NO. 18-1432

In the

Supreme Court of the United States

NIDAL KHALID NASRALLAH,

Petitioner,

V.

WILLIAM P. BARR, ATTORNEY GENERAL.

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Brief for *Amici Curiae* Legal Service Providers in support of Petitioner Nidal Khalid Nasrallah

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INTEREST OF AMICUS CURIAE[1]

Amici, listed in the appendix to this brief, are non-profit organizations serving immigrants, many of whom seek shelter from torture and persecution in their home countries. Collectively, Amici represent or advise tens of thousands of applicants for protection throughout the country. Amici have a strong interest in ensuring access to judicial review over these claims and in ensuring that federal-court oversight remains available to safeguard against inevitable errors in the overtaxed immigration court system, particularly in circumstances where the consequences are deportation to torture. Amici believe their extensive experience practicing in the immigration system will help the Court in considering this case.

Amici include the American Immigration Lawyers Association, Bronx Defenders, Brooklyn Defender Services, Capital Area Immigrant Rights Coalition, Florence Immigrant & Refugee Rights Project, Georgia Asylum and Immigration Network, Human Rights First, Immigrant Defenders Law Center, Immigrant Defense Project, Immigrant Law Center of Minnesota, Immigration Equality, Legal Aid Justice Center, Public Counsel, National Immigrant Justice Center, National Immigration Project of the National Lawyers Guild, Prisoners' Legal Services of

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[1] Counsel for the petitioner and counsel for the respondents have consented in writing to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

New York, Refugee and Immigrant Center for Education and Legal Services, Rocky Mountain Immigrant Advocacy Network, and University of California Davis School of Law Immigration Law Clinic.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our Nation has committed via international treaty to refrain from removing people—including those convicted of serious crimes—to countries where they will be tortured. That is the essence of our commitment under the Convention Against Torture ("CAT") and of our national aversion to arbitrary state violence. That commitment explains why CAT protections are mandatory: "Article 3 of the CAT expressly prohibits the United States from returning any person to a country in which it is more likely than not that he or she would be in danger of being subjected to torture." *Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004) (internal quotation marks omitted).

If the immigration courts got it right every time, there might be little need for judicial review of the factfinding that went into considering that mandatory protection. But immigration courts are flawed. All agencies make mistakes, and those mistakes are even more pronounced due to crushing workloads and onerous case-completion deadlines.

Because of the high cost of decisional error in these cases—life and death—judicial review of agency factual determinations is vital. The extent and variety of fact errors committed by the agency

are much too common. Preserving access to judicial review is necessary to ensure that the United States does not deport individuals to countries where they are likely to be tortured or killed.

CAT protection exists to safeguard against some of the most egregious human rights violations in the world. A CAT applicant might have been "imprisoned in a military prison camp" and deprived of food in Eritrea. *FH-T v. Holder*, 723 F.3d 833 (7th Cir. 2013). Or she could be someone who was "raped, forced to perform oral sex, beaten severely, and threatened" because of her transgender identity. *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015). Some people have fled to the United States following forced disappearance and presumed death of family members in war torn countries like South Sudan. *Wani Site v. Holder*, 656 F.3d 590, 592 (7th Cir. 2011). Others face a clear probability of harm like kidnapping, extrajudicial killing, or grievous physical violence by non-state actors acting with the acquiescence of public officials. *See, e.g.*, *Silva-Rengifo v. Atty. Gen. of US*, 473 F.3d 58, 67 (3d Cir. 2007) (fear of kidnapping and extrajudicial killing by Colombian paramilitary); *Zheng v. Ashcroft*, 332 F.3d 1186, 1190 (9th Cir. 2003) (fear of torture by Chinese snakeheads for testifying against them).

