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Questioning the Legitimacy of the Expedited Removal Process – The Tall Task of Protecting the Constitutional Rights of One of America’s Most Marginalized Groups

JACOB J. BOURQUIN*

ABSTRACT

This Note explores the origin and development of 8 U.S.C. § 1225—a heavily debated facet of the United States’ immigration law. Section 1225, colloquially referred to as the “expedited removal process,” has been interpreted to permit low-level immigration officers to summarily remove certain “arriving” noncitizens from the United States without affording them the procedural due process protections guaranteed under the Fifth Amendment of the United States Constitution to all individuals present in the United States. This Note posits that the current interpretation of § 1225, particularly the interpretation of “is arriving,” and application of the expedited removal process is inconsistent with well-established canons of statutory interpretation—particularly the plain meaning canon, the no superfluous words canon, and the constitutional presumption canon. This Note then puts forth an interpretation that is consistent with these central canons of interpretation. Finally, this Note argues that due to the Fifth Amendment’s broad applicability, the refusal to afford procedural safeguards prior to the denial of life, liberty, and property via the expedited removal process constitutes a wholly unconstitutional due process violation and that even the expansive entry fiction doctrine is not enough to save this unconstitutional removal process. Thus, the expedited removal process, as it is currently employed, must be abandoned and § 1225 must be either amended or repealed.

* J.D. Candidate 2024, Cleveland State University College of Law. Thank you to *Cleveland State Law Review* for selecting this Note for publication and assisting my editorial process. Thank you to Professor Reginald Oh for his role in helping to develop my writing process and skills as I prepare to embark on a life-long journey in this profession, and for his guidance in my writing of this paper. Finally, I would like to thank my mom, dad, and Amy for their unwavering love and support, and for always entertaining even the most boring of my interests—I am forever grateful.

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I. INTRODUCTION

The United States of America is, and always has been, a melting pot.¹ This is largely due to immigration, which has brought people and cultures together from all

¹ See Bill Ong Hang, *Refugee Policy and Cultural Identity: In the Voice of Hmong and Iu Mien Young Adults*, 1 HASTINGS RACE & POVERTY L.J. 111, 149 (2003) (“The melting pot notion

over the world.² This unique mixture defines many aspects of American life and society.³ Immigration is responsible for the United States' incredible diversity and rich culture.⁴ It is also responsible for much of America's historical and continued success and contributes to making the country a desirable place to live.⁵

Immigrants and their progeny comprise nearly 100% of the United States population.⁶ Between 1783 and 2019, more than 86 million people legally immigrated to the United States.⁷ During that period, millions more entered through "illegal" channels, never to be documented.⁸ These people, who came from countries all over

of a blending of races and cultures is a popular image of what happens to immigrants and especially to their offspring in the United States.”).

² See, e.g., Kevin R. Johnson & Bill Ong Hang, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1353 (2005) (“Powerful social, political, and economic forces, however, bring immigrants to the United States, a land of remarkable economic, social, and political opportunity.”).

³ See, e.g., *id.* at 1383 (“[A]merican culture is constantly changing, and the definition of an American is constantly redefined. As immigrants become more ‘American,’ their native cultural traits also influence existing social norms.”).

⁴ See *id.* at 1362 (“The end of racially restrictive immigration and nationality laws have contributed to growing diversity and larger communities . . .”).

⁵ See, e.g., Anna Williams Shavers, *Welcome to the Jungle: New Immigrants in the Meatpacking and Poultry Processing Industry*, 5 J.L. ECON. & POL’Y 31, 39 (2009) (explaining the positive impact of immigration on the American economy and native-born workers’ wages); Nicole Jacoby, *America’s De Facto Guest Workers: Lessons from Germany’s Gastarbeiter for U.S. Immigration Reform*, 27 FORDHAM INT’L L.J. 1569, 1601 (2004) (noting that tax contributions by immigrants fund social programs that are enjoyed by all people in the United States); Jason Furman & Danielle Gray, *Ten Ways Immigrants Help Build and Strengthen Our Economy*, THE WHITE HOUSE PRESIDENT BARRACK OBAMA (July 12, 2012, 10:09 AM), <https://obamawhitehouse.archives.gov/blog/2012/07/12/ten-ways-immigrants-help-build-and-strengthen-our-economy> (explaining immigrants’ role in the economic and historic achievements America has experienced and immigrants’ role in making America a desirable place to live).

⁶ See Cecilia Rouse et al., *The Economic Benefits of Extending Permanent Legal Status to Unauthorized Immigrants*, WHITE HOUSE (Sept. 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/09/17/the-economic-benefits-of-extending-permanent-legal-status-to-unauthorized-immigrants/> (“With the exception of Native Americans, the vast majority of Americans are immigrants or the descendants of immigrants or enslaved people.”).

⁷ Andrew M. Baxter & Alex Nowrasteh, *A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day*, CATO INST. (Aug. 3, 2021), <https://www.cato.org/policy-analysis/brief-history-us-immigration-policy-colonial-period-present-day>.

⁸ See Mark Hugo Lopez et al., *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), <https://www.pewresearch.org/short-reads/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/> (discussing unauthorized immigration into the United States throughout different periods of U.S. history).

the world, were essential to America's founding⁹ and growth,¹⁰ and still play a vital role in its continued existence.¹¹ Although the yearly number of immigrants arriving to the United States has recently declined, over one million people still seek admittance to this country every year.¹²

A. *An Overview of Illegal Immigration in the United States*

America's imperfect immigration system, combined with the many costs and challenges associated with legal immigration and obtaining lawful permanent residence status, drive many people to attempt to illegally immigrate to the United States.¹³ In 2021 alone, there were over 1.7 million encounters between law-enforcement and individuals attempting to illegally enter the United States.¹⁴ Today,

⁹ See *How Many of the Signers Were Born in the American Colonies?*, HARV. UNIV., <https://declaration.fas.harvard.edu/faq/how-many-signers-were-born-american-colonies> (last visited Apr. 20, 2024) (explaining that eight of the signers of the Declaration of Independence were born in countries outside of the United States).

¹⁰ See, e.g., *A Legacy From the Far East*, NAT'L PARK SERV., <https://www.nps.gov/gosp/learn/historyculture/a-legacy-from-the-far-east.htm> (June 10, 2022) (discussing the significant role of Chinese immigrants in the construction of railroads as America was expanding west).

¹¹ See, e.g., Rouse et al., *supra* note 6 ("Immigrants also make an important contribution to the U.S. economy. Most directly, immigration increases potential economic output by increasing the size of the labor force.").

¹² Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> ("More than 1 million immigrants arrive in the U.S. each year.").

¹³ See, e.g., *Why Don't Immigrants Apply for Citizenship? There Is No Line for Many Undocumented Immigrants*, AM. IMMIGR. COUNCIL (Oct. 7, 2021), <https://www.americanimmigrationcouncil.org/research/why-don%E2%80%99t-they-just-get-line> ("Immigration to the United States on a temporary or permanent basis is generally limited to three different routes: employment, family reunification, or humanitarian protection. Each of these legal avenues is highly regulated and subject to numerical limitations and eligibility requirements. As a result, most undocumented immigrants do not have the necessary family or employment relationships and often cannot access humanitarian protection, such as refugee or asylum status. This means that no matter how long they have been in the United States, most undocumented immigrants have no way of achieving legal status. Even those who pay taxes, work hard, and contribute to their communities have no way to 'get in line' unless Congress creates a new pathway to legal status.").

