IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

I.M., *Petitioner/Plaintiff,* v. U.S. CUSTOMS & BORDER PROTECTION; U.S. DEPARTMENT OF HOMELAND SECURITY; ALEJANDRO MAYORKAS, Secretary of the Department of Homeland Security, in his official capacity; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs & Border Protection, in his official capacity;[1] TIMOTHY J. KLEIN, Customs & Border Protection Officer, in his official capacity; Customs & Border Protection Officer BOCK, in his official capacity; and JOSEPH CHAVEZ, Chief Customs & Border Protection Officer, in his official capacity, *Respondents/Defendants.*	Case No. 20-cv-03576-DLF

OPPOSITION TO RESPONDENTS/DEFENDANTS' MOTION TO DISMISS

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[1] Under Rule 25(d) of the Federal Rules of Civil Procedure, Mr. Mayorkas is automatically substituted as a party for former Acting Secretary of Homeland Security Chad Wolf, and Mr. Miller is automatically substituted for former Acting Commissioner of U.S. Customs & Border Protection Mark Morgan.

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This case concerns a blatant violation of the Appointments Clause. Unappointed employees of U.S. Customs and Border Protection ("CBP") purported to exercise one of the most significant sovereign authorities that the United States possesses: the power to exclude an individual from the country. These unappointed employees purported to adjudicate the facts of Petitioner/Plaintiff I.M.'s case, determine his rights, issue a final and largely unreviewable order against him, bar him from the country on penalty of felony prosecution, and strip him of the visa that had been issued to him by a lawfully appointed Officer of the Foreign Service.

Respondents/Defendants (the "Government") argue that, even assuming the truth of all these facts, no court can review their compliance with the Appointments Clause. This effort to render the Appointments Clause—one of the "significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997)—a dead letter is meritless and should be rejected. Contrary to the Government's lead argument, I.M. does not challenge the constitutionality of the expedited removal statute; rather, he challenges "whether . . . an order in fact was issued" against him. 8 U.S.C. § 1252(e)(5*)*; *see Dugdale v. CBP*, 88 F. Supp. 3d 1, 6 (D.D.C. 2015) ("[A] determination of whether a removal order 'in fact was issued' fairly encompasses a claim that the order was not lawfully issued due to some procedural defect."), *aff'd sub nom. Dugdale v. Lynch*, 672 F. App'x 35 (D.C. Cir. 2016). I.M. does not "concede[] . . . that he was issued an order of expedited removal," Mot. to Dismiss 15 ("Mot."), ECF No. 23, as the Government would have it; the entire gravamen of his claim is that no order ever issued, because the order that Respondents Bock and Chavez purported to issue was a nullity.

Thus, this Court has jurisdiction under 8 U.S.C. § 1252(e)(2)(B), which allows courts to review whether a "petitioner was ordered removed." Neither of the Government's arguments

defeats the Court's jurisdiction. First, Section 1252(e)(2) does not contain any requirement that petitioners be "in custody," as numerous courts—and even the Government itself—have previously acknowledged. Second, Section 1252(e)(3) only governs challenges to the constitutionality or validity of the expedited removal statute and its implementing regulations, which I.M. is not challenging.

Moreover, because the putative removal order was void *ab initio*, Section 1252(a) does not strip the courts of their ordinary federal question jurisdiction. Nor does the Government make any attempt to explain why Section 1252 would in any way divest the Court of jurisdiction over the purported visa revocation, which is a separate action that occurred under regulations completely independent of the expedited removal statute.

Finally, the Government's remedial arguments are misplaced for much the same reason as their jurisdictional arguments. Because no order of removal was issued in this case, Section 1252's remedial limitations do not apply. Even if they did, the Government misstates their scope and its argument is premature at the motion to dismiss stage.

BACKGROUND

I. FACTUAL BACKGROUND

An appointed Foreign Service Officer granted I.M. a two-year B1/B2 business/tourism visa on August 23, 2019. Pet. ¶ 12, ECF No. 7. On October 29, 2020, I.M. flew to the United States pursuant to that visa to visit a U.S. citizen mentor who had been helping him develop techniques in sustainable agriculture for use in his home country. *Id.* ¶¶ 26-28. Upon I.M.'s arrival in the United States, Respondent Timothy J. Klein, an unappointed CBP employee, purported to determine that I.M. was "not in possession of a . . . valid entry document required by [the Immigration and Nationality Act and/or] . . . a valid unexpired passport," notwithstanding

his possession of both a valid unexpired nonimmigrant visa and a valid unexpired passport. *Id.* ¶¶ 31-32; Pet. Ex. 2, ECF No. 7-3. Respondent Klein further informed I.M. that he would be barred from entering the United States for five years and his visa would be cancelled. Pet. ¶ 33; I.M. Decl., Pet. Ex. 1 at 6, ECF No. 7-2. Respondent Klein, however, did not purport to issue or serve I.M. with a Form I-860 expedited removal order. Suppl. Decl. of I.M. ¶ 3 ("I.M. Suppl. Decl."), attached hereto as Ex. A.

For the next month, I.M. was detained by U.S. Immigration and Customs Enforcement ("ICE"), a division of Respondent DHS. *Id.* ¶ 4. I.M. and his counsel repeatedly requested that ICE or CBP provide him with a final order of removal and/or his canceled visa so that he could seek relief while still in DHS's physical custody. *Id.* ¶¶ 8-10; *see* Decl. of Mark Fleming ¶¶ 6-13 ("Fleming Decl."), attached hereto as Ex. B. The Government refused to provide either document until November 27, 2020, when Respondent Joseph Chavez, an unappointed CBP employee, served a purported Order of Expedited Removal on I.M. (signed by Chavez and Respondent Bock, another unappointed CBP employee) as they instructed I.M. to board the airplane removing him to his home country. I.M. Suppl. Decl. ¶ 11; *see* Fleming Decl. ¶¶ 8-14. That was the first time I.M. received a purported order of removal, and the first time he was told who was purporting to exercise the United States' sovereign authority to conclusively adjudicate his rights and order him removed from the country. *See* Fleming Decl. ¶ 14. Even then, I.M. was not given his passport and canceled visa until he disembarked the airplane in his home country. I.M. Suppl. Decl. ¶ 12.

II. PROCEDURAL BACKGROUND

I.M. filed this lawsuit less than two weeks later, on December 7, 2020. *See* ECF No. 1. His suit combined two claims: (1) a claim for a writ of habeas corpus and/or invalidation of the

purported order of removal because he was never ordered removed by an appointed Officer, brought under 8 U.S.C. § 1252(e)(2) and directly under the Appointments Clause; and (2) a claim for the revocation of his visa to be set aside under the Administrative Procedure Act ("APA"), both because it was not authorized by 22 C.F.R. § 41.122(e) and therefore was in excess of statutory authority and not in accordance with law, and because it was issued in violation of the Appointments Clause. Pet. ¶¶ 90-100.[2]

On February 26, 2021, the Government moved to dismiss the Petition. The Government did not dispute that a determination of inadmissibility, the issuance of an order of removal, and the revocation of a visa are all significant authorities of the United States that can only be exercised by Officers appointed under the Appointments Clause. *See id.* ¶¶ 70-78. Nor did it dispute that Respondents Klein, Bock, and Chavez are all unappointed employees, rather than appointed Officers. *See id.* ¶¶ 45-51, 79-83. Instead, they argued solely that, accepting those facts as true, federal courts lack jurisdiction to review whether an expedited order of removal issued in violation of the Appointments Clause is a nullity, and that the sole remedy if the Court does have jurisdiction is to place the affected individual into removal proceedings under 8 U.S.C. § 1229a.

