedited consideration because the decision below has severely constrained DHS's flexibility to respond to an increasing flow of illegal migration into the United States through the appropriate use of immigration detention, expedited removal, and the reinstatement of existing orders of removal.

*See* 8 U.S.C. §§ 1225, 1226, 1231. The Government is preparing for any anticipated increases, but also believes that having the full array of legal tools available is an essential component to addressing increased flows of family units seeking to unlawfully enter the United States. Moreover, a key part of any long term solution to the challenge of migrant children involves disrupting human trafficking and smuggling organizations; public information campaigns to combat misperceptions about U.S. immigration laws;<sup>4</sup> and cooperative strategies to address the root “push” causes in the migrants’ countries of origin. To maintain and increase these necessary efforts—which may in some instances include the detention and return of family units to their countries of origins—the United States needs the full flexibility Congress provided to use legally-authorized detention as a tool of immigration enforcement. Past experience has shown the Government that it will be difficult to have and maintain a firm and humane response to the challenge of mass family migration, if we do not have the legal authority and nimbleness to strike the right balance in the face of a constantly changing landscape.

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<sup>4</sup> *See* Alicia Caldwell, *Immigrants caught at border believe families can stay in US*, Associated Press, October 31, 2015, *available at* [http://www.denverpost.com/ci\\_29046254/immigrants-caught-at-border-believe-families-can-stay](http://www.denverpost.com/ci_29046254/immigrants-caught-at-border-believe-families-can-stay) (stating that “Most of the immigrants interviewed, or 181 of them, said reports about the release of immigrant families influenced their decision to come to the United States”).

The Government continues to believe that the District Court erred in its holding that the 1997 settlement addressing a case involving the detention of *unaccompanied* minors must now govern today's situation involving entire family units (including adults) that illegally enter the United States. Prompt resolution of that question is essential for DHS to plan and respond to evolving migration numbers and issues. But, regardless of how this Court may resolve the merits of this appeal, the Government no longer believes it is in a position to wait an additional 12-24 months to obtain a decision.<sup>5</sup>

For these reasons, the Government respectfully asks that the Court expedite the briefing, hearing, and consideration of this appeal under Ninth Circuit Rule 27-12. The Government notes that the transcripts for this appeal have already been filed by the court reporter, and proposes the following briefing and argument

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<sup>5</sup> The Government filed its notice of appeal of the District Court's order on September 18, 2015. *See* Order, Sept. 18, 2015, District Court ECF No. 191. On the same date, this Court entered a Time Schedule Order which set the deadline for Appellants' opening brief on February 29, 2016, and gave Appellees until March 30, 2016, to file their answering brief. Under the original schedule, assuming no extensions of time were sought and granted, all briefing would conclude sometime in mid-April 2016. *See* Order, Sept. 18, 2015, Ninth Circuit ECF No. 1-4. According to this Court's website, this means that oral argument, if granted, would likely occur sometime between January and April 2017. *See* Ninth Circuit Court of Appeals "Frequently Asked Questions," updated August 2015, *available at* <http://www.ca9.uscourts.gov/content/faq.php>, at Question 16 (stating that oral argument is typically held "approximately 9-12 months from completion of briefing."). A decision would likely be expected to issue sometime between July 2017 and December 2017. *See id.* at Question 17 (stating that "most cases are decided within 3 months to a year" from the time of argument).

schedule:

**Fri., January 15, 2016**

Defendants-Appellants' opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

**Mon., February 15, 2016**

Plaintiffs-Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

**Mon., February 29, 2016**

Defendants-Appellants' reply brief shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

**March-April 2016**

Oral Argument

DATED: December 1, 2015

Respectfully submitted,

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*Attorneys for Defendants-Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2015, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Sarah B. Fabian

SARAH B. FABIAN  
Senior Litigation Counsel  
U.S. Department of Justice

*Attorney for Defendants-Appellants*



**-IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

Jenny L. Flores, <i>et al.</i> ,	)	
<i>Plaintiffs-Appellees,</i>	)	
	)	
	)	
	)	No. 15-56434
v.	)	
	)	
Loretta E. Lynch, <i>et al.</i> ,	)	
<u><i>Defendants-Appellants.</i></u>	)	

**DECLARATION OF WOODY LEE**

I, Woody Lee, hereby make the following declaration with respect to the above-captioned matter:

1. I am the Chief of the U.S. Border Patrol's Strategic Planning and Analysis Directorate, a component of U.S. Customs and Border Protection (CBP) within the U.S. Department of Homeland Security (DHS). I have been employed in this capacity since January 2015, and I have been a Border Patrol agent for 27 years. Prior to this current assignment, I served as the Border Patrol's Acting Chief and also as Deputy Chief of Law Enforcement Operations.
2. I make this declaration on the basis of my own knowledge, as well as information made available to me in the course of my official duties.
3. In my capacity as the Chief of the Strategic Planning and Analysis Directorate, I am responsible for the daily collection of statistical data and information, and my directorate performs the analysis of this information to provide strategic recommendations to the Chief of the U.S. Border Patrol and other senior leadership. I assist the Chief of the Border Patrol in planning nationwide enforcement and administrative operations. I develop internal policy for the Chief and represent the U.S. Border Patrol in strategic policy meetings requiring Border Patrol subject matter expertise. These responsibilities extend to oversight of field sectors that carry out the front line mission of CBP.

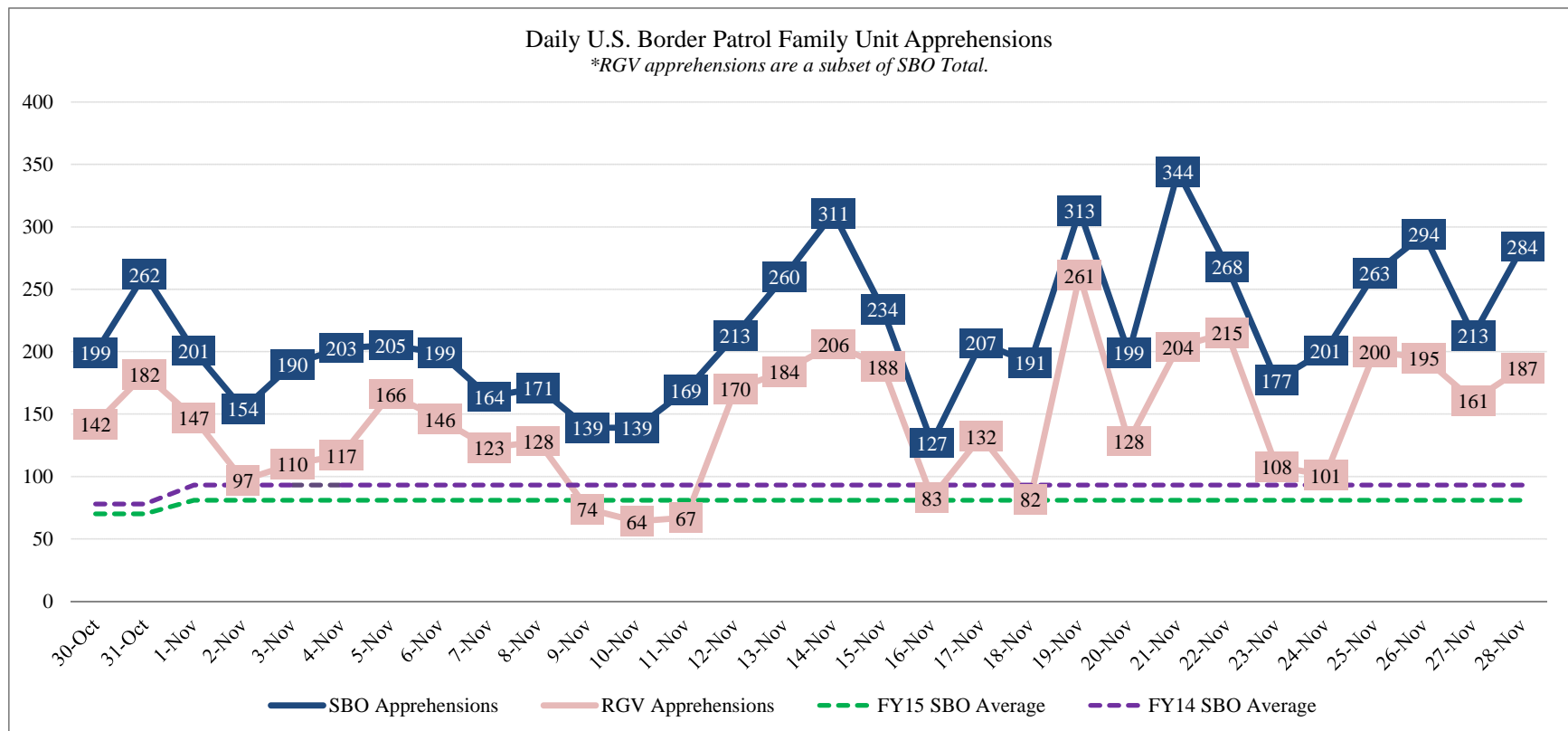
4. I am familiar with the policies and procedures that govern the apprehension, processing, and temporary detention of aliens. As Chief of the Strategic Planning and Analysis Directorate, I am responsible for ensuring that those policies and procedures are implemented and adhered to throughout the entire Border Patrol.
5. I receive all of the daily apprehension information provided to the senior leadership of the U.S. Border Patrol.
6. The number of apprehensions of all aliens along the Southwest Border has been rising steadily, and this rise is most pronounced with respect to family units.
7. Earlier this year, between January 1, 2015, and July 31, 2015, the number of border crossers apprehended while seeking to enter illegally (both in terms of family units and unaccompanied minors) was, with very few exceptions, substantially lower than on the same day in 2014; but, starting in August 2015, that trend reversed itself such that, in the last three months, the average daily apprehensions of individuals in family units illegally crossing the southwest border have been substantially increasing and are now 124% higher per day when compared to the same day in 2014. The number of individuals in family units apprehended started to rise in July and August of 2015, and has since continued to rise at a substantial rate.
8. Specifically, in August 2015, the numbers of individuals in family units apprehended while illegally crossing the Southwest Border was 5,159. This was approximately 57% higher than August 2014, when the number was 3,296.
9. In September 2015, the number of individuals in family units apprehended while illegally crossing the Southwest Border was 5,273. This was approximately 129% higher than September 2014, when the number was 2,301.
10. In October 2015, the number of individuals in family units apprehended while illegally crossing the Southwest Border increased to 6,026, which is nearly a 179% increase from October 2014, when the number was 2,162.