Despite the serious nature of these cases, the factual errors that can arise are pronounced. For instance, Samer Mansour, an Iraqi Assyrian Christian, requested CAT protection based on his status as an Assyrian Christian. He offered evidence, including a State Department report, that the Iraqi

government engaged in flagrant abuses against the Assyrian Christian minority. *Mansour v. INS*, 230 F.3d 902 (7th Cir. 2000). The BIA denied relief. The Seventh Circuit reversed, calling the BIA's treatment of Mansour's torture claim "troubling." *Id.* at 908. The BIA was "silen[t] with regard to the U.S. State Department's Report," and it misread the facts, labeling Mansour a "Syrian Christian" rather than an Assyrian. *Id.* Based on the latter error, the Seventh Circuit "question[ed] whether the BIA adequately comprehended and addressed Mansour's torture claim" and remanded for reconsideration. *Id.*

And in *Castilho de Oliveira v. Holder*, 564 F.3d 892 (7th Cir. 2009), the immigration judge outright refused to consider evidence; arbitrarily demanded an affidavit from a specific person (despite other corroboration); speculated about the relevance of the claimant's Catholic faith; and assumed without evidence that the claimant's mother did not testify because she could not withstand cross-examination. *Id.* at 897-98. The BIA adopted and affirmed the immigration judge's decision. The Seventh Circuit reversed, decrying the judge's "sometimes inflammatory questions," his "refus[al] to consider important evidence," and his failure to "seriously engag[e] with the evidence in the record." *Id.* at 894. This particular case involved asylum, but these errors are just as likely in a case for CAT protection.

That is the kind of gross error that the government contends should be immune from judicial review. The government's theory is wrong as a matter of text and constitutional norms.

In *Kucana v. Holder*, 558 U.S. 233, 251 (2010), this Court applied "the presumption favoring judicial review of administrative action" to interpret the scope of 8 U.S.C. § 1252(a)(2)(B)(ii), which covers judicial review over discretionary immigration remedies. Here, in the context of *mandatory* protection against torture, the need for judicial review is even stronger. Accordingly, Amici write to urge this Court to adopt Nasrallah's position that 8 U.S.C. § 1252(a)(2)(C) does not preclude traditional judicial review of agency factfinding in cases involving applications for CAT protection.

ARGUMENT

Amici draw on their collective experience to amplify three themes in Petitioner's case. First, judicial review is critical as a means of error correction in an error-prone system, and as a way of cabining the collateral consequences of criminal convictions to minimize the risk of deportation to likely torture as punishment for a criminal offense. Additionally, Amici offer context to support Petitioner's argument that a final removal order is distinct from a CAT grant. And finally, Amici write to address some of the constitutional concerns that arise when applying Section 1252(a)(2)(C) to mandatory protection claims.

I. Immigration judges adjudicate torture claims within an overtaxed system lacking sufficient safeguards against error.

This Court has long recognized "the complexity of immigration procedures, and the enormity of the interests at stake." *Ardestani v. INS*, 502 U.S. 129,

138 (1991). In cases involving applications for CAT protection, the interests could not be higher. Yet the system designed to hear these claims is set up in a way that makes factual errors virtually inevitable. This Court should preserve robust judicial review of factual questions that arise in these circumstances to safeguard this country's commitment to protect individuals from removal to serious harm.

A. The United States is committed, by treaty, to refrain from removal to torture in all cases.

Torture is "antithetical to basic notions of liberty, and prohibited by the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment." *Khouzam*, 361 F.3d at 162-63. The Convention was designed to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." United Nations, Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Preamble, 23 I.L.M. 1027, 1027 (1984).

After adoption by the United Nations General Assembly, the United States ratified the Convention. The Senate Foreign Relations Committee described ratification as "consistent with longstanding U.S. efforts to promote and protect basic human rights and fundamental freedoms throughout the world." Comm. on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-30, at 3 (1990).

Under the CAT, the United States agreed to refrain from deporting an individual who is likely to be tortured elsewhere. Article 3 of the CAT provides that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture, 23 I.L.M. at Art. 3. Congress codified that protection in 1998, stating that "[i]t shall be the policy of the United States" to follow Article 3 and directing the "appropriate agencies [to] prescribe regulations" to implement that policy. Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105–277, § 2242(a), (b), 112 Stat. 2681, 2681-822 (1998) (codified as a note to 8 U.S.C. 1231 (1999)).

CAT protection is so critical to the country's international treaty obligations that the protection afforded is mandatory. The law "does not permit any discretion or provide for any exceptions" that would allow removal where torture is likely. *Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011) (citation omitted). This right to be free from removal to torture applies to all noncitizens, without regard to their criminal record. *See, e.g., Wanjiru v. Holder*, 705 F.3d 258, 267 (7th Cir. 2013) ("CAT does not exist only for persons with an unblemished record.").

B. The administrative immigration system fails to adequately safeguard against fact errors leading to the denial of mandatory protection.

