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U.S. CITIZENS DETAINED AND DEPORTED? A TEST OF THE GREAT WRIT'S REACH IN PROTECTING DUE PROCESS RIGHTS IN REMOVAL PROCEEDINGS

Abstract: Every year, the U.S. government unlawfully detains a significant number of U.S. citizens and places them in immigration removal proceedings. Before the United States Court of Appeals for the Tenth Circuit's 2018 decision in *Gonzalez-Alarcon v. Macias*, four circuits had held that an individual in removal proceedings with a valid claim to U.S. citizenship need not exhaust administrative remedies before the claim could be subject to judicial review. With its decision in *Gonzalez-Alarcon*, the Tenth Circuit joined the majority of circuits that have ruled on this issue and asserted the right of such an individual to bring a habeas corpus petition in federal court to resolve the citizenship question prior to exhausting administrative remedies. This Comment analyzes the situation that the plaintiff in *Gonzalez-Alarcon* presented when he discovered that he had a valid claim to U.S. citizenship after having been removed several times. Further, this Comment explores the ways in which the Tenth Circuit's decision solidifies the importance of the writ of habeas corpus in challenging executive detention and affirms the power of judicial intervention to protect individual rights in an immigration system governed by plenary power.

INTRODUCTION

Images of overcrowded immigration detention centers and debates about borders and belonging flood today's media.¹ Beneath those evocative headlines, however, lurks a quieter procedural beast.² Removal proceedings are

¹ See, e.g., David A. Graham, *Are Children Being Kept in 'Cages' at the Border?*, THE ATLANTIC (Jun. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/06/ceci-nest-pas-une-cage/563072/> [<https://perma.cc/Y7SX-NBA5>] (reporting that hundreds of immigrant children along the southern border are being detained in metal chain-link pens as they await processing); Molly Hennesy-Fiske & Cindy Carcamo, *Overcrowded, Unsanitary Conditions Seen at Immigrant Detention Centers*, L.A. TIMES (Jun. 18, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-texas-immigrant-children-20140618-story.html> [<https://perma.cc/M59M-AAYL>] (arguing dirty facilities and overcrowded cells reflect a lack of preparation for an influx of immigrants at the border); Kevin Sieff, *U.S. Is Denying Passports to Americans Along the Border, Throwing Their Citizenship into Question*, WASH. POST (Sept. 13, 2018), https://www.washingtonpost.com/world/the_americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html [<https://perma.cc/DMK7-937G>] (detailing one account, among many, of the State Department's denial of a passport to a Hispanic individual with an official U.S. birth certificate).

² See Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV.

considered civil, and thus do not afford immigrant detainees the same procedural protections available to the criminally accused.³ As a consequence, each year immigration authorities wrongfully detain a sizable number of U.S. citizens, many of whom are foreign-born.⁴ Abraham Gonzalez-Alarcon fit the precise profile of those most vulnerable to such unlawful detention.⁵ Born in Mexico, just south of the U.S. border, Gonzalez-Alarcon discovered that he had a viable claim to derivative U.S. citizenship only after having been detained and removed from the United States several times.⁶ When he finally asserted this claim, however, he initially faced rejection on procedural grounds, namely, failure to exhaust available administrative remedies.⁷ Then, Gonzalez-Alarcon faced an uncertain and unusual appeal.⁸

289, 293 (2008) (explaining that because the Supreme Court has classified removal proceedings as civil, the full range of procedural rights guaranteed to those in criminal proceedings do not extend to noncitizens facing deportation).

³ *Id.*; see *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (asserting that deportation is not criminal punishment and thus does not implicate a deprivation of liberty).

⁴ See AARTI KOHLI ET AL., THE CHIEF JUSTICE EARL WARREN INST. OF LAW & SOC. POLICY, UNIV. OF CAL., BERKELEY SCH. OF LAW, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 4 (2011) (reporting that approximately 3,600, or 1.6%, of Immigration and Customs Enforcement (ICE) detainees from 2008 to 2011 were U.S. citizens). Although the precise number of U.S. citizens detained by immigration authorities is unknown, some studies estimate an even higher percentage. See Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 629, 632 & n.75 (2011) (estimating that between 1% and 8% of ICE detainees in specific states studied were U.S. citizens). Given that an estimated 390,000 individuals are detained each year, this could reasonably place the number of U.S. citizens detained annually by ICE between 3,900 and 31,200. See Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 312 (2014) (explaining that in 2010, the annual detainee population had grown to 390,000, an increase from 95,000 just nine years earlier). Recently, the number of people detained by ICE each year has exceeded 400,000. T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 242 (8th ed. 2016).

⁵ See *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1269 (10th Cir. 2018) (explaining that Gonzalez-Alarcon is foreign-born and claimed U.S. citizenship based on his mother's birth in the United States); Jacqueline Stevens, *The Alien Who Is a Citizen*, in *CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS* 217, 227 (Benjamin N. Lawrence & Jacqueline Stevens eds., 2017) (explaining that citizens who wrongfully land in deportation proceedings are typically U.S. citizens either as a result of their birth in the United States or because they have gained citizenship automatically by descent, rather than by a formal naturalization process); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 767-69 (2000) (revealing that Latinos, as compared with other racial groups, are statistically disproportionate targets of deportation in the United States).

⁶ *Gonzalez-Alarcon*, 884 F.3d at 1269. The foreign-born child of a U.S. citizen can claim derivative citizenship by birthright if one or both of the citizen-parents fulfill particular statutory requirements. 8 U.S.C. §§ 1401-1409 (2018); see Hong, *supra* note 4, at 282 n.3 (discussing statutory requirements such as residency in the United States, legitimacy of the child, and date of the parents' naturalization).

⁷ *Gonzalez Alarcon v. Marcias*, No. 15-CV-00910 MV/LF, 2016 WL 9777258, at *1 (D.N.M. Sept. 29, 2016), *vacated*, 884 F.3d 1266 (10th Cir. 2018).

⁸ *Gonzalez-Alarcon*, 884 F.3d at 1275-76.

Part I of this Comment discusses the current U.S. immigration appeals process and explains how federal courts have interpreted the REAL ID Act's statutory administrative exhaustion requirement in the context of U.S. citizenship claims.⁹ Part I also provides the facts of Gonzalez-Alarcon's case and outlines the ruling of the United States Court of Appeals for the Tenth Circuit in *Gonzalez-Alarcon v. Macias*.¹⁰ Part II delves deeper into the reasoning behind the Tenth Circuit's holding that the REAL ID Act's exhaustion requirement does not apply to individuals claiming U.S. citizenship in the context of a removal proceeding.¹¹ Further, Part II explores the logic isolating the United States Court of Appeals for the Fourth Circuit as the sole contrarian in a five-to-one circuit split over the need to exhaust administrative remedies.¹² Finally, Part III argues that the *Gonzalez-Alarcon* holding lessens the likelihood of prolonged unlawful detention of U.S. citizens by providing more efficient access to judicial intervention.¹³

I. U.S. CITIZENSHIP CLAIMS AND ADMINISTRATIVE EXHAUSTION AS REQUIRED BY FEDERAL COURTS

The administrative law doctrine requiring parties to exhaust administrative remedies prior to judicial review promotes both judicial efficiency and agency autonomy.¹⁴ For individuals in the U.S. immigration system—many of whom are detained pending exhaustion—this process can be lengthy and complex.¹⁵ Section A of this Part introduces the U.S. immigration appeals

⁹ See *infra* notes 14–57 and accompanying text. The REAL ID Act, enacted by Congress in 2005, was part of a broad response to perceived national threats, including terrorism. Jay M. Zitter, Annotation, *Validity, Construction, and Application of REAL ID Act of 2005*, *Pub. L. No. 109-13, 119 Stat. 231*, 11 A.L.R. Fed. 2d Art. 1 (2018). The provisions relevant to this Comment, codified at 8 U.S.C. § 1252, aimed to increase border security and tighten procedures for removal of noncitizens. See *id.* (explaining that the REAL ID Act was part of the much larger Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief). For example, § 1252(d)(1) requires a noncitizen facing removal to exhaust administrative remedies before seeking judicial review in federal court. 8 U.S.C. § 1252(d)(1).

¹⁰ See *infra* notes 58–75 and accompanying text.

