No. 19-161

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Petitioners,

v.

VIJAYAKUMAR THURAISSIGIAM,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR SCHOLARS OF THE LAW OF HABEAS CORPUS AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are scholars at universities across the United States with expertise in the law of habeas corpus. Amici have collectively spent decades researching and writing about the writ of habeas corpus and the Suspension Clause of Article I, Section 9 of the Constitution. This brief is submitted to provide an overview of the historic reach and use of the writ, as well as the Court's jurisprudence on its availability to noncitizens who have entered the territory of the United States.

BACKGROUND

The context for this case arises from the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") and, more specifically, the act's allowance for expedited removal of certain noncitizens. Through expedited removal, Congress granted the Attorney General authority to remove from the United States specified noncitizens who, following a truncated opportunity to be heard, are deemed by an immigration officer to be inadmissible under one of two statutory grounds. 8 U.S.C. § 1225(b)(1)(A)(i). Individuals subject to expedited removal generally fall into two categories: (1) noncitizens arriving at the border and (2) noncitizens who enter the country without inspection and are unable to demonstrate they have been physically present in the country for two years. *Id.* § 1225(b)(1)(A)(i), (iii). At the time of the events in this case, and until only recently, the Attorney General had ap-

[1] All parties have provided written consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person other than amici and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

plied the expedited removal procedures for persons in this second category to more circumscribed groups: (1) noncitizens apprehended within 100 miles of the land or sea borders who allegedly spent fewer than 14 days within the United States after entering without inspection, and (2) noncitizens who entered without inspection by sea, regardless of where they were apprehended, within two years of entry.[2] The Department of Homeland Security recently expanded expedited removal to the full scope of its statutory authority, applying the process to noncitizens encountered anywhere in the United States who have allegedly been continuously present in the country for less than two years. *See Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409-35,410, 35,412 (July 23, 2019).

Under 8 U.S.C. § 1252(e)(2), judicial review of expedited removal orders is available in habeas corpus proceedings but is severely restricted. The statute provides that judicial review "shall be limited to determinations of—(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under [§ 1225(b)(1)], and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee … or has been granted asylum." The statute further provides that "[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal." *Id.* § 1252(e)(5).

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[2] *See* Press Release, *Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border* (Jan. 30, 2006), https://www.hsdl.org/?view&did=476965; *Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004); *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68,924, 68,924 (Nov. 13, 2002).

In this case, after Mr. Thuraissigiam entered the United States, the government placed him into expedited removal proceedings, rejected his claim for asylum, determined he was ineligible for withholding of removal and relief under the Convention Against Torture, and ordered him removed. Mr. Thuraissigiam filed a habeas corpus petition, arguing that although he entered the country without inspection, he is entitled to protection against removal to Sri Lanka under statutory provisions implementing international obligations of the United States, and that immigration officials have committed legal and constitutional violations in ordering him removed, leading to his unlawful detention.

The district court dismissed Mr. Thuraissigiam's habeas petition for lack of subject matter jurisdiction, relying on 8 U.S.C. § 1252(a)(2) and (e)(2). The court held that while Mr. Thuraissigiam is entitled to the protections of the Suspension Clause, the severely restricted judicial review afforded by the district court's interpretation of § 1252(e)(2) is constitutionally sufficient. Pet. App. 51a-54a. The court of appeals reversed, holding that the Suspension Clause guarantees review of Mr. Thuraissigiam's claims and that § 1252(e)(2) violates the Suspension Clause. Pet. App. 40a.

SUMMARY OF THE ARGUMENT

Dating back to English common law, the writ of habeas corpus has provided a right to judicial review of the legality of restraints on one's liberty and has been understood to be available to both citizens and foreigners within the realm. *See INS* v. *St. Cyr*, 533 U.S. 289, 300-302 (2001). The common law experience was adopted by the Framers, who understood that the writ served as "the great bulwark of personal lib-

erty; since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not … ." Story, *Commentaries on the Constitution of the United States* § 1333 (1833). Accordingly, this Court has said that the Suspension Clause protects, at minimum, the writ as it existed in 1789. *St. Cyr*, 533 U.S. at 301. At that time and in the centuries since, this Nation's courts have reviewed habeas petitions filed by persons in the United States—citizens and noncitizens alike—regardless of when or where they were apprehended. This review included instances in which authorities detained people in order to remove them from the jurisdiction, as in cases of deserting seamen and extradition.

