IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

EVER ALEXANDER DIAZ RODRIGUEZ (A206-808-234) Petitioner, v. U.S. CUSTOMS AND BORDER PROTECTION, *et al.*, Respondents.	NUMBER 14-CV-2716 JUDGE MINALDI MAGISTRATE JUDGE KAY

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RESPONSE TO THE COURT'S SEPTEMBER 15, 2014 REQUEST

INTRODUCTION

The Government submits this pleading in response to the Court's September 15, 2014 request for briefing on the issue of jurisdiction as it relates to Petitioner's Emergency Motion for Stay of Removal filed on September 11, 2014 (Doc. 1-1).

As explained below, pursuant to 8 U.S.C. §§ 1252(a)(2), (e)(2), and (e)(5) "no court has jurisdiction to review expedited removal orders through habeas" save for the narrow questions – not at issue or contested here – of whether petitioner is an alien; whether he was ordered removed on an expedited basis; and whether petitioner can prove that he is either a lawfully admitted permanent resident or a refugee granted non-terminated asylum. *Brumme v. INS*, 275 F.3d 442, 447-48 (5th Cir. 2001). Under no set of circumstances can a court review "whether the alien is actually inadmissible or entitled to any relief from removal," 8 U.S.C. § 1252(e)(5), "inquire into whether section 1225(b)(1) was properly invoked." *Meng Li v. Eddy*, 259 F.3d 1132, 1134, *opinion vacated as moot*, 324 F.3d 1109 (9th Cir. 2003), or review the propriety of

applying the expedited removal statute to "individual aliens, including the determination made under" 8 U.S.C. § 1225(b)(1)(B) concerning credible fear determinations. 8 U.S.C. § 1252(a)(2)(A)(iii). These provisions foreclose any review of the claims at issue in this case.

Any suggestion that the jurisdiction-limiting provisions of the expedited removal statute violate the Suspension Clause is meritless. Petitioner is a non-admitted alien apprehended within two days of illegally entering the United States without inspection. Petitioner has no Suspension Clause rights or due process rights to vindicate in a habeas because a non-admitted alien seeking admission into the United States at the border does not have the same rights as a lawfully admitted alien subject to removal proceedings after having entered the United States lawfully, or even an unlawful alien who has lived here for some period of time sufficient to create substantial voluntary ties to the United States. *See, e.g.*, *Garcia de Rincon v. Dep't of Homeland Sec*., 539 F.3d 1133, 1141(9th Cir. 2014).; *AILA v. Reno*, 18 F. Supp. 2d 38, 60 (D.D.C. 1998) (collecting cases). Thus, expedited removal cases do "not implicate [Suspension Clause] issues." *See de Rincon*, 539 F.3d at 1141.

Indeed, the Fifth Circuit as well as the Seventh and Ninth Circuit have held that the expedited removal provisions and the limited review provisions of 8 U.S.C. §§ 1225(b)(1), 1252(a)(2)(A) and 1252(e) do not violate the Suspension Clause. *Brumme*, 275 F.3d at 447-48; *accord Khan v. Holder*, 608 F.3d 325, 329-30 (7th Cir. 2010); *de Rincon*, 539 F.3d at 1141. For non-admitted aliens, "[w]hatever the procedure authorized by Congress is, it is due process," and "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950). Given this absence of due process

rights with respect to applications for admission, there can be no Suspension Clause issue, as there is no due process right to vindicate in habeas proceedings. *See de Rincon*, 539 F.3d at 1141.

The implications of the relief Petitioner seeks are significant. Petitioner asks this Court to stay his removal, reconsider the expedited removal order, and essentially conduct another credible fear interview, until he secures a favorable result. While this relief is captioned in terms of Petitioner only, its practical effect is unbounded. In reality, Petitioner asks this Court to discard the carefully crafted expedited removal regime which expresses Congress's firm conviction that the Executive branch requires the discretion to expeditiously remove certain classes of aliens at or near the border who otherwise have no entitlement to enter the United States and who otherwise may abscond into the interior or consume important enforcement resources.

