No. 19-294

In the Supreme Court of the United States

USAMA JAMIL HAMAMA, ET AL., PETITIONERS

v.

REBECCA ADDUCCI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

When an immigration court issues a final order of removal, an alien can obtain review of that order by appealing to the Board of Immigration Appeals (BIA) and can obtain judicial review of the BIA's decision by filing a petition for review with a federal court of appeals. See 8 U.S.C. 1252(a); 8 C.F.R. 1003.1(b). The petition-for-review process is the exclusive route for obtaining judicial review of a removal order. See 8 U.S.C. 1252(a)(5) and (b)(9). In 8 U.S.C. 1252(g), Congress made clear that district courts lack jurisdiction "to hear any cause or claim by or on behalf of any alien arising from the decision or action" to "execute removal orders."

Petitioners are Iraqi nationals, most of whom were ordered removed to Iraq years ago because of crimes they committed in the United States. For years, however, Iraq refused to repatriate Iraqi nationals who, like petitioners, had been ordered removed. Petitioners thus remained in the United States under final removal orders. When Iraq eventually agreed to cooperate with repatriation efforts, U.S. Immigration and Customs Enforcement (ICE) proceeded to effectuate petitioners' removals from the United States. Pet. App. 4a. After ICE detained many of petitioners for removal, petitioners filed this lawsuit. *Id.* at 5a. The district court granted a preliminary injunction barring ICE from executing petitioners' removal orders on the ground that Section 1252(g) violated the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2. Pet. App. 6a. The court of appeals vacated and remanded with instructions to dismiss for lack of jurisdiction. *Id.* at 22a.

The question presented is whether, as applied to petitioners, Section 1252(g) violates the Suspension Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 912 F.3d 869. The opinion and order of the district court assessing jurisdiction (Pet. App. 82a-111a) is reported at 258 F. Supp. 3d 828. The opinion and order of the district court issuing a preliminary injunction on petitioners' removal claims (Pet. App. 39a-81a) is reported at 261 F. Supp. 3d 820. The opinion and order of the district court issuing a preliminary injunction on petitioners' detention claims (Pet. App. 112a-167a) is reported at 285 F. Supp. 3d 997.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38a) was entered on December 20, 2018. The court of appeals denied rehearing on April 2, 2019 (Pet. App. 168a). On June 25, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to

and including August 30, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*), removal proceedings generally provide the exclusive means for determining whether an alien is both removable from the United States and eligible for any relief or protection from removal. See 8 U.S.C. 1229a. When an immigration court issues a removal order, an alien can challenge that order in an appeal to the Board of Immigration Appeals (BIA). See 8 C.F.R. 1003.1(b), 1003.3(a). If the BIA affirms the immigration court's order, the removal order becomes administratively final. 8 U.S.C. 1101(a)(47)(B). The alien may then seek judicial review of that final order of removal by filing a petition for review in the court of appeals in the regional circuit in which the immigration judge completed the underlying proceedings. See 8 U.S.C. 1252(a) and (b)(1)-(2).

The INA provides further procedures to address developments that may occur after removal proceedings have concluded. The immigration court and the BIA have authority to adjudicate motions to reopen removal proceedings on the basis of "new facts," 8 C.F.R. 1003.2(c), 1003.23(b)(3), and to grant stays of the execution of removal, 8 C.F.R. 1003.2(f), 1003.23(b)(1)(v). See 8 U.S.C. 1229a(c)(7). Although aliens must generally apply for relief from removal during initial removal proceedings, see 8 C.F.R. 1240.11, an alien may apply for such relief after proceedings have concluded by moving to reopen those proceedings if circumstances have changed, 8 C.F.R. 1003.2(c), 1003.23. Typically, an alien may file one motion to reopen, which must be filed within 90 days

