No. 19-161

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Petitioners,

v.

VIJAYAKUMAR THURAISSIGIAM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE FOR INTERNATIONAL LAWYERS IN SUPPORT OF RESPONDENT

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ACRONYMS AND ABBREVIATIONS

Am. J. Int'l L.	American Journal of International Law
Co.	company
Dall.	Dallas
Doc.	document
ed.	edition
Fed. Reg.	Federal Regulation
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
IJ	Immigration Judge
No.	number
O.A.S. or OEA	Organization of American States
O.A.S.T.S.	Organization of American States Treaty Series
para.	paragraph
Pet.	Peters
Pub. L.	Public Law
Res.	resolution
S. Ct.	Supreme Court Reporter
Ser.	series
U.S.	United States or United States Reports
U.N.	United Nations
U.N.G.A.	United Nations General Assembly
U.N.T.S.	United Nations Treaty Series
Vol.	Volume

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The individual *amicus curiae* whose views are presented here are international law scholars specializing in public international law and international human rights law. *See* Appendix A (listing all *amici*). They research, teach, speak, practice, and publish widely on international law issues, and routinely advise governments on issues of international law.

Amici submit this brief to assist the Court in deciding whether international law should be applied in the consideration of this case and generally what law is relevant.

Amici argue that the applicable international law provides for the rights of due process and fair trial and requires the availability of the writ of habeas corpus.

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[1] Pursuant to Supreme Court Rule 37.3, the amici submit this brief without an accompanying motion for leave to file an amicus curiae brief because all parties have consented to its filing. Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the International Lawyers or its members made any monetary contribution to the preparation or submission of the brief.

I. SUMMARY OF ARGUMENT

The purpose of this brief is to bring to the Court's attention international law applicable to the United States that provides requirements of due process or fair trial in the determination of rights such as those at issue in expedited removal proceedings.

The *amici* believe that international law, as it is relevant to the determination of this case, should be addressed by Court. The *amicus* brief therefore seeks to bring to the Court's attention the standards of due process and fair trial that exist under international law and are applicable to the United States.

The applicable international law includes treaties ratified by the United States as well as customary international law that is part of U.S. law. As such, this international law must be faithfully executed by the Executive and enforced by U.S. courts.

II. ARGUMENT

A. INTRODUCTION

The *amici* understand the question before the Court to turn on whether the expedited removal procedure satisfies due process and fair trial requirements. The expedited removal procedure is established in 8 U.S.C. § 1255(b)(1), while 8 U.S.C. § 1252(e) provides that an asylum seeker or a person seeking subject to expedited removal who is seeking protection due to the threat of torture or other persecution may only

have very limited access to judicial review. As a result, an asylum seeker or other person seeking protection from torture or persecution is denied access to a full habeas corpus procedure.

Consequently, an asylum seeker or other person seeking protection from torture or persecution is only entitled to (1) a procedure before the Customs and Border Patrol, a body of whom the majority of members have little or no understanding of international human rights law; (2) an interview with an Asylum Officer, which often lasts less than an hour; and (3) a hearing—which is often very brief—before an administrative official referred to as an Immigration Judge (hereinafter "IJ"). In these expedited administrative proceedings, asylum seekers who are detained are often not represented by legal counsel.

The only judicial review is that foreseen in 8 U.S.C. § 1252(e)—through a district court habeas corpus action. However, district courts are limited to reviewing determinations of whether the petitioner is an alien, was ordered removed, and can prove her or his immigration status. 8 U.S.C. § 1252(e)(2). No matter how egregious the deficiencies of due process or fair trial in the administrative proceedings, these deficiencies cannot be judicially reviewed. Moreover, all the proceedings establishing the record for the limited judicial review are before administrative officials who are employees of the Executive branch. These employees may be intimidated by the statements of their superiors, who are political appointees, indicating that administrative officials should limit the number of immigrants allowed into the country. See, e.g., Innovation Law Lab and Southern Poverty Law Center, The Attorney General's Judges: How The U.S.

Immigration Courts Became A Deportation Tool 22 (June 2019) and Jaya Ramji-Nogales, et al., "Refugee Roulette: Disparities in Asylum Adjudication," 60 Stan. L. Rev. 295, 386 (2007).

