JURISDICTION STRIPPING AND THE RIGHT TO COUNSEL IN IMMIGRATION COURT

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There is a Catch-22 at the center of immigration jurisdiction doctrine: for certain due process claims, the only review available is review that is unavailable. Some federal courts have misread a jurisdictional statute to allow only direct appeals of deportation orders, regardless of what claims are at issue. Appealing without a lawyer is difficult and extremely rare; as a result, due process violations that affect only pro se noncitizens are systematically unreviewable. For example, the government has ignored its obligation to translate the asylum application for non-English speakers. But no one has challenged that violation on appeal because any appeal itself has to be filed in English. Similarly, the government does not provide lawyers for children—even toddlers—in immigration court. But that blatant due process violation has never received judicial review because children who need counsel are unable to appeal and raise that claim themselves.

Collateral suits in district court could easily establish that translation of the asylum application is required and that the government must appoint counsel for toddlers. But courts have misread the jurisdictional statute—8 U.S.C. § 1252(b)(9)—to preclude precisely such suits. And the government has now seized on that misreading to argue that the same provision strips the courts of authority to hear challenges to President Trump's asylum bans.

This problem—that denial of counsel works together with the jurisdictional statute to prevent the federal courts from reviewing certain claims—has received little attention. Courts should solve the problem by applying the presumption in favor of judicial review to read the jurisdiction-channeling statute narrowly where the facts *show that absent district court jurisdiction, claims will evade review.*

This problem also points to a more general point about jurisdiction stripping. Judges and scholars have assumed that determining the extent of jurisdiction-stripping statutes requires answering questions of law. But determining whether

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Congress has withdrawn jurisdiction often raises questions of fact, *just as standing doctrine requires a factual inquiry into the imminence of harm.*

INTRODUCTION

To apply for asylum in the United States, noncitizens must fill out a 12-page form in English. The government provides no translation of that form—even for people who speak no English and are imprisoned while they contest their cases in immigration court. There is no serious question that this failure to provide written translation violates the Due Process Clause.

That failure affects thousands of people every year, but it has never been challenged because courts have misread an obscure jurisdictional statute. 8 U.S.C. § 1252(b)(9) ("section (b)(9)"), a seemingly minor provision of the REAL ID Act of 2005, has protected this from challenge. Section (b)(9) provides that judicial review of any questions "arising from" deportation proceedings can only be decided through a "petition for review"—a direct appeal of a removal (deportation) order to a court of appeals.[2]

This statute appears to channel and consolidate appeals in the circuit courts, but in fact, when read expansively and incorrectly, it strips courts of *all* jurisdiction over certain claims. For example, any challenge by a noncitizen to the lack of translation cannot, under an

[2] 8 U.S.C. 1252(b)(9); *see also id.* (b)(2) (providing that petition must be filed in the court of appeals).

expansive reading of the statute, be raised in a collateral action in district court. Instead, it can only be raised on a direct petition for review to a court of appeals. But appeals and petitions for review must themselves be in English, so no one who needs the asylum application translated can challenge the lack of translation on appeal. And in the unlikely event that that non-English-speaker finds a lawyer after having been ordered deported, the lawyer has an obligation to have the application translated and move to reopen the case, mooting the appeal and preventing the issue from receiving judicial review. By contrast, if a collateral action in district court were possible, lawyers could represent a group of non-English-speakers for the limited purpose of challenging the lack of translation, and the action would very likely result in an injunction requiring the agency to provide translation.

Section (b)(9) has not only protected longstanding violations from judicial review, but has also become a shield for the government in litigation over the Trump Administration attacks on immigrants' rights. The government has urged courts to adopt an ever-more-expansive reading of section (b)(9), culminating in its recent assertions that section (b)(9) strips federal district courts of jurisdiction over individual plaintiffs' challenges to President Trump's two asylum bans. A systematic framework for interpreting section (b)(9) is therefore especially important now.

That framework should start with the facts. Courts should ask the question: is there *in fact* a meaningful opportunity for each claim to be raised defensively before a court of appeals?[3] If so, section (b)(9) applies, and the claim must be raised on direct appeal; if not, the presumption in favor of judicial review applies, and section (b)(9) should be read narrowly to permit district court review. Suggesting that every *claim* must receive a meaningful opportunity for review is not the same as suggesting that every *noncitizen* must have a meaningful chance of review. That would require appointed counsel. Instead, the point is that a statute strips courts of jurisdiction over a claim when that claim systematically evades review.

To answer the key factual question, courts should also consider how often claims are raised *as a proportion of the number of likely violations*. When thousands of asylum seekers are required to fill out an application that they cannot understand each year, but none

[3] This is not the same as suggesting that every noncitizen must have a meaningful chance of review. That would require appointed counsel. Instead, the point is that no claim may systematically evade review.

challenge the lack of translation, courts should conclude that direct appeal does not create a meaningful opportunity for review of this failure to translate.[4]

Courts already make similar probabilistic judgments, but they often calculate the probability incorrectly by failing to consider all violations, rather than just the rare challenges of those violations. In the most egregious example of this error (described in detail below), the Ninth Circuit recently concluded that children facing deportation without lawyers have a meaningful chance to raise their deprivation-of-counsel claims on direct appeal—because a single case including that claim had been docketed at the Ninth Circuit. That appeal settled, and the government still does not appoint counsel for children facing deportation. If the Ninth Circuit had considered the denominator—the thousands of cases in which kids were ordered deported but were not able to appeal—it would have reached the opposite conclusion: that there is no meaningful opportunity for judicial review of the claim that due process requires appointed counsel in immigration court. That conclusion, ironically, rests on the unsurprising fact that children who lack counsel are systematically unable to appeal.

Section (b)(9) creates a fundamental contradiction in the rules governing deportation: the law gives procedural protections to pro se immigrants with one hand while making them unenforceable by jurisdiction channeling with the other hand. Many due process violations for immigrants without lawyers result from the *combination* of their inability to assert their rights individually without counsel *and* the preclusion of collateral impact litigation that follows from an expansive misreading of section (b)(9).

Finally, and most broadly, section (b)(9)'s jurisdiction-stripping-by-channeling should inform scholarly theories of judicial supervision of non-Article III tribunals. Whether a withdrawal of jurisdiction exists often presents a factual question. Court and scholars should recognize the factual nature of this inquiry.

This Essay begins, in Part I, by describing the existing Supreme Court case law on jurisdiction channeling and section (b)(9) and explaining how district courts should decide whether to allow affirmative challenges under that case law. Part II describes claims, in the immigration context, that have been effectively precluded by the jurisdiction channeling statute. Two examples are central: the

[4] For the numbers, see text accompanying notes 68-69 *infra*.

immigration courts' failure to translate applications for asylum and the immigration courts' failure to appoint counsel for even young children. In Part III, finally, I discuss more general implications for the study of limits on the jurisdiction of the federal courts.

I. JURISDICTION CHANNELING

This Part describes and criticizes the doctrinal framework for interpreting statutes that purport to channel administrative claims directly to courts of appeals. Although courts often use factual language in evaluating whether these statutes preclude all judicial review, no court has recognized the determination as a factual one. Treating facts as facts is especially important in the immigration context, where the channeling of judicial review interacts with the lack of government-appointed counsel to preclude all review of many claims.

A. *Channeling and the Presumption in Favor of Judicial Review*

Many agency statutes provide for direct review of agency decisions in the courts of appeals, requiring litigants to skip the district court and precluding collateral challenges to agency adjudication procedures. Such agencies include the Merit Systems Protection Board (so long as employment discrimination is not implicated),[5] the Securities and Exchange Commission,[6] and the National Labor Relations Board.[7]

Scholars have devoted little attention to the standard that courts employ to determine the boundaries of jurisdiction channeling statutes.[8] That standard—for determining when a jurisdiction-channeling statute effectively precludes all review—is poorly developed. The leading Supreme Court case on the question

[5] 5 U.S.C. § 7703(b)(1)(A) (vesting jurisdiction in the Court of Appeals for the federal circuit).

