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This *Report* summarizes opinions issued on June 18, 22, and 25, 2020 (Part I).

I. Opinions

● *Dep't of Homeland Security v. Regents of Univ. of Cal.*, 18-587. By a 5-4 vote, the Court held that the Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals (DACA) policy was arbitrary and capricious under the Administrative Procedure Act and therefore must be vacated. In June 2012, President Obama's Secretary of Homeland Security issued a memorandum announcing the DACA program, which provided immigration relief for "certain young people who were brought to this country as children." The memorandum instructed immigration authorities to exercise their prosecutorial discretion by deferring action on those young people for two years, subject to renewal. In addition, the memorandum directed that these deferred action recipients qualify for work authorization during their period of deferred action and be considered "lawfully present" for purposes of Social Security and Medicare benefits—and therefore entitled to receive them. In November 2014, DHS issued a memorandum expanding DACA eligibility and creating a new program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). That program would have authorized deferred action for parents whose children were U.S. citizens or lawful permanent residents. "These parents were to enjoy the same forbearance, work eligibility, and other benefits as DACA recipients." Before the DAPA program could be implemented, 26 states led by Texas filed suit contending that DAPA and the DACA expansion were unlawful. The district court agreed and issued a nationwide preliminary injunction barring implementation of both. The Fifth Circuit affirmed. It concluded that the plaintiff states were likely to succeed on their claim that the APA required the DAPA memorandum to undergo notice and comment. And it concluded that DAPA contravened the Immigration and Nationality Act, which "expressly and carefully provides legal designations allowing defined classes" to "receive the benefits" associated with "lawful presence" and to qualify for work authorization. The Supreme Court affirmed by an equally divided vote.

In June 2017, President Trump's DHS rescinded the DAPA memorandum, citing the preliminary injunction and the new administration's enforcement priorities. In September 2017, Attorney General Sessions sent a letter to Acting Secretary of Homeland Security Elaine Duke "advis[ing]" that DHS "should rescind" DACA as well. General Sessions cited the Fifth Circuit opinion and the Supreme Court's affirmance and concluded that DACA shared the "same legal . . . defects that the courts recognized as to DAPA" and was "likely" to meet a similar fate. The next day, Duke issued a memorandum summarizing the history of the DACA and DAPA programs, the Fifth Circuit opinion and ensuing affirmance, and the contents of General Sessions' letter. The Duke Memorandum concluded that, "Taking into consideration the Supreme Court's and the Fifth Circuit's rulings" and the "Letter from the Attorney General," the "DACA program should be terminated." Multiple groups of plaintiffs soon challenged Duke's decision in three district courts asserting that the rescission was arbitrary and capricious in violation of the APA and infringed equal protection guarantees. All three district courts ruled for the plaintiffs and entered nationwide injunctions.

The D.C. District Court stayed its order for 90 days to permit DHS to "reissue its memorandum rescinding DACA, this time providing a fuller explanation." Two months later, in June 2018, Duke's successor, Secretary Kirstjen Nielsen, issued a memorandum. She identified three reasons why "the

decision to rescind the DACA policy was, and remains, sound." First, she reiterated that "the DACA policy was contrary to law." Second, she said that regardless, DHS wanted to avoid "legally questionable" policies. Third, she identified multiple policy reasons for rescinding DACA. The D.C. District Court declined to revised its prior order in light of the Nielsen Memorandum. After the Ninth Circuit affirmed the nationwide injunction issued by one district court, but before rulings from two other circuits, the Supreme Court granted certiorari. In an opinion by Chief Justice Roberts, the Court held that DHS's rescission of DACA was procedurally invalid and remanded "to DHS so that it may consider the problem anew."

