Docket No. 2019-01

In The

Supreme Court of the United States

October Term 2019

Kal EL,

Petitioner,

v.

Joseph LUTHOR, in his official capacity as the Attorney General,

Respondent.

On Writ of Certiorari to the

United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

Attorneys for Petitioner
October 24, 2019

QUESTIONS PRESENTED

I. Does the REAL ID Act's administrative exhaustion requirement prevent judicial review of an individual's constitutional claim when the agency was powerless to adjudicate the constitutional claim, the REAL ID Act does not express an issue exhaustion requirement, and the administrative inquiry was focused on resolving fact questions?

II. Does the Alien Sedition Act violate the rights of an undocumented immigrant when the First Amendment does not require membership in "the people" for speech protection, he otherwise meets this Court's criteria for inclusion in "the people," and the Act fails under the lens of strict scrutiny because it is not narrowly tailored to fit a compelling government interest?

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Kal El, Petitioner-Appellant in Docket No. 19-098 before the United States Court of Appeals for the Fourteenth Circuit, respectfully submits this brief on the merits, and asks this Court to affirm the Fourteenth Circuit Court of Appeals as to the question of jurisdiction and reverse as to the constitutional question.

OPINIONS BELOW

The opinion and order for the panel of the Fourteenth Circuit Court of Appeals is unreported and set out in the record. (R. at 10–12.) The opinion and order for the Fourteenth Circuit Court of Appeals sitting en banc is also unreported and set out in the record. (R. at 15–28.)

CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution is relevant to this case and is reprinted in Appendix A.

STATUTORY PROVISIONS

The following statutes are relevant to this case: 8 U.S.C. § 1228(b); 8 U.S.C. § 1252(d); 18 U.S.C. § 2900. These statutes are reprinted in Appendix B.

REGULATORY PROVISIONS

The following provisions of the Code of Federal Regulations are relevant to this case: 8 C.F.R. § 238.1(b); 8 C.F.R. § 238.1(d)(2)(i); 8 C.F.R. § 238.1(d)(2)(ii)(A). These provisions are reprinted in Appendix C.

STATEMENT OF THE CASE

Factual Background

The Alien Sedition Act. Congress passed the Alien Sedition Act in response to demonstrations organized by undocumented immigrants to advocate for immigration law reform and the election of legislators who would enact it. (R. at 2.) The Act makes it a Class E Felony for an undocumented immigrant to participate in a public demonstration intended to advocate for or against a change to any law or for or against the election of any politician. (R. at 2); 18 U.S.C. § 2900. The Act also provides that a violation of its provisions is an aggravated felony. (R. at 2); 18 U.S.C. § 2900. The government's two rationalizations for passage of the Act were that demonstrating undocumented immigrants could intimidate American citizens, and that such demonstrations could overwhelm American citizens' rights to be heard. (R. at 2.)

Kal El: Super Alien. Kal El is an immigrant from Kryptonia. (R. at 2.) After he legally journeyed to the United States in 2009 on a tourist visa, he made America his home and began to build a life in the State of Metropolis. (R. at 2.) El came close to legal resident status in 2016, after marrying a permanent resident. (R. at 3.) Following his divorce from his wife, however, his quest for legal residency fell through. (R. at 3.) So today El remains undocumented, though he considers himself an American. (R. at 2–3.) Despite

his undocumented status, El contributes to his community and participates in society. (R. at 2–3.)

El is a model non-citizen. (R. at 2–3.) He is gainfully employed—he writes for a Kryptonian-language newspaper in Metropolis. (R. at 2.) He has no criminal record. (R. at 2.) He diligently pays child support for his son, of whom his wife has custody. (R. at 3.) El is also active in his Metropolis community. (R. at 3.) He founded a volunteer group for sidewalk maintenance in his neighborhood. (R. at 3.) He also volunteers his time and linguistic skills as a Kryptonian interpreter at a local community learning center. (R. at 3.) Beyond donating his time, El also donates his money, regularly contributing to several charities that assist Kryptonian immigrants. (R. at 3.)

The demonstration and arrest. On February 2, 2019, El joined in a demonstration to advocate for the passage of the "Priority Immigrant Legalization Act" (PILA). (R. at 3.) PILA would have provided undocumented Kryptonian immigrants a path to permanent residency. (R. at 3.) During the demonstration, El gave an impromptu, impassioned speech advocating for the passage of PILA. (R. at 3.) He shared his immigration story and his desire to remain in America. (R. at 3.) He also relayed his exasperation with his plight—how he had no option to extend his visa, and how the government wanted to send him back to Kryptonia despite his lack of connection to the country. (R. at 3.) El called his fellow demonstrators to action, imploring them to contact their

representatives to encourage the passage of PILA. (R. at 3.) El was arrested after he spoke to the assembled crowd. (R. at 3.) He was prosecuted and convicted of Alien Sedition. (R. at 3.) He received a two-year sentence, of which all but fifteen days were suspended. (R. at 3.)

The removal proceedings. After El served his sentence, he received a Notice of Intent to Issue a Final Administrative Removal Order from the Department of Homeland Security (DHS). (R. at 4.) The Notice of Intent informed El that DHS intended to remove him to Kryptonia under 8 U.S.C. § 1228, which provides for expedited removal of aliens convicted of aggravated felonies. (R. at 4.) El's conviction for Alien Sedition, an "aggravated felony" for the purpose of the removal statute, prompted DHS to begin removal proceedings. (R. at 4.)

DHS provided El with a form that he could return to challenge his removal. (R. at 4.) The form offered an avenue of challenge in the way of checking one of four checkboxes. (R. at 4, 7.) Three of the checkboxes allowed El to indicate he challenged his deportability because DHS had made a mistake of fact regarding his immigration status or aggravated felony conviction. (R. at 7.) Those three checkboxes allowed these challenges to deportability: 1) status as a citizen or national of the United States; 2) status as a lawful permanent resident of the United States; or 3) no conviction for the

crime that predicated the removal. (R. at 7.) The form also presented a fourth checkbox option for the responder to indicate that he requested further review and was attaching documents in support of his challenge to deportability. (R. at 7.)

El checked the fourth box, indicating that he would attach documents to the form to support his position. (R. at 4.) El attached a letter to the form requesting a hearing before an immigration officer. (R. at 4.) He was granted a hearing before an Immigration and Customs Enforcement (ICE) Officer. (R. at 4.) At the hearing, El pleaded with the officer to allow him to stay in America. (R. at 9.) He explained that he no longer knew Kryptonia and that he could not bear to leave his child behind in the United States if he was deported. (R. at 9.) None of El's arguments were legal arguments. (R. at 9.) At the end of El's plea, the ICE officer asked El if he had covered all of his arguments. (R. at 9.) El responded that he had. (R. at 9.) The ICE officer then summarily denied El's challenge to his removal. (R. at 9.) Consequently, DHS issued a Final Order of Removal to deport El. (R. at 4.)

Procedural History

The panel of the Fourteenth Circuit. Following the issuance of the Final Order of Removal, El directly filed an appeal in the Fourteenth Circuit Court of Appeals in accordance with his right to do so under the REAL ID Act, 8 U.S.C. § 1252. (R. at 5.) El premised his challenge on the argument that his

conviction under the Alien Sedition Act violates his constitutional rights, and that without the conviction he would not have been subject to expedited removal as an aggravated felon. (R. at 5.)

A three-judge panel of the Fourteenth Circuit considered El's challenge. (R. at 5.) The court determined that it did not have jurisdiction to hear El's claim under 8 U.S.C. § 1252(d)(1), which bars judicial review of removal orders if an alien has not exhausted all administrative remedies, because he did not raise the constitutional challenge at the administrative level. (R. at 5, 11–12.) Accordingly, the panel dismissed El's claim. (R. at 12.)