Despite the exceptional interests at stake, the administrative process leaves much to be desired. As Dana Marks, President Emeritus of the National Association of Immigration Judges, put it, "In essence, we're doing death penalty cases in a traffic court setting." *See* Hon. Mark A. Drummond, *"'Death Penalty Cases in a Traffic Court Setting': Lessons from the Front Lines of Today's Immigration Courts,"* ABA: Voices from the Bench (Jan. 15, 2019), https://bit.ly/36u1qcX. The system is designed for expediency, often at the cost of accuracy, underscoring the need for judicial review as a fact-correction mechanism.

1. The immigration system is gravely overburdened, making accurate decisions on important mandatory-protection cases difficult to obtain. A quota system requires immigration judges to "complete 700 cases a year and to see fewer than 15% of their decisions" remanded; failure to meet the quota puts their job at risk. Laura Meckler, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations*, WALL STREET JOURNAL (Apr. 2, 2018), https://on.wsj.com/356TKNo. The implications for quality control are evident.

Because of those case pressures, Amici have routinely observed immigration judges with triple-booked calendars, endeavoring to complete complex

protection claims in under an hour. Immigration judges have acknowledged the obvious: those pressures limit their "ability to render correct and well-reasoned decisions." Ilyce Shugall, *Op-Ed: Why I resigned as an immigration judge*, LA TIMES, (Aug. 4, 2019), https://lat.ms/2YyS3Wu (explaining that her docket "was fully booked with cases through 2021" and that she was instructed to schedule "three cases every day" on top of status dockets and administrative responsibilities).

Review by the Board of Immigration Appeals is not an adequate safeguard. "From fiscal year 2006 to fiscal year 2015, single BIA members annually reviewed 90 percent or more of completed appeals." Gov't Accountability Office, *Immigration Courts: Action Needed to Reduce Case Backlog and Address Long Standing Management and Operational Control Challenges* (June 2017), https://bit.ly/2P7HarC. Single-member review is necessary for the Board to maintain a completion rate of approximately 30,000 cases per year with fewer than 20 Board members. *See* U.S. Dep't of Justice, Exec. Office for Immigration Review, Statistical Yearbook: Fiscal Year 2018, 35, https://bit.ly/2RGvgGI (five years of case completion); U.S. Dep't of Justice, Board of Immigration Appeals, https://bit.ly/2qKAqGQ (listing BIA members). And although the BIA "is presumed to have considered all of the parties' relevant issues" when it adjudicates an appeal, 84 Fed. Reg. 31463, courts routinely criticize its boilerplate, unreasoned decisions. *See Benslimane v. Gonzales*, 430 F.3d 828, 829, 830 (7th Cir. 2005) (collecting cases, finding that BIA adjudication "has fallen below the

minimum standards of legal justice"); *see also Tushar Pravinkumar Gor v. Holder*, 607 F.3d 180, 198-99 (6th Cir. 2010) ("[F]ollowing the Attorney General's 2002 streamlining reforms—which cut the number of BIA members from twenty-three to eleven and allowed single-member review of most appeals—board members must review an enormous number of deportation cases, resulting in errors of disturbing magnitude and frequency."); *Chi Alfred Zuh v. Mukasey*, 547 F.3d 504, 514 (4th Cir. 2008) ("[C]ourts have grown increasingly skeptical of the high error rate within the immigration system.") (internal citation omitted).

Scholarly analyses further demonstrate that errors and inconsistencies pervade the immigration system, reinforcing the importance of judicial review. *Cf. Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 n.11 (1994) (reasoning that the "empirical evidence" of problematic and highly inconsistent verdicts in other contexts—there, jury damages awards—"supports the importance of judicial review"). Review of thousands of decisions shows that outcomes for similar claimants vary strongly from courthouse to courthouse. For example, researchers found that "an individual fleeing persecution in China is 986% more likely to win her asylum claim in [Orlando] than in [Atlanta]." Ramji-Nougales et al., Refugee Roulette: Disparities in Asylum Adjudication, 60 STANFORD L. REV. 295, 329-30 (2007). The authors found numerous such examples, revealing a system in which like cases are not decided in a like manner. And because applicants for mandatory CAT protection are pursuing their last line of defense, the consequences of mistakes are especially severe.