The Court stated that "[t]he dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so." It then turned to the threshold issue whether DHS's decision was reviewable. The Court held that it was, applying the "basic presumption of judicial review [for] one suffering legal wrong because of agency action." (Quotation marks omitted.) DHS argued that the presumption was overcome because the case involved "agency action [ ] committed to agency discretion by law," 5 U.S.C. §701(a)(2), namely, a decision not to institute proceedings. The Court disagreed, explaining that "DACA is not simply a non-enforcement policy"; it created a review process to determine eligibility for DACA that resulted in an "affirmative act of approval." The creation of "a program for conferring affirmative immigration relief . . . is an 'action [that] provides a focus for judicial review.'" The Court also rejected DHS's contention that two specific provisions of immigration law independently barred review.

The Court then turned to the merits and began by assessing whether it could take into account the June 2018 Nielsen Memorandum. The Court held it could not, based on the "foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" The Court interpreted the Nielsen Memorandum as, by its own terms, providing a further explanation for the Duke Memorandum, not a new rescission ("a new rule implementing a new policy"). As such, "she was limited to the agency's original reasons." Yet Nielsen's second and third reasons for rescinding DACA were distinct from Duke's reason—DACA's illegality—and therefore count "only as impermissible *post hoc* rationalizations and thus are not properly before us." In short, "[a]n agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision."

The Court then turned to whether the Duke Memorandum's justification for rescinding DACA was arbitrary and capricious. The Court bypassed respondents' argument that the Duke Memorandum's explanation that DACA is unlawful was inadequately explained and, in any event, wrong. Instead, the Court focused on respondents' third argument—"that Acting Secretary Duke 'failed to consider . . . important aspect[s] of the problem' before her. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)." The Court reasoned that the Fifth Circuit faulted DAPA for violating the INA by granting work authorization and granting Social Security and Medicare benefits to unauthorized aliens on "a class-wide basis." "But," explained the Court, "there is more to DAPA (and DACA) than such benefits. The defining feature of deferred action

is the decision to defer removal (and to notify the affected alien of that decision). And the Fifth Circuit was careful to distinguish that forbearance component from eligibility for benefits." (Citation omitted.) Indeed, the Fifth Circuit observed that "the states do not challenge the Secretary's decision to 'decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation.'" "In other words," said the Court here, "the Secretary's forbearance authority was unimpaired." Yet Attorney General Sessions' memorandum upon which the Duke Memorandum relied "neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy." "Thus," said the Court, "removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for '[e]stablishing national immigration enforcement policies and priorities.' 116 Stat. 2178, 6 U.S.C. §202(5). But Duke's memo offers no reason for terminating forbearance. She instead treated the Attorney General's conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation." The Court concluded that, "given DHS's earlier judgment that forbearance is 'especially justified' for 'productive young people' who were brought here as children and 'know only this country as home,' the DACA Memorandum could not be rescinded in full 'without any consideration whatsoever' of a forbearance-only policy, *State Farm*, 463 U.S., at 51." (Citation omitted.)

The Court found a second flaw in the Duke Memorandum—it "failed to address whether there was 'legitimate reliance' on the DACA Memorandum." The Court had previously held that "[w]hen an agency changes course" it must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account"—and "[i]t would be arbitrary and capricious to ignore such matters." (Citation and quotation marks omitted.) "Respondents and their amici assert that there was much for DHS to consider. They stress that, since 2012, DACA recipients have 'enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance' on the DACA program." The Court noted that these considerations may not be dispositive; but they must be taken into account. For example, "[h]ad Duke considered reliance interests, she might . . . have considered a broader renewal period based on the need for DACA recipients to reorder their affairs."

Finally, the Court rejected respondents' claim that the rescission violates equal protection guarantees. Respondents alleged three types of evidence showing that animus motivated the rescission, but the Court found none of them sufficient. First, that Latinos from Mexico comprised 78% of DACA recipients, and therefore would be disproportionately affected by the recission, simply reflects that "Latinos make up a large share of the unauthorized alien population." Second, the Court found "nothing irregular about the history leading up to the September 2017 rescission." Third, the Court found statements by President Trump pre- and post-election "unilluminating" because "[t]he relevant actors were most directly Acting Secretary Duke and the Attorney General." (Only four Justices joined this portion of the opinion, but the four dissenting Justices agreed that respondents failed to make out an equal protection claim. Justice Sotomayor dissented from this portion of the majority opinion, saying that she would "permit respondents to develop their equal protection claims on remand.")