11. For the month of November, through November 28, 2015, U.S. Border Patrol apprehended approximately 6,000 individuals in family units crossing the Southwest Border, which is nearly 165% more than the same period in November 2014 (through November 28, 2014), when the number was 2,274.
12. Further, within the last 15-20 days, there have been several days in which the numbers of individuals in family units apprehended along the Southwest Border has topped 300 in a single day.
13. For example, on November 21, 2015, U.S. Border Patrol apprehended 344 individuals in family units, the highest number of apprehensions on a single day since July 2014.
14. Illegal migration along the Southwest Border is typically lower during the fall and winter seasons. As such, it is especially concerning that the numbers of family units apprehended by Border Patrol are increasing.
15. I have attached four charts to this declaration to further illustrate the number of apprehensions of individuals in family units and also of unaccompanied children along the Southwest Border. Specifically, attached are two charts showing the daily number of apprehensions of individuals in family units and apprehensions of unaccompanied children, respectively, over the last month, as well as the fact that those daily apprehension rates now regularly exceed the daily averages for both Fiscal Years 2014 and 2015. The other two charts show a comparison of the daily number of apprehensions of individuals in family units and apprehensions of unaccompanied children, respectively, from January 1 to November 28 in both 2014 and 2015.
16. I declare that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED: December 1, 2015 Wurgha Lee