The Courts of Appeals have expressed concern with the impacts of this system on the interests at stake. For example, the Seventh Circuit has described how "[r]epeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate." *Kadia v. Gonzales*, 501 F.3d 817, 820-21 (7th Cir. 2007); *see Wang v. U.S. Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding.").

2. The risk of an inaccurate decision is even greater from detention; a fact that is significant here because virtually all CAT claimants who could be affected by Section 1252(a)(2)(C) are also subject to mandatory detention due to the overlap with 8 U.S.C. § 1226(c), which governs mandatory detention.

This difficulty is heightened without counsel, and detained applicants are far less likely to have representation. The statute does not guarantee appointed counsel in immigration cases. 8 U.S.C. § 1229a(b)(4)(A) (right to counsel only at the noncitizen's expense). And detained noncitizens are significantly less likely to have legal representation than their non-detained counterparts. *See* Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings:*

NewYork Immigrant Representation Study Report: Part 1, 33 CARDOZO L. REV. 357, 367-68 (2011) (finding that "detained individuals with cases adjudicated in New York Immigration Courts were unrepresented 67% of the time, while nondetained individuals in the same courts were unrepresented only 21% of the time"); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 32 (2015) (finding that from 2007 to 2012 "nondetained respondents were almost five times more likely to obtain counsel than detained respondents").

Detention coupled with lack of representation also makes it harder for noncitizens to effectively present their cases in a way that minimizes the risk of a fact error that could result from, for example, the misunderstanding of a piece of evidence or the absence of objective corroboration. "[T]he resources in detention facility law libraries are minimal at best." *Rodriguez v. Robbins*, 804 F.3d 1060, 1073 (9th Cir. 2015), *reversed and remanded on other grounds sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *see also* Penn State Law Ctr. for Immigrants' Rights Clinic, *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers* 25 (2017), https://bit.ly/2Pz04Xc ("At Stewart [Detention Center], many of the detained immigrants expressed that the law library was not useful because all of the materials were in English and they cannot read English. At Irwin [County Detention Center] and Stewart, detained immigrants reported that they do not have access to the internet."). And, noncitizens often appear by video with their interpreter and a judge in entirely

different locations, adding to the challenges of communicating their claims. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NORTHWESTERN UNIV. L. REV. 933, 934 (2015) (noting that in 2015, "nearly one-third of all detainees attend their immigration hearings by video.").

Given the stakes at issue here, deportation to torture or death, this Court can and should take the flaws in the court system into account when considering whether Congress intended to limit judicial review of fact errors in CAT claims.

II. The need for robust judicial review is critical given the various crimes that can be swept up by Section 1252(a)(2)(C).

In addition to considering the inherent limits of the immigration court system, this Court should be mindful of the broad reach of Section 1252(a)(2)(C) and balance it against a need to preserve judicial review.

A. Section 1252(a)(2)(C) applies to a wide array of criminal conduct.

On the government's view, Section 1252(a)(2)(C) would strip appellate jurisdiction in cases for people with a wide set of convictions. These convictions are often relatively minor, and they are always legally irrelevant in an applicant's ability to receive protection against removal to torture. The list of covered offenses could include selling cigarettes across state lines, as was the case for Mr. Nasrallah, or illegally downloading music, or minor drug

possession. Nothing about criminal convictions should categorically insulate the CAT analysis from judicial review for factual errors.

Section 1252(a)(2)(C) applies to noncitizens ordered removed "by reason of having committed a criminal offense" covered by one of several statutory cross references, including grounds relating to crimes involving "moral turpitude." *See Tall v. Mukasey*, 517 F.3d 1115, 1118 (9th Cir. 2008). Moral turpitude is a common law term not defined by statute. *See Jordan v. De George*, 341 U.S. 223, 231-32 (1951). Early case law applied the term to "crimes . . . of a serious nature." *See Matter of E-*, 2 I. & N. Dec. 134, 139-40 (BIA 1944; A.G. 1944).

But more recent cases interpret the term broadly, finding that "neither the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude." *Matter of Serna*, 20 I. & N. Dec. 579, 581 (BIA 1992). Thus, low-level offenses have been found turpitudinous. *See*, *e.g.*, *Matter of Bart*, 20 I. & N. Dec. 436 (BIA 1992) (writing of bad checks); *Hashish* v. *Gonzales*, 442 F.3d 572, 576 (7th Cir. 2006) ("theft of a recordable sound"—*i.e.*, illegally downloading music); *United States* v. *Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999) (making false statements on a driver's license application); *Castillo-Torres* v. *Holder*, 394 F. App'x 517, 521 (10th Cir. 2010) (giving false identification information to a police officer); *Marin-Rodriguez* v. *Holder*, 710 F.3d 734, 739 (7th Cir. 2013) (using a false Social Security card to obtain employment).

