Nos. 18-776, 18-1015

IN THE

Supreme Court of the United States

PEDRO PABLO GUERRERO-LASPRILLA,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

RUBEN OVALLES,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* SCHOLARS OF HABEAS CORPUS LAW SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are among the nation's foremost scholars of habeas corpus. Paul Halliday is the Julian Bishko professor of history and professor of law at the University of Virginia. Gerald L. Neuman is the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School. James C. Oldham is the St. Thomas More Professor of Law and Legal History at Georgetown University Law Center.[2] As leading scholars of habeas corpus, *amici* are interested in the proper interpretation and application of the writ as well as other laws informed by it.

SUMMARY OF THE ARGUMENT

This Court's interpretation of the statute at issue can begin and end with its plain text. The Savings Clause of the REAL ID Act, 8 U.S.C. § 1252(a)(2)(D), provides for judicial review of removal orders implicating "questions of law." And it is well settled that the term "questions of law" encompasses the application of law to undisputed facts. Because the statute's text is dispositive, this Court need not go further to resolve these cases.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), counsel for *amici curiae* states that all parties have consented to the filing of this brief.

[2] *Amici*'s affiliations are listed for identification purposes only.

In their arguments before this Court, Petitioners contend that the Court can interpret the statutory text with reference to the historical scope of habeas review and the Suspension Clause, U.S. Const., Art. I, § 9. Petitioners point to the legislative history of § 1252(a)(2)(D), which reflects Congress's intent to permit judicial review over issues historically reviewable on habeas corpus. And, indeed, this Court's precedents make clear that the writ historically has encompassed review of application of law to facts in the immigration context. Congress unquestionably enacted the statute against this historical and constitutional backdrop, which was discussed at length in *INS* v. *St. Cyr*, 533 U.S. 289 (2001).

Nevertheless, where the text of a statute is clear, as it is here, this Court has repeatedly cautioned against diving into legislative history. The facts and procedural history of these cases demonstrate the wisdom of such prudence. The parties did not discuss the historical scope of habeas review in their briefing below, and the Fifth Circuit did not decide that issue, making these cases particularly poor vehicles for the Court to attempt to define the precise contours of habeas review or the requirements of the Suspension Clause as applied to removal orders like these. If necessary at all, such analysis should await another day when the subject is fully briefed and decided below.

ARGUMENT

I. The Court Can Decide These Cases On The Plain Language Of The Term "Questions Of Law"

The REAL ID Act's Savings Clause, 8 U.S.C. § 1252(a)(2)(D), provides that "[n]othing . . . in any . . . provision of this chapter . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." *Amici* agree with Petitioners that the plain language of the phrase "questions of law" must include the application of law to undisputed facts. Pet. Br. 28-31. These cases can be decided on that basis without more.

Here, the broad reach of the Savings Clause to all "questions of law" is clear and without qualification. Under the ordinary meaning of that phrase, applying the law to undisputed facts unquestionably presents a reviewable "question of law." Pet. Br. 28-31. This Court need go no further to resolve these cases.

II. The Legislative Purpose Of Section 1252(a)(2)(D) Confirms Its Plain Meaning

Because the text of the Savings Clause is "clear and unequivocal," this Court need not "resort to the legislative history" of the statute to divine its meaning. *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *see also Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms.").

In any event, however, the legislative history of the REAL ID Act evidences Congress's intention to create a constitutionally permissible substitute for habeas corpus jurisdiction, as Petitioners' fallback argument asserts. *See* Pet. Br. 31-38. *Amici* have written extensively on the history of habeas corpus and its relevance to issues before this Court.[3] They thus submit this brief to address some essential background on the historical and constitutionally required contours of habeas in the removal context as relevant to this case.

Because the issue was not briefed or decided below, *amici* present some relevant cases and their view of the approach that should be taken in these

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[3] *See*, *e.g.*, Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575 (2008) (cited in *Boumediene*); Paul D. Halliday, Habeas Corpus: From England to Empire (2010); Gerald L. Neuman, *Jurisdiction and the Rule of Law after the 1996 Immigration Act*, 113 Harv. L. Rev. 1963 (2000) (cited in *St. Cyr*); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998) (cited in *St. Cyr* and *Boumediene*); James Oldham, *New Light on Mansfield and Slavery*, 27 J. of British Studies 45 (1988) (cited in Brief for Legal Historians as *Amici Curiae* in *St. Cyr*); James Oldham, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century (1992) (cited in Brief for Legal Historians as *Amici Curiae* in *St. Cyr*); James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and INS* v. *St. Cyr*, 16 Geo. Immigr. L.J. 485 (2002) (cited in Brief for Legal Historians as *Amici Curiae* in *Boumediene*); *see also Boumediene* v. *Bush*, 553 U.S. 723, 746 (2008) ("[T]he parties in these cases have examined historical sources to construct a view of the common-law writ as it existed in 1789—as have *amici* whose expertise in legal history the Court has relied upon in the past.").