The Court closed by saying that it does "not decide whether DACA or its rescission are sound policies." "We address only whether the agency complied with the procedural requirement that it

provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew."

Justice Thomas filed an opinion concurring in the judgment in part (the equal protection ruling) and dissenting in part (the APA ruling), which Justices Alito and Gorsuch joined. Justice Thomas stated that "DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process. As a result, the program was unlawful from its inception. . . . The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency's determination of illegality is sound, our review should be at an end." The remainder of the dissent explained why, in the dissent's view, DACA was unlawful procedurally and substantively. First, "Congress has not authorized DHS to reclassify an entire class of removable aliens as lawfully present or to categorically exempt aliens from statutory removal provisions. . . . The immigration statutes provide numerous ways to obtain lawful presence, both temporary and permanent. The highly detailed nature of these provisions indicates that Congress has exhaustively provided for all of the ways that it thought lawful presence should be obtainable, leaving no discretion to DHS to add new pathways."

Next, Justice Thomas found that "[t]he relief that Congress has extended to removable aliens likewise confirms that DACA exceeds DHS' delegated authority. Through deferred action, DACA grants temporary relief to removable aliens on a programmatic scale. See *Texas*, 328 F. Supp. 3d, at 714. But as with lawful presence, Congress did not expressly grant DHS the authority to create categorical exceptions to the statute's removal requirements. And again, as with lawful presence, the intricate level of detail in the federal immigration laws regarding relief from removal indicates that DHS has no discretionary authority to supplement that relief with an entirely new programmatic exemption." Finally, Justice Thomas stated that "DHS could not appeal to general grants of authority" to the Secretary: "Basing the Secretary's ability to completely overhaul immigration law on these general grants of authority would eviscerate that deliberate statutory scheme by 'allow[ing the Secretary of DHS] to grant lawful presence . . . to any illegal alien in the United States.' *Texas*, 809 F.3d, at 184."

Justice Thomas added that "[t]he majority's demanding review of DHS' decisionmaking process is especially perverse given that the 2012 memorandum flouted the APA's procedural requirements—the very requirements designed to prevent arbitrary decisionmaking. Even if DHS were authorized to create DACA, it could not do so without undertaking an administrative rulemaking." And "[g]iven this state of affairs," said Justice Thomas, "it is unclear to me why DHS needed to provide any explanation whatsoever when it decided to rescind DACA. Nothing in the APA suggests that DHS was required to spill any ink justifying the rescission of an invalid legislative rule, let alone that it was required to provide policy justifications beyond acknowledging that the program was simply unlawful from the beginning."

Finally, Justice Thomas maintained that the majority's reasoning fails on its own terms. The majority, he said, "cites no authority for the proposition that arbitrary and capricious review *requires* an agency to dissect an unlawful program piece by piece, scrutinizing each separate element to determine whether it would independently violate the law, rather than just to rescind the entire program." The Attorney General reviewed thorough decisions by the district court and Fifth Circuit and agreed with them. "This legal conclusion more than suffices to supply the 'reasoned analysis' necessary to rescind an unlawful program. *State Farm*, 463 U.S., at 42." Nor, found Justice Thomas, did DHS err "by failing to take into account the reliance interests of DACA recipients. [ ] [R]eliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statutory authority to take. No amount of reliance could ever justify continuing a program that allows DHS to wield power that neither Congress nor the Constitution gave it." Plus, he observed, "deferred action creates no rights—it exists at the Government's discretion and can be revoked at any time." Justice Alito filed a brief separate concurring opinion noting that this litigation has prevented the rescission from being implemented for years: "What this means is that the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term. Our constitutional system is not supposed to work that way."

