No. 17-654

In the Supreme Court of the United States

ERIC D. HARGAN, ET AL., PETITIONERS

v.

ROCHELLE GARZA, AS GUARDIAN AD LITEM TO UNACCOMPANIED MINOR J.D.

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

BRIEF FOR THE STATES OF TEXAS, ARKANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Other Authorities

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Arkansas, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.[1] The States have an interest in cooperating with the federal government to establish a consistent and correct understanding of the rights of aliens unlawfully present in the United States, as the States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). The States also have "a legitimate and substantial interest in preserving and promoting fetal life," as well as an "interest in promoting respect for human life at all stages in the pregnancy." *Gonzales v. Carhart*, 550 U.S. 124, 145, 163 (2007).

In this case, the district court entered—and the en banc court of appeals sustained—a temporary restraining order effectively declaring that the U.S. Constitution confers on unlawfully-present aliens the right to an elective abortion that is not medically necessary—even when they have no ties to this country other than the fact of their arrest while attempting to cross the border unlawfully. As far as amici can ascertain, no court has ever before recognized such

[1] Pursuant to Supreme Court Rule 37.2, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici contributed monetarily to the preparation or submission of this brief. The parties' consents to the filing of this brief have been filed with the Clerk.

broad rights for unlawfully-present aliens with virtually no connections to the country. Under the reasoning of the courts below, there will be no meaningful limit on the constitutional rights an unlawfully-present alien can invoke simply by attempting to enter this country. This relief also contradicts the Court's longstanding precedent that full Fifth Amendment rights accorded to citizens can only be extended to those aliens who "have come within the territory of the United States and *developed substantial connections with this country*." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (emphasis added).

Amici thus urge the Court to vacate the court of appeals' judgment.

SUMMARY OF ARGUMENT

The decisions below are unprecedented. Until now, no court had ever declared that the Constitution gives unlawfully-present aliens with virtually no ties to this country the full scope of affirmative liberty rights accorded to citizens. The district court and the en banc court of appeals thus broke new ground by holding that an unlawfully-present alien with virtually no ties to this country has a constitutional right to an elective abortion.

This Court should vacate the court of appeals' order because the Constitution does not confer the right to an elective abortion on unlawfully-present aliens with virtually no ties to the country, as Judge Henderson's dissent below rightly concluded. Under long-settled doctrine, the constitutional rights an alien may invoke depend on the scope of the alien's ties to this country. It is true that all persons—regardless of immigration status, and regardless of their ties here—have certain cabined constitutional rights, including baseline procedural protections and the right to be free from gross physical abuse. But that does not mean that such unlawfully-present aliens are accorded the panoply of affirmative liberty rights that citizens and lawfully-present aliens possess.

The States—and the State of Texas in particular—are already spending enormous resources dealing with unlawful immigration. The court of appeals' decision, though, creates a perverse incentive to unlawfully enter the country. This will further add to the substantial burden faced by the governmental entities trying to prevent and deal with unlawful immigration.

ARGUMENT

I. Unlawfully-Present Aliens with Virtually No Connections to the United States Have No Constitutional Right To An Elective Abortion.

The Court should vacate the decision below because the right asserted does not exist: Unlawfully-present aliens with virtually no connections to the country do not have a constitutional right to an elective abortion. The district court necessarily erred in entering—and the en banc court of appeals erred in upholding—the temporary restraining order. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008) (preliminary injunctive relief unavailable if the plaintiff cannot establish a likelihood of success on the merits); *Mazurek v. Armstrong*, 520 U.S. 968, 970 (1997) (per curiam) (same).

A. The Decisions Below Overrode This Court's Long-Settled "Substantial Connections" Test, Which Provides That the Degree of Connections to This Country Determines the Degree of Fifth Amendment Rights Accorded to Aliens.