III. LEGAL STANDARD

When determining whether a court has jurisdiction to review agency action, the analysis begins with the "'well-settled' and 'strong presumption' favor[ing] judicial review of administrative action." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (quoting

[2] Although the Government spends several pages of its Motion to Dismiss arguing that the Court lacks jurisdiction to hear challenges under the APA to final orders of removal, *see* Mot. 18-22, I.M. did not challenge the purported order of removal under the APA. His only APA claim challenges the visa revocation.

McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496, 498 (1991) and *Kucana v. Holder*, 558 U.S. 233, 251 (2010)). Courts thus presume that "it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review." *McNary*, 498 U.S. at 496. When a statutory provision "is reasonably susceptible to divergent interpretation, [courts] adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Guerrero-Lasprilla*, 140 S. Ct. at 1069 (quoting *Kucana*, 558 U.S. at 251). The Supreme Court has explicitly and "'consistently applied' the presumption of reviewability to immigration statutes." *Id.* (quoting *Kucana*, 558 U.S. at 251).

Even when a statute shows a "'fairly discernible' intent to limit jurisdiction," judicial review is only restricted if "the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010) (alteration in original) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). Thus, even in the face of an explicit statutory constraint on judicial review, courts "presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Id.* at 489-90 (quoting *Thunder Basin*, 510 U.S. at 212-13).

The presumption of review is particularly strong where the claims at issue are constitutional. As the D.C. Circuit has explained:

> The Supreme Court has long held that a statutory bar to judicial review precludes review of constitutional claims only if there is "clear and convincing" evidence that the Congress so intended. Our precedent makes clear that the "particularly rigorous" clear-and-convincing standard applies to both facial and as-applied constitutional claims. . . . [T]he Supreme Court and this Court have required "the clearest evocation of congressional intent to proscribe judicial review of constitutional claims" in light of the "constitutional dangers inherent in denying a

> forum in which to argue that government action has injured interests that are protected by the Constitution."

Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 758 F.3d 296, 308-09 (D.C. Cir. 2014) (citations omitted).

ARGUMENT

I. THE COURT HAS JURISDICTION OVER COUNT ONE

This Court has jurisdiction to review I.M.'s first claim under 8 U.S.C. § 1252(e)(2) and 28 U.S.C. § 1331. The Government's arguments to the contrary are sweeping in nature: that no court can review the constitutional authority of a person purporting to issue an order of expedited removal, and that DHS can evade judicial review of expedited removal orders by refusing to issue them until the moment a petitioner is released from custody. These broad arguments are wrong as a matter of statutory and constitutional interpretation, and have troubling consequences for both the structural integrity of the separation of powers and the ability of noncitizens and citizens alike to obtain relief from unlawful orders. Neither should be accepted.

A. This Court Has Jurisdiction over Count One Under 8 U.S.C. § 1252(e)(2)

1. 8 U.S.C. § 1252(e)(2) Provides Jurisdiction over Count One

I.M.'s central argument is that the removal order that Respondents Bock and Chavez purported to issue was "a nullity" and that I.M. "therefore has not been ordered removed under section 1225(b)(1)." Pet. ¶¶ 85-86. As explained in the Petition, an exercise of significant authority purportedly undertaken by officials who "had not been appointed in accordance with the dictates of the Appointments Clause" is "not valid *de facto*." *Ryder v. United States*, 515 U.S. 177, 179 (1995); *see also Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013) (order

issued by personnel not constitutionally appointed is "void *ab initio*"), *aff'd*, 573 U.S. 513 (2014); Pet. ¶¶ 41-44.[3]

Under the plain language of Section 1252(e)(2), the Court has jurisdiction to review this claim. Section 1252(e)(2)(B) provides that courts may review "whether [a] petitioner was ordered removed under [section 1225(b)(1)]." Section 1252(e)(5) further states that courts shall inquire "whether such an order in fact was issued." Those are the precise determinations called for in Count One. I.M. contends that the Constitution prohibits the federal government from exercising significant authority except through appointed Officers; that no appointed Officer issued the purported removal order against him; and that, as a result, the United States has not issued an order against him. *See* Pet. ¶¶ 70-88.

If I.M.'s factual allegations and substantive legal theory are correct—as the Court must assume, given that they are *entirely* undisputed at this stage—then he has not been "ordered removed." 8 U.S.C. § 1252(e)(2)(B). The purported order is "a nullity," *Lee*, 2018 WL 8576604, at *1, that is "void *ab initio*," *Noel Canning*, 705 F.3d at 493, and "not valid *de facto*," *Ryder*, 515 U.S. at 179.

As the Government acknowledges, a court in this District has previously concluded that "a determination of whether a removal order 'in fact was issued' fairly encompasses a claim that the order was not lawfully issued due to some procedural defect." Mot. 16-17 (quoting *Dugdale*, 88 F. Supp. 3d at 6). In *Dugdale*, the alleged defect was that the purported order was "invalid

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[3] *See also, e.g.*, *Risser v. Saul*, No. 18-cv-4758, 2020 WL 354923, at *1 (E.D. Pa. Jan. 17, 2020) ("[I]n finding that Plaintiff's Appointments Clause claim was meritorious, the Court deemed the ALJ's decision a legal nullity because the ALJ lacked the legal authority to decide Plaintiff's case in the first place."); *Lee v. Berryhill*, No. 18-cv-214, 2018 WL 8576604, at *1 (E.D. Va. Dec. 20, 2018) (an action by an employee not properly appointed that imposes a sanction is "a nullity").

because it was not signed by a CBP supervisor," as required by Section 1225's implementing regulations. 88 F. Supp. 3d at 6. In other words, Dugdale claimed that no order was ever issued against him because the proper personnel (as required by regulation) did not issue it—just as I.M. claims that his order was never issued because the proper personnel (as required by the Constitution) did not issue it. For jurisdictional purposes, the claims are indistinguishable; if anything, I.M.'s claim is more clearly cognizable because of its constitutional dimension. *See Ralls Corp.*, 758 F.3d at 308-09 ("[T]he Supreme Court and this Court have required 'the clearest evocation of congressional intent to proscribe judicial review of constitutional claims' in light of the 'constitutional dangers inherent in denying a forum in which to argue that government action has injured interests that are protected by the Constitution.'" (quoting *Ungar v. Smith*, 667 F.2d 188, 193 (D.C. Cir. 1981))).