Nonviolent drug offenses can likewise bar a noncitizen from judicial review over fact errors. Section 1252(a)(2)(C) cross references both Section 1182(a)(2)(A) and Section 1227(a)(2)(B). The first renders noncitizens inadmissible for a conviction for "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." And Section 1227(a)(2)(B) makes a noncitizen "deportable" based on any controlled substance violation "other than a single offense involving possession for one's own use of 30 grams or less of marijuana." *See also Mellouli v. Lynch*, 135 S. Ct. 1980, 1284 (2015).

Moral turpitude and non-violent drug offenses are two of the most commonly proffered removal charges. Available data suggest that the vast majority of immigration charges that could trigger the Section 1252(a)(2)(C) fall into one of these categories. Indeed, from October 1, 2001 to July 26, 2011, 62.7% of charges against noncitizens that implicated Section 1252(a)(2)(C) were for turpitude offenses or controlled substance violations; only 25% were for aggravated felony convictions.[2] After fiscal year 2011, data on immigration charges is not available, but the overall trend remains that noncitizens are placed in removal proceedings for less serious offenses much more often than they are for more serious ones.[3]

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[2] *See* Transactional Record Access Clearinghouse (TRAC), *Charges Asserted in Deportation Proceedings in the Immigration Courts*, https://bit.ly/35aidRH.

[3] *See* TRAC, *New Deportation Proceedings Filed in Immigration Court*, https://bit.ly/2RICLwT.

For example, Stephen Bosede was convicted of two drug possession offenses that rendered him removable despite his 26 years of residence in the United States. *Bosede v. Mukasey*, 512 F.3d 946, 948 (7th Cir. 2008). Due to his HIV status, he feared removal to Nigeria because Nigerian law mandates imprisonment of people convicted of drug offenses abroad, and he would likely die due to lack of access to appropriate medicine during imprisonment. *Id.* at 949. The immigration judge reasoned, however, that Bosede might be able to bribe his way out of prison. *Id.* at 951. On appeal, the Government argued that this was a "factual finding" immune from review; the Seventh Circuit nonetheless weighed in, reasoning that "whether an alien might succeed in escaping persecution or torture through bribery is an irrational and altogether improper consideration in deciding a claim for asylum or other relief." *Id.* Without judicial review, Bosede might have been subjected to the high likelihood of death in Nigeria for drug possession.

Bosede is not a unique example. In *Kporlor v. Holder*, 597 F.3d 222 (4th Cir. 2010) the Court held that its jurisdiction was limited by Section 1252(a)(2)(C) based on a larceny offense where "the underlying behavior . . . consisted of taking several taxi cab rides for which [Kporlor] could not pay." *Id.* at 223. In *Balogun v. Ashcroft*, 270 F.3d 274, 276 (5th Cir. 2001), the Court concluded that it lacked jurisdiction to consider a CAT claim based on a conviction for illegal possession and fraudulent use of credit cards. And in *Malu v. U.S. Att'y Gen.*, 764 F.3d 1282 (11th Cir. 2014), the court refused to

exercise its jurisdiction based on a conviction for simple battery. *Id.* at 1289-90.

In sum, while some noncitizens seeking CAT protection have criminal records, that criminal record does not bar CAT relief, nor should a criminal record insulate agency factual errors from judicial review.

B. Traditional judicial review promotes important democratic values in this important class of cases.

Eliminating judicial review of fact errors undermines our Nation's commitment to the Torture Convention. Judicial review promotes important values in CAT litigation; the statutory text of Section 1252(a)(2)(C) does not compel the courts to abandon those values. Appellate review of agency decisionmaking facilitates decisional accuracy and adherence to the rule of law. Getting it right after a fair contest is the core requirement of a democratic system for resolving disputes. That benefits not only the litigants, but also public confidence in the institutions of government. The statutory text does not clearly demonstrate an intent to subvert those values in CAT cases.