The "initial inquiry" in assessing any due process claim is whether the Constitution protects the right the plaintiff asserts. *See, e.g.*, *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976). Only after confirming that the right at issue exists should a court move on to whether the government has violated that right. *See id.* The courts below thus should have begun their analysis by asking whether the right to an elective abortion recognized by this Court applies to unlawfully-present aliens with virtually no connections to this country who were apprehended while attempting to cross the border.

The answer to that question, as Judge Henderson correctly concluded, is "plainly—and easily—no." Pet. App. 35a.

1. The Constitutional Rights of Aliens are Determined by a Sliding Scale Based on the Degree of Connections the Alien Has to the Country.

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." This Court has held that unlawfully-present aliens are "persons" protected by the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Court reiterated in 2001 that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).[2]

But simply because an individual is a "person" covered by the Fifth Amendment, it does not follow that the alien is necessarily "due" the same scope of rights accorded to citizens or lawfully-present aliens. This Court has held that the rights an alien is "due" depend on the connections that person has established with this country: *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990), clarified that *Plyler*'s Fifth Amendment analysis "establish[es] only that aliens receive constitutional protections when they have come within the territory of

[2] Contrary to the statements in the panel dissent below, amici did not argue that unlawfully-present aliens are not "persons." *Cf.* Pet. App. 16a.

the United States *and developed substantial connections with this country*." *Id.* at 271 (emphasis added).

Verdugo-Urquidez emerged from this Court's bedrock rule that an alien is "accorded a generous and ascending *scale of rights* as he increases his identity with our society." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (emphasis added). In other words, as set out first in *Eisentrager* and explained by *Verdugo-Urquidez*, an alien's connections determine the scope of rights the alien is due. *See id.* As a person develops increasing connections with this country, the person's constitutional protections expand. *E.g.*, *Verdugo-Urquidez*, 494 U.S. at 268-69; *see also Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (staying injunction of immigration order for aliens "who lack any bona fide relationship with a person or entity in the United States"). Initial lawful entry affords "safe conduct" and confers "certain rights," which "become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization." *Eisentrager*, 339 U.S. at 770; *see Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (alien's "constitutional status changes" only after he "gains admission to our country and begins to develop the ties that go with permanent residence").

No decision of this Court or any other court has abrogated that basic *Eisentrager/Verdugo-Urquidez* framework of a sliding scale of rights based on the degree of connections the alien has to the country. In particular, *Zadvydas* did not alter or undermine *Verdugo-Urquidez*'s pronouncement that to invoke the full scope of Fifth Amendment rights, an unlawfully-present alien

must demonstrate "substantial connections." *See, e.g.*, *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (applying "significant voluntary connection" test from *Verdugo-Urquidez*); *United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016) (same). In fact, *Zadvydas* expressly limited its analysis to "aliens who were admitted to the United States but subsequently ordered removed." 533 U.S. at 682 (emphasis added). By contrast, "[a]liens who have not yet gained initial admission to this country would present a very different question." *Id.*

2. Unlawfully-Present Aliens With Virtually No Connections to the Country Lack the Panoply of Affirmatively Liberty Rights that Citizens and Lawfully-Present Aliens Possess, Although They Do Have Baseline Procedural Protections and the Right to be Free from Gross Physical Abuse.

a. The sliding-scale approach set out in *Eisentrager* and *Verdugo-Urquidez* recognizes that it is the rare exception where constitutional rights are accorded to unlawfully-present aliens with minimal connections to the country. Under that rare exception, the mere fact of presence in this country—even unlawful presence—does confer certain baseline constitutional rights against egregious harm, but not affirmative liberty rights. And even when certain limited constitutional rights are extended to unlawfully-present aliens, courts routinely hold that the full scope of a constitutional provisions' rights do not extend to such aliens.