The Fourteenth Circuit en banc. El then requested a rehearing before the Fourteenth Circuit en banc, which the court granted. (R. at 10–12.) On rehearing, the full court vacated the panel decision, holding that the court did have jurisdiction. (R. at 13, 19.) The court's jurisdiction arose from the fact that El had indeed exhausted his administrative remedies because he had not been offered an opportunity to make a legal challenge to his removal. (R. at 13.) Able to assess the merits of the case, the court then held that El could not avail himself of First Amendment protections because he did not belong to "the people" protected by the amendment. (R. at 13–14, 21.) In so deciding, the court rejected this Court's metric for evaluating whether an individual belongs to "the people" on a case-by-case basis. (R. at 20–21, 23.)

SUMMARY OF THE ARGUMENT

Jurisdiction. The REAL ID Act affords jurisdiction to courts to review an alien's challenge to a removal order, unless the alien has not exhausted all administrative remedies. Generally, if an alien did not raise a particular question at the administrative level, the alien did not exhaust administrative remedies as to that question and a court cannot review it. However, courts recognize an exception to an administrative exhaustion requirement for constitutional claims. Courts have carved out this exception to exhaustion because agencies have no power to resolve constitutional claims, so raising them would be futile at the administrative level.

Additionally, this Court has cautioned against reading a requirement of issue exhaustion into a remedy exhaustion requirement, because issue exhaustion is usually specifically invoked by a statute if the requirement is intended. That is evidenced by various federal administrative statutes that require issue exhaustion specifically. The REAL ID Act does not contain an explicit issue exhaustion requirement. Furthermore, the exhaustion of remedies requires only that the alien pursue all remedies offered by DHS. When DHS does not expressly provide the alien with an avenue to make a legal challenge, a legal challenge cannot be required.

Just because El did not raise his First Amendment claim at his removal hearing does not mean that this Court cannot review it. In fact, it is

reviewable because it falls within the constitutional claim exception to an administrative exhaustion requirement. DHS could not have decided the constitutionality of the Alien Sedition Act, so El was not required to raise the First Amendment issue. Likewise, the absence of an issue exhaustion requirement in the REAL ID Act indicates that the law is not meant to bar judicial review of legal issues; it is instead just meant to ensure an alien has exhausted all remedial options within the administrative process. Further, the form DHS provided to El did not provide an option to make a legal challenge, so he was not required to raise his legal challenge for exhaustion purposes.

El's failure to raise his First Amendment claim at the administrative level does not defeat jurisdiction because this Court can review unexhausted constitutional claims, the REAL ID Act does not require exhaustion of legal issues, and DHS did not present El with an avenue to make a legal challenge. Therefore, this Court has jurisdiction to hear El's claims.

The Applicability of the First Amendment. The First Amendment does not grant the right of free speech to any particular individuals; it restricts the law-making authority of the government. While the Assembly Clause of the First Amendment is restricted to "the people," the Speech Clause makes no mention of "the people." So in light of the plain meaning of the First Amendment, El does not have to be a member of "the people" in order to avail himself of free speech protections.

Beyond utilizing the plain meaning of the text—should this Court decide El needs to belong to "the people" in order to have both speech and assembly rights—this Court's precedent guides a decision that El is a member of "the people." In *United States v. Verdugo-Urquidez* this Court said that individuals with sufficient connection to the United States are "the people" protected under the Constitution. The evaluation of whether a non-citizen is part of "the people" is a fact-specific, case-by-case analysis that considers factors like an alien's willing presence in the country and acceptance of societal obligations.

Despite later language in this Court's *District of Columbia v. Heller* opinion that "the people" are "members of the political community" and "law-abiding, responsible citizens," the *Verdugo-Urquidez* definition of "the people" still controls. That's because *Heller*'s putative limitations are a constitutional impossibility given this Court's affordance of First Amendment rights to individuals outside of the political community and non-citizens in the past.

Under *Verdugo-Urquidez*'s fact-specific analysis, El is a member of "the people" because he has voluntarily lived in the United States for an extended time, he gives back to his community, and he has a job and family here. Because of his voluntary presence and undertaking of societal obligations, El is included in "the people" and should receive First Amendment protections.

The Constitutionality of the Alien Sedition Act. A law that restricts political speech is subject to strict scrutiny analysis, wherein the government

has the burden of showing that the law is narrowly tailored to fit a compelling interest. Political speech is protected to the highest degree in our country, and censorship based upon the identity of the speaker is especially frowned upon. Not only is speech protected by the First Amendment, but also the right to receive speech—foreign speech included—is protected as well. This Court has held that the interest of "levelling the playing field" is not a compelling reason to limit political speech.

Here, the government's stated interests—preventing citizen intimidation and ensuring that the voices of citizens are not overwhelmed by those of undocumented immigrants—are not compelling in light of the extraordinary protection extended to political speech in the United States, no matter its source. The interest in preventing citizen voices from being overwhelmed is particularly uncompelling because it is akin to levelling the playing field. Because the interests proffered by the government are not compelling, the Alien Sedition Act is unconstitutional.

Moreover, even if the Court finds the government's interests compelling, the Alien Sedition Act is not narrowly tailored to fit the interests. The law both captures speech that would not offend the government's interests, and does not cover speech that threatens the interest the law is intended to protect. Because the Alien Sedition Act is both overbroad and underinclusive, the law is not

narrowly tailored and fails strict scrutiny analysis, rendering it unconstitutional.

STANDARD OF REVIEW

The Court has wide latitude to decide each issue of this case without regard for the actions of the court below. Courts always have the authority to determine their own jurisdiction, and a conclusion as to jurisdiction is reviewed de novo. *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940); *see Adams v. Monumental Gen. Cas. Co.*, 541 F.3d 1276, 1277 (11th Cir. 2008) ("We review jurisdictional questions de novo.").

Questions of First Amendment protections are also reviewed de novo. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567 (1995) ("[O]ur review of [a] claim that . . . activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the [lower] court."); *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1196 (9th Cir. 2002) ("We review constitutional questions de novo.").

Likewise, challenges to the constitutionality of a statute are reviewed de novo. *United States v. Rozier*, 598 F.3d 768, 770 (11th Cir. 2010); *United States v. Folen*, 84 F.3d 1103, 1104 (8th Cir. 1996) ("The constitutionality of a statute is a legal question we review de novo."). Restrictions to political speech are subject to strict scrutiny review. *Citizens United v. Fed. Election*

Comm'n, 558 U.S. 310, 340 (2010). Under strict scrutiny review, the government must overcome the high hurdle of showing that the law in question is narrowly tailored to fit a compelling interest. *Id.*

"De novo review means that the reviewing court [does] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below." *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) (internal quotations omitted). This Court owes the court below no deference because it has the freedom of de novo review as to each question in this case.

ARGUMENT

I. This Court has jurisdiction to review El's claim because the Real ID Act does not preclude the review of constitutional claims and El has exhausted all administrative remedies available to him as of right.

The Real ID Act governs the circumstances under which a court may review a deportation order for an alien. *See generally* 8 U.S.C. § 1252. The statute deprives courts of subject matter jurisdiction to review an alien's claim if the alien has not exhausted all administrative remedies. *See id.* § 1252(d)(1). Generally, a court cannot review a question that was not raised at the administrative level because the alien did not "exhaust" it. *See Chung Young Chew v. Boyd*, 309 F.2d 857, 861 (9th Cir. 1962). Even though judicial review of a removal decision is hard to come by, El's constitutional claim is nonetheless appropriately reached by this Court's jurisdiction.

A. El had no need to raise his First Amendment claim at the agency level because DHS is powerless to adjudicate constitutional claims.

This Court has cautioned that a "'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988). A claim that one's speech or assembly rights were violated is a constitutional claim. *See* U.S. Const. amend. I.