¹¹ See *infra* notes 76–97 and accompanying text.

¹² See *infra* notes 98–107 and accompanying text.

¹³ See *infra* notes 108–125 and accompanying text.

¹⁴ See *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (“Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.”). The exhaustion doctrine ensures that agencies, rather than courts, have authority over that which Congress has delegated to them, and that agencies can self-correct and develop informative records for potential judicial review. *Id.*

¹⁵ See, e.g., Camila Domonoske, *U.S. Citizen Who Was Held by ICE for 3 Years Denied Compensation by Appeals Court*, NPR (Aug. 1, 2017), <https://www.npr.org/sections/thetwo-way/2017/08/01/540903038/u-s-citizen-held-by-immigration-for-3-years-denied-compensation-by-appeals-court> [<https://perma.cc/6BBM-Q6T3>] (detailing the account of Davino Watson, a Jamaican-born U.S. citizen, who spent nearly three and a half years in detention while attempting to prove his

process and explains the jurisdictional impact of the 2005 REAL ID Act.¹⁶ Section A further examines how federal courts have interpreted the administrative exhaustion requirement as applied to individuals in removal proceedings claiming U.S. citizenship.¹⁷ Section B discusses Gonzalez-Alarcon's case and provides an overview of the Tenth Circuit's decision.¹⁸

A. The REAL ID Act's Impact on the Immigration Appeals Process and the Judiciary's Interpretation of the Administrative Exhaustion Requirement for U.S. Citizenship Claims

In the immigration context, Congress and the executive branch have “plenary power,” which enables them to regulate the influx of immigrants without substantial intervention from the judicial branch.¹⁹ Immigration courts and the Board of Immigration Appeals (“BIA”) fall under the executive branch, as part of the Department of Justice.²⁰ For a noncitizen faced with a removal order, initial removal proceedings occur before an administra-

citizenship). An attorney on Mr. Watson's case, Mary Meg McCarthy described the U.S. immigration system as “bureaucratic and very, very complicated to navigate . . . very Kafka-esque.” *Id.*

¹⁶ See *infra* notes 19–39 and accompanying text.

¹⁷ See *infra* notes 40–57 and accompanying text.

¹⁸ See *infra* notes 58–75 and accompanying text.

¹⁹ See Kevin R. Johnson, *Chae Chan Ping v. United States: 125 Years of Immigration's Plenary Power Doctrine*, 68 OKLA. L. REV. 57, 58 n.1 (2015) (explaining that the notion of plenary power as a means of protecting immigration decisions from judicial review was first introduced by the Supreme Court in 1889 in *Chae Chan Ping v. United States* with respect to Chinese exclusion laws). In *Chae Chan Ping*, the Court affirmed the validity of a congressional act prohibiting certain Chinese laborers from entering the United States, amid a growing tide of prejudice toward Chinese immigrants. See 130 U.S. 581, 595, 609, 611 (1889) (detailing the restrictions and prejudice, and noting specifically “[a]s [Chinese immigrants] grew in numbers each year the people of the coast saw . . . great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration”); see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”); *Fong Yue Ting*, 149 U.S. at 705, 707 (asserting authority of political branches to admit and exclude noncitizens and characterizing such authority as intrinsic to national sovereignty); LUCY E. SALYER, *LAW HARSH AS TIGERS* 52–53 (1995) (detailing the authority granted to Congress in *Fong Yue Ting* to remove noncitizens if “necessary or expedient for the public interest”).

²⁰ 8 C.F.R. § 1003.1 (2018). The Board of Immigration Appeals (“BIA”) consists of up to twenty-one attorneys appointed by the Attorney General and provides appellate review of immigration court decisions. *Id.* Located in Falls Church, Virginia, the BIA has nationwide jurisdiction to hear immigration cases, and its decisions are binding unless overturned by the Attorney General or a federal court. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE (Sept. 28, 2018), <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/TB9R-CMAA>]. Unlike federal appellate courts, the BIA rarely hears oral arguments; instead, its modus operandi is to conduct a paper review of appealed immigration cases. *Id.*

tive immigration court judge.²¹ An appeal of this decision can be filed with the BIA, which is the highest level of administrative review for immigration matters.²² A noncitizen seeking further review must file an appeal in federal court.²³

The Immigration and Nationality Act (“INA”), enacted by Congress in 1952 and amended several times since, is the cornerstone of U.S. immigration law and policy.²⁴ Before 1952, the only means through which a noncitizen could challenge the legality of a removal order was by filing a habeas corpus petition in federal district court.²⁵ Historically, the writ of habeas corpus, or the “Great Writ,” has been a powerful mechanism for challenging executive detention.²⁶ The consolidation of immigration law into the INA, along with subsequent amendments, however, disrupted the simplicity of the process for appealing removal orders.²⁷

Among the most significant amendments to the INA has been the REAL ID Act of 2005, which effected sweeping changes to immigration law in the wake of the September 11, 2001 attacks.²⁸ The REAL ID Act impacts section

²¹ 8 C.F.R. § 1240.1(a) (2018). U.S. immigration law defines the term “alien” as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2018). To avoid furthering the use of this dehumanizing designation, this Comment instead uses the term “noncitizen,” except where quoting relevant portions of U.S. immigration law.

²² 8 C.F.R. § 1003.1(b).

²³ 8 U.S.C. § 1252(a)(5). For an in-depth view of relevant immigration removal proceedings from initial apprehension of a noncitizen to removal from the United States, see John Gavin, Note, *Finally Freed or Infinitely Detained? The Need for a Clear Standard of Finality for Reinstated Orders of Removal*, 59 B.C. L. REV. 2437, 2445–51 (2018).

²⁴ See generally 8 U.S.C. §§ 1101–1537 (codifying the Immigration and Nationality Act (“INA”) in Title Eight of the U.S. Code); *Public Laws Amending the INA*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-1.html> (last updated May 2013) [<https://perma.cc/L6KK-MX28>] (detailing the various amendments enacted since the INA’s 1952 inception).

²⁵ *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 306 (2001).

²⁶ See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2032 (2007) (explaining that the “Great Writ” of habeas corpus has enabled courts to ensure that “neither the King, the President, nor any other executive official may impose detention except as authorized by law”).

²⁷ See *St. Cyr*, 533 U.S. at 296 n.26 (citing *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955)) (explaining that after 1952, declaratory judgment actions brought in federal district court could also bring about judicial review of deportation orders). In 1961, Congress introduced Section 106 to the INA, which consolidated review of removal orders in the appeals courts and took it away from the district courts. *Id.* (citing *Foti v. Immigration & Naturalization Serv.*, 375 U.S. 217 (1963)); Daniel Kanstroom, *The Long, Complex, and Futile Deportation Saga of Carlos Marcello*, in *IMMIGRATION STORIES* 113, 137 (David A. Martin & Peter H. Schuck eds., 2005) (explaining that Section 106 of the INA drastically altered procedures for judicial review to minimize delay and simplify proceedings).

²⁸ REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231. Responding to increased anti-immigrant sentiment after September 11, 2001, the REAL ID Act aimed to curb illegal immigration by introducing a national ID card system and increasing border security. Jamie Nelson, Note, *Locking Down Our Borders: How Anti-immigration Sentiment Led to Unconstitutional Legislation*

242 of the INA, which governs judicial review of removal orders.²⁹ One of the amendments eliminated the availability of habeas corpus relief in district court to challenge removal orders issued by the BIA.³⁰ The REAL ID Act ordained that the “sole and exclusive” method for judicial review of a removal order is through a petition for review filed with the appropriate federal circuit court of appeals.³¹

Further, the REAL ID Act mandated that an appeals court may only review a final removal order after the noncitizen has exhausted all available administrative remedies.³² Exhaustion is generally fulfilled when an issue is brought before the BIA, but may also require a noncitizen to file motions to reconsider or reopen, depending on the statutory provisions governing the issue.³³ With respect to claims of U.S. citizenship as grounds for rebuttal of a removal order, many circuits have waived the standard exhaustion requirement and concluded that non-frivolous claims to citizenship merit judicial review.³⁴

and the Erosion of Fundamental Principles of American Government, 18 J.L. & POL’Y 459, 459 (2009). In the same vein, the REAL ID Act sought to tighten immigration removal procedures by eliminating the availability of habeas corpus review of removal orders and greatly expanding appeals court jurisdiction. ALEINIKOFF ET AL., *supra* note 4, at 1045, 1055.