after the immigration judge or BIA enters its decision. 8 U.S.C. 1229a(c)(7); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). A narrow exception to the 90-day time limit exists, however, for an alien seeking to apply for asylum or withholding of removal based on changed conditions in the country to which the alien will be removed, if the evidence submitted in support of the application "is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), 1003.23(b)(4)(i). Because filing a motion to reopen generally does not stay execution of the underlying decision, an alien subject to a final removal order must separately move for (and be granted) a stay of removal to avoid execution of any removal order. See 8 C.F.R. 1003.2(f), 1003.23(b)(1)(v); cf. *Stone* v. *INS*, 514 U.S. 386 (1995). Judicial review of a denial of a motion to reopen is available in a court of appeals under 8 U.S.C. 1252. See *Kucana* v. *Holder*, 558 U.S. 233, 243-244 (2010); *INS* v. *Abudu*, 485 U.S. 94, 104-105 (1988).

b. In 8 U.S.C. 1252, Congress channeled into the statutorily-prescribed administrative procedure described above all legal and factual questions that may arise from the removal of an alien, with judicial review of those decisions vested exclusively in the courts of appeals. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (*AADC*). Section 1252 provides that claims arising from the removal process, including a claim seeking review of a final removal order, must first be exhausted administratively. 8 U.S.C. 1252(d)(1). Section 1252 also provides that a petition for review in a court of appeals is the "sole and exclusive means for judicial review of an order of removal." 8 U.S.C. 1252(a)(5). The statute likewise specifies that "a petition

for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the" Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. 8 U.S.C. 1252(a)(4). Finally, Section 1252(b) further emphasizes that review of "all questions of law and fact * * * arising from any action taken or proceeding brought to remove an alien from the United States * * * shall be available *only* in judicial review of a final order under this section." 8 U.S.C. 1252(b)(9) (emphasis added).

Having consolidated all judicially reviewable issues concerning removal in the federal courts of appeals, Congress barred federal district courts from reviewing those issues. Thus, Section 1252(g) provides that, "notwithstanding any other provision of law (statutory or nonstatutory)," "no court"—except a federal court of appeals in the petition-for-review process described above—"shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. 1252(g).[1] That language protects the government's authority to make "discretionary determinations" over whether and when to execute a removal order, "providing that if they are

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[1] The Attorney General once exercised all of that authority, but the authority other than to adjudicate cases has been transferred to the Secretary of Homeland Security. See *Clark* v. *Martinez*, 543 U.S. 371, 374 n.1 (2005). Many of the INA's references to the Attorney General are now understood to refer to the Secretary. *Ibid.*

reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." *AADC*, 525 U.S. at 485.

2. a. For many years, the United States was unable to remove to Iraq most Iraqi nationals who had been issued final removal orders, because Iraq would not accept a repatriation unless the person had an unexpired passport. Pet. App. 4a & n.2. Under the limitations on post-removal-order immigration detention set forth in *Zadvydas* v. *Davis,* 533 U.S. 678 (2001), most Iraqis who were subject to final removal orders were released into the United States on supervised release, because there was "no significant likelihood of [their] removal in the reasonably foreseeable future." *Id.* at 701. That included criminal aliens. See Pet. App. 4a.

In 2017, however, Iraq agreed to accept the repatriation of its nationals who were subject to final removal orders. Pet. App. 4a. In April of that year, "the removal of Iraqi nationals to Iraq quickly resumed." *Ibid.*; see *id.* at 5a. In preparation for a second round of removals scheduled for late June, U.S. Immigration and Customs Enforcement (ICE) brought more than 200 Iraqi nationals back into custody. *Id.* at 5a.

b. In June of 2017, petitioners filed a putative class-action habeas petition in the United States District Court for the Eastern District of Michigan on behalf of "all Iraqi nationals in the United States with final orders of removal, who have been, or will be, arrested and detained by ICE as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal." Pet. App. 5a. Petitioners also filed a motion for a temporary restraining order and/or a stay of removal, "asking the

district court to halt their removal to Iraq" based on allegedly changed conditions in that country. *Ibid.*; see *id.* at 42a.