The concern about statutory imposition of a complete jurisdictional bar to review constitutional claims has driven courts to find exception for constitutional claims to the REAL ID Act's administrative exhaustion requirement. *See Hadayat v. Gonzales*, 458 F.3d 659, 665 (7th Cir. 2006). The fact that DHS is powerless to adjudicate constitutional claims supports the exception; only the courts have purview to decide constitutional questions. *I.N.S. v. Chadha*, 462 U.S. 919, 941–42 (1983) (explaining that neither Congress nor the Executive "can decide the constitutionality of a statute; that is a decision for the courts."); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991) (deciding the Court had jurisdiction to hear a constitutional claim based on agency action "[b]ecause the administrative appeals process does not address the kind of . . . constitutional claims respondents bring in this action"). For example, in *Daud v. Gonzales*, the Third Circuit considered an alien's due process claim despite the government's argument that such

consideration was precluded by the REAL ID Act's exhaustion requirement because he did not raise it at the administrative level. 207 F. App'x 194, 200–01 (3d Cir. 2006). There, because the claim was a "fundamental constitutional claim," the court decided it had jurisdiction to review it because the claim "could not have been resolved by the administrative tribunal." *Id.* at 201.

This constitutional claim exception is especially important where the constitutional challenge is to the substance of the underlying law or regulation, not to the way the government applied the law to the plaintiff. *Hadayat*, 458 F.3d at 665. For example, in the Seventh Circuit case *Hadayat v. Gonzales*, an alien sought to challenge the constitutionality of the substance of the regulation underlying his placement in removal proceedings, not the fact that the regulation was implemented against him. *Id.* Despite his failure to raise the constitutional claim at the agency level, the court decided that the alien was "not required to exhaust" the claim because of its fundamental constitutional nature. *Id.*

In this case, El's First Amendment claim is an exception to the § 1252(d)(1) exhaustion requirement. Like in *Daud*, the exhaustion requirement did not require El to raise his constitutional claim at the hearing level because DHS does not have jurisdiction to resolve whether the Alien Sedition Act violates the First Amendment. Further, El does not allege that DHS's implementation of the Alien Sedition Act against him violated his

rights; he claims that the very substance of the Alien Sedition Act is unconstitutional. So, like *Hadayat*, El's constitutional challenge as to the substance of the Act is properly before this Court. The Court has jurisdiction.

B. Notwithstanding this Court's certain jurisdiction over constitutional claims, El's removal order is also reviewable because he exhausted his administrative remedies.

Should the Court choose not to excuse exhaustion under the constitutional claim exception, then it "may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). Those administrative remedies are few; expedited removal proceedings allow the alien to inspect the evidence supporting removal, rebut the allegations supporting the charge, and request withholding of removal to a country where the alien fears persecution or torture. 8 C.F.R. § 238.1(b). If the alien rebuts the charge, an immigration officer—not judge—will order removal if the alien shows "no genuine issue of material fact" as to the propriety of deportation. 8 C.F.R. § 238.1(d)(2)(i). After that, the relevant statutes and regulations express no next administrative step. *See* 8 U.S.C. § 1228; 8 C.F.R. § 238.1. They do, however, require the government to allow the alien time to apply for judicial review before a removal order is executed. *See* 8 U.S.C. § 1228(b)(3). The conclusion of his administrative proceedings left El with no option but to turn to the judiciary,

which has jurisdiction to review his constitutional claim because he exhausted his administrative remedies.

1. El's claim is reviewable by this Court because the REAL ID Act requires exhaustion only of remedies, not of issues.

The REAL ID Act does not explicitly require exhaustion of *issues*; it merely requires exhaustion of *remedies*. 8 U.S.C. § 1252(d)(1); *Etchu-Njang v. Gonzales*, 403 F.3d 577, 581 (8th Cir. 2005) ("While some statutes governing judicial review of administrative agency decisions explicitly require exhaustion of issues . . . the exhaustion requirement of § 1252(d)(1) does not do so by its terms."). The absence of an express issue exhaustion requirement matters because this Court has noted "that requirements of administrative issue exhaustion are largely creatures of statute." *Sims v. Apfel*, 530 U.S. 103, 107 (2000).

This Court has twice distinguished between issue exhaustion and remedy exhaustion, noting that the former is not necessarily a corollary of the latter. *Sims*, 530 U.S. at 107–08; *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). In the context of judicial review of social security administrative proceedings, this Court decided in *Sims v. Apfel* that an issue exhaustion requirement should not be read into a remedy exhaustion requirement absent express language to that effect. *Sims*, 530 U.S. at 107–08, 112. The same goes for review of habeas corpus decisions—absent express statutory language, an issue exhaustion requirement does not automatically accompany a remedy

exhaustion requirement. *Coleman*, 501 U.S. at 732 (1991). The habeas case—*Coleman v. Thompson*—examined a statute comprised of language similar to the language at issue here. *Compare* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . . ."), *with* 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right . . . ."); *See Theodoropoulos v. I.N.S.*, 358 F.3d 162, 169 (2d Cir. 2004) (confirming that "the exhaustion requirement set forth in [the Real ID Act] echoes that in 28 U.S.C. § 2254," the habeas statute).

Precisely because § 1252(d)(1) does not explicitly require issue exhaustion, the Second Circuit has reviewed issues on appeal that were not raised in immigration proceedings below. *Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 119–21 (2d Cir. 2007). In *Zhong v. The United States Department of Justice*, a citizen of the Peoples Republic of China sought review of the denial of his asylum and removal order under § 1252. *Id.* at 107–08. The plaintiff presented issues to the Second Circuit that he did not raise in his administrative hearings. *Id.* at 118. Relying on words of caution from this Court "against conflating mandatory [prerequisites to review] with jurisdictional prerequisites to review," the Second Circuit decided that "the failure to exhaust individual issues . . . does not deprive this court

of *subject matter jurisdiction* to consider those issues" under § 1252(d)(1). *Id.* at 107, 121–22 (citing *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)) (emphasis in original); *but see, e.g.*, *Ramani v. Ashcroft*, 378 F.3d 554, 559–60 (6th Cir. 2004) (reading into § 1252(d)(1), as five other circuits have, an issue exhaustion requirement).

If Congress meant to require that an alien present an issue at the removal hearing in order for a court to review the issue later, it could have done so—it has before. *See, e.g.*, 29 U.S.C. § 160(e); *see also Sims*, 530 U.S. at 107 (noting "that requirements of administrative issue exhaustion are largely creatures of statute"). For example, the statute that allows review of administrative unfair labor practice decisions explicitly requires exhaustion of issues at the administrative stage: "No objection that has not been urged before the [agency] . . . shall be considered by the court." 29 U.S.C. § 160(e). The Securities and Exchange Act of 1933 boasts a similarly explicit provision, dictating that judicial review of an order of the Securities and Exchange Commission is limited to "objection[s] . . . urged before the Commission." 15 U.S.C. § 77i(a). On the contrary, issue exhaustion language is conspicuously missing from the REAL ID Act. *See* 8 U.S.C. § 1252(d)(1).

Here, El was not required by statute to exhaust every possible issue at his removal hearing; he was just required to exhaust his administrative remedies, which he did. 8 U.S.C. § 1252(d)(1); (R. at 4–5.) The Court should not

ignore the absence of an issue exhaustion requirement in the REAL ID Act when such a qualification is present in other agency review statutes. The absence means that the REAL ID Act does not require issue exhaustion. *See* 8 U.S.C. § 1252(d)(1). Like this Court's decisions in *Sims* and *Coleman* that an issue exhaustion requirement should not necessarily be read into an administrative exhaustion requirement, the Court similarly should not read an issue exhaustion requirement into the REAL ID Act here.

To the extent that § 1252(d)(1) of the REAL ID Act requires only exhaustion of remedies, El did that. His only administrative recourse was to rebut the allegations underlying his removal charge. He did so at his removal hearing before the ICE officer. After the hearing and issuance of the Final Order of Removal, there were no more administrative remedies for El to pursue. Appealing to the Fourteenth Circuit Court of Appeals was his only choice. El has exhausted the remedies afforded to him by statute. Even though El did not raise every legal issue at the administrative level, like in *Zhong* that does not deprive this Court of subject matter jurisdiction.

