No. 16-1339

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROSA ELIDA CASTRO, *et al.*,
Petitioners-Appellants,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Respondents-Appellees.

On Appeal from a Judgment of the United States District Court for the Eastern District of Pennsylvania in Nos. 5:15-cv-6153; 5:15-cv-06403; 5:15-cv-06404; 5:15-cv-06406; 5:15-cv-06410; 5:15-cv-06411; 5:15-cv-06428; 5:15-cv-06429; 5:15-cv-06430; 5:15-cv-06431; 5:15-cv-06451; 5:15-cv-06472; 5:15-cv-06474; 5:15-cv-06475; 5:15-cv-06546; 5:15-cv-06547; 5:15-cv-06551; 5:15-cv-06553; 5:15-cv-06591; 5:15-cv-06592; 5:15-cv-06594; 5:15-cv-06595; 5:15-cv-06676; 5:15-cv-06677; 5:15-cv-06755; 5:15-cv-06788; 5:15-cv-06798; 5:15-cv-06863; & 5:16-cv-00069) (Hon. Paul S. Diamond)

BRIEF FOR *AMICI CURIAE* SCHOLARS OF HABEAS CORPUS LAW, FEDERAL COURTS, AND CONSTITUTIONAL LAW IN SUPPORT OF APPELLANTS' COMBINED PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

JONATHAN FEINBERG
KAIRYS, RUDOVSKY, MESSING & FEINBERG LLP
718 Arch Street, Suite 501 South
Philadelphia, PA 19106
(215) 925-4400

MARK C. FLEMING
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Attorneys for Amici Curiae Scholars of Habeas Corpus Law, Federal Courts, and Constitutional Law

September 19, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1), the undersigned counsel for *amici curiae* Scholars of Habeas Corpus Law, Federal Courts, and Constitutional Law states that *amici* are academic faculty at universities across the United States; and certifies that *amici* are appearing in their individual capacities, that they have no parent corporation, and that they issue no stock. *Amici*'s institutional affiliations are offered for identification purposes only.

Erwin Chemerinsky, University of California Irvine School of Law

Eric M. Freedman, Maurice A. Deane School of Law at Hofstra University

Brandon L. Garrett, University of Virginia School of Law

Jonathan Hafetz, Seton Hall University School of Law

Paul D. Halliday, University of Virginia

Randy A. Hertz, New York University School of Law

Aziz Huq, The University of Chicago Law School

Lee Kovarsky, University of Maryland Francis King Carey School of Law

Christopher Lasch, University of Denver Sturm College of Law

James S. Liebman, Columbia Law School

Gerald L. Neuman, Harvard Law School

Kermit Roosevelt, University of Pennsylvania Law School

Theodore W. Ruger, University of Pennsylvania Law School

Stephen I. Vladeck, University of Texas School of Law

Michael J. Wishnie, Yale Law School

/s/ Mark C. Fleming
MARK C. FLEMING
Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

FOREIGN CASES

STATEMENT OF INTEREST[1]

Amici curiae are scholars at universities across the United States with expertise in habeas corpus law, federal courts, and constitutional law. A full list of *amici* is attached in the addendum to this brief. *Amici* have a professional interest in ensuring that the Court be accurately informed as to the governing precedent regarding the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, and its protection of access to habeas corpus by noncitizens who have entered the United States. *Amici* have no personal, financial, or other professional interest in this case, and take no position respecting other issues raised in the case. *Amici*'s institutional affiliations are provided for identification purposes only.

INTRODUCTION

Amici submit this supplemental brief in support of Appellants' request for rehearing. While *amici*'s position on the issues raised is set forth more fully in their brief before the panel (Doc. No. 003112231822, Mar. 11, 2016) ("Br. for *Amici Curiae* Scholars"), *amici* submit this supplemental brief because of the truly extraordinary nature of the panel's ruling, which is an unprecedented departure from the settled understanding of the Suspension Clause. Absent a proper

[1] No counsel for a party authored this brief in whole or in part, and no one other than *amici* or their counsel made any monetary contribution toward the brief's preparation or submission. *Amici* have submitted a Motion for Leave to File this brief. Appellants have consented to the filing of this brief. Appellees have stated that they take no position on the motion but note that Rule 29.1 does not appear to permit such motions absent an actual order granting rehearing.

suspension of the writ (which has not occurred here), the Constitution's guarantee of habeas corpus has always been available, without question or exception, to all noncitizens within the territory of the United States. The panel's creation of an exception for noncitizens who "were apprehended very near the border and, essentially, immediately after surreptitious entry into the country" (Op. 37) deviates radically from established jurisprudence and is wholly without support.

ARGUMENT

In this supplemental submission, *Amici* make the following additional points to underscore the grave flaws in the panel's decision and to aid in the Court's consideration of the rehearing petition.

