AS-APPLIED SUSPENSION CLAUSE CHALLENGES TO THE IMMIGRATION AND NATIONALITY ACT'S JURISDICTIONAL BARS: A PATHWAY INTO DISTRICT COURT FOR DEPORTATION HABEAS PETITIONS

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In 2005, Congress amended the Immigration and Nationality Act to strip jurisdiction over petitions for habeas corpus challenging an order of removal or the decision to execute an order of removal. A first generation of legal challenges argued that this provision was a facial violation of the Suspension Clause of the U.S. Constitution, which guarantees the right to bring writs of habeas corpus, or an adequate and effective alternative to habeas. These challenges were unsuccessful, and for years, the conventional wisdom has been that noncitizens cannot bring habeas petitions to challenge or delay their removal. However, recent district court cases demonstrate the viability of a new generation of as-applied Suspension Clause challenges to the denial of habeas jurisdiction. This Note identifies and describes a category of cases where the denial of habeas jurisdiction is a Suspension Clause violation: noncitizens with orders of removal who are at risk for persecution in their countries of origin because of changed country conditions that arose while they were living in the United States. Recognizing habeas jurisdiction in these circumstances is essential to protect noncitizens' rights and to check executive power.

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* Copyright © 2019 by Sarah M. Taitz. J.D., 2019, New York University School of Law; B.A., 2009, Oberlin College. I would like to thank Professor Nancy Morawetz for her helpful feedback and support, Professor Alina Das, Jessica Rofé, Sarah Gillman, and Gregory Copeland for supervising my initial research on this topic, and my clinic partner, Kyle Barron, who worked with me on the case that inspired this Note. Many thanks to all of the students in the NYU Immigrant Rights Clinic and to all of our incredible clients. Thanks also to the editors of the *New York University Law Review* and particularly my Notes Editor, Sebastian Devora.

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INTRODUCTION

On June 11, 2017, Immigration and Customs Enforcement (ICE) arrested Usama "Sam" Jamil Hamama at his home in Michigan, in front of his wife and four children.[1] Mr. Hamama, an Iraqi national who belonged to a Christian religious minority, had lived in the United States since he was a child.[2] He had been subject to an order of removal to Iraq for over twenty years, and had been living and working in the United States subject to an ICE order of supervision.[3]

For years, Iraq refused to issue travel documents to many individuals who came to the United States as refugees or children.[4] In 2017,

[1] *See* Amrit Cheng, *One Family's Fight Against Trump's Unlawful Deportation Machine*, ACLU, https://www.aclu.org/issues/immigrants-rights/deportation-and-due-process/one-familys-fight-against-trumps-unlawful (last visited Feb. 25, 2018); *see also* Hamama v. Adducci, 258 F. Supp. 3d 828, 830 (E.D. Mich. 2017), *aff'd in part, vacated in part*, 912 F.3d 869 (6th Cir. 2018).

[2] *See* Cheng, *supra* note 1.

[3] An order of supervision is an alternative to detention that allows a noncitizen with a final order of removal to live at liberty in the United States in compliance with conditions, such as regular in-person meetings at ICE offices. *See* 8 C.F.R. § 241.13(h) (2019). A noncitizen with an order of supervision may receive work authorization. *Id.*

[4] *Id.*

that policy changed, and ICE abruptly arrested over 1400 Iraqi nationals across the United States.[5] Many, like Mr. Hamama, had lived in the United States for years under orders of supervision, and were fearful of persecution should they be returned to Iraq.[6] Conditions for Iraqi Christians had become even more dire in the twenty-five years since Mr. Hamama's immigration proceedings, and he wanted to raise these new facts before the immigration court. Instead of giving Mr. Hamama a chance to make his case, the government sought to deport him back to Iraq immediately.[7]

This round-up of Iraqi nationals was one of several Trump Administration reversals of longstanding immigration policy, leading to large-scale, targeted efforts by ICE to enforce old deportation orders.[8] These harsh enforcement tactics led to the revival of an old legal strategy to combat deportation: filing petitions for writs of habeas corpus in federal district court.[9] Mr. Hamama became the lead plaintiff in *Hamama v. Adducci*, a large class action litigation involving hundreds of other Iraqis.[10] Advocates brought similar class action habeas petitions on behalf of Somali nationals[11] and Indonesian Christians.[12] In all three cases, the petitioners argued that they had due process and statutory rights to apply for immigration relief and claimed that deportation would frustrate these rights.[13] They did not ask the district courts to vacate their underlying final orders of removal but to provide a temporary stay of removal while they pursued the legal process to reopen their immigration cases and ultimately obtain immigration relief.[14] Before they could make these

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5 *Id.*

6 *See* Cheng, *supra* note 1.

7 *Id.*

8 *See, e.g.*, Ibrahim v. Acosta, No. 17-CV-24574-GAYLES, 2018 WL 582520, at *1 (S.D. Fla. Jan. 26, 2018) (describing ICE's arrest and attempted deportation of ninety-two Somalis as part of a larger pattern of deportation of Somali nationals); Chhoeun v. Marin, 306 F. Supp. 3d 1147, 1151 (C.D. Cal. 2018) (describing ICE raids that resulted in the arrest and attempted deportation of approximately one hundred Cambodians who were longtime U.S. residents); Devitri v. Cronen, 290 F. Supp. 3d 86, 88 (D. Mass. 2017) (describing ICE's decision to suddenly deport fifty-one Indonesian Christians who had been living in the United States on orders of supervision).

9 *See infra* Section I.A (describing the history of habeas challenges to deportation).

10 912 F.3d 869 (6th Cir. 2018).

11 *See, e.g.*, *Ibrahim*, 2018 WL 582520, at *1.

12 *See, e.g.*, *Devitri*, 290 F. Supp. 3d at 88.

13 *Id.* at 90 ("Petitioners argue that the sudden [decision to deport them] is preventing [them] from exercising their due process rights and their statutory right to move to reopen."); *accord Ibrahim*, 2018 WL 582520, at *4; Hamama v. Adducci, 258 F. Supp. 3d 828, 830–31 (E.D. Mich. 2017), *aff'd in part, vacated in part*, 912 F.3d 869 (6th Cir. 2018).

14 *See Devitri*, 290 F. Supp. 3d at 88 ("Petitioners seek stays of their removal so that they are not removed before they have the opportunity to file motions to reopen based on 'changed country conditions.'"); *Hamama*, 258 F. Supp. 3d at 831 (similar); *Ibrahim*, 2018

arguments on the merits, however, the plaintiffs needed to convince the federal district courts that they had jurisdiction to hear their motions to stay removal proceedings.[15]

Habeas petitions challenging removal face a procedural hurdle because of jurisdiction-stripping provisions in the Immigration and Nationality Act (INA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, and the REAL ID Act in 2005.[16] The statute states, in relevant part, that federal courts do not have jurisdiction over habeas petitions that challenge "the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen]. . . ."[17] The conventional wisdom since 2005 has been that this language means that the federal district courts do not have jurisdiction over any habeas petition challenging deportation from the United States.[18]

This Note argues that closing the courthouse doors under these circumstances is unconstitutional. The Suspension Clause of the U.S.

WL 582520, at *4 (similar). In this context, a stay of removal refers to a temporary order preventing ICE from deporting the noncitizen for a period of time defined by the court. *See* Nken v. Holder, 556 U.S. 418, 429–30 (2009) (describing stays of removal).

[15] *See Hamama*, 258 F. Supp. 3d at 831; *Ibrahim*, 2018 WL 582520, at *4; *Devitri*, 290 F. Supp. 3d at 88.

[16] *See, e.g.*, *Hamama*, 258 F. Supp. 3d at 834 ("[T]he Government contends that the REAL ID Act, codified at 8 U.S.C. § 1252, divests this Court of jurisdiction.").

[17] 8 U.S.C. § 1252(g) (2012). See *infra* Part II for additional discussion of the jurisdiction-stripping provisions added to the INA in 1996 and 2005.

[18] *See, e.g.*, 16A Stacy L. Davis et al., Federal Procedure, Lawyers Edition § 41:15 (2019) (describing habeas in the immigration context as only being available to challenge physical immigration detention); Thomas Hutchins, Immigration Pleading and Practice Manual § 4:3 (2019) (describing the availability of habeas in the immigration context after the REAL ID Act to "challenge the length or conditions of detention" but not discussing using habeas to obtain a stay of removal); Dan Kesselbrenner & Lory D. Rosenberg, Nat'l Immigration Project of the Nat'l Lawyers Guild, Immigration Law and Crimes § 4:36 (2018) ("The [REAL ID] Act severely eliminates habeas corpus review of final orders of removal and exclusion but does not foreclose district court jurisdiction over detention matters, as is explicitly stated in the statute's legislative history."); Nat'l Immigration Project of the Nat'l Lawyers Guild, Immigration Law and Defense § 10:27 (2019) (stating that the REAL ID Act "purports to eliminate habeas corpus review under 28 U.S.C.A. § 2241 of final orders of removal and exclusion" without discussing the potential viability of habeas petitions to obtain stays of removal); 14A Charles Alan Wright et al., Federal Practice and Procedure § 3664 (4th ed. 2008) ("As a result of the REAL ID Act, habeas corpus no longer is available to any alien as a means of challenging his order of removal, with a narrow exception for . . . procedures for the expedited removal of aliens arriving at the border."). When federal courts accept habeas jurisdiction over challenges by noncitizens, it is typically in the context of a challenge to immigration detention, not deportation. *See, e.g.*, Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Zadvydas v. Davis, 533 U.S. 678 (2001).

Constitution[19] guarantees noncitizens like Mr. Hamama a day in court to challenge their unlawful deportation. The Suspension Clause requires that the writ of habeas corpus, or an adequate and effective alternative to habeas, be available to persons seeking to challenge unlawful detention.[20] When a noncitizen who has lived in the United States for years is denied judicial review of the decision to suddenly deport her to a country where she fears persecution because of changed country conditions, she is deprived of this right.