[6] 15 U.S.C. § 78y(a)(1).

[7] National Labor Relations Act of 1935, Pub. L. No. 74-198, § 10(e), 49 Stat. 449, 454-55 (1935).

[8] Direct review in the courts of appeals has come in for well-deserved criticism by scholars—but usually not as a preclusion of all review. Mead and Fromherz, for example, note that litigants challenging administrative action must "sift through more than one thousand statutory provisions sprawled across fifty-one titles of the United States Code, enacted piecemeal through more than one hundred years of legislation."[8] They describe the costs of such complexity and advocate a uniform rule—that review should begin in the district court. Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 2 (2015).

suggested that channeling review to the court of appeals does not implicate the presumption in favor of review of constitutional claims. That presumption is a strong one; courts have employed it to reach otherwise implausible readings of jurisdiction-stripping statutes. But the Court concluded that that presumption does not apply so long as a meaningful chance of judicial review remains. The Court did not, however, recognize this determination as a factual, probabilistic one.

That case, *Elgin v. Dept. of Treasury*,[9] concerned whether federal employees could go to district court to raise constitutional challenges to their firing or whether they were required to appeal their firing directly to the federal circuit from the Merit Systems Protection Board (MSPB). The petitioners were federal employees who were fired on the basis of a statute that bans the federal employment of any person who failed to register for the draft.[10] They sued in district court, seeking reinstatement to their jobs as well as a declaration that the statute leading to their firing was unconstitutional.[11] The question before the Supreme Court was whether the district court had jurisdiction or whether the plaintiffs were required instead to bring their claims through a direct administrative appeal, with judicial review only available in the court of appeals for the federal circuit. The opinion divided the Justices along unusual lines: Justice Thomas wrote the majority opinion, and Justice Alito filed a dissent, joined by Justices Ginsburg and Kagan.

The majority declined to apply a presumption in favor of collateral judicial review in the district court and held that the statute by its terms required that the issues be raised on direct appeal to the federal circuit. The majority characterized the well-known presumption in favor of judicial review of constitutional claims, from *Webster v. Doe*[12] and *Bowen v. Michigan Academy of Family Physicians*,[13] as a presumption against an interpretation of a statute to "deny *any* judicial forum for a colorable constitutional claim."[14] The Court then held that this "standard does not apply where Congress simply

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[9] 567 U.S. 1, 14 (2012). The case has generated remarkably little academic commentary; it has been cited only 38 times by law journals. As a basis for comparison, a case in the following term that considered the question of whether a houseboat is a vessel for the purposes of maritime law has been cited by scholars more than twice as often. See Lozman v. City of Riviera Beach, 568 U.S. 115 (2013).

[10] *Id.* at 7.

[11] *Id.*

[12] 486 U.S. 592, 603 (1988)

[13] 476 U.S. 667, 681 n.12 (1986).

[14] Elgin, 567 U.S. at 9.

channels judicial review of a constitutional claim to a particular court."[15]

Yet the Court didn't really mean that: it took care to explain why the claims at issue actually could be raised in the court of appeals. The Court therefore *did* conduct a factual inquiry—which it did not describe as factual—into whether review remained available: it considered whether the opportunity for review of the constitutional claims within the agency, and on appeal to the federal circuit, would be "meaningful." It also suggested that the presumption in favor of judicial review might apply if the claims could not be "meaningfully addressed" in a court of appeals.[16]

In deciding whether meaningful review was available, the Court considered whether the Federal Circuit could reach the claims. The plaintiffs contended that the Federal Circuit could not reach the constitutional issues because the MSPB would dismiss a case raising them, thereby depriving the Federal Circuit of the record needed for constitutional review.[17] The Court disagreed. Although the answer to this question is necessarily probabilistic, the Justices did not treat it that way. Instead, they appeared to be answering a different question: whether such review *could ever be possible*.

That must be the wrong question. Imagine a statute that provides that the federal circuit will review 1 in every 1,000 constitutional claims, to be selected by lottery. The Supreme Court could equally have dismissed the contention that such claims would "never reach the factfinding stage" and that the board would "invariably dismiss" them.[18] Justice Alito's dissent was no more realistic than the majority on this point: the dissent offered reasons why a district court could better adjudicate these claims, but, like the majority, did not suggest the court should determine *how likely* the claims were to be reviewed at the court of appeals. Justice Alito therefore also did not quarrel with the majority's determination that the presumption in favor of judicial review did not apply.

Neither the majority nor the dissent recognized that the meaningfulness of any review process must depend on the *chance* that a claim can be reviewed. In order to answer the question of whether review is meaningful, courts need to consider how commonly it is available. Indeed, the Court used probabilistic language, hazarding a

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[15] *Id.*

[16] *Id.* (quoting Thunder Basin Coal. Co. v. Reich, 510 U.S. 200, 215 (1994)).

[17] *Id.* at 20.

[18] *Id.*

guess about whether factfinding would actually be regularly available in the administrative process, holding that "we think the CSRA review scheme fully accommodates an employee's potential need to establish facts relevant to his constitutional challenge to a federal statute."[19] The court's characterization of its statement as a thought was apt: neither the petitioners nor the government produced evidence about how frequently constitutional claims would be adjudicated if brought through the MSPB process. Nor had the district court conducted factfinding on the issue.[20] And none of the Justices suggested that the district court should have done so.

Yet a factual inquiry into a jurisdictional issue is far from unknown in the law. For example, when establishing standing, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."[21] And courts depend on these facts to make a probabilistic determination about the likelihood of injury.[22] Courts could apply this standard, or fashion a similar one, in determining whether plaintiffs are entitled to the presumption in favor of judicial review.

Had the Court understood the "meaningful review" standard as presenting a factual question, it could have remanded the case to the district court for determination of the facts relevant to it—for example, for determination of how frequently the MSPB dismissed such cases (rather than deciding them on the merits). Only after those determinations should it be possible to say whether the presumption in favor of review applies, and therefore whether district courts have jurisdiction to hear these claims.[23]

In sum, *Elgin* requires that courts inquire into whether meaningful review exists but fails to recognize that this question is a factual, probabilistic one.

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[19] *Id.* at 19.

[20] See Elgin v. U.S., 697 F. Supp. 2d 187, 192-94 (D. Mass. 2010).

[21] Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). For a critical account of this standard, see Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PENN. L. REV. 1373, 1374-75 (2014).

[22] See, e.g., Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (determining whether the plaintiff had standing by asking "whether he was likely to suffer future injury").

[23] Of course, such a decision is vulnerable to one of the majority's criticisms of the dissent: "a jurisdictional rule based on the nature of an employee's constitutional claim would deprive the aggrieved employee, the MSPB, and the district court of clear guidance about the proper forum for the employee's claims at the outset of the case." *Id.* at 15. But the benefits of clarity are questionable if the jurisdictional rule prevents all review.

B. *Channeling and the Suspension Clause*

In the immigration context, the stakes of this channeling question are higher: the Suspension Clause does not merely establish a statutory presumption. Instead, for noncitizens challenging removal orders, the Suspension Clause *guarantees* access either to habeas or to an adequate substitute. The preclusion of review through channeling may violate that guarantee.