cases if the Court decides to consider the history and scope of habeas corpus in this setting. They respectfully submit, however, that defining the required scope of habeas review presents questions of constitutional law with potentially far-reaching implications that should be avoided unless critical to the resolution of a claim—which is not the case here. *See Bond* v. *United States*, 572 U.S. 844, 855 (2014); *Ashwander* v. *TVA*, 297 U.S. 288, 345-49 (1936) (Brandeis, *J.*, concurring).

A. In defining the scope of judicial review in removal proceedings as part of the REAL ID Act, Congress was not writing on a blank slate. Congress first limited the scope of judicial review of immigration deportation orders with the Immigration Act of 1891, which made executive officials' exclusion determinations "final" to the greatest extent allowed by the Constitution, and that policy continued with the Immigration Act of 1917, which imposed similar finality on the Executive's deportation orders.

This "finality period" ended when immigration review was broadened by the combination of the Administrative Procedure Act (APA) and the Immigration and Nationality Act (INA) of 1952. As the Court held in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), proceedings under the INA came under the APA's judicial review provisions.

Congress subsequently modified this scheme by enacting the modern petition-for-review procedure in 1961. Congress directed in that year that judicial review of deportation orders would be heard primarily in the courts of appeals through petitions for review and that exclusion orders should be reviewed initially

in district court habeas proceedings. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 651 (codified as amended at 8 U.S.C. § 1105a (1994)) (repealed 1996). Subsequently, in 1996, amendments to the immigration laws[4] directed review of all removal orders (a term which encompassed both the prior exclusion and deportation orders) to the courts of appeals but disallowed direct review of certain claims, such as challenges by noncitizens removable for criminal convictions. *See* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. Sch. L. Rev. 133, 134-36 (2006-2007).

In *St. Cyr*, the Court considered whether these amendments were also intended to strip district courts of their habeas corpus jurisdiction over certain claims of noncitizens convicted of crimes. It held that Congress did not intend to preclude habeas review through these amendments because the statutes contained no clear, unambiguous expression of that intent and adopting such a construction "would raise serious constitutional questions." *See* 533 U.S. at 314.

The Court has long recognized that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *St. Cyr*, 533 U.S. at 300 (quoting *Heikkila* v. *Barber*, 345 U.S. 229, 235 (1953)). The Suspension Clause, adopted as part of the original Constitution in 1789, provides that "The Privilege of the Writ of Habeas Corpus shall not be

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[4] Namely, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, Cl. 2. In *St. Cyr*, the Court explained that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301.[5]

As the Court further explained, "[b]efore and after the enactment in 1875 of the first statute regulating immigration," the federal courts' jurisdiction to issue writs of habeas corpus "was regularly invoked on behalf of noncitizens, particularly in the immigration context." 533 U.S. at 305. Accordingly, the Suspension Clause would have prohibited Congress from withdrawing by statute the historical habeas power of federal judges to review the lawfulness of executive detention, including the enforcement of removal orders, without providing an "adequate substitute for its exercise." *Id.* at 304-05.

Applying these principles, the *St. Cyr* Court discussed the constitutional problems raised by

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[5] Dissenting in *St. Cyr*, Justice Scalia advanced the view, which he subsequently abandoned, that "[a] straightforward reading of [the Suspension Clause] discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended." 533 U.S. at 337. He discarded this ahistorical argument in *Hamdi* v. *Rumsfeld*, acknowledging that "[t]he writ of habeas corpus was preserved in the Constitution." 542 U.S. 507, 558 (2004) (Scalia, *J.*, dissenting); *see also Boumediene*, 553 U.S. at 844, 848 (Scalia, *J.*, dissenting) (recognizing that "[t]he common-law writ [was] received into the law of the new constitutional Republic" and arguing that "[t]he nature of the writ of habeas corpus that cannot be suspended must be defined by the common-law writ that was available at the time of the founding").