The government cannot circumvent the Suspension Clause by creating a new legislative classification for certain noncitizens present in the United States and then maintaining that this new category of persons has no entitlement to any constitutional protections with respect to their removal. Congress's plenary authority over noncitizens remains subject to the limitations of the Constitution. *E.g.*, *INS* v. *Chadha*, 462 U.S. 919, 940-941 (1983). Those limitations include the Suspension Clause, which restricts the powers of the political branches and preserves the role of the judiciary in protecting the separation of powers. *Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008). Congress thus has no power to evade the Suspension Clause by the expedient of devising a new immigration classification for certain persons present in the United States. Allowing such manipulation would contravene the central purpose of the Clause—namely, to *constrain* the political branches' power to restrict access to the writ. U.S. Const. art. I, § 9, cl. 2.

Indeed, this Court's decisions during the "finality era"—the period between 1891 and 1952 during which Congress acted to preclude judicial review of the Attorney General's removal orders to the maximum extent permissible under the Constitution—confirms that the Suspension Clause guarantees noncitizens the right to challenge the legal basis for their immigration-related detention through the writ of habeas corpus. Notwithstanding the finality provisions of the immigration statutes during that period, and notwithstanding the Court's recognition that noncitizens had limited due process rights with respect to their admission to the country, this Court held that noncitizens subject to removal orders were "doubtless entitled" to petition for habeas corpus "to ascertain whether [their] restraint [was] lawful." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892).

For these reasons, the court of appeals properly held that Mr. Thuraissigiam, a noncitizen who entered the country, is entitled to invoke the protections of the Suspension Clause. That provision, in turn, requires more than the restricted, insubstantial judicial review that is provided under 8 U.S.C. § 1252(e). "At its historical core, the writ of habeas corpus has served as a means of reviewing the *legality* of Executive detention." *St. Cyr*, 533 U.S. at 301 (emphasis added). Consistent with that central purpose, the writ has long allowed individuals to challenge their detention "based on errors of law," including "constitutional error" and "the erroneous application or interpretation of statutes." *Id.* at 302-303. This Court reaffirmed this scope of habeas review in *Boumediene*, 553 U.S. at 779-783, declaring it "uncontroversial" that the Suspension Clause protects the jurisdiction of a court to decide questions regarding "'the erroneous application or interpretation'" of law.

These well-established principles demonstrate that the Suspension Clause would be violated if a habeas court had no jurisdiction to consider a noncitizen's legal and constitutional challenges to an expedited removal proceeding. The availability of the token, impotent judicial review under § 1252(e) cannot satisfy the Suspension Clause. Congress cannot circumvent the protections of the Suspension Clause by providing judicial review, but severely restricting it to three basic factual issues.

ARGUMENT

I. THE SUSPENSION CLAUSE GUARANTEES THE AVAILABILITY OF HABEAS TO NONCITIZENS WHO HAVE ENTERED THE UNITED STATES AND ARE DETAINED FOR THE PURPOSES OF REMOVAL

This Court's decisions recognize that persons physically present in the United States are entitled to access to the writ of habeas corpus regardless whether the person is a citizen or not. "Habeas corpus is a right of persons, not only a right of citizens." Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 Colum. L. Rev. 537, 545 (2010). Neither this Court's decisions nor the principles of English common law that informed the Framers' prohibition on suspension of the writ support a status-based exception for noncitizens within the United States or noncitizens subjected to expedited removal proceedings.

The writ's application at English common law and in the early history of this country is instructive on the question presented in this case. This Court has made clear that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker* v.

Turpin, 518 U.S. 651, 663-664 (1996)); *see also Boumediene* v. *Bush*, 553 U.S. 723, 746 (2008) (same). Analyzing that "historical core," this Court has explained that the common law writ "served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. Whether "[i]n England prior to 1789, in the Colonies, [or] in this Nation," the common law writ was "available to nonenemy aliens as well as to citizens." *Id.* at 301-302. In that manner, the protection of the writ at the time of the Founding accorded with the principle under English common law that persons physically present in the sovereign's realm were both "entitled to its benefits, and subject to its burdens." Legal Historians Amici Br. in Support of Respondent, *INS* v. *St. Cyr*, No. 00-767, 2001 WL 306173, at *10 (U.S. Mar. 27, 2001); *Sir Matthew Hale's The Prerogative of the King* 56 (D.E.C. Yale ed., 1976); *see also Calvin's Case* (1608) 77 Eng. Rep. 377, 383 (KB) ("When an alien … cometh into England … as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath been said) draweth the other.").

