

No. 19-161

**In the
Supreme Court of the United States**

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Petitioners,

v.

VIJAYAKUMAR THURAISSIGIAM,
Respondent.

*On Writ of Certiorari to the
Ninth Circuit Court of Appeals*

**BRIEF FOR AMICI CURIAE THE STATES OF
ARIZONA, ALABAMA, ALASKA, ARKANSAS,
INDIANA, LOUISIANA, NEBRASKA, SOUTH
CAROLINA, SOUTH DAKOTA, AND TEXAS IN
SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE

Amici curiae, the States of Arizona, Alabama, Alaska, Arkansas, Indiana, Louisiana, Nebraska, South Carolina, South Dakota and Texas (“Amici States”) file this brief in support of Petitioners.

The Ninth Circuit’s decision nullifies the critical feature of expedited removal—the ability to expeditiously remove aliens who are clearly inadmissible. Amici States, who are wholly dependent upon the federal government to enforce federal immigration law, have a critical interest in the federal government’s ability to expeditiously remove inadmissible aliens. This ability is vital to keeping both Amici States and federal courts from folding under the burdens generated by the ever-growing immigration crisis. The Court should reverse the Ninth Circuit’s decision.

SUMMARY OF ARGUMENT

There is a humanitarian and national security crisis occurring at the southern border that is worsening by the day. This crisis is fueled by the ever-increasing numbers of inadmissible aliens crossing U.S. borders every day. *See* 84 Fed. Reg. 33,829, 33,831 (July 16, 2019) (“The United States has experienced a dramatic increase in the number of aliens encountered along or near the southern land border with Mexico.”).

At the core of this case is a challenge to “expedited removal,” a measure Congress put in place to alleviate the mounting challenges faced at the border. Through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. 104–208, Congress provided authority to

expeditiously remove certain arriving aliens without the extensive levels of review that are available in other types of removal proceedings—levels of review which often take years to complete. *See* 84 Fed. Reg. 35,409, 35,412 (July 23, 2019) (“[I]mmigration courts nationwide are experiencing a historic backlog of removal cases, and non-detained cases are taking years to complete.”).

The Ninth Circuit’s opinion eliminates a critical aspect of the expedited removal framework: the limitation on habeas review. *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097, 1119 (9th Cir. 2019). By holding that, as applied to *Thuraissigiam*, the limitation on habeas review under 8 U.S.C. § 1252(e)(2) violates the Suspension Clause, “expedited” proceedings are no longer expedited, effectively gutting the expedited removal framework.

This decision significantly impacts States, which depend upon the federal government to enforce federal immigration law. States bear “many of the consequences of unlawful immigration.” *Arizona v. United States*, 567 U.S. 387, 397 (2012). Eliminating expedited removal will result in States having to shoulder even greater costs. It will also impact the ability of individuals to obtain timely relief in federal courts, which are already suffering from an unprecedented backlog of cases related to immigration.

The Ninth Circuit’s decision threatens to eviscerate the expedited removal process by undercutting the entire premise of its existence. The Court should reverse.

ARGUMENT**I. EXPEDITED REMOVAL PLAYS AN IMPORTANT ROLE IN ADDRESSING THE GROWING IMMIGRATION CRISIS****A. The Ninth Circuit's Decision Upends A Key Aspect Of Expedited Removal**

By statute, the Secretary of the Department of Homeland Security can apply a process, commonly referred to as “expedited removal,” to arriving aliens who lack proper documentation or who misrepresent a material fact in the admission process. *See* 8 U.S.C. § 1225(b)(1)(A)(i); *see also* §§ 1182(a)(6)(C), (a)(7). This process can also apply to aliens who have “not been admitted or paroled into the United States, and who ha[ve] not affirmatively shown ... [physical presence] in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility[.]” § 1225(b)(1)(A)(iii).