¹⁴ Eileen Sullivan & Miriam Jordan, *Illegal Border Crossings, Driven by Pandemic and Natural Disasters, Soar to Record*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/us/politics/border-crossings-immigration-record-high.html#> ("A record 1.7 million migrants from around the world, many of them fleeing pandemic-ravaged countries, were encountered trying to enter the United States illegally in the last 12 months, capping a year of chaos at the southern border . . .").

an estimated 23% of the over 47 million foreign-born people living in the United States are undocumented.¹⁵

1. Documented Immigrants

The distinction between a documented immigrant and an undocumented immigrant is a significant one within United States immigration law.¹⁶ Documented immigrants are foreign-born individuals who are lawfully present within the United States.¹⁷ “Lawfully present” in the United States means that a person: (1) has “[q]ualified non-citizen’ immigration status without a waiting period,” (2) has “[h]umanitarian status[] or circumstances,” (3) a “valid non-immigrant visa[],” or (4) “[l]egal status conferred by other laws.”¹⁸ Lawful presence affords nearly all of the same rights and constitutional protections that United States’ citizens are entitled to.¹⁹

2. Undocumented Immigrants (“Noncitizens”)

Undocumented immigrants are foreign-born individuals who are deemed to be illegally present or residing in the United States.²⁰ Although a variety of terms have been used to describe a member of this group, the most appropriate is “noncitizens.”²¹ Noncitizens are not lawfully present in the United States because they “do not possess a valid visa or other immigration documentation because they entered the United

¹⁵ Budiman, *supra* note 12 (explaining that ~23% of the foreign-born population residing within the United States, 10.5 million people, were undocumented by U.S. immigration services as of 2017).

¹⁶ Jessica Bolter, *Explainer: Who Is An Immigrant?*, MIGRATION POL’Y INST. (Feb. 2019), <https://www.migrationpolicy.org/content/explainer-who-immigrant> (“To be an immigrant can thus comprise a variety of experiences, some more legally privileged than others.”).

¹⁷ See *Frequently Asked Questions*, WASH. STATE DEP’T SOC. & HEALTH SERVS. (May 10, 2023), <https://www.dshs.wa.gov/esa/frequently-asked-questions#> (“Legal immigrants are foreign-born people legally admitted to the U.S.”).

¹⁸ *Lawfully Present*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/lawfully-present/> (last visited Apr. 20, 2024).

¹⁹ *Immigrants’ Rights*, PA. ATT’Y GEN., <https://www.attorneygeneral.gov/protect-yourself/civil-rights/immigrants-rights/> (last visited Apr. 20, 2024) (“[I]mmigrants have constitutional rights and statutory protections in the areas of civil rights and hate crime, fair labor standards, consumer protection, and more.”).

²⁰ WASH. STATE DEP’T SOC. & HEALTH SERVS., *supra* note 17.

²¹ Memorandum from Jean Kind, Acting Director, on Clarifying the Use of Terminology Regarding Noncitizens to the Executive Office for Immigration Review (July 23, 2021) (available at <https://www.justice.gov/eoir/book/file/1415216/download>) (explaining the need to use language that is “[consistent] with our character as a Nation of opportunity and of welcome,” including how the use of the term “noncitizen” has become increasingly used).

States without inspection, stayed longer than their temporary visa permitted, or otherwise violated the terms under which they were admitted.”²²

Noncitizens can be divided into three categories.²³ The first category does not conform to the traditional notion of a noncitizen but is relevant in the context of the expedited removal process. This category is comprised of people that are not within the jurisdictional United States.²⁴ It includes those individuals who are beyond American borders, such as people in Mexico or Canada, but who intend to illegally enter the United States. Individuals in this category have not yet violated United States immigration law because they have not illegally entered the jurisdictional United States without inspection or are otherwise unlawfully residing in the United States.²⁵

The next two categories conform more closely to the traditional sense of a noncitizen. The second category is comprised of people that have entered the jurisdictional United States but are still in the process of arriving to their intended destination.²⁶ This category includes those individuals that are in the process of or have recently surpassed the threshold of initial entry into the United States, such as a border or a port-of-entry.²⁷

²² WASH. STATE DEP’T SOC. & HEALTH SERVS., *supra* note 17 (“Undocumented immigrants, also called illegal aliens, are foreign-born people who do not possess a valid visa or other immigration documentation, because they entered the U.S. without inspection, stayed longer than their temporary visa permitted, or otherwise violated the terms under which they were admitted.”).

²³ I employ these three categories for the purposes of this Note to simplify the discussion of the different stages of illegal immigration. These categories are not officially recognized categories of noncitizens within immigration law.

²⁴ These individuals are not technically considered “undocumented immigrants” because they are not illegally residing in the United States. For purposes of immigration status, these individuals would be considered citizens of their home countries. However, for purposes of simplicity and uniformity, and because it bears no weight on the analysis of this Note, this Note will refer to these individuals who are outside of the United States but intend to illegally enter for the purpose of establishing a residence as “undocumented immigrants.” See *Undocumented Immigrant*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/undocumented_immigrant (last visited Apr. 20, 2024). “Jurisdictional United States” refers to the geographic “territory within which a court or government agency may properly exercise its power” over immigrants. Jurisdiction, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/jurisdiction> (last visited Apr. 20, 2024).

²⁵ 8 U.S.C. § 1325(a) (illustrating that the violation of immigration law occurs when an individual *actually* enters or attempts to enter the United States).

²⁶ Aliens and Nationality, 8 C.F.R. § 499(I)(A)(1) (2023) (defining individuals who are in the United States legally, but not yet documented).

²⁷ An example of this sub-category would include a person who gained admittance to the United States unlawfully via an unguarded stretch of the U.S. border but is apprehended shortly after. *Id.*; see also *supra* note 23 (explaining the use of noncitizen categories used throughout this Note).

The third category is comprised of people that are present in or are residing in the jurisdictional United States.²⁸ This category includes individuals who are illegally present or residing in the United States and have been doing so for a significant period of time or a significant distance from a border or port-of-entry.²⁹ People fitting into this third category are, by the letter of law, entitled to many of the same rights and protections as American citizens, but in reality, these people are frequently denied those rights and protections.³⁰

B. *Exposing the Expedited Removal Process's Constitutional Violations*

A person's status as either a documented immigrant or a noncitizen carries with it significant legal consequences.³¹ Even within the class of noncitizens, the law treats members of the different categories of people very differently.³² Whether a person is yet to arrive to the jurisdictional United States, is in the process of arriving, or has already arrived determines the rights and protections that person is entitled to.³³ The United States Constitution and Supreme Court precedent make clear that a person outside of the jurisdictional United States is not entitled to any constitutional protections.³⁴ However, it is well-established via these same sources that noncitizens who fall within categories two and three are technically entitled to certain constitutional protections once they have surpassed the geographic threshold into the

²⁸ Jeffery Passel & D'vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, PEW RSCH. CTR. (Sept. 20, 2016), <https://www.pewresearch.org/hispanic/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/>.

²⁹ *Id.*

³⁰ Aisosa Osaretin, *Undocumented Immigrants Have Constitutional Rights Too*, ARK. J. SOC. CHANGE & PUB. SERV. (Nov. 16, 2020), <https://ualr.edu/socialchange/2020/11/16/undocumented-immigrants-have-constitutional-rights-too/>.

³¹ Matthew Green, *What Legal Rights Do Undocumented Immigrants Have? (With Lesson Plan)*, KQED (Mar. 28, 2017), <https://www.kqed.org/lowdown/26358/what-legal-rights-do-undocumented-immigrants-have-with-lesson-plan> (“[T]he U.S. Constitution actually guarantees most of the same fundamental civil rights and liberties to everyone within the United States, citizens and non-citizens alike.”).