The Government's only attempt to distinguish *Dugdale* is to argue that "there is no reasonable dispute that the expedited removal order here 'in fact was issued.'" Mot. 17 (quoting 8 U.S.C. § 1252(e)(5)). To the contrary, that is *exactly* what I.M. disputes. I.M.'s claim is precisely what Judge Cooper found present in *Dugdale* and missing in *D.A.M. v. Barr*: "a claim that [the petitioner's] removal order[] w[as], as a matter of law, *not* issued." 486 F. Supp. 3d 404, 419 (D.D.C. 2020)). *See, e.g.*, Pet. ¶ 86 ("I.M. therefore has not been ordered removed under section 1225(b)(1)."). The Government's assertion to the contrary does not make it so.

The Government's claim that jurisdiction is lacking because Section 1252(e)(2) precludes review of "whether some *subsequent* determination of a legal defect might have later impacted the order," Mot. 17, is similarly misplaced. Count One does not challenge anything *subsequent* to the order, but rather the purported issuance of the order itself. *See Dugdale*, 88 F. Supp. 3d at 7 (Section 1252(e)(2) allows review of "when, if ever, the order became final").

Finally, the Government's out-of-circuit citations do not aid them. *Thuraissigiam* did not conclude that all "'statutory, regulatory, and constitutional claims' fell beyond the scope of review permitted under § 1252(e)(2)," as the Government suggests. Mot. 18 (quoting *Thuraissigiam v. U.S. DHS*, 917 F.3d 1097, 1102, 1103 (9th Cir. 2019), *rev'd on other grounds*, 140 S. Ct. 1959 (2020)). The "statutory, regulatory, and constitutional" claims in *Thuraissigiam* were that DHS had "deprived [petitioner] 'of a meaningful right to apply for asylum' and other forms of relief," violating the Due Process Clause, the Convention Against Torture, and various statutory and regulatory requirements. *Id.* at 1102. These claims did not have any connection to "whether the petitioner was ordered removed," 8 U.S.C. § 1252(e)(2)(B), and the Ninth Circuit did not suggest that claims that *do* bear on that question—like both I.M.'s and Dugdale's—fall outside the courts' power simply because they have a statutory, regulatory, or constitutional dimension. *Castro v. United States Department of Homeland Security* similarly dealt with "claims regarding the procedural shortcomings of the credible fear determination," which it expressly distinguished from claims that are "at least *arguably* related to the question whether a removal order 'in fact was issued.'" 835 F.3d 422, 433 (3d Cir. 2016).[4] And *Singh v. Barr* is even further afield, as it dealt merely with an argument that the immigration judges reviewing petitioners' credible fear determinations should have granted petitioners' motions to reopen. 982 F.3d 778, 784 (9th Cir. 2020).

2. 8 U.S.C. § 1252(e)(2) Has No Custody Requirement

The Government asserts that I.M. cannot seek relief under Section 1252(e)(2) because he was not "in custody" when he filed his petition. Mot. 11-14. This is wrong as a matter of the text,

[4] The Government also cites *Castro* for the proposition that the analysis applied in *Dugdale* is "an outlier view." Mot. 18 n.7. *Castro* did not reject *Dugdale* or describe it as an outlier, but merely distinguished it. *See Castro*, 835 F.3d at 433.

history, purpose, and practice of Section 1252(e)(2). Nowhere does Section 1252(e)(2) require that the petitioner be "in custody." To the contrary, there was an "in custody" requirement in the habeas provision in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1105a(a)(10) (1994), which Congress eliminated when replacing the provision with Section 1252. Courts have repeatedly recognized that Section 1252(e)(2) lacks a custodial requirement; indeed, even the Government has acknowledged as much in previous cases. The Government's new argument to the contrary is based on cases having nothing to do with Section 1252(e) or expedited removal and ignores the incompatibility between a custody requirement and the intended swiftness of expedited removal. Moreover, the Government willfully refused to provide I.M. with a final order of removal, preventing him from filing while still in custody.

a. This Court's statutory construction "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). The text of Section 1252(e)(2) unambiguously does not require that a noncitizen challenging their expedited removal order be "in custody." While it provides several explicit limitations on the scope and procedure of proceedings to challenge an expedited removal order, it notably does not state that the petitioner must be "in custody."

Despite the absence of any textual custody requirement, the Government asserts that Section 1252(e)(2) silently incorporated the custody requirement from the general habeas statute, 28 U.S.C. § 2241(c). *See, e.g.*, Mot. 2, 11-12. This is a strikingly atextual argument, given that Section 1252 explicitly *prohibits* application of Section 2241 in challenges to expedited removal orders. *See* 8 U.S.C. § 1252(a)(2)(A) ("*Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28*, or any other habeas corpus provision . . . no court shall have jurisdiction to review. . . except as provided in subsection (e) any individual

determination or to entertain any other cause or claim arising from [an expedited removal order]." (emphasis added)). When a statute is silent on an issue, courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. ICE*, 543 U.S. 335, 341 (2005). When a statute has explicitly excluded the statutory source of the requirements the Government advances, the argument is even less credible. Section 1252 cites Section 2241 eight times, and every one of those cross-references *excludes* proceedings under Section 2241. *See* 8 U.S.C. § 1252(a)(2)(A); *id.* § 1252(a)(2)(B); *id.* § 1252(a)(2)(C); *id.* § 1252(a)(4); *id.* § 1252(a)(5); *id.* § 1252(b)(9); *id.* § 1252(g). "If, as the Government supposes, Congress had wanted to borrow" the custody requirement from Section 2241(c), "it could have easily cross-referenced" that requirement, and its decision to do the opposite makes the Government's interpretation "a most unlikely reading." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019).

The exclusion of a custody requirement was no accident. When Congress enacted Section 1252(e)(2) in 1996, it was working from the backdrop of a long history of immigration-specific habeas provisions embedded in the INA to govern challenges to removal orders. Until Section 1252's enactment, habeas review over any removal order was governed by former Section 1105a, which expressly required that the petitioner be "held in custody" and file suit before he or she had "departed from the United States." 8 U.S.C. § 1105a(a)(10), (c) (1994). In 1996, Congress repealed former section 1105a and replaced it with Section 1252. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546, § 306(a)-(b) (in consecutive subsections, enacting Section 1252 (INA § 242) and repealing former Section 1105a). When drafting Section 1252, Congress chose to retain some limitations on judicial review from former Section 1105a, *compare* 8 U.S.C. § 1105a(d) (1994)

with 8 U.S.C. § 1252(e)(2), (e)(5), but notably declined to include the "in custody" and pre-departure filing requirements, *compare* 8 U.S.C. § 1105a(a)(10), (c) (1994) *with* 8 U.S.C. § 1252. *See also Nken v. Holder*, 556 U.S. 418, 424 (2009) ("Congress lifted the ban on adjudication of a petition for review once an alien has departed."). "When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." *See Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) (interpreting a statute in which "Congress removed any mention" of term in question); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (inferring congressional intent from absence of language used in related statutes).