Petitioners' habeas petition alleged that, with the rise of ISIS in 2014, conditions in Iraq had changed since their removal orders had been entered and that they would "face persecution, torture, and possibly death if returned to Iraq" before their legal claims could be pursued in the immigration courts. Pet. App. 114a; see *id.* at 46a. Although those conditions had been known for several years before they filed suit, petitioners did not previously seek to reopen their removal proceedings to argue that changed country conditions should preclude their removal to Iraq. See *id.* at 14a; see also *id.* at 108a-109a. Petitioners nevertheless sought a stay of removal to allow them to retain local immigration counsel and file motions to reopen administrative proceedings. *Id.* at 11a. They contended that it was "unlawful to remove them prior to an adjudication of their motions to reopen by the immigration courts and the filing of a petition for review with the courts of appeals, if necessary." *Id.* at 43a. Petitioners contended that they are "eligible for mandatory relief" under provisions of the INA and the CAT, and that those laws "prohibit their removal until motions to reopen have been filed and adjudicated." *Id.* at 43a-44a. They also alleged that the Due Process Clause barred their removal. *Id.* at 44a.

3. The district court entered an order staying the government's execution of petitioners' final removal orders pending the court's determination of whether it had subject-matter jurisdiction over the case. Pet. App. 86a. The court later expanded its stay to Iraqi nationals nationwide. *Id.* at 86a-87a.

a. In July 2017, the district court concluded that it had jurisdiction over petitioners' claims. Pet. App. 82a-111a. The court recognized that "[b]ecause Petitioners are bringing claims that arise out of the [Secretary's] decision to execute final orders of removal, 8 U.S.C. § 1252(g) applies to divest this Court of subject-matter jurisdiction." *Id.* at 102a. The court nevertheless concluded that Section 1252(g) violated the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2, as applied to petitioners under what it termed the "singular" and "compelling confluence of extraordinary circumstances presented here." Pet. App. 40a. The court reasoned that "to enforce the Congressional mandate that district courts lack jurisdiction—despite the compelling context of this case—would expose Petitioners to the substantiated risk of death, torture, or other grave persecution before their legal claims can be tested in a court." *Id.* at 82a-83a. It believed that result "would effectively suspend the writ of habeas corpus." *Id.* at 83a.

b. Shortly thereafter, the district court issued a nationwide preliminary injunction that prevented the government from enforcing final removal orders against members of a putative class of Iraqi nationals under final orders of removal. Pet. App. 39a-81a.[2] The court reiterated its conclusion that, "[u]nder ordinary circumstances," Section 1252(g) would "divest th[e] [c]ourt of jurisdiction." *Id.* at 58a. But the court again stated that applying Section 1252(g) here would unconstitutionally suspend the writ of habeas corpus. *Id.* at 57a-59a.

The district court rejected the government's argument that, because "[p]etitioners [we]re not challenging the fact of their detention," they had failed to raise the

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[2] The district court later certified the class. See D. Ct. Doc. 191 (Jan. 2, 2018); D. Ct. Doc. 404 (Sept. 26, 2018).

sort of habeas claim that would trigger the Suspension Clause's protections. Pet. App. 56a. The court also rejected the government's argument that the alternative statutory framework providing for "claims brought by motions to reopen adjudicated at the administrative level followed by petitions for review in the courts of appeals * * * is adequate and effective." *Ibid.*; see *id.* at 56a-63a. The court concluded that "the confluence of events in this case would effectively foreclose th[e] route [of filing motions to reopen and motions to stay at the administrative level] for many Petitioners without intervention by the Court." *Id.* at 57a.

c. After the district court granted petitioners' removal-based preliminary injunction, petitioners amended their habeas petition and class-action complaint to challenge their continued detention while their motions to reopen were resolved. See Pet. App. 7a. In January 2018, the court issued a classwide injunction requiring that petitioners be released or that individualized bond hearings be conducted. *Id.* at 112a-167a.