"The decision to adopt an 'expedited removal' system was prompted by Congress's finding that 'thousands of aliens arrive in the U.S. at airports each year without valid documents and attempt to illegally enter the U.S.'" *AILA*, 18 F. Supp. 2d at 41 (quoting H.R. Rep. No. 104-469, pt. 1, at 158 (1996)). As noted in the conference report for the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), the law crafting the expedited removal regime, expedited removal was viewed as one of several necessary tools to deal with the "crisis at the land border, allowing hundreds of thousands of illegal aliens to cross each year, and contributing more than half of the 300,000 to 400,000 annual growth in the illegal alien population." H.R. Rep. No. 104-469, pt. 1, at 107. In Congress's view, the tool was needed in part because "[t]housands of smuggled aliens arrive in the United States each year with no valid entry documents and declare asylum immediately upon arrival. Because of lack of detention space and overcrowded immigration court dockets, many have been released into the general

population. Not surprisingly, a majority of such aliens do not return for their hearings." *Id.* at 117. Likewise, "[d]ue to the huge backlog in asylum cases, and the inability of the INS to detain failed asylum applicants who are deportable from the United States, these aliens could reasonably expect that the filing of an asylum application would allow them to remain indefinitely in the United States," providing further incentive for illegal entry. *Id.* at 117-18. These Congressional findings and Congress's belief in the need for an expedited removal system to combat the perceived immigration crisis which existed in 1995 are entitled to the greatest of deference, as "over no conceivable subject is the legislative power of Congress more complete than it is over the decision of Congress to admit or to exclude aliens." *Negusie v. Holder*, 555 U.S. 511, 546 n. 2 (2009).

In place of this system, Petitioner suggests a review process in which all unadmitted aliens subject to expedited removal(some 163,000, or 39 percent of all removals during 2012, *see* Immigration Enforcement Actions: 2012, at 1, *available at* http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf,) can challenge those proceedings in a full blown hearing in federal district court, delaying their removal for months, if not years, and tying up Executive resources.[1] This possibility is precisely what Congress sought to avoid in enacting the expedited removal statute, *see AILA*, 18 F. Supp. 2d at 41; H.R. Rep. No. 104-469, pt. 1, at 107, 117-18, 158.

In light of the jurisdictional bars to review, the absence of any suspension clause issue, and the deference due Congress's determination concerning admission to and exclusion from the United States, the Court should dismiss the Petition.

[1] Notably, such review would provide asylum seekers at the border 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.

BACKGROUND

As a result of the expedient nature of this response, the Government has not been able to examine Petitioner's A-file. However, the petition provides that the Petitioner, a native and citizen of El Salvador, "entered the United States at or near Hidalgo, Texas or McAllen[,] Texas on June 27, 2014[,] and was apprehended by U.S.Border Patrol officers two days after he entered the United States." He was detained and transferred to the Federal Detention Center in Oakdale, Louisiana. He was later transferred to the South Louisiana Correctional Center in Basile, Louisiana. (Rec. Doc. 1, pp. 2, 8, 10). While in Oakdale on August 6, 2014, Petitioner was "given a credible fear hearing." (Rec. Doc. 1, p. 10). According to the Petitioner, the asylum officer rendered a "negative credible fear determination" and also a "negative determination on a claim for withholding of removal pursuant to the Convention against Torture ("CAT")." (Rec. Doc. 1, p. 11).

On August 27, 2014, the credible fear determination was reviewed by an Immigration Judge ('IJ") in Oakdale. Petitioner contends that his attorney was prohibited from participating during the hearing. (Rec. Doc. 1, pp. 11, 12; Rec. Doc. 1-3, pp. 9, 10). The IJ affirmed the credible fear determination and "sent the case back to DHS for removal of the Petitioner forthwith." (Rec. Doc. 1, p. 12). Petitioner asserts that he is making a request with DHS for re-interview.

ARGUMENT

1. Does this Court have jurisdiction to consider whether the jurisdictional bar and statutory scheme set forth in 8 U.S.C. § 1252 violate the Suspension Clause?

The plain language of the Immigration and Nationality Act ("INA") restricts judicial review of expedited removal orders issued under Section 1225(b). Section 1252(a)(2)(A) provides, in pertinent part, that notwithstanding any other provision of law, including any habeas provision, no court shall have jurisdiction to review:

> (i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1) [8 U.S.C. § 1225(b)],
>
> (ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,
>
> (iii) the application of such section to individual aliens, including the determination made under section 235(b)(1)(B) [8 U.S.C. § 1225(b)(1)(B), concerning credible fear determinations].

Section 1252(e)(2) in turn permits review of only three issues: "(A) whether the petitioner is an alien; (B) whether the petitioner was ordered removed under [the expedited removal statute, 8 U.S.C. § 1225], and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee . . . , or has been granted asylum[.]" 8 U.S.C. § 1252(e)(2)(A)-(C). Courts lack jurisdiction to consider any collateral challenge to an expedited removal order beyond these three permissible bases for review. *See, e.g.*, *Brumme*, 275 F.3d at 447. Moreover, the statute specifically provides that "no court may--(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section [8

U.S.C. § 1225(b)(1)] except as" established by 8 U.S.C. § 1252(e)(1)(D).[2] 8 U.S.C. § 1252(e)(1)(A).