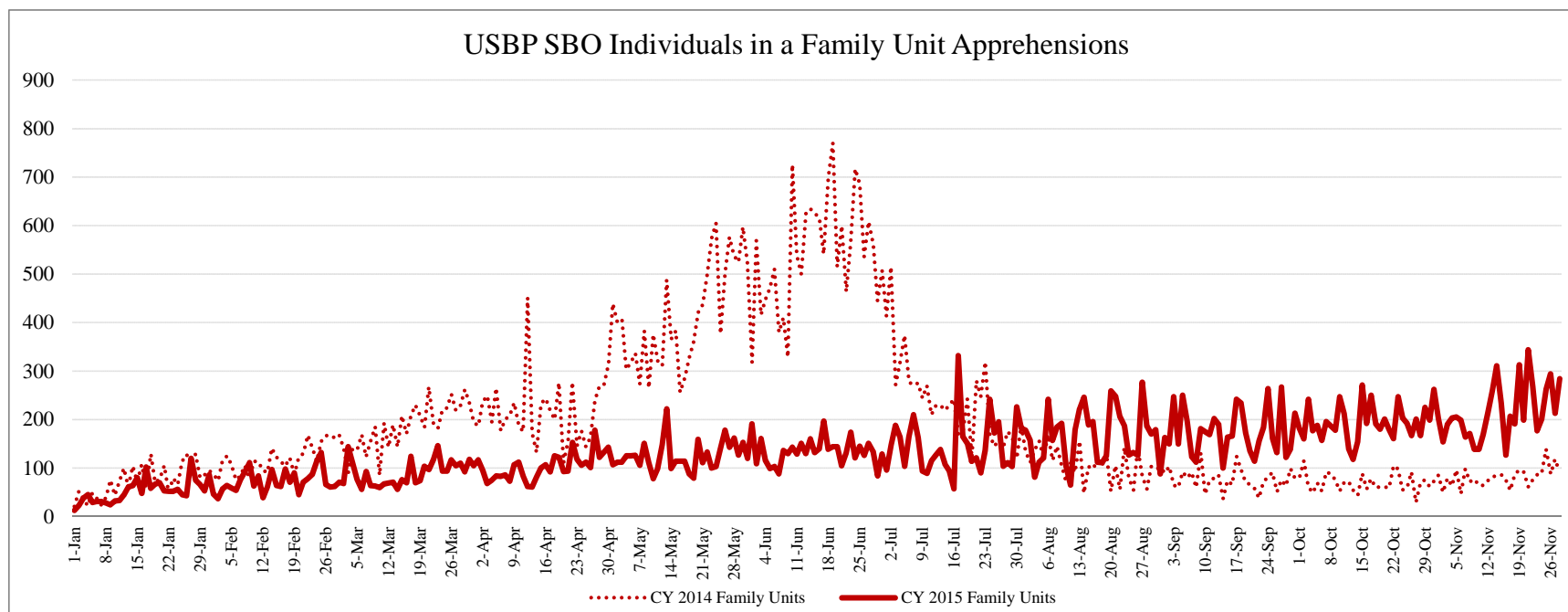


## Family Unit Apprehensions along the Southwest Border





## Family Unit SBO Daily Apprehensions CY14 vs CY15 YTD

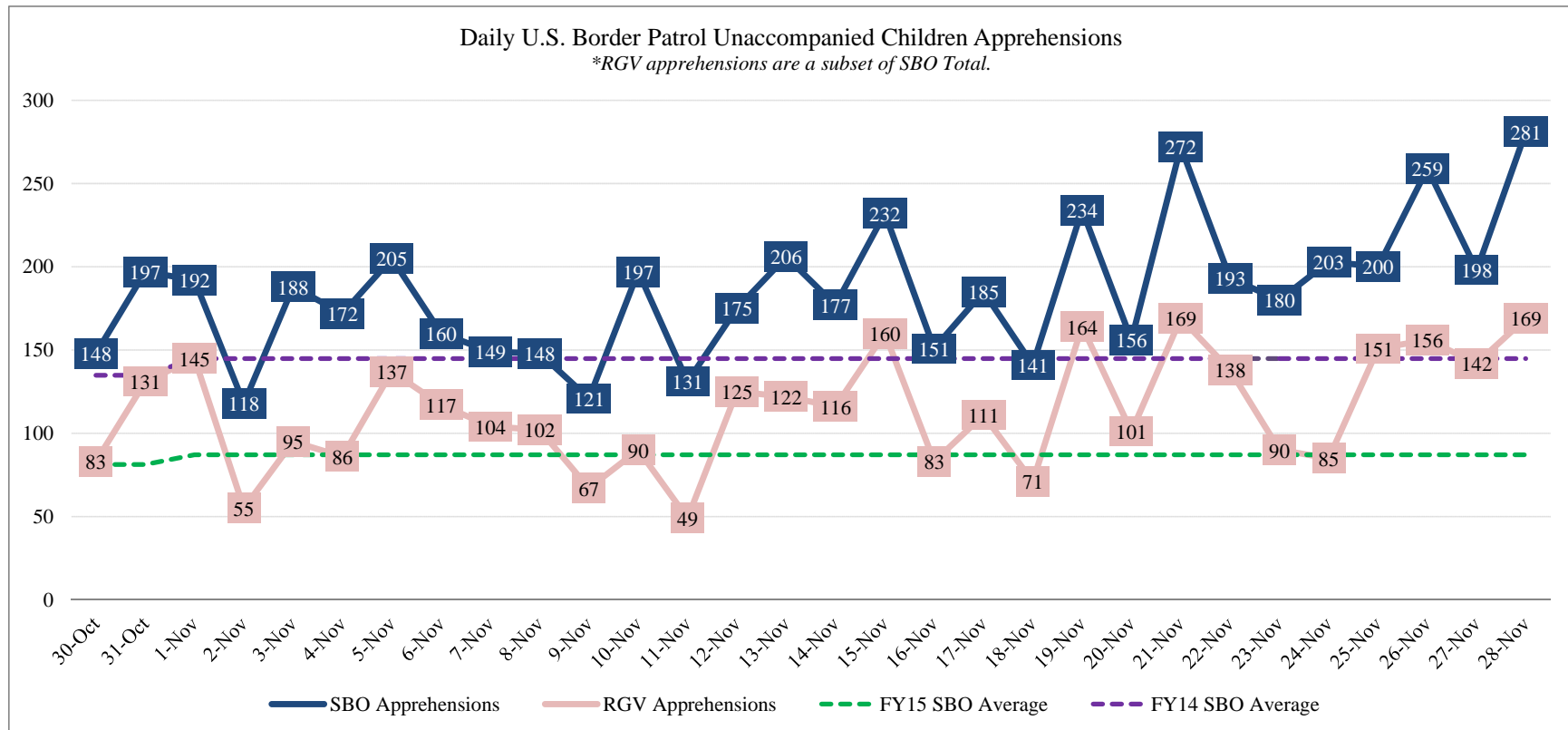


\*As of 28 November 2015.



Homeland  