In accord with the statute's plain meaning, courts have consistently declined to read a custody requirement into Section 1252(e)(2). *See Smith v. CBP*, 741 F.3d 1016, 1018 (9th Cir. 2014) (even though petitioner was never in custody, court has "jurisdiction under the limited review provisions of 8 U.S.C. § 1252(e)(2) to consider whether [petitioner] was 'ordered removed' under the expedited removal statute"); *Li v. Eddy*, 259 F.3d 1132, 1135 (9th Cir. 2001) ("[T]here is no 'in custody' requirement for the limited review provisions of section 1252(e)."), *vacated on other grounds*, 324 F.3d 1109 (9th Cir. 2003); *Dugdale*, 88 F. Supp. 3d at 3-4, 6-8 (finding jurisdiction over petitioner's 1252(e)(2) petition where petitioner was not in custody and had received discretionary permission to enter the country); *cf. Dugdale v. CBP*, 300 F. Supp. 3d 276, 278 (D.D.C. 2018) (stating that petitioner "cannot bring a habeas petition under § 2241" because he was not in custody, then proceeding to deny claims brought under Section 1252(e)(2) on unrelated grounds), *aff'd*, 2019 WL 2157423 (D.C. Cir. May 1, 2019).

The two cases the Government cites are wholly inapposite. *See* Mot. 13. Neither case involved expedited removal orders or petitions brought under Section 1252(e)(2). *See Leal*

Santos v. Gonzales, 495 F. Supp. 2d 180 (D. Mass. 2007), *aff'd sub nom. Leal Santos v. Mukasey*, 516 F.3d 1 (1st Cir. 2008); *Sadhvani v. Chertoff*, 460 F. Supp. 2d 114 (D.D.C. 2006), *aff'd*, 279 F. App'x 9 (D.C. Cir. 2008). *Sadhvani* does not even mention Section 1252(e)(2), and *Leal Santos* makes just a passing reference to it. 495 F. Supp. 2d at 183. The Government is thus flatly wrong to say that these cases "recognized that [courts] lack jurisdiction to review § 1252(e)(2) claims brought by noncitizens after being released from custody." Mot. 13.

The Government's position is even harder to credit given that it has long "agree[d] there is no 'in custody' requirement for the limited review provisions of section 1252(e)." *Li*, 259 F.3d at 1135; *see also Smith*, 741 F.3d at 1020 n. 3 (observing that the Government argued at the district court that there was no "in custody" requirement under Section 1252(e)(2)). When it has supported its arguments to defeat jurisdiction, the Government has taken the position that there is no "in custody" requirement. *See, e.g.*, Resp. to Pet'r's Objections to the Magistrate's R.&R. at 12 n.7, *Smith v. CBP*, No. 10-cv-2036 (W.D. Wash. May 5, 2011), Dkt. No. 26, attached hereto as Ex. C ("As the court in *Li* observed, 'there is no "in custody" requirement for the limited review provisions of section 1252(e).'"); Opp'n to Pet'r's Mot. for Summ. J. 10 n.8, *id.*, Dkt. No. 22, attached hereto as Ex. D ("More importantly, the 'in custody' analysis applied to habeas jurisdiction under [2]8 U.S.C. § 2241 does not apply to habeas cases challenging expedited removal.");[5] *cf.* Reply Br. for the Pet'rs, *DHS v. Thuraissigiam*, No. 19-161, 2020 WL 833097, at *10 (U.S. Feb. 14, 2020) ("The question here is not whether respondent was 'in custody' for

[5] The Government acknowledges *Smith* in a footnote, asserting that the "in custody" issue was "not briefed in that case." Mot. 13 n.5. This phrasing is, at best, misleading: although the Government may have been silent on the issue in its appellate briefing, it repeatedly briefed the issue before the district court and, as the citations above show, acknowledged that Section 1252(e)(2) does not have an "in custody" requirement.

purposes of filing a habeas petition under the general habeas statute, 28 U.S.C. 2241(c)(1); Congress has withdrawn that statutory authorization, 8 U.S.C. 1252(e)(2) and (5).").

b. Even if the text and history of Section 1252(e)(2) did not unambiguously compel rejection of the Government's argument, its purpose and practice would. Congress's express purpose in enacting Section 1225(b) was to provide for *expedited* removal. Individuals who, like I.M., arrived at a port of entry must be "removed immediately" if practicable. 8 U.S.C. § 1231(c)(1). The Government's policies recognize this goal of expeditious deportation. As CBP's Inspector Field Manual instructs, individuals subject to final expedited removal orders should be "promptly removed." CBP Inspector's Field Manual § 17.15 (b)(14), https://bit.ly/3f6FDj2. When an individual expresses a fear of persecution if removed, as I.M. did, CBP withholds a final expedited removal order until the individual's credible fear determination has been fully adjudicated. *See id.* § 17.15 (b)(8), (d). The time that an individual is in physical custody *and* subject to a final order of removal is, by design, fleeting. It is thus typically impossible to seek legal relief after execution of an order but before removal.[6]

I.M.'s removal illustrates the practical impossibility of an "in custody" requirement under Section 1252(e)(2). After an immigration judge affirmed his negative credible fear determination on November 19, 2020, I.M. received a copy of an unsigned Form I-860, the expedited removal order form. I.M. Suppl. Decl. ¶ 7; *See* Pet. Ex. 2, ECF No. 7-3. Because this order had not been signed by any immigration officer or supervisor, it was not a final order of removal. *See* 8 C.F.R.

[6] The Government's argument is especially troubling when one considers the effect on U.S. citizens or lawful permanent residents ("LPRs"). Section 1252(e)(2)(A) is the sole means by which an individual can seek judicial review of an expedited removal order on the basis that he or she is not in fact an alien. If the Government were correct, then it could deport U.S. citizens and LPRs without any judicial recourse so long as it moved swiftly enough.

§ 235.3(b)(7). As such, it could not yet have been challenged under Section 1252(e)(2)(B).[7] Over the next several days, both I.M. and his counsel diligently but unsuccessfully sought a final removal order from the Government, precisely so I.M. could initiate this challenge. I.M. submitted four requests to ICE for a completed expedited removal order, yet he never received one. I.M. Suppl. Decl. ¶¶ 8-10. Simultaneously, I.M.'s counsel on November 19 requested from the ICE agent responsible for I.M.'s case a copy of all of I.M.'s immigration documents, including his final expedited removal order. Fleming Decl. ¶ 6. After the ICE agent failed to provide a completed expedited removal order, I.M.'s counsel repeatedly followed up with ICE and CBP to try to obtain I.M.'s final expedited removal order. *Id.* ¶¶ 8-11. Those efforts proved fruitless. *Id.* ¶¶ 13-14. In fact, I.M.'s counsel was repeatedly informed that the expedited removal order is typically served "on an individual when transferred back into [CBP] custody for deportation," that neither I.M. nor counsel would be served with the order until I.M. "was transferred to the airport for deportation," and that counsel would have to "get [the order] from [I.M.] once he arrived back in [his] home country." *Id.* ¶¶ 8-9, 11.