Justice Kavanaugh filed a separate opinion concurring in the judgment in part (the equal protection ruling) and dissenting in part (the APA ruling). He would have upheld the rescission based on the Nielsen Memorandum, which "more fully explained the Department's legal reasoning for rescinding DACA, and clarified that even if DACA were lawful, the Department would still rescind DACA for a variety of policy reasons." In his view, the Nielsen Memorandum itself constituted a "rule" and "agency action," much like other "common forms of agency action that follow earlier agency action on the same subject." And "[c]ourts often consider an agency's additional explanations of policy or additional explanations made, for example, on agency rehearing or reconsideration, or on remand from a court, even if the agency's bottom-line decision itself does not change." Justice Kavanaugh disagreed that the Nielsen Memorandum is an improper *post hoc* justification, stating that the *post hoc* justification doctrine merely means that courts should not assess agency actions "based on after-the-fact explanations advanced *by agency lawyers during litigation*."

Justice Kavanaugh added that "the ordinary judicial remedy for an agency's insufficient explanation is to remand for further explanation by the relevant agency personnel. It would make little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly *post hoc*, and then to turn around and remand for further explanation by those same agency personnel. Yet that is the upshot of the Court's application of the *post hoc* justification doctrine today." He said that "the only practical consequence of the Court's decision to remand appears to be some delay. The Court's decision seems to allow the Department on remand to relabel and reiterate the substance of the Nielsen Memorandum, perhaps with some elaboration as suggested in the Court's opinion."

● *Liu v. SEC*, 18-1501. By an 8-1 vote, the Court held that "the SEC may seek 'disgorgement' . . . through its power to award 'equitable relief' under 15 U.S.C. §78u(d)(5)," so long as the "dis-

gorgement award [ ] does not exceed a wrongdoer's net profits and is awarded for victims." Petitioners Charles Liu and his wife, Xin Wang, solicited almost $27 million from foreign investors under a federal immigrant investment program. Liu sent a private offering memorandum to prospective investors which pledged that most of the contributions would go toward construction costs of a cancer-treatment center; only amounts collected from a small administrative fee would fund legal, accounting, and administrative expenses. As it turned it out, however, Liu spent nearly $20 million of investor money on marketing expenses and salaries; only a small fraction of the funds went toward a lease, property improvements, and a proton-therapy machine. Liu also diverted much of the funds to accounts under Wang's control. The SEC brought a civil action against Liu and Wang, alleging they violated the terms of the offering documents and misappropriated millions of dollars. The district court ruled for the SEC. Among the remedies it ordered was disgorgement equal to the full amount petitioners raised from investors, less the $234,899 that remained in the corporate accounts for the project. The district court rejected petitioners' contention that the disgorgement award failed to account for their business expenses; and the court ordered petitioners jointly and severally liable. The Ninth Circuit affirmed. In an opinion by Justice Sotomayor, the Court agreed that disgorgement is an available remedy to the SEC in civil actions but placed limits on the remedy. It remanded to allow the lower courts to consider those limits.

Whereas federal law expressly authorizes the SEC to seek disgorgement in administrative proceedings, in civil actions it provides that a "Federal court may grant . . . any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. §78u(d)(5). Although Congress did not define "equitable relief," federal courts since the early 1970s held that the SEC had the authority to obtain profits from wrongdoers, a remedy later called "disgorgement." In *Kokesh v. SEC*, 581 U.S. ___ (2017), the Court held that disgorgement was a "penalty" for purposes of the applicable statute of limitations. But the Court left unresolved whether it could still qualify as "equitable relief" under §78u(d)(5). To answer that question, the Court explained that it "analyzes whether a particular remedy falls into 'those categories of relief that were *typically* available in equity.' *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993)." And what was typically available in equity "can be discerned by consulting works on equity jurisprudence."