Expedited removal, however, contains a limited exception for aliens who indicate either “an intention to apply for asylum” or “a fear of persecution.” § 1225(b)(1)(A)(ii). When this occurs, the alien’s asylum claims are subject to a multi-level review process, which includes review by an asylum officer, as well as confirmation of the asylum officer’s findings by a supervisory asylum officer. § 1225(b)(1)(A)(i)-(ii); 8 C.F.R. § 208.30(e)(7). If the alien is found to have “a credible fear of persecution,” the alien is taken out of the expedited removal process and placed into full removal proceedings. *See* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). If the asylum officers find no “credible fear of persecution,” the alien is entitled to “prompt review” of that

determination by an immigration judge. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.30(g)(1).

But, after an immigration judge affirms what two other asylum officers have concluded, Congress made clear that “no court shall have jurisdiction to review” a determination to place an individual into expedited removal. § 1252(a)(2)(A). After this process is concluded, habeas review is only available to consider (1) whether the petitioner is an alien, (2) whether the petitioner was ordered removed through expedited removal proceedings, and (3) whether the petitioner can prove he or she is a Legal Permanent Resident, a refugee, or has been granted asylum. § 1252(e)(2).

The Ninth Circuit dismantled these provisions. The panel held that the habeas restriction in § 1252(e)(2) violates the Suspension Clause of the U.S. Constitution. But, as this case illustrates, granting habeas review to aliens subject to expedited removal significantly delays their removal, undermining the entire purpose of expedited removal.

B. Expedited Removal Is A Measured Response To Address The Mass Influx Of Inadmissible Aliens

Expedited removal has proven essential to the continuation of a functioning border. In 1996, Congress enacted the expedited removal framework to address an urgent need. At that time, Congress expressed growing concern with the increasing number of illegal entries. *See* S. Rep. No. 104-249, at 3 (1996) (bill “needed to address the high current levels of illegal immigration”).

Since then, expedited removals have accounted for a significant portion of all aliens removed during any given year. For example, in 2016, the Department of Homeland Security (“DHS”) removed 140,709 aliens through expedited removal, accounting for ~41% of removals that year; and in 2017, DHS removed 103,704 aliens through expedited removal, accounting for ~35% of removals that year.¹

Further illustrating the need for expedited removal, DHS has expanded the classes of aliens subject to expedited removal. While Congress provided authority under § 1225(b)(1)(A)(iii) to use expedited removal proceedings when an alien could not show that he or she was “physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility,” expedited removal was not initially applied to the full extent allowed by the statute. *See, e.g.*, 62 Fed. Reg. 10,312 (Mar. 6, 1997) (defining “arriving aliens” to include aliens arriving at a port-of-entry and aliens interdicted at sea). Nevertheless, the right was reserved “to apply the expedited removal procedures to additional classes of aliens within the limits set by the statute, if, in the Commissioner’s discretion, such action is operationally warranted.” 62 Fed. Reg. at 10,314. Because of the unprecedented influx of illegal entries, DHS has increasingly introduced rules permitting expedited removal to the full extent of the statute. *See, e.g.*, 69 Fed. Reg. 48,877 (Aug. 11, 2004)

¹ *See* U.S. Dep’t of Homeland Sec., Office of Immigration Statistics, Immigration Enforcement Actions: 2017 at 9, 12 tbl.6 (Mar. 2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf.

(expanding expedited removal to include aliens encountered “within 100 air miles” of the border who have not shown physical presence in the U.S. for at least fourteen days); *see also* 84 Fed. Reg. 35,409 (July 23, 2019) (exercising authority to the full extent of the statute).

Still, even with expedited removal broadened and intact, the federal government lacks sufficient resources to detain the surge of immigrants illegally entering the U.S. through the southern border. 84 Fed. Reg. at 35,413 (“U.S. Border Patrol and ICE lack sufficient detention capacity and resources to detain the vast majority of aliens DHS apprehends along the southern border.”); *see also* U.S. Dep’t of Homeland Sec., Office of Immigration Statistics, *Immigration Enforcement Actions: 2017* at 9 (Mar. 2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf (320,000 aliens booked into detention during 2017).