Congress's denial of direct review to noncitizens convicted of crimes, holding that the preclusion of direct review in the court of appeals did not bar the noncitizens at issue from bringing habeas corpus actions to challenge removal orders in the district court. Such review, the Court recognized, must encompass "errors of law, including the erroneous *application or* interpretation of statutes." 533 U.S. at 302 (emphasis added). This Court confirmed that understanding of the Suspension Clause while finding a constitutional violation in *Boumediene* v. *Bush*, 553 U.S. 723, 779 (2008).

The ruling in *St. Cyr* resulted in a bifurcated system of judicial review, with certain challenges to removal orders remaining in the courts of appeals, while other challenges belonged in habeas actions in the district courts. In light of the inefficiencies and other perceived problems resulting from this bifurcation, Congress passed the REAL ID Act of 2005, including what is now § 1252(a)(2)(D).

It is self-evident from the legislative record that Congress enacted the REAL ID Act in response to *St. Cyr*. *See* 151 Cong. Rec. H2813, H2873 (2005) (further discussed below). *St. Cyr* recognized that "Congress could, without raising any constitutional questions, provide an adequate substitute [for the writ] through the courts of appeals." 533 U.S. at 314 n.38. And the REAL ID Act sought to do just that. In the aftermath of *St. Cyr*, Congress sought to restore exclusive jurisdiction for review of final removal orders in the court of appeals (by means of a petition for review) without disturbing the decision's central principle that constitutional questions and questions of law must be reviewable by an Article III court. As such,

the REAL ID Act expressly precluded habeas corpus actions themselves, but specifically amended the INA to provide for review in the courts of appeals of the legal and constitutional claims that the Court explained must be encompassed by habeas. *See* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. Sch. L. Rev. 133, 134-36 (2006).

As the Conference Report makes clear, the Act is not intended to "eliminate judicial review, but simply [to] restor[e] such review to its former settled forum prior to 1996" and this Court's opinion in *St. Cyr*. 151 Cong. Rec. H2813, H2873 (2005). Accordingly, as the Report also makes clear, the "purpose" of the Savings Clause is "to permit judicial review over those issues that were historically reviewable on habeas." *Id.*; *see also id.* ("Under section 106, all aliens who are ordered removed by an immigration judge will be able to appeal to the BIA and then raise constitutional and legal challenges in the courts of appeals.").

As further demonstrated below, the legislative history of the Savings Clause thus compels the same conclusion as its text—it provides for review of the "legal elements" of "mixed question[s] of law and fact." 151 Cong. Rec. at H2873.

B. "[R]econstructing habeas corpus law" as it historically existed for purposes of a Suspension Clause analysis is a "difficult enterprise." *St. Cyr*, 533 U.S. at 301 n.13 (quoting Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 980 (1998)). The historical scope of habeas review for noncitizens

facing removal was thus the subject of lengthy analysis in this Court's opinion in *St. Cyr*.

Based on this analysis, the Court recognized that constitutionally guaranteed habeas rights extend to judicial review of removal orders for "errors of law, including the erroneous *application or* interpretation of statutes." 533 U.S. at 302 (emphasis added).[6] Then, three years after Congress enacted § 1252(a)(2)(D), the Court in *Boumediene* ruled as a constitutional matter that it is "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." 553 U.S. at 779.[7] This conclusion is compelled by the history of habeas corpus and its guarantee in the Constitution.

English cases prior to the Revolution confirm that review of the application of law to fact was encompassed within habeas in that period. For example, in *Thomas Miller's Case*, 96 Eng. Rep. 518,

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[6] The Court found the *St. Cyr* case itself particularly clear because it involved a "pure" issue of law. But in doing so, as noted above, the *St. Cyr* Court emphasized that the historical scope of habeas included "erroneous application or interpretation of statutes"—a proposition which was confirmed in *Boumediene*'s invalidation of a provision of the Military Commissions Act as violative of the Suspension Clause.

[7] Habeas review of executive detention, as considered in *St. Cyr* for removal and *Boumediene* for military detention, differs in constitutionally significant ways from the more limited habeas corpus available for constitutional review of criminal convictions. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 981-87 (1998).

2 Black. W. 881 (C.P. 1773), the court confronted law that required a prisoner to answer the questions of a bankruptcy commissioner. But that straightforward legal rule did not resolve the case; the Court of Common Pleas applied the law to the facts presented—a prisoner who claimed to have no memory of the events at issue and thus to be unable to answer the commissioner's questions—and granted habeas relief: "If he really has no recollection, 'tis impossible to make any other answer, and we must not compel men to impossibilities." *Id.* at 520.