The Government did not serve I.M. with his final expedited removal order until November 27, 2020, as I.M. was being instructed to board the plane departing the United States. I.M. Suppl. Decl. ¶ 11; Pet. ¶ 39. As the ICE agent had stated, I.M.'s counsel had no opportunity to receive the order until I.M. arrived in his home country the following day. Fleming Decl. ¶ 14. Because the government did not provide I.M. with his completed and signed expedited order of removal until he was boarding the plane to be removed on November 27, 2020, it was impossible

[7] The Government argues that "Petitioner was detained in the United States for about a month while he underwent credible fear proceedings, and could have filed his Petition while he was detained." Mot. 14. That is not so. During those weeks, I.M. had not yet been purportedly ordered removed and a petition under Section 1252(e)(2) would not have been ripe.

for I.M. to bring a Section 1252(e)(2) petition to challenge the removal order while still detained by U.S. officials. In short, the Government's importation of an "in custody" requirement would render judicial review under Section 1252(e)(2) wholly illusory. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("[G]iven our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action, . . . it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review.").

As a last resort, the Government falls back on "the traditional understanding of habeas relief." Mot. 13. But as the Government acknowledges, under that understanding, "the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). The custodial requirement is a function of that limitation. Yet Congress sought to bar courts from ordering a noncitizen's release as a remedy under Section 1252(e). *See* 8 U.S.C. § 1252(e)(4) ("[T]he court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title."). Given that Congress consciously set aside the traditional function of habeas proceedings, there is no basis for assuming that it silently intended to maintain a corresponding prerequisite to suit.

c. Even if this Court were to import a custody requirement into Section 1252(e)(2), that requirement is construed "very liberally" and does not require physical custody. *Maleng v. Cook*, 490 U.S. 488, 492 (1989); *see also Sadhvani*, 460 F. Supp. 2d at 118-19. In particular, the jurisdictional requirement is satisfied where the government's conduct prevented a petitioner from filing before removal from the country. *See, e.g.*, *Carillo v. Ashcroft*, 111 F. App'x 532, 533 (9th Cir. 2004) (where government could not prove that it provided order to petitioner before removal, extreme circumstances excused failure to file "a timely petition for habeas corpus"); *Singh v. Waters*, 87 F.3d 346, 349-50 (9th Cir. 1996) (petitioner was "in custody" for purposes of

Section 1105a where Government refused to provide immigration file to petitioner's counsel, "effectively scuttl[ing] the right to counsel guaranteed . . . by statute," and then "physically remov[ed] him ma[king] the full reopening of his case impossible").

As explained above, I.M. and his counsel made more than half a dozen attempts to obtain an executed removal order before the Government deported I.M. to his home country. *See supra* at pp. 14-16; I.M. Suppl. Decl. ¶¶ 8-10; Fleming Decl. ¶¶ 6, 8-11, 13-14. The Government flatly refused, withholding a final order until the moment it placed I.M. on an airplane. *See* I.M. Suppl. Decl. ¶ 11; Pet. ¶ 39. Thus, the Government willfully prevented I.M. from challenging the removal order prior to his removal, "prevent[ing] [him] from seeking [relief] in an orderly way" while he was in the Government's physical custody. *Singh*, 87 F.3d at 349. Therefore, if the Court does read a custody requirement into Section 1252(e)(2), that requirement should be deemed satisfied in light of I.M. and his counsel's diligence and the Government's refusal to provide an executed Form I-860 expedited removal order until the moment of I.M.'s removal. If such conduct divests the Court of jurisdiction, then the Government could prevent the federal courts from *ever* having jurisdiction over claims under Section 1252(e)(2), simply by manipulating the timing of removal orders. This result is manifestly incompatible with Congress's intent in enacting Section 1252(e)(2) and need not be condoned.

3. 8 U.S.C. § 1252(e)(3) Is Inapplicable Here

The Government also argues that I.M.'s claim is a "systemic challenge . . . concerning the expedited removal statute" that could only be brought under 8 U.S.C. § 1252(e)(3). Mot. 9. According to the Government, I.M. is challenging "Congress's provision, through § 1225(b)(1), of authority to immigration officers to inspect applicants for admission to this country and to determine that such applicants are inadmissible or removable through the expedited removal process." Mot. 9. Because Section 1252(e)(3) required that any action alleging that

Section 1225(b) is unconstitutional be brought within 60 days of Section 1225(b)'s enactment on April 1, 1997, the Government says, it is time-barred. Mot. 9-10; *see* 8 U.S.C. § 1252(e)(3)(A)(1), (e)(3)(B).

This fundamentally misunderstands I.M.'s claim. He is not arguing that Section 1225(b) is facially unconstitutional, and no such issue is presented by this case. Instead, I.M. asserts that the *individuals* who purported to issue *his particular order* could not do so under the Appointments Clause. For purposes of this case, it is undisputed that a lawfully appointed Officer could exercise the powers of Section 1225(b). This is thus not a challenge to the validity or the constitutionality of Section 1225(b) or its implementing regulations, and Section 1252(e)(3) has no application.

The Government cites *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010), for support, but their depiction of that case misrepresents it. Mot. 10. According to the Government, *Khan* held that any "challenge to the application of the statute under which Petitioner's 'case has been processed'" falls under Section 1252(e)(3). Mot. 10 (quoting *Khan*, 608 F.3d at 330). But they elide the fact that the petitioners in *Khan* were challenging "*the regulations* under which their case has been processed," 608 F.3d at 330 (emphasis added), as stated in the full sentence that the Government quotes, *see* Mot. 10. Specifically, the petitioners in *Khan* argued that "the applicable regulation, 8 C.F.R. § 235.3, is invalid." 608 F.3d at 329. Theirs was a direct challenge to whether a "regulation issued to implement [Section 1225(b)] is constitutional . . . , or is otherwise in violation of law," the exact thing proscribed by Congress in the plain language of Section 1252. 8 U.S.C. § 1252(e)(3)(A)(i)-(ii). The *Khan* petitioners were not arguing that, taking Section 1225(b) and all of its implementing regulations as facially valid, no constitutionally cognizable removal order was issued against them, as I.M. argues here.

D.A.M. is no different. There, the petitioners argued that their removal orders were issued pursuant to "an interim rule known as the 'Transit Ban,'" and that that rule was unlawful. 486 F. Supp. 3d at 407. As in *Khan*, the petitioners in *D.A.M.* were directly and explicitly challenging "a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement [Section 1225(b)]." 8 U.S.C. § 1252(e)(3)(A)(ii). The court distinguished that challenge from "a claim that [petitioners'] removal orders were, as a matter of law, *not* issued," which it suggested would be reviewable. *D.A.M.*, 486 F.3d at 419. As discussed *supra* Part I(A)(1), that the United States never issued a removal order against I.M. is precisely the claim at issue in this case.