For example, mere unlawful presence confers a basic right against "gross physical abuse" in this country. *Castro v. Cabrera*, 742 F.3d 595, 600 (5th Cir. 2014) (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir. 1987)). The Constitution protects everyone on U.S. soil, even unlawfully-present aliens with no other ties to this country, against the "wanton or malicious infliction of pain" by governmental officials. *Id.*

The panel dissent—which the en banc majority below "substantially" adopted, Pet. App. 19a—argued that amici's position would mean that the alien here and "everyone else here without lawful documentation—including everyone under supervision pending immigration proceedings and all Dreamers—have no constitutional right to bodily integrity in any form (absent criminal conviction)." Pet. App. 16a. But that does not follow from amici's position, and this Court's precedents do not lead to that drastic outcome. The "deeply troubling" hypotheticals the panel dissent posited are thus fully resolved by a proper application of the *Eisentrager/Verdugo-Urquidez* framework. *Cf.* Pet. App. 16a.

Under the "ascending scale" of rights articulated in *Johnson* (339 U.S. at 770), reinforced in *Landon* (459 U.S. at 32), restated in *Verdugo-Urquidez* (494 U.S. at 268-69)—and applied in *Lynch* (810 F.2d at 1370) and *Castro* (742 F. 3d at 600)—all persons on U.S. soil are constitutionally protected against "gross physical abuse." *Castro*, 742 F.3d at 600. However, even though the Constitution confers basic protection against gross physical abuse, full Fourth Amendment rights accorded to citizens do not apply to unlawfully-present aliens with

only minimal connections to the country. *See, e.g.*, *Castro*, 742 F.3d at 599-600 (Fourth Amendment does not extend to unlawfully-present aliens who remain in the United States illegally, unless they are raising claims of "gross physical abuse"); *United States v. Vilches-Navarrete*, 523 F.3d 1, 13 (1st Cir. 2008) (criminal defendant lacked "substantial connection" with U.S. necessary to invoke Fourth Amendment protection under *Verdugo-Urquidez*).

In addition to the gross-physical-abuse prohibition, the mere fact of presence in this country—even unlawful presence—also confers a certain set of basic procedural guarantees before the federal government can deport the individual. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003) (it is "well established" that aliens have due-process rights in deportation hearings). But even then, the full scope of procedural due process rights guaranteed to citizens does not extend to unlawfully-present aliens. *See, e.g.*, *id.* at 521 ("'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976))); *accord, e.g.*, *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens, however." (citing *Mathews*, 426 U.S. at 79-80)).

In sum, the fact that basic procedural safeguards and protections against "gross physical abuse" are afforded to everyone on U.S. soil does not mean that the full panoply of constitutional rights accorded to citizens extends

to each unlawfully-present alien with only minimal connections to the country. *See Verdugo-Urquidez*, 494 U.S. at 268-69.

b. Furthermore, courts routinely hold that unlawfully-present aliens with minimal connections to the country lack affirmative liberty rights.

For example, numerous courts have held that unlawfully-present aliens with minimal connections to the country do not have the Second Amendment "fundamental right" (*McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010)) to keep and bear arms. *United States v. Portillo–Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) as revised (June 29, 2011); *United States v. Carpio–Leon*, 701 F.3d 974, 979 (4th Cir. 2012); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam); *cf. Meza-Rodriguez*, 798 F.3d at 669-672 (unlawfully-present alien had Second Amendment rights only because he arrived in the U.S. at a young age and lived here for 20 years).

And full First Amendment rights do not extend to unlawfully-present aliens without substantial connections to the country. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (noting federal statute, now codified at 52 U.S.C. §30121, prohibiting "foreign national[s]" from making direct contributions or independent expenditures for political speech); *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) (alien may be returned to home country for engaging in disfavored political speech in this country); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (government may restrict alien's freedom of association).

The Department of Justice has explicitly advanced this view in previous litigation. *See* Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for

TRO at 13, *Pineda-Cruz v. Thompson*, No. 5:15-cv-00326 (W.D. Tex. May 7, 2015) (Dkt. 22) ("Because Plaintiffs never gained entry into the United States and have not developed substantial connections with this country, they are not within the scope of individuals contemplated by the Supreme Court as being able to raise claims under the First Amendment."). In fact, the federal government has, on dozens of occasions, argued that unlawfully-present aliens lack the full scope of constitutional rights afforded to citizens. *See infra* Part II.B.2.