Aliens were not an exception to this principle. They "were understood as owing the allegiance of a subject, even if this allegiance was given only locally, or temporarily, as a result of being within the queen's dominions and thus under her protection." Halliday, *Habeas Corpus: From England to Empire* 204 (2010); *see also Case of Du Castro* (1697) 92 Eng. Rep. 816 (KB) (granting bail on habeas petition and rejecting argument that defendant was "not [e]ntitled to have a habeas corpus" on account of his status as a "foreigner"); *Somerset* v. *Stewart* (1772) 98 Eng. Rep. 499, 509-510

(KB) (concluding that presence in the realm was sufficient basis to trigger habeas protection for enslaved African against removal to Jamaica).

From English common law, the writ's protections were embraced by the colonies. S*ee* Duker, *A Constitutional History of Habeas Corpus* 115 (1980) (recounting that the writ operated in all thirteen colonies). Those protections were then "provided for, in the most ample manner, in the plan of the [Constitutional] convention." The Federalist No. 83, at 573 (Hamilton) (Jacob E. Cooke ed., 1961). Noncitizens in the United States at the Founding thus could petition for habeas corpus regardless whether their presence in the United States was brief or their ties to the country limited. *See St. Cyr*, 533 U.S. at 301-302 & n.16 (discussing availability of the writ to aliens within the United States at the Founding).[3]

For example, in the 1813 case of *Ex parte D'Olivera*, the U.S. Circuit Court for the District of Massachusetts (per Justice Story, riding circuit) discharged from confinement Portuguese sailors who had been arrested and detained for deserting their vessel in

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[3] *See also* Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 990-1004 (1998) (surveying history of foreigners' access to habeas corpus in United States before period of modern immigration regulation); Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2517, 2523-2524 & nn.113-114 (1998) (discussing access to habeas corpus at English common law and noting "[a]liens in the United States have likewise been able to challenge their confinement through habeas corpus since the nation's founding"); Oldham & Wishnie, *The Historical Scope of Habeas Corpus and* INS v. St. Cyr, 16 Geo. Immigr. L.J. 485, 496-499 (2002) (discussing habeas corpus for Acadian refugees in American colonies in the 1750s).

Boston harbor. 7 F. Cas. 853, 853 (C.C.D. Mass. 1813) (No. 3967). Similarly, in *Commonwealth* v. *Holloway*, the Supreme Court of Pennsylvania discharged an alleged foreign deserter upon concluding that neither common law, treaty, nor statute authorized his detention so that he could be "carried out of the country." 1 Serg. & Rawle 392, 394-396 (Pa. 1815). These early American cases, and others like them,[4] confirm that all persons who entered the United States, regardless of the duration of their presence or the significance of their ties to the country, had access to the writ. Importantly, the cases also demonstrate that habeas was available for courts to review the legality of detention undertaken for purposes of removal of the petitioner from the country.

The Founding Era understanding that habeas was available to review the legality of orders requiring aliens to depart the country is confirmed by James Madison's Report on the Virginia Resolutions, which condemned as unconstitutional the Alien Friends Act of 1798 and its authorization for such orders. Among the

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[4] *See also, e.g.*, *Case of the Deserters from the British Frigate L'Africaine*, 3 Am. L.J. & Misc. Repertory 132 (Pa. 1810) (reporting 1809 Maryland decision discharging alleged deserters); *Case of Hippolyte Dumas*, 2 Am. L.J. & Misc. Repertory 86 (Md. 1809) (reporting 1807 Pennsylvania decision discharging alleged deserters); *Commonwealth* v. *Chambre*, 4 U.S. (4 Dall.) 143 (Pa. 1794) (granting habeas petition of two recently imported slaves whose former owner attempted to reclaim them after they had absconded to Pennsylvania).

Similarly, individuals detained in the early history of our Nation as part of their transfer to another state availed themselves of the habeas writ to review the legality of their detention. *See Arabas* v. *Ivers*, 1 Root 92 (Conn. Super. Ct. 1784) (releasing former slave imprisoned in New Haven by his former owner "for safe-keeping" during his return to New York).