³² David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003) (discussing the different protections one's immigration status affords).

³³ *See id.* at 367–88.

³⁴ *See, e.g.*, Lyle Denniston, *Constitution Check: Do Individual Rights Stop at the U.S. Border?*, NAT'L CONST. CTR. (Oct. 29, 2015), <https://constitutioncenter.org/blog/constitution-check-do-individual-rights-stop-at-the-u-s-border> (discussing the Supreme Court's interpretation of the Constitution as protecting the rights only of those present in the United States, as well as case law which established that persons outside of the United States are not entitled to constitutional protections).

United States, despite frequently being denied such rights and protections.³⁵ Thus, physical presence is at the heart of entitlement to constitutional protections.³⁶

This Note will demonstrate how one statutory tool that is available to immigration officers to remove noncitizens—the expedited removal process—is currently being exploited. The expedited removal process is being exploited in a manner that necessarily involves constitutional due process violations when employed against certain category two and three noncitizens.³⁷ This Note argues that certain executive agencies have concocted a wholly inappropriate meaning for the word “arriving” as it is used within 8 U.S.C. § 1225.³⁸ The meaning these agencies have attributed to the word is inconsistent with the plain meaning of the word as it is used in the statute, with any notion of common sense, and with several canons of statutory construction.³⁹

Part II of this Note discusses the various sources of immigration law, as well as the now infamous expedited removal process.⁴⁰ Part III explores the language of § 1225, the expedited removal process’s statutory basis, and argues that canons of statutory construction and the English language led to the conclusion that the current interpretation of § 1225 is incorrect, and then suggests an appropriate definition.⁴¹ Part IV discusses the Fifth Amendment’s Due Process Clause and analyzes courts’ current interpretation of § 1225 in light of these considerations.⁴² Part V concludes this Note and provides a clear and concrete alternate interpretation of § 1225 that is consistent with existing canons of statutory construction and does not involve constitutional violations.⁴³

³⁵ See, e.g., *Do Non-Citizens Have Constitutional Rights?*, MANIATIS L. (Aug. 22, 2018), <https://www.maniatislawoffice.com/blog/2018/08/do-non-citizens-have-constitutional-rights/> (“There is a misconception that the U.S. Constitution applies only to U.S. citizens. Some passages and phrases in our laws explicitly state only ‘citizens’ are afforded certain rights, such as the right to vote. When the terms ‘resident’ or ‘person’ is used instead of citizen, the rights and privileges afforded are extended to protect citizens and non-citizens alike.”).

³⁶ Ilya Somin, *The Constitutional Rights of Noncitizens*, LEARN LIBERTY (Apr. 30, 2017), <https://www.learnliberty.org/blog/t-he-constitutional-rights-of-noncitizens/>.

³⁷ See generally *infra* Parts II–IV.

³⁸ See *infra* Parts II–III.

³⁹ See *infra* Parts III–IV.

⁴⁰ See *infra* Part II.

⁴¹ See *infra* Part III.

⁴² See *infra* Part IV.

⁴³ See *infra* Part V.

II. SOURCES AND ENFORCEMENT OF UNITED STATES IMMIGRATION LAW

A. *The Immigration and Nationality Act of 1952 (the “INA”)*

The INA was enacted in 1952.⁴⁴ Codified in the United States Code at Title 8, Chapter 12, the INA dictates the processes and procedures for many different facets of immigration law.⁴⁵ The INA aims to promote and further the explicit goals of United States immigration policy: “the reunification of families, admitting immigrants with skills that are valuable to the U.S. economy, protecting refugees, and promoting diversity.”⁴⁶ It also establishes the different removal processes for persons determined to be unlawfully residing in or arriving to the United States.⁴⁷

Enforcement of the INA and immigration law is the responsibility of multiple executive agencies.⁴⁸ In 2002, the Department of Homeland Security (“DHS”) was created and tasked with the enforcement of the INA and immigration law enforcement generally.⁴⁹ The DHS carries out these responsibilities primarily through three of its agencies: U.S. Citizenship and Immigration Services (“USCIS”), Customs and Border Protection (“CBP”), and Immigration and Customs Enforcement (“ICE”).⁵⁰ USCIS

⁴⁴ *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 10, 2019), <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act>.

⁴⁵ See HILLEL R. SMITH, CONG. RSCH. SERV., IF11357, EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION 1 (2022) (“The Immigration and Nationality Act (INA) establishes different removal processes for different categories of aliens. Most removable aliens apprehended within the interior of the United States are subject to ‘formal’ removal proceedings under INA § 240. Aliens in these proceedings are given certain procedural guarantees including the rights to counsel, to appear at a hearing before an immigration judge (IJ), to present evidence, and to appeal an adverse decision. The INA, however, sets forth a streamlined ‘expedited removal’ process for certain arriving aliens and aliens who recently entered the United States without inspection.”); 8 U.S.C. § 1225.

⁴⁶ *How the United States Immigration System Works*, AM. IMMIGR. COUNCIL (Sept. 14, 2021), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>.

⁴⁷ See SMITH, *supra* note 45 (describing the “formal” and expedited removal processes).

⁴⁸ See *Immigration Enforcement*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/topic/immigration-enforcement-overview> (July 12, 2022) (explaining enforcement of national immigration policies is the task of the Department of Homeland Security, an executive agency).

⁴⁹ *Id.*; see also *DHS at 20: Celebrating a Legacy of Service*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/dhs20> (last visited Apr. 20, 2024) (explaining enforcement of national immigration policies is the task of the Department of Homeland Security, an executive agency).

⁵⁰ The Department of Homeland Security was formed by combining twenty-two executive agencies into a single department. USCIS, CBP, and ICE are the three agencies within DHS that perform much of immigration law enforcement. These three agencies work in conjunction, performing different roles in different areas of the country. See generally *Honoring the History of ICE*, U.S. DEP’T HOMELAND SEC., <https://www.ice.gov/features/history> (Mar. 22, 2023).

“adjudicates applications and petitions for immigration and naturalization benefits.”⁵¹ CBP enforces customs and immigration law primarily along borders and at ports-of-entry and ICE performs these same functions at the border, but also in the interior of the United States.⁵²

B. *The Formal Removal Process*

These agencies have the authority to “prevent unlawful entry into the United States and to apprehend and repatriate noncitizens who have violated or failed to comply with U.S. immigration laws.”⁵³ Apprehended individuals are typically entitled to a hearing before an immigration judge.⁵⁴ In accordance with the Fifth Amendment, these hearings provide the opportunity for individuals to obtain adequate legal representation, to present evidence, and to have one’s case heard before an immigration judge.⁵⁵ This type of removal proceeding is also known as the formal removal process.⁵⁶

The statutory basis, or organic statute, for the formal removal process is found at 8 U.S.C. § 1229a and provides that, “[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”⁵⁷ Further, § 1229a states:

In proceedings under this section, under regulations of the Attorney General . . . the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings, . . . the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine

⁵¹ U.S. DEP’T HOMELAND SEC., *Immigration Enforcement Actions*, ANN. REP. IMMIGR. ENF’T ACTIONS: 2017, Mar. 2019, at 2.

⁵² See *Career Frequently Asked Questions (FAQs)*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/careers/faqs> (Sept. 1, 2022).

⁵³ *Immigration Enforcement Actions Annual Flow Report*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/ohss/topics/immigration/enforcement-AFR> (Aug. 26, 2022) (“The Department of Homeland Security (DHS) engages in immigration enforcement actions to prevent unlawful entry into the United States and to apprehend and repatriate noncitizens who have violated or failed to comply with U.S. immigration laws.”).