These principles establishing that unlawfully-present aliens lack affirmative liberty rights held by citizens comport with this Court's declaration that aliens subject to deportation may be detained as their deportation is processed. *See, e.g.*, *Kim*, 538 U.S. at 523 ("At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process."). With physical detention necessarily comes a restriction of liberties.

c. The affirmative substantive due process right recognized by the Court to seek the medical procedure of an elective abortion is much more analogous to the affirmative liberty rights courts have repeatedly held are not accorded to unlawfully-present aliens who lack substantial connections to the country. In contrast, baseline procedural safeguards and the basic protection against gross physical abuse are negative prohibitions on drastic government conduct (detention and removal without any process, and gross physical abuse).

Respondent has never offered any authority to the contrary. In the proceedings below, respondent argued that the alien's immigration status has no impact at all

on the constitutional rights she may assert. That is wrong, as the authorities above confirm. Moreover, the authorities respondent relied on below do not establish the right to an elective abortion.

Respondent relied on various abortion cases, including *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality op.), for the proposition that "the government may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Plaintiff's Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for Preliminary Injunction, *Garza v. Hargan*, No. 1:17-cv-02122 (D.D.C. Oct. 14, 2017) Dkt. 3-2 at 9-10 (citing *Casey*, 505 U.S. at 871 (plurality op.); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976), and *Bellotti v. Baird*, 443 U.S. 622, 633 n.12 (1979)). But not one of respondent's cited cases says or implies that the substantive due process right to abortion recognized by this Court extends to unlawfully-present aliens—especially not those who have no ties to this country.

Respondent further offered a string citation of cases, but none of those cases support the proposition that unlawfully-present aliens have the right to an elective abortion. *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 187 (D.D.C. 2015), for example, concerned whether the government could continue to detain asylum applicants after those individuals had demonstrated a credible fear of persecution. Each of the applicants had family members in the United States who had agreed to provide shelter and support for the asylum-seekers. On those facts, and in

light of the plaintiffs' threshold showing of asylum eligibility, the district court held that they could invoke the protection of the Due Process Clause. Here, the operative complaint says nothing about asylum, alleges no connection to the U.S. at all, and offers no basis to believe that the alien is on track to permanent residence.

Respondent's other authorities fare no better. Respondent claimed the alleged abortion right was derived from *Plyler*, 457 U.S. at 210. But as explained above, this Court explicitly clarified and supplanted *Plyler* in *Verdugo-Urquidez*, 494 U.S. at 270-71. So too with *Mathews*, 426 U.S. at 77, which concerned *resident* aliens who were lawfully admitted to the United States; plus, *Mathews* too was clarified and supplanted by *Verdugo-Urquidez*. And *Kwai Fun Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004), concerned an alien who had been *lawfully* present in the U.S. for almost two decades—in other words, someone who had established "substantial connections" under *Verdugo-Urquidez*.

In short, none of respondent's cited authorities support the extraordinary constitutional holding in the courts below.

B. The Operative Complaint Confirmed that the Alien At Issue Here Had No "Substantial Connections" to This Country, and Therefore Had No Right to an Elective Abortion.

The operative Complaint (Dist. Ct. Dkt. 1) confirmed that that alien here had no other connection to the United States:

- Paragraphs 4 and 5 summarized the aliens' situation but offered no allegations establishing a connection to the United States other than her unlawful presence.
- Paragraph 13 alleged: "J.D. was detained by the federal government and placed in a federally funded shelter in Texas. J.D. is years [sic] old, pregnant, and told the staff at the shelter where she is currently housed that she wanted an abortion." This paragraph admitted that the alien entered the United States unlawfully but offered no allegations establishing a connection to the United States.
- Paragraphs 14 and 15 discussed the alien's efforts to obtain an abortion during her time in custody.
- Paragraphs 33, 34, 35, 36, and 43 alleged that the defendants restricted the alien's ability to receive an abortion in the United States.

