03-2522/03-2529

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

YUEN SHING LEE,

Petitioner-Appellee-Cross-Appellant,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, and EDWARD MCELROY, NEW YORK DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AND THE IMMIGRANT DEFENSE PROJECT OF THE NEW YORK STATE DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER-APPELLEE-CROSS-APPELLANT

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INTEREST OF *AMICI CURIAE*

The Brennan Center for Justice at New York University School of Law ("the Brennan Center") is a partnership between the family and friends of Justice William J. Brennan, Jr., many of his law clerks, and the New York University School of Law, designed to honor Justice Brennan's contribution to American law. The mission of the Brennan Center is to advance an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. The Brennan Center served as counsel in *Legal Services Corp.* v. *Velazquez,* 531 U.S. 533 (2001), a case in which the Supreme Court overturned a federal law that had barred legal challenges by low income litigants represented by federally funded legal services lawyers. The Brennan Center also served as *amicus* in *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999), in which resident aliens sought unsuccessfully to establish federal court jurisdiction to promptly review claims of First Amendment violations.

The Brennan Center submits this brief because of the threat that the government's position poses both to the important historic role of the judiciary in safeguarding individual rights and to the specific individual, Yuen Shing Lee, whose future is at stake here. The government argues that federal judicial review is precluded by Mr. Lee's failure to advance a claim in administrative proceedings

at a time when the government had effectively isolated him from his attorney and left him to proceed *pro se*. The Brennan Center urges this Court to preserve the federal judiciary's role in guaranteeing habeas review to persons for whom it provides the only fail-safe mechanism against the grave consequences of deportation.

The New York State Defenders Association ("the NYSDA") is a non-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and others throughout the State of New York. Its objectives are to improve the quality of public defense services in the state, establish standards for practice in the representation of poor people, and engage in a statewide program of community legal education. Among other initiatives, the NYSDA operates the Immigrant Defense Project, which provides immigrants and their lawyers with legal research and consultation, publications, and training on issues involving the intersection between criminal and immigration law.

The Immigrant Defense Project of the NYSDA submits this brief to urge this Court to affirm the district court's exercise of habeas corpus jurisdiction over Mr. Lee's legitimate claim that he is a national of the United States based on the evidence of his permanent allegiance to this country. The NYSDA's Immigrant Defense Project is aware of numerous cases of individuals with legitimate claims to United States citizenship or national status who, due to their detention far from

home and/or lack of resources to hire an attorney, have not been able to give precise legal form to those claims during their agency removal proceedings. In addition, through its experience in educating detainees and lawyers about various issues, the NYSDA has discovered that many are unaware of the technical bases for the assertion of citizenship and nationality claims. Accordingly, the NYSDA requests that this Court find that such individuals, including Mr. Lee, may not be denied access to federal habeas review, as they may in fact be citizens or nationals of the United States and thus not subject to detention or removal.

Amici submit this brief with the parties' consent.

INTRODUCTION

The U.S. government seeks to deport petitioner Yuen Shing Lee based on a conviction for mail fraud. In response, Mr. Lee asserts a claim of derivative citizenship under the Child Citizenship Act of 2000 ("CCA").[1] He also contends that he is not an alien but rather a "national of the United States," 8 U.S.C. §§ 1101(a)(3), 1101(a)(22), and thus not subject to removal from this country under the Immigration and Nationality Act ("INA"). *See id.* § 1227. Specifically, Mr. Lee, a long-time resident of the United States whose wife, children, parents, and grandchild are all American citizens, can demonstrate that he meets the statutory definition of a U.S. national based on his continuous and lasting relationship with,

[1] Pub. L. No. 106-395, 114 Stat. 1631 (2000) (codified at 8 U.S.C. § 1431).

and proven allegiance to, the United States. If removed, Mr. Lee will be forced to abandon his country and the only life he has known since he came to the United States as a young boy over three decades ago.

