No. _____

# In The
# Supreme Court of the United States

STEFANY VEGA DURON, a Minor, and; BRITTANY ELIZABETH VEGA DURON, a Minor, by and Through Their Father and Next Friend; MARTIN DURON ESPARZA; and by and Through Their Next Friends; TROY BROWN and CHRIS BROWN,

*Petitioners,*

versus

RON JOHNSON, Individually, and in His Official Capacity as Director of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security; and DERRICK McCLUNG, an Immigration Officer of the Mississippi Field Office of the United States Immigration and Custom Enforcement Division of the United States Department of Homeland Security,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

I. Is there an administrative remedy in the immigration courts to decide American citizens' claims of a violation of their First and Fifth Amendment constitutional rights?

II. Is an interpretation of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which precludes a judicial remedy for violation of American citizens' constitutional rights, an unconstitutional interpretation?

## LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Stefany Vega Duron, a Minor, Petitioner;

2. Brittany Elizabeth Vega Duron, a Minor, Petitioner;

3. Martin Duron Esparza, Father and Next Friend of Petitioners;

4. Troy Brown, Next Friend of Petitioners;

5. Chris Brown, Next Friend of Petitioners;

6. Roy Johnson, Respondent; and

7. Derrick McClung, Respondent.

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## OPINIONS BELOW

The published decision of the United States Court of Appeals for the Fifth Circuit is found at 898 F.3d 644 (5th Cir. 2018), and is attached as Appendix 1-7. The unpublished opinion of the United States District Court for the Northern District of Mississippi is attached as Appendix 8-17, and is found at 2017 WL 2389640 (N.D. Miss. 2017). The unpublished Judgment of the United States District Court is attached as Appendix 18-19. The unpublished order of the United States Court of Appeals for the Fifth Circuit dated September 5, 2018, denying petition for rehearing is attached as Appendix 20-21.

## JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on August 6, 2018, motion for rehearing denied on September 5, 2018, by writ of *certiorari* under 28 U.S.C. § 1254(1).

## FEDERAL STATUTES CONSTRUED

U.S. Const. Amend. V provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ."

U.S. Const. Art. III, Sec. 1 provides, in pertinent part: "The judicial Power of the United States, shall be

vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, . . . ."

28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

8 U.S.C. § 1252(b)(9) provides, in pertinent part:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, . . . to review such an order or such questions of law or fact.

8 U.S.C. § 1252(g) provides, in pertinent part:

> Except as provided in this section and notwithstanding any other provision of law . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

## STATEMENT OF THE CASE

Five (5) year old Petitioner Stefany Vega Duron (hereinafter "Petitioner Stefany") and twelve (12) year old Petitioner Brittany Elizabeth Vega Duron (hereinafter "Petitioner Brittany") (collectively "Petitioners") are the children of Martin Duron Esparza ("Esparza"), an alien. Esparza's father brought him to the United States from Mexico in 1997 when Esparza was sixteen (16) years old. Petitioners were born in the United States and are, therefore, citizens of the United States. U.S. Const. Amend. XIV.

Esparza has lived in the United States continuously since 1997, except for periodic visits to his blind mother in Mexico. Esparza operated his own irrigation business in Leflore County, Mississippi, employing five (5) people, paying all of his taxes, actively supporting his church, educating Petitioners in the Catholic schools, and committing no crimes.

In 2011, before Petitioner Stefany was born, Esparza requested cancellation of removal under 8 U.S.C. § 1229b(b)(1).[1]

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[1] 8 U.S.C. § 1229b(b)(1) provides:

> The Attorney General may cancel removal of, and adjust to the status of an alien . . . deportable from the United States if the alien –
>
> > (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

Following a hearing, the immigration court entered an order finding that Esparza met three (3) of the four (4) requirements to cancel his removal status. That court found that Esparza was of "good moral character," that he had not been "convicted of any offense," and that his removal would cause "exceptional and extremely unusual hardship" to Petitioner Brittany. But the immigration court denied cancellation of Esparza's removal because the immigration court believed that Esparza's visits to Mexico violated the continuance-presence requirement of 8 U.S.C. § 1229b(a)(1). The immigration judge, therefore, on February 27, 2012, ordered Esparza removed to Mexico.