²⁹ 8 U.S.C. § 1252(a)(5). Section 242 of the INA is codified at 8 U.S.C. § 1252. 1 BENDER’S IMMIGRATION AND NATIONALITY ACT SERVICE § 242 (8 U.S.C. 1252) (2018).

³⁰ 8 U.S.C. § 1252(a)(5). The REAL ID Act was not the first congressional attempt to streamline judicial review. *See* Kanstroom, *supra* note 27, at 137–38 (explaining that in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) in an effort to eliminate judicial review of certain immigration decisions). In 2001, however, the Supreme Court concluded in *St. Cyr* that preventing judicial review in removal proceedings implicated Suspension Clause issues, and thus held that the 1996 amendments did not preclude habeas jurisdiction to consider questions of law. *St. Cyr*, 533 U.S. at 314; Kanstroom, *supra* note 27, at 137–38. The REAL ID Act’s jurisdiction-limiting provision was largely inspired by congressional dissatisfaction with the Court’s holding in *St. Cyr*. *See* Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 82 (D. Mass. 2005) (explaining that Congress’s introduction of Section 106 to the INA largely responded to discontent with *St. Cyr* and the belief that the Court’s holding could enable noncitizens with a criminal history to delay their removal for years); *see also* Iasu v. Smith, 511 F.3d 881, 886 (9th Cir. 2007) (“[T]he REAL ID Act responded to *St. Cyr* by eliminating all district court habeas jurisdiction over orders of removal.”).

³¹ 8 U.S.C. § 1252(a)(5); *see St. Cyr*, 533 U.S. at 311–12 (explaining that historically, in the immigration context, “judicial review” and “habeas corpus” have differed primarily in their scope of inquiry, with habeas corpus limited to due process concerns); *Omolo v. Gonzales*, 452 F.3d 404, 407 (5th Cir. 2006) (explaining that the REAL ID Act instructed district courts to transfer all pending habeas petitions challenging final orders of removal to the appropriate courts of appeals to be addressed as if presented for the first time in a petition for review).

³² 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 id.* § 1101(a)(3) (defining the term “alien” as “any person not a citizen or national of the United States”).

³³ 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 104.02 (2018).

³⁴ *Poole v. Mukasey*, 522 F.3d 259, 261, 264 (2d Cir. 2008); *Omolo*, 452 F.3d at 406–07; *Minasyan v. Gonzales*, 401 F.3d 1069, 1074–76 (9th Cir. 2005); *Moussa v. Immigration & Naturalization Serv.*, 302 F.3d 823, 824–25, 827 (8th Cir. 2002); *see infra* notes 42–51 and accompa-

In 1922, in *Ng Fung Ho v. White*, the Supreme Court held that the Fifth Amendment guarantees judicial evaluation of non-frivolous claims to U.S. citizenship because the deportation of an individual with a valid citizenship claim would yield an unconstitutional loss.³⁵ In the same vein, the Court asserted that the executive branch lacks the authority to deport U.S. citizens.³⁶ Under U.S. immigration law, however, the line between citizen and noncitizen is far from cut-and-dry, and not all claims to citizenship are equal.³⁷ For instance, in removal proceedings, for people claiming birth in the United States, the government assumes the burden of disproving U.S. citizenship; however, for foreign-born people claiming citizenship, the respondent bears the burden of proving U.S. citizenship.³⁸ A statutory directive that such claims must be administratively exhausted prior to judicial review could compound this already heavy burden on some respondents.³⁹

nying text (discussing cases in which the circuit courts ruled that the exhaustion requirement under 8 U.S.C. § 1252(d) does not apply to people with non-frivolous U.S. citizenship claims). To determine whether a claim to citizenship is frivolous, courts assess whether the claim is statutorily valid. *See, e.g., Minasyan*, 401 F.3d at 1074–76 (holding that the plaintiff’s claim was not frivolous because it clearly met the statutory requirements of a derivative citizenship claim under former 8 U.S.C. § 1432(a)); *Taniguchi v. Schultz*, 303 F.3d 950, 953–55 (9th Cir. 2002) (holding that the plaintiff’s citizenship claim was frivolous where she was a native citizen of the Philippines, had been convicted for impersonating a U.S. citizen, and based her claim solely on the fact that she had filed an N-600 Application for Certificate of Citizenship); *see also Rivera v. Ashcroft*, 394 F.3d 1129, 1138 (9th Cir. 2004) (distinguishing *Taniguchi* and explaining that in that case, the petitioner’s U.S. citizenship claim was “patently frivolous”).

³⁵ *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922). Indeed, Justice Brandeis did not overstate the potentially grave implications of deportation, for citizens and noncitizens alike. *See id.* at 284 (asserting that deportation of an individual who claims to be a U.S. citizen “may result . . . in loss of both property and life, or of all that makes life worth living”). More recently, the Court has also characterized deportation as “the equivalent of banishment or exile.” *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *see Peter L. Markowitz, Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301–02 (2011) (explaining that deportation can send individuals to unfamiliar countries where they lack familial support in the face of language barriers, persecution, or even death).

³⁶ *Ng Fung Ho*, 259 U.S. at 284; *see Rachel E. Rosenbloom, The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 2000 (2013) (explaining that in *Ng Fung Ho*, the Court finally acknowledged a doctrine of citizenship exceptionalism and formally established that “citizenship claims should be set apart from the rest of immigration law”).

³⁷ *See Padilla*, 559 U.S. at 359 n.1 (explaining that, although U.S. citizens are not deportable, the law that grants derivative citizenship is complex, relying on a variety of factors including the immigration laws in place at the time of the child’s birth and the marital status of the child’s citizen parent).

³⁸ *See Stevens, supra* note 4, at 637–38, 638 n.111 (citing 8 U.S.C. § 1229a(c) (2006)) (explaining that in deportation proceedings, “the alien has the burden of establishing . . . by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission”); *see also Polly J. Price, Jus Soli and Statelessness: A Comparative Perspective from the Americas*, in CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS, *supra* note 5, at 27, 36 (explaining that a petitioner’s lack of proof of citizenship is often a major factor in wrongful removals of U.S. citizens).

³⁹ *See* 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 . . .”).

Several circuit courts, however, have addressed the issue of whether an individual in removal proceedings claiming U.S. citizenship must exhaust administrative remedies before the claim can be subject to judicial review.⁴⁰ The majority of circuits that have ruled on this issue have interpreted the exhaustion requirement under 8 U.S.C. § 1252(d) as applying only to “aliens,” and not to people with non-frivolous U.S. citizenship claims.⁴¹

For example, in 2005, in *Minasyan v. Gonzales*, the United States Court of Appeals for the Ninth Circuit held that a previously deported Armenian native claiming U.S. citizenship did not need to exhaust his administrative remedies before the court could review his final order of removal.⁴² If courts required such exhaustion, the court reasoned that an individual could inadvertently relinquish his or her U.S. citizenship.⁴³ In that case, the Ninth Circuit determined that the plaintiff’s non-frivolous citizenship claim entitled him to a judicial determination of that claim despite his failure to exhaust available administrative remedies.⁴⁴

The United States Court of Appeals for the Eighth Circuit has applied a textual interpretation of § 1252(d) and observed that the statute’s exhaustion provision does not apply to “any person” seeking to challenge a final removal order, but only to an “alien.”⁴⁵ In 2002, in *Moussa v. Immigration and Naturalization Service*, the court reasoned that it had jurisdiction to review the final removal order of an Ethiopian-born plaintiff claiming U.S. citizenship prior to administrative exhaustion because the court needed to first determine

⁴⁰ *Johnson v. Whitehead*, 647 F.3d 120, 125 (4th Cir. 2011); *Poole*, 522 F.3d at 261, 264; *Omolo*, 452 F.3d at 406–07; *Theagene v. Gonzales*, 411 F.3d 1107, 1110 & n.4 (9th Cir. 2005); *Minasyan*, 401 F.3d at 1074–76; *Moussa*, 302 F.3d at 824–25, 827; see *infra* notes 42–57 and accompanying text (discussing the circuit courts that have addressed the exhaustion requirement in the context of removal proceedings).