And the cost of promoting those values is low. In fact, the term "cost" is inapt. Getting the outcome right when human life is on the line is fundamental to our system. Deliberativeness is a good to promote, not a business expense to avoid.

Petitioner's reading of Section 1252(a)(2)(C) already prevails in more than half the country by volume of immigration appeals. Experience shows that appellate jurisdiction over factual issues is not only workable but works. The Seventh and Ninth Circuits have affirmed CAT denials where supported by substantial evidence, but also reversed and remanded when the agency commits gross factual error. In the Courts of Appeals where the rule Petitioner advances is not available, CAT petitioners already can and do raise constitutional and legal challenges under 8 U.S.C § 1252(a)(2)(D). Adding a basis for reversal may change the nature of the arguments, but it is unlikely to materially increase the volume of CAT litigation.

Because of the deferential standard of review, BIA decisions are unlikely to be reversed for factual errors unless they are grossly inaccurate. That is exactly when reversal is most important. That is not a tautology, but a practical point: the cases likely to be reversed for factual errors are those where reversal is necessary to comply with our treaty obligations and prevent torture. And it is precisely those circumstances where more than a generalized legislative intent to "expedite the removal of criminal and other illegal aliens from the United States," Br. in Opp. to Cert. at 3, is necessary to establish that Congress meant to immunize CAT decisions from traditional error-correction.

III. CAT protection is distinct from traditional immigration relief.

Amici also write to add practical context to support Petitioner's argument that a grant of CAT protection is distinct from a final removal order. In Amici's view, the differences between a grant of CAT and the issuance of a removal order lend support to treating them differently for judicial review purposes.

A. CAT relief conveys unique rights and limitations.

CAT relief differs markedly from asylum, the most robust protection-based immigration remedy. When a noncitizen is granted asylum she receives legal status that operates as a defense to removability. *E.g.*, 8 C.F.R. 245.1(d)(1) (defining "lawful immigration status" to include asylees). The asylum grant is akin to a legal admission, and once in place, an asylee cannot be removed unless that status is revoked. *See* 8 U.S.C. § 1158(c)(1)(A). Asylees can work without restriction (8 U.S.C. § 1158(c)(1)(B); 8 C.F.R. 274a.12(a)(5)), travel abroad (8 C.F.R. 223.1), and apply for permanent residence after one year (8 U.S.C. § 1159(b)).

None of that is true for CAT protection. Recipients of CAT are ordered removed; indeed, a removal order is a condition precedent for obtaining CAT relief. 8 C.F.R. 208.16(f); 1208.16(f); *see Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434 & n.3 (BIA 2008). Having been ordered removed, they are often subject to conditions when released from detention,

like placement on an "Order of Supervision." 8 C.F.R. 241.4(b)(3); 241.5. Such conditions can require periodic reporting, limited mobility (e.g. no travel outside of a state or region without consent from DHS), and other conditions as the agency sees fit. 8 C.F.R. 241.4(j).

B. In many cases, Immigration Judges adjudicating protection claims do not enter removal orders at all.

Further marking the difference, CAT claims are not even always adjudicated at the same time or by the same party that adjudicates a removal order. Specifically, some noncitizens are subject to removal orders entered by DHS agents rather than Immigration Judges. In those cases, CAT applications proceed wholly apart from, and after the issuance of, the removal order itself.

For example, some noncitizens with criminal records can receive "administrative removal orders" under 8 U.S.C. § 1228(b). These orders are entered by DHS agents outside the immigration court system. 8 C.F.R. 238.1(d).[4] After entry of an administrative removal order, the asylum office (also

[4] The Agency's regulatory authority to enter administrative removal orders is doubtful. The statute does not specify who should enter an administrative removal order, and in fact requires that the order of removal be issued "pursuant to the procedures set forth in this subsection or section 1229a." 8 U.S.C. § 1228(b)(1). That section in turn provides that "[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1). Amici offer this example as an illustration of the process, not as an endorsement of the regulations.

part of DHS) addresses the plausibility of a protection claim. 8 C.F.R. 241.8(e); 208.31. If the noncitizen cannot pass a threshold "reasonable fear" inquiry, she is removed without full agency review. 8 C.F.R. 1208.31(g)(1). If the noncitizen is found to have a reasonable fear, she can see a judge for the limited purpose of seeking protection from persecution or torture. 8 C.F.R. 1208.2(c)(2). These are not removal proceedings; to the contrary, a removal order would already have been entered and the protection claim is assessed independently.