Since the passage of IIRIRA, AEDPA, and the REAL ID Act, scholars have identified this constitutional problem and argued that stripping jurisdiction over habeas petitions violates the Suspension Clause on its face.[21] These facial challenges failed in the courts,[22] leading to a prevailing view that habeas petitions are unavailable as a tool to challenge removal from the United States.[23] But a new generation of challenges is succeeding by arguing that the INA's denial of habeas jurisdiction violates the Suspension Clause as applied to the particular circumstances faced by petitioners.[24] This new line of argument allows noncitizens with final orders of removal to access an

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[19] U.S. Const. art. I, § 9, cl. 2 ("The 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.").

[20] *See infra* Section I.B.

[21] *See, e.g.*, Thomas Hutchins, *An Overview of Habeas Corpus, Post REAL ID: The Writ Remains*, 08-05 Immigr. Briefings 1 (2008) (explaining that when new evidence is discovered but cannot be placed on the administrative record, "the habeas-stripping provisions contained in REAL ID [may] violate the Suspension Clause"); Jill M. Pfenning, *Inadequate and Ineffective: Congress Suspends the Writ of Habeas Corpus for Noncitizens Challenging Removal Orders by Failing to Provide a Way to Introduce New Evidence*, 31 Vt. L. Rev. 735, 750 (2007); Jennifer Norako, Comment, *Accuracy or Fairness?: The Meaning of Habeas Corpus After* Boumediene v. Bush *and Its Implications on Alien Removal Orders*, 58 Am. U. L. Rev. 1611 (2009); *cf.* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. Sch. L. Rev. 133, 139 (2006/2007).

[22] *See* Luna v. Holder, 637 F.3d 85, 95 (2d Cir. 2011) (holding that because "Congress has provided an adequate and effective substitute for habeas," there was no violation of the Suspension Clause); Muka v. Baker, 559 F.3d 480, 484–85 (6th Cir. 2009) ("[E]very circuit to confront this issue has agreed that, facially, the petition for review filed in the court of appeals provides an adequate and effective process to review final orders of removal, and thus the elimination of habeas relief does not violate the Suspension Clause."); Ruiz-Martinez v. Mukasey, 516 F.3d 102, 114 (2d Cir. 2008); Mohamed v. Gonzales, 477 F.3d 522, 526 (8th Cir. 2007); Puri v. Gonzales, 464 F.3d 1038, 1041 (9th Cir. 2006).

[23] *See supra* note 18.

[24] *See, e.g.*, Compere v. Nielsen, 358 F. Supp. 3d 170, 181 (D.N.H. 2019); Jimenez v. Nielsen, 334 F. Supp. 3d 370, 384 (D. Mass. 2018); Hussein v. Brackett, No. 18-CV-273-JL, 2018 WL 2248513, at *5 (D.N.H. May 16, 2018); Devitri v. Cronen, 289 F. Supp. 3d 287, 294 (D. Mass. 2018); Ibrahim v. Acosta, No. 17-CV-24574-GAYLES, 2018 WL 582520, at *6 (S.D. Fla. Jan. 26, 2018); Chaudhry v. Barr, No. 2:19-CV-00682-TLN-DMC, 2019 WL 2009307, at *5–6 (E.D. Cal. May 7, 2019).

important tool to pursue their legal rights and to check executive power.[25]

While the initial *Hamama* district court decision recognized this Suspension Clause problem and found jurisdiction, on appeal a divided Sixth Circuit panel reversed.[26] As this Note will demonstrate, the panel's decision is deeply flawed.[27] It is an outlier in a trend of district court cases recognizing that the Suspension Clause requires federal court jurisdiction over habeas petitions challenging removal to a country where a noncitizen will face persecution because of changed country conditions.[28] This Note will focus on this category of cases as an example, but the argument has broader applicability—courts have begun recognizing the Suspension Clause problem in other challenges to the enforcement of removal orders as well.[29]

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25 This argument is not always necessary. Occasionally, noncitizens are able to get a habeas petition challenging immigration enforcement into court without invoking the Suspension Clause. Supreme Court precedent interprets the jurisdiction-stripping provisions of the INA somewhat narrowly, allowing some habeas challenges to proceed. *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999). A district court may hear a habeas petition without conflicting with the INA if the challenge is framed as, for example, a challenge to "ICE's legal authority" to exercise its removal discretion against a subject without first allowing him to seek a provisional unlawful presence waiver that would prevent his immediate removal. Calderon v. Sessions, 330 F. Supp. 3d 944, 954 (S.D.N.Y. 2018), *appeal withdrawn sub nom.* Villavicencio Calderon v. Sessions, No. 18-2926, 2018 WL 6920377, at *1 (2d Cir. Oct. 5, 2018); *accord* You v. Nielsen, 321 F. Supp. 3d 451, 457 (S.D.N.Y. 2018). This Note sets aside this issue of statutory interpretation and refers to cases simply as challenges to removal, recognizing that this framing conflicts with the jurisdiction-stripping provision. It may be possible to reframe these cases to avoid that conflict, but this Note chooses to confront the conflict directly, in order to demonstrate that the Suspension Clause provides a constitutional backstop ensuring the fundamental rights of noncitizens facing deportation, regardless of what jurisdiction-stripping provisions Congress may attempt to impose.

26 *See* Hamama v. Adducci, 912 F.3d 869 (6th Cir. 2018).

27 *See infra* Part IV. The decision also had enormous human consequences. One member of the *Hamama* class, Jimmy Aldaoud, was deported to Iraq on June 2, 2019, and died on the streets of Baghdad just two months later. Sarah Rahal, *Refugee Who Died After Being Deported to Iraq Laid to Rest in Michigan*, DETROIT NEWS (Sept. 6, 2019), https://www.detroitnews.com/story/news/local/michigan/2019/09/06/funeral-refugee-jimmy-aldaoud-who-died-after-being-deported-iraq-laid-rest-michigan/2219741001. He had been homeless, suffering from mental illness and unable to find medical treatment for diabetes. *Id.* Congressman Andy Levin invoked Aldaoud's "predictable, preventable death" in calling for a temporary moratorium on all deportations to Iraq. Andy Levin, *Jimmy Al-Daoud's Diabetes Didn't Kill Him—Being Deported to Iraq by Trump's ICE Did*, USA TODAY (Aug. 16, 2019), https://www.usatoday.com/story/opinion/voices/2019/08/16/jimmy-aldaoud-iraq-michigan-trump-deportation-iraqi-nationals-column/2019270001.

28 *See id.*

29 *See* Ragbir v. Homan, 923 F.3d 53, 78 (2d Cir. 2019) (holding that the Suspension Clause guarantees jurisdiction over a noncitizen's habeas petition challenging his removal based on a First Amendment retaliation claim); S.N.C. v. Sessions, No. 18 Civ. 7680 (LGS), 2018 WL 6175902, at *3 (S.D.N.Y. Nov. 26, 2018) (holding that Suspension Clause concerns required the use of the canon of constitutional avoidance in interpreting the INA

Part I of this Note will provide background on the writ of habeas corpus and review Supreme Court case law defining the protections guaranteed by the Suspension Clause. Part II will explain the jurisdiction-stripping amendments to the INA, which are the legal backdrop to the Suspension Clause issues discussed here. Part III will describe the problem created and the legal options statutorily available when ICE seeks to enforce an old deportation order against a noncitizen who fears persecution based on changed country conditions. Part IV will argue that the scenarios raised in Part III give rise to strong as-applied Suspension Clause challenges, because the Suspension Clause broadly applies to noncitizens facing deportation, and the INA does not provide an adequate and effective substitute for habeas in these particular circumstances.

I
The Writ of Habeas Corpus and the Suspension Clause

The writ of habeas corpus originated in old English common law as a way to challenge unlawful detention.[30] It became one of few individual rights included in the U.S. Constitution prior to the Bill of Rights.[31] The Suspension Clause states: "The 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."[32] Because court interpretations of the scope of the Clause have often invoked

to allow federal court jurisdiction over a habeas petition by a noncitizen applying for a visa for trafficking victims); Jimenez v. Nielsen, 334 F. Supp. 3d 370, 384 (D. Mass. 2018) (finding that the Suspension Clause required jurisdiction over noncitizens applying for adjustment of status through a U.S. citizen spouse); Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1100 (9th Cir. 2019) (holding that the Suspension Clause requires jurisdiction over habeas petition by noncitizen facing expedited removal). *But see* Barros Anguisaca v. Decker, No. 18 CIV. 7493 (PAE), 2019 WL 3244122, at *7 (S.D.N.Y. July 9, 2019) (rejecting Suspension Clause arguments by a noncitizen seeking a stay of removal while litigating a motion to reopen based on a change in law); Santos v. Cissna, No. CV 18-12232-WGY, 2019 WL 1745187, at *1–2 (D. Mass. Apr. 18, 2019), *adhered to sub nom.* Viana Santos v. McAleenan, No. CV 19-11296-WGY, 2019 WL 3412175 (D. Mass. July 29, 2019) (rejecting Suspension Clause arguments where the court found that the noncitizen did not have a colorable claim for relief).

30 Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 Harv. L. Rev. 1963, 1965 (2000).

31 *See* Boumediene v. Bush, 553 U.S. 723, 739 (2008) ("[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights."); *see also* Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. Rev. 143, 143 (1952) (describing the Suspension Clause as "[t]he most important human rights provision in the Constitution").

32 U.S. Const. art. I, § 9, cl. 2.

historical analysis,[33] Section I.A will briefly discuss the role of the writ in early English common law, as well as U.S. immigration history.[34] Section I.B will summarize Supreme Court Suspension Clause precedent, which provides a method of analysis for determining when the elimination of habeas jurisdiction is in violation of the Constitution.

A. History of Habeas Corpus and Noncitizen Challenges to Removal

Historically, the writ of habeas corpus has functioned as an adaptable remedy available to challenge a variety of types of confinement. In eighteenth-century common law, writs of habeas corpus were available in diverse circumstances, including a person's challenge to his enslavement,[35] a sailor's challenge to his impressment,[36] and a wife's challenge to her husband detaining her.[37] The writ is often associated with criminal incarceration, but it has always had a broader meaning.[38] Blackstone described habeas as "the great and efficacious writ, in all manner of illegal confinement,"[39] and early habeas law allowed the writ to issue "[i]n any matter involving the liberty of the subject . . . ."[40]

The Supreme Court has endorsed this history, recognizing that common law habeas was used to "challenge Executive and private detention in civil cases as well as criminal."[41] Surveying the varied history of habeas in another case, the Court concluded, "[C]ommon-law habeas corpus was, above all, an adaptable remedy."[42] The U.S. Constitution imported this adaptable English common law writ through the Suspension Clause.[43] In early U.S. history, the writ con-

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33 *See, e.g.*, *Boumediene*, 553 U.S. at 739 ("We begin with a brief account of the history and origins of the writ.").