Delineating the extent of the Suspension Clause's guarantee of access to court requires a quick detour through the history of immigration habeas. The Suspension Clause has long been understood to allow noncitizens to challenge deportation orders. The 1917 Immigration Act made deportation orders issued by the Attorney General "final"; the Supreme Court understood this provision as making such orders "nonreviewable to the fullest extent possible under the Constitution."[24] Throughout the period from 1917 to 1952, there was no statutory cause of action for judicial review of deportation orders.[25] Yet access to habeas for such review remained available. In fact, a pair of cases decided in the early 1950s simultaneously set the high water mark for the Supreme Court's deference to Congress on immigration issues and confirmed that noncitizens were guaranteed access to the Great Writ to challenge their deportation—even when initially arriving at a port of entry. In both *United States ex rel. Knauff v. Shaughnessy*[26] and *Shaughnessy v. United States ex rel. Mezei*,[27] the Supreme Court allowed noncitizens to challenge their exclusion from the country at ports of entry, holding that a petitioner "may by habeas corpus test the validity of his exclusion"[28]—but finding that arriving noncitizens had virtually no substantive rights to invoke under the Due Process Clause or the immigration laws. The Suspension Clause therefore provides jurisdiction and a cause of action for noncitizens to invoke constitutional, statutory, and regulatory rights, but does not determine the substantive content of the rights to be determined upon such review.

In 1996, Congress tested the limits of this understanding with its passage of the Antiterrorism and Effective Death Penalty Act

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[24] Heikkila v. Barber, 345 U.S. 229, 233-34 (citing Immigration Act of 1917 Section 19(a)).

[25] *Id.* at 231-32.

[26] 338 U.S. 537, 543-44 (1950).

[27] 345 U.S. 206 (1953).

[28] *Id.* at 213.

(AEDPA)[29] and the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA).[30] Together, those statutes purported to preclude all judicial review of deportation orders issued to noncitizens convicted of certain crimes.[31]

The Court invalidated that preclusion in *INS v. St. Cyr*. In *St. Cyr*, a noncitizen who had no other avenue for judicial review filed a habeas petition in district court raising a purely legal question: whether he was eligible, under IIRIRA, for a certain form of immigration relief.[32] The Court held that the district court had habeas jurisdiction. Formally, the Court decided the case on statutory grounds, determining that when Congress deprived the petitioner of "judicial review," it did not intend to deprive the petitioner of access to habeas in the district court.[33] But the Court reached that conclusion by applying "the presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction,"[34] as well as the canon of constitutional avoidance and its cousin requiring "a clear indication" when Congress "invokes the outer limits of [its] power."[35]

How these similar presumptions interact or layer is unclear, but it is clear that the Court applied a strong presumption. In fact, the Court declared outright that the presumption was determinative, acknowledging that if the petitioner had had access to "another judicial forum, it might [have been] permissible to accept" the government's reading of the statute.[36] Moreover, although the Court's ultimate holding was statutory, the Court took care to describe the outer limits of Congress's jurisdiction-stripping power under the Constitution. The Court started from the premise that "'some judicial intervention in deportation cases' is unquestionably 'required by the

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[29] 10 Stat. 1214.

[30] 110 Stat. 3009-546

[31] *See* AEDPA § 401(e) ("Elimination of Custody Review by Habeas Corpus") (eliminating judicial review provisions created by the 1961 statute amending the Immigration and Nationality Act); IIRIRA § 306 (limiting direct review to the court of appeals and providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a designated set of crimes); *see also* INS v. St. Cyr, 533 U.S. 289, 308-14 (2001).

[32] St. Cyr, 533 U.S. at 296-97.

[33] *Id.* at 311-12.

[34] *Id.* at 298.

[35] *Id.* at 299.

[36] *Id.* at 313.

Constitution.'"[37] It then went on explain that the Suspension Clause likely requires judicial review of questions of law arising from deportation proceedings "even assuming that the Suspension Clause protects only the writ as it existed in 1789."[38]

The Suspension Clause also sets requirements for an adequate substitute for habeas. In *Boumediene v. Bush*,[39] the Court held that the Clause, at a minimum, "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[40] Moreover, the Court emphasized that habeas is "above all, an adaptable remedy," and that the contours of habeas review might depend in part on the procedural adequacy of earlier administrative proceedings.[41] The Court also held that a judge hearing a habeas petition must be able to review factual determinations in addition to legal ones where the earlier proceeding was non-adversarial and limited the detainee's ability to develop the underlying factual record.[42]

The Suspension Clause, then, protects judicial review of deportation orders, and any adequate substitute must allow petitioners a meaningful opportunity to vindicate their constitutional and statutory rights, particularly where the underlying administrative procedure is deficient. Yet, as I explain below, section (b)(9) precludes all review of certain deportation-related due process claims. The Suspension Clause is the backdrop for the presumption in favor of review of these claims, and the Clause makes that presumption strong or even dispositive.

II. JURISDICTION CHANNELING, COUNSEL, AND CONSTITUTIONAL VIOLATIONS IN IMMIGRATION COURT

This Part describes two examples of claims precluded by an expansive reading of Section (b)(9): claims seeking translation of the asylum application, and claims seeking appointed counsel for children. Those examples are significant enough, on their own, to

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[37] *Id.* at 300 (quoting Heikkila, 345 U.S. at 235). The Solicitor General has recently asked the Court to reconsider this view, brazenly suggesting that the Court's thorough constitutional reasoning is dicta that it may now set aside. See Brief for the United States, Dep't of Homeland Security v. Thuraissigiam, No. 19-161, at 27-35.

[38] *Id.* at 304.

[39] 533 U.S. 723, 779 (2008).

[40] *Id.* (quoting St. Cyr, 533 U.S. at 302).

[41] *Id.* at 780-81.

[42] *Id.* at 779.

require a rethinking of section (b)(9). But they are only examples, and section (b)(9) has become even more important and harmful as the government has invoked it to defend its asylum bans.

Before describing the two examples in subparts C & D, I offer a brief introduction, in subparts A & B, to immigration court procedure and the state of the doctrine interpreting the immigration statute's channeling scheme.

A. *Immigration Court Procedure*

A standard removal case (called a deportation or exclusion case before 1996) begins when the government files a Notice to Appear. The Notice to Appear sets out the immigration charge—the statutory provision according to which the government believes that the person is in the United States without authorization—and sets a date on which the person is to appear in immigration court.[43] In some cases, the government imprisons the noncitizen pending immigration proceedings; in others, the noncitizen remains free but must appear at immigration court hearings.

The proceedings in immigration court unfold over a series of hearings. At an initial group or "master calendar" hearing, the immigration judge holds a short colloquy with each respondent, offering an advisal of rights (if the respondent lacks an attorney) and giving the respondent a chance to admit or deny the immigration charges.[44] At all hearings, an interpreter is present to translate the oral proceedings—but not any written applications. If the respondent intends to contest the immigration charges or to apply for a form of immigration relief, like asylum or family-based relief, the immigration judge schedules an individual merits hearing, which is a short trial-like proceeding at which the parties may present evidence (including witnesses) and legal arguments.[45]

Either the government or the noncitizen may appeal the immigration judge's decision to the Board of Immigration Appeals (the administrative appeals board within the Executive Office for Immigration Review). If the Board grants relief, that decision is subject to review only by the Attorney General, who may certify decisions of the Board to herself and reverse them if she chooses. If,

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[43] https://www.justice.gov/eoir/dhs-notice-appear-form-i-862; see also Immigration Court Practice Manual at 4.2, https://www.justice.gov/eoir/page/file/1084851/download.

[44] Immigration Court Practice Manual at 4.15(e), https://www.justice.gov/eoir/page/file/1084851/download.

[45] *Id.* at 4.16.

on the other hand, a removal order is affirmed by the Board of Immigration Appeals or by the Attorney General, the respondent may still petition for review of the decision to a court of appeals within 30 days.

B. *The Channeling of Immigration Appeals*

Before describing claims for which an expansive reading of section (b)(9) precludes jurisdiction entirely, a little background on that section is in order.