The Government will likely argue that this Court should itself impose an issue exhaustion requirement for review under § 1252, as a number of the lower circuits have. However, that argument is flawed because the analysis of those lower courts is flawed—all but one of them entirely failed to acknowledge this Court's suggestions in *Sims* and *Coleman* that an issue exhaustion

requirement should not necessarily be read into a remedy exhaustion requirement. *See Sims*, 530 U.S. at 107–08; *Coleman v.*, 501 U.S. at 732; *Ramani*, 378 F.3d at 559–60; *Xie v. Ashcroft*, 359 F.3d 239, 245 n. 8 (3d Cir. 2004); *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004); *Fernandez-Bernal v. Attorney General*, 257 F.3d 1304, 1317 n. 13 (11th Cir. 2001); *Sousa v. INS*, 226 F.3d 28, 31–32 (1st Cir. 2000); *Singh v. Reno*, 182 F.3d 504, 511 (7th Cir. 1999); *Witter v. I.N.S.*, 113 F.3d 549, 554 (5th Cir. 1997). The one circuit court that did mention *Sims* cursorily disregarded the case in a footnote without analysis because it "appear[ed] to be distinguishable on multiple grounds." *See Sousa*, 226 F.3d at 32 n. 2. Because this Court has expressed guidance that the lower courts ignored and because this Court's precedent controls over that of the lower courts, this Court should not follow the lower courts' misguided readings of an issue exhaustion requirement into the REAL ID Act.

2. Because DHS focuses on resolving fact questions and did not hold out an option for El to make a legal challenge to his removal, failure to make a legal challenge does not preclude judicial review of his claim.

"[P]roper exhaustion of administrative remedies . . . 'means using all steps that the agency holds out . . . .'" *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). To that end, "the mere opportunity to mention a claim in administrative proceedings is not the same as having an avenue 'as of right' to do so." *Mejia v. Sessions*, 866 F.3d 573, 581 (4th Cir. 2017).

The regulations that govern the procedural hearing process for expedited removal illustrate that the process focuses on resolving fact questions, not legal questions. *Valdiviez-Hernandez v. Holder*, 739 F.3d 184, 187 (5th Cir. 2013) (citing 8 C.F.R. § 238.1(d)(2)(i),(ii)). For example, the regulations instruct that the deciding immigration officer should base the removal decision on whether the alien demonstrated a "genuine issue of material fact." 8 C.F.R. § 238.1(d)(2)(i),(ii)(A). The process also lacks the trappings of a proceeding meant to resolve a legal question: immigration judges do not preside over the removal hearings of aliens subject to expedited removal, and these aliens cannot appeal an adverse decision to the Board of Immigration Appeals. *See generally id.* § 238.1.

Accordingly, "[t]he relevant statutes and corresponding regulations" do not provide aliens "with an avenue to challenge the legal conclusion[s]" of the DHS. *Valdiviez-Hernandez*, 739 F.3d at 187. The Fourth Circuit has even held that as to the Notice of Intent form specifically, if the form does not provide an option specifically to raise a legal challenge, making a legal challenge was not "one of 'the steps the agency holds out.'" *Etienne v. Lynch*, 813 F.3d 135, 142 (4th Cir. 2015) (quoting *Woodford*, 548 U.S. at 90). In that case, *Etienne v. Lynch*, the alien was sent a form that allowed him to rebut DHS's removal charge by selecting reasons of rebuttal from a list of checkboxes. *Id.* at 140. None of the checkboxes indicated a legal reason for rebuttal. *Id.* For that

reason, the court determined that because the option to make a legal challenge was not offered to the alien, doing so was not a requirement of administrative exhaustion. *Id.* at 142. So, the court could properly review Etienne's legal challenge under 8 U.S.C. § 1252(d)(1). *Id.*

Here, the fact-specific nature of removal proceedings forecloses the requirement of raising a legal challenge in order to effect remedy exhaustion. The regulations instructing DHS personnel on how to conduct removal proceedings make clear that the deciding officer is to ascertain the facts in a proceeding. *See* 8 C.F.R. § 238.1(d)(2)(i),(ii)(A). The record reflects that El, too, was focused on the facts during his removal proceeding, as he raised factual arguments about his life to the immigration officer. (R. at 9.)

El would not have known to make a legal argument because doing so was not held out to him as an option; the DHS Notice of Intent form did not present an option to make a legal challenge. (R. at 7.) In this way, El's case is just like *Etienne*. In fact, El's Notice of Intent presented the very same options to rebut allegations underlying the DHS's removal charge as the form in *Etienne. Compare Etienne*, 813 F.3d at 140, *with* (R. at 7.) Those options only offer an opportunity for the alien to rebut DHS's claims about whether he is *factually* a resident of the United States or has *in fact* committed the crime alleged. (R. at 7.) Because DHS's form did not "hold[ ] out" an option to El to make a legal challenge, or otherwise notify him that he could do so, he was not

required to make the legal challenge in order to exhaust his administrative remedies. *See Woodford*, 548 U.S. at 90.

The judicially-imposed constitutional claim exception to the REAL ID Act opens the door for this Court to hear El's case. Beyond that, El exhausted all of his administrative remedies because he pursued all remedies made available by the REAL ID Act, which does not require (or solicit) the raising of legal issues in its fact-focused removal proceedings. Therefore, this Court has jurisdiction to hear his claim.

II. The Alien Sedition Act is unconstitutional because El has First Amendment rights to free speech and assembly that the Act does not properly restrict under strict scrutiny analysis.

The First Amendment to the Constitution of the United States mandates that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. Of course, no right is unlimited. *See D.C. v. Heller*, 554 U.S. 570, 635 (2008). In the First Amendment context, expression of "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" is not within the protective boundaries of the amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Importantly, statutes that appropriately restrict speech only limit expression by *conduct*, not by *speaker*. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010). Laws restricting political

speech are especially disfavored by the First Amendment, and such laws are strictly scrutinized. *Citizens United*, 558 U.S. at 340.

Of course, a law cannot be held violative of an individual's constitutional rights if that individual is not protected by the Constitution. So, this Court is tasked with deciding a matter of first impression: whether an undocumented immigrant is protected by the First Amendment. El respectfully urges the Court to hold that he is, because the amendment on its face does not restrict speech protection to "the people" and, even if it does, he is included in "the people" because he is a member of this country's national community.

A. The First Amendment does not restrict freed speech to of a subset of individuals; instead it restricts the law-making authority of the government.

The First Amendment proscribes the power of the federal government to restrict speech. *See* U.S. Const. amend. I ("Congress shall make no law . . . ."). It does not grant the right to free speech to a select group of individuals. *See id.*; *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978). The First Amendment cannot grant individuals a right that they already innately have. *Heller*, 554 U.S. at 592 ("[I]t has always been widely understood that the . . . First . . . Amendment[ ] . . . codified a *pre-existing* right.") (emphasis in original). Of course, analysis of the First Amendment begins with the text of the amendment itself. Thomas E. Baker, *Constitutional Theory in A Nutshell*, 13 Wm. & Mary Bill Rts. J. 57, 70 (2004).

A look at the full text of the amendment reveals that the First Amendment does not say that only "the people" have the freedom of speech:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

A dissection of the amendment helps reveal its boundaries and inclusions. The clause is trifurcated by semicolons into three distinct sections. *See id.* Within the trifurcated framework, the forepart prohibits Congress from making laws establishing religion, prohibiting the free exercise of religion, or abridging freedom of speech or of the press. *See id.*; *Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995). Only in the latter part of the First Amendment—the part that speaks to peaceful assembly and government petition—does it refer to "the right of the people." *See* U.S. Const. amend. I.; *Underwager*, 69 F.3d at 365. This Court has itself noted that the appearance of "the people" in the First Amendment is specific to the Assembly-and-Petition Clause. *See Heller*, 554 U.S. at 579. Thus, a plain reading of the text reveals that the First Amendment does not constrain speech to "the people" at all. *See* U.S. Const. amend. I.

