No. 16-812

IN THE

Supreme Court of the United States

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

v.

UNITED STATES 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 FOR SCHOLARS OF THE LAW OF HABEAS CORPUS, THE FEDERAL COURTS, CITIZENSHIP, AND THE CONSTITUTION AS AMICI CURIAE SUPPORTING PETITIONERS

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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, the federal courts, citizenship, and the Constitution. Based on Amici's understanding and research, this brief is submitted to provide an overview of the historic reach and use of the writ of habeas corpus and of 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 specified noncitizens from the United States following a truncated opportunity to be heard. 8 U.S.C. § 1225(b)(1). Under the statute, the Attorney General may apply expedited removal to certain individuals in 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). Noncitizens in these categories may be subjected to expedited removal if they are inadmissible because they lack a proper entry document or because they engaged in certain types of fraud. *Id.*

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[1] No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

§ 1225(b)(1)(A)(i). To date, the Attorney General has applied the expedited removal procedures for persons in this second category to more circumscribed groups: undocumented aliens found within 100 miles of the border with Mexico or Canada who have spent fewer than 14 days within the United States after entering without inspection, Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004), and undocumented aliens who enter without inspection by sea, regardless of where they are apprehended, within two years of entry, 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). Judicial review of expedited removal determinations is significantly restricted. 8 U.S.C. § 1252(e)(2), (5).

Amici observe that the lower federal courts have previously been asked to interpret and apply these statutory limitations on judicial review in cases where aliens arriving at the border or a port of entry have sought habeas corpus review of their expedited removal orders. In such contexts, several courts have applied the expedited removal provisions to divest jurisdiction to review those habeas claims. *See, e.g.*, *Garcia de Rincon* v. *Department of Homeland Sec.*, 539 F.3d 1133, 1142 (9th Cir. 2008); *Li* v. *Eddy*, 259 F.3d 1132, 1135 (9th Cir. 2001), *vacated on reh'g as moot*, 324 F.3d 1109 (2003); *Brumme* v. *INS*, 275 F.3d 443, 446 (5th Cir. 2001). This Court has not evaluated whether those decisions are consistent with the Suspension Clause.

The decision of the court of appeals in this case raises issues of even greater seriousness because it now extends this statutory preclusion of habeas review to noncitizens who have already entered the United States, and it does so by holding, as a constitutional

matter, that such persons "cannot [] invoke the Suspension Clause." Pet. App. 53a n.26. Amici file this brief to explain why the court of appeals decision is contrary to long-established understandings of the Suspension Clause and of the availability of the writ of habeas corpus. The ability to petition for a writ of habeas corpus turns on the extent to which the government exercises control of the petitioner's person and not on that person's status as a citizen, noncitizen, or alien seeking asylum. Amici also file this brief to explain that the constraints imposed by the Suspension Clause, a vital check on the powers of the political branches, cannot be ignored by Congress or the Executive through exercising powers, plenary or otherwise.

SUMMARY OF ARGUMENT

Dating back to English common law, the writ of habeas corpus has been understood to extend 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 the writ to represent the "stable bulwark of our liberties," 1 Blackstone, *Commentaries* 137 (1803), and 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. Consistent with the common law history, this Nation's courts have, since the Founding, reviewed habeas petitions of persons in the United States, from citizens and noncitizens alike, regardless of their "ties" to the country.

Neither Congress nor the Executive may cabin the reach of the Suspension Clause absent a proper suspension of the writ. To the contrary, the Clause exists as one of the Constitution's central *limits* on both legislative and executive power. This holds true regardless of

whether the ambit in which Congress legislates or the Executive acts is one that the courts have concluded allows for "plenary" discretion by the political branch. As most recently demonstrated by this Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), noncitizens detained pursuant to the wartime powers of Congress and the Executive have been found to have access to the writ when confined outside the United States in territory under U.S. control.

ARGUMENT

I. At Common Law In England And In This Nation Since The Founding, Access To Habeas Corpus Has Been Available To Persons Within The Realm Regardless Whether They Are Citizens Or Aliens

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." Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 Colum. L. Rev. 537, 545 (2010). Neither this Court's cases nor the principles of English common law that informed the Framers' prohibition on suspension of the writ admit of a status-based exception for noncitizens on U.S. soil, nor more specifically of an exception for those "apprehended [] near the border … immediately after surreptitious entry into the country." Pet. App. 28a.