The immigration statute, as amended by the REAL ID Act of 2005, provides that court of appeals review "shall be the sole and exclusive means for judicial review of an order of removal,"[46] and explicitly notes that the preclusion of other review means the preclusion of all habeas review as well.[47] The statute does not stop there, though. It also provides, in the less-infamous-than-it-should-be section (b)(9), that "[j]udicial 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."[48] This provision is titled "consolidation of questions for judicial review," and it sounds like a means of consolidating questions in the Court of Appeals, allowing litigants to skip the district court and have all of their claims resolved at once.

Congress amended Section (b)(9) in 2005 "to clarify that, except as otherwise provided in section 242 of the INA, no court is to have jurisdiction for habeas review or other non-direct judicial review of a removal order or questions of law or fact arising from such an order."[49] This clarified the confusing jurisdictional patchwork leff after *St. Cyr*, in which some claims had to be brought as habeas actions in the district court, whereas others needed to be litigated on petition for review in the court of appeals.[50]

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[46] 8 U.S.C. § 1252(a)(5)

[47] *Id.*

[48] *Id.* § 1252(b)(9).

[49] HR Report 109-72 at 176.

[50] Before the REAL ID Act of 2005, when certain noncitizens were able to bring habeas petitions in district court to challenge their removal orders, district courts in habeas proceedings reviewed noncitizens' removal orders pursuant to 28 U.S.C. § 2241. See, e.g., Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 43 (D. Mass. 2005) (district judge held full evidentiary hearing and issued findings of fact in written opinion in which judge granted

Courts generally deemed the petition for review process an adequate alternative to habeas corpus in the run of challenges to deportation orders,[51] but it was less clear whether courts would allow affirmative district court lawsuits challenging aspects of immigration court procedure.[52]

Courts have interpreted section (b)(9) to require that all claims that *could* be raised on a petition for review *must* be raised on a petition for review—and may not be asserted in a district court action. For example, the Ninth Circuit has held that (b)(9) precludes review so long as a claim "could and should have been brought before the agency."[53]

The key question, then, is whether any given claim can, *in fact*, be raised on a petition for review (a direct appeal).[54] Courts have not

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habeas, remanded CAT claim to BIA for reconsideration and ordered Enwonwu's immediate release).

[51] See, e.g., Stephen I. Vladeck, *Habeas Corpus, Alternative Remedies, and the Myth of Swain v. Pressley*, 13 ROGER WILLIAMS U. L. REV. 411, 432 (2008) (noting that "[e]ven when the adequacy of the remedy [on petition for review] has been open to question, courts have uniformly upheld the congressional displacement of habeas corpus); *see also, e.g.*, Xiao Ji Chen v. U.S. D.O.J., 471 F.3d 315, 326-29 (2d Cir. 2006) (construing the REAL ID act as intending to provide an effective substitute for habeas and concluding that the statute properly failed to grant courts of appeals jurisdiction over questions of fact or discretionary judgments); Enwonwu v. Gonzales, 438 F.3d 22, 32-34 (1st Cir. 2006) (finding that petition for review process was adequate substitute for habeas in the case at bar).

[52] The bill's legislative history indicates that in making these changes, Congress was careful to avoid depriving any noncitizen of judicial review. The Joint Report accompanying the bill states:

> Significantly, this section does not eliminate judicial review, but simply restores such review to its former settled forum prior to 1996. . . No alien, not even criminal aliens, will be deprived of judicial review of such claims. Unlike AEDPA and IIRIRA, which attempted to eliminate judicial review of [certain noncitizens'] removal orders, [this section] would give every alien one day in the court of appeals, satisfying constitutional concerns.

HR Report 109-72 at 174-75.

[53] J.E.F.M. v. Lynch, 837 F.3d 1026, 1032 (9th Cir. 2016) (citing *Singh v. Gonzales*, 499 F.3d 969, 974 (9th Cir. 2007)).

[54] Scholars raised questions about the validity of the REAL ID Act's jurisdictional provisions almost as soon as it was passed, but they generally did not focus on the factual preclusion of all review. In an influential early article, Gerald Neuman surveyed the possible inadequacies of the petition for review process as a replacement for habeas. Gerald L. Neuman, On the Adequacy of Direct Review After the REAL ID Act of 2005, 51 N. Y. L. SCHOOL REV. 133 (2006). Neuman systematically worked through the constitutional questions raised by the stricter channeling of claims to the courts of appeals. He identified several likely issues: the short 30-day period for filing a petition for review, the failure of the statute to provide for post-removal-order review, and the limitation of review to the administrative record. *Id.* at 143-53.

described this inquiry as factual; instead, they have looked to the statutory scheme itself to determine whether a meaningful opportunity for review existed.[55] For example, in a 2010 challenge to the government's failure to provide counsel to mentally incompetent respondents in immigration court, the district court recognized that absent counsel, mentally disabled noncitizens' counsel claims would not receive judicial review. But the court did not describe this as a factual conclusion, and it relied less on this conclusion than on the proposition that the relief—appointed counsel—would only "help to ensure [the plaintiffs'] meaningful participation in removal and/or custody proceedings."[56] (The government did not appeal, and as a result, the Ninth Circuit did not review that decision.[57])

In each of the examples below, a factual inquiry into whether section (b)(9) is preclusive should consider three factors: 1) the obstacles (or lack of them) to raising the claim in the court of appeals; 2) how often the challenged action occurs relative to how often it is reviewed by a court of appeals; and 3) how important the procedural devices of collateral district court litigation are to an effective challenge. In each example, if courts were to conduct this factual inquiry, they would determine that the unavailability of collateral review precludes the relevant claims, and would therefore apply the presumption in favor of judicial review and read section (b)(9) narrowly to allow district court jurisdiction. After discussing these examples, I explain in subpart E that this factual inquiry is most

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[55] In some cases, the statutory scheme does answer the question, and courts need not reach the facts. For example, in *Singh v. Gonzales*, 499 F.3d 969, 973 (9th Cir. 2007), the petitioner filed a habeas petition in district court raising an ineffective assistance of counsel claim against his attorney, who had missed the deadline to file a petition for review. Because of the missed deadline, the petitioner had no opportunity to file a petition for review. The Government contended that section (b)(9) barred Singh's district court action. The Ninth Circuit disagreed, finding that the district court had jurisdiction over Singh's habeas petition because the petitioner would otherwise never have his "day in court"—in violation of the Suspension Clause. *Id.* at 979 The Ninth Circuit effectively made a determination that this claim would never receive judicial review absent district court review. This inquiry did not require factfinding because it was clear that once the petition for review filing deadline had passed, the PFR process could no longer provide judicial review.

[56] Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1044-45 (C.D. Cal. 2010).

[57] *See* Franco-Gonzalez v. Sessions, No. 10-2211, 2017 WL 10604127, at *2 (C.D. Cal. May 12, 2017). A quick note here on exhaustion: in order to exercise jurisdiction over petitioners' claims, courts must not only find that section (b)(9) does not bar them, but also that they are not precluded by the more general requirement that plaintiffs exhaust administrative remedies before seeking relief in court. But the exhaustion requirement poses no obstacle once a court has concluded that a plaintiff would lack meaningful judicial review and that (b)(9) does not apply: exhaustion is not required where "adequate relief is unavailable through the administrative process." Franco-Gonzalez, 767 F. Supp. at 1046.

likely to find a preclusion of jurisdiction when the violation at issue affects only noncitizens without lawyers.

C. *Example 1: Failure to Translate the Asylum Application*

The government's failure to translate the asylum application fails all three parts of the proposed factual test: 1) the appeals process presents nearly insuperable obstacles to challenges in the court of appeals, 2) the claim has never been raised, despite thousands of non-English speakers encountering it every year, and 3) the availability of injunctive relief and the class action device is critical to solving the problem.