34 Previous scholarship, particularly work by Jonathan Hafetz and Gerald Neuman, has carefully documented the history of the writ of habeas corpus. *See* Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509 (1998); Neuman, *supra* note 30, at 1965–69. This historical background is summarized briefly here to contextualize the arguments put forward in this Note.

35 *See* 20 Howell's State Trials 1 (K.B. 1772).

36 *See* Goldswain's Case (1778) 96 Eng. Rep. 711; 2 Black. W. 1207.

37 *See* Mr. Lister's Case (1721) 88 Eng. Rep. 17; 8 Mod. 22.

38 For further discussion of this history, see Hafetz, *supra* note 34, at 2522–24, which documents the availability of the writ to challenge noncriminal confinement as early as the seventeenth century.

39 3 WILLIAM BLACKSTONE, COMMENTARIES *131.

40 Hafetz, *supra* note 34, at 2523 (quoting 11 HALSBURY'S LAWS OF ENGLAND 25 (3d ed. 1995)).

41 INS v. St. Cyr, 533 U.S. 289, 302 (2001).

42 Boumediene v. Bush, 553 U.S. 723, 779 (2008).

43 *See id.* at 739 ("[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights.");

tinued to be available in a variety of circumstances and to protect citizens and noncitizens alike.[44]

In 1875, the federal government began actively regulating immigration, and district courts began hearing habeas petitions challenging deportation. As habeas scholar Professor Gerald Neuman writes, at this point, "the federal courts quickly confirmed the need to examine the lawfulness of exclusion and deportation decisions on habeas, and the Supreme Court agreed."[45] The most crucial case Neuman discusses is *In re Jung Ah Lung*, decided by the District Court of California in 1885 and affirmed by the Supreme Court in 1888.[46] Jung Ah Lung, a Chinese national, traveled to the United States by sea, and when he arrived, customs officials detained him on the ship on which he had arrived, and intended to force him to return to China.[47] The court resoundingly rejected the government's arguments that Jung Ah Lung was "not restrained of his liberty within the meaning of the habeas corpus act."[48] The court wrote:

> If the denial, therefore, to the petitioner of the right to land, thus converting the ship into his prison-house, to be followed by his deportation across the sea to a foreign country, be not a restraint of his liberty within the meaning of the habeas corpus act, it is not easy to conceive any case that would fall within its provisions.[49]

This case established precedent that deportation is a restraint on liberty that can be challenged in habeas. The Supreme Court echoed this holding in *Chin Yow v. United States*, where it stated, "It would be difficult to say that [a person] was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China."[50] The Supreme Court later recognized, "It is clear that prior to the Administrative Procedure Act habeas corpus was the only remedy by which deportation orders could be challenged in the courts."[51]

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see also Chafee, *supra* note 31, at 143 (describing the Suspension Clause as "[t]he most important human rights provision in the Constitution").

[44] *See* Hafetz, *supra* note 34, at 2524 (citing United States v. Villato, 2 U.S. (2 Dall.) 370, 373 (1797)) (noting that noncitizens have been able to bring habeas petitions since the nation's founding).

[45] Neuman, *supra* note 30, at 1966–67 (citing *In re* Jung Ah Lung, 25 F. 141 (D. Cal. 1885), *aff'd sub nom.* United States v. Jung Ah Lung, 124 U.S. 621, 635 (1888)).

[46] *In re Jung Ah Lung*, 25 F. at 141.

[47] *Id.* at 142.

[48] *Id.*

[49] *Id.*

[50] 208 U.S. 8, 12 (1908).

[51] Heikkila v. Barber, 345 U.S. 229, 230 (1953); *see also* Ragbir v. Homan, 923 F.3d 53, 73 (2d Cir. 2019) (quoting Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1044 (1998)) ("[H]istorical precedents

In 1952, Congress enacted a new scheme for immigration regulation, the Immigration and Nationality Act.[52] The original INA did not limit habeas jurisdiction over immigration cases.[53] In 1961, when Congress amended the INA to funnel appeals of orders of removal into the courts of appeals,[54] habeas continued to be a viable alternative in some cases. As Professor Nancy Morawetz has written, the writ "served as a backstop for unusual cases . . . ."[55] As one court of appeals put it, "Prior to 1996, a[] [noncitizen] could challenge a removal order either in a petition for review filed in the court of appeals or in a petition for a writ of habeas corpus in the district court."[56] The changes to the immigration law scheme in 1996, and again in 2005, will be discussed in Part II.

B. *Modern Suspension Clause Doctrine*

In the last two decades, the Supreme Court has revisited the history of the writ of habeas corpus in two key cases articulating modern Suspension Clause doctrine: *INS v. St. Cyr*[57] and *Boumediene v. Bush*.[58]

1. INS v. St. Cyr

In 2001, the Court decided *INS v. St. Cyr*, a habeas petition brought by a noncitizen seeking to challenge his removal to Haiti.[59] The government argued that the 1996 amendments to the INA, AEDPA and IIRIRA, barred the federal courts from hearing St. Cyr's

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beginning shortly after 1787 and reaching to the present confirm the applicability of the writ of habeas corpus to the detention involved in the physical removal of aliens from the United States.").

[52] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

[53] *See id.* § 360(c), 66 Stat. at 274.

[54] *See* Pub. L. No. 87-301, 75 Stat. 650, 651 (1961), *repealed by* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 § 401(e)(3), 110 Stat. 1214, 1268 (1996) ("The procedure prescribed by, and all the provisions of the [Hobbs Act] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation . . . ."); *see also* Hobbs Act, 28 U.S.C. §§ 2341–51 (2000) (providing procedures for judicial review of specific agency decisions in the courts of appeals).

[55] Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113, 117 (2006/2007). Professor Morawetz cites as "unusual examples" habeas cases including a grant of a stay of removal while an agency appeal was pending, Motta v. Dist. Dir. of INS, 61 F.3d 117 (1st Cir. 1995), and a grant of a stay of removal related to ineffective assistance of counsel, Butros v. INS, 990 F.2d 1142 (9th Cir. 1993). *See* Morawetz, *supra*. Professor Morawetz also notes that at times, a second habeas petition was permitted. *Id.*

[56] Luna v. Holder, 637 F.3d 85, 93 (2d Cir. 2011).

[57] 533 U.S. 289 (2001).

[58] 553 U.S. 723 (2008).

[59] *St. Cyr*, 533 U.S. at 293.

claim because they stripped jurisdiction.[60] The Court rejected this argument, holding that a clear statement of congressional intent is required to repeal habeas jurisdiction.[61] The Court justified this rule by invoking the canon of constitutional avoidance, explaining that stripping habeas jurisdiction over all challenges to deportation raised substantial questions under the Suspension Clause.[62] The constitutional concerns were so grave in this case that they overcame relatively unambiguous statutory language: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal."[63]

The Court invoked the history of the Suspension Clause to demonstrate that it applied to noncitizens challenging deportation.[64] The Court noted the possibility that the Clause's protections might extend beyond its common law core, but stated, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"[65] The Court's historical analysis briefly summarized the history stated in Section I.A,[66] and concluded that there was "substantial evidence" supporting the argument that St. Cyr's petition "could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus."[67] The Court also examined modern history to determine that barring all habeas petitions challenging deportation would "represent a departure from historical practice in immigration law."[68]

St. Cyr takes a step towards articulating the reach of the Suspension Clause by stating that, at a minimum, it covers the writ as it existed in 1789, but that the modern history of the writ is also relevant. *Boumediene* applied and expanded on *St. Cyr*'s blueprint for considering historical practice in evaluating the applicability of the Suspension Clause.[69]

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[60] *Id.* at 297. The jurisdiction stripping provisions of AEDPA and IIRIRA are further discussed *infra* Part II.

[61] *Id.* at 298.

[62] *Id.* at 299–301.

[63] *See* Martin J. Katz, *Guantanamo,* Boumediene*, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 389 (2009) (discussing the use of constitutional avoidance in *St. Cyr*); *see also St. Cyr*, 533 U.S. at 326–27 (Scalia, J., dissenting) (describing the statutory language as "utterly clear" and accusing the majority of imposing a "'magic words' requirement").

[64] *St. Cyr*, 533 U.S. at 301.

[65] *Id.*

[66] *See id.* at 301–05.

[67] *Id.* at 304–05.

[68] *Id.* at 305.

[69] Boumediene v. Bush, 553 U.S. 723 (2008).

2. Boumediene v. Bush

In the 2008 decision *Boumediene v. Bush*, the Supreme Court, for the first time, struck down a law restricting habeas corpus as a violation of the Suspension Clause.[70] The statute in question denied habeas review to noncitizens (deemed "enemy combatants") detained at Guantanamo Bay.[71] The Court held that the denial of habeas to the detainees was unconstitutional. The Court analyzed two questions: first, whether the noncitizen detainees were protected by the Suspension Clause,[72] and second, whether there was an adequate and effective alternative to habeas.[73]

On the first question, the Court revisited the history of habeas corpus discussed in *St. Cyr*, though it again affirmed the "possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ."[74] The Court located the origin of the Suspension Clause in separation-of-powers concerns and therefore held that all persons subject to deprivations of liberty by the United States, including noncitizens, could invoke it.[75] The Court found that the historical record was inconclusive on the question of whether a common law court would have jurisdiction over an "enemy combatant" in a territory similar to Guantanamo Bay.[76] The Court "decline[d] . . . to infer too much, one way or the other, from the lack of historical evidence on point."[77] Justice Kennedy suggested it was not possible for the framers of the Constitution to resolve this question, which involved "the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age."[78] Instead, the Court emphasized

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70 *Id.*; *see also* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1053 (2010) ("*Boumediene v. Bush* is the first decision since *United States v. Klein* in 1871, to hold unequivocally that a statute framed as a withdrawal of jurisdiction from the federal courts violates the Constitution.").