This analysis is not novel. In fact, because "the people" are not mentioned in connection with the freedom of speech, at least one court has found that the freedom is not restricted to a certain group by the language of the amendment. In *Underwager v. Channel 9 Australia*, the Ninth Circuit had to decide whether freedom of speech protections extended to an Australian citizen visiting and speaking in California. 69 F.3d at 364–65. The *Underwager* court decided that the First Amendment Speech Clause did protect the Australian, even though she was neither an American citizen nor a resident of the United States. *Id.* at 365. After dissecting the First Amendment to determine that the Assembly-and-Petition Clause is the only one restricted to "the people," the Ninth Circuit determined "there is no expressed limitation as to whom the right of free speech applies." *Id.* (concluding "that the speech protections of the First Amendment *at a minimum* apply to all persons legally within our borders") (emphasis added); *see* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. Rev. 1237, 1248 (2016) (deciphering that "whatever 'the people' refers to, free speech is not one of the rights for which it matters").

This understanding of the First Amendment is in accord with this Court's insistence that the right to free speech is not speaker-specific. *See Citizens United*, 558 U.S. at 342. This Court has made clear that in free speech cases, "[t]he proper question . . . is not whether [the plaintiffs] 'have' First

Amendment rights . . . . Instead, the question must be whether [the statute at issue] abridges expression that the First Amendment was meant to protect." *Bellotti*, 435 U.S. at 776. Therefore, the freedom of speech does not fluctuate from speaker to speaker depending on whether they are included in "the people," as a plain reading of the First Amendment indicates. *See Citizens United*, 558 U.S. at 342.

A plain reading of the First Amendment reveals that it does not limit the right of free speech to any group or type of person. In fact, the only speech-related limitation that the First Amendment prescribes is placed on the government: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The freedom of speech is for everyone, not just those who can be labelled as "the people."

Accordingly, El does not have to be a member of "the people" in order for his innate right to freedom of speech to be protected by the First Amendment. El was born with the right to free speech, and the government cannot wield the language of the First Amendment to take it away.

B. Even if the First Amendment does have a restrictive effect on individuals, El is a member of "the people" for the purposes of the First Amendment.

Should this Court decide that the freedom of speech only belongs to "the people," El still falls within that group. The phrase "the right of the people" appears in two other amendments besides the First: The Second and Fourth

Amendments. U.S. Const. amends. I, II, IV. However, the Constitution does not define what "the people" means. *See generally* U.S. Const. So, it is this Court's task to interpret the meaning of "the people." *See Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

As a general matter, "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931). Thus, interpretation of the Constitution begins with the text itself, but does not necessarily end there if the text is unclear. *The Meaning(s) of "The People" in the Constitution*, 126 Harv. L. Rev. 1078, 1088 (2013) (relying on Chief Justice Marshall's interpretive methodology in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). Two other avenues this Court has historically explored to discern meaning from the Constitution are looking to the rest of the Constitution for context and referring to the Court's own precedent. *Id.*; Baker, *supra* at 68.

"The people" could have a number of different "ordinary" meanings. *See Sprague*, 282 U.S. at 731; *compare People*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/people (last visited Oct. 24, 2019) (listing seven distinct definitions of the word "people" as used today), *with People*, *A Complete Dictionary of the English Language, Both with Regard to*

Sound and Meaning (3d ed. 1790) (listing five distinct meanings the word could have had in 1790). Because the words "the people" in the First Amendment do not have an obvious meaning on their face, this Court's consideration other instances of the phrase in the Constitution can help ascertain which individuals "the people" may include or exclude.

1. El is protected by the First Amendment because he is a member of "the people" due to his substantial connections to the United States.

If consultation of the text of the Constitution does not lend a clear meaning to a word or phrase, the Court properly turns to precedent. Baker, *supra* at 68. This Court has discussed the implications of the phrase "the people" two times, neither cases of which dealt with the First Amendment. *See The Meaning(s) of "The People" in the Constitution*, *supra* at 1078 (citing *Heller*, 554 U.S. at 580; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). Only one of those cases discussed which individuals "the people" encompasses; the other case decided whether "the people" connotes an individual right or collective power. *See Verdugo-Urquidez*, 494 U.S. at 265; *Heller*, 554 U.S. at 579. Both cases suggested that "the people" means the same thing each instance it is used in the Constitution. *See Heller*, 554 U.S. at 580; *Verdugo-Urquidez*, 494 U.S. at 265.

On the face of the two cases that discuss "the people," it seems the Court offered a confusing contradiction of who the phrase includes. *Compare Heller*,

554 U.S. at 580, *with Verdugo-Urquidez*, 494 U.S. at 265. In the Fourth Amendment case *United States v. Verdugo-Urquidez*, the Court said "'the people' . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265. Then, in *District of Columbia v. Heller*—a Second Amendment case—the Court endorsed the *Verdugo-Urquidez* explanation of the phrase. *Heller*, 554 U.S. at 580. Later, in its discussion of whether the use of the phrase "the people" bestowed an individual right or a collective power, the Court explained the individual right to bear arms belonged to "members of the political community" and "law-abiding, responsible citizens." *Id.* at 580, 635.

That language could potentially throw confusion upon the meaning of "the people," but it need not. That is because only *Verdugo-Urquidez* discussed who belongs to "the people." *Compare Heller*, 554 U.S. at 580, *with Verdugo-Urquidez*, 494 U.S. at 265. *Heller*'s decision was limited to whether the wording "the people" in the Second Amendment conferred an individual right or collective power. *Heller*, 554 U.S. at 579; *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168 (10th Cir. 2012) (explaining that "the question in *Heller* was the amendment's *raison d'être*—does it protect an individual or collective right?"). That means that *Heller* discussed *what right* the Second Amendment

protects (to individually possess firearms or to possess firearms when serving in a militia), not *who possesses* the right. *See Heller*, 554 U.S. at 579.

So, the language *Heller* used when explaining the individual nature of Second Amendment protection—"members of the political community" and "law-abiding, responsible citizens"—does not restrict who "the people" includes. *See id.*; *United States v. Meza-Rodriguez*, 798 F.3d 664, 669 (7th Cir. 2015) ("While some of *Heller*'s language does link Second Amendment rights with the notions of 'law-abiding citizens' and 'members of the political community,' . . . those passages did not reflect an attempt to define the term 'people.'"). Therefore, *Verdugo-Urquidez* controls as to the meaning of "the people."

The *Verdugo-Urquidez* Court scrutinized what (and who) "the people" means. *See generally Verdugo-Urquidez*, 494 U.S. at 265. In that case, this Court considered the question of whether the Fourth Amendment applies to searches and seizures of property located outside of the United States and owned by a nonresident alien. *Id.* at 261. Due to suspected narcotics trafficking, the Drug Enforcement Agency searched an alien's Mexican residences without a warrant. *Id.* at 262–63. At the time of the search, the alien was in the United States following his arrest in Mexico and forcible removal. *Id.* at 272. Importantly, he was only in this country for a matter of days. *Id.*

The *Verdugo-Urquidez* Court acknowledged that immigrants have "been accorded a generous and ascending scale of rights as [they] increase[ ] [their] identity with our society." *Id.* at 269 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)). It then considered older cases that extended constitutional protections to aliens (both resident and undocumented), namely the First, Fifth, Sixth, and Fourteenth Amendments. *Id.* at 270–71 (discussing *Plyler v. Doe*, 457 U.S. 202, 211–212 (1982) (holding the Equal Protection Clause protects undocumented aliens); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (deciding the word "person" in the Fifth Amendment includes resident aliens); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (holding that resident aliens have First Amendment rights); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (deciding that resident aliens have Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment protects resident aliens)).

Despite a long history of aliens enjoying constitutional rights, the *Verdugo-Urquidez* Court did not extend the protections of the Fourth Amendment to Verdugo-Urquidez because of a distinction it saw between him and the aliens in those prior cases: Verdugo-Urquidez "had no previous significant voluntary connection with the United States." *Id.* at 271. The Court further implied that the case may have turned out differently had Verdugo-Urquidez "accepted some societal obligations" in America. *Id.* at 273. The

Court noted that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country," emphasizing that rights generally do not attach until "an alien lawfully enters and resides in this country." *Id.* at 271 (quoting *Kwong Hai Chew*, 344 U.S. at 596 n. 5) (emphasis omitted). The Court's analysis suggests review of the facts on a case-by-case basis to determine whether an undocumented person is included in "the people." *Id.* at 271–73.