⁵⁴ See SMITH, *supra* note 45 (“Most removable aliens apprehended within the interior of the United States are subject to ‘formal’ removal proceedings under INA § 240. Aliens in these proceedings are given certain procedural guarantees including the rights to counsel, to appear at a hearing before an immigration judge (IJ), to present evidence, and to appeal an adverse decision.”).

⁵⁵ See *id.* These opportunities are essential when a person is entitled to due process under the law. These opportunities ensure that a person being civilly charged is the correct person and is susceptible to removal via a formal removal proceeding or the expedited removal process. See also 8 U.S.C. § 1229(a).

⁵⁶ SMITH, *supra* note 45.

⁵⁷ 8 U.S.C. § 1229a(a)(1).

witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and . . . a complete record shall be kept of all testimony and evidence produced at the proceeding.⁵⁸

Thus, this removal process seeks to remove individuals who unlawfully entered and were present in the United States only after they have been given a reasonable opportunity to make one's case and put on a defense.

C. *The Expedited Removal Process*

In addition to the formal removal process, DHS agencies possess other statutorily granted tools to carry out their enforcement responsibilities. One such tool stems from the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "IIRIRA").⁵⁹ The IIRIRA created an additional removal process colloquially referred to as the expedited removal process.⁶⁰ This process entails exactly what its name suggests—a removal process that is significantly "streamlined" in relation to the formal removal process.⁶¹ Functionally, the expedited removal process permits low-level immigration officers to remove certain noncitizens from the United States

⁵⁸ *Id.* § 1229a(b)(4).

⁵⁹ See, e.g., Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 214 (1999) ("The expedited removal procedure is one of the changes brought about with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ('IIRIRA'). Congress created the new procedure to screen out foreign nationals upon arrival at United States 'ports of entry' without proper documents or who use misrepresentation or fraud to gain admission to the United States in violation of federal immigration law."); Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 576–88 (2007) (explaining (1) the enforcement of the expedited removal process can cause due process violations because a lack of judicial review and (2) the rationales behind the initial notions of the expedited removal process are outdated and racist); Allison Wexler, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-Zadvydas*, 25 CARDOZO L. REV. 2029, 2032–77 (2004) (explaining (1) the flaws innate in the entry fiction doctrine and (2) the constitutional protections owed to noncitizens); see also D. Carolina Nunez, *Dark Matter in the Law*, 62 B.C. L. REV. 1556, 1556–1619 (2021); *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?*, 116 HARV. L. REV. 1868, 1883–84 (2003).

⁶⁰ 8 U.S.C. § 1225(b)(1)(A); see HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 1 (2019) ("Under this streamlined removal procedure, which Congress established through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, such aliens may be summarily removed without a hearing or further review.").

⁶¹ SMITH, *supra* note 60, at 13 ("[E]xpedited removal is a more streamlined process than formal removal proceedings . . ."); see also Gebisa, *supra* note 59, at 566–67, 580 (explaining the expedited removal process streamlines an individual's removal from the United States); Wexler, *supra* note 59, at 2068 (explaining how the streamlined process avoids many of the nuances of formal proceedings).

“without further hearing or review.”⁶² In recent years, the expedited removal process has become a favorite tool of DHS agencies.⁶³

The expedited removal process is also one of the most controversial aspects of immigration law.⁶⁴ The expedited removal process’s organic statute, 8 U.S.C. § 1225, states, “[i]f an immigration officer determines that an alien . . . who *is arriving* in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review”⁶⁵ However, very problematically, the IIRIRA does not define the critical term “arriving.”⁶⁶ This failure is the source of much of the controversy surrounding the process.⁶⁷ A person subject to an expedited removal is not afforded the “right to counsel, to appear at a hearing before an immigration judge, to present evidence, [or] to appeal an adverse decision.”⁶⁸

⁶² 8 U.S.C. § 1225(b)(1)(A)(i); *id.* § 1225(b)(1)(C) (preventing judicial review of a removal determination); *see* SMITH, *supra* note 60, at 16 (“[A]n alien subject to expedited removal will be ordered removed without further hearing to contest the immigration officer’s determination.”); Gebisa, *supra* note 59, at 566 (“[U]nder [the] IIRIRA, an immigration officer may order an alien’s removal from the United States without any hearing or review.”).

⁶³ Bryan Baker, *Immigration Enforcement Actions: 2016*, U.S. DEP’T HOMELAND SEC. 3 (Dec. 2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf; SMITH, *supra* note 60, at 2 (“[E]xpedited removal is a major component of immigration enforcement, and in recent years it has been one of the most regularly employed means by which immigration authorities remove persons from the United States.”).

⁶⁴ *See* SMITH, *supra* note 60 (“Given the streamlined nature of expedited removal and the broad discretion afforded to immigration officers to implement that process, challenges have been raised contesting the procedure’s constitutionality. In particular, some have argued that the procedure violates aliens’ due process rights because aliens placed in expedited removal do not have the opportunity to seek counsel or contest their removal before a judge or other arbiter.”). *See generally* Laplante, *supra* note 59, at 219–70; Gebisa, *supra* note 59; Wexler, *supra* note 59; Nunez, *supra* note 59.

⁶⁵ 8 U.S.C. § 1225(b)(1)(a)(i) (emphasis added).

⁶⁶ *See* SMITH, *supra* note 60, at 9 (“While the expedited removal statute governs the removal of certain aliens who are ‘arriving’ in the United States, it does not define this group.”).

⁶⁷ *See id.*

⁶⁸ Gebisa, *supra* note 59, at 576 (“In immigration proceedings prior to the passage of IIRIRA, that guarantee meant that aliens seeking admission into the United States could expect minimal due process guarantees, such as the right to counsel, to present evidence at a hearing, to challenge the government’s evidence, and to appeal an immigration judge’s decision. However, expedited removal procedures strip certain aliens seeking admission of those minimal due process guarantees by authorizing immigration inspection officers to order the alien’s removal from the United States without any hearing or review of that order.”); *cf.* 8 U.S.C. § 1229(a).

Intensifying the controversy, there are very limited exceptions to avoid removal via the expedited removal process.⁶⁹

Furthermore, an expedited removal is capable of proceeding at an alarming rate, especially considering the consequences of a removal determination and the limited opportunity for review.⁷⁰ If a person is determined to be subject to a removal, they are generally not entitled to any further review of such a determination and can be removed from the United States that very same day.⁷¹ Additionally, in order to challenge an expedited removal order, an appeal must be first filed with the Board of Immigration Appeals and then with a federal appellate court in the District of Columbia Circuit.⁷² This poses obvious hurdles for individuals that have already been removed from the United States.⁷³

As its organic statute makes clear, the expedited removal process is intended to be used against arriving noncitizens who do not possess valid entry documents or who committed fraud or misrepresentation on the application for entrance to the United States.⁷⁴ Muddying the waters, however, is the fact that these qualifying factors, or requirements (establishing who may be subject to the expedited removal process) are not fixed.⁷⁵ Currently, the expedited removal process is only permitted to be used

⁶⁹ See SMITH, *supra* note 60, at 16 (“Notwithstanding these restrictions, further administrative review occurs if an alien in expedited removal indicates an intent to seek asylum or claims that the alien fears persecution if removed. Administrative review also occurs if a person placed in expedited removal claims that the person is a U.S. citizen, an LPR, or has been granted refugee or asylee status. In these limited circumstances, DHS may not proceed with removal until the alien’s claim receives consideration.”).

⁷⁰ See Laplante, *supra* note 59, at 230 (explaining removal orders are “subject to very limited review”).