First, some background on the asylum application. Noncitizens facing deportation have a statutory right to apply for asylum and other forms of persecution-related relief.[58] An application for asylum (or withholding of removal or relief under the Convention Against Torture) begins with a paper application: the I-589 form.[59] That form solicits information about each applicant's asylum claim, including the reasons why the noncitizen fears persecution if deported. The form is only available in English,[60] and the instructions specify that "[y]our answers must be completed in English. Forms completed in a language other than English will be returned to you.[61]

The failure to translate the application and the requirement that it be filled out in English are almost certainly illegal—under the asylum statute[62] and under the Due Process Clause[63]—but no court has had the opportunity to consider their legality.

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[58] Who can apply for which forms of relief raises complex questions. For example, noncitizens convicted of certain crimes are ineligible for asylum, as are noncitizens who failed to apply for asylum within the statutory period after entry.

[59] https://www.uscis.gov/i-589. The form is used both for affirmative applications for asylum, in which a noncitizen seeks asylum without being placed in removal proceedings, and defensive applications, which are filed after the initiation of removal proceedings.

[60] *Id.*

[61] Instructions for I-589, https://www.uscis.gov/system/files_force/files/form/i-589instr.pdf?download=1, at 5.

[62] The asylum statute provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a). Courts have held that the right to apply for asylum must be meaningful. For example, when the Trump Administration recently issued a rule purporting to make noncitizens ineligible for asylum if they had entered the country between ports of entry, the Ninth Circuit refused to stay an injunction of that rule, explaining that "[i]t is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for

A district court, when deciding whether it has jurisdiction over a collateral challenge to this failure to translate, should consider the three factors I have described should determine that absent district court review, no meaningful review of these claims would be possible.

First, the court should consider the obstacles to challenging the lack of translation on petition for review. The translation issue cannot realistically be raised by a *pro se* applicant who finds an attorney after being ordered removed by the immigration judge but before the 30-day deadline for filing an appeal. If applicant finds an attorney at that stage, the attorney's responsibility is to move the IJ to reconsider[64] or to move the BIA to remand to consider new evidence.[65] And if an attorney appears on the scene after the deadline for appeal has passed, the correct course is to file a motion to reopen, which is likely to be granted, since a new asylum application will almost certainly contain new evidence.[66] And even if all of these obstacles could be overcome and these issues were briefed on appeal, the court of appeals could very well decide the petition for review on alternative ground, as the Ninth Circuit recently did in the children's counsel context.[67] Or, in some circuits, the court of appeals could ignore the violation if it found that the failure to translate did not cause

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asylum based on precisely that fact." E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1247 (9th Cir. 2018) (Bybee, J.).[62] The Supreme Court, by a 5-4 vote, also refused to issue a stay of the injunction. A right to apply for asylum, but only in a language you don't understand, is hollow.

[63] Finally, there is a due process right to interpretation arising from the fundamental requirement that the respondent in immigration court receive 'a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government.'" Ahmed v. Gonzales, 398 F.3d 722, 725 (6th Cir. 2005) (quoting Mikhailevitch v. INS, 146 F.3d 384, 391 (6th Cir. 1998)). Since as long ago as 1930, courts have recognized that insufficient interpretation may violate due process. *See, e.g.*, Gonzales v. Zurbrick, 45 F.2d 934, 937 (6th Cir. 1930); Tun v. Gonzales, 485 F.3d 1014 (8th Cir. 2007); Perez-Lastor v. INS, 208 F.3d 773 (9th Cir. 2000). If insufficient interpretation of a hearing violates due process, the absence of interpretation of the asylum application itself doubly violates those principles.

[64] 8 C.F.R. § 1003.23.

[65] *See* Board of Immigration Appeals Practice Manual § 4.8(b); 8 C.F.R. § 1003.1(d)(3)(iv).

[66] 8 U.S.C. § 1229a(c)(7) (statute foreseeing motions to reopen). *See generally* American Immigration Council, Practice Advisory, *The Basics of Motions to Reopen EOIR-Issued Removal Orders*, February 7, 2018, https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf.

[67] *See text accompanying note __ infra.*

prejudice in that respondent's case—for example, if it concluded that the respondent lacked a viable asylum claim regardless.

The analysis so far involves the statutory scheme—something that courts already consider. But courts should also consider other evidence of the obstacles to raising these claims. For example, the plaintiffs might provide affidavits explaining why they would unable to challenge the lack of translation in immigration court. Even without such evidence, however, the first factor clearly supports finding district court jurisdiction.

The second factor is straightforward and decisive. The district should consider the numbers. Over 85% of respondents in the immigration courts have limited English proficiency.[68] Around 40% of asylum seekers who end up in immigration proceedings do not file an asylum application—no doubt in many cases because they cannot fill out the application in English and they lack a lawyer.[69] And zero Court of Appeals cases have squarely considered whether the government must translate the asylum application. Instead, the existing inadequate interpretation cases generally concern instances in which an interpreter translated incorrectly, and I am not aware of any case in which a court has considered whether the application must be translated.[70] Tellingly, the few cases in which Courts of Appeals considered language issues for asylum applicants concerned people who *did* have their applications translated at their own expense—but where those translations contained errors or were late. For example, one case involved an asylum applicant whose attorney provided a Mandarin instead of a Korean translator for the asylum application,[71] and another concerned an applicant who filed an initial asylum application in Spanish and a subsequent late application in English,

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[68] Abel, *supra* note 78, at 1.

[69] *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934, 55946 (finding that "40% of all initial completions originating with a credible-fear referral . . . were completed in FY 2018 without an alien filing an application for asylum"). Note that this may be an overestimate, because the number of credible fear interviews has surged recently, and there is often a long gap between the initiation of a case and the filing of an application.

[70] *See, e.g.*, Iao v. Gonzales, 400 F.3d 530, 532 (7th Cir. 2005) (remanding where interpreter at hearing "appears not to have had a good command of English"); He v. Ashcroft, 328 F.3d 593, 602 (9th Cir. 2003) (holding that failure to provide interpreter who spoke the respondent's Chinese dialect undermined the agency's finding of inconsistencies in the respondent's testimony); Ilunga v. Holder, 777 F.3d 199, 208 (4th Cir. 2015) (remanding because inconsistency likely resulted from translation errors or language-based misunderstanding).

[71] Haisong Li v. Holder, 563 Fed. Appx. 806, 808 (2d Cir. 2014) (unpublished).

and then sought to have the later English application considered.[72] In both cases, the courts of appeals affirmed the applicants' removal orders; the courts held that translation issues did not prevent their applications for asylum. The claim at issue here—that the government must translate the application and individuals' responses—therefore went unaddressed.

Moreover, in both of these cases, the respondents had lawyers. Indeed, one of the courts noted that "[e]ven though Petitioner did not speak English, his attorney did."[73] It's not surprising that both these cases concern applicants who had attorneys. As a statistical matter, applicants without attorneys virtually never appeal.[74] But more important, as a matter of common sense, applicants who don't have a lawyer and can't speak English *can't* appeal: all appeals, even to the administrative Board of Immigration Appeals, must be in English.[75]

The second factor therefore strongly suggests that section (b)(9) has preclusive effect, and that the presumption in favor of review in district court should apply.

Finally, the third factor—the importance of district court procedural devices—points in the same direction. If civil rights attorneys could bring a collateral district court action challenging this practice, the practice would be quickly invalidated. The attorneys could represent applicants with pending cases, and they could certify a class of people who wanted to apply for asylum but lacked access to attorneys or interpreters. Moreover, a district court could issue injunctive relief that would comprehensively address the due process issues. By contrast, if the issue were decided on a petition for review, the government would be free to read the opinion as it chose. It might conclude, for example, that the relevant court of appeals decision only required translation in some subset of cases. Litigants would not be able to bring an enforcement action to challenge that interpretation.