For instance, Biuma Malu received a final administrative removal order and then sought protection from removal to her native Democratic Republic of Congo, explaining that she feared persecution as a lesbian who had been subjected to forced marriage as a young girl. *Malu*, 764 F.3d at 1289-93 (11th Cir. 2014), *cert. pet. withdrawn*, *Malu v. Lynch*, 136 S. Ct. 6 (2015). Malu had been convicted of simple misdemeanor battery and DHS concluded that this offense was an aggravated felony despite significant case law to the contrary. *See, e.g.*, *Johnson v. United States*, 559 U.S. 133 (2010). The proceedings in Malu's case illustrate the bifurcation between the issuance of an expedited removal order by DHS and the adjudication of a CAT claim by an immigration judge. Malu argued to the Eleventh Circuit that there was no "reasonable administrative process" for her to contest the legal determination that formed the basis of her administrative order. *Malu*, 764 F.3d at 1288. Had she been in the Fifth Circuit, she would have won that argument. *See Valdiviez-Hernandez v. Holder*, 739 F.3d 184, 187 (5th Cir. 2013) (holding that review of

administrative orders "is geared toward resolving only issues of fact"). The Eleventh Circuit rejected this reading as it applied to Malu herself, but the tension between that decision and *Valdiviez-Hernandez* is instructive in that it demonstrates that the administrative removal process stands apart from CAT adjudication processes in time and in scope.[5]

Similarly, individuals who reenter illegally after a prior order of removal have their prior orders "reinstated" under 8 U.S.C. § 1231(a)(5). Those orders, likewise, are entered by DHS. 8 C.F.R. 241.8(c); *see De Sandoval v. U.S. Att'y Gen.*, 440 F.3d 1276, 1283 (11th Cir. 2006); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007) (en banc). As with administrative removal orders, a noncitizen who fears return to her homeland is not placed into removal proceedings, but into "withholding-only" proceedings under 8 C.F.R. 1208.2(c)(2).

In both of these contexts, the DHS agents who enter administrative or reinstated removal orders have no authority over protection claims. 8 C.F.R. 238.1(f)(3) (administrative order); 8 C.F.R. 241.8(e) (reinstatement). And the judge who decides the protection claim has no authority over the removal

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[5] Amicus National Immigrant Justice Center represented Malu in her proceedings, and on appeal to this Court. *See Malu v. Lynch*, 136 S. Ct. 6 (2015). Malu voluntarily dismissed that case after the government agreed to reopen and withdraw the administrative order. The factual errors in Malu's CAT case, which the Eleventh Circuit refused to review because of Section 1252(a)(2)(C), are evident given that following remand, Malu received protection.

order. *See* 8 C.F.R. 1208.2(c)(2) (administrative order); 8 U.S.C. § 1231(a)(5) (providing that a reinstatement order "is not subject to being reopened or reviewed"). These processes highlight the disconnect between a removal order and a grant or denial of CAT protection. Removal orders are logically distinct from the protection remedies, and in some instances occur in front of different adjudicators at different points in time. And the outcome of the protection claim has no effect on the entry of the removal order.

IV. The Government's reading of Section 1252(a)(2)(C) is constitutionally doubtful.

Finally, Amici note that the Government's reading of Section 1252(a)(2)(C) raises constitutional concerns regarding separation of powers and due process that Petitioner's reading easily avoids. It is difficult to think of another regime in which factual errors made in the course of deciding life and death questions are immune from judicial review, particularly where the Executive branch has both prosecuted and decided the case. The due process balance surely tips in favor of life over administrative efficiency.

A. Jurisdiction-stripping precedent has not adequately grappled with the Constitution's vesting of judicial power in the courts.

As a baseline rule, the "'check' the Judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial

review." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 52 (2015) (Thomas, J., concurring). This Court has repeatedly considered limitations on judicial review over immigration matters, but that case law has not fully assessed or explained when jurisdiction-striping is consistent with Article III. And they have certainly not done so in cases involving the highest liberty interest—life—against the backdrop of a judicial process that an immigration judge compared to "traffic court." *See supra* Part I.B.