Notwithstanding the immigration court's removal order of February 27, 2012, which directed that Esparza be "ordered removed to Mexico," the United States Immigration and Customs Enforcement Division of the United States Department of Home Security ("ICE") determined that Esparza was not a "priority" for deportation. Therefore, ICE permitted Esparza to remain in the United States under

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> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

supervision. After permitting Esparza to live, work, and raise his children in the United States for five (5) years, ICE developed different priorities. On May 30, 2017, five (5) months after the inauguration of President Donald J. Trump, ICE issued Esparza a "Notice of Action–Voluntary Departure" order, stating "you are required to depart from the United States at your expense on or before June 1, 2017." Appendix 22. When Esparza asked for an explanation, the ICE officer replied that "the new President don't like you guys."

Invoking federal question jurisdiction under 28 U.S.C. § 1331, the minor Petitioners, American citizens, immediately filed suit in the United States District Court for the Northern District of Mississippi, seeking to prevent their *de facto* deportation. The complaint alleged that the American citizen children had a First and Fourteenth Amendment "familial interest in [their father's] making parental decisions which are in their best interest." Petitioners also alleged that their father was selected for deportation because "he is Hispanic, and the immigration polices [sic] of the executive branch of the United States are targeted against Hispanics" in violation of Fifth Amendment due process.

District Court Judge Michael P. Mills immediately scheduled a hearing on Petitioners' request for a temporary restraining order and preliminary injunction. At the evidentiary hearing held on May 31, 2017, Petitioners introduced the 2012 order of the immigration court finding "exceptional and extremely unusual

hardship" to Petitioner Brittany because of her asthmatic condition if Esparza were deported.

Since Petitioner Stefany had not been born when Esparza requested cancellation, Petitioners also introduced oral testimony of the hardship to her because of her autism. Petitioner Stefany's autism was effectively treated in the United States, but there is no effective treatment in Mexico. Esparza testified that the ICE order of May 30, 2017, that he voluntarily depart by June 1, 2017, Appendix 22, meant that his American citizen children (Petitioners) must leave the United States and accompany him to Mexico since there is no one in the United States to care for them.

Petitioners attached to the complaint and introduced evidence that no interest of the United States is served by deporting their father and, *de facto*, deporting his American citizen children. According to the pastor of the First Presbyterian Church in Greenwood, Mississippi, Esparza "epitomizes the story America loves: Someone who starts with nothing, works hard, lives uprightly, and then is rewarded by becoming a business-owner, home-owner and upstanding person in the community." A Catholic priest who had known Esparza for over ten (10) years described him as an "irrigation systems technician," one of the "very few individuals who work in this specialized field in a five state region," and stated that Esparza's "work is absolutely essential to the continued flourishing of the local agricultural sector both in and beyond the Mississippi Delta." The priest continued that if Esparza "and his family were to abruptly depart from the local parish

and civic communities, their absence would leave a noticeable void in the community," and that "[i]t is people precisely like [Esparza] that our local community needs to strive to retain."

The Respondents (ICE officers who had ordered Esparza to leave the United States) offered no proof at the preliminary/temporary restraining order hearing. This left undisputed Esparza's opinion testimony that he, and *de facto*, his American citizen children, are being deported because they are Mexican.[2]

After hearing the evidence, the district court found that "in November of [2016] . . . the people of this country, made a political decision . . . [to] exercise different discretion in these matters." Thus, the district court denied a preliminary and temporary injunction, and *sua sponte* dismissed the case. The district court followed with a written opinion, quoting *de Chavez v. Holder*, 514 F.App'x 449, 450-51 (5th Cir. 2013), which held that "[a] United States citizen child's constitutional rights are not implicated by the deportation of a parent, even where a de facto deportation of the child would surely occur."

Petitioners timely appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit

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[2] Only subject matter jurisdiction, not the plausibility of this claim, is before this Court. In any event, reasonable inferences can be drawn that Respondent officers perceived President Trump to entertain animosity toward Mexicans, and wanted them to be arbitrarily deported. *See*, e.g., *Time* article entitled, *Here Are All the Times Donald Trump Insulted Mexico*, found at http://time.com/4473972/donald-trump-mexico-meeting-insult/

held that 8 U.S.C. § 1252(b)(9) deprives the district court of jurisdiction of the First and Fourteenth Amendment familial associational claim, and that 8 U.S.C. § 1252(g) deprives the district court of jurisdiction of the Fifth Amendment equal protection claim. Appendix 7.