The government does not merely disagree with Mr. Lee's challenge to his alien status, but further asserts that no federal court *may even hear it* because Mr. Lee has failed to exhaust his administrative remedies. The government further argues that Mr. Lee improperly sought review under the federal habeas statute, 28 U.S.C. § 2241, rather than by a petition for review under 8 U.S.C. § 1252(b)(5). The district court properly rejected the government's jurisdictional arguments and exercised habeas review over Mr. Lee's claim that he is not an alien, and *amici* respectfully request that this Court affirm the district court's decision.

FACTS

Mr. Lee has lived continuously in the United States since he arrived with his parents in 1973 at age 11. Both parents are naturalized citizens; his father became a U.S. citizen in 1978 and his mother in 1983. Mr. Lee attended school, married, and raised a family in the United States, and "[e]veryone Mr. Lee cares about and knows is an American citizen." Brief for Petitioner-Appellee-Cross-Appellant ("Lee Br.") at 6.

After serving a six-month sentence for his mail fraud conviction, the Immigration and Naturalization Service ("INS") placed Mr. Lee in deportation proceedings on the ground that he was an aggravated felon under the INA and detained him in Newark, New Jersey. Mr. Lee retained private counsel but, over his counsel's vehement objections, the INS then transferred him to a detention facility in Oakdale, Louisiana, causing him to lose access to his counsel.

From the outset of the agency's deportation proceedings, Mr. Lee raised with the INS his claim that he was not an alien, citing his parents' status as naturalized citizens and his own deep ties to the United States. Detained in Louisiana, far from his home in New York, and proceeding *pro se*, Mr. Lee advanced his claim to an Immigration Judge ("IJ") and to the Board of Immigration Appeals ("BIA"). He next filed a habeas corpus petition and moved for declaratory judgment in the Eastern District of New York. And, while these proceedings were ongoing, Mr. Lee also filed three separate petitions for appellate court review of the INS's decision that he was an alien.

Mr. Lee never obtained a ruling on the merits of his claims through his petitions for review. The INS succeeded in moving his case to the Fifth Circuit and then prevailed in its argument to that court that Mr. Lee was barred from obtaining any merits review of the INS's decision on his alienage. It was only

through his habeas petition that Mr. Lee finally obtained federal court review of the merits of his nationality claim.

Amici urge this Court to affirm the decision of the district court for the Eastern District of New York, which exercised its traditional power to issue a writ of habeas corpus, the only available means to give Mr. Lee a real opportunity to make his case and the only safeguard against the otherwise unfair and inevitable deportation of this American national.

SUMMARY OF ARGUMENT

The federal courts' basic authority to review a claim of citizenship or of nationality is essential. "Alienage" is a fundamental jurisdictional question that goes to the very heart of the government's power over an individual. Eliminating habeas review over the claim of "citizenship" would alter our basic understanding of an individual's relationship to his government.

Second, precluding judicial review of Mr. Lee's claim for failure to have exhausted administrative remedies under 8 U.S.C. § 1252(d) would raise serious constitutional questions. Due process has always required judicial review of challenges to alienage. The "plenary power" of the political branches to regulate admission and deportation presumes that the affected persons have no claim to be present in the United States as citizens or nationals, but rather are here as aliens.

The importance of not conditioning judicial review of citizenship or nationality claims on administrative exhaustion is underscored by the complexity of immigration law, the obstacles facing unrepresented individuals who seek to challenge their deportation (especially while detained), and the real risk that a person, like Mr. Lee, could be removed from his own country by the Executive without any federal court ever reviewing the merits of his claim. Moreover, ensuring that the federal courts remain open to hear claims of citizenship or nationality is fully consistent with the caselaw of this Circuit.