⁷¹ *Expanded Expedited Removal: What It Means and What to Do*, NAT’L IMMIGR. F., https://immigrationforum.org/wp-content/uploads/2019/09/Expanded-Expedited-Removal-What-to-Do_FINAL.pdf (last visited Apr. 20, 2024) (“Under expedited removal processes, certain noncitizens are deported in as little as a single day without an immigration court hearing or other appearance before a judge.”).

⁷² Kristin Macleod-Ball et al., *Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements*, AM. IMMIGR. COUNCIL 2–3 (Feb. 20, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory-_updated_2-21-17.pdf; SMITH, *supra* note 60, at 34.

⁷³ *Fact Sheet: Expedited Removal*, NAT’L IMMIGR. F. 1 (June 4, 2019), <https://immigrationforum.org/wp-content/uploads/2019/06/Fact-Sheet-on-Expedited-Removal.pdf>.

⁷⁴ 8 U.S.C. § 1225(b)(1)(A); see SMITH, *supra* note 60 (“[T]he INA provides for the expedited removal of arriving aliens who do not have valid entry documents or have attempted to gain their admission by fraud or misrepresentation.”); Gebisa, *supra* note 59, at 565 (“Under the ‘IIRIRA,’ Congress created a procedure for ‘expedited removal of inadmissible arriving aliens.’”).

⁷⁵ See Gebisa, *supra* note 59, at 572 (“[T]he exact procedural and geographical boundaries surrounding the enforcement of expedited removal remain unsettled.”).

against “arriving” noncitizens apprehended within 100 miles of a U.S. border and who are unable to prove continual presence in the country for the previous fourteen days.⁷⁶ However, the statutory limits of the IIRIRA permit the process to be expanded and used by immigration officers against *any* noncitizen, *anywhere* in the United States, who does not have valid entry documents or has committed fraud or misrepresentation on their application for entrance and has not been present in the United States for two years.⁷⁷ Thus, just as the removal process has been expanded in recent years to its statutory limits, the possibility remains that it will again be expanded to those statutory limits again.⁷⁸

Due to the interpretation of the IIRIRA permitting this expansion of the expedited removal process to essentially any noncitizen anywhere in the United States, it inappropriately subjects people who have obviously surpassed the “arriving” threshold to removal.⁷⁹ As a result, certain applications of the expedited removal process necessarily involve constitutional violations.⁸⁰ This occurs because, pursuant to the loose interpretation of “arriving,” immigration officers use the expedited removal process to remove people who are entitled to Fifth Amendment procedural due process protections.⁸¹ These constitutional rights and protections are guaranteed to all persons

⁷⁶ See SMITH, *supra* note 45, at 2 (“In 2019, DHS exercised authority to employ expedited removal to the full degree authorized by INA § 235(b)(1), to include all aliens physically present in the United States without being admitted or paroled, who have been in the country less than two years, and who lack valid entry documents or procured admission through fraud or misrepresentation. . . . In 2021, however, President Biden directed the Secretary of Homeland Security to consider whether to modify or rescind the expanded designation of aliens subject to expedited removal. In 2022, the DHS Secretary rescinded the expansion, citing DHS’s operational constraints and limited enforcement resources.”).

⁷⁷ See *id.* at 1 (noting that DHS may “extend application of expedited removal to ‘certain other aliens’ inadmissible on the same grounds if they (1) were not admitted or paroled into the United States by immigration authorities and (2) cannot establish at least two years’ continuous physical presence in the United States at the time of apprehension”).

⁷⁸ See *id.* at 2 (“In 2019, DHS exercised authority to employ expedited removal to the full degree authorized by INA § 235(b)(1), to include all aliens physically present in the United States without being admitted or paroled, who have been in the country less than two years, and who lack valid entry documents or procured admission through fraud or misrepresentation. A federal district court initially enjoined DHS from implementing this initiative pending a legal challenge, but the D.C. Circuit reversed that decision, enabling DHS to apply expedited removal in the interior of the United States pending the outcome of the litigation.”).

⁷⁹ See 8 U.S.C. § 1225(b)(1); SMITH, *supra* note 60, at 2 (“In addition to providing for expedited removal of certain arriving aliens, INA Section 235(b)(1) also confers the Secretary of the Department of Homeland Security (DHS) with the ability to expand the use of expedited removal to aliens present in the United States without being admitted or paroled if they have been in the country less than two years and do not have valid entry documents or have attempted to gain their admission by fraud or misrepresentation.”).

⁸⁰ See *infra* Part IV.

⁸¹ See 8 U.S.C. § 1225(b)(1); see also *infra* Part II.C.

physically present in the jurisdictional United States.⁸² However, the IIRIRA's expedited removal process permits some noncitizens who are present in the United States to still be removed without being afforded constitutionally required due process.⁸³

In large part, the source of the controversy surrounding the expedited removal process stems from the legislature's failure to provide a clear and adequate definition for the phrase "is arriving" in the statute.⁸⁴ As a result, governmental agencies have been forced to interpret the statute for themselves, which has led to an overly-broad interpretation of "is arriving."⁸⁵ In response to critiques, supporters of the expedited removal process, or its current application, often cite two doctrines as justification for its use: the plenary power doctrine and the entry fiction doctrine.⁸⁶ Both doctrines have been the subject of serious and arguably valid critiques, however, those critiques are beyond the scope of this Note.⁸⁷ However, they are worth noting, along with their controversy, as evidence that there is no satisfactory justification or explanation that exists for the expedited removal process's unconstitutional denial of due process protections.

III. CANONS OF STATUTORY CONSTRUCTION DO NOT SUPPORT THE CURRENT INTERPRETATION OF THE EXPEDITED REMOVAL PROCESS'S ORGANIC STATUTE

The current interpretation of 8 U.S.C. § 1225 is wholly inconsistent with multiple well-established canons of statutory construction, including the plain meaning canon, the no superfluous words canon, and the constitutional presumption canon. The source of these inconsistencies boils down to two words: "is" and "arriving." The word "arriving" is not defined by the statute and, as a result, the executive agencies tasked with enforcing the IIRIRA have seemingly been given *carte blanche* to interpret the

⁸² See *infra* Part IV.A.

⁸³ See, e.g., *Demore v. Kim*, 538 U.S. 510, 523 (2003) (extending constitutional protections to all people in the United States); see also *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Matthews v. Diaz*, 426 U.S. 67, 77 (1976); *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). *But see* 8 U.S.C. § 1225(c).

⁸⁴ See SMITH, *supra* note 60, at 9.

⁸⁵ See Brief for Respondent in Opposition at 34 n.8, *Wolf v. Innovation L. Lab*, 951 F.3d 1073 (9th Cir. 2020) (No. 19-1212).

⁸⁶ See *Gebisa*, *supra* note 59, at 571 ("Two controversial doctrines, the 'entry fiction' and 'plenary power' doctrines . . . were key rationales behind the initial articulation of expedited removal."); *Laplante*, *supra* note 59, at 243 ("The Court established this realm of unreviewable power by characterizing the regulation of immigration law as falling within 'plenary power,' a Supreme Court doctrine handed down under common law doctrine which gives Congress full power to create and review immigration law.").

⁸⁷ See, e.g., *Gebisa*, *supra* note 59, at 572, 583–89 (challenging the plenary power and entry fiction doctrines); *Laplante*, *supra* note 59, at 218–19, 243, 250, 258–59 (challenging the plenary power doctrine); *Wexler*, *supra* note 59, at 2045–46 (challenging case law giving rise to the entry fiction doctrine); SMITH, *supra* note 60, at 3–6 (explaining some of the controversy surrounding the plenary power and entry fiction doctrines).

statute as they please. As a further result, a meaning has been attributed to the statute that wildly expands the power of federal agents when determining whether to remove certain noncitizens.