Over the last ten years, the number of asylum claims have spiked 1,883%. 84 Fed. Reg. at 33,838. Further complicating the dramatic increase in asylum claims is the demographic shift in the alien population crossing the southern border toward “predominantly Central American family units and unaccompanied alien minors.” *Id.* It is difficult to care for, process, and “expeditiously repatriate [these] family units and unaccompanied alien children.” *Id.*

The volume of asylum seekers arriving at the southern border “is simply unsustainable” given federal resources that “are stretched too thin.”²

² *The Secure and Protect Act: a Legislative Fix to the Crisis at the Southwest Border: Hearing on S. 1494 Before the S. Comm.*

“DHS facilities are overflowing, agents and officers are stretched too thin, and the magnitude of arriving and detained aliens has increased the risk of life-threatening incidents.”³ For example, DHS lacks sufficient beds and bed space, medical teams, vehicles and transportation workers, and other personnel required to provide humanitarian and operational assistance, such as conducting welfare checks, preparing meals, and accounting for personal property. Nielsen Letter, *supra* at 2–3. The flood of asylum applications—less than 15% of which are granted—also occupies a large portion of limited docket time and absorbs scarce government resources, exacerbating the backlog of over 900,000 pending immigration court cases. 84 Fed. Reg. at 33,839. As then-Secretary of Homeland Security Kirstjen Nielsen explained, “We are grappling with a humanitarian and security catastrophe that is worsening by the day, and the Department has run out of capacity[.]” Nielsen Letter, *supra* at 1.

This crisis has “eroded the integrity of our borders.” 84 Fed. Reg. at 33,840. The overwhelming number of aliens illegally entering the United States and invoking asylum diverts “an ever-increasing amount” of DHS resources that are necessary to “surveil, apprehend, screen, and process the aliens.” *Id.* at 33,839. This in turn has resulted in “a massive

On the Judiciary, 116th Cong. (2019) (written testimony of Acting Secretary U.S. Department of Homeland Security Kevin McAleenan) (hereinafter, “McAleenan Testimony”) at 1–2.

³ Letter from Kirstjen Nielsen, Secretary of Homeland Security, and Mike Rogers, Ranking Member of the House Committee on Homeland Security (Mar. 28, 2019) (hereinafter, “Nielsen Letter”); McAleenan Testimony, *supra* at 2 (accord).

increase in illegal crossings of our borders.” Homeland Security Advisory Council, Final Emergency Interim Report CBP Families and Children Care Panel Subcommittee at 1 (Apr. 16, 2019) (hereinafter, “Advisory Council”). Because DHS resources are being absorbed dealing with aliens invoking asylum, DHS “is not able to effectively manage its other border security missions—apprehending migrants illegally seeking to evade detection, including criminal aliens and those who pose a public safety or national security threat, uncovering instances of trafficking, fraudulent family relationships and other criminal activity among this population, and monitoring the border for drug smuggling and other contraband.” *Id.*

Simply stated, the magnitude of aliens seeking asylum along the southern border has created a humanitarian and security crisis that is preventing DHS from “properly protect[ing] America’s territory, enforc[ing] its immigration laws, and keep[ing] criminals from exploiting our system.” McAleenan Testimony, *supra* at 1; *see also* Nielsen Letter, *supra* at 1 (DHS is “increasingly unable” to take operational control of the southern border “given the emergency situation.”). Granting asylum seekers—who have failed to establish even preliminary eligibility for asylum—the unrestricted ability to seek habeas review effectively eliminates the ability to expeditiously remove such aliens and will threaten the stability of an already strained immigration system.

II. ELIMINATING EXPEDITED REMOVAL WILL SIGNIFICANTLY BURDEN STATES

A. States Expend Extraordinary Resources In Addressing The Immigration Crisis

It is well-established that the federal government “has broad, undoubted power over the subject of immigration and the status of aliens.” *Arizona*, 567 U.S. at 394. Because of this, States depend on the federal government both to formulate and to enforce wise immigration policy. *See id.* at 403. As such, the federal government’s ability to perform this responsibility is critical to States, which bear “many of the consequences of unlawful immigration.” *See id.* at 397.