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[72] Toj-Culpatan v. Holder, 612 F.3d 1088, 1091 (9th Cir. 2010). The court appeared not to understand that the government does not provide translation of the asylum application itself, finding that "Petitioner fails to explain how his inability to speak English is extraordinary for an alien nor how it prevented him from timely filing an asylum application in English, especially given that the government makes translators available to immigrants who do not speak or read English." *Id.*

[73] *Id.*

[74] David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177, 1193 (2016).

[75] Board of Immigration Appeals Practice Manual § 3.3(a), available at https://www.justice.gov/eoir/page/file/1173091/download.

Applying a presumption in favor of judicial review, district courts should conclude that section (b)(9) does not deprive them of jurisdiction to hear challenges to the government's failure to translate the asylum application.

D. *Example 2: Appointed Counsel for Children Facing Deportation*

Almost everyone agrees that the Due Process Clause guarantees government-appointed counsel for young children in immigration court, but no case has reached that holding—because of section (b)(9).[76] The failure of the government to provide children with counsel in removal proceedings has generated perhaps the leading case on section (b)(9). That case and its aftermath demonstrate why the statute must be read to allow collateral challenges in district court to this lack of government counsel.

In *JEFM v. Lynch*, several civil rights groups brought a class action on behalf of unaccompanied children who lacked counsel in removal proceedings.[77] The government moved to dismiss the case on jurisdictional and other grounds, but the district court denied the motion in part, allowing the case to proceed.[78] The plaintiffs assembled a detailed record, including expert evidence and fact depositions. (In one of those depositions, an immigration judge notoriously asserted that three- and four-year-olds could competently represent themselves in removal proceedings.[79])

The Ninth Circuit reversed on jurisdictional grounds, holding that the plaintiffs' statutory and constitutional claims seeking appointed counsel in immigration court could be asserted only on petition for review of a removal order in a court of appeals.[80] The panel began by noting the breadth of section (b)(9)'s text, which—together with the statute's command that "[a] petition for review . . . shall be the sole and exclusive means for judicial review of an order of removal"[81]—

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[76] *Compare, e.g.*, J.E.F.M., 837 F.3d at 1039 (McKeown, J. & Smith, J., concurring) *with id.* at 1041 (Kleinfeld, J., concurring) (agreeing that the lack of counsel for children raises serious due process concerns).

[77] J.E.F.M. v. Lynch, No. 14-01026, Doc. 1 (W.D. Wash. filed July 9, 2014).

[78] J.E.F.M., 837 F.3d at 1031. The district court dismissed the statutory claims but allowed the constitutional claims to proceed. The Ninth Circuit eventually reversed on jurisdictional grounds.

[79] Molly Hennessy-Fiske, *This Judge Says Toddlers Can Defend Themselves in Immigration Court*, Los Angeles Times, Mar. 6, 2016, https://www.latimes.com/nation/immigration/la-na-immigration-judge-20160306-story.html.

[80] J.E.F.M., 837 F.3d at 1031-38.

[81] *Id.* at 1031 (quoting 8 U.S.C. 1252(a)(5)).

requires that any claim related to removal proceedings that is not "[a]ncillary"[82] or "collateral"[83] to those proceedings may *only* be raised on a petition for review. Quoting the First Circuit, the Court characterized section (b)(9) as "'breathtaking' in scope and 'vise-like' in grip."[84]

The court's analysis of the statute depended on facts, but it didn't characterize the inquiry as factual. The court took as a premise that "while the [statutory] sections limit *how* immigrants can challenge their removal proceedings, they are not jurisdiction-stripping statutes that, by their terms, foreclose *all* judicial review of agency actions."[85] This premise was critical: the panel relied on the Supreme Court's suggestion in *Elgin* that the presumption in favor of judicial review does not apply "where Congress channels judicial review of constitutional questions to a particular court but does not deny all judicial review of those questions."[86]

The court then engaged in a factual, probabilistic analysis of whether the claims in question could be raised on a petition for review. The court began by suggesting that adult immigrants "routinely" raise right-to-counsel claims on petition for review, and cited three opinions over the last thirty years in which such claims were raised.[87] The court also noted the existence of a single pending petition for review in which a 14-year-old obtained a lawyer after having been ordered removed.[88] The court declared that this single case "lays to rest the contention that right-to-counsel claims will never surface through the PFR process."[89] Finally, the court noted that the government had agreed, for a limited period, to provide

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[82] *Id.* at 1032 (quoting Torres–Tristan v. Holder, 656 F.3d 653, 658 (7th Cir. 2011)).

[83] *Id.* (quoting Aguilar v. ICE, 510 F.3d 1, 11 (1st Cir. 2007)).

[84] *Id.* at 1031 (quoting Aguilar, 510 F.3d at 9).

[85] *Id.*

[86] *Id.* (citing *Elgin*, 132 S. Ct. at 2132).

[87] *Id.* at 1033 (citing Ram v. Mukasey, 529 F.3d 1238, 1242 (9th Cir. 2008); Zepeda–Melendez v. INS, 741 F.2d 285, 289 (9th Cir. 1984); Biwot v. Gonzales, 403 F.3d 1094, 1100 (9th Cir. 2005)).

[88] *Id.* at 1037 (citing Guzman–Heredia v. Gonzales, No. 04-72769 (9th Cir.)).

[89] *Id.* At least one other court has adopted this reasoning. In Vetcher v. Sessions, a *pro se* petitioner filed an action in the D.C. District Court seeking, among other things, increased access to legal material and the detention facility's law library to help him navigate the petition for review process and contest his ongoing removal proceedings. 316 F. Supp. 3d 70 (D.D.C. 2018). Citing *J.E.F.M.* and *Elgin*, the district court declined to exercise jurisdiction. Despite conceding that neither the Immigration Judge nor the Board of Immigration Appeals could resolve his constitutional due process claim, the court found the issue to be "enmeshed with his removal proceedings," and therefore held that it could only be reviewed through a petition for review in the Fifth Circuit. *Id.* at 77.

notice to the plaintiffs' counsel of any removal order for an unaccompanied child following a merits hearing.[90] These were all factual points, but the court did not recognize the inquiry as factual.

Had the Ninth Circuit recognized that this test was factual and instructed the district court to take evidence on the jurisdictional question, that evidence would have yielded unambiguous results. Again, the same three factors should have organized the inquiry.

First, the Ninth Circuit underestimated the obstacles to raising the appointed counsel issue on petition for review. Indeed, a concerted effort to bring this issue before a court of appeals has so far failed.[91] Consider the many barriers to bringing this claim in that posture. First, unrepresented children, if they are ordered removed, are vanishingly unlikely to be able to appeal—ironically, for the same reasons that they need counsel in the first place.[92] The only chance of appeal arises within the 30-day window after the order of removal is entered. But—again because the child lacked counsel at the time of the removal order—other attorneys are unlikely to learn of the removal order.[93] Moreover, in most of these cases, the immigration judge ordered the child removed *in absentia*, when he or she did not appear at the hearing.[94] When the child does not appear in court, it is unlikely that an attorney will locate the child and file an appeal, yet the child's interest in having an attorney is even higher in those cases: who could expect an unaccompanied toddler to read a notice to appear and come to a hearing?[95] And if an *in absentia* removal order is entered, that order allows ICE later to deport the child without any opportunity for the child to appear before an immigration judge, let alone to access appointed counsel.

Despite these hurdles, impact litigators managed to raise similar claims in one recent case—though the case concerned a child who was accompanied by his mother, and therefore did not raise the question of whether a young unaccompanied child has a right to appointed counsel. In *C.J.L.G. v. Barr*,[96] 923 F.3d 622, 625 (9th Cir.