As this case comes before the Court, the U.S. government is in the process of further limiting due process and fair trial provisions of the expedited removal procedure. See 84 Fed. Reg. 63994 (Nov. 19, 2019) (authorizing the removal of asylum-seekers and other seeking protection before any administrative proceeding before an Asylum Officer or IJ). In so doing, the government is paying little to no attention to the legal obligations of the United States under international law.

The *amici* submit that international law is relevant to the consideration of the legality of the expedited removal procedure because this procedure must be consistent with the international legal obligations of the United States relating to due process and fair trial. This law should be applied by the Court in its consideration of this case.

B. International Law Applicable to the United States Provides for Minimum Norms of Due Process and Fair Trial.

International law applicable to the United States includes the rights to due process and a fair procedure for the determination of claims for asylum and other forms of protection from serious human rights violations.

The rights to due process and fair trial apply to procedures through which individuals claim rights recognized by domestic or international law. A person seeking asylum or claiming protection from a serious violation of her or his human rights is exercising a right recognized under both domestic and international law—namely, the right to seek and receive asylum or the right to be protected from torture, cruel, inhumane and degrading treatment or punishment.

At a minimum, the combined effect of the rights to due process and fair trial guarantee a migrant seeking asylum or other protection from serious human rights violations the right to challenge the legality of her or his removal, including the factual determinations of the administrative official and the fairness of the process leading to removal. This requires the United States to provide these individuals the right to the common law writ to habeas corpus.

1. The Rights to Due Process and a Fair Trial in Treaties Is Applicable to the United States.

The rights to due process and fair trial are found in International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (hereinafter "ICCPR"). This treaty has been ratified by the United States. The ICCPR provides in article 14 that in the determination of one's rights, ". . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." ICCPR art. 14. This right requires access to a body that is not

beholden to one of the parties before it and to a proceeding in which there is equality of arms between the parties. The right enumerated in article 14 also requires that a petitioner be allowed an opportunity to determine the fairness of his or her procedure.

The United Nations Working Group on Arbitrary Detention has concluded that "where people have been detained, expelled or returned without being provided with legal guarantees, their continued detention and subsequent expulsion are to be considered as arbitrary." U.N. Working Group on Arbitrary Detention, Conclusions and Recommendations, U.N. Doc. E/CN.4/2004/3, para. 86 (Dec. 15, 2003). Similarly, the United Nations Special Rapporteur on the Human Rights of Migrant Workers has urged States to avoid actions that curtail judicial control of the right to seek asylum. United Nations, Report of the United Nations Special Rapporteur on Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, U.N. Doc. E/CN.4/2003/85, para. 75(h) (Dec. 30, 2002).

2. The Rights to Due Process and a Fair Trial Also Arise Under Customary International Law.

The fundamental aspects of both the right to due process and the right to a fair trial are well-established in customary international law that is applicable to the United States. These rights are included in numerous human rights instruments that have been ratified by virtually every country in the world. See, e.g., ICCPR, arts. 6, 7, 14 (ratified by 173 of 206 sovereign States in the international community); Convention for the Protection of Human Rights and

Fundamental Freedoms, Nov. 4, 1950, arts. 2, 3, 6, 213 U.N.T.S 221 (entered into force Sept. 3, 1953) (ratified by 47 European States); American Convention on Human Rights, Nov. 22, 1969, arts. 4, 5, 8, 114 U.N.T.S. 213 (entered into force Jul. 18, 1978) (ratified by 25 American States); African Charter of Human and Peoples' Rights, Jun. 27, 1981, arts. 4, 5, 7, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986) (ratified by 54 African States). In total, these treaties enjoy more than 300 ratifications.

The most important expressions of the customary international law rights to due process and fair trial are found in the Inter-American context, in which the United States is an important and very influential actor. As a Member State of the Organization of American States (hereinafter "O.A.S."), the United States has recognized and accepted its obligation to respect the Inter-American rules of customary international law. It has done this by joining the consensus of States that have adopted the regional Inter-American instruments that expressly endorse the rights to due process and fair trial. These instruments are interpreted by the Inter-American Commission on Human Rights (hereinafter "IACHR" or "Commission"), a body whose "principal function [is] to promote the observance and protection of human rights." Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, art. 112, O.A.S.T.S. 1-A (entered into force Mar. 12, 1970) (ratified by the United States on April 23, 1968). The United States is party to the Charter of the Organization of American States, 119 U.N.T.S. 3 (1951), the instrument that created the Commission, and is subject to the jurisdiction of the Commission. See Interpretation of the American

Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human, Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. ¶ 45 (Jul. 14, 1989).