Even with expedited removal in place, States are shouldering significant burdens because of the already depleted federal resources. *See* Advisory Council *supra* at 1, 7. These burdens “must not be underestimated.” *Arizona*, 567 U.S. at 398. A few illustrations are provided below:

- Lacking facilities, DHS has reverted to busing and dropping off asylum seekers at local bus stations or “already overwhelmed non-profit shelters.” Advisory Council, *supra* at 1. Indeed, DHS has affirmatively bused aliens apprehended outside of Arizona into Arizona to utilize resources within the State.⁴

⁴ Rafael Carranza, *Migrant Families Apprehended in El Paso Were Transported, Released in Tucson*, *azcentral.com* (Mar. 7, 2019) <https://www.azcentral.com/story/news/politics/border-issues/2019/03/07/migrant-families-apprehended-us-mexico-border-being-released-tucson-asylum-seekers/2995413002/>.

- Lacking medical resources, DHS depends on “community emergency rooms and other medical facilities, as well as local emergency transport systems,” to provide necessary medical treatment to asylum seekers. Advisory Council, *supra* at 7.

- Lacking resources, DHS has released aliens into communities “with unknown vaccination status and without a standard medical examination for communicable diseases of public health concern,” creating significant public health risks. McAleenan Testimony, *supra* at 3.

- It is believed that, lacking resources, DHS has released aliens into local communities without conducting criminal background checks, exposing those local communities to heightened risks of crime and forcing expenditure of resources to mitigate public safety concerns.

- DHS’s inability to maintain operational control of the southern border has resulted in degradation of state environmental resources. For example, the Arizona Department of Environmental Quality estimates that over 2,000 tons of trash are discarded at the Arizona border every year.⁵

- DHS’s inability to maintain operational control of the southern border has resulted in states having to expend significant resources to protect their citizens and enforce their laws against criminal elements. For example, according to a recent survey, “nearly 3% of illegal immigrants in Arizona end up in state prison or jail during the

⁵ Arizona Department of Environmental Quality, *Waste* (2016), <https://legacy.azdeq.gov/obep/waste.html>.

course of a year—four times the rate of U.S. citizens and legal residents.”⁶

- The diversion of resources caused by the immigration crisis has contributed to a dramatic spike in illegal drugs entering the U.S. through the southern border. Deputy Attorney General Jeffrey A. Rosen Delivers Remarks to the National Sheriffs’ Association (June 17, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-remarks-national-sheriffs-association> (“[T]he crisis at the [southern] border is a driver to the drug crisis in our communities.”). For example, between FY 2017 and FY 2018, there was a 38% increase in methamphetamines, a 22% increase in heroin, and a 73% increase in fentanyl at the southern border. Congressional Border Security Briefing, White House, A Border Security and Humanitarian Crisis (Jan. 1, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/01/Border-Briefing.pdf>. These drugs destroy lives, tear apart families, and have negative effects that ripple through communities across the nation.

States expend large amounts of resources on illegal immigration every year.⁷ Studies have shown that “state and local governments spend more on

⁶ Stephen Dinan, *Study Finds High Rates of Prison, Jail for Illegals*, A.P. News (Feb. 5, 2019), <https://www.apnews.com/b78a2a3c7b9d28c765ca3542e4581382>.

⁷ In 2000, counties “that share a border with Mexico incurred almost \$190 million” in uncompensated health care costs for illegal aliens. U.S. Congressional Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments*, at 8 (Dec. 2007). Law enforcement activities related to illegal immigration cost counties bordering Mexico a combined total of \$108 million in 1999. *Id.* at 9.

unauthorized immigrants than they collect in revenues from that population.” U.S. Congressional Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments*, at 9 (Dec. 2007). “[E]ven though unauthorized immigrants pay taxes and other fees to state and local jurisdictions, the resulting revenues offset only a portion of the costs incurred by those jurisdictions for providing services related to education, healthcare, and law enforcement.” *Id.* at 3. State resources are not unlimited and, by undercutting a critical aspect of expedited removal, the Ninth Circuit’s decision threatens to compound the burdens of illegal immigration born by states.