Third, it cannot be that despite an individual's contention that he is a citizen or an American national, access to the federal courts must inevitably be channeled exclusively to the courts of appeals under 8 U.S.C. § 1252(b)(5), thereby precluding habeas review under 28 U.S.C. § 2241. Congress has not made the necessary express statement that would be required to repeal the federal courts' historic habeas jurisdiction. Indeed, this case demonstrates precisely the threat that justifies continued access to the Great Writ, since it illuminates how a "channeling" provision can potentially deprive the federal courts of all jurisdiction over an individual's claim that he is not an alien but rather a citizen or national of the United States.

ARGUMENT

I. FUNDAMENTAL JURISDICTIONAL FACTS LIKE ALIENAGE HAVE TRADITIONALLY BEEN REVIEWED ON HABEAS CORPUS

Since it was enacted in 1789, the federal habeas statute has served the critical function of ensuring independent federal court review of the authority of government officials to exercise custody and control over an individual. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (currently codified at 28 U.S.C. § 2241(c)(1)); *see generally* William Church, *A Treatise on the Writ of Habeas Corpus* § 222, at 311 (2d ed. 1893) ("The question of jurisdiction . . . *is always open* and may be inquired into upon proceedings by habeas corpus.") (emphasis added). Where an individual is held by pursuant to executive rather than judicial command, the writ's protections have been at their strongest. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). The federal courts have always been open to hear the habeas petitions of those who assert the government has no power over them. *E.g.*, *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922) (challenge to deportation based on citizenship reviewable on habeas); *Ludecke v. Watkins*, 335 U.S. 160, 172 n.17 (1948) (challenge to "alien enemy" status reviewable on habeas); *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858, 860 (2d Cir. 1943) (same); *Givens v. Zerbst*, 255 U.S. 11, 19 (1921) (challenge to military's "special and limited" jurisdiction reviewable on habeas); *cf. Frank v. Mangum*, 237 U.S. 309, 331 (1915) (habeas

court "to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not").

Challenges like Mr. Lee's to the government's allegation of his alien status raise precisely the type of core jurisdictional fact traditionally within the purview of habeas review. In *Ng Fung Ho*, the Supreme Court considered the habeas petitions of four individuals, two of whom challenged their deportation orders on the ground that they were U.S. citizens. 259 U.S. at 281. The Court underscored the unique nature of a habeas challenge to alienage. Any such claim concerning an "essential jurisdictional fact," the Court stated, goes to the root of the Executive's very power to order that a person be deported. *Id.* at 284-85; *see also Tod v. Waldman*, 266 U.S. 113, 119 (1924), *as modified*, 267 U.S. 547 (1925). Similarly, the Court explained in *Crowell v. Benson*, 285 U.S. 22 (1932), "[j]urisdiction in the Executive to order deportation exists *only if* the person arrested is an alien," and a writ of habeas corpus issues "'to determine the [person's] status.'" *Id.* at 61 (quoting *Ng Fung Ho*, 259 U.S. at 284-85) (emphasis added).

More recent decisions adhere to this understanding of the federal courts' essential role in determining the jurisdictional fact of a person's alien status. In *Moussa v. INS*, 302 F.3d 823 (8th Cir. 2002), the Eighth Circuit held that the

administrative exhaustion requirement contained in 8 U.S.C. § 1252(d) does not apply to an individual challenging his status as an alien, the core jurisdictional fact on which the court's jurisdiction over all other subsidiary questions depends. *Id.* at 825-26. Similarly, other courts have held that they retain jurisdiction to review an individual's claim of U.S. citizenship or national status *even where* review would otherwise be barred based on the individual's prior criminal conviction. *E.g.*, *Hughes v. Ashcroft*, 255 F.3d 752, 755 (9th Cir. 2001); *see also Salim v. Ashcroft*, 350 F.3d 307, 308 (3d Cir. 2003) (jurisdiction to determine "jurisdictional fact[]" of alienage); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1064 (9th Cir. 2003); *Bowrin v. INS*, 194 F.3d 483, 486 (4th Cir. 1999). Indeed, the plain language of the INA provision on which the government relies presumes the individual facing removal is in fact an *alien*. 8 U.S.C. § 1252(d) ("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 . . . .").

