No. 16-812

In The
Supreme Court of the United States

ROSA ELIDA CASTRO, ET AL.,
Petitioners,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association (ABA) is the leading national organization of the legal profession,

[1] This brief is filed with the written consent of all parties through letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae's* pro bono counsel made a monetary contribution intended to fund its preparation or submission.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

with more than 400,000 members from all 50 states, the District of Columbia, and the U.S. territories. Membership is voluntary and includes attorneys in private practice, government service, corporate law departments, and public interest organizations. ABA's membership comprises judges, legislators, law professors, law students, and nonlawyer "associates" in related fields, and represents the full spectrum of public and private litigants. The ABA's mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."[2]

Since its founding in 1878, the ABA has worked to protect the rights secured by the United States Constitution, including the rights of noncitizens under the Due Process, Equal Protection, and Suspension Clauses. As the leading national membership organization of the legal profession, the ABA has a special interest and responsibility in protecting the rights guaranteed by the Constitution and ensuring the sanctity of the rule of law. Preserving access to the writ of habeas corpus is crucial to these goals.

This matter directly concerns the ABA's core value of promoting robust judicial review of legislative and executive action, which goes hand-in-hand with the rule of law. The ABA has particular expertise in this area through its work to protect the habeas rights of persons deprived of their liberty by

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[2] See ABA Mission and Goals, *available at* http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Jan. 24, 2017).

arrest or detention, and has previously submitted briefs as *amicus curiae* in several matters before this Court concerning the rights of aliens to obtain judicial review. *See, e.g.*, Br. Amicus Curiae of the Am. Bar Ass'n in Support of Pet'rs, *Boumediene v. Bush,* 553 U.S. 723, 740 (2008) (Nos. 06-1195, 06-1196) (federal courts should have jurisdiction to hear challenges to detentions of Guantanamo detainees); Br. of the Am. Bar Ass'n as Amicus Curiae in Support of Pet'rs, *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (No. 00-1011) (federal courts should review final removal orders); Br. Amicus Curiae of the Am. Bar Ass'n in Support of Pet'r, *Ardestani v. INS*, 502 U.S. 129 (1991) (No. 90-1141) (Equal Access to Justice Act should apply to deportation proceedings); Br. Amicus Curiae of the Am. Bar Ass'n in Support of Resp'ts, *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (No. 89-1332) (federal courts should have jurisdiction to hear broad-based challenge to INS procedures affecting resident alien farmworkers). The ABA has also established a "Rule of Law Initiative," a central part of which is the promotion of judicial review of executive action, both domestically and internationally.[3]

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[3] The ABA's Rule of Law Initiative is an international development program established in 2007 with the goal of promoting justice, economic opportunity, and human dignity through the rule of law. Through the Initiative and in conjunction with its partners worldwide, the ABA seeks to strengthen legal institutions and foster respect for human rights by, among other things, developing programs to address local challenges, providing in-depth evaluations of draft legislation internationally, and drafting resource guides of rules of law issues. In addition, the Initiative has conducted over eighty assessments in more than thirty countries exploring rule of law

The ABA is deeply concerned that, for the first time in our country's history, a federal court of appeals has held that noncitizens who are within the United States can be denied the protections of the Suspension Clause. Pet. App. 59a. That holding means that Petitioners, whose asylum claims were rejected by an Executive Branch official alone, are subject to removal from the United States without any judicial review of their claims. Consistent with its steadfast support of judicial review as a means of preserving the promises of the Constitution and the protection of the rule of law, the ABA respectfully requests that the Court grant Petitioners' petition for writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

> *"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it."*

U.S. CONST. art. I, § 9, cl. 2 (emphasis added).