"sacred" principles violated by the Act, according to Madison's Report, was the principle that a person "have the benefit of a writ of habeas corpus, and thus obtain his release, if wrongfully confined." By allowing "the executive magistrate alone" to "order the suspected alien to depart the territory of the United States," Madison argued, "the benefit of the writ of habeas corpus, may be suspended with respect to the party, although the constitution ordains, that it shall not be suspended, unless when the public safety may require it in case of rebellion or invasion."[5]

Later in the history of the republic, before the development of modern immigration law, the writ also was available to persons, usually noncitizens, to obtain judicial review of the legality of detention undertaken for the purpose of extradition to another government. For example, in the case of *In re Stupp*, 23 F. Cas. 296, 300 (C.C.S.D.N.Y. 1875) (No. 13,563), the court considered the habeas petition of Joseph Stupp after demand for his extradition for crimes committed in Belgium. Then-Judge Blatchford recognized that the "great purposes of the writ of habeas corpus can be maintained, as they must be," requiring the court to "inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute." *Id.* at 303;[6] *see also In re*

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[5] Madison's Report on the Virginia Resolutions (Jan. 7, 1800) *in* 17 Papers of James Madison 318 (D. Mattern ed. 1991).

[6] Justice Blatchford later wrote for the Court in *United States* v. *Jung Ah Lung*, 124 U.S. 621, 626 (1888), holding that the district court had jurisdiction to issue the writ in the case of an excluded Chinese alien. He also joined the opinion in *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892), in which this Court affirmed that an arriving noncitizen prevented from landing in the

Washburn, 4 Johns. Ch. Rep. 473 (N.Y. Ch. 1819) (granting habeas petition of noncitizen following request for extradition).[7]

The historical record thus demonstrates that the touchstone for access to the writ of habeas corpus has not been U.S. citizenship or ties to the country, but rather whether the petitioner challenges control of his person, including detention for the purposes of transporting one out of the jurisdiction. That teaching endures: "[A]bsent suspension, the writ … remains available to *every individual detained within the United States*." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) (emphasis added).

II. CONGRESS'S POWER OVER IMMIGRATION DOES NOT ALLOW IT TO ENACT A *DE FACTO* SUSPENSION OF THE WRIT

In this case, the government seeks to carve out an exception to the historical scope of the writ of habeas corpus. The government does so based on Congress's attempt to treat certain noncitizens already in the United States as persons seeking admission into the country and the further contention that such persons

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United States is "doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."

[7] There is similar evidence of the availability of the writ to obtain judicial review of the legality of detention for purposes of interstate extradition. *See e.g.*, *People* v. *Goodhue*, 2 Johns. Ch. Rep. 198 (N.Y. Ch. 1816) (releasing prisoner held in New York for possible extradition to Kentucky for misdemeanor allegedly committed there). *Goodhue* followed the tradition of English common law. *See*, *e.g.*, *Rex* v. *Kimberley*, 93 Eng. Rep. 890, 2 Strange 848 (KB 1729) (reviewing on writ of habeas corpus the petition of a prisoner detained in order to be transmitted to Ireland for crimes committed there).

have no due process rights with respect to admission. Neither basis can justify the suspension of the writ of habeas corpus effected by the expedited removal provisions at issue here. To the contrary, this Court's decisions, including those during the finality era, confirm that the Suspension Clause requires the availability of the habeas writ in these circumstances.

1. This Court's precedent and centuries of practice demonstrate that the applicability of the Suspension Clause does not turn on whether the power sought to be checked is a plenary power—or, more specifically, is Congress's power over immigration. The reason is both basic and fundamental to the purpose of the Suspension Clause as a restriction on the powers of the political branches. Because "the Constitution is viewed as the creator and origin of all national government authority," "the government's enumerated powers are constrained by the Constitution's prohibitions on government action." Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1, 19-20 (2002).