In short, courts have consistently treated the issue of alienage uniquely in reviewing the government's enforcement of the nation's immigration laws. Alienage is the *sine qua non* upon which the entire removal apparatus of the INA depends, and if an individual is not an alien, the government simply lacks the power to deport him. For this reason, the federal courts should retain their traditional habeas jurisdiction to hear a challenge to this core jurisdictional fact.

Mr. Lee is not an alien, and habeas review in this case is essential to prevent a deportation that is ultimately beyond the government's authority to order or carry out.

II. BARRING JUDICIAL REVIEW OF MR. LEE'S NATIONALITY CLAIM FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS

In seeking to preclude judicial review of the merits of Mr. Lee's nationality claim, the government asserts that Mr. Lee failed to exhaust his administrative remedies. Brief of Respondent-Appellant-Cross-Appellee at 9-12. The government's argument, if accepted, would raise serious constitutional questions, and it should be rejected for the reasons described below.

A. Due Process Requires Judicial Review of Citizenship or Nationality Claims

In the immigration context, due process has been understood to require federal court review of an individual's claim that he cannot be removed from the United States on the ground that he is a citizen or a national, and thus not an alien subject to deportation. As the Court stated in *Ng Fung Ho*, "[t]o deport one who . . . claims to be a citizen obviously deprives him of liberty," and due process guarantees such persons "a judicial determination" of their citizenship claim. 259 U.S. at 284-85; *see also United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 152-53 (1923).

Even in exclusion proceedings, which have traditionally been subject to more limited judicial oversight than deportation,[2] judicial review has existed to ensure that the basic guarantee of due process has been met. *Kwock Jan Fat v. White*, 253 U.S. 454, 459 (1920) (granting relief to individual claiming citizenship because procedures cannot be "unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law"); *Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908); *Fong Tan Jew ex rel. Chin Hong Fun v. Tillinghast*, 24 F.2d 632, 636 (1st Cir. 1928) (ensuring immigration officials "exercise[d] their great power" in accordance with the "'traditions and principles of free government'" in addressing petitioner's citizenship claim) (quoting *Kwock Jan Fat*, 253 U.S. at 464); *United States v. Chin Len*, 187 F. 544, 550 (2d Cir. 1911) (ensuring that administrative determination of citizenship claim was "full, fair, and unbiased"). Indeed, even in construing the notoriously racist and xenophobic Chinese exclusion laws that sought to stem further immigration from Asia,[3] the Supreme Court still acknowledged the importance of judicial review

[2] In 1996, Congress combined deportation and exclusion proceedings into a single type of proceeding known as removal proceedings. *Evangelista v. Ashcroft*, 359 F.3d 145, 147 n.1 (2d Cir. 2004). Courts continue to use the former terminology of deportation. *E.g.*, *id.*

[3] *E.g.*, T. Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 152 (4th ed. 1998) (describing "blatantly racist [laws], prohibiting immigration and naturalization of aliens from China and Japan"); *see also* Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny," 100 *Harv. L. Rev.* 853, 859 (1987).

over claims of citizenship, stating "[i]t is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country." *Kwock Jan Fat,* 253 U.S. at 464; *see also Gee Fook Sing v. United States*, 49 F. 146, 148 (9th Cir. 1892) (individual claiming U.S. citizenship "entitled to have a hearing and a judicial determination").

In short, "the very existence of a jurisdiction in habeas corpus; coupled with the constitutional guarantee of due process, implied a regime of law." Henry M. Hart, Jr., "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 *Harv. L. Rev.* 1362, 1390 (1953). Notwithstanding Congress's broad power to define the substantive criteria governing an alien's admission to or deportation from the United States, the guarantee of due process has long ensured that federal courts remain open to hear the claims of an individual, like Mr. Lee, who seeks to challenge his removal from the United States based on the fact that he is not an alien.[4]

[4] Due process also prevents individuals from being stripped of their citizenship without a judicial proceeding. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 166 (1963). And the loss of citizenship can be considered so severe a punishment as to violate the Eighth Amendment. *Trop v. Dulles,* 356 U.S. 87, 97 (1958) (plurality opinion) (loss of citizenship for war-time desertion).