The Commission has held that the provisions of the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Apr. 1948, O.A.S. Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (hereinafter "American Declaration"), which enumerates the rights to due process and fair trial and was adopted by the 1948 inter-governmental Ninth International Conference of American States, in which the United States participated, are incorporated into the text of the Charter because they reflect customary international law. The Commission reaffirmed the customary international nature of the American Declaration on the Rights and Duties of Man in its opinions in White and Potter (Baby Boy) v. United States, Judgment, Inter-Am. Comm'n H.R. 25, OEA/sev.L/V/II.54, doc. 9, rev. 1 (Mar. 6, 1981) and Roach and Pinkerton v. United States, Judgment, Inter-Am. Comm'n H.R. 147, OEA/ser.IJVII.71, doc. 9 rev. 1 (Sept. 22, 1987). In the latter case, the Commission held unequivocally that the provisions of the Declaration are part of international law applicable to the United States. Roach and Pinkerton v. United States, ¶¶ 45–48.

Article XVIII of the American Declaration provides that "[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." American Declaration at 17. Article XXVI of the American Declaration states that "[e]very person

accused of an offense has the right to be given an impartial and public hearing . . ." Id. The IACHR, as the body authorized to interpret the obligations of O.A.S. Member States, has made clear that it understands these fair trial provisions to apply to immigration proceedings. See Andrea Mortlock v. United States, Admissibility and Merits, Judgment, Inter-Am. Comm'n H.R., Report No. 63/08, Case No. 12.534, ¶ 83 (2008). The Commission stated that to deny an alleged victim these protections "simply by virtue of the nature of immigration proceedings would contradict the very object of this provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the persons under the State's jurisdiction are established." Id.

Both the Inter-American Court and Commission have reiterated this understanding. In its "Report on Immigration in the United States: Detention and Due Process," the Commission noted that "[w]hile many of these guarantees are articulated in a language that is more germane to criminal proceedings, they must be strictly enforced in immigration proceedings as well, given the circumstances of such proceedings and their consequences." IACHR, "Report on Immigration in the United States: Detention and Due Process," O.A.S. Doc. OEA/Ser.L/V/II.Doc. 78/10 (Dec. 30, 2010); see also IACHR, "Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere, Annual Report 2000," para. 90 (Apr. 16, 2001); Wayne Smith v. United States, Admissibility, Judgment, Inter-Am. Comm'n H.R., Report No. 56/06, Case No. 12.562, ¶ 51 (Jul. 20, 2006); Loren Laroye Riebe Star, Jorge Alberto Barón Gutlein and Randolfo Izal Elorz v. Mexico, Merits,

Judgment, Inter-Am. Comm'n H.R., Report No. 49/99, Case No. 11.610, ¶ 46 (Apr. 13, 1999).

The rights to due process and fair trial require that the writ of habeas corpus be available to every migrant challenging the legality of her or his detention, removal, and/or deportation, even in states of emergency. See Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion, Inter-Am. Ct. H.R., No. OC-8/87 (Jan. 30, 1987). This right exists, according to the Inter-American Court of Human Rights, because it is "essential for the protection of various rights whose derogation is prohibited … and that serve, moreover, to preserve legality in a democratic society." Id. ¶ 20. While the right to fair trial may be derogated from in exceptional cases of emergency, the right to access a procedure for a writ of habeas corpus may never be derogated from because it is essential "to preserve legality in a democratic society." Id. ¶ 42.

U.S. courts have long recognized the complex nature of our immigration laws. U.S. immigration law involves a complex set of regulations that are difficult for any non-citizen to understand. See, e.g., Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004) (referring to the "morass of immigration law"); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (acknowledging the "baffling skein of provisions for the INS and courts to disentangle"). Unless a person has access to the full panoply of due process and fair trial rights required by law, there is little chance that they can be provided a fair process in the determination of their rights. The current expedited removal process does not provide for an adequately reasoned decision, does not allow

adequate time and facilities to prepare one's case, does not provide for adequate access to legal counsel, and does not provide for 'equality of arms.'