In light of the *Verdugo-Urquidez* "substantial connections" test, the Seventh Circuit ruled that an undocumented immigrant belonged to "the people" in *United States v. Meza-Rodriguez*. 798 F.3d at 672. There, the court evaluated the immigrant's longtime voluntary presence in the United States, his family ties, and his employment. *Id.* at 670–71. Based on those considerations, the court determined his connections to the Unites States were substantial enough to cause his inclusion in "the people" for constitutional protections. *Id.*

Here, El has developed "sufficient connections" with the United States to be considered part of the national community, and so he should receive First Amendment freedom of speech protections. What makes El eligible for First Amendment speech protection is exactly what this Court said was lacking in *Verdugo-Urquidez*: a voluntary presence in the United States and the adoption

of societal obligations. First, El has held consistent employment with a newspaper in Metropolis during his time in the United States. (R. at 2.) Second, El has a son for whom he has never failed to pay child support to his former wife. (R. at 3.) Third, El founded a volunteer group to help maintain sidewalks in his neighborhood, he regularly donates to charities, and he otherwise volunteers his time as a Kryptonian interpreter at the local community center. (R. at 3.) Just like in *Meza-Rodriguez*, El's entrenchment in his community exhibits that he has connections substantial enough to render him a member of "the people."

In addition to his community ties, El had constitutional protections attach because he entered the United States legally on a tourist visa. (R. at 2.) Like *Verdugo-Urquidez* suggests, the obtainment of rights for aliens begins with legal entry, as here. While El is admittedly not presently residing in the country legally, his ten-year residence in the United States began legally. (R. at 10.) That is not insignificant; his situation could not be further from the alien's in *Verdugo-Urquidez*, who only ended up in the United States for a few days by happenstance after being arrested for his involvement in narcotics trafficking. El's longtime residence in the United States strengthens his "substantial connections" to this country that have only grown since constitutional rights attached upon his legal entry.

El is a model member of his community, contributing in many different ways to the vitality of his neighborhood. On the "ascending scale of rights," El has increased his identity with American society to the point that he is thoroughly ingrained in our national community. *See Eisentrager*, 339 U.S. at 770. Consequently, he is a member of "the people" and is due the constitutional protection that the label affords.

2. Despite *Heller*, El does not need to be a member of the political community or a citizen to be "the people."

Of course, the Government will likely argue that *Heller* modified *Verdugo-Urquidez*'s definition of "the people" by further restricting the phrase to include only "members of the political community" and "law-abiding, responsible citizens." *See Heller*, 554 U.S. at 565, 580. Beyond the language's context—discussing what right the Second Amendment protects—there are several reasons why *Heller*'s language cannot logically be read to limit who "the people" are.

First and foremost, *Heller* quoted *Verdugo-Urquidez* with approval and without any express modification, reemphasizing *Verdugo-Urquidez*'s "sufficient connection" language. *Id.* at 580 (quoting *Verdugo-Urquidez*, 494 U.S. at 265). More importantly, the group of individuals that "the people" encompasses in other constitutional amendments negates the idea that the group only includes "members of the political community" or "citizens."

i. "The people" cannot logically mean only those individuals who are "members of the political community" because the Constitution protects "people" who are not members of the political community.

"[T]he people" cannot possibly only mean "members of the political community" because the narrowest, most obvious definition of that phrase would mean eligible voters. *See The Meaning(s) of "The People" in the Constitution*, *supra* at 1083. Keeping in mind that "the people" carries the same meaning throughout the Constitution, restricting the group to eligible voters is impossible because the amendments so limited by "the people" protect the rights of non-eligible voters. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504, 513–14 (1969) (protecting the free speech rights of teenagers).

One need look no further than the First Amendment to see why "the people" cannot mean only eligible voters. The seminal case *Tinker v. Des Moines Independent Community School District* acknowledged the free speech protection of high school students as young as thirteen years old. *Id.* Of course, thirteen-year-olds do not have the right to vote in this country. U.S. Const. amend. XXVI. Convicted felons, too, enjoy speech protection despite the fact that most cannot vote. *See, e.g.*, *Packingham v. North Carolina,* 137 S. Ct. 1730, 1734, 1737–38 (2017) (striking down a North Carolina law that prohibited felony sex offenders from using social media websites on freedom of speech grounds); *see* Bailey Figler, *A Vote for Democracy: Confronting the*

Racial Aspects of Felon Disenfranchisement, 61 N.Y.U. Ann. Surv. Am. L. 723, 728 (2006) (discussing the widespread disenfranchisement of felons in the United States).

Because non-eligible voters like children and felons are "the people" in the eyes of the First Amendment, "members of the political community" cannot logically be a literal definition of "the people" based on the former phrase's most obvious meaning (eligible voters). If the Court were to restrict protections afforded to "the people" to those who are literally "members of the political community" (those who can participate in the political process), so holding would ripple far beyond the rights of undocumented immigrants to disrupt the rights of individuals who currently enjoy the First Amendment's protections. For that reason, "the people" cannot mean "members of the political community" as *Heller* may suggest.

ii. "[T]he people" cannot mean "law-abiding, responsible citizens" because the First Amendment protects non-citizen speech.

To the extent that the government argues that only "law-abiding, responsible citizens" can avail themselves of First Amendment speech protections, that argument is a nonstarter because non-citizens are regularly protected by the First Amendment. *See Citizens United*, 558 U.S. at 365 (holding that the speech of corporations is protected by the First Amendment); *Kwong Hai Chew*, 344 U.S. at 598 n. 5 (recognizing First Amendment

protections for resident aliens); *Huitron-Guizar*, 678 F.3d at 1168 ("Nor can we say that the word 'citizen' was used deliberately to settle the question [of "the people"], not least because doing so would conflict with *Verdugo–Urquidez*, a case *Heller* relied on."). Besides, the Framers restricted constitutional protections to "citizens of the United States" in other amendments; if they had meant for only citizens to have First Amendment protections, they would have said so. *See, e.g.*, U.S. Const. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States* . . . .") (emphasis added).

Courts have even applied the First Amendment to protect the speech of foreigners with no residential ties to the United States at all. *See, e.g.*, *Underwager*, 69 F.3d at 365. In *Underwager*, the free speech rights of an Australian citizen visiting for business were protected by the First Amendment by the Ninth Circuit. *Id.* In another case, *Times Newspapers Limited (Of Great Britain) v. McDonnell Douglas Corp.*, a California court applied the First Amendment to protect the expression of a foreign newspaper published in a foreign country for a foreign audience. 387 F. Supp. 189, 192 (C.D. Cal. 1974).

Here, *Heller*'s language about "members of the political community" and "law-abiding, responsible citizens" cannot be taken at face value to limit "the people" to "citizens" because several different types of non-citizens already

enjoy First Amendment protections as "the people." Consequently, holding that the First Amendment does not protect undocumented immigrants because "the people" means "law-abiding, responsible citizens," as *Heller* may suggest, would hurt the rights of far more than just the undocumented population. That is not an acceptable outcome.

Scrutiny of *Verdugo-Urquidez* and *Heller* reveals that *Verdugo-Urquidez* controls as to the meaning of "the people." El has the "substantial connections" to the United States that the *Verdugo-Urquidez* Court said would make an individual a member of "the people." Because El is encompassed by the term "the people," he is protected by the First Amendment.

C. The Alien Sedition Act is unconstitutional under the First Amendment because it is not narrowly tailored to fit a compelling government interest.

Because the First Amendment protects El, the Court now must determine whether the Alien Sedition Act violates the First Amendment. "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' *Citizens United*, 558 U.S. at 340 (quoting *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007)). The burden of justifying a law's constitutionality rests entirely with the government. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 210 (2014). Strict scrutiny is "the most demanding test known to

constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Alien Sedition Act wholly fails this exacting test.