When this Court has addressed Congress's "'plenary power' to create immigration law," *Zadvydas* v. *Davis*, 533 U.S. 678, 695 (2001), or acknowledged its "plenary authority … over aliens," *INS* v. *Chadha*, 462 U.S. 919, 940 (1983), it has made clear that Congress must choose "constitutionally permissible means" to "implement[] that power," *Id.* at 941. In that manner, as with any other power, so-called plenary power remains "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695; *see also Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1212-1213 (2018) (concluding that Immigration and Nationality Act definition of ground for deportation is subject to same "void-for-vagueness" standard that is

applied to criminal statutes) (plurality opinion); *Dimaya*, 138 S. Ct. at 1229-1231 (refusing to assess deportation ground under different constitutional standard) (Gorsuch, J., concurring in part, concurring in the judgment in part).

The Suspension Clause and its guarantee of access to the writ of habeas corpus is just such a constitutional limitation on Congress's plenary power. It is also an extremely important limitation, as it preserves the role of the judiciary as final "monitor[] [of] the separation of powers." *Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008). The Framers, understanding the "pendular swings to and away from individual liberty [that] were endemic to undivided, uncontrolled power," ensured through the Suspension Clause that "except during periods of formal suspension, the Judiciary will have a time-tested device … to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Id.* at 742, 745 (quoting *Hamdi*, 542 U.S. at 536).

Congress thus cannot effect a *de facto* suspension of the writ for noncitizens found within territory under U.S. sovereign control based on the premise that it is exercising its powers over immigration. This is true whether or not that authority is considered "plenary." Rather, the evident care taken by the Framers in listing the specific and "limited grounds" whereby habeas corpus may be suspended denotes the writ's vitality as a limit on legislative and executive action. *Boumediene*, 553 U.S. at 743-744. In the absence of "Cases of Invasion or Rebellion," the Suspension Clause categorically prohibits denial of the writ's protections. Congress has no such power to circumvent that prohibition—regardless whether it legislates in an area where it is considered to have ample discretion. This Court has thus made clear that "[t]he test for de-

termining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain." *Id.* at 765-766; *see also Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting) ("[T]he Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription[.]").[8]

2. This Court's decisions in the finality era confirm that notwithstanding Congress's exercise of its power over immigration—including to foreclose judicial review of executive officer determinations—the Suspension Clause applies when noncitizens who have entered the United States seek to challenge the legal basis for their detention by the government in service of removal from the country.

Dissatisfied with the courts' willingness to entertain habeas petitions challenging the exclusion of immi-

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[8] In *Hamdi*, Justice Scalia abandoned his previous suggestion in *St. Cyr* that "[a] straightforward reading of [the Suspension Clause] discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended." 533 U.S. at 337. Retreating from this ahistorical argument, Justice Scalia acknowledged in *Hamdi* that "[t]he writ of habeas corpus was preserved in the Constitution … as a means to protect against 'the practice of arbitrary imprisonments … in all ages, [one of] the favourite and most formidable instruments of tyranny.'" 542 U.S. 507, 558 (2004) (Scalia, J., dissenting) (quoting The Federalist No. 84, at 444 (Hamilton)); *see also Boumediene*, 553 U.S. at 844, 848 (Scalia, J., dissenting) (recognizing that "[t]he common-law writ [was] received into the law of the new constitutional Republic" and arguing that "[t]he nature of the writ of habeas corpus that cannot be suspended must be defined by the common-law writ that was available at the time of the founding").

grants in the late nineteenth century,[9] Congress in 1891 began an effort to confer finality on the immigration decisions of executive officers. *See* Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 1004-1008 (1998); *see also* Salyer, *Laws as Harsh as Tigers* 75 (1995). The first finality provision provided that "*[a]ll decisions* made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." Act of Mar. 3, 1891, ch. 551 § 8, 26 Stat. 1084, 1085-1086 (emphasis added). This finality provision was extended to Chinese exclusion cases three years later, *see* Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390, and was repeated in subsequent immigration statutes that were in effect until 1952.[10]

This Court limited the effect of the 1891 finality provision shortly after its enactment, in the case *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892). There, the Court considered the exclusion of a Japanese immigrant based on a finding that she was likely to become a public charge. The petitioner sought a writ of habeas corpus, making two arguments: first, that vesting an executive officer with the exclusive right to de-

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[9] The Chinese exclusion laws created a bifurcated procedure whereby the executive officials were permitted to exclude arriving Chinese laborers, but preserved proceedings in front of a judge or commissioner for the deportation of Chinese immigrants. *See e.g.*, Act of Sept. 13, 1888, ch. 1015, § 12, 25 Stat. 476, 478.