Moreover, the prohibition of torture and the right to seek and receive asylum when one has shown a well-founded fear of serious threats to life, well-being or other basic rights are among these most basic human rights. Individuals seeking asylum or other forms of protection against serious interferences with their most basic human rights are entitled to protection under both international and national law. The determination of whether or not they qualify for protection must be made in a procedure that meets the standards of due process and fair trial both domestically and under international law.

C. The Executive and All of Its Officers are Bound by International Law.

International law, emanating from both treaties that the U.S. has ratified and customary international law that is applicable to the U.S., creates legal obligations for the Executive and all Executive Officers of the U.S.

The American Law Institute, The Restatement (Third) of the Foreign Relations Law of the United States (1987) (hereinafter "Restatement"), in its "Introduction," states unambiguously that "[i]n conducting the foreign relations of the United States, [officials of the United States] are not at large in a political process; they are under law." Id. at 5. Similarly, Professor Jordan Paust, reviewing extensive practice by this Court, and the writings of the founding fathers,

concludes that there can be no doubt that "the President is bound by customary and treaty-based international law." Paust, J.J., "Actual Commitment to Compliance with International Law and Subsequent Supreme Court Opinions: A Reply to Professor Moore," 39 Hous. J. Int'l L. 57, 71–72 & nn. 51–63 (2017).

A failure by this Court to consider the international obligations of the United States providing for the rights to due process and fair trial would not only reverse centuries of consistently upheld precedent, but also could subject the United States to international criticism as a state unwilling to abide by and show due respect for international law.

1. Treaties

The Executive is bound by treaties that have received the advice and consent of the United States Senate, as the U.S. Constitution expressly states that the President of the United States "shall take Care that the Laws be faithfully executed," including as indicated above international law. U.S. Const. art. II, § 3. These treaties should be applied by the Court whenever an exercise of Executive authority raises an issue of consistency with the United States' treaty obligations. Indeed, this Court has frequently reviewed executive power based on treaties. Justice John McLean, in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1932), held that treaties with native American Nations are treaties that "must be respected and enforced by the appropriate organs of the Federal Government." Id. at 594. In Dooley v. United States, 182 U.S. 222 (1901), Justice Henry Billings Brown cited with approval the seminal work of American General Henry Wager

Halleck, a jurist and expert in international law, stating that the "[t]he stipulations of treaties . . . are obligatory upon the nations that have entered into to them . . . and therefore the Executive is bound by the laws of war that are international law. Id. at 231–32 (citing Bart, S.H., Halleck's International Law, Vol. II, 433 (1878)). More recently, in Hamdan v. Rumsfeld, 548 U. S. 557 (2006), this Court applied international law to an armed conflict involving the United States and held that ". . . the Executive is bound to comply with the rule of law . . ." including international law. Id. at 635.

Treaties are expressly made part of U.S. law by the U.S. Constitution that expressly states that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land." U.S. Const. art. IV, cl. 2.

During the founding of the United States, two of the most prominent founders, Alexander Hamilton and John Jay, expressed the opinion that treaties were binding and should be applied by U.S. courts. See The Federalist No. 22 at 197 (Hamilton); No. 80 at 501–03 (Hamilton); No. 64 423–24 (Jay). This Court, on numerous occasions, has recognized that treaties are part of U.S. law and must be applied by the Court. See, e.g., Missouri v. Holland, 252 U.S. 416 (1920); Cook v. United States, 288 U.S. 102 (1933); Kolovrat v. Oregon, 366 U.S. 187 (1961); Water Splash, Inc. v. Menon, 581 U.S. ___ (2017), 137 S. Ct. 1504 (2017); see also Paust, J.J., "Actual Commitment to Compliance with International Law and Subsequent Supreme Court Opinions: A Reply to Professor Moore," 39 Hous. J. Int'l L. 57 (2017). Adherence to treaty obligations is particularly important when application of

the treaty carries significance for the United States in international affairs. As Justice James Iredell stated long ago, and is equally valid today,

> a treaty, when executed pursuant to full power, is valid and obligatory, in point of moral obligation, on all, as well on the legislative, executive, and judicial departments . . . as on every individual of the nation, unconnected officially with either, because it is a promise in effect by the whole nation to another nation, and if not in fact complied with, unless there be valid reasons for noncompliance, the public faith is violated. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272 (1796).