The Alien Sedition Act makes it a felony for an undocumented immigrant "to organize or participate in any public demonstration . . . which is intended . . . [t]o advocate for a change to any law of the United States" or "[t]o advocate for or against the election of any person to be an officer or representative of the United States government." 18 U.S.C. § 2900. A conviction under the Act is an aggravated felony. *Id.*

The stated interest of Congress in passing the Act was "that the participation of undocumented persons in rallies and protests within the United States threatened to intimidate American citizens and overwhelm their legitimate right to be heard." (R. at 2.) That interest is not compelling, nor is the Alien Sedition Act narrowly tailored.

1. The Government does not have a compelling interest in censoring immigrant political speech to shelter American citizens because the First Amendment calls for open and diverse communication in the democratic process.

This Court has acknowledged that when speech is political in nature, its protection is especially critical. *See Citizens United*, 558 U.S. at 344. In fact, this Court has emphasized the imperative that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 340. Preventing citizen intimidation and protecting citizens' voices from being

overwhelmed are not compelling interests in light of this Court's wariness of censoring political speech.

"It is . . . vitally important . . . that all channels of communication be open . . . during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *Id.* at 310. (quoting *United States v. Automobile Workers*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting)). To that end, the First Amendment frowns upon censoring speech on a certain topic or viewpoint. *See, e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (striking down content-based restriction). The First Amendment also prohibits speech restrictions "distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, 558 U.S. at 340 (citing *Bellotti*, 435 U.S. at 784). These prohibitions on restrictions exist because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United*, 558 U.S. at 340. "The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Id.* at 340–41.

First Amendment protections extend to both sides of communication—the speaker and the listener. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (explaining that the First Amendment protects communication generally, both as to "its source and to its

recipients"). So, this Court has held that the First Amendment necessarily protects a "right to receive." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)). "This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." *Id.* (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)). This Court has specifically recognized a right to receive foreign speech. *See Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 302, 307 (1965) (protecting the right of Americans to receive communist literature in the mail from foreign countries).

Additionally, the Court has ruled that political speech laws intended to "level the playing field" are not a legitimate government objective, let alone a compelling one. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749–50 (2011) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 741 (2008)). In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, this Court held a statute unconstitutional for a matching funds scheme in political campaign donations, which are a form of political speech. *Id.* at 728. The Court described that, while "'[l]eveling the playing field' can sound like a good thing," the democratic process is "not a game." *Id.* at 750.

Here, the government's interests in preventing the intimidation of American citizens and ensuring their speech is not "overwhelmed" is not compelling both because it restricts undocumented immigrants' political

speech and because it restricts citizens' right to receive information. First, an interest that requires censorship of political speech cannot be compelling in light of this Court's vehement disdain for such censorship. That is especially true given the First Amendment's prohibition on limiting speech based on source. To that end, the government cannot have a compelling interest in shielding citizens from certain sources of speech when this Court has emphasized that is should be up to listeners to determine which speakers are worth listening to. In fact, this Court's specific acknowledgment of citizens' rights to receive foreign speech shows why a law that restricts the speech of non-citizens is particularly repugnant to First Amendment principles.

More specifically, the Government's stated interest not to "overwhelm" the "right to be heard" of others is akin to statutes designed to "level the playing field" of campaign contributions. The Alien Sedition Act is ostensibly aimed at suppressing immigrant speech so that citizen speech is not inhibited by the competition. That sort of fairness-minded provision is just like the fund-matching scheme the Court struck down in *Arizona Free Enterprise Club*. Here, like in that case, levelling the playing field is not a compelling interest.

The government's interests in preventing citizen intimidation and ensuring the voices of citizens are not overwhelmed are not compelling. Subsequently, the Alien Sedition Act fails the strict scrutiny test and is therefore unconstitutional.

2. Even if the Government's interest in shielding citizens from immigrant speech is compelling, the Alien Sedition Act is not narrowly tailored to fit that interest.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citing *City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 808–810 (1984)). A statute that implements a "complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Id.*

A law is not narrowly tailored if it is overbroad, which means that the government's proffered interest "could be achieved by narrower [laws] that burden[ ] [the right] to a far lesser degree." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993). Likewise, a law is not narrowly tailored if it is underinclusive, meaning that it does not prohibit all speech that could damage the interest it purports to protect. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2232 (2015) (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)).

i. The Alien Sedition Act is overbroad because it encompasses expressive activity that is not intimidating to citizens and that does not overwhelm citizens' rights to be heard.

The Alien Sedition Act is woefully overbroad. It is a complete ban on the participation of undocumented immigrants in an assembly, the purpose of which is to advocate *any* sort of legal reform or to advocate for or against *any*

federal political candidate. (R. at 2.); 18 U.S.C. § 2900. The law captures more speech and behavior than necessary to achieve the government's interest of preventing citizen intimidation and preventing the voices of American citizens from being overwhelmed, because an alien's attendance at a rally with a political purpose will not always threaten those government objectives.

This Court famously evaluated the overbreadth of a speech restriction in *Reno v. American Civil Liberties Union*. 521 U.S. 844, 864 (1997). There, the law under scrutiny banned the transmission or display of "indecent" and "patently offensive" materials to children under the age of eighteen, with the purpose of protecting children from exposure to pornography. *Id.* at 859–60. This Court decided the law was overbroad because it would render inappropriate the transmission of "large amounts of nonpornographic material with serious educational or other value," such as information about safe sexual practices or artistic images featuring nude figures. *Id.* at 877–78.

Here, the Alien Sedition Act reflects the same overbreadth as the law in *Reno*. Like in *Reno*, here many scenarios could arise in which an alien attends a political rally or demonstration that does not threaten the government's stated interests. For example, an alien could attend the campaign rally of a presidential candidate, or march in a demonstration calling for laws to remediate the opioid crisis, both of which would be a violation of the Alien Sedition Act. Both of these events would take place with or without the

participation of the alien and would likely be organized by American citizens. The alien's attendance and participation would not serve to intimidate citizens any more than the occurrence of the event in first place would intimidate American citizens. Especially if it is an American citizen who organizes the event—such as a presidential campaign rally—an alien's participation in the event could not be said to "overwhelm" the voices of the American citizens who are speaking in the first place.

These examples illustrate the overbreadth of the Alien Sedition Act. Because the Alien Sedition Act is overbroad, it fails the narrow tailoring requirement of the strict scrutiny test.

iii. Likewise, the Alien Sedition Act is underinclusive because it does not prohibit all expressive activity that could intimidate citizens or overwhelm a citizen's right to be heard.

This Court has acknowledged that, though it is "somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech[,] . . . underinclusiveness can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (quoting *Brown v. Entm't Merchs. Ass'n,* 564 U.S. 786, 802 (2011)).

To that end, this Court delivered an instructive analysis of an underinclusive speech law in *Reed v. Town of Gilbert, Arizona*. 135 S. Ct. at

2231. There, a church challenged a city ordinance that prevented it from placing temporary signs around town to notify the community about its weekly church services, but did not restrict other types of signs. *Id.* at 2224–26. The town's stated purpose for restricting signs about events was to preserve the town's aesthetic appeal and promote traffic safety. *Id.* at 2231. This Court did not buy the town's justifications because of the law's failure to prohibit other types of signs—like political signs—that would equally affect the town's aesthetic appeal or threaten traffic safety. *Id.* at 2231–32. So the Court determined the speech restriction was underinclusive. *Id.*

Here, the Alien Sedition Act is underinclusive in the same way that the speech restriction in *Reed* was. Like in *Reed*, the Act does not prohibit all forms of speech that could threaten the government's interests of preventing citizen intimidation and ensuring citizens' rights to be heard are not overwhelmed. An alien's participation in a protest unconnected to advocacy for or against any particular law or political candidate could be threatening to people and overwhelm the speech of others. For example, citizens likely feel threatened by a rally of the Ku Klux Klan. Some American citizens may fear speaking in response to the rally, to the point that their "right to be heard" is effectively "overwhelmed." Yet, the Alien Sedition Act would not make it a crime for an undocumented immigrant to rally with the KKK. The fact that the law allows for speech that threatens the very same interests it purports to

serve reveals its underinclusiveness. This underinclusiveness does not just "raise doubts" that the government passed the law to satisfy its stated interest, it outright confirms that the law was passed to "disfavor[ ] a particular speaker or viewpoint." *See Williams-Yulee*, 135 S. Ct. at 1668.