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. *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.").

The Ninth Circuit has described sections 1252(a)(2)(A) and (e)(2) as illustrating "that when Congress meant to strip jurisdiction over all matters relating to an immigration order or decision, it did so unequivocally and unambiguously." *Montero–Martinez v. Ashcroft*, 277 F.3d 1137, 1143 (9th Cir. 2002). By enacting 1252(a)(2)(A), Congress has "spoken quite clearly" about its "intent to severely limit both contemporaneous and later tampering with the results that flow from § 1225(b)(1) removal orders." *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 818 (9th Cir. 2004). The Fifth Circuit and every other court to address the expedited removal statute has concluded that courts may not review whether the statute was properly invoked, but only whether it was invoked at all. *Brumme*, 275 F.3d at 447-48 (court may not review whether expedited removal statute "was applicable in the first place"); *Khan*, 608 F.3d at 330 ("we lack

[2] 8 U.S.C. § 1252(e)(1)(D) provides that "the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 240 [8 U.S.C. § 1229a]." Such relief only becomes relevant if the court determines that the alien has shown she qualifies under one of the three permissible categories for review under section 1252(e)(2), and is therefore irrelevant here.

jurisdiction to inquire whether the expedited removal procedure to which the [plaintiffs] were subjected was properly invoked); *Li*, 259 F.3d at 1134 (section 1252(e) "does not appear to permit the court to inquire into whether section 1225(b)(1) was properly invoked, but only whether it was invoked at all."). Given this overwhelming weight of authority, the Court lacks jurisdiction to address Petitioner's claim that the Suspension Clause requires that he retain some forum in which to challenge his expedited removal order or the procedures applied to him once the expedited removal statute was invoked by Customs and Border Protection (" CBP").

Petitioner argues that the Court retains jurisdiction to review "whether Petitioner should be given an expedited removal order in the first place." (Rec. Doc. 1-3, p. 11). Petitioner suggests that 8 U.S.C. § 1252(e)(2)(B)'s limitation of review to, among other things, "whether the petitioner was ordered removed under such section," by definition must include review of whether CBP had authority to issue the removal order (Rec. Doc. 1-3, p. 11). According to Petitioner, if CBP did not have authority to issue the removal order, then the alien was not "removed under" section 8 U.S.C. § 1225(b)(1). *Id.* More specifically, Petitioner claims that the court must retain jurisdiction to review CBP and the IJ's credible fear determinations because if he satisfied the credible fear standard, he should not be subject to expedited removal. *Id.* Petitioner essentially argues that the Court must retain jurisdiction to review the *merits* of CBP and the IJ's determinations that he is otherwise inadmissible given that he is ineligible for asylum. Such review requires reviewing precisely what 8 U.S.C. § 1252(a)(2)(A) precludes – the application of the expedited removal procedures to a specific alien, the decision to invoke such

procedures, or any cause or claim arising from or relating to the implementation or operation of an expedited order of removal.[3] 8 U.S.C. § 1252(a)(2)(A).

In support of argument, Petitioner cites *Smith v. U.S. Customs and Border Prot.*, 741 F.3d 1016 (9th Cir. 2014), for the proposition that courts retain jurisdiction to review "whether [an] individual belongs in expedited removal." (Rec. Doc. 1-3, p. 11). However, Petitioner misinterprets *Smith.* In *Smith*, petitioner argued that as a non-intending immigrant of Canadian citizenship, he was not subject to the documentary requirements to which any other visitor to the United States is subject. 741 F.3d at 1019. In particular, Smith claimed "that the CBP unlawfully applied the statute to him, on the grounds that documentary requirements for entry into the United States are waived for Canadians, and that the CBP violated his due process rights in issuing the expedited removal order." *Id.*

Rejecting this argument, the Ninth Circuit pointed out that Smith had conceded that he was an alien and that he was not a lawful permanent resident, asylee or refugee. The Court focused on the second category of permissible review: "whether the petitioner was removed under the expedited removal statute." *Id.* at 1021. The Court construed Smith's argument as similar to the argument raised by petitioner here as follows:

[3] One district court decision has read section 1252(e)(2) & (5) to permit the "lawfully applied" inquiry Petitioner seeks. *See American-Arab Anti-Discrimination Comm. v. Ashcroft*, 272 F. Supp. 2d 650, 662-63 (E.D. Mich. 2003). However, that holding is at odds with the statute, has been expressly rejected by the Tenth Circuit and every other Circuit Court to address the issue, as well as every other district court decision to address the issue. *See Vaupel v. Ortiz*, 244 F. App'x 892, 895 (10th Cir. Aug. 8, 2007)(unpublished)(rejecting *Am.-Arab* because "[t]he language of the statute clearly and unambiguously precludes review in a habeas proceeding of 'whether the alien is actually inadmissible or entitled to any relief from removal'"); *Wei Chen v. Napolitano*, 2012 U.S. Dist. LEXIS 160525, *9 (S.D.N.Y. Nov. 8, 2012) (unpublished) (noting case is "contrary to both the plain language of the statute and the overwhelming weight of authority on the issue"); *Al Khedri v. Sedlock*, 2009 U.S. Dist. LEXIS 96856, *5 (N.D. Ill. Oct. 20, 2009) (unpublished) (rejecting *Am.-Arab* and citing *Vaupel*); *accord Smith*, 741 F.3d at 1021 n.4; *Khan*, 608 F.3d at 330; *Brumme*, 275 F.3d at 447-48; *Li*, 259 F.3d at 1134.

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

Id. at 1022; *compare* (Rec. Doc. 1-3, p. 11) (contending expedited removal statute does not foreclose review of "whether Petitioner should be given an expedited removal order in the first place").

Contrary to Petitioner's reliance on *Smith,* the Ninth Circuit did not review whether Smith "belong[ed] in expedited removal." (Rec. Doc. 1-3, p. 11). Instead, the Court "[a]ccept[ed] his theory at face value," but, nevertheless, concluded that Smith "cannot prevail because he was in fact removed under § 1225." The Court reviewed the relevant law applicable to aliens seeking admission and noted that it was entirely within CBP's discretion to determine for itself whether it believed Smith was an intending immigrant or a non-intending immigrant not subject to documentary requirements. *Id.* Because CBP determined that he was an intending immigrant, that was the end of the inquiry. "Smith was 'ordered removed,' under § 1225" ;therefore, the Court lacked jurisdiction to inquire further. *Id.* at 1022. The Ninth Circuit expressly rejected the same claim Petitioner advances here, that there must be jurisdiction to review CBP's determination that Smith was subject to the expedited removal statute. As the Court noted, "[w]e do not evaluate the merits of the CBP's decision to classify Smith as an intending immigrant" because 8 U.S.C. § 1252(e)(5) bars judicial review of "whether the alien is actually inadmissible or entitled to any relief from removal."

This case is no different. Petitioner claims CBP was wrong to determine that he lacked credible fear, and should not have issued an expedited removal order against him. However, this Court has no jurisdiction to review the underlying merits of the credible fear determination

any more than the *Smith* court had jurisdiction to review the underlying merits of CBP's intending immigrant determination. Both claims require review of the merits of CBP's underlying decisions that form the basis of their decision to issue an expedited removal order. That is precisely what the expedited removal statute forecloses. *Smith*, 741 F.3d at 1020-22 (no jurisdiction to review CBP's classification of alien as intending immigrant lacking entry documents); *see Li*, 259 F.3d at 1132 (no jurisdiction to review CBP's determination that alien's facially valid visa was invalid); *accord Khan*, 608 F.3d at 327, 330 (same); *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 56-57 (D.D.C. 1998) (same). Accordingly, courts lack jurisdiction to determine whether the expedited removal statute should not have applied in the first place, as such review is inextricably intertwined with review of the merits of CBP's conclusions regarding admissibility.

Because Petitioner raises none of the permissible bases for review in his petition, he fails to state any claim for relief under section 1252(e)(2). Consequently this Court lacks jurisdiction over his claims, including his claim that his inability to challenge CBP's determination that he lacked credible fear violates the Suspension Clause.[4] *Brumme*, 275 F.3d at 446 (finding no jurisdiction under Suspension Clause theory to reach merits of claims raised by petitioners subject to expedited removal order).

[4] To the extent Petitioner's claims are construed as a general attack on the constitutionality or legality of the credible fear regulations in the expedited removal context, or a general Suspension Clause challenge, the Court lacks jurisdiction to hear those claims as well. *Vaupel*, 244 F. App'x at 895; *see also Garcia de Rincon*, 539 F3d at 1141 n.5 (noting the separate statutory sub-section at 8 U.S.C. § 1252(e)(3), that allows a systemic challenge to the expedited removal process and its 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 *American Immigration Lawyers Ass'n v. Reno*, 18 F.Supp.2d 38, 54–56 (D.D.C.1998)). [

2. Assuming this Court has jurisdiction to consider the Suspension Clause arguments, what are the merits of Petitioner's argument that the Suspension Clause gives this Court jurisdiction over her habeas petition and complaint?