[10] *See* Immigration Act of 1903, ch. 1012, § 25, 32 Stat. 1213, 1220; Immigration Act of 1907, ch. 1134, § 25, 34 Stat. 898, 906-907; Immigration Act of 1917, ch. 29, § 17, 39 Stat. 874, 887.

termine her admissibility would deprive her of liberty without due process and, second, that "by the constitution she had a right to the writ of *habeas corpus*, which carried with it the right to a determination by the court as to the legality of her detention, and therefore, necessarily, the right to inquire into the facts related thereto." *Id.* at 656. This Court rejected petitioner's due process argument but agreed in part with her contention about her constitutional right to habeas corpus. Specifically, although the 1891 finality provision made no distinction between the factual and legal grounds for an executive officer's decision, rendering "all decisions" final, this Court held that while the "final determination of … *facts* may be entrusted by Congress to executive officers," the petitioner was "doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint [wa]s *lawful*." *Id.* at 660 (emphases added).

The Court reaffirmed this distinction in further decisions during the finality era, holding that Congress could through the finality provisions commit factual decisions to the executive branch but that the habeas writ remained available for the judiciary to test the legal grounds for both exclusion and deportation.[11] For example, in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713-714 (1893), the Court upheld on habeas the judicial

[11] This Court later qualified the finality that may be accorded factual determinations by executive officers: "Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus. … Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial." *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927).

deportation procedure for unregistered Chinese immigrants, observing that, as in *Nishimura Ekiu*, the proceedings could instead have been assigned to executive officials, "except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." Again, in *Gegiow* v. *Uhl*, 239 U.S. 3, 9-10 (1915), the Court exercised habeas review, this time of claims by a group of arriving noncitizens, and held that the immigration officer had exceeded his statutory power in determining their inadmissibility. Importantly—and again, although the finality provision drew no distinction between an officer's factual and legal decisions—this Court explained that "[t]he conclusiveness of the decisions of immigration officers under [the finality provision] is conclusiveness upon matters of fact," but "when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus." *Id.* at 9.

As the Court explained in *Heikkila* v. *Barber*, 345 U.S. 229, 234 (1953), in reviewing the sixty-year finality period, the finality statutes "intended to make these [immigration] decisions nonreviewable to the fullest extent possible under the Constitution." And in response, this Court's cases gave effect to Congress's intent, but only up to a point—"precluding judicial intervention in deportation cases *except* insofar as it was required by the Constitution." *Id.* at 234-235 (emphasis added). As a result, throughout the finality period, courts continued to hear habeas petitions challenging the legality of exclusion and deportation orders. Although Congress sought to preclude judicial review by statute, habeas corpus persisted as "the only remedy" to challenge deportation. *Id.* at 230; *see also id.* at 234-235. And almost a half century after *Heikkila*, in *St.*

Cyr, this Court explained that before the 1952 enactment of the Immigration and Nationality Act, "the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action." *St. Cyr*, 533 U.S. at 306. At a time when Congress narrowly circumscribed judicial review over immigration orders and considered the latter "final," the right to petition for habeas corpus remained available. "In case after case, courts answered questions of law in habeas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws." *Id.* at 306-307.

The government suggests that the Supreme Court might not have associated the requirement that habeas corpus be available with the Suspension Clause. That suggestion is untenable. The Justices of the 1890s had all lived through the Civil War and President Lincoln's suspension of habeas corpus, and then President Grant's suspension of habeas corpus pursuant to the Ku Klux Klan Act of 1871. The Court was later confronted with the suspension of habeas corpus in the Philippines, *see Fisher* v. *Baker*, 203 U.S. 174 (1906), and a case of civil commitment that prompted the reminder that the Suspension Clause ran against the federal government and not the states, *Gasquet* v. *Lapeyre*, 242 U.S. 367 (1917). Justice Brewer's concurrence in the deportation case *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 295-296 (1904), expressly invoked the Suspension Clause, as did the district judges in the exclusion cases of *In re Feinknopf*, 47 F. 447 (E.D.N.Y. 1891), and *Ex parte Fong Yim*, 134 F. 938 (1905). Even Representative Geary recognized the applicability of the Suspension Clause in the congressional debate on his bill for the deportation of Chinese immigrants. 23 Cong. Rec. 2887, 2915 (1892).