Because the Alien Sedition Act is both overbroad and underinclusive, it is not narrowly tailored to fit the government's interests. Therefore, the Alien Sedition Act fails the strict scrutiny analysis applied to political speech and is unconstitutional under the First Amendment.

CONCLUSION

The Real ID Act's administrative exhaustion requirement does not prevent this Court from hearing El's First Amendment claim, even though he did not raise it during his removal proceeding, for three reasons. First, courts recognize that because agencies cannot adjudicate constitutional claims, administrative exhaustion requirements do not include a requirement to raise constitutional claims at the administrative level. Second, the REAL ID Act could have an express issue exhaustion requirement, but it does not. Third, the removal hearing process is entirely fact-focused and does not offer the opportunity to raise a legal claim. Consequently, this Court has jurisdiction to hear El's First Amendment claim.

El's speech is protected by the First Amendment because the amendment does not limit speech protection to just "the people." Even if it did,

El is still a member of "the people" for speech and assembly protection because his longtime residency in the United States and his community ties render him a part of the national community. Accordingly, his expression is protected by the First Amendment.

The First Amendment invalidates the Alien Sedition Act because it restricts El's political speech. The government did not—and cannot—articulate a compelling interest to restrict the political speech of undocumented immigrants. Further, the Act is not narrowly tailored to the government's proffered interests because it is both overbroad and underinclusive. Because the Act fails under the exacting lens of strict scrutiny analysis, it is unconstitutional.

It is for these reasons that the Court should affirm the Court of Appeals for the Fourteenth Circuit as to the jurisdiction question and reverse the court as to the First Amendment question.

Respectfully Submitted,

/s/

Attorneys for Petitioner

CERTIFICATE OF SERVICE

We certify that a copy of Petitioners' brief was served upon Respondent, Joseph Luthor, in his official capacity as the Attorney General, through the counsel of record by certified U.S. mail return receipt requested, on this, the 24th day of October, 2019.

/s/_____

Attorneys for Petitioners

APPENDIX A

Constitutional Provisions

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

APPENDIX B

United States Code Provisions

8 U.S.C. § 1228(b). Expedited removal of aliens convicted of committing aggravated felonies.

(b) Removal of aliens who are not permanent residents

(1) The Attorney General may, in the case of an alien described in paragraph (2), determine the deportability of such alien under section 1227(a)(2)(A)(iii) of this title (relating to conviction of an aggravated felony) and issue an order of removal pursuant to the procedures set forth in this subsection or section 1229a of this title.

(2) An alien is described in this paragraph if the alien— (A) was not lawfully admitted for permanent residence at the time at which proceedings under this section commenced; or (B) had permanent resident status on a conditional basis (as described in section 1186a of this title) at the time that proceedings under this section commenced.

(3) The Attorney General may not execute any order described in paragraph (1) until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review under section 1252 of this title.

(4) Proceedings before the Attorney General under this subsection shall be in accordance with such regulations as the Attorney General shall prescribe. The Attorney General shall provide that— (A)the alien is given reasonable notice of the charges and of the opportunity described in subparagraph (C); (B)the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as the alien shall choose; (C)the alien has a reasonable opportunity to inspect the evidence and rebut the charges; (D)a determination is made for the record that the individual upon whom the notice for the proceeding under this section is served (either in person or by mail) is, in fact, the alien named in such notice; (E)a record is maintained for judicial review; and (F)the final order of removal is not adjudicated by the same person who issues the charges.

(5) No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.

8 U.S.C. § 1252(d). Judicial review of orders of removal.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

18 U.S.C. § 2900. Alien Sedition Act.

It shall be the crime of Alien Sedition, a Class E Felony punishable by up to two years imprisonment, for any person who is present within the boundaries of the United States without legal authorization, to organize or participate in any public demonstration within the boundaries of the United States, which is intended:

1. To advocate for a change to any law of the United States, or

2. To advocate for or against the election of any person to be an officer or representative of the United States government.

Violation of this law shall be considered an Aggravated Felony, as such term is defined under 8 U.S.C. § 1101(a)(43).

APPENDIX C

Code of Federal Regulations Provisions

8 C.F.R. § 238.1(b).

(b) Preliminary consideration and Notice of Intent to Issue a Final Administrative Deportation Order; commencement of proceedings.

(1) Basis of Service charge. An issuing Service officer shall cause to be served upon an alien a Form I-851, Notice of Intent to Issue a Final Administrative Deportation Order (Notice of Intent), if the officer is satisfied that there is sufficient evidence, based upon questioning of the alien by an immigration officer and upon any other evidence obtained, to support a finding that the individual:

(i) Is an alien;

(ii) Has not been lawfully admitted for permanent residence, or has conditional permanent resident status under section 216 of the Act;

(iii) Has been convicted (as defined in section 101(a)(48) of the Act and as demonstrated by any of the documents or records listed in § 1003.41 of this chapter) of an aggravated felony and such conviction has become final; and

(iv) Is deportable under section 237(a)(2)(A)(iii) of the Act, including an alien who has neither been admitted nor paroled, but who is conclusively presumed deportable under section 237(a)(2)(A)(iii) by operation of section 238(c) of the Act ("Presumption of Deportability").

(2) Notice.

(i) Removal proceedings under section 238(b) of the Act shall commence upon personal service of the Notice of Intent upon the alien, as prescribed by 8 CFR 103.8. The Notice of Intent shall set forth the preliminary determinations and inform the alien of the Service's intent to issue a Form I-851A, Final Administrative Removal Order, without a hearing before an immigration judge. The Notice of Intent shall constitute the charging document. The Notice of Intent shall include allegations of fact and conclusions of law. It shall advise that the alien: has the privilege of being represented, at no expense to

the government, by counsel of the alien's choosing, as long as counsel is authorized to practice in removal proceedings; may request withholding of removal to a particular country if he or she fears persecution or torture in that country; may inspect the evidence supporting the Notice of Intent; may rebut the charges within 10 calendar days after service of such Notice (or 13 calendar days if service of the Notice was by mail).

(ii) The Notice of Intent also shall advise the alien that he or she may designate in writing, within the rebuttal period, the country to which he or she chooses to be deported in accordance with section 241 of the Act, in the event that a Final Administrative Removal Order is issued, and that the Service will honor such designation only to the extent permitted under the terms, limitations, and conditions of section 241 of the Act.

(iii) The Service must determine that the person served with the Notice of Intent is the person named on the notice.

(iv) The Service shall provide the alien with a list of available free legal services programs qualified under 8 CFR part 3 and organizations recognized pursuant to 8 CFR part 292, located within the district or sector where the Notice of Intent is issued.

(v) The Service must either provide the alien with a written translation of the Notice of Intent or explain the contents of the Notice of Intent to the alien in the alien's native language or in a language that the alien understands.

8 C.F.R. § 238.1(d)(2)(i).

(d) Determination by deciding Service officer –

* * *

(2) Response submitted –

(i) Insufficient rebuttal; no genuine issue of material fact. If the alien timely submits a rebuttal to the allegations, but the deciding Service officer finds that deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding, the deciding Service officer shall issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the decision of deportability.

8 C.F.R. § 238.1(d)(2)(ii)(A).

(d) Determination by deciding Service officer –

* * *

(2) Response submitted –

* * *

(ii) Additional evidence required.

(A) If the deciding Service officer finds that the record of proceeding, including the alien's timely rebuttal, raises a genuine issue of material fact regarding the preliminary findings, the deciding Service officer may either obtain additional evidence from any source, including the alien, or cause to be issued a notice to appear to initiate removal proceedings under section 240 of the Act. The deciding Service officer may also obtain additional evidence from any source, including the alien, if the deciding Service officer deems that such additional evidence may aid the officer in the rendering of a decision.