Likewise, in *Good's Case*, 96 Eng. Rep. 137, 1 Black. W. 251 (K.B. 1760), the King's Bench, acting on habeas, applied a law allowing impressment into service at sea to the particular factual scenario at issue: it reviewed a sworn affidavit and held that the law was inapplicable to a ship-carpenter who "never used to go to sea." The grant of habeas relief to John Golding in 1692 provides further evidence. Detained from a vessel flying French colors as a prisoner of war, the native of Dublin was released apparently because the legal term "prisoner of war" could not apply to him as a British subject. *See* Paul D. Halliday, Habeas Corpus: From England to Empire 170 (2010).

The common-law writ of habeas corpus was also available throughout the thirteen British colonies that later became the original United States. William F. Duker, A Constitutional History of Habeas Corpus 115 (1980). And while colonial courts produced few *reported* habeas decisions, the historical record shows that the writ was available to non-citizens, including in cases applying law to fact. *See* James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and INS* v. *St. Cyr*, 16 Geo. Immigr. L.J. 485,

496 (2002). In one instructive episode, British forces sought to reduce resistance to their control in Nova Scotia by relocating upwards of 5,000 Acadians to other British colonies. Governor James Glen of South Carolina considered expelling Acadians who arrived there, but conferred with the colony's Attorney General and Chief Justice, who

> both concurred, & are most clearly of Opinion, that I could not: That it wou'd be illegal, & unwarrantable in acting not only contrary to one of my Instructions, which I shew'd them, but that it wou'd be a violation of Magna Charta, The Great Charter of the Land; *[&] might subject me to all the Pains & Penalties in the Habeas corpus Act*[.]

Id. at 498 (quoting Message of Royal Governor James Glen to the Commons House Assembly (Feb. 21, 1756), reprinted in The Colonial Records of South Carolina: Journal of the Commons House of Assembly, 1755-1757, at 120 (Terry W. Lipscomb ed., 1989)). The opinion of the Governor's advisors plainly suggests that expulsion, as an exercise of law applied to the undisputed facts of the Acadians' situation, would implicate habeas.

Following independence and adoption of the Constitution, federal courts embraced the English habeas doctrine's openness to review the application of law to fact. For example, Chief Justice John Marshall, riding circuit, ordered the release of one prisoner detained under a statute concerning enforcement of debts to the Treasury owed by "any collector of the revenue, receiver of the public money, or any other officer who shall have received the public

money," or by "any officer employed, or who has been heretofore employed in the civil, military, or naval departments . . . to disburse the public money appropriated to the service of those departments." On the facts of the case, where the detained man was only in an *acting* capacity as a Navy ship's purser (temporarily replacing the regular purser, who had died during the voyage), Marshall ruled for the prisoner, holding that he was "not one of those persons on whom the law was designed to operate." *Ex parte Randolph*, 20 F. Cas. 242, 254-55 (No. 11,558) (C.C. Va. 1833).

The guarantee to immigrant detainees of habeas review on mixed questions became especially clear during the finality period between the 1890s and the mid-1950s—during which, as discussed earlier, Congress precluded the Judiciary from reviewing the "final" immigration expulsion decisions of the Executive, "except insofar as it was required by the Constitution." *Heikkila* v. *Barber*, 345 U.S. 229, 235 (1953). Nevertheless, during the finality period this Court repeatedly recognized that habeas corpus guaranteed immigrants facing exclusion or deportation a minimal level of judicial review. Indeed, the Court said that an excluded immigrant was "doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint [was] lawful." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892) (holding that Congress had withdrawn the courts' ability to review the facts presented in that case); *see also generally* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 1007-20 (1998).

During this finality period, the Court repeatedly corrected the Executive's errors of law in habeas cases involving immigrants facing removal. *See*, *e.g.*, *Mahler* v. *Eby*, 264 U.S. 32, 45 (1924) (holding that statute required explicit finding that petitioners were "undesirable residents" before they could be deported for certain wartime convictions); *Fong Haw Tan* v. *Phelan*, 333 U.S. 6 (1948) (rejecting the Executive's interpretation of multiple conviction provision of Immigration Act of 1917).[8]

Throughout this period, habeas review of immigration orders applied to mixed questions of law and fact. For example, in *Hansen* v. *Haff*, 291 U.S. 559 (1934), this Court considered the lawfulness of the order of removal of a Danish woman residing in Los Angeles who, after returning from a trip to Europe, was ordered deported for "coming into the United States for . . . [an] immoral purpose" in violation of the 1917 Act—namely for the purpose of "extra-marital relations" with the married man with whom she had traveled. 291 U.S. at 560, 562. The Court held that these extra-marital relations did not qualify as an "immoral purpose" as that term was used in the statute but also, applying the law to the undisputed facts presented in the case, that she did not enter for the purpose of continuing such relations. Even