A. *The Text of the Statute*

As discussed above, the expedited removal process provides for the streamlined removal of “arriving” noncitizens.⁸⁸ The relevant portion of the statute reads:

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who *is arriving* in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution⁸⁹

Thus, the text of the statute makes it abundantly clear that the expedited removal process only applies to an alien who “is arriving.”⁹⁰ However, that phrase has been interpreted to mean something it plainly does not, and this incorrect interpretation brings with it constitutional violations.

B. *The Common, Everyday Meaning of “Is Arriving”*

It is a fundamental canon of statutory construction that when a word within a statute is given no specific or specialized meaning, it is to assume its common, everyday meaning.⁹¹ As previously said, the source of the controversy regarding interpretation of the IIRIRA stems from the phrase “is arriving”—more specifically, the inappropriate interpretation of this phrase. Thus, because the IIRIRA does not define these words or the phrase, it should assume its common, everyday meaning.

The common, everyday meaning of a word is typically determined by looking at its definition in dictionaries. The word “arrive” is defined by multiple dictionaries to mean some iteration of “to reach a destination.”⁹² This is also the meaning that the

⁸⁸ See SMITH, *supra* note 60, at 13 (“[E]xpedited removal is a more streamlined process than formal removal proceedings”); see also Gebisa, *supra* note 59, at 566–67, 580 (explaining the expedited removal process streamlines an individual’s removal from the United States); Wexler, *supra* note 59, at 2068 (explaining how the streamlined process avoids many of the nuances of formal proceedings).

⁸⁹ 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added).

⁹⁰ *Id.*

⁹¹ See VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 54 (2022) (“Ordinary Meaning Canon: Words should be given ‘their ordinary, everyday meanings,’ unless ‘Congress has provided a specific definition’”).

⁹² See, e.g., *Arriving*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/arriving> (last visited Apr. 20, 2024) (defining “arriving” as “to reach a destination; to make an appearance; to come upon the scene”); *Arriving*, DICTIONARY.COM, <https://www.dictionary.com/browse/arriving> (last visited Apr. 20, 2024) (defining “arriving” as

public recognizes. However, the IIRIRA does not merely use the word “arrive.”⁹³ The IIRIRA uses the present participle form of the word: “is arriving.”⁹⁴ Present participles express “present action in relation to the time expressed by the finite verb in its clause”⁹⁵ Here, the finite verb “is” precedes “arriving.”⁹⁶ The drafters’ decision to use this verb as opposed to the past participle or the future participle forms clearly denotes that the expedited removal process applies only to those individuals who are presently engaged in the process of arriving to the United States. Therefore, “is arriving,” in the context of the IIRIRA’s expedited removal process, must be understood to refer to one who is actively engaged in the process of reaching one’s destination—in this case, the destination being the United States.⁹⁷

Absent a specialized definition to the contrary, the plain meaning canon does not permit for the expansion of the use of the expedited removal process to all people that “have arrived” or “will arrive,” because such an expansion would be inconsistent with the plain meaning of the text. The statute, based on its plain meaning, is necessarily limited in its application to only those persons presently engaged in the process of arriving. As a result, common sense and the plain meaning canon demand that the expedited removal process’s applicability is limited to only those actively engaged in reaching their destination. This strongly suggests that this removal process may only be employed against persons actively entering the United States through a port-of-entry or while actively attempting to unlawfully enter the United States.

C. Attaching Meaning to Every Word

A second fundamental canon of statutory construction requires that “no clause, sentence or word . . . be construed to be superfluous, void or insignificant.”⁹⁸ This

“to come to a certain point in the course of travel; reach one’s destination”); *Arriving*, THEFREEDICTIONARY.COM, <https://www.thefreedictionary.com/arriving> (last visited Apr. 20, 2024) (defining “arriving” as “to reach a destination”); *Arriving*, BRITANNICA.COM, <https://www.britannica.com/dictionary/arriving> (last visited Apr. 20, 2024) (defining “arriving” as “to come to or reach a place after traveling, being sent, etc.”).

⁹³ 8 U.S.C. § 1225(b)(1)(A)(i).

⁹⁴ *Id.*

⁹⁵ *Present Participle*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/present%20participle> (last visited Apr. 20, 2024) (“[A] participle that typically expresses present action in relation to the time expressed by the finite verb in its clause and that in English is formed with the suffix -ing and is used in the formation of the progressive tenses.”).

⁹⁶ 8 U.S.C. § 1225(b)(1)(A)(i).

⁹⁷ BRANNON, *supra* note 91, at 51–52; *Arriving*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/arriving> (last visited Apr. 20, 2024) (“[T]o reach a destination”).

⁹⁸ Patrick Bracher, *Every Word Must Be Given a Meaning When Interpreting a Statute*, NORTON ROSE FULBRIGHT (May 12, 2021), <https://www.financialinstitutionslegalsnapshot.com/2021/05/every-word-must-be-given-a-meaning-when-interpreting-a-statute> (“When interpreting a statutory provision, one must

canon demands that, when interpreting a statute, it is necessary to give meaning to each and every word used.⁹⁹ Thus, when interpreting § 1225, every single word must be given meaning, including “is” and “arriving.”¹⁰⁰ Incidental to this canon, words that are not in the text of the statute cannot be read into the statute.¹⁰¹

Here, it is necessary to understand that § 1225 does not apply to all noncitizens that “have arrived” or “will arrive.” Instead, the statute only permits the expedited removal process to remove a noncitizen that “is arriving.”¹⁰² Although these phrases may appear to be saying similar things on their face, assigning meaning to each individual word reveals that these phrases refer to significantly different stages of the immigration process. Therefore, consistently and in conjunction with the plain meaning canon discussed above,¹⁰³ the IIRIRA’s expedited removal process is clearly limited in its application to only noncitizens who are actively engaged in the process of arriving in the United States; the process should not be interpreted as a tool for federal agents to employ against noncitizens who will attempt to illegally arrive in the United States in the future or have arrived in the United States in the past.

D. *The Constitutional Presumption*

A final, but particularly relevant canon of statutory construction, maintains that “statutes are presumed to be constitutional.”¹⁰⁴ This canon requires that when there are two possible interpretations of a statute—one which would render the statute constitutional and another which would render the statute unconstitutional—the interpretation that would render the statute constitutional must be used.¹⁰⁵

Thus, when faced with multiple interpretations of § 1225, such as the federal agencies’ interpretations and alternatively the ordinary meanings of all the statute’s words, only one of the interpretations can prevail. Because the federal agencies’ interpretation denies constitutional due process to persons entitled to such protections, it is necessary to adopt the interpretation rooted in the plain meanings of all the

proceed from the fundamental premise that meaning must be given to every word (provided the context lends itself to such meaning). The rationale for this principle is that a statute is not taken to use words without meaning.”).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ BRANNON, *supra* note 91, at 51.

¹⁰² 8 U.S.C. § 1225(b)(1)(A)(i).

¹⁰³ *See supra* Part III.B.

¹⁰⁴ *Commonly Applied Rules of Statutory Construction*, COLO. GEN. ASSEMBLY, <https://leg.colorado.gov/agencies/office-legislative-legal-services/commonly-applied-rules-statutory-construction> (last visited Apr. 20, 2024) (“If a statute can be interpreted two ways—one of which is constitutional and the other unconstitutional—the court will choose the constitutional interpretation. The party in a lawsuit that is claiming that a law is unconstitutional has the burden of proving unconstitutionality beyond a reasonable doubt.”).