71 *Boumediene*, 553 U.S. at 732.

72 *Id.* at 739 ("[W]e must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their physical location, i.e., their presence at Guantanamo Bay.").

73 *Id.* at 771 ("In light of this holding the question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus.").

74 *Id.* at 746 (citing INS v. St. Cyr, 533 U.S. 289, 300–01 (2001)).

75 *Id.* at 743 ("Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles . . . ." (citations omitted)).

76 *Id.* at 746–47.

77 *Id.* at 752 (citations omitted).

78 *Id.*

separation-of-powers issues and prescribed a balancing test encompassing practical concerns. To justify this approach, Justice Kennedy wrote, "[T]he scope of this provision must not be subject to manipulation by those whose power it is designed to restrain."[79] The Court concluded that Suspension Clause protections did apply to Guantanamo Bay detainees.[80]

The Court then turned to its analysis of whether there was an adequate and effective alternative to habeas available to the detainees.[81] This method of analysis drew from prior Supreme Court precedent, including *Swain v. Pressley*,[82] which held that the Suspension Clause required that habeas could be restricted only in the case of "the substitution of a new collateral remedy which is both adequate and effective . . . ."[83] The *Boumediene* Court outlined broad principles for the "adequate substitute" analysis, emphasizing that habeas was "above all, an adaptable remedy" and therefore required case-by-case determinations.[84] The Court drew from the due process context to hold that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings . . . ."[85] Under this analysis, it was significant that the petitioners were detained by executive order, making collateral review "more urgent" than it would be if the detention had been ordered through a rigorous judicial proceeding.[86] If the initial proceeding was not rigorous, the substitute habeas court "must have the means to correct errors that occurred."[87] The substitute provided to Guantanamo detainees was deficient principally because it did not allow petitioners to submit new exculpatory evidence. The Court found that the "sum total of procedural protections afforded to the detainee at all stages, direct and collateral" was insufficient, and therefore the substitute provided was inadequate, and the Suspension Clause was violated.[88]

In summary, the Suspension Clause analysis requires: (1) a determination that the Clause applies, with history as a guide in this

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[79] *Id.* at 766.

[80] *Id.* at 771.

[81] *Id.* at 771–92.

[82] 430 U.S. 372 (1977).

[83] *Id.* at 381. The *Swain* Court did not need to conduct an analysis of whether the collateral remedy was adequate and effective, because the law at issue specifically preserved habeas relief in the event that the substitute was not adequate and effective. *Id.* at 381–82 (citing United States v. Hayman, 342 U.S. 205, 223 (1952)).

[84] *Boumediene*, 553 U.S. at 779 (citations omitted).

[85] *Id.* at 781 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[86] *Id.* at 783 ("Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.").

[87] *Id.* at 786.

[88] *Id.* at 783.

inquiry; and (2) a determination, informed by due process principles, of whether there exists an adequate and effective alternative to habeas.

II
THE JURISDICTION-STRIPPING AMENDMENTS TO THE INA

The Immigration and Nationality Act (INA) provides the statutory framework for the regulation of immigration in the United States.[89] It was first passed in 1952, and subject to several amendments since. As described *supra* in Section I.A, after the initial passage of the INA, noncitizens facing removal continued to be entitled to judicial review through habeas petitions in district court.[90] In 1996,[91] and again in 2005,[92] Congress amended the INA to curtail federal courts' jurisdiction over decisions to remove noncitizens from the United States.

A. AEDPA and IIRIRA

In 1996, Congress enacted two pieces of immigration legislation: the Antiterrorism and Effective Death Penalty Act[93] and the Illegal Immigration Reform and Immigrant Responsibility Act.[94] These two statutes made dramatic changes to the immigration enforcement scheme and the judicial review available to those caught up in it.

AEDPA and IIRIRA purported to withdraw jurisdiction from federal courts on a wide variety of immigration claims. These jurisdictional bars were laid out in INA section 242 and essentially sought to consolidate all challenges to removal into a single proceeding, with one, limited path to judicial review.[95] That path starts with a hearing

89 The law lists grounds of inadmissibility, under which a noncitizen may be denied entry to the United States, and grounds of removability, under which a noncitizen already present may be deported from the country. The INA also provides numerous avenues for a noncitizen to apply for immigration relief to avoid removal. *See, e.g.*, 8 U.S.C. §§ 1182(a), 1227(a).

90 *See* Neuman, *supra* note 51, at 964.

91 *See infra* Section II.A (discussing AEDPA and IIRIRA, the 1996 amendments to the INA).

92 *See infra* Section II.B (discussing the REAL ID Act).

93 Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

94 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009–546 (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

95 *See, e.g.*, 8 U.S.C. § 1252(b)(9) (2012) ("Judicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."); 8 U.S.C. § 1252(g) (2012) ("[N]o court shall have jurisdiction to

before an Immigration Judge (IJ), with appeals to the Board of Immigration Appeals (BIA). An adverse BIA decision or an unappealed adverse IJ decision becomes a "final order of removal." Upon receiving a denial from the BIA, a noncitizen may petition the circuit court of appeals for narrow review.[96] The INA also provides the opportunity for a motion to reopen the original proceedings in limited circumstances involving changed circumstances or new evidence. While this review process might be effective in some cases, more complicated situations posed problems and led to extensive litigation over the meaning and scope of INA section 242.

There were several phases of litigation over the jurisdiction-stripping provisions enacted in 1996,[97] but the two key cases that reached the Supreme Court were *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*)[98] in 1999 and *INS v. St. Cyr* in 2001.[99] In *AADC*, the Supreme Court narrowly interpreted the jurisdiction-stripping provisions of INA section 242. The Court concluded that the particular challenge brought by petitioners, who claimed that they were targeted for deportation based on their membership in a politically unpopular group, was barred by the statute.[100] However, the Court held that not all challenges to immigration enforcement were barred by section 242.[101] The statute only stripped jurisdiction over "three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'"[102] Thus, the Supreme Court preserved federal judicial review for other types of challenges to immigration enforcement, including challenges to "the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsider-

hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.").

[96] This review is limited by, *inter alia*, provisions stating "a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law" and "the Attorney General's discretionary judgment whether to grant [asylum] shall be conclusive unless manifestly contrary to the law and an abuse of discretion." 8 U.S.C. § 1252(b)(4)(C)–(D) (2012).

[97] Neuman, *supra* note 30, at 1976 (describing the phases of litigation over jurisdiction-stripping provisions in AEDPA and IIRIRA).

[98] 525 U.S. 471 (1999).

[99] 533 U.S. 289 (2001).

[100] *AADC*, 525 U.S. at 471.

[101] *See id.* at 482.

[102] *Id.*

ation of that order."[103] This case continues to influence interpretation of the INA's jurisdiction-stripping provisions and leaves room for arguments that any particular immigration challenge is outside of the narrow scope of the statute.

As explained *supra*, the Supreme Court held in *St. Cyr* that AEDPA and IIRIRA did not strip jurisdiction from courts considering habeas petitions.[104] Therefore, habeas remained an option for noncitizens challenging their removal, and they continued to bring these claims in district courts.[105] This prompted new legislation to make the withdrawal of habeas jurisdiction explicit.[106]

B. The REAL ID Act

In 2005, Congress passed the REAL ID Act, a law that purported to explicitly strip federal district courts of jurisdiction over habeas petitions that challenge removal.[107] The REAL ID Act amended INA section 242(g) to say:

> Except as provided in this section and 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 hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.[108]

INA section 242(b)(9) was similarly expanded, to say:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

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[103] *Id.*

[104] *See supra* Section I.B.1; *see also St. Cyr*, 533 U.S. at 297.

[105] *See, e.g.*, David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996-2005)*, 51 N.Y.L. Sch. L. Rev. 75, 99 n.139 (2007) (discussing habeas petitions challenging detention brought between 2001 and 2005); Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. Third World L.J. 13, 18 (2005) (describing stay practices in the Western District of Louisiana); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 Cornell L. Rev. 459, 481 (2006) (discussing district court jurisdiction in a habeas petition in the Fifth Circuit).

[106] *See* Neuman, *supra* note 21, at 135–36 (discussing the origins of the REAL ID Act).

[107] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302–23.

[108] 8 U.S.C. § 1252(g) (2012) (emphasis added to indicate language added by the REAL ID Act).

> *Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact*.[109]

Following the passage of the REAL ID Act, district courts transferred pending habeas petitions for review of removal orders to the circuit courts.[110] In new habeas petitions challenging removal brought in district courts (and appealed to circuit courts), the government successfully argued that there was no jurisdiction under the REAL ID Act.[111] After the REAL ID Act, the Supreme Court's interpretation in *AADC* continues to be significant, and occasionally, habeas challenges are allowed to proceed, as long as they do not challenge a decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders.[112]

Several cases challenged the constitutionality of the REAL ID Act under the Suspension Clause, but many of the courts that considered these cases held that the Act was facially constitutional, because the motion to reopen process provided an adequate alternative.[113] Those cases dealt with more straightforward appeals and did not consider the complicated fact patterns raised by changed country conditions.[114]

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[109] Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302–23; 8 U.S.C. § 1252(b)(9) (emphasis added to indicate language added by the REAL ID Act).

[110] *See* Ruiz-Almanzar v. Ridge, 485 F.3d 193, 196 n.7 (2d Cir. 2007) ("District courts were instructed to transfer those habeas petitions challenging a final order of removal that were pending at the time of REAL ID's enactment to the court of appeals in which the petitions could have been properly brought . . . .").

[111] *See, e.g.*, Luna v. Holder, 637 F.3d 85, 95 (2d Cir. 2011); Muka v. Baker, 559 F.3d 480, 485 (6th Cir. 2009); Ruiz-Martinez v. Mukasey, 516 F.3d 102, 114 (2d Cir. 2008); Mohamed v. Gonzales, 477 F.3d 522, 526 (8th Cir. 2007); Puri v. Gonzales, 464 F.3d 1038, 1041 (9th Cir. 2006); Alexandre v. U.S. Attorney Gen., 452 F.3d 1204, 1206 (11th Cir. 2006).