The alien even admitted below that that she has "no legal immigration status." Declaration, Dist. Ct. Dkt. 3-2 at 3. And the declaration that the alien submitted in support of her motion for a temporary restraining order confirmed no substantial ties to this country: The alien explicitly admitted she was "detained upon arrival." Dist. Ct. Dkt. 3-3 ¶ 4.

Those undisputed facts should have resolved this case "plainly" and "easily," as Judge Henderson recognized below. Pet. App. 35a. Under *Verdugo-Urquidez*, the alien must show "substantial connections" to assert full Fifth Amendment affirmative liberty rights. 494 U.S. at 271. She did not do so. *See* Dist. Ct. Dkt. 1. She thus stands at

the start of the "ascending scale of rights" that individuals climb as they "increase[] [their] identity with our society." *Eisentrager*, 339 U.S. at 770. At that level, the Constitution protects her against "gross physical abuse" in this country. *Castro*, 742 F. 3d at 600. The Constitution further confers some basic procedural guarantees related to her deportation proceedings. *Kim*, 538 U.S. at 523. But as *Verdugo-Urquidez*, *Eisentrager*, and *Kim* confirm, it does not accord the affirmative liberty right to an elective abortion.

II. The Court of Appeals Did Not Even Cite This Court's "Substantial Connections" Test, Which Is Well Accepted.

The court below entirely overlooked the bedrock principles articulated in *Eisentrager* and *Verdugo-Urquidez*, even though those principles confirm that an unlawfully-present alien with virtually no ties to this country has no right to an elective abortion. That "initial inquiry," *Meachum*, 427 U.S. at 223-24, appears nowhere in any decision below. The fact that the court of appeals not only reached the wrong result, but also applied the fundamentally wrong framework, is further grounds to vacate its judgment. *See United States v. Munsingwear*, 340 U.S. 36, 40-41 (1950).[3]

[3] Amici fully briefed this *Verdugo-Urquidez* framework to the courts below. *See* Br. for Texas et al., *Garza v. Hargan*, No. 1:17-cv-02122-TSC (D.D.C.) (Oct. 17, 2017); Br. for Texas et al., *Garza v. Hargan*, No. 17-5236 (D.C. Cir.) (Oct. 19, 2017).

A. The Courts Below Had a Duty to Apply the Correct Law.

As Judge Henderson's dissent recognized, Pet. App. 35a, 42a, regardless of what the parties have argued, the court of appeals should have decided the predicate constitutional question before issuing such a momentous holding. *See, e.g.*, *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (if a party "fail[s] to identify and brief" "an issue 'antecedent to . . . and ultimately dispositive of' the dispute," an appellate court may consider the issue sua sponte (citation omitted)). After all, "even an explicit concession on this point would not "'relieve this Court of the performance of the judicial function'" of deciding the issues." *Torres v. Puerto Rico*, 442 U.S. 465, 471 n.3 (1979) (quoting *Sibron v. New York*, 392 U.S. 40, 59 (1968)). Moreover, a government's "concessions cannot be accepted" when they are contrary to law. *Massachusetts v. United States*, 333 U.S. 611, 625 (1948).

In short, regardless of what the parties argued, the court of appeals was still required to apply the correct legal framework. *See id.* Because the court of appeals' wholly incorrect framework is now law, it should be set aside.

B. The "Substantial Connections" Test Is Widely Cited and Applied as Controlling.

1. The court of appeals' failure here to address the *Verdugo-Urquidez* substantial-connections, sliding-scale test is particularly striking given that other circuits uniformly and routinely apply this controlling test when determining whether aliens can assert constitutional

rights. *E.g.*, *Meza-Rodriguez*, 798 F.3d at 670; *Ibrahim*, 669 F.3d at 995; *United States v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012); *Portillo-Munoz*, 643 F.3d at 440; *Vilches-Navarrete*, 523 F.3d at 13; *Atamirzayeva v. United States*, 524 F.3d 1320, 1325 (Fed. Cir. 2008); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 202 (D.C. Cir. 2001).