The instruction that can be derived from the writ's application at English common law is critical to 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)). Amici are aware of no evidence that at English common law the writ would have been unavailable to a foreigner within the realm because the person was found "near the border" or following "surreptitious entry into the country." Pet App. 28a. 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."[2] *St. Cyr*, 533 U.S. at 301-302. In that manner, the protections of the writ at the time of the Founding accorded with the precept of English common law that persons physically present in the sovereign's realm—to any degree or for any length of time—were both "entitled to its benefits, and subject to its burdens." Br. *Amici Curiae* of Legal Historians in Support of Respondent, *INS* v. *St. Cyr*, 553 U.S. 289 (2001) (No. 00-767), *reprinted in* 16 Geo. Immigr. L.J. 465, 472 (2002). Because "every person that [came] within the king's dominions owe[d] a local subjection and allegiance to the king," those same persons were entitled, while in the realm, to "the privilege of protection." *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

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[2] In *St. Cyr*, this Court did not have the need or opportunity to consider whether enemy aliens within the United States can invoke the Suspension Clause. *See* Neuman, 110 Colum. L. Rev. at 545 (noting reference to "nonenemy aliens" in *St. Cyr* "was adequate for its immigration context"). In *Boumediene*, however, this Court confirmed that the "Suspension Clause *constitutionally* guarantees habeas corpus to noncitizens, including noncitizens who are suspected of engaging in armed conflict against the United States" where they were detained and held subject to U.S. control. *Id.* (emphasis added).

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 maxim. 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." Paul D. Halliday, *Habeas Corpus: From England to Empire* 204 (2010). Consequently, while not entitled to all benefits of English law, aliens present within the realm could petition for habeas corpus, and did so "[i]n virtually all the same ways, in the same instances, and with the same results as the king's other subjects." *Id.* at 205.

This Court has recognized that at English common law, noncitizens physically present within the country's borders had access to habeas corpus regardless of their status or ties to the country. *See St. Cyr*, 533 U.S. at 301-302 (discussing common law experience and understanding of writ at Founding); *see also Rasul* v. *Bush*, 542 U.S. 466, 481-482 (2004) (noting "[t]here was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown'" (quoting *R* v. *Cowle* (1759) 97 Eng. Rep. 587, 598-599 (KB)).

For example, as early as 1697, the King's Bench rejected the argument that, because the defendant was a "foreigner," he was "not [e]ntitled to have a habeas corpus." *Case of Du Castro* (1697) 92 Eng. Rep. 816 (KB) (granting bail on habeas petition). In 1759, the King's Bench employed the writ to review and reject a challenge to detention by a Swedish sailor forced to serve on a French privateer. *R* v. *Schiever* (1759) 97

Eng. Rep. 551 (KB).[3] And in *Somerset* v. *Stewart*, the court considered the case of an African sold into slavery in Virginia who was then detained on a ship offshore in English waters. (1772) 98 Eng. Rep. 499, 509-510 (KB). The King's Bench concluded that presence in the realm was sufficient to trigger habeas protection, and in the absence of English authority to force a slave out of the country, Lord Mansfield found that the slave "must be discharged" and protected from deportation to Jamaica. *Id.* at 510.[4]

Another well-known decision of the King's Bench issued less than two decades after the Founding reaffirms the understanding that at English common law the writ applied to those present in the King's realm, including aliens. In the *Case of the Hottentot Venus*,

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[3] *See also* Gerald L. 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); Jonathan L. Hafetz, Note, *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"); James Oldham & Michael J. 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).

[4] The historical record shows slaves also availed themselves of the writ of habeas corpus in cases other than the well-known *Somerset* decision. *See* Halliday, *Habeas Corpus*, *supra*, at 174 (discussing two other recorded cases). However, while *Somerset* directly bore "on the question of whether one might be a slave in England," other cases turned on writs "not to free slaves," but to return slaves impressed into military service to their masters. *Id.* at 174-175.