[112] *See, e.g.*, Aguilar v. U.S. Immigration & Customs Enf't Div. of the Dep't of Homeland Sec., 510 F.3d 1, 11 (1st Cir. 2007) (explaining that 1252(b)(9) excludes "claims that are independent of, or wholly collateral to, the removal process"); *see also* Hutchins, *supra* note 21, at 1 (describing the availability of habeas jurisdiction post-REAL ID Act).

[113] *See, e.g.*, *Luna*, 637 F.3d at 95; *Muka*, 559 F.3d at 485; *Ruiz-Martinez*, 516 F.3d at 114; *Mohamed*, 477 F.3d at 526; *Puri*, 464 F.3d at 1041; *Alexandre*, 452 F.3d at 1206.

[114] These cases left open the possibility that there would be successful as-applied challenges to the REAL ID Act. *See, e.g.*, *Muka*, 559 F.3d at 486 ("We do not say that there will never be an alien claiming protection under § 1255(i) who could make a successful as-applied challenge to the REAL ID Act. . . . [We] do not foreclose other distinct as-applied challenges.").

III
The Predicament of Noncitizens Facing Deportation Who Are at Risk of Persecution Based on Changed Country Conditions

Modern immigration law is a "complicated statutory scheme . . . akin to a corn maze."[115] This maze gives rise to procedural postures where noncitizens may find that there is no judicial forum available to hear their claims that their deportation is unconstitutional or contrary to statute. One example courts have recently recognized occurs when a noncitizen is not deported for years following the issuance of a final order of removal, and during that time conditions in her home country change such that she fears persecution upon return. This Part will first explain why noncitizens may find themselves living in the United States for years after receiving a final order of removal, and second, the limited legal options available to a noncitizen with a final order of removal who fears persecution.

A. Noncitizens Living in the United States with Final Orders of Removal

Upon reading a story like Mr. Hamama's in the Introduction, readers may wonder: How did Mr. Hamama continue living and working in the United States for twenty-five years after the immigration court ordered that he be deported? In fact, Mr. Hamama's situation is not uncommon. 962,000 people are living in the United States with outstanding deportation orders that have never been enforced.[116] The reasons for the delay in deportation are varied. Immigration orders may go unenforced for humanitarian or policy reasons—some deportations, particularly of people who do not have criminal records, have been considered low priority.[117] In other cases, immigration officers are unable to locate somebody because they have moved or otherwise "slipped through gaping cracks in the immigration system."[118] In about a quarter of the cases of noncitizens living in the United States with old orders of removal, it is impossible for ICE to

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115 Ragbir v. Sessions, No. 18-CV-236 (KBF), 2018 WL 623557, at *2 (S.D.N.Y. Jan. 29, 2018).

116 Vivian Yee, *Migrants Confront Judgment Day over Old Deportation Orders*, N.Y. Times (Mar. 4, 2017), https://www.nytimes.com/2017/03/04/us/migrants-facing-old-deportation-orders.html.

117 *Id.* (citing examples of law-abiding immigrants with strong community ties who were not considered priorities for deportation).

118 *Id.*

deport the noncitizen because their country of origin refuses to take back deportees.[119]

If a noncitizen's "removal is not significantly likely in the reasonably foreseeable future," she may be released from immigration detention on an order of supervision.[120] A noncitizen with an order of supervision may receive employment authorization, allowing her to work legally in the United States.[121] An order of supervision can allow a noncitizen to lead a "normal" life, marked only by occasional routine check-ins with ICE, although many individuals on orders of supervision now live in fear that they will be suddenly detained at their check-in.[122]

The Trump Administration has taken aggressive steps to enforce previously unenforced removal orders.[123] Tactics have included arresting noncitizens at ICE check-ins, at interviews for immigration benefits, and at courthouses.[124] Another strategy has been to pressure other nations into accepting deportees, sometimes using visa sanctions.[125] As of September 2018, there were only nine countries remaining on a Department of Homeland Security list of "recalcitrant" countries who were uncooperative with deportations.[126] These combined efforts put noncitizens who have been living peaceably in the United States for years at increased risk of being suddenly targeted for deportation, even in cases where they fear persecution.

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119 *Id.* (listing China, Haiti, Brazil, and India as countries that refuse to take back deportees).

120 *See* 8 C.F.R. § 241.13(h) (2019); *see also* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1147 (2015) (discussing ICE orders of supervision). Various conditions may be attached to orders of supervision, such as compliance with the law, and regular in-person meetings at ICE offices. Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2160 (2017). The number of noncitizens living in the United States on orders of supervision is significant: In 2014, ICE granted supervision orders to 81,085 individuals. Heeren, *supra*, at 1148.

121 *See* § 241.13(h)(3).

122 *See, e.g.*, Liz Robbins, *Once Routine, Immigration Check-Ins Are Now High Stakes*, N.Y. TIMES (Apr. 11, 2017), https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html ("[U]nder President Trump, the stakes of these [annual check-in] meetings have changed. What was routine is now roulette."); Fernanda Santos, *She Showed Up Yearly to Meet Immigration Agents. Now They've Deported Her.*, N.Y. TIMES (Feb. 8, 2017), https://www.nytimes.com/2017/02/08/us/phoenix-guadalupe-garcia-de-rayos.html.

123 *See* RANDY CAPPS ET AL., MIGRATION POLICY INST., REVVING UP THE DEPORTATION MACHINERY: ENFORCEMENT AND PUSHBACK UNDER TRUMP 1 (2018), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationEnforcement-FullReport-FINAL-WEB.pdf.

124 *See id.* at 40, 45.

125 JILL H. WILSON, CONG. RESEARCH SERV., IMMIGRATION: "RECALCITRANT" COUNTRIES AND THE USE OF VISA SANCTIONS TO ENCOURAGE COOPERATION WITH ALIEN REMOVALS (2019), https://fas.org/sgp/crs/homesec/IF11025.pdf.

126 *Id.*

B. Existing Remedies

The INA provides for three forms of immigration relief for a noncitizen with a reasonable fear of persecution or torture in her country of origin: asylum,[127] withholding of removal,[128] and relief under the Convention Against Torture (CAT).[129] If a noncitizen has already gone through immigration proceedings and received a final order of removal, she cannot just file a new application for one of these forms of relief. Instead, she must file a motion to reopen. Noncitizens living in the United States with final orders of removal have the statutory right to file motions to reopen their cases, which allows them to introduce new evidence and have their case considered again.[130] Motions to reopen are generally subject to temporal and numerical bars.[131] However, the temporal bars do not apply to noncitizens seeking asylum, withholding, or protection under CAT "based on changed country conditions arising in the country of nationality . . . ."[132] If a motion to reopen is denied, it can be appealed to the relevant federal circuit court of appeals.[133]

The availability of the motion to reopen process is of little help to noncitizens facing immediate deportation. A motion to reopen is a complex legal document that can take three to six months to prepare, so it is not a realistic option for somebody facing a sudden, unexpected deportation.[134] Furthermore, submission of a motion to reopen does not automatically stay a noncitizen's removal. A noncitizen can request a discretionary stay of removal from the BIA in conjunction

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127 *See* 8 U.S.C. § 1101(a)(42) (2014) (describing asylum as a pathway to citizenship available for noncitizens with "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

128 Withholding of removal is a more limited form of relief, which prevents deportation but does not provide a pathway to citizenship for a noncitizen who shows that his "life or freedom would be threatened . . . because of his race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2012).

129 A noncitizen may receive protection under the CAT if she proves that it is more likely than not that she will be tortured if removed at the hands of the government or with acquiescence of the government. *See* 8 C.F.R. § 1208.16(c)(2) (2019).

130 *See* 8 U.S.C. § 1229a(c)(7) (2012).

131 Generally, a motion to reopen must be filed within ninety days of a final order of removal, but this limitation does not apply to motions based on changed country conditions. 8 U.S.C. § 1229a(c)(7)(C)(i)–(ii). The statute allows for only one motion to reopen, with an exception for victims of domestic violence. § 1229a(c)(7)(A). Because of these limitations, practitioners are encouraged to include all possible legal bases for reopening in a single motion to reopen. *See, e.g.*, AM. IMMIGRATION COUNCIL, THE BASICS OF MOTIONS TO REOPEN EOIR-ISSUED REMOVAL ORDERS 5 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf.

132 8 U.S.C. § 1229a(c)(7)(C)(ii) (2012).

133 8 U.S.C. § 1252(a)(5) (2012).

134 *See* Hamama v. Adducci, 912 F.3d 869, 884 (6th Cir. 2018) (White, J., dissenting).

with a motion to reopen, but there is no guarantee that such a stay will be granted, even when a noncitizen fears persecution or torture.[135] If the stay is denied, judicial review is not available until the motion to reopen is also decided.[136] Sometimes the BIA fails to review the request for a stay before a person is deported.[137]

This procedure leaves the possibility that a noncitizen facing persecution because of changed country conditions may be deported before she has the opportunity to file a motion to reopen, before the BIA reviews her request for a stay of removal in conjunction with a motion to reopen, or after the BIA denies a stay of removal in a cursory, non-reviewable decision. The noncitizen has a right to continue litigating the motion to reopen from abroad, but for a noncitizen who is facing persecution, that option is not practicable. She may be deported to a death sentence, imprisonment, or torture. She may need to go into hiding to avoid victimization.[138] Under these circumstances, there is no meaningful opportunity to continue to pursue the motion to reopen.

IV
Applying the Suspension Clause to Noncitizens Challenging Deportation to a Country Where They Face Persecution Because of Changed Country Conditions

As described in Section I.B, the Supreme Court's Suspension Clause analysis requires: (1) a determination that the Suspension Clause applies, and (2) a determination of whether there is an adequate and effective alternative to habeas. Noncitizens seeking to challenge their removal meet the first requirement of the test, as this is the type of challenge to detention that came within habeas jurisdiction at common law and fits within the separation-of-powers policy justifications for the writ. Whether the INA provides an adequate and effective alternative to habeas depends on the facts of the individual case. This Note identifies a category of cases where the INA processes are not an adequate and effective alternative: when a noncitizen with a

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[135] *See* Devitri v. Cronen, 289 F. Supp. 3d 287, 292 (D. Mass. 2018) (discussing the BIA's stay of removal process).