4. The court of appeals vacated the district court's preliminary injunction staying petitioners' removal and remanded to the district court with directions to dismiss petitioners' removal-based claims for lack of jurisdiction. Pet. App. 1a-22a.[3]

a. The court of appeals first concluded that Section 1252(g) barred the district court from exercising jurisdiction. Pet. App. 8a-10a. The court of appeals explained that, "[u]nder a plain reading of the text of the statute,

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[3] The court of appeals also vacated the district court's detention-based injunction, on the ground that 8 U.S.C. 1252(f)(1) barred the district court from entering classwide injunctive relief. Pet. App. 14a-21a. Petitioners do not seek a writ of certiorari on that question, which is not at issue here. See Pet. 10 n.3.

the [Secretary's] enforcement of longstanding removal orders falls squarely under the [Secretary's] decision to execute removal orders and is not subject to judicial review." *Id.* at 9a-10a (citing *AADC*, 525 U.S. at 483).

But, the court of appeals noted, its "agreement with the district court's reasoning end[ed] there." Pet. App. 10a. The court of appeals held that the district court "erred by finding that it could still exercise jurisdiction because 'extraordinary circumstances' created an as-applied constitutional violation of the Suspension Clause." *Ibid.* That was, the court of appeals explained, "a broad, novel, and incorrect application of the Suspension Clause." *Ibid.* For two independent reasons, the court determined that Section 1252(g)'s jurisdictional limitations do not violate the Suspension Clause. *Id.* at 10a-14a.

First, the court of appeals determined that "the type of relief Petitioners seek is not protected by the Suspension Clause." Pet. App. 10a. The court explained that, "'[a]t its historical core,' the writ 'served as a means of reviewing the legality of Executive detention.'" *Id.* at 11a (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001)). Accordingly, the court continued, "[t]he traditional remedy provided by habeas is 'removing the injury of unjust and illegal confinement.'" *Ibid.* (quoting 3 William Blackstone, *Commentaries on the Laws of England* 137 (1768)). The court noted that here, by contrast, petitioners requested relief that is "fundamentally different from a traditional habeas claim." *Ibid.* It explained that petitioners "did not challenge any detention and did not seek release from custody," but rather sought "'a stay of removal'" to provide "'a reasonable period of time'" in which to file and await the adjudication of a motion to reopen, as well as time to file a petition for review in the court of appeals. *Ibid.* It also

noted that "the relief ordered by the district court—a stay of removal—did not result in Petitioners' release from custody" and thus fell outside the scope of "the common-law writ." *Id.* at 11a-12a. The court of appeals pointed to other elements of petitioners' request for injunctive relief that fell outside the traditional scope of habeas, including that "Petitioners have not exhausted available remedies; Petitioners' claim is based on allegedly changed factual circumstances, which is not a core use of habeas; and Petitioners seek class-wide relief, which falls outside the traditional use of habeas." *Id.* at 12a n.7.

Second, the court of appeals determined that, "[e]ven if the relief Petitioners seek was available under the common-law writ, Petitioners' Suspension Clause claim would fail for the independent reason that Congress has provided an adequate alternative as applied to them." Pet. App. 13a. The court reasoned that "Congress does not suspend the writ when it strips the courts of habeas jurisdiction," so long as it "provides a substitute that is adequate and effective to test the legality of a person's detention." *Ibid.* (citing *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977), and *Felker* v. *Turpin*, 518 U.S. 651, 664-665 (1996)). The court then explained that here, "[w]hen Congress stripped the courts of jurisdiction to grant habeas relief in [Section] 1252(g), it provided aliens with an alternative method to challenge the legality of removal orders" through "a motion to reopen followed by a petition for review filed in a court of appeals." *Ibid.* (citing 8 U.S.C. 1252(a)(2)(D) and (5)). The court noted that the petition-for-review process "provides an alien with the same scope of relief as habeas." *Ibid.* And it rejected petitioners' contention that "a confluence of