⁴¹ 8 U.S.C. § 1252(d)(1); *Poole*, 522 F.3d at 261, 264; *Omolo*, 452 F.3d at 406–07; *Theagene*, 411 F.3d at 1110 & n.4; *Minasyan*, 401 F.3d at 1074–76; *Moussa*, 302 F.3d at 824–25, 827; see *infra* notes 42–51 and accompanying text (discussing cases in which the circuit courts ruled that the exhaustion requirement under 8 U.S.C. § 1252(d) does not apply to people with non-frivolous U.S. citizenship claims). *But see Johnson*, 647 F.3d at 125 (holding the plaintiff’s habeas corpus petition was barred because he had failed to exhaust administrative remedies before filing in the district court).

⁴² *Minasyan*, 401 F.3d at 1072, 1075.

⁴³ *Id.* at 1075.

⁴⁴ *Id.*

⁴⁵ *Moussa*, 302 F.3d at 825; see also *Theagene*, 411 F.3d at 1110 & n.4 (“[T]he plain language of the statute specifies that only an alien may be required to exhaust remedies.”). *But see Theagene*, 411 F.3d at 1115–16 (Kleinfeld, J., dissenting) (addressing potential for overburdening of judicial branch in adjudicating immigration cases by arguing “*Moussa* [on which the *Theagene* majority relies] does not stand for the proposition that one may litigate his case on the merits before the IJ and BIA, expressly conceding that he is an alien, but then relitigate his claims in the court of appeals on the contradictory basis that he is a citizen”).

the validity of his citizenship claim before deciding whether § 1252(d) even applied to him.⁴⁶

Similarly, in 2006, in *Omolo v. Gonzales*, the United States Court of Appeals for the Fifth Circuit concluded that courts always have jurisdiction to determine their own jurisdiction.⁴⁷ Acknowledging that it may only review a final removal order when the “alien” has exhausted administrative remedies, the court held that it first must determine whether the Kenyan-born plaintiff was, indeed, an “alien.”⁴⁸ Thus, the court granted her habeas petition.⁴⁹

Echoing the circuits above, in 2008 the United States Court of Appeals for the Second Circuit in *Poole v. Mukasey* found no “jurisdictional obstacle” to a Guyanese-born plaintiff’s citizenship claim for failure to exhaust.⁵⁰ Although the court dismissed all other aspects of the plaintiff’s petition for review of a removal order for failure to exhaust, it concluded that his citizenship claim was distinct, given that such an assertion would act as a jurisdictional bar in a removal proceeding.⁵¹

The only circuit to require exhaustion of a citizenship claim is the United States Court of Appeals for the Fourth Circuit.⁵² In 2011, in *Johnson v. Whitehead*, the Fourth Circuit held that a Jamaican-born plaintiff claiming U.S. citizenship was barred from bringing a habeas petition challenging his removal order on that basis because he had failed to exhaust available administrative remedies.⁵³ The plaintiff’s prior removal proceedings had been terminated by an immigration judge, who stated that he appeared to be a U.S. citizen.⁵⁴ The plaintiff then filed a N-600 Application for Certificate of Citizenship, which was rejected and never appealed.⁵⁵ Relying on two statutes to justify its dismissal, the court first held that 8 U.S.C. § 1252(b)(9) prohibits

⁴⁶ *Moussa*, 302 F.3d at 824–25, 827.

⁴⁷ *Omolo*, 452 F.3d at 407.

⁴⁸ *Id.* at 406–07.

⁴⁹ *Id.* at 407. The court ultimately found that the plaintiff did not have a valid claim to U.S. citizenship. *Id.* at 409.

⁵⁰ *Poole*, 522 F.3d at 261, 264.

⁵¹ *Id.* at 264 (quoting *Ng Fung Ho*, 259 U.S. at 284) (“An assertion of United States ‘citizenship is . . . a denial of an essential jurisdictional fact’ in a deportation proceeding.”).

⁵² See generally *Johnson*, 647 F.3d 120 (holding the plaintiff’s citizenship claim was barred because he had failed to exhaust administrative remedies before filing a habeas petition in federal court).

⁵³ *Id.* at 123, 125. The plaintiff relied on former 8 U.S.C. § 1432(a)(3) and asserted U.S. citizenship on the basis of his father’s naturalization. *Id.* at 123 (stating “[t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents’ conferred citizenship on that child” under former 8 U.S.C. § 1432(a)(3)).

⁵⁴ *Id.* at 123–24, 130 (first citing *Barnes v. Holder*, 625 F.3d 801, 805–06 (4th Cir. 2010); and then citing *Acosta Hidalgo*, 24 I. & N. Dec. 103, 108 (B.I.A. 2007)) (pointing out that immigration judges and the BIA do not have the authority to confer citizenship).

⁵⁵ *Id.* at 125. The plaintiff could not demonstrate that his parents had legally separated because they had never married. *Id.* at 123–24.

the use of habeas corpus petitions as a means of obtaining review of issues that arise in removal proceedings, including questions of citizenship.⁵⁶ Second, the court concluded that 8 U.S.C. § 1503(a) barred the plaintiff's habeas petition because it requires a final administrative denial before a plaintiff can institute an action claiming U.S. citizenship.⁵⁷

B. The Tenth Circuit Examines the Exhaustion Issue

The Tenth Circuit had not ruled on the precise issue of whether an individual in removal proceedings claiming U.S. citizenship must exhaust administrative remedies until it decided *Gonzalez-Alarcon* in 2018.⁵⁸ Born in the border city of Ciudad Juárez, Mexico, Abraham Gonzalez-Alarcon (“Gonzalez-Alarcon”) entered the United States as a child in 2005 and was subsequently removed several times.⁵⁹ In 2015, immigration authorities once again found Gonzalez-Alarcon in the United States, took him into federal custody, charged him with illegal reentry, and reinstated his removal order.⁶⁰

Gonzalez-Alarcon eventually realized he could claim citizenship based on his mother, who was a U.S. citizen by virtue of being born in New Mexico.⁶¹ As a result, he filed a habeas petition in the United States District Court for the District of New Mexico seeking release from Immigration and Cus-

⁵⁶ 8 U.S.C. § 1252(b)(9) (“[N]o court shall have jurisdiction, by habeas corpus . . . to review such an order or such questions of law or fact.”); *Johnson*, 647 F.3d at 124–25. Because the plaintiff's citizenship claim arose in his removal proceedings, the court reasoned that a petition for review, not his habeas petition, was the proper avenue to seek redress. *Johnson*, 647 F.3d at 124.

⁵⁷ 8 U.S.C. § 1503(a) (2018) (mandating that an action to declare U.S. citizenship “may be instituted only within five years after the final administrative denial of such right or privilege” and also asserting that an individual cannot bring a habeas petition claiming U.S. citizenship if such a claim arose in connection with removal proceedings); *Johnson*, 647 F.3d at 125. *But see* *Ortega-Morales v. Lynch*, 168 F. Supp. 3d 1228, 1238 (D. Ariz. 2016) (deeming the Fourth Circuit's statement that § 1503(a) requires exhaustion dictum and unnecessary to court's conclusion).

⁵⁸ *Gonzalez-Alarcon*, 884 F.3d at 1272.

⁵⁹ *Id.* at 1269; *Gonzalez Alarcon*, 2016 WL 9777258, at *1. Gonzalez-Alarcon was ordered removed in 2012, and after he reentered the United States, his order of removal was reinstated in 2013. *Gonzalez-Alarcon*, 884 F.3d at 1269.

⁶⁰ *Gonzalez-Alarcon*, 884 F.3d at 1269. Gonzalez-Alarcon's prior removal order was reinstated under 8 U.S.C. § 1231(a)(5) (2018). *Id.* at 1270. When a prior removal order is reinstated, it is reinstated from its original date and cannot be reviewed or reopened. *Id.* An immigration officer can reinstate a prior removal order upon finding that (1) the noncitizen received a prior removal order, (2) the noncitizen was previously removed or departed voluntarily while subject to a removal order, and (3) the noncitizen reentered the United States illegally. *Id.* (citing 8 C.F.R. § 241.8(a) (2018)). For more information on the practice of reinstating prior orders of removal, including controversies surrounding the practice, see Gavin, *supra* note 23, at 2451–62.