Doing so, the Court first concluded that "equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy." The Court explained that a "'profit-based measure of unjust enrichment' Restatement (Third) §51, Comment *a*, at 204, reflected a foundational principle: '[I]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong[.]'" The Court found that its own decisions "confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts." The Court rejected petitioners' contention that equity courts limited this remedy to cases involving a breach of trust or of fiduciary duty.

The Court next concluded that, "[w]hile equity courts did not limit profits remedies to particular types of cases, they did circumscribe the award in multiple ways to avoid transforming it into a penalty outside their equitable powers." First, "the profits remedy often imposed a constructive trust on wrongful gains for wronged victims." Second, equity courts generally rejected the concept of joint-

and-several liability. Third, "courts limited awards to the net profits from wrongdoing," meaning "legitimate expenses" are deducted. (The Court recognized an exception to that last rule "when the 'entire profit of a business or undertaking' results from the wrongful activity.")

The Court observed that the SEC, over the years, has awarded disgorgement in ways "that test the bounds of equity practice: by ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims, imposing joint-and-several disgorgement liability, and declining to deduct even legitimate expenses from the receipts of fraud. The SEC's disgorgement remedy in such incarnations is in considerable tension with equity practices." (Footnote omitted.) The Court rejected the SEC's contention that Congress tacitly approved those practices by referring to "disgorgement" in other statutes. The Court went on to "discuss principles that may guide the lower courts' assessment" of these limits on remand. First, the government must return the funds to known victims, where possible, and not simply deposit the funds in government accounts. The Court left open whether the SEC may deposit disgorged funds with the Treasury "when it is infeasible to distribute the collected funds to investors." Second, the Court held that imposing joint-and-several disgorgement liability conflicts with the common-law rule and "could transform any equitable profits-focused remedy into a penalty." That said, "[t]he common law did [ ] permit liability for partners engaged in concerted wrongdoing." The Court left it to the Ninth Circuit on remand to determine whether that principle applies here. Finally, the Court reiterated that "courts must deduct legitimate expenses before ordering disgorgement under §78u(d)(5)." The Court expressed some skepticism that this case falls within the exception to that rule (for entirely fraudulent schemes), but left it to the Ninth Circuit to resolve.

Justice Thomas issued a dissenting opinion. In his view, "[d]isgorgement can never be awarded under 15 U.S.C. §78u(d)(5)" because "disgorgement is not a traditional equitable remedy." Justice Thomas stated that, "[a]ccording to our usual interpretive convention, 'equitable relief' refers to forms of equitable relief available in the English Court of Chancery at the time of the founding." He pointed to ERISA, the Judiciary Act of 1974, and provisions of the Bankruptcy Code as examples of statutes following that convention. "There is nothing about §78u(d)(5) that counsels departing from this approach." Next, Justice Thomas maintained that "[d]isgorgement is not a traditional form of equitable relief. Rather, cases, legal dictionaries, and treatises establish that it is a 20th-century invention." He distinguished disgorgement from an accounting for profits, which was a traditional equitable remedy, and dismissed disgorgement as "'a relic of the heady days' of courts inserting judicially created relief into statutes." Justice Thomas accused the majority of "undermin[ing] our entire system of equity," and insisted that, at the very least, any disgorgement order "be limited to petitioners' profits," "the order should not be imposed jointly and severally," and "the money paid by petitioners should be used to compensate petitioners' victims."

● *Department of Homeland Security v. Thuraissigiam*, 19-161. By a 5-2-2 vote, the Court held that the Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) restrictions on habeas corpus review for asylum seekers trying to enter the country do not violate the Suspension Clause. IIRIRA created an expedited removal procedure for certain aliens who arrive at the United States and are inadmissible because they lack a valid entry document. An immigration officer can order such an

alien removed without further hearing or review. Applicants can avoid expedited removal, however, by claiming asylum, which they can do by showing a credible fear of persecution. The applicant can try to make that showing to an asylum officer; to a supervisor; and to an immigration judge. If all three reject the applicant's credible-fear claim, the applicant may not—under IIRIRA, 8 U.S.C. §§1252(e)(2), 1252(a)(2)(A)(iii)—seek court review of that determination. (An applicant may obtain habeas review on the question whether he is an alien, was ordered removed, or had already been granted entry as a lawful permanent resident, refugee, or asylee.) This case concerned the constitutionality of that restriction on habeas review.