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[90] *Id.* at n.10.

[91] *See infra.*

[92] See text accompanying n. 84 *supra.*

[93] In master calendar hearings, in which counsel for other immigrants might be present, immigration judges typically hear represented cases first and then allow counsel to leave, in order to save attorneys' time.

[94] *See id.* at 139.

[95] In J.E.F.M., the court made much of the government's agreement to let counsel know of removal orders issued to children, but that agreement specifically excluded absentia orders. *J.E.F.M.*, 837 F.3d at 1037 n.10.

[96] 923 F.3d 622, 625 (9th Cir. 2019) (en banc).

2019) (en banc), a 14-year-old asylum applicant was ordered removed by an immigration judge after explaining that he could not afford counsel.[97] He found counsel for his appeal, and that counsel argued that his removal order violated his right to appointed counsel under the Due Process Clause.[98] The Board of Immigration Appeals dismissed the appeal, and the applicant petitioned for review to the Ninth Circuit. The Ninth Circuit panel rejected the counsel argument, largely because it concluded that there was no prejudice—that C.J.L.G.'s claims would have failed regardless of whether he had found counsel.[99] C.J.L.G. petitioned for rehearing en banc, and the en banc Ninth Circuit vacated the panel opinion—but declined to reach the issue of whether the petitioner had the right to appointed counsel. Instead, the en banc court vacated the removal order on the ground that the immigration judge had failed to inform the child that he was eligible for a different form of immigration relief.[100] *C.J.L.G.* illustrates that even when attorneys are able to find a similar claim and raise it defensively on petition for review, they may still be unable to get a broad ruling on the right at issue: the reviewing court can often resolve the case without addressing a facial challenge to the legality of the practice.

The second factor—the relative numbers—also supported applying the presumption in favor of review. Recall that the Ninth Circuit found that right-to-counsel claims are "routinely"[101] raised in the Court of Appeals on petition for review. In reaching that conclusion, it cited three Court of Appeals decisions considering right to counsel issues, as well as a single pending case concerning a minor who lacked counsel. The court was making an empirical suggestion—that children who are denied counsel appeal directly as a matter of routine. That statement was false, and the court should have known that it was false. One of the expert reports submitted in the case showed nearly 7,000 deportation orders for unaccompanied children in just the last several years.[102] In other words, the court

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[97] *Id.*

[98] *Id.*

[99] C.J.L.G. v. Sessions, 880 F.3d 1122, 1146 (9th Cir. 2018), reh'g en banc granted, 904 F.3d 642 (9th Cir. 2018), and on reh'g en banc sub nom. C.J.L.G. v. Barr, 923 F.3d 622 (9th Cir. 2019).

[100] C.J.L.G., 923 F.3d at 626-29.

[101] J.E.F.M., 837 F.3d at 1033.

[102] J.E.F.M. v. Holder, No. 14-1026, Doc. No. 212-1, at 138 (W.D. Wash. filed Dec. 23, 2015). See also id. at 131 (explain that these cases included only cases beginning in 2014, when the database began tagging children's cases in a new way).

concluded that an event that occurred one in 7,000 times was routine. Indeed, the single pending case settled, and as a result there have still been no cases successfully raising the issue. With thousands of potential cases and not a single one resulting in review, the relative numbers strongly support finding that (b)(9) does not just channel these claims, but rather precludes them.

Third, and finally, district court procedural devices are crucial to raising this claim. Expert discovery produced the numbers that I just cited because the district court (correctly) held that section (b)(9) did not apply; the class action device would allow a holding to reach beyond the individual circumstances of the case; and the district court's ability to fashion injunctive relief would allow it to supervise a system of appointed counsel.

E. *What Courts Should Do*

The path forward for courts is straightforward. In fact, the Supreme Court has already outlined the interpretive tack that courts should take. In *Jennings v. Rodriguez*,[103] the Supreme Court considered a challenge to prolonged hearingless detention of immigrants during removal proceedings. The government argued that the district court lacked jurisdiction because the petitioners' detention arose from their removal proceedings. Seven Justices disagreed. In the opinion for the Court, Justice Alito explained that the words "arising from" could not be given their literal meaning because such a reading would "depriv[e] . . . detainee[s] of any meaningful chance of review."[104]

The factual inquiry that I have proposed would help courts determine when plaintiffs have a "meaningful chance" of review: where claims are factually precluded by section (b)(9), courts should hold that the claims do not arise from actions taken to remove a noncitizen. A blueprint exists for exactly this type of decision: In *McNary v. Haitian Refugee Center*,[105] the Supreme Court interpreted a provision similar to section (b)(9) to permit affirmative pattern and practice claims brought in the district court. Perhaps partly in response to the *McNary* decision, section (b)(9) is more unequivocal than the statute at issue in *McNary*. But all of the same functional considerations apply.

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[103] 138 S. Ct. 830 (2018).
[104] *Id.* at 840.
[105] 498 U.S. 479 (1991)

Finally, there is a shortcut for the factual inquiry that I propose: courts should begin by determining whether the challenged violation only or mostly harms people without lawyers. Table 1 summarizes this approach. In the two examples above—challenges to lack of appointed counsel and challenges to lack of translation—*only* people without counsel are harmed. In those instances, no district court review means no review at all. For those cases, the presumption of reviewability, if it has any meaning at all, must be a presumption of reviewability in district court.

But what does this approach say about cases where review *will* eventually be available on direct appeal? Timing matters, and under some circumstances, interim review must be available. The *eventual* availability of review is not equivalent to a meaningful chance at review if it is nearly certain that thousands of noncitizens will be deported because a claim has not received review in the meantime. To see this point, consider a case challenging Trump's asylum ban.

In that case, *O.A. v. Trump*,[106] plaintiffs challenged the first of President Trump's asylum bans: his November 9, 2018 rule purporting to preclude asylum for noncitizens who entered the country between ports of entry. That rule was contrary to the text of the asylum statute, which guarantees the right to apply for asylum for any person "who arrives in the United States (whether or not at a designated port of arrival . . .)." 8 U.S.C. § 1158(a)(1). The ban was quickly enjoined (in a parallel case in the Ninth Circuit), and the Supreme Court refused to stay the injunction.[107]

In *O.A.*, the government asserted that the D.C. district court lacked jurisdiction over the individual plaintiffs' claims under section (b)(9).[108] The district court, in a lengthy and thorough analysis, correctly concluded that the claims challenging the ban did not arise from actions taken to remove a noncitizen. In that analysis, the court relied on the Supreme Court's suggestion, in *Jennings*, that "arise from" should be read narrowly. The court therefore correctly concluded that reading section (b)(9) to preclude district court jurisdiction might deprive the plaintiffs of a meaningful opportunity for judicial review. But it, like other courts, did not describe the meaningful-opportunity-for-review question as a factual one and therefore did not highlight one of the key reasons why a challenge to

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[106] 404 F. Supp. 3d 109 (D.D.C. 2019).

[107] E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219 (9th Cir. 2018); see also Trump v. E. Bay Sanctuary Covenant, 139 S. Ct. 782 (2018) (declining to stay injunction).

[108] O.A., supra note 106, at 126-138

the asylum ban must be allowed to proceed in district court: if the ban were not reviewable in district court, noncitizens without counsel would be deported in large numbers before its legality was decided.