circumstances" caused that "facially adequate alternative" process to be "constitutionally inadequate as applied to them." *Id.* at 14a. The court explained that "Petitioners had years to file their motions to reopen" and had "not shown any constitutional inadequacy in this process." *Ibid.*

b. Judge White dissented. Pet. App. 22a-37a. She would have concluded that the district court had jurisdiction over petitioners' removal-based claims, both because she took a broader view of historical habeas protections, see *id.* at 24a-28a, and because she viewed the generally adequate petition-for-review process as inadequate "in the present compelling confluence of grave, real-world circumstances," *id.* at 28a (citation and internal quotation marks omitted).

ARGUMENT

Petitioners contend (Pet. 11-15) that the court of appeals erred in concluding that 8 U.S.C. 1252(g) does not violate the Suspension Clause as applied to petitioners, and that this Court should hold this case pending its decision in *Department of Homeland Security* v. *Thuraissigiam*, cert. granted, No. 19-161 (Oct. 18, 2019). Both contentions are incorrect. The court of appeals correctly concluded, on two alternative grounds, that Section 1252(g) does not violate the Suspension Clause, and its decision does not conflict with any decision of this Court or of any other court of appeals. And because this Court's decision in *Thuraissigiam* would at most affect one of the court of appeals' two independently sufficient rationales, a hold for *Thuraissigiam* is not warranted.

1. The court of appeals correctly held, on two alternative grounds, that Section 1252(g) does not violate the Suspension Clause as applied to petitioners.

a. The court of appeals correctly held that the Suspension Clause does not protect the type of habeas claim that petitioners seek to raise here. As the court explained, "'[a]t its historical core,' the writ [of habeas corpus] 'served as a means of reviewing the legality of Executive detention.'" Pet. App. 11a (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001)); see *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008) ("Habeas is at its core a remedy for unlawful executive detention."). And the traditional "remedy for such detention is, of course, release." *Munaf*, 553 U.S. at 693; see 3 William Blackstone, *Commentaries on the Laws of England* 137 (1768) (explaining that the traditional habeas remedy is "removing the injury of unjust and illegal confinement") (emphasis omitted).

The court of appeals reasoned that the relief requested by petitioners here was "fundamentally different from a traditional habeas claim" because petitioners "did not challenge any detention and did not seek release from custody." Pet. App. 11a. Rather, "'the last thing petitioners want is simple release' but instead a 'court order requiring the United States to shelter them.'" *Ibid.* (quoting *Munaf*, 553 U.S. at 693-694). A habeas claim asking the court to stay removal while a habeas petitioner seeks relief elsewhere falls well outside the "historical core" of common-law habeas. *Ibid.* (citation omitted).

Petitioners nevertheless contend (Pet. 12-13) that the court of appeals erred, for three reasons. None has merit.

First, petitioners assert (Pet. 12) that this Court in *St. Cyr* "made clear that [judicial] review of deportation orders is protected by the Suspension Clause." *St. Cyr*, however, made that statement in the course of applying

the constitutional-avoidance canon to interpret a statute, not in directly upholding a constitutional claim. See 533 U.S. at 299-300; see also *id.* at 304 (concluding that "the ambiguities in the scope of the exercise of the writ at common law" were sufficient to conclude that the Suspension Clause question was "difficult"). *St. Cyr*'s relevance is limited for that reason alone. Moreover, *St. Cyr* involved a lawful permanent resident's request for relief that would have entitled him to be released into and remain in the United States. See *id.* at 293, 297. Here, by contrast, petitioners effectively seek a stay of removal so that they can pursue other proceedings and potentially avoid removal to a particular country. See Pet. App. 11a.