As these citations demonstrate, the arguments amici and Judge Henderson advanced simply reflect basic principles that have governed the rights of aliens for decades.

2. In conformance with the circuits' widespread adherence to this Court's established precedent, the Department of Justice has relied on *Verdugo-Urquidez*'s substantial-connections test dozens of times to argue that unlawfully-present aliens without sufficient ties to the country lack constitutional rights.

Just months ago, the Department argued in this Court that:

> [A]n alien arrested shortly after crossing the U.S. border surreptitiously cannot lay the same claim to constitutional protections as aliens who were lawfully admitted or who entered illegally then became, "in a[] real sense, a part of our population[.]"

Brief for the Respondents in Opposition, *Castro v. Dep't of Homeland Sec.*, 137 S. Ct. 1581 (2017) (No. 16-812), 2017 WL 1046315, at *17.

That is not the only time this year that the Department made that argument in this Court. *See, e.g.*, Brief for the United States, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118), 2017 WL 104588 at *35 (arguing

that, under *Verdugo-Urquidez*, aliens are "afforded constitutional protections only when 'they ha[d] come within the territory of the United States and developed substantial connections with this country'"); Transcript of Oral Argument at 17, *Jennings v. Rodriguez*, No. 15-1204 (U.S. October 3, 2017) (Q: "is your argument about the new admits, the people who are coming to the border, premised on the idea that they simply have no constitutional rights at all?" A: "It is premised on that.").[4]

The Department has made similar arguments in the Fifth Amendment context in other courts. *E.g.*, Reply in Support of Appellants' Brief, *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) (No. 17-55208), 2017 WL 1055525, at *13 n.6 ("Aliens identified at the border who have not had any contact with the United States—even if they are subsequently paroled into the territorial United States during the resolution of their applications for admission—are not entitled to any process other than that provided by statute."); Brief for Appellee, *United States v. Kole*, 164 F.3d 164 (3d Cir. 1998) (No. 96-5457), 1996 WL 33453512, at *24 ("the Constitution was 'not intended to extend to aliens in the same degree as to citizens'"); Brief for Respondent, *Wigglesworth v. I.N.S.*, 319 F.3d 951 (7th Cir. 2003) (No. 02-1209), 2002 WL 32170294, at *19-*21 ("In order for the due process clause to apply, there must be an identifiable life, liberty or property interest. It is clear that any liberty interest [petitioner] may have

[4] The Department later modified its response to suggest that aliens might have *some* rights (which is also consistent with amici's position, as explained above), but certainly not the full scope afforded citizens. Tr. at 17-18.

in this regard is so weak that she clearly has no right to a hearing before an immigration judge…[petitioner] is not a permanent resident of the United States or even a temporary resident.").

And the Department has explicitly relied on the *Eisentrager* "ascending scale" analysis to argue against expanded due process rights for unlawfully-present aliens. *E.g.*, Brief for Appellee United States, *United States v. Raya-Vaca*, 771 F.3d 1195 (9th Cir. 2014) (No. 13-50129), 2013 WL 6221846, at *13–15 ("[T]here has long been a sliding-scale approach to determining the rights to be afforded to aliens by the Due Process Clause. Under that approach, aliens generally enjoy more rights as a function of their legality/longevity in this country. On one end of the scale is the undocumented alien; in the middle is the lawful permanent resident; and at the opposite end is the naturalized citizen. As an alien moves from one end of the scale to the other, his rights increase . . ."); Brief for Defendant-Appellee Robert S. Mueller, *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008) (No. 06-4216-CV), 2007 WL 7285642 at * 32-33 (similar); Brief for Cross-Appellees and Reply Brief for Appellants, *Gutierrez v. Ashcroft*, 125 F. App'x. 406 (3d Cir. 2005) (Nos. 03-4798, 04-1031), 2004 WL 4184747, at *16, 20 (similar).

Even beyond the due-process context, the Department has invoked *Verdugo-Urquidez*'s substantial-connections test to argue against various other constitutional rights for aliens without sufficient ties to the country:

- *First Amendment*. *E.g.*, Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for TRO at 13, *Pineda-Cruz v. Thompson*, No.