Adopting the Government's construction of Section 1252(e)(3) in this case would raise serious constitutional questions. On the Government's view, in enacting Section 1252(e)(3), Congress forever immunized future violations of the Appointments Clause, one of the "significant structural safeguards of the constitutional scheme," *Edmond*, 520 U.S. at 659, from review, even where, as here, the constitutional violation is not created by the statute or its implementing regulations, but rather by the action of an individual federal employee in a specific case. But "[n]either Congress nor the Executive can agree to waive th[e] structural protection" of the Appointments Clause. *Freytag v. Commissioner*, 501 U.S. 868, 880 (1991) ("The Appointments Clause prevents Congress from dispensing power too freely . . . ."). Neither the Constitution in general, nor the Appointments Clause in particular, is so feeble that Congress can require a constitutional violation that occurred in 2020 to be challenged in 1997, 23 years before it occurred. At a minimum, "serious constitutional doubts" would arise if Section 1252(e) were construed to preclude challenges to the authority of the official purporting to issue an order of removal. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Thus, the "competing plausible

interpretation[],” *id.*—that Section 1252(e)(2)(B) allows such challenges because they ask “whether such an order in fact was issued,” 8 U.S.C. § 1252(e)(5)—is the correct one.

B. This Court Has Jurisdiction over Count One Under 28 U.S.C. § 1331

Separate and apart from Section 1252(e)(2), the Court has federal question jurisdiction under 28 U.S.C. § 1331 over I.M.’s Appointments Clause claim. Although the Government asserts that Section 1252(a) precludes jurisdiction under Section 1331, putative orders that are void *ab initio* cannot divest a court of jurisdiction. Even if that were not so, the statutory scheme would not preclude jurisdiction under the *Thunder Basin* factors, because “‘a finding of preclusion could foreclose all meaningful judicial review’; . . . the suit is “wholly collateral to a statute’s review provisions’; . . . [and] the claims are ‘outside the agency’s expertise.’” *Free Enter. Fund*, 561 U.S. at 489-90 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994)).

a. In arguing against federal question jurisdiction, the Government relies on Section 1252(a). Mot. 6-7. That section provides, in relevant part:

> (1) General orders of removal
>
> > Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.
>
> (2) Matters not subject to judicial review
>
> > (A) Review relating to section 1225(b)(1)
> >
> > Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—
> >
> > > (i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title, . . . [or]

> (iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title . . . .

These provisions presuppose the existence of an "order of removal," 8 U.S.C. § 1252(a)(1), (a)(2)(A)(i), or a "determination made under section 1225(b)(1)(B)," *id.* § 1252(a)(2)(a)(iii). However, both the putative order of removal in this case and the putative determinations of inadmissibility in this case were issued by Respondents Klein, Chavez, and/or Bock—none of whom were appointed pursuant to the Appointments Clause. *See* Pet. ¶¶ 31-32, 37, 45-51, 91; *see also* ECF Nos. 7-3, 7-4. As explained in the Petition (and undisputed by the Government), that order and those determinations were nullities that are "void *ab initio*." *Noel Canning*, 705 F.3d at 493; *see also, e.g.*, *Ryder*, 515 U.S. at 179; *Lee*, 2018 WL 8576604, at *1; *see* Pet. ¶¶ 68-88. They therefore have no legal significance and cannot serve to remove this Court's jurisdiction.

Courts have repeatedly followed this logic in a closely analogous context under 8 U.S.C. § 1326(d), a different provision of the same statute. Section 1326(d) explicitly provides that defendants in criminal reentry prosecutions may challenge the validity of the underlying deportation order only if they meet a limited set of criteria. Despite this restriction, "numerous district courts have held that the requirements of 8 U.S.C. § 1326(d) do not apply to defendants who challenge the validity of a deportation order when the Immigration Court lacked jurisdiction over the removal proceeding." *United States v. Ceja-Melchor*, 445 F. Supp. 3d 157, 168 (N.D. Cal. 2020). This is because, "if the order is void on its face for want of jurisdiction, it is the duty of this and every other court to disregard it." *United States v. Arteaga-Centeno*, 353 F. Supp. 3d 897, 902 (N.D. Cal. 2019) (quoting *Wilson v. Carr*, 41 F.2d 704, 706 (9th Cir. 1930)), *vacated on other grounds on reconsideration by* 2019 WL 1995766 (N.D. Cal. May 6, 2019), *aff'd*, 836 F. App'x 589 (9th Cir. 2021); *see also id.* at 903 ("And so Arteaga's claim is not a 'collateral

challenge' to his deportation order, because there is no removal order to be collaterally attacked.").

Because this case does not involve a legally cognizable order of removal or determination of inadmissibility, nothing in 8 U.S.C. § 1252(a) deprives this Court of the ordinary route by which constitutional claims are decided: federal question jurisdiction under 28 U.S.C. § 1331.

b. In any event, this Court would have jurisdiction under Section 1331 even if the Government's interpretation of Section 1252 were correct. Courts "presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enter. Fund*, 561 U.S. at 489-90 (quoting *Thunder Basin*, 510 U.S. at 212-13). The first of these factors is the "most critical"; the other two, although "relevant to the determination, are not controlling." *Bebo v. SEC*, 799 F.3d 765, 774 (7th Cir. 2015). Thus, in *Free Enterprise Fund*, the Supreme Court found district court jurisdiction over an Appointments Clause challenge notwithstanding a statute that channeled judicial review through the agency. 561 U.S. at 489-90.

Here all three *Thunder Basin* factors point toward exercising jurisdiction. The first, "most critical" factor, *Bebo*, 799 F.3d at 774, is plainly satisfied: the Government's very argument is that there can be no "meaningful judicial review," *Thunder Basin*, 510 U.S. at 212-13, of an Appointments Clause challenge to an expedited order of removal.

The other two factors are equally clear. I.M.'s challenge is wholly collateral because he is not "'aim[ing] to obtain the same relief [he] could seek in the agency proceeding'" and his claim is not "of the type that was 'regularly adjudicated' through the statutory scheme." *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 929 F.3d 748, 759-60 (D.C. Cir. 2019) (citations omitted).

And, as the Supreme Court has said of the SEC, Appointments Clause claims are "outside the [agency's] competence and expertise" because they are "standard questions of administrative law, which the courts are at no disadvantage in answering." *Free Enter. Fund*, 561 U.S. at 491.

Thus, on any interpretation of Section 1252, Count One is "properly presented for [the court's] review." *Id.*

II. THIS COURT HAS JURISDICTION OVER COUNT TWO

Count Two of I.M.'s Petition alleges that the revocation of I.M.'s visa exceeded Respondent Klein's[8] authority and was not in accordance with law, and therefore must be set aside under 5 U.S.C. § 706(2)(A) and (C). Pet. ¶¶ 96-100. This is a straightforward APA claim, and the Court has federal question jurisdiction over it. *See, e.g.*, *Robbins v. Reagan*, 780 F.2d 37, 42-43 (D.C. Cir. 1985) ("Even though the APA itself . . . grants no jurisdiction, power to review *any* agency action under the APA exists under 28 U.S.C. § 1331." (citation omitted)).