In sum, this Court's practice during the finality era further confirms that the Suspension Clause guarantees the availability of the writ of habeas corpus to test the legality of executive detention—in the face of a congressional exercise of its power over immigration to confer finality on executive branch determinations and, as in cases like *Nishimura Ekiu* and *Gegiow*, in proceedings concerning the admissibility of noncitizens.

3. Contrary to the government's assertion, the applicability of the Suspension Clause does not change because Congress purports to treat certain noncitizens within this country similarly to so-called "arriving aliens" seeking admission and, as a consequence, posits that such noncitizens should not be entitled to the protections of the Due Process Clause.

Beginning with the more general of the two propositions, access to habeas corpus does not turn on access to other specific constitutional guarantees but, rather, exists so that a person can challenge, and the judiciary may review, the legal basis for the government's restraint of his or her liberty. In cases where an individual may have more limited rights under the Constitution, as in the case of noncitizens arriving at the border, that person remains protected by the Suspension Clause and can invoke its protections to challenge unlawful detention and removal. *See St. Cyr*, 533 U.S. at 302. In this respect, this Court's cases follow from early habeas practice at English common law and at the Founding, where habeas corpus was available to challenge detention on statutory grounds. *See id.* (citing habeas cases brought to "command the discharge of seamen who had a statutory exemption from impressment into the British Navy," among others).

The proposition that a person's protection under the Suspension Clause does not turn on whether that person is protected by the Due Process Clause is clear as a historical matter, given that the Suspension Clause is part of the original Constitution, before the Due Process Clause was added in the Bill of Rights. The proposition is also clear from this Court's decision in *Boumediene*. There, the Court determined that noncitizens detained as "enemy combatants" are protected by the Suspension Clause while leaving undecided their entitlement to due process. *See* 553 U.S. at 785. If due process were to apply and the administrative procedures satisfied those standards, the Court explained, "it would not end [the] inquiry"; "the Suspension Clause remains applicable and the writ relevant." *Id.*

This proposition is further demonstrated by cases in which this Court has held that a noncitizen seeking admission has no due process rights with respect to that application—*i.e.*, that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)). In those very same cases, this Court not only exercised habeas review but made a point of noting that the noncitizen seeking admission was in fact entitled to such habeas review.[12]

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[12] The passage from *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), that the government repeatedly references (e.g., U.S. Br. 21), stands only for this same proposition—*i.e.*, that as to admission to the United States, the process that Congress gives a noncitizen seeking initial admission is due process. This is demonstrated by the Court's citation of *Knauff* and *Nishimura Ekiu* as authorities for its statement about such a noncitizen's "constitutional rights." The passage holds nothing regarding such a per-

For example, in *Knauff*, 338 U.S. at 539-540, this Court reviewed the habeas petition of an arriving noncitizen "war bride" challenging the legality of her exclusion without a hearing. The Court conducted that habeas review despite concluding, in the course of rejecting her legal challenge, that the Due Process Clause did not require the immigration officer who made the exclusion determination to hold such a hearing. *Id.* at 543-544. *Mezei*, a case decided the same day as *Heikkila* in an opinion written for the Court by the same Justice as in *Heikkila* (Justice Clark), is to the same effect. There, the Court exercised habeas jurisdiction over a petition filed by an arriving noncitizen confined on Ellis Island. While the Court rejected petitioner's constitutional and statutory claims, 345 U.S. at 212-216, it made clear in doing so that because the petitioner's "movements are restrained by authority of the United States, … he may by habeas corpus test the validity of his exclusion." *Id.* at 213.[13]

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son's entitlement to access to the habeas writ. To the contrary, the Court's citation to *Nishimura Ekiu* is to the very passage in that decision in which the Court affirmed that an arriving noncitizen is entitled to the habeas writ. *Landon*, 459 U.S. at 32 (citing *Nishimura Ekiu*, 142 U.S. at 659-660).