[136] *See id.* (citing Gando-Coello v. INS, 857 F.2d 25, 26 (1st Cir. 1988)).

[137] *See id.* (finding it likely that petitioners will be deported before their motions are reviewed by the BIA).

[138] *See id.* at 294 (describing this conundrum as a "Kafkaesque procedure" which removes somebody "back to the very country where they fear persecution and torture while awaiting a decision on whether they should be subject to removal because of their fears of persecution and torture").

final order of removal is facing deportation to a country where she fears persecution based on changed country conditions.

From 2017 to 2019, six federal district courts found that the Suspension Clause guaranteed habeas jurisdiction in cases challenging execution of a final order of removal because the noncitizen feared persecution based on changed country conditions.[139] In an additional case, the court interpreted the INA's jurisdiction-stripping provisions with the canon of constitutional avoidance, thereby finding jurisdiction and avoiding Suspension Clause problems.[140] These cases recognize the grave constitutional issues at stake in deporting a noncitizen to a country where she faces persecution without judicial review and provide a viable avenue for noncitizens in these circumstances to challenge their removal.

The only circuit court to consider this question went in the other direction.[141] On December 20, 2018, a divided panel of the Sixth Circuit, over a strenuous dissent, reversed the Eastern District of Michigan and ruled that the Suspension Clause did not protect noncitizens seeking a stay of removal to allow them to file motions to reopen to pursue persecution-based relief.[142] This decision flies in the face of a growing body of well-reasoned district court case law acknowledging jurisdiction in similar circumstances.[143] It ignores the history of the habeas petition, contradicts Supreme Court Suspension Clause precedent, and disregards the realities of modern immigration enforcement. Other courts facing this question should decline to follow the Sixth Circuit and instead recognize the necessity of habeas jurisdiction over these types of claims.[144]

This Part will apply the *Boumediene* method of Suspension Clause analysis, and in doing so, answer the two core constitutional

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139 *See* Chaudhry v. Barr, No. 2:19-CV-0682-TLN-DMC-P, 2019 WL 3713762, at *9 (E.D. Cal. Aug. 7, 2019); Compere v. Nielsen, 358 F. Supp. 3d 170, 173 (D.N.H. 2019); Hussein v. Brackett, No. 18-CV-273-JL, 2018 WL 2248513, at *7 (D.N.H. May 16, 2018); Ibrahim v. Acosta, No. 17-CV-24574-GAYLES, 2018 WL 582520, at *6 (S.D. Fla. Jan. 26, 2018); *Devitri*, 289 F. Supp. 3d at 294; Hamama v. Adducci, 258 F. Supp. 3d 828, 829 (E.D. Mich. 2017).

140 *See* Sied v. Nielsen, No. 17-CV-06785-LB, 2018 WL 1142202, at *21, *25 (N.D. Cal. Mar. 2, 2018) (avoiding an interpretation of the disputed statute that would result in a constitutional violation).

141 But the Second Circuit recently approved a different as-applied Suspension Clause challenge to the INA's jurisdiction-stripping provisions. *See* Ragbir v. Homan, 923 F.3d 53, 74 (2d Cir. 2019) (holding that the Suspension Clause guaranteed habeas jurisdiction over a noncitizen's petition challenging his removal as unconstitutional First Amendment retaliation).

142 Hamama v. Adducci, 912 F.3d 869, 880 (6th Cir. 2018).

143 *See* cases cited *supra* note 139.

144 Indeed, the Second Circuit has already declined to follow a *Hamama*-style analysis. *See supra* note 141.

contentions of the *Hamama* court. Section IV.A will demonstrate that protection from forcible removal from the country is relief that is traditionally cognizable in habeas, and that even if it were not, *Boumediene* forecloses a strict historical test. Section IV.B will explain why the motion to reopen and petition for review process is not an adequate substitute for habeas for noncitizens who are facing immediate deportation and fearing persecution because of changed country conditions.

A. The Suspension Clause Applies to a Noncitizen Challenging Her Deportation

In the seminal Suspension Clause case, *Boumediene*, the Court wrote: "[C]ommon-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances."[145] The *Hamama* court holds that the petitioners, seeking to prevent their forcible removal from the country, "are not seeking habeas relief."[146] This statement reflects an untenably narrow view of habeas, which would deprive noncitizens facing deportation of rights that have been acknowledged in such circumstances for centuries.

First, this Section argues that deportation is a physical restraint on liberty traditionally cognizable in habeas. Second, this Section argues that the narrow historical test the *Hamama* court proposes is at odds with Supreme Court precedent in *Boumediene*.

1. Deportation Is a Physical Restraint on Liberty Traditionally Cognizable in Habeas

As discussed *supra* in Part I, at common law and in early American history, habeas was a right of persons, not limited to citizens.[147] Supreme Court precedent states that the Suspension Clause, *at minimum*, protects the writ of habeas corpus as it existed in 1789.[148]

As Professor Lenni Benson has explained, "Before a person can be removed from the United States, the government must have control over the body of the person. In immigration cases, this simple fact

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[145] Boumediene v. Bush, 553 U.S. 723, 779 (2008).

[146] *Hamama*, 912 F.3d at 875.

[147] *See supra* Section I.A; *see also Boumediene*, 553 U.S. at 732 (recognizing that noncitizens designated "enemy combatants" and held outside of the territorial United States are protected by the Suspension Clause under certain circumstances); INS v. St. Cyr, 533 U.S. 289, 304–07 (2001) (recognizing substantial evidence that noncitizens in the United States are protected by the Suspension Clause).

[148] *St. Cyr*, 533 U.S. at 304.

has always been the basis for habeas corpus jurisdiction."[149] By definition, removal-based claims challenge the government's control over the body of the person and are cognizable in habeas. In *St. Cyr*, where a noncitizen brought a habeas petition to challenge his removal, "the INS argue[d] that this case f[ell] outside the traditional scope of the writ at common law."[150] The Court disagreed, finding that there was substantial evidence to support the proposition that "pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus."[151] *St. Cyr* is grounded in a historical analysis of the writ of habeas corpus as a way of outlining the *minimum* protections of the Suspension Clause. That history demonstrates that habeas was an adaptable writ, applied to a variety of circumstances. It has never been limited to challenges to strict physical confinement.[152] The Supreme Court in *St. Cyr* cited Jonathan Hafetz's history of the writ as a flexible remedy, described *supra* in Section I.A.[153]

The *Hamama* court confines the protections of the Suspension Clause to a narrow (and ahistorical) understanding of habeas, in direct contradiction with Supreme Court precedent. The Court's reasoning is summed up in the following sentence: "Because the common-law writ could not have granted Petitioners' requested relief, the Suspension Clause is not triggered here."[154]

The allegation that challenges to removal "are not traditionally cognizable" is conclusory. *Hamama* does not cite a single historical case supporting this proposition—nor could it, as no case law exists to support this proposition.[155] It does not explain why the history detailed in *St. Cyr* is not relevant, except to provide a semantic distinction between types of relief.[156]

The *Hamama* court attempts to distinguish *St. Cyr* by claiming that the relief that the petitioner in *St. Cyr* sought was "qualitatively different" because he sought "cancellation of removal, which would have entitled him to be released into and remain in the United States," while the *Hamama* petitioners sought "withholding of

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[149] Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411, 1417 (1997).

[150] *St. Cyr*, 533 U.S. at 303.

[151] *Id.* at 304–05.

[152] *See supra* Section I.A (discussing the broad scope of common law habeas).

[153] *St. Cyr*, 533 U.S. at 303–04.

[154] Hamama v. Adducci, 912 F.3d 869, 875–76 (6th Cir. 2018).

[155] The Second Circuit recently came to the exact opposite conclusion on this point. *See* Ragbir v. Homan, 923 F.3d 53, 73 (2d Cir. 2019) ("[Suspension Clause] protections extend fully to [noncitizens] subject to an order of removal.").

[156] *See id.* at 876–77.

removal, which would entitle them not to be released into Iraq."[157] The court provides no basis for making this fine distinction between these two challenges to forcible government removal from the country. No such basis exists.[158] In both cases, the habeas petitioner sought freedom from immediate deportation. ICE intended to put the *Hamama* petitioners on planes to Iraq, and they asked the court, through the vehicle of habeas, to stay their removal. The *Hamama* court incorrectly complicated the inquiry by unnecessarily looking at the precise type of underlying immigration relief for which the petitioners applied. *St. Cyr* stated that "[b]ecause of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'"[159] This analysis does not apply only to particular types of immigration relief.[160]

Perhaps because the history, and logic, of habeas petitions challenging removal is widely known after *St. Cyr*, many of the recent district court decisions on this topic do not even address the question.[161] Instead, they move directly to the question contemplated in Section IV.A.2. Similarly, the circuit court cases addressing facial challenges to the REAL ID Act do not rest on this reasoning, either. Instead, they upheld the Act because of the availability of an adequate and effective substitute for habeas.[162] If a challenge to removal is not cognizable in habeas at all, these courts would not even need to address the *Swain* adequate and effective substitute question.

Instead of relying on relevant precedent and history, the *Hamama* opinion relies heavily on a case that is inapposite: *Munaf v.*

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157 *Id.* at 876.

158 The Second Circuit has declined to make such a distinction. *See Homan*, 923 F.3d at 73 (relying on *St. Cyr* to support a Suspension Clause argument outside of the context of withholding of removal).

159 INS v. St. Cyr, 533 U.S. 289, 300 (2001) (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

160 *See* Hamama v. Adducci, 912 F.3d 869, 882 (White, J., dissenting) ("I do not find this difference significant; the point is that protection against deportation was within the core of the writ.").

161 *See, e.g.*, Hussein v. Brackett, No. 18-CV-273-JL, 2018 WL 2248513 (D.N.H. May 16, 2018); Ibrahim v. Acosta, No. 17-CV-24574-GAYLES, 2018 WL 582520 (S.D. Fla. Jan. 26, 2018); Devitri v. Cronen, 290 F. Supp. 3d 86 (D. Mass. 2017); *see also* Compere v. Nielsen, 358 F. Supp. 3d 170, 178 n.10 (D.N.H. 2019) (addressing this issue only in a footnote rejecting the *Hamama* court's analysis).