## REASONS FOR GRANTING THE WRIT

### I. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT THERE IS AN ADMINISTRATIVE REMEDY IN THE IMMIGRATION COURT TO DECIDE AMERICAN CITIZENS' CLAIM OF A VIOLATION OF THEIR FIRST AND FIFTH AMENDMENT ASSOCIATIONAL RIGHTS.

Petitioners allege that the Respondents' May 31, 2017 order that their father voluntarily depart the United States by June 1, 2017, Appendix 22, violates their First and Fifth Amendment constitutional rights to have a parent make parental decisions on their behalf.[3] The Fifth Circuit, however, held that there is no

[3] The right to familial association is constitutionally-protected. *See*, e.g., *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (noting that "there is a constitutional dimension to the right of parents to direct the upbringing of their children," and stating that this Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988) (describing as the "most essential and basic aspect of familial privacy – the right of the family to remain together without the coercive interference of the awesome power of the state"); *Crowe v. Cty. of San Diego*, 608 F.3d 406, 441 (9th Cir. 2010) (noting that "[U]nwarranted state interference" with the relationship between

federal question (28 U.S.C. § 1331) jurisdiction to consider this claim. The Fifth Circuit held that the American citizens' constitutional claims must proceed "through the preordained administrative process." Appendix 4.

The "preordained administrative process" referenced by the Fifth Circuit is the immigration court. A deportation proceeding in the immigration court begins exclusively by the United States issuing a "notice to appear" to an *alien*. 8 U.S.C. § 1229(a)(1); *Pereira v. Sessions*, ___ U.S. ___, 138 S.Ct. 2105, 2109-10 (2018) (explaining that the United States removes aliens through service upon the alien of a "written notice to appear." An "immigration agency has no jurisdiction over U.S. citizens." Jennifer Lee Koh, *Rethinking Removability*, 65 Fla. L. Rev. 1803, 1822 (2013).

The Fifth Circuit's holding that the citizen "children's claim is one that can percolate through the administrative process just fine; . . . ." Appendix 5, is wrong. The immigration court has no jurisdiction to

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parent and child violates substantive due process"); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (noting that parental decision over children is constitutionally-protected, and there must be a "balancing process" when this right interferes with other fundamental rights). For a powerful argument that the deportation of immigrants violates their American children's constitutional rights, *see* Susan Hazeldean, *Anchoring More Than Babies: Children's Rights After* Obergefell v. Hodges, 38 Cardozo L. Rev. 1397 (2017), and *see* Joanne Joseph, *The Uprooting of the American Dream: The Diminished and Deferred Rights of the U.S. Citizen Child in the Immigration Context*, 24 Cornell J.L. & Pub. Pol'y 209 (2014).

initiate deportation proceedings against American citizens.

Nor could Petitioners have their father reopen the cancellation of the removal proceedings which he had filed in 2011. That procedure ended unsuccessfully in 2013 with the affirmance by the Board of Review and the denial of a petition for review by the Sixth Circuit Court of Appeals. In 2017, when ICE had a change of policy and ordered Esparza to depart the United States, it was too late to reopen the old cancellation proceeding since motions to reopen must be filed within ninety (90) days of a final order. 8 C.F.R. § 1003.23.[4]

In any event, Petitioner Stefany could not have litigated any issue in the cancellation proceeding in 2011 since she had not yet been born.

The Fifth Circuit misconstrued *Reno v. Am.-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 473 (1999), as holding that the immigration court is Petitioners' exclusive remedy. *AADC* was a suit filed by aliens in response to a deportation case that had already been initiated in the immigration court.

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[4] Robert L. Koehl, *Perpetual Finality: In Immigration Removal Proceedings, Motions to Reopen Create More Problems Than They Solve*, 2 Tex. A&M L. Rev. 107, 122 (2014), states that it is "nearly impossible for an alien to meet the required elements" for a case to be reopened. To do so, "an alien must: (1) find new evidence within ninety days; (2) prove that it was unattainable at the original hearing; (3) prove prima facie eligibility for relief with this new evidence; and (4) prove that favorable discretion is merited."

This suit does not arise from the 2012 immigration court order for Petitioners' father's failure to leave the United States. ICE disregarded that order for five (5) years, and permitted Petitioners' father to remain in the United States because he was "not a priority." This case arose because on May 30, 2017, ICE ordered Esparza to depart to Mexico based on Respondents' perception that "the new President don't like you guys."