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[8] The questions of law reviewable under constitutionally required habeas included not only questions concerning statutes but also questions concerning regulations. For example, in *United States ex rel. Johnson* v. *Shaughnessy*, 336 U.S. 806 (1949), on a habeas challenge to a Swedish woman's exclusion on grounds of mental defect, the Court ruled that the Government had failed to comply with health examination regulations for immigrants.

assuming that the relations would continue, "[t]he fact is that she was returning to her former residence, and nothing is disclosed to indicate that she did not intend, as she claimed, to resume her employment as a domestic." *Id.* As a legal matter, the Court considered these facts to have primary significance in evaluating her purpose in entry. *Id.*

This and other cases from the finality period show the reach of habeas extending to review of the application of law to undisputed facts. In *Delgadillo* v. *Carmichael*, for example, the Court reviewed case law "suggest[ing] that every return of an alien from a foreign country to the United States constitutes an 'entry' within the meaning of the [1917] Act." 332 U.S. 388, 390 (1947). But that case involved a foreign resident of the United States who served as a crew member on a merchant ship torpedoed while sailing from Los Angeles to New York during the Second World War. Since the ship's sinking left him involuntarily stranded on Cuba, the Court found that his subsequent return to the United States did not constitute a legal "entry," which would give the Act "a capricious application." *Id.* at 389-91. As mentioned above, the "finality period" lasted until 1952, when deportation orders became reviewable under the Administrative Procedure Act. With that new statutory guarantee of judicial review, immigration habeas cases were no longer determining the constitutional minimum of judicial inquiry.

The text of § 1252(a)(2)(D)—protecting "review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals"—accords with this history and the directive of *St. Cyr* respecting the constitutional minimum of

judicial review guaranteed in the removal context. The statute embodies *St. Cyr*'s admonition that historical habeas review encompassed review of "errors of law, including the erroneous application or interpretation of statutes." 533 U.S. at 302. The purpose and effect of § 1252(a)(2)(D), then, was to change the venue for what would have been habeas claims to the courts of appeals.

III. It Is Unnecessary To Expound Here On The Metes And Bounds Of Habeas Review

Notwithstanding the abbreviated discussion above, *amici* respectfully submit that the Court need not explore the precise contours of judicial review required by the Suspension Clause in deciding these cases. As noted, Petitioners' claims fit squarely within the review allowed for "questions of law" under § 1252(a)(2)(D), rendering an analysis of complex constitutional issues unnecessary.[9]

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[9] For important reasons, *amici* also agree with Petitioners that it would be a mistake to approach application-of-law questions under § 1252(a)(2)(D) solely on the basis of the Court's decision in *U.S. Bank Nat'l Ass'n* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018). In *U.S. Bank*, the Court discussed the proper standard of review on appeal for mixed questions of law and fact. As the Court noted, "[m]ixed questions are not all alike" and the standard of review for such questions will thus "depend[]—on whether answering it entails primarily legal or factual work." 138 S. Ct. at 967. While this may be a useful insight, we stress that it cannot be transposed automatically to the habeas context. Importantly, *U.S. Bank* was concerned with the proper scope of appellate review for decisions rendered by Article III courts in the first instance. By contrast, habeas review of executive detentions provides the first level of Article III scrutiny for decisions rendered by non-judicial tribunals.

The Fifth Circuit did not consider or rule on the potential importance of habeas corpus in the statutory review scheme, nor did the parties brief that issue below. Given the posture in which this issue arose, *amici* cannot know and will not have an opportunity to respond to whatever the Government may say about this significant constitutional issue, which could have far reaching implications well beyond these cases.

CONCLUSION

Because the plain language providing for judicial review of "questions of law" under 8 U.S.C. § 1252(a)(2)(D) encompasses review of the application of law to undisputed facts, these cases can be resolved on that basis. Delving into the habeas issues that lie in the background of the statute could raise constitutional issues in light of *St. Cyr* and *Boumediene*, which have arisen for the first time at this stage of the case and which the Court should seek to avoid. If the Court determines that further consideration of the historical scope of habeas is necessary, *amici* submit that these cases are poor vehicles for such consideration and should be dismissed as improvidently granted or remanded to the courts of appeals for full briefing and consideration of this important issue in the first instance.

Respectfully submitted.

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