Even if this Court were to find that it has jurisdiction to consider Petitioner's Suspension Clause arguments, section 1252(e)(2) does not violate the Suspension Clause. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Petitioner contends that even if section 1252(e)(2) forecloses review of his claims, he must be able to raise his legal claims concerning whether the credible fear regulations as applied to him violates due process in some forum. In support of this claim he primarily relies on *INS v. St. Cyr*, 533 U.S. 289 (2001) and *Boumediene v. Bush*, 553 U.S. 723 (2008), going so far as to suggest that *Boumediene*, which had nothing to do with expedited removal, undermines the legality of the expedited removal regime. (Rec. Doc. 1-3, p. 12).

As an initial matter, several Circuits have issued decisions upholding the expedited removal regime after the Supreme Court's *Boumediene* decision. *See, e.g., Khan*, 608 F.3d at 329-30 (courts lack jurisdiction to entertain claim that Suspension Clause permits court to "disregard jurisdictional restrictions" and hear the merits of petitioners' claims); *de Rincon*, 539 F.3d at 1141(narrow habeas review of expedited removal orders "does not raise [Suspension Clause] problems"); *accord De La Torre-Flores v. Napolitano*, 2012 U.S. Dist. LEXIS 104432, *16 n.9 (S.D. Cal. July 25, 2012) (unpublished) (rejecting this claim and observing and noting that *de Rincon* post-dates *Boumediene*)

Importantly, Petitioner's assertions concerning the holdings and applicability of *St. Cyr* and *Boumediene*—that, in Petitioner's words, "noncitizens have always had access to the courts to raise both constitutional and non-constitutional legal challenges to their removal orders and

that the absence of such review would violate the Suspension Clause, (Rec. Doc. 1-3, p. 12), are not correct interpretations of the caselaw. Unlike the present case, the plaintiff in *St. Cyr* was a lawful permanent resident lawfully admitted and physically present in the United States, who, after pleading guilty to selling a controlled substance, was ordered removed and subjected to physical detention pending removal. 533 U.S. at 292-93, 304-05. At issue in *St. Cyr* was whether district courts retained habeas jurisdiction under then-applicable sections of the INA to review the legal question of whether INA section 212(c) abrogated any authority the Attorney General had "to waive deportation for aliens previously convicted of aggravated felonies." *Id*. at 297. The Government argued that portions of 8 U.S.C. §§ 1252(a)(1), (a)(2)(C), and (b)(9) as then codified, which concerned judicial review of non-expedited removal orders generally, and of removal orders against criminal aliens specifically, deprived the district court of habeas jurisdiction to decide that issue. *Id*. at 293-98.

The Court first reiterated "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *Id*. at 298. Examining sections 1252(a)(1), (a)(2)(C), and (b)(9) as then codified, the Court noted the lack of a plain statement, let alone any mention of habeas – in each of the provisions cited by the Government.[5] *Id*. at 310-14. The focus of those provisions, as the Court explained, was "judicial review" or "jurisdiction to review," as opposed to "habeas corpus." Id. at 310-11. Because "judicial review," or "jurisdiction to review," and "habeas corpus" have historically distinct meanings, the Government could not satisfy the plain statement rule. *Id*. at 310-14. Consequently, those provisions did not deprive the district court of jurisdiction under the general habeas statute, 28 U.S.C. § 2241.

[5] 8 U.S.C. §§ 1252(a)(2)(C) and (b)(9) have since been amended by the REAL ID act to expressly limit habeas review. *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

The Ninth Circuit analyzed the applicability of *St. Cyr* in the expedited removal context in *Li*. 259 F.3d at 1133-36. Li, a native and citizen of China, sought entry to the United States via Anchorage, Alaska. *Id*. at 1133. Although petitioner alleged that she presented a facially valid visa, the former Immigration and Naturalization Service ("INS") determined that she sought to enter the U.S. by engaging in fraud or misrepresentation, and issued an expedited removal order. *Id*. On appeal, petitioner argued that the court retained jurisdiction to determine whether the Government correctly invoked the expedited removal procedure and that Congress did not intend to circumscribe habeas jurisdiction. *See Li*, 259 F.3d at 1134.