Second, petitioners contend that historical practice in immigration law, in what is known as the finality era,[4] "guarantees habeas review where petitioners allege that removal to a particular country is unlawful." Pet. 12 (citing *Wenglinsky* v. *Zurbrick*, 282 U.S. 798 (1930) (per curiam)). But the decisions from that period, including *Wenglinsky*, do not expressly discuss the Suspension Clause and thus offer limited, if any, insight into its meaning. See *St. Cyr*, 533 U.S. at 339 (Scalia, J., dissenting). In addition, in the ordinary challenge to a deportation order during that period, as in *St. Cyr*, the alien argued that removing him from the country was not permitted, and thus that his detention was unlawful and

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[4] The "finality era" refers to an approximately 60-year period from the passage of the Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, to the passage of the INA in 1952. During that period, Congress rendered final (hence, the "finality" era) the Executive Branch's decisions to admit, exclude, or deport aliens, but the Court permitted some habeas corpus challenges to an alien's exclusion or deportation. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51-52 (1955).

he was entitled to be released into the country. See, *e.g.*, *Heikkila* v. *Barber*, 345 U.S. 229, 230, 237 (1953) (rejecting claim that the statute authorizing the alien's deportation was unconstitutional); cf. *St. Cyr*, 533 U.S. at 293, 326 (holding that the basis for denying a waiver of deportation was legally erroneous). That relief, however, is not what the district court's injunction involves, as it grants a stay of removal that would ensure petitioners' continued detention. See Pet. App. 11a.

Third, petitioners contend that the court of appeals' conclusion that the Suspension Clause was not triggered here conflicts with "the historically 'uncontroversial' attributes of the 'privilege of habeas corpus'" that this Court described in *Boumediene* v. *Bush*, 553 U.S. 723 (2008). Pet. 12-13 (quoting *Boumediene*, 553 U.S. at 779). But *Boumediene*'s discussion of the historical attributes of habeas corpus related to the sort of procedures that might be necessary to provide an adequate substitute for habeas, not the scope of the Suspension Clause's coverage in the first instance. See 553 U.S. at 779-787. As for the Clause's coverage, this Court's decision in *Boumediene* arose in fundamentally different circumstances. Among other things, *Boumediene* involved a challenge to indefinite detention for the duration of hostilities, pursuant to the law of war. *Id.* at 732; see *id.* at 785 (noting that "the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more"). The habeas petitioners there sought to be released from government custody so they could return home or to the country where they were captured. See *id.* at 788 (discussing "[t]he absence of a release remedy" under the relevant statute). By contrast, petitioners here sought stays

of removal, which would and did continue their detention. See *Munaf*, 553 U.S. at 693.

b. In the alternative, even if the Suspension Clause applied to petitioners' claims, the court of appeals correctly held that the statutory petition-for-review process provides an adequate alternative to habeas review. Pet. App. 13a-14a. As the court explained, Congress can, consistent with the Suspension Clause, foreclose a habeas remedy "so long as it provides a substitute that is adequate and effective to test the legality of a person's detention." *Id.* at 13a (citing *Swain* v. *Pressley*, 430 U.S. 372, 381 (1972); *Felker* v. *Turpin*, 518 U.S. 651, 664-665 (1996)). Here, that "alternative method to challenge the legality of removal orders"—a motion to reopen followed by a petition for review filed in a court of appeals, see 8 U.S.C. 1252(a)(2)(D) and (5)—"provides an alien with the same scope of relief as habeas." Pet. App. 13a. That alternative method had been available to petitioners for years and was still available to them when they sought to enjoin their removal in district court. *Id.* at 14a; see *id.* at 87a-88a (describing how country conditions in Iraq began changing by at least 2014). Petitioners' failure to avail themselves of the motion-to-reopen and petition-for-review process does not make Congress's review mechanism constitutionally inadequate. See *id.* at 14a.