(1810) 104 Eng. Rep. 344 (KB), the King's Bench reviewed the case of Saartje Baartman, a "female native of South Africa" being "exhibited in London" under alleged private and involuntary custody. *Id.* Although she was not an English subject, the court considered a petition brought by third parties on Ms. Baartman's behalf, ultimately appointing investigators and reviewing affidavits to determine whether she was being held against her will. *Id.* at 344-345.

From England, the writ's protections were embraced by the United States, where "the common-law writ of habeas corpus was in operation in all thirteen of the British colonies that rebelled in 1776." William F. Duker, *A Constitutional History of Habeas Corpus* 115 (1980). The writ then also was "provided for, in the most ample manner, in the plan of the [Constitutional] convention." The Federalist No. 83 (Hamilton). 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, 302 n.16 (discussing availability of writ to aliens within United States at Founding; citing Brief for Legal Historians). 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 Boston harbor. 7 F. Cas. 853, 853 (C.C.D. Mass. 1813). And in *Commonwealth* v. *Holloway*, the Supreme Court of Pennsylvania similarly discharged an alleged foreign deserter upon concluding that neither treaty nor statute authorized his detention. 1 Serg. & Rawle 392 (Pa. 1815). Along with other contemporary cases involving deserters and foreign nationals detained

within the United States,[5] *D'Olivera* and *Holloway* confirm what the concurrence in the court of appeals acknowledged: that the writ not only applied expansively in the American colonies, but that the Framers would have doubtless been aware of significant developments at English law, such as the *Somerset* decision. Pet. App. 63a n.1 (Hardiman, J., concurring *dubitante*).

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 or her person. 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).

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[5] *See also, e.g.*, *United States* v. *Villato*, 2 U.S. (2 Dall.) 370 (1797) (granting habeas relief to Spanish national charged with treason for involvement in seizure of a U.S. ship on grounds that, as a noncitizen, he could not be so charged); *United States* v. *Desfontes & Gaillard* (C.C.S.D. Ga. 1830), *reprinted in* Eric M. Freedman, *Milestones in Habeas: Part I*, 57 Ala. L. Rev. 531 (2000) (on habeas petition by French Consul to deliver alleged French deserters, holding sailors properly detained on state criminal charges); *United States* v. *Lawrence*, 3 U.S. (3 Dall.) 42, 49 (1795) (mem.) (where district court declined request of French consul to arrest alleged deserter, Attorney General sought mandamus from Supreme Court, arguing that if arrest was unlawful prisoner could seek release on habeas corpus); *Case of the Deserters from the British Frigate L'Africaine*, 3 Am. L.J. & Misc. Repertory 132 (1810) (reporting 1809 Maryland decision discharging alleged deserters); *Case of Hippolyte Dumas*, 2 Am. L.J. & Misc. Repertory 86 (1809) (reporting 1807 Pennsylvania decision discharging alleged deserters).

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

The court of appeals concluded that petitioners "are unable to invoke the Suspension Clause." Pet. App. 59a. It grounded that conclusion on the reasoning that, because Petitioners were "recent surreptitious entrants," Congress had the power under the Constitution to statutorily deem them equivalent to "'alien[s] seeking initial admission to the United States,'" with controlling effect for purposes of the Suspension Clause. *Id.* (alteration in original). According to the court of appeals, this follows from the "plenary power doctrine," whereby Congress retains broad authority over the admission of noncitizens at the border. *Id.* 60a.

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." Sarah H. 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, 941 (1983), it has made clear that Congress must choose

"constitutionally permissible means" to "implement[] that power," *Chadha*, 462 U.S. 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.

The Suspension Clause and its guarantee of access to the writ of habeas corpus is just such a limitation. It is also an extremely important one, 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); *see also* Eric M. Freedman, *Habeas Corpus in Three Dimensions—Dimension III: Habeas Corpus as an Instrument of Checks and Balances*, 8 Ne. U. L.J. 251 (2016) (arguing that, as implied in *Boumediene*, courts' inherent authority to issue writs of habeas corpus in the absence of suspension derives from Article III).