The likely deportation of many pro se noncitizens absent district court review follows from two facts about immigration court. First, pro se cases finish more quickly than represented cases, meaning that deportation orders for pro se noncitizens will be entered long before any represented noncitizen is able to obtain review on direct appeal. The difference in case length reflects the fact noncitizens without lawyers are so much less likely to be able to apply for relief (partly because relief applications aren't translated).[109] And second, pro se noncitizens rarely appeal.[110] These facts about immigration proceedings are not obvious, but both would be easy for a court to determine through jurisdictional factfinding. The factfinding would reveal that, absent district court review, the asylum ban would be applied first to noncitizens without lawyers, who would systematically be unable to obtain judicial review of their orders of deportation, leading the asylum ban to be unreviewable for a long period in which it already began to do harm.

TABLE 1: COUNSEL AND THE LIKELIHOOD THAT JURISDICTION CHANNELING PRECLUDES REVIEW

	Claim affects represented immigrants.	*Claim does not affect represented immigrants.*
Claim affects pro se immigrants.	Pro se immigrants will be harmed in the interim period before the issue is decided on a defensive appeal, so the reviewability presumption applies.	No review exists absent collateral district court review, so the reviewability presumption applies.
Claim does not affect pro se immigrants.	The reviewability presumption may not apply, since it is likely that represented immigrants will eventually obtain review on direct appeal.	N.A.

[109] Hausman, *supra* note 74, at 1201, 1203.
[110] *Id.* at 1193.

III. IMPLICATIONS FOR THEORIES OF ARTICLE I ADJUDICATION

This Essay's proposed factual inquiry into jurisdictional preclusion fits easily within prominent theories of Article I adjudication. I suggest simply adding a factual step to determine whether Article I courts are subject to sufficient Article III supervision.

Federal courts scholars largely agree that Congress retains extremely broad—maybe unlimited—powers to strip the district courts of jurisdiction over challenges to administrative action, so long as appellate jurisdiction remains.[111] Richard Fallon's summary of Congress' power to set the conditions of judicial review of administrative action is representative:

> Congress typically has great flexibility in the choice of remedies, even when the Constitution requires that a party whose rights have been violated must have some mode of redress. Accordingly, there is no constitutional problem with preclusion of APA review . . . as long as [harmed] parties . . . can bring their legal complaints before a court in another form—for example, . . . as a defense in a civil or criminal enforcement action (provided that the alternative procedure affords due process).[112]

In a sense this is merely a more specific articulation of Hart's well-known proposition that "a complaint about [Congress's choice of remedies] can rarely be of constitutional dimension."[113]

But to what extent does Congress have the power to vest adjudicatory authority entirely in an Article I court? For systems of adjudication in which Congress requires that parties initially seek relief in an administrative tribunal, Fallon has proposed an influential

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[111] *See, e.g.*, Richard Fallon, *Jurisdiction Stripping Reconsidered*, 96 VA. L. REV 1043, 1093-95 (2010) (rejecting limits on Congress's power to strip district courts of jurisdiction); *cf.* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 776 (1984) (presenting an originalist argument for mandatory district court jurisdiction); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 501 (1974) (arguing that the Constitution places limits on Congress's ability to prevent plaintiffs from vindicating constitutional rights by eliminating lower court jurisdiction).

[112] Fallon, *supra* note 108, at 1127.

[113] Henry M. Hart, *The Power of Congress to limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953).

"appellate review theory."[114] That theory starts by defending the premise that "the Constitution, subject only to narrow qualifications, requires judicial review of and effective remedies for coercive violations of constitutional rights by government officials."[115] Fallon concludes that that requirement can generally be satisfied through appellate review.[116]

Jim Pfander has offered an alternative account, focusing on Congress's power under the Constitution to create "inferior tribunals."[117] That theory shares some elements of appellate review theory, but describes circumstances under which collateral review may be a sufficient substitute for appellate review, and focuses on Congress's purpose in placing adjudication within the executive.

My suggestion—that jurisdiction channeling schemes sometimes lead to the preclusion of all review, and that courts must determine whether they do—can be fit into either the appellative review or inferior tribunals account. It merely requires more detailed factual examination of the statutory premise that review exists.

Fallon's discussion of the immigration appeals context in the late 1980s—very different then from now—is instructive. At the time, immigration cases proceeded along one of three tracks. In deportation cases, the noncitizen had a direct right of appeal from the decision of the agency to a court of appeals.[118] In exclusion cases—those concerning people seeking admission to the country at a port of entry—petitioners had access to habeas in district court.[119] And for all other cases, judicial review was generally available so long as the plaintiff had exhausted administrative remedies.[120]

Fallon argued that this "statutory scheme accords surprisingly well with an appellate review theory of Article III."[121] He noted the danger that some claims might not receive review—particularly those designated as discretionary by statute—but thought that the structure

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[114] *See generally* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

[115] *Id.* at 961.

[116] *See generally id.*

[117] Fallon, *supra* note 108, at 1118 (noting that Pfander had shown that appellate review theory would require the invalidation of more existing review structures than Fallon had anticipated). An additional implication of my argument is that the availability of collateral review may, in some circumstances, better protect constitutional rights than direct review.

[118] Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1310-12 (1986).

[119] *Id.*

[120] *Id.*

[121] Fallon, *supra* note 111, at 968.

of appellate review was sufficient.[122] And perhaps it was: the key difference between then and now was that then, judicial review was available so long as plaintiffs had exhausted administrative remedies or shown that exhaustion was not required—a far lighter burden than the burden imposed by section (b)(9) today.[123]

This Essay aims to draw attention to the ways in which the absence of general district court judicial review can preclude review entirely. That preclusion implicates basic constitutional principles. Fallon and Meltzer have suggested that two basic principles animate constitutional remedies.[124] First, and weaker, is the principle that each individual has a right to a remedy for a constitutional wrong. This right can be displaced for many reasons. Second, and stronger—to fill in the gaps where the first principle does not require a remedy—is that there must be a sufficient web of remedies to prevent *systemic* unremedied constitutional violations. This second principle underlies my view that section (b)(9) functions as a withdrawal of jurisdiction if it prevents all review of a given *claim*.

Finally, this functional approach has implications for other puzzles in the jurisdiction-stripping literature. In *Patchak v. Zinke*,[125] the Court considered the constitutionality of a statute that was passed with the manifest but unstated purpose of determining the result in a pending case. A plurality of four Justices held that the statute did not impinge on the judicial power because it "change[d] the law"—it stripped the courts of jurisdiction over a whole class of cases, even if it was intended to change the result in a single case.[126] Two Justices concurred on other grounds, and Justice Roberts wrote a stinging dissent, joined by Justices Kennedy and Gorsuch. The dissenters castigated the formalism of the majority's approach, explaining that "[b]ecause the Legislature has no authority to direct entry of judgment for a party, it cannot achieve the same result by stripping jurisdiction over a particular proceeding."[127] The disagreement between the majority and the dissent goes to the nub of the problem in evaluating jurisdiction channeling schemes: if the judiciary cannot examine the actual effects of jurisdictional statutes, Congress may

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[122] *Id.* at 968-69.

[123] *See* n.57 *supra* (describing exhaustion standard).

[124] Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1787-89 (1991); *see also* Fallon, *supra* note __ at 1107.

[125] 138 S. Ct. 897 (2018).

[126] *Id.* at 905-08.

[127] *Id.* at 920.

preclude jurisdiction—and even suspend the Great Writ—without judicial resistance.

CONCLUSION

Section (b)(9)'s silent preclusion of judicial review has broad implications for immigration and federal courts scholarship. First, an expansive and wrong interpretation of section (b)(9) has led to a large withdrawal of federal jurisdiction that is significant in its own right. Second, the effective preclusion of due process claims has particularly large implications for immigration enforcement in the age of Trump, when translation of the written asylum application and access to counsel are more important than ever, and when the Trump Administration has increasingly attempted to rely on section (b)(9) to shield its immigration policies from judicial scrutiny. Finally, the examples involving section (b)(9) offer a blueprint for the inquiry that courts should perform whenever they consider the contours of a jurisdictional statute.