¹⁰⁵ *Id.*

words.¹⁰⁶ Therefore, the only appropriate interpretation of the expedited removal process requires that it only be used against noncitizens who are in the process of arriving.

E. The Ordinary Meaning Interpretation of 8 U.S.C. § 1225 Only Comports with the Second Sub-Category of Noncitizens

Considering the ordinary meaning interpretation of § 1225 in conjunction with the different categories of noncitizens, it is clear that the expedited removal process may only be appropriately employed against the second category.¹⁰⁷ The expedited removal process cannot be used against the first category of noncitizens either because individuals within this category are not actively arriving to the United States or are simply not within the jurisdiction of American laws.¹⁰⁸ Even if a person has initiated the process of arriving to the United States, the sheer fact that they are outside of the jurisdictional United States prevents the applicability of § 1225¹⁰⁹ and they cannot be subjected to the expedited removal process.¹¹⁰ Similarly, individuals within the third category, those who are squarely residing in the United States and have been for some time, are also not subject to the expedited removal process.¹¹¹ This is because individuals who are within the United States and have been living and working there for some time are no longer in the process of actively arriving to the United States—they have already arrived.¹¹²

Thus, the only category that the expedited removal process can appropriately be employed against is the second category of noncitizens, or those individuals who are in the process of illegally arriving to the United States and are located at or near a U.S. border or port-of-entry.¹¹³ This is because individuals apprehended in this situation are still engaged in the process of arriving to the United States.¹¹⁴ The fact they are still engaged in the process of arriving brings them directly within the purview of the expedited removal process and Congress's plenary power over immigration.¹¹⁵

¹⁰⁶ See BRANNON, *supra* note 91, at 52, 54.

¹⁰⁷ See *supra* Part I.A.2.

¹⁰⁸ See *supra* Part I.A.2.

¹⁰⁹ See SMITH, *supra* note 60, at 5.

¹¹⁰ *Id.*

¹¹¹ See *supra* Part I.B.

¹¹² See *supra* Part I.B.

¹¹³ See SMITH, *supra* note 60, at 49–52.

¹¹⁴ *Id.*

¹¹⁵ See Laplante, *supra* note 59, at 243.

IV. THE CURRENT INTERPRETATION OF THE EXPEDITED REMOVAL PROCESS'S
ORGANIC STATUTE NECESSARILY INVOLVES CONSTITUTIONAL DUE PROCESS
VIOLATIONS

The current interpretation of the expedited removal process, as determined by the various federal agencies, necessarily involves Fifth Amendment Due Process violations.

A. *The Fifth Amendment's Due Process Protections Apply to All "Persons" Physically Present in the United States*

The United States Constitution extends Fifth Amendment protections to all "person[s]," including noncitizens.¹¹⁶ Conclusive evidence of this can be found in the text of the Fifth Amendment.¹¹⁷ Various Supreme Court opinions and academic works affirm that this is the proper interpretation of the Fifth Amendment.¹¹⁸

The Fifth Amendment's clear and unambiguous language demands that "[n]o person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . ."¹¹⁹ The Amendment's use of the word "person" evidences its broad applicability.¹²⁰ Therefore, one's status as a person is sufficient to guarantee protection.¹²¹ Any consideration beyond one's status as a "person" is irrelevant in determining what rights and protections are owed to that person.¹²²

¹¹⁶ U.S. CONST. amend. V.

¹¹⁷ *See id.*

¹¹⁸ *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953))); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (explaining that the Due Process Clause applies "to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *see also, e.g., Laplante, supra* note 59, at 219–70 (discussing due process violations inherent in the expedited removal process); *Gebisa, supra* note 59 (discussing how enforcement of the expedited removal process causes due process violations); *Wexler, supra* note 59 (discussing entry fiction doctrine's flaws and the constitutional protections owed to noncitizens).

¹¹⁹ U.S. CONST. amend. V.

¹²⁰ *See id.*; SMITH, *supra* note 60; *see, e.g., Zadvydas*, 533 U.S. at 693 (recognizing due process protections as applying to all "persons" regardless of the legality of their presence); *Plyler*, 457 U.S. at 210 (recognizing illegal aliens as persons under the Fifth Amendment); *Demore v. Kim*, 538 U.S. 510, 523 (2003) ("It is well established that the Fifth Amendment entitles aliens to due process of law . . ."); *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 994 (9th Cir. 2012) ("Even aliens who are in the United States illegally may bring constitutional challenges . . ."); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Mezei*, 345 U.S. at 212.

¹²¹ *See* U.S. CONST. amend. V; *Mezei*, 345 U.S. at 212 (passing through the border into the United States, even illegally, entitles a person to due process protections).

¹²² *Mezei*, 345 U.S. at 212.

As a result, due process protections are not reserved exclusively for U.S. citizens.¹²³ If citizenship was intended to be a prerequisite to protection under the Fifth Amendment, the drafters of the Amendment would have used specific language to establish this.¹²⁴ Other constitutional amendments use the language, “citizen[s] of the United States” to reserve rights exclusively for citizens.¹²⁵ But, such language was not used here; the Fifth Amendment explicitly uses “person” rather than “citizen.”¹²⁶ This choice of language makes clear that the due process protections are to be extended to all people regardless of citizenship.

The Supreme Court has directly addressed the issue of constitutional protections for noncitizens.¹²⁷ In a plethora of cases, the Court has held that noncitizens are entitled to various constitutional rights and protections, including due process protections.¹²⁸ These opinions demonstrate the Court’s understanding that Fifth Amendment protections extend to all people in the United States.¹²⁹

It must be noted, however, that there are necessary limitations to the definition of “person.” Fifth Amendment protections do not extend to all people anywhere in the

¹²³ It is well-established that noncitizens are entitled to Fifth Amendment protections. *See* U.S. CONST. amend. V; *see, e.g., Demore*, 538 U.S. at 523; *Mezei*, 345 U.S. at 212; *Mathews*, 426 U.S. at 77; *Plyler*, 457 U.S. at 210; *Zadvydas*, 533 U.S. at 693.

¹²⁴ Various amendments to the Constitution contain exclusive, rather than inclusive, language. For example, the 11th, 14th, 15th, 24th, and 26th amendments all contain language explicitly limiting their applicability to “citizens” of specific states or the United States. *See, e.g.,* U.S. CONST. amend. XI (“[A]gainst one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”); *id.* amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”); *id.* amend. XV, § 1 (“[C]itizens of the United States”); *id.* amend. XXIV, § 1 (“[C]itizens of the United States”); *id.* amend. XXVI, § 1 (“[C]itizens of the United States”).

¹²⁵ Protections reserved exclusively for citizens make this abundantly clear through the use of carefully selected language. *See, e.g.,* U.S. CONST. amends. XI, XIV, XV, XXIV, XXVI (employing “citizen” to reserve certain rights and privileges exclusive for those who possess citizenship status).

¹²⁶ *See id.* amend. V (employing “person”). *But see, e.g., id.* amend. XI (employing “citizen”).

¹²⁷ *See, e.g., Demore*, 538 U.S. at 523; *Mezei*, 345 U.S. at 212; *Mathews*, 426 U.S. at 77; *Plyler*, 457 U.S. at 210; *Zadvydas*, 533 U.S. at 693.

¹²⁸ The Supreme Court has determined that the central question revolves around the noncitizen’s physical location. Noncitizens outside of the United States are subject to Congress’s will regarding their admittance, while noncitizens within the United States are entitled to many of the same rights and protections that citizens are entitled to. *See, e.g., Demore*, 538 U.S. at 523; *Mezei*, 345 U.S. at 212; *Mathews*, 426 U.S. at 77; *Plyler*, 457 U.S. at 210; *Zadvydas*, 533 U.S. at 693.