First, the Suspension Clause extends, without exception or qualification, to all persons within U.S. borders regardless of citizenship; indeed, it is even accessible to some noncitizens outside sovereign territory. Br. for *Amici Curiae* Scholars 6-9. The historical record predating the Founding demonstrates that noncitizens in the country had access to habeas corpus, regardless of their status or ties to the country. *INS v. St. Cyr*, 533 U.S. 289, 300-01, 305-306 (2001); Br. for *Amici Curiae* Scholars 6-7. Such was the strength of the guarantee that habeas was available even to African slaves detained aboard a ship in English waters. *Sommerset v. Stewart*, (1772) 98 Eng. Rep. 499, 509-510 (K.B.); *see also* Op. 1-2 & n.1 (Hardiman, J., concurring) (recognizing the writ's broad availability in the

American colonies, including to individuals other than British-American citizens of European ancestry and noting the Founders' almost certain awareness of the *Sommerset* case). In *St. Cyr*, the Supreme Court confirmed that the scope of the Suspension Clause's protection derives from the writ's broad historical availability. 533 U.S. at 301-302. The Court also held that the Constitution "unquestionably" requires judicial review in immigration cases. *Id.* at 300-301. The Court thus expressly rejected any suggestion, such as that offered by Judge Hardiman in concurrence, that removal orders (as opposed to release from detention) fall outside the Suspension Clause. Br. for *Amici Curiae* Scholars 18-20.

Second, the panel's conclusion that the plenary power doctrine limits the protections of the Suspension Clause (Op. 67-68, 78) is unfounded. Not even the dissenting opinions in *St. Cyr* suggested such a limitation. Simply put, the plenary power doctrine, whatever authority it gives Congress to establish immigration criteria and procedures, does not also give Congress license to effect a *de facto* suspension of the writ for noncitizens in U.S. sovereign territory by decreeing that they are subject to a new immigration procedure. In its most recent Suspension Clause decision, *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court made clear that the Suspension Clause limits Congress's power to restrict access to habeas corpus. *Id.* at 745. There, the Court held that Congress and the President cannot,

absent a proper suspension of the writ, eliminate access to habeas corpus *even for* noncitizen enemy combatants outside the United States and *even when* acting jointly pursuant to their war powers. *Id.* at 771. *A fortiori* Congress cannot alter or otherwise circumvent the Suspension Clause's application to noncitizens who have entered this country, simply by reclassifying them as "arriving" noncitizens or noncitizens "seeking initial admission."

Third, the panel ruled that, because appellants do not have any constitutional rights to enforce, they have no claim to habeas corpus. Op. 67-68. That was error for two reasons. As a threshold matter, noncitizens who have entered the United States do have constitutional rights. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); Br. for *Amici Curiae* Scholars 27. Indeed, this Circuit has found that even *arriving* noncitizens have due process protections under certain circumstances. *Khouzam v. Attorney General*, 549 F.3d 235, 256 (3d Cir. 2008); Br. for *Amici Curiae* Scholars 27-28. But even if, contrary to Supreme Court precedent, this Court were somehow to find that noncitizens within the United States generally lack constitutional rights, those individuals are still protected by the Suspension Clause and can invoke its protections to challenge their unlawful removal. *St. Cyr*, 533 U.S. at 302; Br. for *Amici Curiae* Scholars 26-27. As *Boumediene* makes clear, the Suspension Clause still protects individuals whether or not they possess other constitutional rights. *Boumediene*, 553 U.S. at 785 (concluding that noncitizen

enemy combatants at Guantanamo are protected by the Suspension Clause while leaving undecided their entitlement to due process). Habeas is a vehicle for non-constitutional challenges to detention, including statutory and regulatory claims. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212-216 (1953) (finding that Mezei had no procedural due process rights, but nevertheless exercising habeas jurisdiction over his non-constitutional claims). Indeed, as noted in our prior brief, the Suspension Clause, which was adopted in the original Constitution, cannot depend on the Bill of Rights, which was only proposed and ratified afterwards. Br. for *Amici Curiae* Scholars 25.[2]

Fourth, the panel wrongly dismissed the "finality period" cases described in *Heikkila v. Barber*, 345 U.S. 229 (1953). Op. 68-72 & n.28, 78. In those cases,

[2] Notably, the Supreme Court in *Boumediene* and this Court in *Khouzam* allowed noncitizens to invoke habeas notwithstanding the government's reliance on plenary power over immigration and Executive power over the conduct of war. *See, e.g.*, Br. of Respondent 15-16, *Boumediene v. Bush*, 553 U.S. 723 (2008), 2007 WL 2972541 (Nos. 06-1195, 06-1196) (Oct. 9, 2007) (arguing that "wartime exigencies" and "special circumstances" justified reduced judicial scrutiny); Opening Br. of Respondents 10, *Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008) (Nos. 07-2926, 08-1094) (Mar. 7, 2008) (arguing that "[t]he Suspension Clause was not violated" because, inter alia, "the precise question here . . . is committed to the Executive Branch"); id. at 39 (arguing against judicial review because "[t]he Supreme Court has made clear . . . that 'control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature'" (quoting *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982)); *id.* at 41 (arguing that "there is no Suspension Clause issue because this is a separation of powers issue," and relying on the Executive's "powers to conduct foreign relations and plenary powers over immigration").