Shielding the removal process for noncitizens within the United States from meaningful judicial review contravenes fundamental principles of our

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topics, including access to justice, judicial reform, detention procedures, and prosecutorial reform. *See* About the ABA Rule of Law Initiative, *available at* http://www.americanbar.org/advocacy/rule_of_law/about.html (describing the activities and mission of the ABA's Rule of Law Initiative) (last visited Jan. 24, 2017).

constitutional system and this Court's precedent. The ABA, as the nation's leading legal organization and a longtime advocate of the foundational importance of judicial review, believes that it is critical that the Court grant certiorari. Until the Third Circuit's decision, no individual found on U.S. soil has been deemed outside the protections of the Suspension Clause absent a formal suspension of the habeas writ. Such a sea change in the law should not escape this Court's review.

Petitioners, 28 Central American mothers and their 33 children, were arrested in Texas, placed into summary "expedited removal" proceedings, found to have no credible fears of persecution, and ordered removed from the country. Each family properly filed individual habeas petitions in the Eastern District of Pennsylvania under the procedures set forth in the Immigration and Nationality Act to challenge the removal order. Asylum seekers in expedited removal proceedings do not receive full immigration hearings, administrative review by the Board of Immigration Appeals, or direct judicial review in the courts of appeals. Yet the Third Circuit held that the expedited removal statute barred *any* review of Petitioners' claims—including habeas review—and that Petitioners were not even entitled to invoke the Suspension Clause to challenge the preclusion of judicial review.

The Third Circuit's startling conclusion that Petitioners fall entirely outside the Suspension Clause's protections cannot be reconciled with this Court's precedent, which has repeatedly affirmed the availability of judicial review in immigration cases, including where the government seeks to remove a

noncitizen who has entered the country. *See, e.g.*, *INS v. St. Cyr,* 533 U.S. 289, 300-301 (2001) (internal quotation marks omitted) (citing *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)) The only situation in which Congress can suspend the constitutionally protected writ of habeas corpus is in "Cases of Invasion or Rebellion"—an exception obviously not applicable here.

While Congress enjoys broad powers to regulate immigration, those powers cannot be construed to override fundamental structural and individual constitutional protections. Because the Third Circuit's opinion signals a stark retreat from the core protection of habeas corpus for individuals within the borders of the United States, this Court should grant review.

ARGUMENT

THIS COURT SHOULD IMMEDIATELY REVIEW THE THIRD CIRCUIT'S UNPRECEDENTED DECISION TO DENY CONSTITUTIONAL HABEAS PROTECTION TO PERSONS ON U.S. SOIL

A. Judicial Review of Executive and Legislative Action Is Essential to a Functioning Democracy.

Under our constitutional scheme, judicial review serves as a bulwark against impingement of the rule of law. *DOT v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1246 (2015) ("The 'check' the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review."). The Framers envisioned a system in which the powers of the U.S. government would be spread among three

branches of government, each with the power to check the others. Judicial review of legislative and executive action is necessary to keep the political branches accountable and maintain the proper balance of powers. *See Nixon v. Fitzgerald*, 457 U.S. 731, 761 (1982).

The genius of this structure is that it "serves not only to make Government accountable but also to secure individual liberty." *Boumediene*, 553 U.S. at 742; *see Loving v. United States,* 517 U.S. 748, 756 (1996) (noting that "[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny") (citation omitted); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) ("[T]he Constitution diffuses power the better to secure liberty."). By helping to ensure that no branch aggrandizes power at the expense of any other, judicial review has played a crucial role in strengthening the separation of powers and protecting individual liberty throughout our Nation's history.

That longstanding commitment to judicial review helps explain why this Court has "constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme." *Johnson v. Avery*, 393 U.S. 483, 485 (1969). It "must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). Moreover, that view is consistent with the views of the Framers, who believed that the right to the habeas writ is "perhaps greater securit[y] to liberty and republicanism" than any of the separate rights

mentioned in the Bill of Rights. THE FEDERALIST No. 84 (Alexander Hamilton).

B. The Writ of Habeas Corpus Extends To Any Persons Within the United States, Including Aliens Subject To Removal.

Certain constitutionally protected rights, including the right to habeas review, have not been limited to U.S. citizens.