5:15-cv-00326 (W.D. Tex. May 7, 2015) (Dkt. 22) ("Because Plaintiffs never gained entry into the United States and have not developed substantial connections with this country, they are not within the scope of individuals contemplated by the Supreme Court as being able to raise claims under the First Amendment.").

- *Second Amendment*. *E.g.*, Brief for the United States as Appellee, *United States v. Torres*, No. 15-10492 (9th Cir. July 15, 2016), 2016 WL 3878372, at *22 ("unauthorized aliens do not have a Second Amendment right to bear arms"); Brief and Short Appendix of Plaintiff-Appellee, *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016) (No. 14-3271), 2015 WL 2064443, at*13-*15 ("[T]he government asserts that the term 'the people' within the Second Amendment properly excludes illegal aliens."); Brief for the United States, *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (No. 11-10086), 2011 WL 2115676, at *7 ("illegal immigrants do not possess Second Amendment rights"); Brief of Plaintiff/Appellee, *United States v. Rangel-Hernandez*, 597 F. App'x 553 (10th Cir. 2015) (No. 14-7056), 2015 WL 222869, at *8-*17 (arguing that an unlawfully-present alien has no Second Amendment rights).
- *Fourth Amendment*. *E.g.*, Appellee's Brief, *Castro v. Cabrera*, 742 F.3d 595 (5th Cir. 2014) (No. 13-40017), 2013 WL 8635071, at *25 ("Plaintiffs who were seeking admission as aliens were not entitled to constitutional protections, because they

had not yet 'come within the territory of the United States.'").

- *Sixth Amendment*. *E.g.*, Reply Brief for Appellant United States at 9, *United States v. Ospina*, 317 F. App'x 684 (9th Cir. 2009) (No. 08-50461), 2008 WL 6822006 (defendant's rights "should have turned on objective factors and practical concerns, such as his citizenship, lack of substantial ties to the United States . . . . In [defendant]'s case, that right must be considered diminished, relative to the speedy trial right of others with more substantial ties to the United States, living within the sovereign or diplomatic reach of the United States.").

These authorities confirm that the analyses set out in *Verdugo-Urquidez* and *Eisentrager* not only are axiomatic, but that they are routinely applied in the exact situation this case presents. The court of appeals' failure to even recognize, let alone apply, the proper legal framework confirms that its decision should be vacated. *See Munsingwear*, 340 U.S. at 40-41.

III. If Left in Place, the Decision Below Will Exacerbate Unlawful Immigration and Further Strain the States' Limited Resources.

As this Court has recognized, the States already "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397. In short, "[t]he States lose badly needed tax dollars each year due to the presence of illegal aliens—a clear drain upon their already-taxed resources." *Texas v. United States*, 86 F. Supp. 3d 591, 631 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *as*

revised (Nov. 25, 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). If allowed to stand, the court of appeals' decision will only exacerbate those losses by inviting everyone who reaches this country unlawfully—no matter how briefly—to demand the full scope of constitutional rights.

The State of Texas, in particular, already expends substantial resources trying to deal with unlawful immigration. Two decades ago, the Fifth Circuit recognized that Texas' "educational, medical, and criminal justice expenditures on undocumented aliens" were over a billion dollars annually. *Texas v. United States*, 106 F.3d 661, 664 (5th Cir. 1997). And "in 2008, Texas incurred $716,800,000 in uncompensated medical care provided to illegal aliens." *Texas*, 86 F. Supp. 3d at 630.