B. Mr. Lee's Case Underscores the Dangers of Requiring Exhaustion of Citizenship or Nationality Claims

It is vital that the federal courts remain open to review habeas challenges to removal orders based on an individual's claim that he is not an alien. As Mr. Lee's case makes clear, enforcement of inflexible exhaustion rules can otherwise lead to the incorrect and unfair deportation of a person who is a United States citizen or national.[5]

Immigration law is indisputably complex. *E.g.*, *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity.") (internal quotation marks and citation omitted). It consists of "a maze of hyper-technical statues and regulations that engender waste, delay, and confusion for the Government and petitioners alike." *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003). Language barriers, fear or intimidation, and a lack of knowledge about the legal process can prevent individuals from asserting, let alone prevailing on, their challenges to deportation. *E.g.*, Margaret H. Taylor, "Promoting Legal Representation for Detained Aliens: Litigation and

[5] An administrative exhaustion requirement would also raise troubling concerns if applied to other types of challenges to deportability, such as one in which an alien claimed that his particular criminal conviction did not subject him to deportation under the INA. *Cf. Lewis v. INS*, 194 F.3d 539, 540 (4th Cir. 1999) ("disquieting possibility" of absence of some judicial forum to review government's charge of deportability).

Administrative Reform," 29 *Conn. L. Rev.* 1647, 1650 (1997). As a result, individuals attempting to challenge their alien status, for example through a claim of national status or derivative citizenship under the CCA, may fail to recognize right away that they are not aliens and thus not subject to deportation at all. Indeed, the recent liberalization of the derivative citizenship requirement under the CCA makes this even more likely, as an individual under age 18 now needs only one parent (and not two as before) who is an American citizen by birth or naturalization in order to gain derivative citizenship, assuming other requirements are met. 8 U.S.C. § 1431(a).

Although deportation carries severe consequences, potentially resulting "in the loss of all that makes life worth living," *Bridges v. Wixon*, 326 U.S. 135, 147 (1947) (internal quotation marks omitted),[6] individuals facing deportation do not have a recognized right to court-appointed counsel, and frequently appear *pro se*. The problem is exacerbated when an individual is detained by the INS during the pendency of removal proceedings, as typically occurs when the INS seeks to deport an individual based on a past criminal conviction. *See generally* 8 U.S.C. § 1226(c) (providing for mandatory detention). Immigration detainees are held at over 400 facilities nationwide, and only approximately 10% of those in detention

[6] *See also Woodby v. INS*, 385 U.S. 276, 286 (1966) ("This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.").

are able to secure legal representation to advance their claims.[7] Routinely held far from family and friends and without access to legal counsel, immigration detainees have a difficult time advancing their claims in administrative proceedings. *E.g.*, Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (1998) ("[A]ccess to counsel is usually seriously compromised when immigrants are detained by the INS, especially in local jails. Incarceration far from friends and family who can locate and pay for lawyers, frequent transfers from facility to facility, restrictive visitation policies and limited telephone access create significant obstacles to adequate representation.").[8]

Notwithstanding the substantial difficulties that individuals face in contesting deportation, the government seeks a rule here that would bar Mr. Lee from obtaining federal habeas review of his nationality claim even though he had plainly raised the issue of alienage before the agency. Similarly, in *Moussa*, *supra*, the government argued that the petitioner had not exhausted his administrative remedies because he did not articulate before the BIA "the precise argument"

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[7] *See, e.g.*, Christopher Nugent, "The INS Detention Standards: Facilitating Legal Representation and Humane Conditions of Confinement for Immigration Detainees," *Immigration Current Awareness Newsletter* (Nat'l Immig. Project of the Nat'l Lawyers Guild 2003), .