This Court has long held that many of the substantive guarantees of the Fifth and Fourteenth Amendments protect all "persons" within the United States, regardless of citizenship or status. For example, in *Mathews v. Diaz*, 426 U.S. 67 (1976), this Court explained that while aliens may not be "entitled to enjoy all the advantages of citizenship," "[e]ven one whose presence in this country is unlawful, involuntary, or transitory" was still entitled to fundamental constitutional protections. *Id*. at 77–78; *see also Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding that an ordinance used to discriminate against persons from China violated the Fourteenth Amendment). One of those constitutional protections is due process for aliens in removal proceedings. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *see also, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) (affirming procedural due process rights in exclusion proceedings). Although Congress unquestionably enjoys broad powers to regulate

immigration, that power cannot trump individual constitutional protections.

In recognition of those fundamental protections, as well as the essential role of judicial review, this Court has repeatedly affirmed "the strong presumption in favor of judicial review of administrative action," including in the context of removal proceedings. *St. Cyr*, 533 U.S. at 298; *see also, e.g.*, *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *McNary*, 498 U.S. at 498; *Webster v. Doe*, 486 U.S. 592, 603 (1988). Without such a presumption, serious separation-of-powers questions would arise. *Webster*, 486 U.S. at 603. And with respect to habeas corpus specifically, this Court has recognized that the Suspension Clause "unquestionably require[s]" judicial review in deportation cases. *St. Cyr*, 533 U.S. at 300-301 (internal quotation marks omitted).

This Court's prior affirmation that Suspension Clause protection extends to noncitizens within U.S. borders is consistent with English common law, which recognized that the writ ran to all citizens and nonenemy foreigners within the realm. *See, e.g.*, *Boumediene,* 553 U.S. at 746, 771, 779; *see also id.* at 746 ("[A]t the absolute minimum the Clause protects the writ as it existed when the Constitution was drafted and ratified.") (internal quotation marks and citation omitted); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) ("[F]or the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law . . . ."). For example, at common law the writ was held to apply to aliens who were located overseas, as it was one of the main defenses for (non-English) sailors facing impressment

into the Royal Navy. Kevin Costello, *Habeas Corpus and Military and Naval Impressment, 1756-1816*, 29 J. LEGAL HIST. 215 (2008).

Accordingly, it is no surprise that this Court has continued to make the writ available to any person—citizen or not—within the United States (or other areas under U.S. control). *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Boumediene*, 553 U.S. at 779. Petitioners fall squarely within the group of persons that the Suspension Clause protects.

C. The Third Circuit's Unprecedented And Erroneous Decision Presents A Matter Of Exceptional Importance.

The ABA agrees with Petitioners that the Third Circuit erred in denying them access to the writ of habeas corpus. That error is one of fundamental importance.

The Third Circuit's approach—barring aliens who have already entered the United States from invoking the protections of the Suspension Clause—is inconsistent with the Suspension Clause's design to "ensure[] that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Boumediene*, 553 at U.S. 745 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)). Prohibiting aliens already within the United States from invoking the Suspension Clause (at least without requiring Congress to formally suspend the writ) would bar those persons from access to "a vital instrument for the protection of

individual liberty." *Boumediene*, 553 U.S. at 743, 745 (citing *Hamdi*, 542 U.S. at 536).