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

The Court then expressly distinguished the expedited removal context from *St. Cyr*, observing that the "case does not implicate the jurisdictional issues that would be raised had [petitioner] been *lawfully admitted* to this country" as the plaintiff in *St. Cyr* was. *Id*. at 1135 (emphasis added). Although reserving the issue for another day, the Court opined that if petitioner was in fact a lawfully admitted alien the Court might have "jurisdiction to determine whether an individual in such a situation is lawfully ordered removed under" the expedited removal statute. *Id*. (citations omitted). As for aliens who have not been lawfully admitted to the United States, the Court held that such aliens are "clearly of the type of case for which expedited

removal provisions of 8 U.S.C. § 1225(b) and the limited review provisions of section 1252(e)(2) were designed."[6] *Id*. at 1136 (citing H.R.Rep. No. 104-518 (1995), U.S. CODE CONG. AND ADM. NEWS, at 924). *See also, Khan*, 608 F.3d at 329-30 (distinguishing *St. Cyr* in the expedited removal context); *de Rincon*, 539 F.3d at 1141 (same, citing *Li* favorably); *Brumme*, 275 F.3d at 447-48 (same). Thus, non-admitted aliens lack Suspension Clause rights in relation to their admission. *See Li*, 259 F.3d at 1135-36; *see also Knauff*, 338 U.S. at 543 ("Whatever the rule may be concerning the deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.").

Boumediene is similarly inapposite, given its specific factual circumstances. In *Boumediene*, certain enemy combatants physically detained at the United States naval base at Guantánamo Bay, Cuba brought an action challenging their indefinite detention. 553 U.S. at 732. The Supreme Court concluded that Boumediene and his fellow petitioners were under *de facto* United States' jurisdiction in Guantánamo Bay, and therefore could challenge their physical detention through a writ of habeas. *Boumediene*, 533 U.S. 758-71. In the specific context of aliens detained indefinitely in *de facto* U.S. sovereign territory, the Court concluded "that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the

[6] The Fifth Circuit expressly adopted the Ninth Circuit's reasoning in *Brumme*. 275 F.3d at 447-48. Specifically, the court distinguished *St. Cyr* by observing that "[u]nlike the present case, [] *St. Cyr* did not concern an alien subjected to expedited removal. Rather, it concerned a lawful permanent resident who was ordered deported after pleading guilty to selling a controlled substance." *Id.* at 447. As in *Li*, the Fifth Circuit concluded that the limited review provisions presented no Suspension Clause issue. *Id.* at 448. Critically, the court went further than *Li*, holding that "§§ 1252(e)(2) and (5) are sufficient to satisfy the plain statement rule concerning habeas restrictions," thereby concluding that the limited review provisions did not run afoul of *St. Cyr*, even assuming *St. Cyr* was relevant in the expedited removal context. *Id.* As the Court held, petitioner "attempts an end run around this language; but the language is clear, and the matter ends there." *Id.*

citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id*. at 766 (emphasis added).

Petitioner's reliance on *Boumediene* is misplaced, as this argument confuses the physical detention issue in *Boumediene* and the denial of a credible fear finding that resulted in an expedited removal order at issue here. As the Supreme Court in *Boumediene* observed, "the privilege of habeas corpus entitles [a] *prisoner* to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." 533 U.S. at 779 (emphasis added); *see also id*. at 745 (discussing the historical origins of the writ and noting that "[t]he Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the *jailer* to account") (emphasis added); *St. Cyr*, 533 U.S. at 305-06 ("The writ of habeas corpus has always been available to review the legality of executive detention."). Here, Petitioner is not challenging his detention, but rather his classification by CBP as an alien who had not made his case for a credible fear determination and the issuance of an expedited removal against her.

The fact that Petitioner does not expressly challenge his detention renders his situation different from the physical detention at issue in *Boumediene*.[7] 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

[7] Even if he was, it is undisputable that "[d]etention during removal proceedings is a constitutionally permissible part of that process," *Demore v. Hyung Joon Kim*, 538 U.S. 510, 533 (2003), particularly here, where Petitioner has only been detained a short time pending execution of his expedited removal.. *See* 8 U.S.C. § 1225 ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.").

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 process provided them by Congress concerning their applications for admission to the United States, there are no due process minimums to achieve through habeas, as there is no federal custody to test for compliance with minimal due process. As the Supreme Court has long held, in those circumstances, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" and "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543-44; *see Carlson v. Landon*, 342 U.S. 524, 537 (1952) ("The power to expel aliens is essentially a power of the political branches of government, which may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit."). That is, because unadmitted aliens lack any due process rights regarding their admission, *see de* there is no due process right to vindicate through habeas, assuming habeas jurisdiction even exists. *See de Rincon*, 539 F.3d at 1141-42.

Ultimately, Petitioner's reliance on *St. Cyr* and *Boumediene* fails because Petitioner's argument assumes he retains some due process right to vindicate in a habeas proceeding. Petitioner appears to suggest that because he, in his words, "effected entry" into the United

States, albeit illegally and without inspection at a port of entry, he is therefore "present in the United States for purposes of the Due Process clause," and ,thus, has more rights concerning his applications to remain in the United States than an arriving alien standing at the threshold of entry (Rec. Doc. 1, p. 15). In other words, notwithstanding the fact that Petitioner illegally entered the United States by purposefully avoiding a port of entry and inspection, or the fact that he was apprehended two days after crossing the border illegally, Petitioner claims this illegal entry entitles him to greater procedural due process rights than aliens who present themselves for inspection at the border and are lawfully admitted to United States.