[8] *See also* Taylor, *supra*, at 1651 (obstacles to securing representation "particularly acute" for those in immigration detention); Magha Bahree & Cassi Feldman, "Southern Discomfort: Local Deportees Sent out of State," No. 411 *City Limits* (Dec. 8, 2003) (difficulties facing immigration attorneys who represent out of state detainees).

presented in his federal appeal in support of his claim of derivative citizenship under former 8 U.S.C. § 1432(a)(1). *See Moussa*, 302 F.3d at 825. Specifically, the government maintained that Moussa had not previously relied on the INA's definition of "spouse" as the basis for concluding his parents were legally separated while he was under age 18 years of age and thus eligible for derivative citizenship based upon his father's naturalization. *Id.* The federal court rejected the government's argument, holding that it had habeas jurisdiction to review its own jurisdiction. The court also held that, in any event, Moussa had exhausted his administrative remedies in advancing his derivative citizenship claim. *Id.* at 825-26.

Mr. Lee's case highlights how the inflexible application of an administrative exhaustion requirement could unfairly deprive an individual of access to the federal courts and cause the deportation of an American citizen or national. From the beginning, the gravamen of Mr. Lee's challenge to his deportation has been that he was not an alien, but rather a U.S. national not subject to deportation by the government. Indeed, it is not surprising Mr. Lee possesses the same sense of membership and belonging that most citizens possess given his long-time residence in the United States and enduring allegiance and deep ties to this country. By transferring him to a detention facility across the country and separating him from his legal counsel, the INS effectively forced Mr. Lee to

proceed *pro se* and thus undercut his ability to advance his claims. *See Lee v. Ashcroft*, 216 F. Supp. 2d 51, 56 n.1 (E.D.N.Y. 2002) (explaining consequences of INS's action in moving Lee to Louisiana).

From the little advice he obtained from his own research at the detention facility's law library and from other detainees, Mr. Lee was able to contest his alien status administratively and in federal court. Lee Br. at 8. However, as an immigration detainee, without counsel, he could not articulate the contours of his U.S. national claim as precisely as he might otherwise have done or as the government would demand. Mr. Lee, moreover, was afforded no help from the immigration judge, despite the judge's duty to develop the record, *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002); *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000), a failure that is sufficient to excuse an individual from the technical application of exhaustion requirements (even where the issue does not concern the jurisdictional fact of alienage). *Asani v. INS*, 154 F.3d 719, 727-29 (7th Cir. 1998); *see also Moran-Enriquez v. INS*, 884 F.2d 420, 422 (9th Cir. 1989).

Dismissal of Mr. Lee's claim for failure to exhaust administrative remedies would effectively preclude any review on the merits of his challenge to the jurisdictional fact of alienage.[9] Habeas corpus must thus be preserved to provide

[9] Were this Court to find instead that Mr. Lee had administratively exhausted his claim that he is a U.S. national, it would not need to reach the question of whether

the critical fail-safe of federal judicial review over citizenship and nationality claims, as courts have long understood due process to require.

C. Ensuring the Existence of a Federal Forum for Mr. Lee's Nationality Claim is Consistent with this Circuit's Precedents

Nothing in this Circuit's precedents requires habeas courts to turn a blind eye to claims of nationality and citizenship that were not fully articulated before the agency. While this Circuit has applied exhaustion requirements under § 1252(d) to bar review of some claims, nothing in its caselaw supports the application of such a bar to the basic jurisdictional fact of alienage.