Even if there were a method by which Petitioners' father could reopen the proceedings in the immigration court, he has a powerful disincentive for doing so. If an immigration court issues an order to deport, the "Attorney General shall detain the alien." 8 U.S.C. § 1231(2). Esparza's being "detained" by ICE defeats the very purpose of the present suit, which was to be able to remain with his children in the United States.[5]

Claims that "cannot effectively be handled through the available administrative process. . . ." are not precluded by 8 U.S.C. § 1252(b)(9). *Aguilar v. U.S. Immigration & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007).

Contrary to the Fifth Circuit, the First Circuit held that there is federal question jurisdiction to redress a claim of citizen children for violation of familial rights, despite 8 U.S.C. § 1252(b)(9):

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[5] Being detained is only the most serious of the consequences. Generally, one who has been removed by an order of the immigration court is ineligible for any future relief under the immigration statutes. *See Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133 (9th Cir. 2008).

> This leaves only the petitioners' substantive due process claims, which allege violations of the Fifth Amendment right of parents to make decisions as to the care, custody, and control of their children. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). We conclude that, unlike most of the petitioners' other claims, these claims are collateral to removal and, thus, outside the channeling mechanism of section 1252(b)(9).

*Aguilar*, 510 F.3d at 18-19.[6]

*Aguilar* pointed out that "the right to family integrity is only marginally related to removal, the harm from continuing disruption may be irretrievable, and the issue is not one with which the immigration court ordinarily would grapple." *Aguilar*, 510 F.3d at 19.

The Writ should be granted to correct the Fifth Circuit's erroneous holding that 8 U.S.C. § 1252(g) deprives United States district courts of jurisdiction over suits by citizens alleging that an order by officers of ICE directing an alien to depart the United States violates citizen childrens' First and Fifth Amendment constitutional rights.

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[6] *Aguilar* denied relief on the merits. This Petition, however, presents only an issue of subject matter jurisdiction. Appendix 3.

## II. THE FIFTH CIRCUIT ERRONEOUSLY HELD THAT 8 U.S.C. § 1252(g) DEPRIVES THE DISTRICT COURT OF JURISDICTION TO DECIDE THE CLAIM OF SELECTIVE PROSECUTION BASED ON NATIONAL ORIGIN.

Besides alleging that the deportation of their father violates their family associational rights, Petitioners' complaint also alleges that Petitioners' father was selected for deportation because of his national origin (Mexican), in violation of the Due Process Clause of the Fifth Amendment. The Fifth Circuit correctly found that 8 U.S.C. § 1252(b)(9) does not apply to this claim since that statute is inapplicable when the issue is "*how* the Government chooses to enforce already-existing removal orders." Appendix 5 (emphasis in original).

Nevertheless, the Fifth Circuit upheld dismissal of the selective enforcement claim based upon 8 U.S.C. § 1252(g), which provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien. . . ." Appendix 5.

The Fifth Circuit acknowledged that the text of the statute applies only to a claim brought "by or on behalf of any alien. . . ." 8 U.S.C. § 1252(g). This case was brought not by an alien, but by American citizens. Using 8 U.S.C. § 1252(g) to close the federal courthouse

door to citizens violates the most fundamental rule of statutory construction, that words of a statute must be given their ordinary meaning. Antonin Scalia, *et al., Reading Law: The Interpretation of Legal Texts*, 69 (2012).

The Fifth Circuit wrote: "Fundamentally, the children complain of discrimination against their *father* based on his national origin, and as a consequence, they rely necessarily on their *father's* right to be free from discrimination." Appendix 6 (emphasis in original). But even Respondents admitted that Petitioners do, indeed, have standing. According to footnote 1, p. 2 of Respondents' brief in the Fifth Circuit Court of Appeals:

> Defendants concede that Plaintiffs have standing. *See Sessions v. Morales-Santa*, ___ U.S. ___, 137 S.Ct. 1678, 1689 (2017) (noting that while, ordinarily, a party must assert his own legal rights and cannot rest his claim to relief on the legal rights of third parties, an exception is recognized where the party asserting the right has a close relationship with the person who possesses the right and there is a hindrance to the possessor's ability to protect his own interests).