Treaties that the United States has ratified must be applied by U.S. courts because Article II of the U.S. Constitution makes those treaties applicable both in and of themselves and as part of U.S. law, and because the Court itself has affirmed the application of treaties to relevant disputes. For the foregoing reasons, in reviewing the actions of the Executive, the Court should consider the treaties that the United States has ratified as part of U.S. law.

2. Customary International Law

Similarly, customary international law should be applied by the Court because it is part of U.S. law according to both the Constitution, U.S. Const. art. III, § 2, cl. 1, and the holdings of this Court.

The Court has consistently recognized that customary international law is part of U.S. law and that it will apply such law. This Court has stated that "[f]or two centuries we have affirmed that the domestic law

of the United States recognizes the law of nations [i.e. customary international law]." Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004). Indeed, the first Chief Justice of this Court, Chief Justice John Jay, expressly charged grand juries "that the laws of nations make part of the laws of this and of every other civilized nation. They consist of those rules for regulating the conduct of nations towards each other; which, resulting from right reason, receive their obligations from that principle and from general assent and practice." John Jay, C.J., Charge to Grand Juries: The Charges of Chief Justice Jay to the Grand Junes on the Eastern circuit at the circuit Courts held in the Districts of New York on the 4th, of Connecticut on the 22d days of April, of Massachusetts on the 4th, and of New Hampshire on the 20th days of May, 1790 in The Correspondence and Public Papers of John Jay, Vol. III, 387, 393 (Henry P. Johnston, ed., 1891). Justice Gray, writing the opinion for the Court in Hilton v. Guyot, 159 U.S. 113 (1895), expressly agreed, stating that "[t]he most certain guide . . . [to the applicable international law] is a treaty or a statute . . . [but] when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is . . . ." Id. at 163. The opinion states further that "[i]nternational law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination." Id. In The Paquete Habana, 175 U.S. 677 (1900), Justice Gray, again writing the opinion for the Court, stated that "[i]nternational law is part of our law, and must be

ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." Id. at 700. Justice Gray further clarified that "[t]his rule of international law is one which . . . [this Court] . . . administering the law of nations are bound to take judicial notice of, and to give effect to . . . ." Id. at 708. This Court has again recently recognized that customary international law is part of U.S. law and must be applied by the U.S. courts. See Bolivarian Republic of Venezuela et al., v. Helmerich & Payne International Drilling Co. et al., 581 U. S. ____, 137 S. Ct. 348 (2017). This view is shared by the Restatement, op cit, reading "[i]nternational law and international agreements of the United States are law of the United States . . . [c]ases arising under international law or international agreements of the United States are within the Judicial Power of the United States . . . ." Id. at § 111.

Reviewing the constitutional history of Executive authority in light of international law, Professor Jordan J. Paust, one of the foremost authorities on international law in U.S. courts, concludes that the U.S. Constitution

> documents an early expectation that international law is part of the supreme federal law to be applied at least by the Executive and the judiciary. It also documents broader legal policies at stake, all of which make it quite evident that if the President violates constitutionally based international law, he violates not only his constitutional oath and duty, but also the expectations of the Framers—still generally shared—about authority, delegated powers and democratic government. Paust, J.J.,

"May the President Violate Customary International Law? (Cont'd): The President is Bound by International Law," 81 Am. J. Int'l L. 377, 378 (1987).

This expectation was reiterated by this Court in The Paquete Habana, 175 U.S. 677 (1900). This Court found that while Congress may authorize action contrary to the mere "usage" of the international community of States, action may not be taken by the Executive merely "by direction of the Executive, without express authority from Congress." Id. at 711.

Finally, the Charming Betsy doctrine counsels that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). It is possible to construct 8 U.S.C. § 1252(e) in a manner that ensures the basic tenants of due process and fair trial: by preserving the right to access the writ of habeas corpus. For years, the U.S. did exactly this by allowing federal judges to review the findings of administrative asylum proceedings *de novo* in habeas corpus proceedings. Today, expediency should not be allowed to undermine the fundamental values of due process, fair trial and the right to seek and receive asylum and the prohibition of torture that are embedded in the international obligations that are legally binding on the United States.

D. Public Policy Supports Applying International Law.

This Court should apply international law as part of its obligation to uphold the rule of law and to

preserve the system of constitutional democracy of the United States.