B. Granting Federal Habeas Review To Rejected Asylum Claimants Would Further Clog Already-Congested Courts

The Ninth Circuit’s decision also undermines the ability of individuals to have timely access to justice in federal courts. Cases related to immigration already occupy large portions of the limited docket time available in federal courts. For example, in a recent 12-month period, appeals from the Board of Immigration Appeals to the circuit courts constituted 86 percent of all administrative agency appeals, “the largest category of administrative agency appeals filed in each circuit,” excluding the D.C. Circuit. Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2018*, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018>. And in that same time period, “[f]ilings for defendants charged with immigration crimes ... constituted 29 percent of all criminal defendant filings ... [and] [s]eventy-seven percent of [these]

filings occurred in the five southwestern border districts.” *Id.*⁸

The Ninth Circuit’s current caseload is a clear example of the problems faced by federal courts as the number of cases filed continues to increase. Currently, the amount of cases filed in the Ninth Circuit “exceeds those of the First, Third, Seventh, Tenth, and D.C. Circuits, combined[,]” and its backlog “is almost five times larger than the average circuit’s.” *See The Case for Restructuring the Ninth Circuit: An Inevitable Response to an Unavoidable Problem: Hearing on Oversight of the Structure of the Federal Courts Before the S. Comm. on the Judiciary*, 115th Cong. (July 31, 2018) (written testimony of U.S. Cir. Judge for the Ninth Cir. Diarmuid F. O’Scannlain) (hereinafter, “O’Scannlain Testimony”) at 7. Even though the Ninth Circuit is staffed with more judges than any other circuit, it still takes 30% longer to dispose of appeals than the average of all other circuits. O’Scannlain Testimony at Ex. 15. As the number of cases filed in federal courts continues to grow, “the Ninth Circuit’s problems will not go away; rather they [will] continue to get worse.” *Id.* at 18.

And since the Ninth Circuit issued its decision in the case below, expedited removal cases have already been entering district courts. *See, e.g., Kaur v. Barr*, No. 19-cv-05306-PHX-MTL, 2019 WL 4974425 (D. Ariz. Oct. 8, 2019) (order granting temporary stay of removal in light of *Thuraissigiam*); *Singh v. Barr*,

⁸ Furthermore, recent data shows that immigration courts are experiencing a backlog of well over 900,000 pending cases. *See* 84 Fed. Reg. at 33,839.

No. 19-cv-05641-PHX-MTL, 2019 WL 6219315 (D. Ariz. Nov. 21, 2019) (same); *see also, e.g., Singh v. McAleenan*, No. 5:19-cv-02154-AB-SHK, 2019 WL 6053007 (C.D. Cal. Nov. 15, 2019) (denying writ of habeas, but recognizing jurisdiction over petitioner's claim in light of *Thuraissigiam*); *Funes Suazo v. McAleenan*, No. 19-cv-1882-LAB, 2019 WL 4849188 (S.D. Cal. Oct. 1, 2019) (same).

Allowing asylum seekers—who have already failed three levels of review by DHS—to petition for habeas review in federal courts will cause a new wave of litigation in federal courts. Doing so not only delays the removal of aliens, it will further exacerbate federal caseloads and the staggering number of backlogged cases. This undermines the ability of individuals within states to have timely access to justice in federal courts.

* * *

The habeas restriction in § 1252(e)(2) is a critical component of the expedited removal framework enacted by Congress. Eliminating this provision nullifies the critical feature of expedited removal: the ability to expeditiously remove aliens who are clearly inadmissible. Doing so threatens the federal government's ability to maintain control over the border and imposes significant burdens on the States.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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