[13] Given the Court's repeated endorsement of habeas review in cases where it found the petitioning noncitizen's due process rights to be limited, the passage from *Yamataya* v. *Fisher*, 189 U.S. 86, 100 (1903), that the government repeatedly references (e.g., U.S. Br. 24) has no relevance to the Suspension Clause question presented in this case. In that passage in *Yamataya*, the Court referred to the right of certain noncitizens to "invoke the due process clause of the Constitution," saying nothing about the Suspension Clause or access to the writ. 189 U.S. at 100. Just as importantly, notwithstanding the Court's having raised but "le[ft] on one side" the question about the due process rights of a noncitizen "who has entered the country clandestinely, and who has been here for too brief a period to have become … a part of our popula-

For this reason, the government's attempt to treat noncitizens present in the United States, like Mr. Thuraissigiam, as equivalent to so-called "arriving aliens" for purposes of the Due Process Clause has no relevance in this Suspension Clause case. To the contrary, this Court's decisions, in the immigration context (*e.g.*, *Nishimura Ekiu*) and beyond (*e.g.*, *Boumediene*), demonstrate that the availability of the habeas writ does not turn on the applicability of the Due Process Clause, either generally to the petitioner or more specifically to the question of the petitioner's admission.

III. SECTION 1252(e) IS RADICALLY INCONSISTENT WITH THE GUARANTEE OF THE SUSPENSION CLAUSE

The Constitution authorizes Congress to suspend the writ only in "Cases of Rebellion or Invasion," U.S. Const. art. I, § 9, cl. 2, which has not taken place here. The limited nature of that exception is consistent with the role of habeas as "an indispensable mechanism for monitoring the separation of powers." *Boumediene*, 553 U.S. at 765; *see also id.* at 743 ("That the Framers considered the writ a vital instrument … is evident from the care taken to specify the limited grounds for its suspension.").

The mere fact that § 1252(e) provides some token judicial review in rare cases does not suffice under the Suspension Clause. Congress sharply circumscribed judicial inquiry for expedited removal and precluded courts from considering a habeas petitioner's statutory and constitutional challenges to his removal. For ex-

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tion" (*id.*), the Court has never *held* that such noncitizens constitute a different class for constitutional purposes and certainly has never held, or even suggested, that such persons can be denied the protection of the Suspension Clause.

ample, if an asylum officer were to refuse to provide the very process that Congress has required in 8 U.S.C. § 1225(b)(1)—*e.g.*, fail to "prepare a written record of a determination"—§ 1252(e) would not allow courts to conduct habeas review of that statutory violation. Nor could a noncitizen seek review of violations of explicit congressional limits on the expedited removal power—*e.g.*, restriction of expedited removal to only two of many inadmissibility grounds, *see* § 1225(b)(1)(A)(i) (referring, in turn, to the inadmissibility grounds in § 1182(a)(6)(C) and (a)(7)). Indeed, although Congress has required that removal of most unaccompanied children (*i.e.*, those from noncontiguous countries) be undertaken through regular removal proceedings, the placement of such a child in expedited removal could not be reviewed by courts in habeas proceedings. Lawfully admitted students too would be vulnerable to arbitrary removal without judicial recourse because § 1252(e) gives them no avenue for asserting their lawful status. For example, if an enforcement officer were simply to place all Iranian students into expedited removal, § 1252(e) would bar courts from conducting habeas review of those actions. The types of violations that would escape habeas review are not simply statutory in nature; § 1252(e) also would preclude habeas review of gross constitutional violations.

To be clear, all these errors could occur, and would be unreviewable by a court, under the expedited removal system before its recent vast expansion to the full scope of the statute. Expedited removal is now available, however, for noncitizens encountered anywhere in the United States who are alleged to have been in the country less than two years. That breathtaking expansion makes the ramifications of the government's legal positions—which in most, if not all, re-

spects bear no relation to how close in time or distance a noncitizen is apprehended in relation to his or her entrance into the United States—extend far beyond just Mr. Thuraissigiam.

In principle, if the skeletal review provided by § 1252(e) were sufficient under the Suspension Clause, Congress would be free to manipulate access to habeas corpus simply by providing some artificially narrow scope of review to detainees. The Suspension Clause, which was included among the Constitution's deliberate "structural barriers," was intended to prevent exactly this type of legislative "encroachment." *Boumediene*, 553 U.S. at 745. The Constitution is not satisfied merely because a petitioner is entitled to some narrowly circumscribed, impotent judicial review; rather habeas review must be available for the judiciary to hear and act on legal and constitutional claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2020

APPENDIX

APPENDIX

AMICI CURIAE SCHOLARS OF THE LAW OF HABEAS CORPUS

This Appendix provides amici's titles and institutional affiliations for identification purposes only. The listing of these affiliations does not imply any endorsement of the view expressed herein by amici's institutions.

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