First, the U.S. Constitution and the precedents of this Court interpreting the Constitution indicate that international law—both treaties and customary international law—are part of United States law. The U.S. Constitution expressly declares treaties to be part of U.S. law, and this Court has repeatedly recognized that customary international law is part of the laws of the United States that must be applied by the courts. When international law is overlooked, relevant law is not applied to decide a case at law. In this case, international law is relevant law that should be applied.

Second, the United States has represented to its own people that it will respect international law by ratifying treaties in which it undertakes to guarantee certain rights to all individuals under its jurisdiction, such as the rights to due process, fair trial, and to seek and receive asylum and the prohibition of torture, cruel, inhumane and degrading treatment. These rights are essential to the trust of the American people in their government. It is incumbent that the Executive branch uphold such representations to the American people for the proper functioning of the government as envisioned by the U.S. Constitution. The Court should ensure this crucial trust is maintained.

Third, respect for international law is essential to the reputation of the United States in the international community. By ratifying treaties and participating in international affairs, the United States represents to the international community that it will respect international law. As Professor Louis Henkin wrote almost forty years ago, and is still true today, "almost all nations observe almost all principles of

international law and almost all of their obligations almost all of the time." Henkin, L., How Nations Behave: Law and Foreign Policy 47 (2d ed., 1979). Nations that do not respect international law open themselves to international ridicule and expose themselves to charges of being rogue States. Any failure of the United States to respect international law harms the United States and is inconsistent with the consensus of States expressed in the text of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), which although only signed and not ratified by the United States, expresses a widely accepted rule of customary international law in article 27: "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Id. art. 27. Article 26 of the Vienna Convention, further declares that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Id. art. 26. Finally, the American Law Institute's Restatement notes that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . a consistent pattern of gross violations of internationally recognized human rights." Id. § 702. A Comment to this provision of the Restatement observes that "the obligations of the customary law of human rights are erga omnes," thus an obligation owed to all states and in which all States have an interest of enforcement. Id. Comment b. Therefore, when the United States ignores international law, it harms the reputation of the U.S. in the international community, embarrasses American citizens, and fuels the arguments of those States and non-State actors who seek to use extra-legal means to influence the

actions of the United States. It also subjects the U.S. to the possibility of being found responsible for an internationally wrongful act by international bodies, such as United Nations special mandate holders or the IACHR. This is the case because, as the Restatement notes, failure to apply a rule of international law in a domestic context "does not relieve the United States of its international obligation or of the consequences of a violation of that obligation." Id. at § 115. As the final arbiter of the extent to which international law should apply in the U.S. courts, this Court should safeguard the reputation of the United States by ensuring the application of international law.

Fourth, disrespect for international law imposes significant restrictions on the ability of future administrations to conduct international affairs in the best interest of the American people. Regardless of domestic law, the United States may face consequences for having committed an internationally wrongful act if any organ of the State acts in violation of its international legal obligations. These consequences or reparations for injuries are summarized in the International Law Commission's Draft Articles on State Responsibility, annexed to U.N.G.A. Res. 56/83 of December 12, 2001, and corrected by U.N. Doc. A/56/49(Vol. I)/Corr. 4., as including restitution, compensation, satisfaction, and interest on any principal sum due. Id. arts. 35–38. The commission of an internationally wrongful act also entitles States that are injured by the act to take countermeasures against the responsible State. Id. art. 22. Moreover, if the internationally wrongful acts are serious, as acts of systemic discrimination based on religion or national origin and targeting large numbers people are likely

to be, all States in the international community "shall cooperate to bring to an end through lawful means any serious breach." Id. art. 41. These negative consequences are likely to affect the foreign relations of the U.S. government for many years. They are also reasons why this Court should, whenever possible, ensure respect for international law.

IV. CONCLUSION

For the foregoing reasons, *Amici* request that the Court consider United States' obligations under international law in disposing of this case. *Amici* urge the Court to apply international law as a safeguard for an indivdual's procedural rights. In this respect, the *Amici* urge the Court to view habeas corpus as a guarantee of an impartial and independent adjudication of removal proceedings for immigrants.

Date: January 22, 2020

Respectfully submitted,

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APPENDIX

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APPENDIX A

The *Amici* are international lawyers and legal scholars specializing in public international law and international human rights law. They have substantial expertise in issues directly affecting the outcome of this case. These *Amici* are identified below.

Institutional affiliations are listed for identification purposes only; opinions in this brief do not reflect those of any affiliated organization.

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