The Third Circuit should not have relied on the Government's broad plenary power to exclude "alien[s] seeking initial admission to the United States" as its basis for prohibiting Petitioners from invoking the Suspension Clause. Pet. App. 48a (quoting *Landon*, 459 U.S. at 32). This Court has long recognized that aliens within or controlled by the United States may seek relief from immigration decisions through a writ of habeas corpus. *See, e.g.*, *Zadvydas*, 533 U.S. at 687–88 (concluding habeas review is available for aliens in deportation proceedings); *cf. Boumediene*, 553 U.S. at 771 (holding that persons held at Guantanamo Bay "are entitled to the privilege of habeas corpus to challenge the legality of their detention"). And aliens "on the threshold of initial entry" or "'assimilated to (that) status' for constitutional purposes," *Shaughnessy v. U.S. ex. rel. Mezei*, 345 U.S. 206, 212, 214 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 599 (1953)), could also historically seek habeas relief, *see, e.g.*, *id.* at 208 (considering an alien's challenge to his exclusion on habeas review); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.").

It is the right of an alien to certain Due Process protections, not his or her right to habeas relief, that has historically driven "[t]he distinction between an alien who has effected an entry into the United

States and one who has never entered ***." *Zadvydas*, 533 U.S. at 693; *see also, e.g.*, *id.* ("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Mezei*, 345 U.S. at 212 ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

Moreover, treating aliens within the United States as equivalent to those standing on the "threshold of initial entry" undercuts the rule of law by proscribing judicial review for aliens who fall within certain arbitrary categories, such as those "very near" a border or "within hours of surreptitiously entering," Pet. App. 28a, 52a. Such an approach legitimizes the "manipulation" of the Suspension Clause, thereby undercutting the purpose of habeas review as "an indispensable mechanism for monitoring the separation of powers." *Boumediene*, 553 U.S. at 765–66. And it "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" *Id.* at 765 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Proscribing judicial review for certain aliens based on such arbitrary distinctions also replaces a bright-line rule—an alien's location within or without the border of the United States—with an imprecise

and vague alternative that would necessitate future litigation as courts wrestle "to evaluate the Suspension Clause rights of an alien whose presence in the United States goes meaningfully beyond that of Petitioners here." Pet. App. 58a n.30. The long-term implications of such a change are considerable. Although current regulations limit the scope of expedited review principally to those aliens encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border, Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877-01 (Aug. 11, 2004), the statutory provisions potentially encompass any alien who cannot show presence for up to two years prior to the determination of inadmissibility, 8 U.S.C. § 1225(b)(1)(A)(iii). Accordingly, leaving undisturbed the Third Circuit's determination that *these* aliens are not entitled to invoke the Suspension Clause implicates an even broader group of aliens.

As the ABA has long recognized, "[f]or many noncitizens, it is the right to go before a judge that differentiates the United States from other countries that lack the same commitment to the rule of law." American Bar Association, Policy Report 114D, at 3 (adopted 2010).[4] The ABA has likewise maintained

[4] In furtherance of its mission and goals, the ABA adopts policies that represent the ABA's official position on numerous legislative, national, and professional issues. *See Governance and Policies of the American Bar Association*, ABA, *available at* http://www.americanbar.org/about_the_aba/governance_policies.html (last visited Jan. 24, 2017). The policies adopted by the ABA House of Delgates are each accompanied by a report, which provides background and insight into the reasoning underlying the ABA's adoption of the relevant policy.

that "[j]udicial review *** has been important in protecting immigrants' rights and civil liberties." Letter from Robert D. Evans, Dir., Gov't Affairs Office, Am. Bar Ass'n, to the Senate (Apr. 4, 2006). Indeed, the ABA highlighted over fifty years ago the fundamental issue with prohibiting judicial review for persons within the United States based merely on the facts of their previous entrance: "The administration of our immigration and naturalization laws will thus become an administration of men rather than of laws." *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearing on S. 716, H.R. 2379, and H.R. 2816 Before the Subcomms. of the Comms. on the Judiciary*, 82nd Cong. 527 (1951) (statement of Jack Wasserman, American Bar Association), *as reprinted in* American Bar Association, Policy Report 119, at 23 (adopted 1983).

Because the Third Circuit's decision risks making that warning a reality, this Court should grant review.

CONCLUSION

For the foregoing reasons, and those stated by Petitioners, the Court should grant the petition.

Respectfully submitted.

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