As the court of appeals recognized, the motion-to-reopen and petition-for-review process has been widely held to be an adequate and constitutional substitute for habeas corpus. See Pet. App. 13a; see, *e.g.*, *Luna* v. *Holder*, 637 F.3d 85, 97 (2d Cir. 2011) (concluding that motion-to-reopen process "provides Petitioners with an adequate and effective substitute for habeas"); *Muka* v.

Baker, 559 F.3d 480, 485 (6th Cir. 2009) ("Because a petition for review provides an alien with the availability of the same scope of review as a writ of habeas corpus, * * * facially, the limitation on habeas corpus relief in [Section 1252(g)] does not violate the Suspension Clause."); *Iasu* v. *Smith*, 511 F.3d 881, 893 (9th Cir. 2007) ("[A] potential motion to reopen at the administrative level and the possibility of judicial review thereafter provides the necessary process to alleviate Suspension Clause concerns."); *Kolkevich* v. *Attorney Gen. of the U.S.*, 501 F.3d 323, 332 (3d Cir. 2007) ("[T]here is no question that the current regime, in which aliens may petition for review in a court of appeals but may not file habeas, is constitutional."); *Alexandre* v. *U.S. Attorney Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006) (per curiam) (motion-to-reopen procedure with judicial review in courts of appeals "offers the same review as that formerly afforded in habeas corpus" and therefore "is adequate and effective").

Indeed, petitioners do not directly contest, see Pet. 11-15, the court of appeals' conclusion that, even if the Suspension Clause protected the category of relief that petitioners seek, "Congress's petition-for-review process provides an adequate alternative to an action in habeas as applied to Petitioners." Pet. App. 10a. For that reason alone, further review is unwarranted.

2. Petitioners contend (Pet. 13-16) that the Court should hold this petition pending the disposition of *Thuraissigiam*, and vacate the judgment below and remand if the Court's decision in *Thuraissigiam* justifies further consideration by the court of appeals. According to petitioners (Pet. 13), *Thuraissigiam* "concerns the closely related question" whether 8 U.S.C. 1252(e)(2)'s limitations on habeas corpus review in the context of

expedited-removal orders violates the Suspension Clause, as applied to the alien there.

A hold for *Thuraissigiam* is not warranted. As an initial matter, *Thuraissigiam* concerns a different provision of the INA, 8 U.S.C. 1252(e)(2), which cabins habeas corpus review of expedited-removal orders. See generally 8 U.S.C. 1225(b)(1). The court of appeals' decision here did not involve expedited removal. Petitioners were subject to final removal orders following full removal proceedings before an immigration judge under 8 U.S.C. 1229a, and then had available to them the procedure for filing a motion to reopen followed by another opportunity for judicial review. See Pet. App. 4a. Indeed, the decision under review in *Thuraissigiam* expressly distinguished this case, because it "does not address the Suspension Clause in the context of the procedures leading up to an expedited removal order." *Thuraissigiam* v. *U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1110 n.12 (9th Cir. 2019), cert. granted, No. 19-161 (Oct. 18, 2019).

Moreover, even if the methodology that this Court adopts in *Thuraissigiam* for determining whether the Suspension Clause protects certain types of habeas relief that did not exist at the Founding could have some effect on the *first* of the court of appeals' two alternative holdings here, the same is not true of the court of appeals' *second* alternative holding. The court determined that the motion-to-reopen and petition-for-review process provides an adequate alternative to habeas corpus relief, both facially and as applied in this case, Pet. App. 13a-14a, and the issues before the Court in *Thuraissigiam* have no clear bearing on that question. Because the existence of an adequate substitute process was an independent ground for the court of appeals' decision—

and a ground that petitioners do not directly contest—any reasoning in *Thuraissigiam* about the scope of the Suspension Clause's coverage will not affect the outcome here. Holding the petition in this case pending this Court's decision in *Thuraissigiam* is thus unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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