⁶¹ *Gonzalez-Alarcon*, 884 F.3d at 1269 (under 8 U.S.C. § 1409(c), “[a] child born abroad to an unwed, citizen mother is a citizen if the mother lived in the United States for at least one year prior to the child's birth”).

toms Enforcement (ICE) custody.⁶² The district court dismissed Gonzalez-Alarcon's habeas petition on two grounds.⁶³ First, the court reasoned that Gonzalez-Alarcon had failed to exhaust his administrative remedies because he did not file a N-600 Application for Certificate of Citizenship before seeking habeas relief.⁶⁴ Second, the district court determined that it lacked jurisdiction to review Gonzalez-Alarcon's habeas petition under the REAL ID Act.⁶⁵ Gonzalez-Alarcon appealed to the Tenth Circuit.⁶⁶ That appeal enabled the Tenth Circuit to address the question of whether a person facing removal must exhaust administrative remedies before bringing a non-frivolous claim of U.S. citizenship in district court.⁶⁷

The Tenth Circuit concluded that the provision at issue does not require a plausible U.S. citizenship claim to be exhausted prior to judicial review.⁶⁸ Mirroring *Minasyan* and *Moussa*, the court interpreted § 1252(d) as applying only to "aliens" and thus not governing individuals with a plausible U.S. citizenship claim.⁶⁹ The court further held that because district courts have jurisdiction to determine their own jurisdiction, a court must first determine a petitioner's citizenship before requiring exhaustion.⁷⁰ Additionally, the court concluded that, despite Gonzalez-Alarcon's central aim of release from detention, he was nonetheless seeking "judicial review of an order of removal," which was barred by § 1252(b)(1) after the thirty-day deadline passed.⁷¹

⁶² *Id.* at 1268; Petition for a Writ of Habeas Corpus at 1, *Gonzalez Alarcon*, 2016 WL 9777258 (No. 15-00910). Habeas review is available only to those in custody. 28 U.S.C. § 2241(c); see César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1409 (2014) (explaining that in the context of federal habeas relief, "custody" requires a deprivation of liberty but is not limited to physical confinement or detention). In this case, the district court determined and the appeals court agreed that Gonzalez-Alarcon was in custody for habeas purposes because an ICE order restricted him from traveling outside the ICE Oklahoma City sub-office boundaries without approval and required him to report to immigration officers periodically. *Gonzalez-Alarcon*, 884 F.3d at 1270; *Gonzalez Alarcon*, 2016 WL 9777258, at *2.

⁶³ *Gonzalez Alarcon*, 2016 WL 9777258, at *9, *11.

⁶⁴ *Id.* at *9.

⁶⁵ *Id.* at *11.

⁶⁶ *Gonzalez-Alarcon*, 884 F.3d at 1266.

⁶⁷ *Id.* at 1272.

⁶⁸ *Id.* at 1273.

⁶⁹ *Id.* at 1268; *Minasyan*, 401 F.3d at 1075; *Moussa*, 302 F.3d at 825.

⁷⁰ *Gonzalez-Alarcon*, 884 F.3d at 1273.

⁷¹ *Id.* at 1275. The court reasoned that although the aim of Gonzalez-Alarcon's petition was to secure release from detention, his pending removal order was the sole basis for ICE's ongoing supervision of him. *Id.* A petition for review of a removal order must be filed within thirty days of a final order of removal. 8 U.S.C. § 1252(b)(1). This thirty-day deadline is "mandatory and jurisdictional; it is not subject to equitable tolling." *Gonzalez-Alarcon*, 884 F.3d at 1271.

The court acknowledged that barring habeas review of citizenship claims raises a serious Suspension Clause issue.⁷² Declining to address this constitutional issue, the court instead concluded that Gonzalez-Alarcon should first attempt to obtain review through the petition for review process under the REAL ID Act.⁷³ For Gonzalez-Alarcon, the court noted, the appropriate appeals court in which to file a petition for review was the Fifth Circuit, where his original removal proceedings occurred.⁷⁴ If the BIA denied Gonzalez-Alarcon's motion to reopen, he could thus appeal the denial in a petition for review to the Fifth Circuit; however, the Tenth Circuit expressed concern that its interpretation of the REAL ID Act would not be binding in the Fifth Circuit.⁷⁵

II. THE TENTH CIRCUIT JOINS THE MAJORITY AND ALLOWS INDIVIDUALS CLAIMING U.S. CITIZENSHIP TO BRING THE CLAIM IN FEDERAL COURT PRIOR TO EXHAUSTION

In *Gonzalez-Alarcon v. Macias*, the United States Court of Appeals for the Tenth Circuit made an exception to the exhaustion provision of 8 U.S.C. § 1252(d) for non-frivolous claims to U.S. citizenship.⁷⁶ The court's decision echoed the concern of many of its sister courts that such a significant claim could be suppressed by a procedural bar.⁷⁷ Section A of this Part describes the Tenth Circuit's reasoning in further detail.⁷⁸ Section B explains the contrast between the reasoning of the majority of circuits that have determined this issue and that of the United States Court of Appeals for the Fourth Circuit.⁷⁹

A. The Tenth Circuit's Reasoning Resolves a Critical Legal Issue but Leaves Gonzalez-Alarcon's Fate Unknown

Although the Tenth Circuit had not yet addressed the precise issue at the crux of Gonzalez-Alarcon's case, it relied in part on one of its prior holdings

⁷² U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); *Gonzalez-Alarcon*, 884 F.3d at 1275, 1277 (“The REAL ID Act does not contain any explicit safety valve under which an individual could obtain review of a reinstated order of removal that was not presented in a timely petition for review In the context of a citizenship claim, the lack of a failsafe provision is troubling.”).

⁷³ *Gonzalez-Alarcon*, 884 F.3d at 1277–78.

⁷⁴ 8 U.S.C. § 1252(b)(2); *Gonzalez-Alarcon*, 884 F.3d at 1269.

⁷⁵ *Gonzalez-Alarcon*, 884 F.3d at 1277–79.

⁷⁶ *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1272 (10th Cir. 2018).

⁷⁷ *Id.*; see, e.g., *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005) (holding that if exhaustion were required, it would be possible to “unintentionally relinquish U.S. citizenship”).

⁷⁸ See *infra* notes 80–97 and accompanying text.

⁷⁹ See *infra* notes 98–107 and accompanying text.

to inform its decision in that case.⁸⁰ In 2012, in *Shepherd v. Holder*, the court had held that in removal proceedings, citizenship serves as the denial of an essential jurisdictional fact because only noncitizens are removable.⁸¹ Further, it had determined that in assessing jurisdiction under 8 U.S.C. § 1252 generally, the court had authority to determine if the factual conditions for the jurisdictional bar were present.⁸² Extending *Shepherd's* reasoning in *Gonzalez-Alarcon*, the Tenth Circuit concluded that § 1252(d) does not require exhaustion of a citizenship claim before a court can determine the jurisdictional facts relevant to that statute's particular jurisdictional bar, including the petitioner's citizenship.⁸³

Further, although the Tenth Circuit held that the exhaustion provision of § 1252(d) applies only to "aliens," it determined that the statute as a whole could not be interpreted as such.⁸⁴ For example, the court noted that § 1252(a)(5) does not contain the word "alien," and thus interpreted that subsection to apply to petitioners regardless of their citizenship.⁸⁵ As a result, the court reasoned that § 1252(a)(5) bars habeas challenges to removal orders for both alien petitioners and those claiming U.S. citizenship.⁸⁶ Thus, the court concluded that the REAL ID Act bars habeas review of Gonzalez-Alarcon's claim and implicates Suspension Clause issues.⁸⁷ Adhering to the canon of constitutional avoidance, the Tenth Circuit deferred analysis of whether Congress indeed has the authority to prevent such review and instead offered an uncertain course for Gonzalez-Alarcon.⁸⁸

⁸⁰ *Gonzalez-Alarcon*, 884 F.3d at 1272; see *Shepherd v. Holder*, 678 F.3d 1171, 1175, 1185 (10th Cir. 2012) (determining that an Indian-born plaintiff in removal proceedings failed to meet the statutory requirements for citizenship under the Child Citizenship Act of 2000 and thus was not a U.S. citizen).