162 *See, e.g.*, Luna v. Holder, 637 F.3d 85, 87 (2d Cir. 2011) ("We hold that applying the [provision of the REAL ID Act] to Petitioners does not violate the Suspension Clause because the statutory motion to reopen process as described herein is an adequate and effective substitute for habeas review."); *see also* Muka v. Baker, 559 F.3d 480, 485 (6th Cir. 2009) ("Because a petition for review provides an alien with the availability of the same scope of review as a writ of habeas corpus, we hold that, facially, the limitation on habeas corpus relief in the REAL ID Act does not violate the Suspension Clause.").

Geren.[163] *Munaf* held that district courts do not have habeas jurisdiction to stop the military from transferring American citizens detained in Iraq to the Iraqi government for criminal prosecution.[164] The language from *Munaf* that the *Hamama* court focused on is as follows:

> [H]ere the last thing petitioners want is simple release; that would expose them to apprehension by Iraqi authorities for criminal prosecution, precisely what petitioners went to federal court to avoid. At the end of the day, what petitioners are really after is a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes . . . .[165]

These facts do not apply to noncitizens seeking to stay their deportation.[166] *Munaf* is specific to individuals facing criminal prosecution from a foreign government. The *Munaf* analysis is steeped in complex questions of military and foreign affairs and is therefore a red herring in the domestic immigration context.[167]

For these reasons, district courts considering this issue in other circuits after *Hamama* should not follow the Sixth Circuit's ahistorical approach.[168] One court has already stated that it is "unpersuaded" by the *Hamama* Sixth Circuit decision.[169] In *Compere*, the District of New Hampshire stated: "It is also quite clear that a stay to prevent a petitioner's removal in violation of federal law is a permissible form of habeas corpus relief."[170] The court noted that the only Supreme Court case *Hamama* relied on was *Munaf v. Geren*, which is "easily distinguishable."[171] The government's briefing in that case cited *Hamama* but did not strongly argue the point that a stay of removal is not cognizable in habeas, indicating that perhaps even the government does not believe in this historically flawed argument.[172]

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[163] 553 U.S. 674 (2008).

[164] *See id.* at 680.

[165] *Id.* at 693–94.

[166] Hamama v. Adducci, 912 F.3d 869, 882 (6th Cir. 2018) (White, J., dissenting) ("Here, Petitioners are not subject to the extradition request of a foreign power and are not seeking habeas that would 'shelter them' from government prosecution.").

[167] *See, e.g.*, *id.*; Sied v. Nielsen, No. 17-CV-06785-LB, 2018 WL 1142202, at *23 n.75 (N.D. Cal. Mar. 2, 2018) ("*Munaf* addressed U.S. citizens who had traveled voluntarily to Iraq and allegedly committed crimes there, and who were then captured by multinational forces. . . . No similar issue is presented here.").

[168] The Second Circuit's approach to this question in *Ragbir* is more in line with historical precedent. *See* Ragbir v. Homan, 923 F.3d 53, 73 (2d Cir. 2019) (discussing historical treatment of the writ of habeas corpus).

[169] Compere v. Nielsen, 358 F. Supp. 3d 170, 179 n.10 (D.N.H. 2019).

[170] *Id.*

[171] *Id.*

[172] *See id.* at 178–79 n.10.

2. Boumediene *Does Not Require a Direct Common Law Analogue*

Even if it was true that "the common-law writ could not have granted [p]etitioners' requested relief," this does not foreclose Suspension Clause protections.[173] The Supreme Court has never held that the Suspension Clause *only* protects writs of habeas available in 1789. *St. Cyr* stated that *at minimum*, the Suspension Clause protects writs of habeas available in 1789.[174] *Boumediene* goes further by stating that the Suspension Clause applied even though there was *no historical evidence* that the type of habeas the petitioners brought would have been available in 1789.[175]

Boumediene recognized history as a guide, but not a dispositive factor, when dealing with problems that simply did not exist at common law.[176] Common law courts were not confronted with the question of habeas petitions brought by noncitizen enemy combatants detained at a location with the complex legal status of Guantanamo Bay.[177] Common law courts also did not deal with an immigration enforcement scheme with the complexities of applications for cancellation of removal and relief under the Convention Against Torture. What history shows is that the writ was adaptable, strongest in challenges against executive detention, and available regardless of citizenship status.[178] The *Boumediene* court was concerned with history to understand the essential separation-of-powers doctrine underlying the Suspension Clause, not to find direct common law analogues.[179]

The Suspension Clause protects challenges to unlawful detention, a fundamental right at common law[180] and in American society.[181]

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173 *See id.* at 178 n.10 (citing Hamama v. Adducci, 912 F.3d 869, 875–76 (6th Cir. 2018).

174 *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001).

175 Boumediene v. Bush, 553 U.S. 723, 752 (2008) (declining to "infer too much, one way or the other, from the lack of historical evidence on point").

176 The Second Circuit cited this aspect of *Boumediene* in support of its analysis that the Suspension Clause applies to noncitizens facing deportation. *See* Ragbir v. Homan, 923 F.3d 53, 78 (2d Cir. 2019) ("In the end, we cannot rely 'upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us.'" (quoting *Boumediene*, 553 U.S. at 779–80)).

177 *Boumediene*, 553 U.S. at 752 (noting "the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age").

178 *See id.*

179 *Id.* at 765–66 ("The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.").

180 Blackstone called it "the most celebrated writ in English law." 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

181 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("[The] Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."); Compere v. Nielsen, 358 F. Supp. 3d 170, 178 (D.N.H. 2019)

The writ as it existed in 1789 sets a minimum floor, but there is no reason why the Suspension Clause cannot or should not protect jurisdiction over *all* habeas petitions. A court deciding a case involving a noncitizen challenging removal need not decide so broadly, however, because this type of challenge is traditionally cognizable in habeas.

B. The Lack of an Adequate and Effective Alternative to Habeas for Noncitizens Facing Deportation Who Fear Persecution Based on Changed Country Conditions

After establishing that the Suspension Clause applies to challenges to removal, the next question in analyzing when habeas has been eliminated is whether there is an adequate and effective alternative to habeas. It may be true that, in general, the immigration enforcement scheme provides an adequate and effective alternative such that habeas jurisdiction is not constitutionally required in most cases.[182] However, in the category of cases described in this Note,[183] and likely in other exceptional circumstances as well,[184] there is no adequate and effective alternative, and federal district courts are constitutionally required to exercise habeas jurisdiction.

The "adequate and effective alternative" test is drawn from *Swain v. Pressley*,[185] as expanded upon in *Boumediene v. Bush*.[186] Congress has the ability to restrict habeas jurisdiction only if it provides for "the substitution of a new collateral remedy which is both

("The right to seek habeas corpus relief is fundamental to the Constitution's scheme of ordered liberty.").

[182] *See supra* text accompanying notes 103–04. While the facial unconstitutionality argument was rejected in the courts, there was strong scholarly support for it. *See, e.g.*, Pfenning, *supra* note 21, at 751; Jennifer Norako, *Accuracy or Fairness?: The Meaning of Habeas Corpus After* Boumediene v. Bush *and Its Implications on Alien Removal Orders*, 58 AM. U. L. REV. 1611, 1632–33 (2009). However, this Note assumes that the REAL ID Act is facially constitutional and therefore focuses only on as-applied challenges.

[183] *See Compere*, 358 F. Supp. 3d at 181; Hussein v. Brackett, No. 18-CV-273-JL, 2018 WL 2248513, at *5 (D.N.H. May 16, 2018); Devitri v. Cronen, 289 F. Supp. 3d 287, 294 (D. Mass. 2018); Ibrahim v. Acosta, No. 17-CV-24574-GAYLES, 2018 WL 582520, at *6 (S.D. Fla. Jan. 26, 2018).

[184] *See, e.g.*, Ragbir v. Homan, 923 F.3d 53, 73–74 (2d Cir. 2019) (holding that the Suspension Clause guaranteed habeas jurisdiction over a noncitizen's petition challenging his removal as unconstitutional First Amendment retaliation); Jimenez v. Nielsen, 334 F. Supp. 3d 370, 384 (D. Mass. 2018) (applying similar Suspension Clause arguments to a noncitizen facing deportation who was in the process of applying for an adjustment of status through a U.S. citizen spouse); S.N.C. v. Sessions, No. 18 Civ. 7680 (LGS), 2018 WL 6175902, at *3 (S.D.N.Y. Nov. 26, 2018) (applying the canon of constitutional avoidance because of concerns about how the Suspension Clause would apply to a noncitizen facing deportation who was in the process of applying for a visa for trafficking victims).

[185] 430 U.S. 372, 381 (1977).

[186] 553 U.S. 723, 779–80 (2008).

adequate and effective."[187] The *Boumediene* Court advocated an in-depth, case-by-case inquiry on this question, considering the totality of the circumstances, including the rigor of any earlier proceedings and whether detainees were held pursuant to judicial or executive order.[188]

From 2017 to 2019, six district courts,[189] including the now-reversed *Hamama* Eastern District of Michigan, have acknowledged that in the case of a noncitizen facing deportation to a country where she fears persecution based on changed country condition, the INA alternative to habeas—the motion to reopen and petition for review process—is not adequate. This analysis reflects an understanding of the complexities of immigration law, as well as the methodology of *Boumediene.*

The *Hamama* court dispenses of this complex inquiry with two simple paragraphs, without even citing the most relevant Supreme Court precedent, *Boumediene*. *Hamama* held that "a motion to reopen followed by a petition for review filed in a court of appeals . . . provides an alien with the same scope of relief as habeas."[190] The court dismissed the unique factors presented by the case and said that the petitioners had adequate time to avail themselves of the motion to reopen process.[191] This cursory analysis overlooks the myriad deficiencies of the motion to reopen process in the context of a noncitizen seeking to pursue persecution-related relief.