The State of Texas continues to incur these staggering costs caused by unlawful immigration. For example, during the 2013 fiscal year (the most recent year for which such data has been compiled) the State of Texas alone spent approximately $90 million on emergency Medicaid services for unlawfully-present aliens. *See* Texas Health and Human Services Commission, *Report on Texas Health and Human Services Commission Services and Benefits Provided to Undocumented Immigrants* (Dec. 2014), https://hhs.texas.gov/reports/2015/02/report-health-and-human-services-commission-services-and-benefits-provided-undocumented-immigrants. That was almost a $20 million increase over the $71 million spent on such services in 2011, and almost a 50% increase over the $62 million spent on such services in 2009. *Id.* The State of Texas further spent approximately $38 million during the 2013 fiscal year

providing coverage for perinatal care. That was millions more than it spent in 2011 ($35 million) and 2009 ($33 million). *Id.*

When more benefits are given to unlawfully-present aliens, it will incentivize even more aliens to enter the country unlawfully and "will increase the number of individuals that demand them." *Texas*, 86 F. Supp. 3d at 634. The State's Health and Human Services Commission has thus correctly projected the estimated sums will continue to rise as the number of unlawfully-present aliens increases within the State's borders. *See* Plaintiff's Reply in Support of Motion for Preliminary Injunction at 53, *Texas v. U.S.*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-00254). Plus, unlawfully-present aliens are less likely to have health insurance and are more likely to rely on emergency rooms or public clinics for health care. Congressional Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments* (Dec. 2007), at 8, https://www.cbo.gov/publication/41645.

The rapid increase in unaccompanied minors such as the alien here accounts for much of those cost trends. From 2011 to 2014, the number of unaccompanied minors apprehended at the border more than *quadrupled*—from 17,109 in 2011 to 73,741 in 2014. U.S. Government Accountability Office, *Unaccompanied Children: HHS Can Take Further Actions to Monitor Their Care, GAO-16-180* (Feb. 2016), at 4, https://www.gao.gov/products/GAO-16-180. Of those 73,741, nearly 57,500 were turned over to the care of the Office of Refugee Resettlement. *Id.* at 1. This rapid increase "has at times strained

ORR's capacity to find shelter beds," *id.* at 2, and "created challenges for the communities in which these children are eventually placed." *Id.* Furthermore, the increase in facilities combined with insufficient resources have prevented ORR from performing required on-site monitoring of facilities, in some cases for several years. *Id.* at 26-27.

Large influxes of unaccompanied minors also strain States' education resources. The State of Texas bears the cost of about $9,473 per child for the public education of unlawfully-present alien children. *Texas*, 86 F. Supp. 3d at 630. From October 2013 to September 2014, "Texas absorbed additional education costs of at least $58,531,100 stemming from illegal immigration." *Id.*

The costs are not just financial. This Court in *Arizona* recognized the "disproportionate share of serious crime" committed by unlawfully-present aliens in Arizona's most populous county. 567 U.S. at 398. Indeed, "there is an 'epidemic of crime, safety risks, serious property damage, and environmental problems' associated with the influx of illegal migration across private land near the Mexican border." *Id.* (citation omitted).

States like amici "cannot protect themselves from the costs inflicted" by a massive uptick in the number of individuals able "to compel state action." *Texas*, 86 F. Supp. 3d at 620. That is why the States have consistently fought against any effort to "explicitly or impli[citly] solicit immigrants to enter the United States illegally." *Id.* at 630.

Yet the decision below does exactly that. The court of appeals' decision effectively announces that anyone on Earth has any number of constitutional rights simply by

being apprehended while trying to cross the United States border unlawfully. This holding will make the unlawful immigration crisis worse and further strain the budgets and resources of governments throughout the Nation.

* * *

The federal government has suggested that respondent counsel's efforts to thwart this Court's review may warrant disciplinary action. Pet. 26-28. The propriety of such action could turn on representations in documents amici cannot review. *See, e.g.*, Pet. 12-13. Because amici do not have access to these materials, amici are unable to take a definitive position on this issue. But it is abundantly clear that the federal government intended to seek this Court's review in an expeditious matter within 24 hours of the court of appeals' en banc decision. *See* Pet. 9, 11. At a minimum, these extraordinary circumstances further warrant vacatur.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to remand to the district court for dismissal of all claims for prospective relief regarding pregnant unaccompanied minors.

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Respectfully submitted.

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