The Government does not meaningfully challenge this Court's jurisdiction to hear Count Two. They argue at length that Section 1252 precludes review of *an expedited removal order* under the APA, *see* Mot. 18-22, but I.M. does not challenge the purported order of removal under the APA. As to the visa revocation, the Government's brief includes just one conclusory sentence. *See id.* at 20. Every single case it cites deals with the reviewability of an expedited removal order, *see id.* at 20-21 & nn.9-10, and not a word of the Government's argument explains why the same analysis would apply to visa revocations. A "one-sentence argument" that is "perfunctory and undeveloped" is waived, and the Court need not consider it. *Fling v. Martin*,

[8] I.M. has no knowledge as to which of Respondents Klein, Chavez, or Bock purported to revoke his visa. *See* Pet. ¶¶ 38, 97. The Government asserts in its Motion that it was Respondent Klein. Mot. 5. As nothing in this case turns on which of the three took that action, I.M. accepts that representation at this stage of the case.

No. 19-cv-693, 2020 WL 4569335, at *2 n.5 (D.D.C. Aug. 7, 2020), *aff'd*, 2020 WL 8569529 (D.C. Cir. Dec. 22, 2020); *accord, e.g.*, *Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013) ("[I]t is not the obligation of this Court to research and construct the legal arguments available to the parties." (citation omitted)).

To the extent any content could be imputed to the Government's perfunctory argument, it would be meritless. The governing regulation, 22 C.F.R. § 41.122, does not implement the expedited removal statute; it was promulgated by the Secretary of State nearly a decade before that statute even existed, and applies equally to ordinary and expedited removal orders. *See* Visas; Regulations and Documentation Pertaining to Both Nonimmigrants and Immigrants Under the Immigration and Nationality Act, 52 Fed. Reg. 42,590 (Nov. 5, 1987). It was not enacted to implement Section 1225(b) or any removal authorities, but rather to spell out the conditions on which various personnel can revoke visas, an implementation of the Secretary of State's authority under 8 U.S.C. § 1104. *See id.* at 42,597 (identifying statutory authority for 22 C.F.R. § 41.122). It is, quite simply, a separate matter from expedited removal, and outside the reach of Section 1252.[9]

Indeed, the Government itself admits that "[t]he issue of *why* [I.M.'s] visa was revoked is distinct from the question of whether an order of expedited removal was issued." Mot. 17 n.6. Notably, they do not dispute the core of I.M.'s argument in Count Two: that neither the

[9] Although the Government does not mention it, it bears note that the doctrine of consular nonreviewability does not apply to "the decisions of non-consular officials and certainly not to DHS." *Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 418 (S.D.N.Y. 2006). Congress has made revocations by a "consular officer or the Secretary of State" unreviewable, but has not done so with regard to revocations by an immigration officer. 8 U.S.C. § 1201(i). This is presumably because consular officers and the Secretary of State have plenary discretion to "revoke a nonimmigrant visa at any time, in his or her discretion," 22 C.F.R. § 41.122(a), while an immigration officer is authorized to revoke a visa only in specific, discrete situations predicated on the existence of concrete facts, *id.* § 41.122(e).

subsection of 22 C.F.R. § 41.122(e) on which Respondent Klein relied, nor any other subsection of Section 41.122(e), authorized him to revoke I.M.'s visa in the absence of a valid order of expedited removal, and no such order existed. At most, the Government attacks a strawman, asserting that I.M "claims that his visa was invalidly revoked under the APA due to a scrivener's error." Mot. at 1.[10] This misunderstands the role of Respondent Klein's apparent scrivener's error in I.M.'s argument. I.M. does not argue that a scrivener's error alone would invalidate the visa revocation, but that neither the subsection of 22 C.F.R. § 41.122(e) that Respondent Klein cited *nor any other subsection* authorized the revocation. Pet. ¶¶ 89, 98. The Government does not dispute this. Without any argument on the merits *or* at the jurisdictional threshold, the Government's attempt to dismiss Count Two must be rejected.

III. I.M.'S PRAYER FOR RELIEF SHOULD NOT BE DISMISSED

Finally, the Government argues that the Court should dismiss the relief that I.M. seeks except for "any claim for a new hearing before an IJ." Mot. 26. But a motion to dismiss is not the proper vehicle for challenging the remedy requested in a prayer for relief. Even if the Government's argument were construed as a motion to strike, it would be inappropriate to strike portions of the prayer for relief, because the Government is incorrect that the only remedy this Court can award to I.M. is a hearing in accordance with 8 U.S.C. § 1229a.[11]

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[10] The Government goes even further afield by suggesting that I.M. argues "that the alleged 'scrivener's error' on his revoked visa creates a question as to whether his order of removal 'was issued' under *Dugdale*." Mot. at 17 n.6. I.M. does not claim that the absence of a valid ground for revoking I.M.'s visa bears on the validity of the order of removal itself. I.M.'s actual argument is the opposite: that the absence of a valid removal order made the grounds for revoking the visa that Respondent Klein presumably meant to cite (*i.e.*, 22 C.F.R. § 41.122(e)(2) or (e)(4)) unavailable. *See* Pet. ¶¶ 89, 98.

[11] Without citing any legal authority, the Government claims in a footnote that I.M.'s lawsuit is "premature" because I.M. could apply for discretionary permission from the DHS Secretary to reapply for admission to the United States. Mot. 23 n.11. There is no statutory requirement that a petitioner seek discretionary relief before bringing a claim under Section

a. The Government's remedial argument is premature and inappropriate under Rule 12(b). A "request to dismiss a prayer for relief is baseless," because a motion to dismiss under Rule 12(b) is "an inappropriate method of challenge" to a remedy, as opposed to a claim. *Simba v. Fenty*, 754 F. Supp. 2d 19, 21, 23 (D.D.C. 2010). If I.M. has standing to obtain *any* relief on each claim, which the Government does not appear to dispute, "[t]he question of whether [he] is entitled to" a particular subset of the requested relief is best left for "a later stage of this litigation." *Steinberg v. Gray*, 815 F. Supp. 2d 293, 303 n.9 (D.D.C. 2011). The Government's cases are not to the contrary; their few cases that involved motions to dismiss all involved the dismissal of an entire claim, not a portion of the requested relief. *See* Mot. 25-26 (citing *Judicial Watch, Inc. v. Nat'l Archives & Records Admin.*, 845 F. Supp. 2d 288 (D.D.C. 2012), *Taylor v. McCament*, 875 F.3d 849 (7th Cir. 2017), and *Brown v. Berhndt*, No. 1:12-cv-24, 2013 WL 1704877 (E.D. Ark. Apr. 19, 2013)).

To the extent the Government's argument is cognizable at all, it is as a motion to strike under Rule 12(f). *See Simba*, 754 F. Supp. 2d at 23. If the Court construes the Government's argument as a motion to strike, it should deny it. The Court "has broad discretion in ruling on a motion to strike; however, striking portions of a pleading is a drastic remedy, and motions to strike are disfavored." *Nugent v. Unum Life Ins. Co. of Am.*, 752 F. Supp. 2d 46, 51 (D.D.C.