Respondent Vijayakumar Thuraissigiam, a Sri Lankan national, was stopped by a Border Patrol agent within 25 yards of the southern border, which he had just entered without inspection or entry document. The Department of Homeland Security detained him for expedited removal. He claimed a fear of returning to Sri Lanka because he had been abducted and beaten by a group of men there. An asylum officer held that did not make him eligible for asylum. The supervising officer and immigration judge agreed. Respondent then filed a federal habeas petition asserting a fear of persecution because of his Tamil ethnicity and political views. He alleged that the immigration officials deprived him of "a meaningful opportunity to establish his claims," and requested a writ of habeas corpus to provide him "a new opportunity to apply for asylum and other applicable forms of relief." "His petition made no mention of release from custody." The district court dismissed the petition based on IRRIRA's limit on habeas review. The Ninth Circuit reversed, holding that §1252(e)(2) violates the Suspension Clause. The court added that respondent "has procedural due process rights." In an opinion by Justice Alito, the Court reversed and remanded.

The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, §9, cl. 2. The Court stated in *INS v. St. Cyr*, 533 U.S. 289 (2001), that the Clause, at a minimum, "protects the writ as it existed in 1789," when the Constitution was adopted. Respondent did not contend that the Clause extends any further. The Court held here that "[t]his principle dooms respondent's Suspension Clause argument, because neither respondent nor his *amici* have shown that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result. The writ simply provided a means of contesting the lawfulness of restraint and securing release." The Court pointed to Blackstone, Justice Story, and its own opinions for the proposition that habeas' traditional function was to secure release from illegal custody. Yet respondent "sought entirely different relief: vacatur of his 'removal order' and 'an order directing [the Department] to provide him with a new . . . opportunity to apply for asylum and other relief from removal.'" Such "relief falls outside the scope of the common-law habeas writ." Indeed, noted the Court, "simply releasing him would not provide the right to stay in the country that his petition ultimately seeks. Without a change in status, he would remain subject to arrest, detention, and removal."

Respondent relied on "three bodies of case law" to support his claim, but the Court held that none does so. Respondent first pointed to "the use of habeas before and around the time of the

adoption of the Constitution," but the Court found no evidence that habeas was used to obtain "authorization for an alien to remain in a country other than his own or to obtain administrative or judicial review leading to that result." The Court acknowledged cases where "deserting foreign sailors used habeas to obtain their release from the custody of American officials," but observed that the courts did nothing more than order "simple release from custody." That the released sailors were able to remain in the United States was "a collateral consequence of release," but was due to the absence of immigration laws at the time, not to the writ ordering their release. The second body of case law was decisions of the Court during the "finality era," "which takes its name from a feature of the Immigration Act of 1891 making certain immigration decisions 'final.'" Respondent claimed that these cases—particularly, *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)—held that "the Suspension Clause mandates a minimum level of judicial review to ensure that the Executive complies with the law in effectuating removal." The Court held, however, that "[t]his interpretation of the 'finality era' cases is badly mistaken. Those decisions were based not on the Suspension Clause but on the habeas statute and the immigration laws then in force." Finally, respondent relied on two recent cases, *Boumediene v. Bush*, 553 U.S. 723 (2008), and *St. Cyr*. The Court distinguished *Boumediene*: it was not an immigration case; it involved Guantanamo Bay detainees who sought release from detention, not to enter this country. And the Court distinguished *St. Cyr* as involving "aliens already in the country who were held in custody pending deportation" who challenged their detention.