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, as this Court explained in *Boumediene*, 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. 553 U.S. at 743-744. In the absence of "Cases of Invasion or Rebellion," the Sus-

pension 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 determining 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 554 (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[.]").[6]

An understanding of plenary power permitting Congress to deprive noncitizens in the United States of access to habeas corpus by analogizing such persons to arriving noncitizens finds no precedent in this Court's cases. Consistent with the historically recognized scope of habeas corpus, this Court has repeatedly affirmed—in the face of congressional efforts to restrict judicial review—that the Suspension Clause requires habeas review of legal and constitutional claims asserted by aliens on U.S. soil. *See St. Cyr*, 533 U.S. at 300-301, 304 (citing *Heikkila* v. *Barber*, 345 U.S. 229, 234-235 (1953)). This analysis was most evident during the approximately sixty years of the so-called "finality pe-

[6] The court of appeals itself reasoned that, even under its view, Congress might not be able to preclude habeas review of expedited removal determinations altogether, including where "the government has committed even more egregious violations of the expedited removal statute than those alleged by Petitioners." Pet. App. 27a n.13. But the Suspension Clause's prohibition on legislative abrogation of access to habeas corpus does not turn on the egregiousness of the conduct sought to be challenged in a particular case. Rather, the Suspension Clause is a categorical prohibition on such legislative abrogation.

riod," wherein administrative decisions concerning immigration were considered immune from review "except insofar as it was required by the Constitution."[7] *Heikkila*, 345 U.S. at 234-235; *see also St. Cyr*, 533 U.S. at 306-308 (discussing "finality" period).

Heikkila is, itself, paradigmatic of this Court's recognition of the writ as the minimum protection required by the Constitution during this period. There, the government argued that because the 1917 Immigration Act rendered the Attorney General's deportation orders "final," no judicial review was permitted. 345 U.S. at 234-235. This Court traced the "finality" of executive and administrative immigration decisions back to the Immigration Act of 1891, when Congress first restricted judicial review over executive exclusion orders, purporting to render those decisions "final." *See id.* at 233. Despite such provisions, habeas corpus remained available: the Court explained (*id.* at 233-234) that in *Nishimura Ekiu* v. *United States*, 142 U.S. 651 (1892), it evaluated the 1891 Act, where it found that the petitioning noncitizen was "doubtless" entitled to petition for habeas corpus despite the fact that the Act was "manifestly intended" to prevent review of administrative exclusion orders.

These finality provisions were "carried forward" in subsequent immigration legislation with the goal of rendering "administrative decisions nonreviewable to the fullest extent possible under the Constitution." *See Heikkila*, 345 U.S. at 233-234 (citing *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893)). Yet courts contin-

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[7] As commonly understood and as described by the court of appeals, the "finality era" spans the period between the "passage of the Immigration Act of 1891 … and … the Immigration and Nationality Act of 1952." Pet. App. 32a.

ued to hear habeas petitions. This Court concluded that although judicial review was largely removed by statute, habeas corpus persisted as "the only remedy" to challenge deportation. *Id.* at 230; *see also id.* at 234-235.[8] And almost a half century after *Heikkila*, in *St. Cyr*, this Court explained that before the INA's enactment in 1952, "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, 307 n.28, 312. Thus, at a time when Congress narrowly circumscribed judicial review over immigration orders and considered the latter "final," *St. Cyr* noted that the right to petition for habeas corpus remained available.

Another line of cases also makes plain that noncitizens can petition for habeas. A series of decisions rely on a legal fiction whereby a person on U.S. soil, but seeking admission at the border, may be "'assimilated'" "'for constitutional purposes,'" Pet. App. 45a (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212, 214 (1953)), to someone outside the Nation's borders. Those decisions recognize that noncitizens arriving at the border retain the right to petition for habeas corpus. Thus, in *Gegiow* v. *Uhl*, this Court considered and granted the habeas petition of "a group of illiterate laborers" from Russia arriving in the United

[8] Indeed, the Court in *Nishimura Ekiu* considered it already well-established that noncitizens could petition for habeas corpus to challenge immigration orders. 142 U.S. at 660 (citing *Wan Shing* v. *United States*, 140 424, 425-428 (1891) (reviewing habeas challenge from petitioner re-entering the country to determine whether he was inadmissible as a Chinese laborer); *Ex parte Lau Ow Bew*, 141 U.S. 583, 586-589 (1891) (granting certiorari to allow "full discussion" of a Chinese merchant's habeas petition challenging his inability to re-enter the country under the Act of March 3, 1891)).