First, filing a motion to reopen does not automatically stay a noncitizen's removal.[192] A noncitizen may request an emergency stay of removal from the IJ or, if his case was appealed, from the BIA in conjunction with a motion to reopen. But there is no judicial review in the federal courts of either discretionary stay.[193] As the *Compere* court has summarized:

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[187] *Swain*, 430 U.S. at 381.

[188] *See Boumediene*, 553 U.S. at 783 ("Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.").

[189] *See supra* note 139.

[190] Hamama v. Adducci, 912 F.3d 869, 876 (6th Cir. 2018).

[191] *Id.* at 876–77.

[192] *See* 8 C.F.R. § 1003.2(f) (2019). There is an exception, however, for motions filed under § 1003.23(b)(4)(ii) or § 1003.23(b)(4)(iii)(A). *Id.*

[193] *See* 8 U.S.C. § 1252(b)(9) (2012) (limiting judicial review of removal proceedings to final orders); *see also* Hussein v. Brackett, No. 18-CV-273-JL, 2018 WL 2248513, at *6 (D.N.H. May 16, 2018) ("As counsel for both parties agreed at oral argument, a denial of Hussein's motion for an emergency stay would not constitute a final order, a necessary prerequisite to that court's jurisdiction." (citing Gando-Coello v. INS, 857 F.2d 25, 26 (1st Cir. 1988))); Devitri v. Cronen, 289 F. Supp. 3d 287, 294 (D. Mass. 2018) (noting that the BIA emergency stay of removal process is unavailable to noncitizens who are not detained).

> In short, because no Article III court has been granted jurisdiction either to review the denial of an emergency motion to stay while a motion to reopen is pending, or to entertain a motion to stay pending the BIA's ruling on a motion to reopen, the government takes the position that it has the absolute and unreviewable discretion to remove an alien while a motion to reopen is pending.[194]

In some cases, the administrative adjudicators fail to review a request for a stay before a noncitizen is removed.[195] This discretionary stay of removal process does not measure up to the rigors of federal court habeas review.[196]

There is also the possibility that a noncitizen with a strong claim for a motion to reopen may be deported before she has a chance to file that motion. Emergency stays of removal must be requested concurrently with the filing of a motion to reopen. But motions to reopen are time-consuming, complex legal documents, requiring extensive factual research and documentary evidence.[197] Preparing this motion may take three to six months, so this is not a feasible option for a noncitizen facing the government's sudden decision to deport her.[198] Filing a habeas petition does not require this level of research and evidentiary showing, and it is possible to amend habeas petitions,[199] so it is a more practical option in an emergency where a noncitizen faces abrupt deportation.

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194 Compere v. Nielsen, 358 F. Supp. 3d 170, 180 (D.N.H. 2019).

195 *See, e.g.*, Devitri v. Cronen, 290 F. Supp. 3d 86, 94 (D. Mass. 2017) (describing an affidavit filed by Petitioner's side describing cases of deportation prior to review); *see also* Sied v. Nielsen, No. 17-CV-06785-LB, 2018 WL 1142202, at *7 (N.D. Cal. Mar. 2, 2018) (listing examples of "scenarios where a[ ] [noncitizen] can be deported before his motion to reopen is heard and decided"), *appeal dismissed*, No. 18-16128, 2018 WL 6624692 (9th Cir. Sept. 14, 2018).

196 *Cf.* Boumediene v. Bush, 553 U.S. 723, 783 (2008) (analyzing the need for habeas by looking at the rigor of underlying proceedings and noting "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing").

197 *See* 8 U.S.C. § 1229a(c)(7)(B) (2012) ("The motion to reopen . . . shall be supported by affidavits or other evidentiary material."); 8 C.F.R. § 1003.2(c)(1) (2019) ("A motion to reopen proceedings shall state the new facts that will be proven at a hearing . . . and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings . . . must be accompanied by the appropriate application for relief and all supporting documentation.").

198 *See* Hamama v. Adducci, 912 F.3d 869, 884 (6th Cir. 2018) (White, J., dissenting) ("Under normal circumstances, preparing a motion to reopen can take between three and six months.").

199 *See* 28 U.S.C. § 2242 (2012) (requiring only that a habeas petition "allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known"); *see also* FED. R. CIV. P. 15 (providing rules for amended and supplemental pleadings).

Requiring a noncitizen facing persecution in her home country to litigate a motion to reopen after removal is both inhumane and impracticable.[200] The *Devitri* court explained the problem as follows: "[U]nder this Kafkaesque procedure, they will be removed back to the very country where they fear persecution and torture while awaiting a decision on whether they should be subject to removal because of their fears of persecution and torture."[201] Under the Convention Against Torture, the United States has an obligation not to return people to countries where they are likely to be tortured.[202] The purpose of this important international obligation is frustrated if noncitizens are returned while they are attempting to litigate a motion to reopen on the grounds that they are likely to be tortured. An administrative process that can return somebody to a country where they face persecution, without any Article III review, does *not* provide "the same scope of relief as habeas."[203]

The *Hamama* court dismisses these arguments by blaming the petitioners for not filing a motion to reopen earlier.[204] This solution does not offer a "meaningful opportunity" to challenge their detention, as required by *Boumediene*.[205] Before the petitioners were arrested, they had no notice that their removal was imminent—they had orders of supervision authorizing them to live and work in the United States.[206] Given that a motion to reopen is a complex and lengthy legal document bound by temporal and numerical bars,[207] it is unreasonable for the court to have expected Mr. Hamama and others like him to have retained an attorney for this purpose when removal was not foreseeable.[208] There is also the possibility that long-time

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[200] *See* Compere v. Nielsen, 358 F. Supp. 3d 170, 181 (D.N.H. 2019); Ibrahim v. Acosta, No. 17-CV-24574-GAYLES, 2018 WL 582520, at *6 (S.D. Fla. Jan. 26, 2018) ("Petitioners cannot effectively pursue motions to reopen from Somalia where they would likely be forced underground to avoid persecution immediately upon arrival.").

[201] Devitri v. Cronen, 289 F. Supp. 3d 287, 294 (D. Mass. 2018).

[202] *See* 8 C.F.R. § 208.16(c) (2019).

[203] *Hamama*, 912 F.3d at 876.

[204] *See id.* ("Petitioners had years to file their motions to reopen; they cannot now argue that the system gave them too little time.").

[205] Boumediene v. Bush, 553 U.S. 723, 779–80 (2008).

[206] *See Hamama*, 912 F.3d at 884 (White, J., dissenting) ("Petitioners were living for years (or decades) under removal orders but with no actual prospect of being deported. . . . [T]here was no real possibility of removal and it was unclear what country conditions might be at some hypothetical future time when removal might be possible.").

[207] *See supra* note 133.

[208] *See Hamama*, 912 F.3d at 884 (White, J., dissenting) ("There is abundant evidence in the record that motions to reopen are complicated, time-consuming, and expensive. These motions require the applicant to compile files, affidavits, and 'hundreds of pages of supporting evidence,' fill out all sections of the application, and include an original signature.").

residents of the United States may be out of touch with the on-the-ground realities in their home countries and not know the severity of the persecution they may encounter until they realize they are facing an imminent deportation. These concerns counsel in favor of focusing on what alternatives to habeas exist in the present, not requiring petitioners to have taken some action in the past when circumstances were different. For noncitizens facing deportation to countries where they face persecution based on changed country conditions, a motion to reopen is not an adequate alternative to habeas, and the Suspension Clause requires habeas jurisdiction.

Conclusion

The history of the writ of habeas corpus and Suspension Clause jurisprudence described in this Note demonstrate that the Clause applies to noncitizens facing deportation. The circuit courts have concluded that, in general, there is no Suspension Clause problem in the denial of habeas jurisdiction, not because the Suspension Clause does not apply but instead because the motion to reopen process provides an adequate and effective alternative. The question in any as-applied Suspension Clause inquiry is, then, whether the motion to reopen is an adequate alternative under the specific confluence of circumstances the case presents. It may be that in the majority of cases, the motion to reopen is an adequate alternative, and the noncitizen can continue litigating that motion from abroad. But exceptional circumstances will occur where that is not a practicable solution.

This Note describes a set of circumstances under which the Suspension Clause guarantees jurisdiction over a noncitizen's habeas challenge to her deportation because the motion to reopen does not substitute for habeas. The threat of persecution or torture brings a particular urgency and sympathy to this set of cases. Practitioners may find a variety of other situations where exceptional circumstances render the motion to reopen process similarly inadequate. District courts have already begun to identify more circumstances, invoking the Suspension Clause in two cases where ICE sought to deport a noncitizen who was in the process of applying for immigration relief.[209] These cases involve applications for immigration status that are adjudicated outside of immigration court, so the motion to reopen

[209] *See* Jimenez v. Nielsen, 334 F. Supp. 3d 370, 376 (D. Mass. 2018) (finding jurisdiction based on a Suspension Clause analysis for noncitizens in the process of applying for adjustment of status through a U.S. citizen spouse); S.N.C. v. Sessions, No. 18 Civ. 7680 (LGS), 2018 WL 6175902, at *3 (S.D.N.Y. Nov. 26, 2018) (applying the canon of constitutional avoidance because of concerns about how the Suspension Clause applies to a noncitizen in the process of applying for a visa for trafficking victims).

process cannot provide relief.[210] The Second Circuit has also recognized that the Suspension Clause protects habeas jurisdiction for a noncitizen challenging his removal as unconstitutional First Amendment retaliation.[211]

These cases demonstrate the renewed viability of habeas challenges to deportation in the face of an immigration enforcement crackdown. The Constitution does not allow ICE to act with unchecked discretion in forcing a noncitizen to "get into a vessel against his wish and be carried to [another country]."[212] The constitutional protections of the Suspension Clause allow the courts to step in and to consider the lawfulness of such restraints on liberty. Whether the court should enjoin removal in any individual case is a separate question—but where the administrative process is inadequate, the Constitution requires that a noncitizen be allowed her day in court.

210 *Jimenez*, 334 F. Supp. 3d at 382 (noting that a motion to reopen is not a viable alternative to habeas where the underlying relief sought is not adjudicated by the immigration court).

211 Ragbir v. Homan, 923 F.3d 53, 57 (2d Cir. 2019).

212 Chin Yow v. United States, 208 U.S. 8, 12 (1908).