The Court next rejected respondent's contention "that IIRIRA violates his right to due process by precluding judicial review of his allegedly flawed credibility proceeding." The Court said that it has held for more than a century that an alien seeking initial entry into the country has no due process rights beyond the procedures authorized by Congress. Nor does it matter, held the Court, that respondent wasn't taken into custody immediately upon entry into the country and that he made it 25 yards into U.S. territory before he was apprehended. The forgoing due process rule rests on the fundamental proposition that "[t]he power to admit or exclude aliens is a sovereign prerogative" that rests with "the political department of the government." "This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil." "For these reasons," held the Court, "an alien in respondent's position has only those rights regarding admission that Congress has provided by statute"—which does not include court review of the credible-fear determination.

Justice Thomas filed a concurring opinion. He joined the Court's opinion but wrote separately to opine on the original meaning of the Suspension Clause. In his view, "it seems that the founding generation viewed the privilege of the writ of habeas corpus as a freedom from arbitrary detention." And the Framers understood the privilege to have been "suspended" when there was "a grant of authority to the executive to detain without bail or trial based on suspicion of a crime or dangerousness." IIRIRA, he observed, does not remotely meet that definition of suspension.

Justice Breyer issued an opinion concurring in the judgment, which Justice Ginsburg joined. Justice Breyer "agree[d] that enforcing" IIRIRA's "limits *in this particular case* does not violate the Suspension Clause's constitutional command. . . . But we need not, and should not, go further." That is because "[a]ddressing more broadly whether the Suspension Clause protects people challenging removal decisions may raise a host of difficult questions in the immigration context." For example,

"[w]hat review might the Suspension Clause assure, say, a person apprehended years after she crossed our borders clandestinely and started a life in this country?" "Could Congress, for that matter, deny habeas review to someone ordered removed despite claiming to be a natural-born U. S. citizen? . . . . What about foreclosing habeas review of a claim that rogue immigration officials forged the record of a credible-fear interview that, in truth, never happened?" Justice Breyer would narrowly rule against respondent because he "has never lived in, or been lawfully admitted to, the United States"; and because, at bottom, respondent is challenging factual findings, of which the Court has already held Congress can eliminate habeas review. As to respondent's procedural objections, they are "technical"; review of them "would go beyond the traditionally 'limited role' that habeas has played in immigration cases similar to this one—even during the finality era."

Justice Sotomayor issued a lengthy dissent, which Justice Kagan joined. She wrote that the Court's ruling "flouts over a century of this Court's practice. In case after case, we have heard claims indistinguishable from those respondent raises here, which fall within the heartland of habeas jurisdiction going directly to the origins of the Great Writ." In her view, "Respondent asks merely to be freed from wrongful executive custody. He asserts that he has a credible fear of persecution, and asylum statutes authorize him to remain in the country if he does. That request is indistinguishable from, and no less 'traditional' than, those long made by noncitizens challenging restraints that prevented them from otherwise entering or remaining in a country not their own." Justice Sotomayor then walked through two centuries of cases. Among other things, she read the leading finality era case, *Ekiu*, as recognizing on constitutional grounds "the availability of habeas to review a range of legal and constitutional questions arising in immigration decisions." And she read *St. Cyr* and *Boumediene* as "instruct[ing] that eliminating judicial review of legal and constitutional questions associated with executive detention, like the expedited-removal statute at issue here does, is unconstitutional."

As to procedural due process, Justice Sotomayor wrote that noncitizens *in this country* "undeniably have due process rights"—and respondent was caught in the country. Noting that the majority appeared to cabin its rule to noncitizens "in respondent's position"—*i.e.*, found within 25 feet of the border and caught within 24 hours of entry—Justice Sotomayor found no logical stopping point to the Court's rule. "Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them no matter how many decades they have lived here, how settled and integrated they are in their communities, or how many members of their family are U.S. citizens or residents."

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