States and detained for removal upon grounds that they were likely to become public charges upon entry. 239 U.S. 3, 8 (1915). This Court acknowledged that the arriving petitioners could nonetheless seek their release through habeas corpus. *Id.* at 10.

Petitioners were also afforded access to habeas in the two decisions of this Court that the court of appeals read to "signal [this Court's] commitment to the full breadth of the plenary power doctrine." Pet. App. 48a. Specifically, in *United States ex rel. Knauff* v. *Shaughnessy*, this Court reviewed an arriving noncitizen "war bride's" denial of admission and subsequent habeas petition despite concluding that the Due Process Clause did not entitle her to a hearing to contest her exclusion. 338 U.S. 537, 543-544 (1950). And in *Shaughnessy* v. *United States ex rel. Mezei*, in a case arising from the exclusion of an arriving noncitizen who then remained confined to Ellis Island for two years, the Court remarked that the arriving noncitizen "may by habeas corpus test the validity of his exclusion" "whether he enjoys temporary refuge on land … or remains continuously aboard ship." 345 U.S. at 213. This was true, the Court held in *Mezei*, despite the legal fiction whereby "shelter ashore" under applicable laws was "'not [to] be considered a landing'" in the United States. *Id.* at 214.

As these cases demonstrate, the writ's "extraordinary territorial ambit," *Rasul*, 542 U.S. at 482 n.12, which extends at minimum to all U.S. sovereign territory, means that the Suspension Clause's full force applies where, as here, a person is apprehended in the United States near the border or shortly after clandestine entry. As was true at English common law, the writ applies at minimum to those present in the realm. This conclusion follows from this Court's habeas cases,

which have been steadfastly clear that the Suspension Clause protects the writ as it existed at the Founding and further clarify that the writ "is at its core a remedy for unlawful executive detention." *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008).

Most recently, in *Boumediene*, this Court held that Congress and the President cannot, absent a proper suspension of the writ, bar access to habeas corpus for noncitizen enemy combatants outside the United States where they are held in territory under "complete [U.S.] jurisdiction and control" and pursuant to the full authority of the political branches' war powers. *Boumediene*, 553 U.S. at 755, 771. Given that the Suspension Clause protects aliens on U.S. soil, including arriving noncitizens, as well as alleged "enemy combatants" held outside the country on territory subject to U.S. control, it also must be available to noncitizens like Petitioners, who are physically present in the United States seeking a fair asylum hearing under the law.

III. The Reach Of The Suspension Clause Does Not Depend On The Applicability Of Due Process Protections

The court of appeals believed that Petitioners' constitutional status could be analogized to that of aliens arriving at a port of entry and lacking "'constitutional rights regarding [their] application [to enter]'" the United States. Pet. App. 52a (quoting *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982)). The court of appeals further concluded that Petitioners' purported lack of constitutional rights resulted in reducing the reach of habeas safeguards preserved by the Suspension Clause. *Id.*

As this Court has explained, however, noncitizens who have entered the United States—lawfully or un-

lawfully—are entitled to certain recognized constitutional guarantees. Most fundamentally, "the Due Process Clause applies to *all* 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693 (emphasis added); *see also Mezei*, 345 U.S. at 212 ("[A]liens who have once passed through our gates, *even illegally*, may be expelled only after … due process of law." (emphasis added)).

In any event, even if Petitioners could be properly grouped with aliens arriving at the border, they would still be entitled to habeas. Access to habeas corpus does not turn on access to other specific constitutional guarantees, but to asserting a violation of federal law. 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 his or her 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). As noted, in *Mezei* itself, which the court of appeals cited for the proposition that aliens seeking admission at the border "clearly lack constitutional due process protections," Pet App. 50a, this Court exercised habeas jurisdiction to consider the Petitioner's claims, *Mezei*, 345 U.S. at 212-216. And most recently, in *Boumediene*, the Court determined that noncitizens detained as "enemy combatants" are protected by the Suspension Clause, while leaving unde-

cided their due process entitlement. 553 U.S. at 785. If due process applies and administrative procedures satisfy those standards, the Court explained, "it would not end [the] inquiry"; "the Suspension Clause remains applicable and the writ relevant." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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* This brief does not purport to state the views of Yale Law School, if any.

APPENDIX

APPENDIX

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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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