1252(e)(2) or the Appointments Clause. Moreover, in order to apply for such relief, I.M. would need to concede that he "ha[s] been removed . . . in expedited removal proceedings under [Section 1225(b)(1)]," the very thing he is contesting here. *See* Form I-212 at Part 2(1)(a) (June 9, 2020), https://www.uscis.gov/sites/default/files/document/forms/i-212.pdf. Thus, "requiring resort to the administrative process [would] prejudice [I.M.'s] court action." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004). Nor could a waiver invalidate the purported expedited removal order or reverse the visa revocation, and the agency therefore lacks "the authority to change its decision in a way that would satisfy the challenger's objections." *Id.* Accordingly, even if the Government had provided any support for imposing an extrastatutory exhaustion requirement, doing so would be inappropriate here.

2010). Only material that is "redundant, immaterial, impertinent, or scandalous" may be stricken, Fed. R. Civ. P. 12(f), and "courts view motions to strike portions of a complaint with such disfavor that many will grant such a motion only if the portions sought to be stricken as immaterial are also prejudicial or scandalous." *Nugent*, 752 F. Supp. 2d at 51 (quoting *Uzlyan v. Solis*, 706 F. Supp. 2d 44, 52 (D.D.C. 2010)).

The Government does not argue that the requested relief meets any of the requirements of Rule 12(f), much less explain why the Court should exercise its broad discretion to determine now which of the requested remedies will ultimately be appropriate if I.M. prevails. Because such a determination will turn on the nature of the Court's substantive holdings, it is best made "at a later stage of this litigation." *Steinberg*, 815 F. Supp. 2d at 303 n.9; *see also Am. Council of the Blind v. Snow*, 311 F. Supp. 2d 86, 90 (D.D.C. 2004) (declining to strike "two of plaintiffs' specific prayers for relief" even where "it does appear unlikely that a specific injunction of any kind would be appropriate"). Therefore, the Government's motion should be denied.

b. If the Court does exercise its discretion to treat the Government's final argument as a motion to strike, the Government's legal argument is wrong. The Court has authority to issue all of the relief requested by I.M., and thus there is no redressability problem. Section 1252(e), on which the Government relies for its supposed remedial limitations, concerns "orders under section 1225(b)(1)." 8 U.S.C. § 1252(e). It imposes limitations on relief only in actions "pertaining to an order to exclude an alien in accordance with section 1225(b)(1)." *Id.* § 1252(e)(1)(A).[12] As explained above, if the Court determines that the putative order of removal was a nullity that was void *ab initio*, it will have a "duty . . . to disregard" the putative order.

[12] While subsection 1252(e)(4), the only subsection that the Government quotes, does not explicitly repeat this limitation, it plainly incorporates it as it falls within subsection 1252(e), which is limited by its terms to "[j]udicial review of orders under section 1225(b)(1)."

Arteaga-Centeno, 353 F. Supp. 3d at 902 (quoting *Wilson*, 41 F.2d at 706); *see supra* Part I(B). Its authority then will not be limited by remedial constraints that apply only in the presence of such an order. Put another way, once the Court determines that no order of removal was ever issued, this limitation will be irrelevant. Thus, the Court possesses its full range of equitable authority.

Even if the Government were correct that Section 1252(e) limits the Court's remedial authority, it misconstrues the extent of those limits. As the Government reads Section 1252(e)(4), an expedited order of removal would remain in effect even after it was found to be void *ab initio*—with no further way to have it expunged. If the only effect of a successful Section 1252(e)(2) petition were that the petitioner received a hearing under 8 U.S.C. § 1229a, with no effect on the operation of the expedited removal order, then expedited removal orders could *never* be voided. Section 1229a does not authorize immigration judges to vacate expedited removal orders issued under Section 1225(b)(1). *See* 8 U.S.C. § 1229a. Nor does the BIA or an Article III court hearing an appeal from the BIA have that power. *See* 8 U.S.C. § 1252(e)(4)(B) (providing for judicial review only of an order of removal "resulting" from 1229a proceedings, and specifically incorporating Section 1252(a)(1)'s prohibition on reviewing expedited orders). Thus, under the Government's reading, the petitioner would still be subject to an operative expedited removal order even if an immigration judge declined to order the petitioner removed in the subsequent 1229a proceedings, or if the BIA or court of appeals reversed such an order. This absurd, self-defeating reading should be rejected. *See Allen v. District of Columbia*, 969 F.3d 397, 404 (D.C. Cir. 2020) (courts "should not 'lightly conclude' that Congress enacted such a 'self-defeating statute'" (quoting *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019))).

Rather, Section 1252(e)(4)(B) can only plausibly be interpreted to presume that an expedited removal order *becomes invalid* upon a court's determination that it is invalid and grant of a writ of habeas corpus under Section 1252(e). In the Government's lead case, for example, the court explicitly found that the expedited removal order was "a legal nullity" and "restored [petitioner] to the status he enjoyed before the 2012 removal order went into effect," even though the functional relief awarded to the petitioner was a hearing under 8 U.S.C. § 1229a. *Kabenga v. Holder*, No. 14-cv-9084, 2015 WL 728205, at *5 n.55 (S.D.N.Y. Feb. 19, 2015). This result necessarily followed from the court's ruling in the petitioner's favor; it would be absurd to order a hearing under Section 1229a if the unlawful expedited removal order and the determinations underlying it were left standing and binding on the immigration judge. What Judge Scheindlin did in *Kabenga* is effectively what I.M. requests in the first two items of his Prayer for Relief, *see* Pet. 24 ¶¶ A-B; she simply did not declare his legal status "as a final matter," *Kabenga*, 2015 WL 728205, at *5 n.55.

The Government's two Ninth Circuit cases are no more availing. One simply states that courts cannot make the discretionary decision to grant asylum, thereby providing a new legal status to the petitioner; the other deals with whether a *Bivens* action is available in the context of an expedited removal proceeding. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 759 (9th Cir. 2018); *Sissoko v. Rocha*, 509 F.3d 947, 948-51 (9th Cir. 2007). Neither bears any resemblance to this case, and neither suggests that a Court is prohibited from recognizing and declaring that a putative order of removal is "a legal nullity." *Kabenga*, 2015 WL 728205, at *5 n.55.

As to the third and fourth items in I.M.'s Prayer for Relief, these go to the visa revocation in Count Two, rather than to the expedited removal order in Count One. *See* Pet. 23 ¶¶ C-D. As

explained above, 8 U.S.C. § 1252 has no bearing whatsoever on I.M.'s claim regarding the purported revocation of his visa. *See supra* Part II. The Government does not explain how Section 1252 could bar relief related to this entirely separate agency action.[13]

CONCLUSION

For the foregoing reasons, the Court should deny the Government's motion to dismiss.

[13] If the Government's construction of Section 1252(e) were correct, I.M. could simply dismiss Count Two from the Petition and file a separate action challenging only the visa revocation. I.M.'s decision not to follow such an inefficient approach is no reason to bar him from relief he could plainly obtain by wasting judicial resources in that manner.

Dated: March 26, 2021

/s/ Jeffrey B. Dubner

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021 I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of the Court on the ECF system and transmitted to counsel registered to receive electronic service.

/s/ Jeffrey B. Dubner
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