⁸¹ *Shepherd*, 678 F.3d at 1175.

⁸² *Id.* at 1180 (acknowledging Congress's plenary power with respect to immigration policy, the court noted "Congress may limit federal court jurisdiction through provisions such as the § 1252(a)(2)(C) bar, but courts have authority to determine whether the factual conditions for the bar are present"). In that case, the court did not settle the issue of whether the exhaustion requirement applied to U.S. citizens because it concluded that petitioner was not a citizen and thus dismissed her petition for review on that basis. *Id.* at 1184.

⁸³ *Gonzalez-Alarcon*, 884 F.3d at 1272; *Shepherd*, 678 F.3d at 1179–80.

⁸⁴ *Gonzalez-Alarcon*, 884 F.3d at 1273–74.

⁸⁵ 8 U.S.C. § 1252(a)(5) (2018) ("[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act . . ."); *Gonzalez-Alarcon*, 884 F.3d at 1274.

⁸⁶ *Gonzalez-Alarcon*, 884 F.3d at 1274.

⁸⁷ *Id.* at 1275.

⁸⁸ *Id.*; see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1192 & n.8 (2006) (explaining that the canon of constitutional avoidance provides that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress"); see also *Clark v. Suarez Martinez*, 543 U.S.

The Tenth Circuit proposed that Gonzalez-Alarcon raise his citizenship claim in a petition for review following the denial of a motion to reopen issued by an immigration judge.⁸⁹ Iterating the enormous importance of the writ of habeas corpus in protecting against executive detention, the Tenth Circuit nonetheless noted that an adequate substitute may provide sufficient relief under the Constitution where a habeas petition cannot be filed.⁹⁰ In Gonzalez-Alarcon's case, the court noted, a petition for review of his citizenship claim would surely provide an adequate substitute.⁹¹ The court held that it would not hear Gonzalez-Alarcon's habeas petition unless he is denied review through this proposed process.⁹² The availability of this option in the United States Court of Appeals for the Fifth Circuit, however, where the petition for review deadline has passed, is not entirely clear.⁹³

Although the Tenth Circuit cannot issue a REAL ID Act interpretation that is binding in the Fifth Circuit, it noted that in 2013 in *Iracheta v. Holder*, the Fifth Circuit confirmed its own jurisdiction to review a nationality claim in the context of a reinstated order of removal.⁹⁴ Further, the Tenth Circuit cited two cases from sister circuits that provide a roadmap for review of an untimely motion.⁹⁵ In those cases, *Iasu v. Smith* and *Luna v. Holder*, however,

371, 385 (2005) (explaining that in cases where a statute is found to have more than one construction after ordinary textual analysis, the canon of constitutional avoidance serves as a means of choosing between the textual interpretations).

⁸⁹ *Gonzalez-Alarcon*, 884 F.3d at 1271, 1275 (explaining that 8 U.S.C. § 1231(a)(5) prohibits an immigration judge from granting a motion to reopen Gonzalez-Alarcon's removal proceedings because it states that prior orders of removal are not subject to being reopened).

⁹⁰ *Id.* at 1276 (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 301 (2001)) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); see also *Swain v. Pressley*, 430 U.S. 372, 381–82 (1977) (holding that a substitute remedy that offers a scope of review equal to that of a habeas remedy is adequate and effective).

⁹¹ *Gonzalez-Alarcon*, 884 F.3d at 1276.

⁹² *Id.* at 1275–76.

⁹³ See *id.* at 1269, 1279 (explaining that "Gonzalez-Alarcon might be able to obtain review because the question cannot be directed to our court"). Unlike the courts in *Omolo*, *Minasyan*, and *Moussa*, the Tenth Circuit could not directly address the citizenship claim of its petitioner because Gonzalez-Alarcon's original removal proceedings occurred in the Fifth Circuit. See *Omolo v. Gonzales*, 452 F.3d 404, 407 (5th Cir. 2006) (original removal proceedings occurred in the circuit reviewing the citizenship claim); *Minasyan*, 401 F.3d at 1074–75 (same); *Moussa v. Immigration & Naturalization Serv.*, 302 F.3d 823, 827 (8th Cir. 2002) (same).

⁹⁴ See *Gonzalez-Alarcon*, 884 F.3d at 1279 (quoting *Iracheta v. Holder*, 730 F.3d 419, 422 (5th Cir. 2013)) ("Such review [of a petitioner's nationality claim] is proper because whether a petitioner is actually an alien is a jurisdictional fact in a removal or reinstatement proceeding."). In *Iracheta*, the Fifth Circuit considered the citizenship of a Mexican-born petitioner facing reinstatement of a previously issued removal order. 730 F.3d at 421, 427. There, the court held that its jurisdiction to review petitioner's claim was not barred by the fact that immigration authorities had previously rejected it. *Id.* at 422.

⁹⁵ *Gonzalez-Alarcon*, 884 F.3d at 1278 (first citing *Luna v. Holder*, 637 F.3d 85, 87 (2d Cir. 2011); and then citing *Iasu v. Smith*, 511 F.3d 881, 892–93 (9th Cir. 2007)). In *Luna*, the Second Circuit held that petitioners who were prevented from filing timely motions for review indeed

the petitioners had not been previously removed and had raised their claims in the appropriate appeals courts where their original removal proceedings occurred.⁹⁶ Thus, despite the Tenth Circuit's persuasive guidance, Gonzalez-Alarcon's particular circumstance would pose a novel issue to the Fifth Circuit, if the case indeed reaches that stage.⁹⁷

B. Individual Rights in Tension with Plenary Power

Underlying the circuit split on this issue is a tension between the established plenary power in the realm of immigration and the role of the judicial branch to intervene to protect individual rights.⁹⁸ The Fourth Circuit's decision in *Johnson v. Whitehead* reinforced Congress's plenary power and a limited judicial reach in immigration matters, and it avoided substantive mention of the sanctity of citizenship.⁹⁹ In contrast, several of the sister courts that the Tenth Circuit joined on this issue espouse greater skepticism toward the supremacy of plenary power where a detainee's citizenship is in question.¹⁰⁰ Indeed, the collective concerns of the majority of the addressing courts spring from a fraught history of evolving U.S. immigration law, over the course of which the security of one's citizenship has fluctuated with the political tides.¹⁰¹

raised Suspension Clause issues; however, the statutory motion to reopen process could provide a sufficient alternative to a habeas petition. 637 F.3d at 87. In *Iasu*, the Ninth Circuit rejected a Suspension Clause claim based on citizenship where petitioner could file an untimely motion to reopen under the REAL ID Act. 511 F.3d at 892–93. There, the court reasoned that even if the immigration judge and the BIA rejected petitioner's untimely motion, he could still appeal the jurisdictional issue directly with an appeals court. *Id.*

⁹⁶ *Gonzalez-Alarcon*, 884 F.3d at 1278; *Luna*, 637 F.3d at 87; *Iasu*, 511 F.3d at 892–93.

⁹⁷ *Gonzalez-Alarcon*, 884 F.3d at 1279.

⁹⁸ *Johnson v. Whitehead*, 647 F.3d 120, 125 (4th Cir. 2011); *Poole v. Mukasey*, 522 F.3d 259, 264 (2d Cir. 2008); *Omolo*, 452 F.3d at 406–07; *Theagene v. Gonzales*, 411 F.3d 1107, 1110 & n.4 (9th Cir. 2005); *Minasyan*, 401 F.3d at 1074–76; *Moussa*, 302 F.3d at 824–25, 827; see *supra* notes 40–57 and accompanying text (presenting the current circuit split on the exhaustion requirement for citizenship claims in removal proceedings).

⁹⁹ *Johnson*, 647 F.3d at 126 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)) (“The Supreme Court has emphasized Congress’s plenary power over immigration and naturalization . . . ‘the power over aliens is of a political character and therefore subject only to narrow judicial review.’”). *Johnson* delved into the petitioner’s criminal record, involving gun and drug offenses, noting that “[r]emoval of aliens who commit serious crimes is a central aim of the INA.” *Id.* at 131. The court offered just one sentence to iterate the importance of protecting citizenship, stating that *Johnson*’s U.S. citizenship claim “is of central importance, because if *Johnson* ever was a citizen, his criminal acts would not strip him of citizenship and DHS would be unable to remove him.” *Id.* at 125.