Security

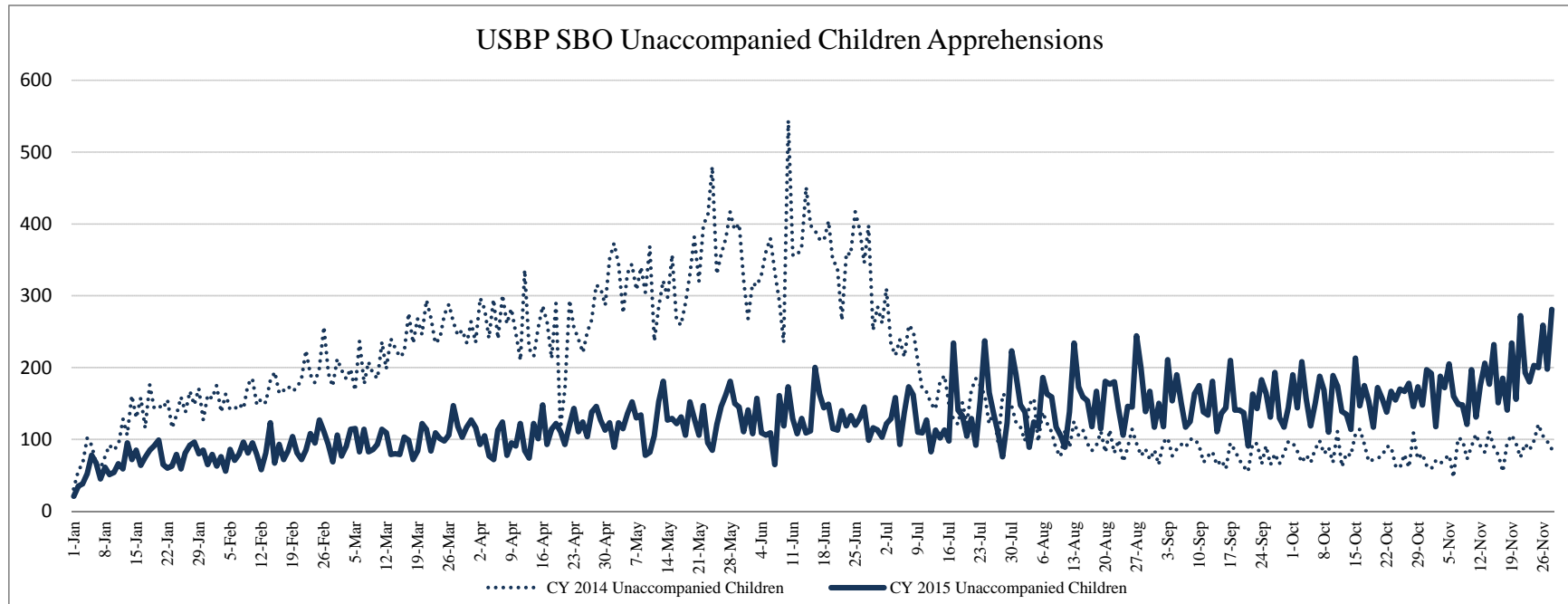
## Unaccompanied Children Apprehensions along the Southwest Border





Homeland  
Security

## Unaccompanied Children SBO Daily Apprehensions CY14 vs CY15



\*As of 28 November 2015.