The court's decision *Theodoropoulos v. INS*, 358 F.3d 162 (2d Cir. 2004) provides no support for the government's position. There, the court considered whether the petitioner could obtain habeas review of the denial of discretionary relief under former INA § 212(c) when he had never even appealed the IJ's

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applying the exhaustion requirement to him violates due process. Indeed, a conclusion that Mr. Lee had in fact exhausted this claim is supported by the record, and, moreover, is consistent with the liberal rules guiding review of claims of *pro se* litigants. (Mr. Lee was *pro se* during a substantial portion of the INS deportation proceedings). *E.g.*, *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (liberal construction of *pro se* filings in immigration proceedings); *Jacinto*, 208 F.3d at 733 (deportation hearings "'should be understandable to the layman . . . and not strict in tone and operation'") (quoting *Richardson v. Perales*, 402 U.S. 389, 402 (1971)); *see also Merritt v. Faulkner*, 697 F.2d 761, 769 (7th Cir. 1983) (Posner, J., concurring in part and dissenting in part) ("A prisoner not represented by counsel . . . is entitled to every indulgence in the court's procedural rulings. . . . It is unfair to deny a litigant a lawyer and then trip him up on technicalities.").

decision denying him that relief. Only after finding that Theodoropolous had plainly waived his right to appeal this decision to the BIA in open court, and thus completely bypassed an entire step in the administrative process, *id.* at 166, did the court conclude that his claim was subject to exhaustion under § 1252(d). *Id.* at 171-72. Moreover, the court understood Theodoropolous not to be challenging any essential jurisdictional fact, but rather to be conceding deportability and seeking a discretionary waiver of deportation. *Id.* at 165.

Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003), also fails to support the government's sweeping application of § 1252(d). In *Beharry*, the court concluded that the petitioner had failed to exhaust administrative remedies, *id.* at 62,[10] but under dramatically different circumstances than those presented here. First, Beharry was represented by counsel and had explicitly conceded deportability before the IJ. *Id.* at 54. Also, like Theodoropolous, Beharry claimed that he was eligible for discretionary relief from deportation (in Beharry's case, a waiver of inadmissibility under former INA § 212(h)), *id.* at 55, and thus never contested any jurisdictional fact, let alone the core jurisdictional fact of alienage. Moreover, this Court should read *Beharry* in light of its more recent decision in *Restrepo v.*

[10] The *Beharry* court did not ultimately reach the question of whether the exhaustion requirement under former INA § 106(c) -- the statute at issue in that case -- applied to Beharry because it concluded that, even if it did not, he could not be excused from his failure to satisfy the requirements of judicial exhaustion. 329 F.3d at 62-63

McElroy, -- F.3d --, No. 99-2703, 2004 WL 652802 (2d Cir. Apr. 1, 2004), in which it held that a *pro se* petitioner had adequately preserved his claim for judicial review by "rais[ing] *the general issue*" of a statute's retroactivity before the agency. *Id.* at *3 n.10 (emphasis added); *cf. Jacinto*, 208 F.3d at 730 (*pro se* litigants in removal proceedings "may not possess the legal knowledge" to develop fully their legal claims). Thus, neither *Theodoropoulos* nor *Beharry* supports the application of § 1252(d) to bar judicial review of Mr. Lee's alienage claim in this case. *Cf. Nehme v. INS*, 252 F.3d 415, 421 (5th Cir. 2001) (notwithstanding § 1252(d)(1), *de novo* review of "whether [petitioner] is an alien").

III. SECTION 1252(b)(5) DOES NOT PRECLUDE HABEAS REVIEW OF MR. LEE'S NATIONALITY CLAIM

The government also urges this Court to deny federal review of Mr. Lee's nationality claim because he raised that claim in his habeas petition, rather than in a petition for review under 8 U.S.C. § 1252(b)(5), which the government insists is the only way in which such a claim may be raised in federal court. The government argues that while § 1252(b)(5) does not strip the federal courts of jurisdiction, it channels that jurisdiction exclusively to another forum (*i.e.*, directly to the courts of appeals on a petition for review). As the district court correctly determined, this argument is inconsistent with *St. Cyr* and the law of this Circuit, which together provide for the continued availability of habeas corpus even if

another forum is available, absent an express statement by Congress eliminating habeas review. *Lee v. Ashcroft*, No. 01-CV-0997, 2003 WL 21310247, at *5 (E.D.N.Y. May 27, 2003). Also, Mr. Lee's case underscores how what might at first blush seem an innocuous "channeling" provision can, in light of actions taken by the government, function as a *de facto* repeal of federal habeas jurisdiction.