*AADC* demonstrates why the Fifth Circuit is in serious error. *AADC* was a suit by an alien claiming that he was selectively chosen for deportation because of exercise of his First Amendment rights. *AADC* held that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as

a defense against his deportation." *AADC*, 525 U.S. at 488.

Thus, *AADC* forecloses any claim by a deportable alien that he was selected for deportation because of his race. But Petitioners are American citizens, not undocumented aliens. The Fifth Circuit seriously misread *AADC* because that decision did not adjudicate that American citizens have no claim to be free from selective prosecution based on nationality. ICE has no authority to deport American citizens.

The claim that Petitioners' alien father and, thus, Petitioners themselves are being *de facto* deported because of national origin states a colorable constitutional claim. "[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *AADC*, 525 U.S. at 497-98 (Ginsburg, J., concurring) (citations omitted).

## III. THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER AN INTERPRETATION WHICH PRECLUDES A JUDICIAL REMEDY FOR VIOLATION OF CITIZENS' CONSTITUTIONAL RIGHTS IS AN UNCONSTITUTIONAL INTERPRETATION.

If the Fifth Circuit's erroneous interpretation of these two (2) jurisdictional-stripping statutes is allowed to stand, there is no available judicial forum in

which an American citizen child of an alien may bring suit to assert her First and Fifth Amendment familial associational rights, nor her Fifth Amendment right to be free from selective enforcement based on nationality.

In *AADC*, 525 U.S. at 508, Justice Souter noted that a "serious constitutional question. . . ." will be presented if "Congress [] block[ed] every remedy for enforcing a constitutional right." Justice Souter wrote:

> [C]omplete preclusion of judicial review of any kind for claims brought by aliens subject to proceedings for removal would raise the serious constitutional question whether Congress may block every remedy for enforcing a constitutional right. See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n. 12, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986). The principle of constitutional doubt counsels against adopting the interpretation that raises this question. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

*AADC*, 525 U.S. at 508. (Souter, J., concurring)

As Justice Souter implied, there are those who argue that there is no constitutional impairment to Congress withdrawing federal court jurisdiction to hear constitutional claims. As explained by Gerald Gunther, *Congressional Power to Curtail Federal*

*Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 895 (1984):

> The constitutional starting point lies in the relatively few words of article III, the Judiciary article. The opening sentence of the first section of that article states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The second part of that sentence is relied upon heavily by those who assert that there exists a broad congressional authority to curtail the jurisdiction of the lower federal courts: since "inferior Courts" are not mandated by the Constitution and since Congress has explicit discretion whether or not to "ordain and establish" them, the argument goes, Congress presumptively may give or take away whatever portions of the "judicial Power" it wishes.

Professor Gunther, however, goes on to note that "academics probably would agree that Congress could not limit access to the federal courts on the basis of race or of wholly irrelevant criteria such as a litigant's height, weight, or hair color." *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. at 916. Professor Gunther was quoted with approval by this Court in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 (1986).

Circuit Judge Richard Posner has written: "The circuits are in agreement: door-closing statutes do not,

unless Congress expressly provides, close the door to constitutional claims, provided that the claim is colorable and the claimant is seeking only a new hearing or other process rather than a direct award of money by the district court." *Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996).

*Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 453 (1985), stated: "Given the rule of judicial restraint requiring us to avoid unnecessary resolution of constitutional issues, . . . we decline to decide in this case whether due process would require judicial review." (Citation omitted).

David Cole, in *Jurisdiction and Liberty: Habeas Corpus and Due Process As Limits on Congress's Control of Federal Jurisdiction*, 86 Geo. L.J. 2481, 2482-83 (1998), argues that jurisdiction-stripping statutes must be narrowly construed in order to find that the federal courts retain jurisdiction to decide cases alleging violation of federal constitutional rights. Professor Cole discusses *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974), which held that a federal statute prohibiting judicial review of a veterans benefits determination should not be interpreted to bar review of constitutional claims; and also discusses *Webster v. Doe*, 486 U.S. 592, 603 (1988), which held that despite a federal statute barring review of Central Intelligence Agency employment decisions, federal courts retain jurisdiction to decide questions alleging violation of constitutional rights.

*Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015), *aff'm* by an evenly-divided court, 136 S.Ct. 2271 (2017), noted: "[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,' and we will accordingly find an intent to preclude such review only if presented with 'clear and convincing evidence.'"[7]

The Writ should be granted to determine whether the Fifth Circuit's interpretation of 8 U.S.C. §§ 1252(b)(9) and 1252(g), which, in effect, strips all courts of jurisdiction to hear Petitioners' constitutional claims violates due process.