¹⁰⁰ See, e.g., *Poole*, 522 F.3d at 264 (“The executive branch may remove certain aliens but has no authority to remove citizens.”); *Minasyan*, 401 F.3d at 1075 (reaching the same conclusion).

¹⁰¹ See, e.g., *United States v. Sing Tuck*, 194 U.S. 161, 170 (1904) (dismissing a petition for writ of habeas corpus on behalf of several people of Chinese descent claiming U.S. citizenship because petitioners had failed to appeal the immigration inspector’s decision not to admit them via the applicable statutory appeal provision). In that case, Justice Holmes justified his decision with a

For example, both the United States Court of Appeals for the Ninth Circuit in *Minasyan v. Gonzales* and the United States Court of Appeals for the Second Circuit in *Poole v. Mukasey* cited *Ng Fung Ho v. White*, which asserted the right to judicial determination of U.S. citizenship claims in the wake of years of historical discrimination against Chinese immigrants in America.¹⁰² *Ng Fung Ho* and other contemporaneous cases regarding Chinese exclusion marked a shift in the Court's interpretation of the role of the judiciary in immigration matters.¹⁰³ Citing due process concerns, the Supreme Court in *Ng Fung Ho* warned of the risk of a deprivation of liberty if individuals claiming U.S. citizenship were not afforded judicial review.¹⁰⁴ Despite the Court's efforts in the 1920s to bolster safeguards to protect citizenship, in the following decades the Court continued to vacillate between asserting the supremacy of congressional power and protecting the sanctity of citizenship.¹⁰⁵

Almost a century later, the full extent of Congress's plenary power in the realm of immigration remains unresolved and deeply influenced by the political climate.¹⁰⁶ As of 2019, individuals like Gonzalez-Alarcon, who are foreign-born and claiming U.S. citizenship, thus face an uncertain future.¹⁰⁷

procedural argument by asserting, "it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way." *Id.* at 168. In a vigorous dissent, Justice Brewer exposed an insidious racial component lurking beneath the Court's decision. *Id.* at 178 (Brewer, J., dissenting) (pointing out unjust discrepancy between immigration enforcement against American-born U.S. citizens of Chinese descent and those of Anglo-Saxon descent).

¹⁰² *Ng Fung Ho v. White*, 259 U.S. 276, 276 (1922); *Poole*, 522 F.3d at 264; *Minasyan*, 401 F.3d at 1075.

¹⁰³ Compare *Ng Fung Ho*, 259 U.S. at 285 (holding individuals detained by immigration authorities "entitled to a judicial determination of their claims that they are citizens of the United States"), and *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920) ("It 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."), with *United States v. Ju Toy*, 198 U.S. 253, 258, 263–64 (1905) (granting the Secretary of Commerce authority to make final determination on admissibility of petitioner claiming to be a native-born U.S. citizen and finding no violation of due process in denying judicial appeal of such determination).

¹⁰⁴ *Ng Fung Ho*, 259 U.S. at 284–85.

¹⁰⁵ See, e.g., *Perez v. Brownell*, 356 U.S. 44, 61–62 (1958), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253 (1967). In *Perez*, the Court affirmed petitioner's loss of U.S. citizenship because of his involvement in Mexican political affairs, holding that denaturalization was necessary to avoid embarrassment to the U.S. government. *Id.* (clarifying the Court's stance with respect to involuntary renunciation of citizenship stating "it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so"). Less than a decade later, the Court overruled *Perez* in *Afroyim v. Rusk* and asserted a more secure notion of citizenship that cannot be involuntarily relinquished. *Afroyim*, 387 U.S. at 262. The Court stated, "There is no indication in [the words of the Fourteenth Amendment] of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time." *Id.*

¹⁰⁶ See, e.g., Sieff, *supra* note 1 (reporting that immigration authorities in the Trump administration are denying passports to Hispanic individuals with official U.S. birth certificates).

¹⁰⁷ See, e.g., Eyder Peralta, *You Say You're an American, but What if You Had to Prove It or Be Deported?*, NPR (Dec. 22, 2016), <https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/>

III. THE TENTH CIRCUIT PAVES A PIVOTAL PATH FOR U.S. CITIZENSHIP CLAIMS

The United States Court of Appeals for the Tenth Circuit's opinion in *Gonzalez-Alarcon v. Macias* reflects an instinctual aversion to the notion that the government is wrongfully detaining and possibly deporting U.S. citizens.¹⁰⁸ With its decision to join the majority of circuits in holding that the REAL ID Act's exhaustion provision does not apply to a U.S. citizenship claim by an individual facing removal, the Tenth Circuit correctly interpreted 8 U.S.C. § 1252(d).¹⁰⁹ Although the requirement of administrative exhaustion before judicial intervention is logical and necessary in many aspects of immigration and administrative law, U.S. citizenship claims should not be suppressed or unduly delayed for the sake of procedural order.¹¹⁰ The Tenth Circuit's decision chips away at the likelihood that U.S. citizens will be wrongfully detained or deported through a complex and often discretionary administrative process.¹¹¹ By legally recognizing this statutory safeguard and providing quicker access to judicial review by tenured, Article III judges, the Tenth Circuit moved to protect those most vulnerable to being mistaken as noncitizens by immigration authorities.¹¹²

you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported#text1 [https://perma.cc/Q5W4-3R4D] (revealing ICE's wrongful detention of Lorenzo Palma, an American citizen born in Gonzalez-Alarcon's hometown of Ciudad Juarez, Mexico).

¹⁰⁸ See *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1277 (10th Cir. 2018) (quoting *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting)) (noting that “[c]itizenship is unique; it is a person’s ‘basic right for it is nothing less than the right to have rights’”); Stevens, *supra* note 4, at 611–12 (“[T]he mistaken deprivation of citizenship rights effects a legal death, the political equivalent of an execution or wrongful death at the hands of the police.”).

¹⁰⁹ See *Gonzalez-Alarcon*, 884 F.3d at 1273 (holding that “if a petitioner advances a plausible claim to citizenship, the district court possesses jurisdiction to determine whether § 1252(d)(1) applies”).

¹¹⁰ See ALENIKOFF ET AL., *supra* note 4, at 1031 (explaining that the exhaustion rule, as a traditional prerequisite to judicial review, permits agencies to perform fact development, apply the specific law at which they are expert, and engage in self-correction); Shruti Rana, “Streamlining” the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action, 2009 U. ILL. L. REV. 829, 836 (arguing that an instrumentalist approach in the immigration context prioritizes efficient results over adherence to “standards, precedents, and legal principles”).

¹¹¹ See *Gonzalez-Alarcon*, 884 F.3d at 1272 (noting that if the law required citizenship claims to be exhausted, an individual could involuntarily relinquish his or her citizenship); see, e.g., Domonoske, *supra* note 15 (recounting the nearly three-and-a-half-year detention of Davino Watson, a Jamaican-born U.S. citizen whose claims were repeatedly ignored by ICE). The Director of the Heartland Alliance National Immigrant Justice Center, Mary Meg McCarthy, posited that Watson's case dragged on precisely because he continued to assert his U.S. citizenship, which led to various organizations and people becoming involved. Domonoske, *supra* note 15.

¹¹² See Paige St. John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 days. He's Not the Only One Who Had to Prove His Citizenship*, L.A. TIMES (Apr. 27, 2018), <http://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html#> [https://perma.cc/W9RR-UFH8] (reporting that the two groups most vulnerable to being mistaken as noncitizens are for-

Although the Tenth Circuit did not resolve the Suspension Clause issue posed by the REAL ID Act's bar of Gonzalez-Alarcon's habeas claim, Judge Lucero added a concurrence to his own majority opinion to reinforce the importance of the Great Writ in rectifying procedural errors that could impinge upon constitutional rights.¹¹³ Judge Lucero's concurrence and the Tenth Circuit's decision call for a fortification of procedural safeguards to protect U.S. citizens from wrongful detention and deportation, which some courts and scholars have equated with criminal punishment.¹¹⁴ In fact, Judge Lucero drew an explicit parallel between an assertion of innocence in response to a criminal conviction and a citizenship claim in the context of immigration detention.¹¹⁵ Indeed, where detainees facing removal are routinely housed in correctional facilities, and where the consequences of deportation often involve loss of life and liberty, Judge Lucero does not stretch this metaphor.¹¹⁶

Despite the U.S. legal system's unwillingness to formally classify immigration detention and deportation as criminal punishment, due process in a civil proceeding nonetheless includes the right to be heard before being de-

eign-born citizens and the children of immigrants); see also Rachel E. Rosenbloom, *From the Outside Looking in: U.S. Passports in the Borderlands*, in CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS, *supra* note 5, at 132, 142 (explaining that from 1980 to 2003, federal spending on border enforcement has grown twenty-fold, and as a result, the status of citizens living at U.S. borders is questioned more frequently).