St. Cyr requires that "a statute must, at a minimum, explicitly mention either 'habeas corpus' or '28 U.S.C. § 2241' in order to limit or restrict § 2241 jurisdiction." *Wang v. Ashcroft*, 320 F.3d 130, 141 (2d Cir. 2003). As the court concluded in *Liu v. INS*, 293 F.3d 36 (2d Cir. 2002), habeas jurisdiction continues to exist in its traditional form, regardless of any channeling provision of the INA. *Id.* at 40-41; *see also Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001). Thus, the mere fact that there is another forum to review the petitioner's claim does not divest the federal courts of their § 2241 habeas jurisdiction absent a clear statement by Congress to that effect.

St. Cyr's express statement rule applies with particular force here, given the long tradition of habeas review of claims contesting essential jurisdictional facts like citizenship and nationality. *St. Cyr* itself considered whether Congress had repealed § 2241 habeas jurisdiction to consider the retroactive elimination of discretionary relief under former INA § 212(c); *see also Liu*, *supra* (denial of asylum); *Chmakov*, *supra* (same). Thus, any departure from *St. Cyr*'s express

statement rule would be particularly inappropriate where the petitioner contests the jurisdictional fact of alienage, the type of claim subject to habeas review since the earliest days of federal immigration law.

The most troubling part of the government's channeling argument is that its practical effect may be to foreclose the opportunity to litigate in any federal forum rather than channeling such litigation to a federal forum other than habeas. Here, the government made its channeling argument to send Mr. Lee's case to the Fifth Circuit and then contended that the Fifth Circuit lacked subject matter jurisdiction over Mr. Lee's challenge to his alien status. Thus, Mr. Lee would never have had his nationality claim reviewed on the merits had it not been for the district court's exercise of its habeas jurisdiction.

In sum, for an immigration detainee confined far away from family and other sources of support, facing the grave consequences of deportation, and forced to navigate the labyrinthine system of U.S. immigration law without legal representation, it is crucial to preserve not merely the promise but the reality of federal review. For persons like Mr. Lee, who challenge the very essence of their government's power to deport them, the meaningful access to the courts provided by habeas corpus remains vital. *Cf. Bounds v. Smith*, 430 U.S. 817, 822 (1977) (need to ensure inmate's access to courts is "adequate, effective, and meaningful"). Mr. Lee's case thus underscores why habeas corpus remains "the precious

safeguard of personal liberty" and why "there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). Indeed, by providing judicial review of the Executive's attempt to remove an individual who claims he is a U.S. national, and not an alien subject to deportation, habeas has served the same basic function for Mr. Lee as it has for countless others before him, thus demonstrating why it has rightly been called "'the great and efficacious writ, in all manner of illegal confinement'" that "cuts through all forms" to the very heart of the matter. *Harris v. Nelson*, 394 U.S. 286, 291 & n.2 (1969) (quoting 3 William Blackstone, *Commentaries* *131).

CONCLUSION

For the foregoing reasons, the district court's determination that it had habeas corpus jurisdiction over the petitioner's claims should be affirmed.

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Respectfully submitted,

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I hereby certify that this brief complies with the type-volume limitations under Fed. R. App. P. 32(a)(7)(C) and contains 6,910 words, exclusive of this certificate.

Dated: May 19, 2004

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CERTIFICATE OF SERVICE

I, Jonathan L. Hafetz, Esq., hereby certify that I sent on the 19th day of May, 2004, two copies of the foregoing Brief of *Amici Curiae* The Brennan Center for Justice and The Immigrant Defense Project of the New York State Defenders Association In Support of Petitioner-Appellee-Cross-Appellant by first-class mail, postage pre-paid, to:

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