## IV. THIS CASE PRESENTS ISSUES OF IMMENSE IMPORTANCE TO MILLIONS OF AMERICAN CITIZENS.

The importance of this case to the citizen children of undocumented immigrants is indicated by the fact that former President Barack Obama attempted to exercise his executive authority to grant deferred action to undocumented parents of United States citizens. President Obama's executive order established a program entitled Deferred Action for Parents of American and Lawful Permanent Residents ("DAPA"). This

[7] *Texas v. United States* ultimately held that the Executive Branch lacked authority to adopt a policy deferring the deportation of parents of American children (the "DAPA" policy). This holding, however, was based on procedural and statutory grounds. *Texas v. United States* did not reach any constitutional issue. *See Batalla Vidal v. Nielsen*, 2018 WL 834074, *7, 17 (E.D.N.Y. 2018) (examining and disagreeing with *Texas v. United States*).

would have provided relief from deportation to American citizens, such as Petitioners. The DAPA program, however, never took effect because the Fifth Circuit, *en banc*, held that it exceeded the President's executive authority. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'm* by an evenly divided court, ___ U.S. ___, 136 S.Ct. 2271 (2016). The fact that a President of the United States took executive action to correct the outrage in the *de facto* deportations of America's own citizens indicates the importance of this case. The Ninth Circuit also considers these important situations. In the process of holding that the cancellation of a similar deferred action program (Deferred Action for Childhood Arrivals ("DACA")) to be unconstitutional, the Ninth Circuit, *en banc*, disagreed with the Fifth Circuit. *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, ___ F.3d ___, 2018 WL 5833232, *21-22 (9th Cir. 2018).

This Court has also held unconstitutional a state statute that would place "a lifetime hardship on a discrete class of children [of aliens] not accountable for their disabling status." *Plyler v. Doe*, 457 U.S. 202, 223 (1982). *De facto* deportation of these American citizens will cause them a "lifetime hardship" as did the state's denial of their public education in *Plyler*.

Professor Susan Hazeldean has argued that the many lower federal court decisions holding that American citizen children have no greater rights than their alien parents is inconsistent with recent Supreme Court precedents. Professor Hazeldean writes:

> The Supreme Court's decision in *Obergefell*[8] suggests that children have a right to be raised by their parents without being demeaned or denigrated by the State. The deportation of an American child's parent thus jeopardizes two of her fundamental due process rights: the right to be raised by her own parents, and the right to remain in the United States.

Susan Hazeldean, *Anchoring More Than Babies: Children's Rights After* Obergefell v. Hodges, 38 Cardozo L. Rev. 1397, 1451 (2017).

Professor Hazeldean and other academics[9] demonstrate that there is a substantial federal question as to whether American citizen children's constitutional rights are violated by the deportation of their alien parents. Because there are approximately 4.5 million American children of undocumented immigrants living in the United States,[10] a decision as to whether federal

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[8] *Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct. 2584, 2600 (2015).

[9] *See* Alison M. Osterberg, *Removing the Dead Hand on the Future: Recognizing Citizen Children's Rights Against Parental Deportation*, 13 Lewis & Clark L. Rev. 751, 771-72 (2009); Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 Hastings Const. L.Q. 491 (1995); Joanne Joseph, *The Uprooting of the American Dream: The Diminished and Deferred Rights of the U.S. Citizen Child in the Immigration Context*, 24 Cornell J.L. & Pub. Pol'y 209 (2014).

[10] This statistic was taken from a Google search of Wikipedia, which cited the Pew Hispanic Center as providing this information. A similar figure is given by an American Immigration Council Fact Sheet, *U.S. Citizen Children Impacted by Immigration Enforcement* (May 23, 2018).

courts have jurisdiction to entertain claims of a violation of their federal constitutional rights through deportation of an undocumented parent is a question affecting millions of American citizen children, who are "not accountable for their disabling status."

## CONCLUSION

This Court should grant the Writ in order to determine whether the Fifth Circuit correctly interpreted the immigration laws' jurisdictional-stripping provisions to deny federal district courts jurisdiction over substantial claims by American children that the deportation of their parent violates their constitutional rights.

Respectfully submitted,

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