This argument is misguided for a number of reasons. First, it is untenable considering Congress's intent when amending the INA through the IIRIRA. In 1996, Congress passed IIRIRA, 110 Stat. 3009, at *3009-546, which amended INA § 101(a)(13) to replace the term "entry" as previously used in the INA, and defined as "any coming of an alien into the United States, from a foreign port or place," *see* 8 U.S.C. § 1101(a)(13) (1988 ed.); *Vartelas v. Holder*, --U.S.--, 132 S. Ct. 1479, 1484 (2012), with the terms "admission" and "admitted," defined as the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A); IIRIRA, 110 Stat. 3009, at *3009-546. IIRIRA further amended INA § 212(a)(6)(A) to provide that "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible." 8 U.S.C. § 1182(a)(6)(A)(i). These amendments demonstrate Congress's "inten[tion] to replace certain aspects of the current [as of 1996] 'entry doctrine,' under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a port of entry." H.R. Rep. 104-469(1), at 225 (1996);

see Ali v. USCIS, 2010 U.S. Dist. LEXIS 129968, * 7 (S.D. Fl. Dec. 9, 2010) (unpublished) (noting abrogation of "entry" concept as used by INA pre-IIRIRA and observing that mere physical entry to United States no longer negates inadmissibility). "Hence, the pivotal factor in determining an alien's status will be whether or not the alien has been lawfully admitted," and not, whether the alien is physically present in the United States. *Id.*

Petitioner's 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. 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. *Cf. 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."); *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"); *see also, Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1440 (5th Cir.1993), *amended in part*, 997 F.2d 1122 (a case predating IIRIRA recognizing that "aliens subject to deportation generally are granted greater substantive rights than are excludable aliens"); *accord Cardenas-Perez v. Dobre*, 58 F.App'x 596 (5th Cir. 2003). 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 *Zadyvdas* 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 would present a very different question." *Id*. at 682.

Moreover, 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." 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 aliens making illegal entry may have some constitutional rights, made that observation in the context of a substantive due process challenge to the legality of indefinite detention. 533 U.S. at 682 ("indefinite detention of aliens [who were admitted to the United States] would raise serious constitutional concerns").

However, while "non-admitted aliens" physically present in the United States might retain some substantive due process rights as noted above, they do not retain the same level of

procedural due process available to aliens who have been lawfully admitted or who have lived in the United States for some period of time and developed ties to the community. *See Landon*, 459 U.S. at 32; *Kwong*, 344 U.S. at 597 n.5; *accord Gisbert*, 988 F.2d at 1440 (excludable aliens lack any substantive due process right to avoid detention pending deportation or any procedural due process right to be paroled into, or otherwise admitted, to the United States). As the Supreme Court has explained "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo–Urquidez*, 494 U.S. 259, 271 (1990). For non-admitted aliens lacking such ties, the so-called "entry fiction" applies. That is, although aliens seeking admission into the United States who lack such connections "may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country." *Gisbert*, 988 F.2d at 1440; *accord-AILA*, 18 F. Supp. 2d at 59. The doctrine has been affirmed time and again by the Supreme Court. *See, e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 175 (1993) (discussing entry fiction); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (though present in the United States, excluded alien "was still in theory of law at the boundary line and had gained no foothold in the United States").

The entry fiction applies to all non-admitted aliens, both at the border, and those who have made illegal entry and are apprehended shortly thereafter, like Petitioner, such that *Knauff* continues to apply. Although an alien may be "physically present in the United States," absent actual lawful admission into the United States or proof of prolonged ties to the community, such

an alien is "legally considered to be detained at the border and hence as never having effected entry into this country."[8] *Gisbert*, 988 F.2d at 1440.