¹²⁹ *See supra* note 128 and accompanying text.

world.¹³⁰ The Supreme Court has held that people outside of the jurisdictional United States are not entitled to constitutional protections.¹³¹ Physical presence in the jurisdictional United States is, therefore, an essential prerequisite to establish one's right to Fifth Amendment protections, including procedural due process.

The unambiguous text of the Fifth Amendment, numerous Supreme Court opinions, and ample academic literature confirm that Fifth Amendment protections apply to all people present in the United States, citizens and noncitizens alike.¹³² Therefore, because the expedited removal process inherently involves due process violations¹³³ and noncitizens in the United States are entitled to these protections, the expedited removal process necessarily denies constitutional rights and protections when carried out against noncitizens in the United States.¹³⁴

B. The Expedited Removal Process Necessarily Involves Due Process Denials When Employed Against Certain Noncitizens

At its heart, due process protections involve “an assurance that all levels of American government must operate within the law . . . and provide fair procedures.”¹³⁵ Due process involves numerous guarantees, such as the right to counsel, to present evidence at a hearing, to challenge the government's evidence, and

¹³⁰ See, e.g., *Zadvydas*, 533 U.S. at 693 (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (“[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”).

¹³¹ See, e.g., SMITH, *supra* note 60 (“The Supreme Court has repeatedly held that the government may exclude an alien seeking to enter this country without affording him the traditional due process protections that otherwise govern formal removal proceedings”); *Zadvydas*, 533 U.S. at 693 (limiting constitutional protections to persons inside the United States’ geographic borders); *Verdugo-Urquidez*, 494 U.S. at 269 (declining to extend Fifth Amendment rights and protections to persons outside of the United States).

¹³² U.S. CONST. amend V.

¹³³ The due process violations inherent in the expedited removal process are discussed in Part II.C. The violations pertain to the denial of the opportunity for legal representation, a trial, and to present evidence.

¹³⁴ This Note does not argue that every conceivable application of the expedited removal process results in constitutional due process violations. This Note only argues that when used against a person entitled to constitutional due process protections, a violation occurs. See *supra* Part II.C.

¹³⁵ *Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process (Oct. 2022) (“The Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be ‘deprived of life, liberty or property without due process of law.’ The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states. These words have as their central promise an assurance that all levels of American government must operate within the law (‘legality’) and provide fair procedures.”).

to appeal a judge's decision.¹³⁶ Despite that due process protections are guaranteed to all “persons” physically present in the United States, regardless of immigration status, and the fact that the expedited removal process inherently denies due process to those subjected to it, the expedited removal process continues to be used by various federal agencies.¹³⁷

A fundamental aspect of the expedited removal process is the removal of a subjected individual “without further hearing or review.”¹³⁸ This means, as discussed above, there are inherent denials of due process in the expedited removal process. This fact necessitates the abandonment or amendment of § 1225 to immediately discontinue all constitutional violations relating to enforcement of this statute.

C. *The Fictitious Entry Fiction Doctrine*

Despite the blatant constitutional violations that arise when the expedited removal process is employed against noncitizens who have surpassed the arriving phase of the immigration process, it continues to be used.¹³⁹ These blatant violations are justified via the judicially constructed “entry fiction doctrine” that resulted from the Supreme Court’s desire to effectuate a policy Congress sought to implement.¹⁴⁰ The doctrine “provides that certain constitutional rights are not extended to those on the threshold of initial entry.”¹⁴¹ The expedited removal process reasons that noncitizens not lawfully admitted to the United States who are “on the threshold of entry” are not entitled to constitutional rights and protections.¹⁴²

This doctrine provides the sole exception to the constitutional guarantee of due process protections for all people physically present in the United States. The entry fiction doctrine does, however, shed light on the term “arriving,” as it is used by the IIRIRA’s expedited removal process. For example, this doctrine originally permitted for the denial of due process protections only to those individuals located at ports-of-entry to the United States.¹⁴³ Immigration officers and courts are still permitted to

¹³⁶ Gebisa, *supra* note 59, at 576.

¹³⁷ See Baker, *supra* note 63; SMITH, *supra* note 60, at 2 (“[E]xpedited removal is a major component of immigration enforcement, and in recent years it has been one of the most regularly employed means by which immigration authorities remove persons from the United States.”).

¹³⁸ See 8 U.S.C. § 1225(b)(1)(A)(i).

¹³⁹ See Baker, *supra* note 63.

¹⁴⁰ See *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); Laplante, *supra* note 59, at 243 (“This plenary power does not arise out of a specific constitutional enumeration, but rather comes from judge-made decisions . . .”); Wexler, *supra* note 59, at 2039; *Kaplan v. Tod*, 267 U.S. 228, 229–31 (1925) (extending the entry fiction to cover noncitizens that have been paroled into the United States).

¹⁴¹ Gebisa, *supra* note 59, at 584.

¹⁴² *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1098 (9th Cir. 2004); see SMITH, *supra* note 60, at 5 (“[T]he alien is legally considered to be ‘standing on the threshold of entry,’ and outside the territorial jurisdiction of the United States.”).

¹⁴³ Wexler, *supra* note 59, at 2039; *Ju Toy*, 198 U.S. at 263.

deny constitutional rights to noncitizens detained at ports-of-entry, but Supreme Court opinions have expanded the doctrine, citing Congress's plenary power, to deny constitutional rights to persons within the U.S. border's immediate vicinity.¹⁴⁴ Thus, the entry fiction doctrine only provides justification for the denial of constitutional due process protections to the second category of noncitizens, or those individuals apprehended at or near the U.S. border or a port-of-entry.

Once again, these individuals are seemingly still actively involved in the process of arriving in the United States. Further, the second category of noncitizens exist in a gray area on the "threshold of initial entry."¹⁴⁵ As a result, these individuals are likely not entitled to the full spectrum of constitutional protections.¹⁴⁶ This serves as further evidence that the expedited removal process has been inappropriately expanded to be used against a far larger group of noncitizens than Congress intended.

V. CONCLUSION

The preceding arguments demonstrate just a few of the many egregious problems associated with the expedited removal process. However, the removal process continues to be used by federal agencies to systematically deny constitutional rights and protections owed to noncitizens and to remove these people from the United States at the discretion of low-level immigration officers without affording them the opportunity to present their case before an immigration judge.

The current interpretation of the expedited removal process has wildly and inappropriately expanded federal agencies' power to remove noncitizens. To remedy this, absent an amendment by the legislature to § 1225 providing a technical definition of "is arriving," the current interpretation must be replaced by prescribing the ordinary meanings of all the words of the statute. Not only is this more consistent with well-established canons of statutory construction, but it also makes an unconstitutional statute constitutional. And it is well-established that when a constitutional and unconstitutional interpretation of a statute exist, the statute must be interpreted in a manner that does not render the statute inconsistent with the Constitution. Limiting the scope of the expedited removal process to only those noncitizens who are actively in the process of arriving to the United States better ensures that the constitutional rights and protections owed to those entitled to them are not at risk.

Thus, § 1225 and the expedited removal process must be either amended, repealed, or, at the very least, be understood to only allow the removal of noncitizens who are actively engaged in the process of arriving to the United States. The use of the expedited removal process to transgress upon the rights and protections of any group of people sets a dangerous precedent that threatens individual liberties.

¹⁴⁴ *Ju Toy*, 198 U.S. at 263; *Gebisa*, *supra* note 59, at 584; *Laplante*, *supra* note 59, at 243.

¹⁴⁵ *See SMITH*, *supra* note 60, at 5.

¹⁴⁶ *See id.*