Congress had precluded judicial review of administrative removal orders "to the fullest extent possible under the Constitution." *Heikkila*, 345 U.S. at 234-235. Nonetheless, the Court consistently allowed habeas corpus challenges to those orders. *Id.* at 233-234; Br. for *Amici Curiae* Scholars 9-12. As *amici* have explained, the many habeas challenges considered by federal courts during the finality period reflect the constitutional minimum required by the Suspension Clause. Br. for *Amici Curiae* Scholars 9-12. This Court, moreover, previously reached the same conclusion. *See Sandoval v. Reno*, 166 F.3d 225, 237 (3d Cir. 1999) ("Despite repeated congressional efforts since the late nineteenth century to confer finality on the immigration decisions of the Attorney General, the Court has consistently recognized the availability of habeas relief to aliens facing deportation."). But even if this Court were unwilling to find that those finality period cases were ***Suspension Clause*** cases because they were not formally labeled as such, those cases plainly demonstrate ***use of the writ***, which is what the Court evaluates in understanding the meaning and scope of habeas. *Boumediene*, 553 U.S. at 739-744 (looking to historical usage in interpreting the Suspension Clause); *St. Cyr*, 533 U.S. at 304-305; Br. for *Amici Curiae* Scholars 12-13.

CONCLUSION

For the foregoing reasons, and for those expressed in *amici*'s previous submission, *amici* respectfully urge this Court to grant the petition for rehearing.

Respectfully submitted,

/s/ Mark C. Fleming

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

JONATHAN FEINBERG
KAIRYS, RUDOVSKY, MESSING &
FEINBERG LLP
718 Arch Street, Suite 501 South
Philadelphia, PA 19106
(215) 925-4400

Attorneys for Amici Curiae Scholars of Habeas Corpus Law, Federal Courts, and Constitutional Law

September 19, 2016

ADDENDUM – LIST OF *AMICI CURIAE*[*]

Erwin Chemerinsky
Dean of the School of Law
Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California, Irvine School of Law

Eric M. Freedman
Siggi B. Wilzig Distinguished Professor of Constitutional Rights
Maurice A. Deane School of Law at Hofstra University

Brandon L. Garrett
Justice Thurgood Marshall Distinguished Professor of Law
University of Virginia School of Law

Jonathan Hafetz
Professor of Law
Seton Hall University School of Law

Paul D. Halliday
Julian Bishko Professor of History & Professor of Law
Chair, Corcoran Department of History
University of Virginia

Randy A. Hertz
Professor of Clinical Law and Vice Dean
Director, Clinical and Advocacy Programs
New York University School of Law

Aziz Huq
Frank and Bernice J. Greenberg Professor of Law
The University of Chicago Law School

Lee Kovarsky
Professor of Law
University of Maryland Francis King Carey School of Law

[*] Institutional affiliations are provided for identification purposes only.

Christopher Lasch
Associate Professor of Law
Criminal Defense Clinic
University of Denver Sturm College of Law

James S. Liebman
Simon H. Rifkind Professor of Law
Columbia Law School

Gerald L. Neuman
J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law
Harvard Law School

Kermit Roosevelt
Professor of Law
University of Pennsylvania Law School

Theodore W. Ruger
Dean of Law School
Bernard G. Segal Professor of Law
University of Pennsylvania Law School

Stephen I. Vladeck
Professor of Law
University of Texas School of Law

Michael J. Wishnie
Deputy Dean for Experiential Education
William O. Douglas Clinical Professor of Law
Director, Jerome N. Frank Legal Services Organization
Yale Law School

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1, I, Mark C. Fleming, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Mark C. Fleming
MARK C. FLEMING

Dated: September 19, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B)(i).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2010.

2. The brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 40(b) because exclusive of the exempted portions it does not exceed 15 double-spaced pages.

In addition, pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the brief filed with the Court via CM/ECF is identical to the text of the paper copies. I further certify that a virus detection program has been run on the electronic file and that no virus was detected. I rely on the virus detection program Trend Micro Office Scan Client in making this representation.

/s/ Mark C. Fleming
MARK C. FLEMING

September 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Mark C. Fleming
MARK C. FLEMING