Therefore, even assuming Petitioner crossed the border—albeit it illegally and without presenting himself for inspection as required by law—he is 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 achieve through habeas. *Knauff*, 338 U.S. at 543-44; *de Rincon*, 539 F.3d at 1141-42; *Li*, 259 F.3d at 1136. 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)

[8] It is for this reason that the fact Petitioner alleges that he was apprehended within the United States two days after illegaly entering is irrelevant. As an initial matter, Congress has granted the Attorney General, and by extension CBP, the authority to apply expedited removal to illegal entrants apprehended within 100 miles of the border who cannot show they have been physically present in the United States continuously for the 14-day period immediately preceding the date of their apprehension. *See* 8 U.S.C. § 1225(b)(1)(A)(iii) ("The Attorney General may apply [expedited removal] to any or all aliens" "who ha[ve] not been admitted or paroled into the United States, and who ha[ve] not affirmatively shown, to the satisfaction of an immigration officer, that alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility"); "Designating Aliens For Expedited Removal," 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004). But more importantly, in light of the case-law governing arriving aliens, the entry fiction, and the development of ties to the United States sufficient to provide greater procedural due process protections to otherwise illegal aliens, applying expedited removal to petitioner is no different than applying expedited removal to an alien physically standing at the border. Both are unadmitted aliens with no legal right to be here and no accrual of time, connection, or equities to the United States to warrant greater protections. *See, e.g.*, *Verdugo–Urquidez*, 494 U.S. 259, 271; *AILA*, 18 F. Supp. 2d at 59. To hold otherwise is to ignore "the perverse incentive that would otherwise exist for aliens to evade immigration checkpoints altogether and thereby acquire constitutional protections," *Kwai Fun Wong*, 373 F.3d at 973, which Congress expressly sought to avoid in exercising its plenary power over admissions and implementing an expedited removal system. *See AILA*, 18 F. Supp. 2d at 41; H.R. Rep. No. 104-469, pt. 1, at 107, 117-18, 158 Petitioner therefore remains both an unadmitted and arriving alien and lacks Suspension Clause rights in relation to her admission. *See Li*, 259 F.3d at 1135-36; *see also Knauff*, 338 U.S. at 543.

and (e) is all the process Petitioner is due. Accordingly, any Suspension Clause claim fails on the merits and must be dismissed.[9]

To the extent Petitioner suggests that some independent due process right to apply for asylum or to remain in this country if he faces persecution in his home country, that claim is foreclosed by the entry doctrine. *See, e.g.*, *Ukrainian-American Bar Ass'n v. Baker*, 893 F.2d 1374, 1382 (D.C. Cir. 1990) (noting that asylum applicant who is "an alien seeking initial admission to the United States" "requests a privilege and has no constitutional rights regarding his application"); *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); *AILA*, 18 F. Supp. 2d at 59 (collecting cases); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) (stating that "an alien who satisfies the applicable standard under § 208(a)13 does not have a right to remain in the United States; he or she is simply eligible for asylum, if the Attorney General, in

[9] Out of an abundance of caution, Respondents note, that even assuming that *Boumediene* might apply to Petitioner, notwithstanding that he is not indefinitely detained physically and not challenging his physical detention, and notwithstanding the fact that the Supreme Court in *Boumediene* purported to establish a test for determining the extraterritorial reach of the Suspension Clause, *Boumediene* does not help Petitioner. 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 the enemy combatants at Guantanamo, the Court suggested the application of a "functional approach" rather than a bright-line rule. *Id*. The Government contends that this test is irrelevant in the expedited removal context, but even were this court to rule otherwise, under this functional approach, aliens apprehended shortly after crossing the border and who have 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 ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country"). Simply put, a functional analysis based on objective factors and practical concerns does vest due process rights in aliens who surreptitiously enter the country, have no ties to the country, and who do not present themselves for inspection and ultimately lawful admission to the United States. *Cf. Kwai Fun Wong*, 373 F.3d at 972 (noting "perverse incentive that would otherwise exist for aliens to evade immigration checkpoints altogether and thereby acquire constitutional protections).

his discretion, chooses to grant it."); *cf. Garcia v. INS*, 7 F.3d 1320, 1326 (7th Cir. 1993) (rejecting argument that aliens have liberty interest in receiving relief through asylum because, among other things, the asylum provision "grants the Attorney General discretionary power to decide whether any alien shall receive asylum; asylum, therefore, is not a right"). Moreover as the Fifth Circuit "has repeatedly held," "discretionary relief from removal . . . is not a liberty or property right that requires due process protection." *Ahmed v. Gonzales*, 447 F.3d 433, 440 (5th Cir.2006); *accord Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir.2004) (stating, in a removal context, that due process claims revolving around an alleged failure to receive discretionary relief are not based upon a constitutionally protected liberty interest); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 219 (5th Cir.2003) (holding that eligibility for discretionary relief from a removal order is not a liberty or property interest warranting due process protection); *cf. Gisbert*, 988 F.2d at 1443 (no liberty interest in relief that is "contingent upon the Attorney General's discretion").

CONCLUSION

For the foregoing reasons, the Court should conclude that it lacks jurisdiction over Petitioner's claims, and that even if it retains jurisdiction, Petitioner's Suspension Clause claim fails on the merits.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

s/ Cristina Walker
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