¹¹³ *Gonzalez-Alarcon*, 884 F.3d at 1282 (Lucero, J., concurring) ("The Great Writ, as protected by the Suspension Clause, necessarily includes the power to excuse procedural errors to cure a miscarriage of justice.")

¹¹⁴ See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010) ("Although removal proceedings are civil, deportation is intimately related to the criminal process . . ."); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1893–94, 1935 (2000) (arguing that deportation—specifically of long-term permanent residents for post-entry criminal conduct—should be considered punishment because it incapacitates, deters, and operates as a form of retribution); Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 23–24 (2011) (arguing in the wake of *Padilla v. Kentucky* that the deportation of lawful permanent residents for criminal convictions does not serve merely a regulatory purpose, but instead constitutes punishment); Markowitz, *supra* note 2, at 294–95 ("The deprivation of liberty from a criminal conviction can pale in comparison to the liberty interest at stake in the removal proceeding that the conviction triggers.")

¹¹⁵ *Gonzalez-Alarcon*, 884 F.3d at 1285 (Lucero, J., concurring) ("[I]f we analogize the finding that Gonzalez-Alarcon is removable to a state court conviction, his plausible allegation of citizenship would show that he is not removable in the same way that a state prisoner might show he did not commit the crime of conviction.")

¹¹⁶ See Markowitz, *supra* note 35, at 1301–02 (explaining that immigrants in deportation proceedings can face not only "life sentences of banishment from their homes, families, and livelihoods in the United States" but also "serious persecution or death."); Dagmar R. Myslinska, *Living Conditions in Immigration Detention Centers*, NOLO (2018), <https://www.nolo.com/legal-encyclopedia/living-conditions-immigration-detention-centers.html> [<https://perma.cc/2S43-6TZF>] (noting that immigration detention centers not only resemble prisons, but they are often contained in correctional facilities).

ported.¹¹⁷ In practice, however, an individual with a final removal order may well be deported before an appeal is fully resolved by a federal court.¹¹⁸ Although noncitizens have the right to file a stay of removal, in many cases this determination is left to the discretion of an immigration judge or the BIA.¹¹⁹ An appeals court, however, can issue a judicial stay of removal while the BIA or federal court adjudicates the petitioner's claim.¹²⁰ Thus, by providing an avenue for judicial review of U.S. citizenship claims, the Tenth Circuit provides an added layer of protection for citizens at risk of discretionary deportation by the executive branch.¹²¹

Writing more liberally in his concurrence, Judge Lucero calls for an analysis of Gonzalez-Alarcon's Suspension Clause challenge with respect to the REAL ID Act's ability to grant him relief.¹²² Deflecting this issue to the United States Court of Appeals for the Fifth Circuit for now, the Tenth Circuit nonetheless contributes to the evolution of an immigration system that, as a whole, has grown wary of the government's capacity to revoke U.S. citizenship, intentionally or not.¹²³ By joining the majority, the Tenth Circuit cuts against the United States Court of Appeals for the Fourth Circuit's assertion

¹¹⁷ See *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (holding that administrative officers executing statutory provisions involving individual liberty cannot disregard due process, including the right to be heard where liberty is at stake). For the first time in *Yamataya*, the Court held that due process applies to deportation procedures for lawfully admitted noncitizens, however, the Court failed to specify exactly what due process in this context entails. See *id.* at 101 (clarifying that due process in this context does not necessarily require “an opportunity [to be heard] upon a regular, set occasion, and according to the forms of judicial procedure”).

¹¹⁸ See TRINA REALMUTO ET AL., NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, BOS. COLL. POST DEPORTATION HUMAN RIGHTS PROJECT & IMMIGRANT RIGHTS CLINIC, WASH. SQUARE LEGAL SERVS., N.Y. UNIV. SCH. OF LAW, AND THE AM. IMMIGRATION COUNCIL, SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS 2 (2014) (explaining that “there is no automatic stay of removal during the 30-day period for filing a petition for review”).

¹¹⁹ See U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 4.2(c) [hereinafter BIA PRACTICE MANUAL] (“An alien may seek a stay of deportation or stay of removal while an appeal is pending before the Board. Stays are automatic in some instances, but discretionary in others.”).

¹²⁰ REALMUTO ET AL., *supra* note 118, at 1; see *Devitri v. Cronen*, 289 F. Supp. 3d 287, 289, 298–99 (D. Mass. 2018) (granting preliminary injunction to fifty Indonesian Christians with final removal orders to prevent their possible removal until seven days after the BIA ruled on a timely motion to reopen, thereby providing petitioners a chance to seek a judicial stay of removal in the appeals court).

¹²¹ See BIA PRACTICE MANUAL, *supra* note 119 (explaining that immigration judges and the BIA have discretion in some cases to grant or deny requests for a stay of removal).

¹²² *Gonzalez-Alarcon*, 884 F.3d at 1286.

¹²³ See *id.* at 1277–78 (explaining that despite the court's concern about the Suspension Clause argument, the court would not address this argument until Gonzalez-Alarcon undergoes the petition for review process); Nora Graham, Note, *Patriot Act II and Denationalization: An Unconstitutional Attempt to Revive Stripping Americans of Their Citizenship*, 52 CLEV. ST. L. REV. 593, 601–05 (2004–2005) (detailing the history of the Supreme Court's gradual recognition of unconstitutionality of Congress revoking citizenship involuntarily).

of the supremacy of plenary power.¹²⁴ Given the historical use of plenary power to justify racist immigration policies, the Tenth Circuit's decision represents a small step toward reframing the American perception of others as less "alien" and more human.¹²⁵

CONCLUSION

Each year, the U.S. government wrongly detains and seeks to remove a significant number of U.S. citizens. These grave errors stem from a number of sources, including racial bias, an overburdened administrative system, and a lack of procedural safeguards. Five circuits have now agreed that the REAL ID Act's exhaustion provision does not apply to a U.S. citizenship claim by an individual facing removal. In *Gonzalez-Alarcon v. Macias*, the United States Court of Appeals for the Tenth Circuit joined the majority of circuit courts in this interpretation, carving out a judicial avenue for those in removal proceedings with non-frivolous U.S. citizenship claims. Although the decision does not settle the constitutional issue of a potentially suppressed habeas claim, it reasserts the importance of the Great Writ in protecting due process rights. The Tenth Circuit's holding tightens the reins, if subtly, on a too-often unbridled plenary power. In so doing, the decision contributes momentum to efforts of policy-makers and advocates to preserve individual rights in our ever-evolving immigration system.

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¹²⁴ *Gonzalez-Alarcon*, 884 F.3d at 1273; *Johnson v. Whitehead*, 647 F.3d 120, 126 (4th Cir. 2011).

¹²⁵ See, e.g., *United States v. Sing Tuck*, 194 U.S. 161, 178 (1904) (Brewer, J., dissenting) (pointing out unjust discrepancy between immigration enforcement against American-born U.S. citizens of Chinese descent and those of Anglo-Saxon descent); see also Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, in *CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS*, *supra* note 5, at 117, 118 (arguing that U.S. citizenship law can only be understood by recognizing the pivotal role of racism in shaping the regulatory field); Jon Lee Anderson, *How Mexico Deals with Trump*, *NEW YORKER* (Oct. 9, 2017), <https://www.newyorker.com/magazine/2017/10/09/mexico-in-the-age-of-trump> [<https://perma.cc/ZL6R-FJYC>] (detailing Donald Trump's depictions in presidential campaign events of Mexicans as rapists, criminals, and "bad hombres").