The constitution "vest[s]" the judicial power in the Courts and specifies its reach: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution [and] the laws of the United States." Art. III, §§ 1-2. And the Founders were deliberate in separating that power from the executive. They considered "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many" as "the very definition of tyranny." The Federalist No. 47 (Madison). This concern was not limited to executive encroachment on the legislative branch. "The executive shall never exercise the legislative and judicial powers . . . to the end it may be a government of laws and not of men." *Id.* (citing Mass. Const. pt. 1, art. XXX).

Congress may not, consistent with the Constitution, reallocate the authority of the three branches. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring) ("the Vesting Clauses are exclusive and . . . the branch in which a power is vested may not give it up or otherwise reallocate it."). Indeed, some

commentators blame excessive delegation for the collapse of Congressional authority. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015).

It is true that some read Article III to permit Congress to limit federal court jurisdiction, when it grants the Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Art. III § 2, cl. 2. But as commentators have noted, reading the Exceptions clause this way is flawed; it would have been passing strange for the Founders to have authorized one branch to so limit another branch in such a "remarkably offhanded" way. David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 119-32; *see* Steven G. Calabresi, Gary Lawson, *The Unitary Executive, Jurisdiction Stripping and the Hamdan Opinions: a Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (May 2007). Reading Section 1252(a)(2)(C) to allow Congress to throttle the judicial voice overreads that language.

Congress did not broadly delegate responsibility for deciding how to prevent torture to the Executive. Rather, it mandated that federal agencies adopt rules in conformity to the Torture Convention, providing a rule against which to judge individual cases. And Congress made compliance with that Convention mandatory. This feature distinguishes this case from many immigration cases that involve an exercise of discretion. Here, to the contrary, the decision to grant or withhold protection is not

discretionary and it requires weighing facts against a legal standard. These are stereotypical judicial functions.

Nor does the Constitution distinguish between legal and factual determinations. To the contrary, the Founders conferred jurisdiction on the courts "*both as to Law and Fact*." Art. III § 2, cl. 2 (emphasis added). As such, the savings provision found within Section 1252(a)(2)(D) does not avoid the separation-of-powers problem implicated here.

For a number of reasons, the government cannot rely on the abstract claim that "Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases." *Patchak v. Zinke*, 138 S. Ct. 897, 906-07 (2018) (plurality op.) (citing *Ex parte McCardle*, 74 U.S. 506, 514 (1868)). First, *McCardle* was really a channeling provision, barring jurisdiction by one route but permitting it by another. *See McCardle*, 74 U.S. at 514 (finding that statute did not repeal "the whole appellate power of the court). Indeed, this was confirmed that same term when the Court found jurisdiction to decide *Ex parte Yerger*, 8 Wall. 85 (1869). *See Patchak*, 138 S. Ct. at 920-21 (Roberts, J., dissenting).

Second, as the *Patchak* plurality noted, Congress may not "violate other constitutional provisions" via jurisdiction-stripping. *Patchak*, 138 S. Ct. at 906. The jurisdiction-stripping statute in *Patchak* did not render some other body supreme in saying what the law is, but rather, it removed jurisdiction as a means of confirming its change in substantive law whereby it ratified prior governmental decisions. 138 S. Ct.

at 911-12 (Breyer, J., concurring). Whatever one thinks of *Patchak*, to the extent that Congress would wish to employ any Exceptions Clause authority, Art. III § 2, cl. 2, to vest judicial power in an agency—or any body other than this Court—that could not be saved by *Patchak* or *McCardle*.

Finally, as discussed below, there are serious due process questions about the regime that would result from jurisdiction-stripping in this case. The *Patchak* plurality did not address whether Congress may use jurisdiction-stripping to effectively decide a group of highest-stakes cases for the executive against a politically-weak group (immigrants with criminal convictions), without changing the substantive law. *Cf. Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 439 (1992); *see also Patchak*, 138 S. Ct. at 914 (Roberts, J., dissenting).

Article III vests judicial power in the federal courts. Whatever deference is appropriate to an Agency making fact determinations, Article III requires that the federal courts have authority to fulfill the judicial function and review those determinations.

B. Jurisdiction-stripping in this context raises problematic due process concerns.

Under the Government's reading of Section 1252(a)(2)(C), the statutory scheme created by Congress is a house divided. On the one hand, the executive is ordered, in nondiscretionary terms, to comply with treaty obligations not to deport people to death or torture. On the other hand, says the

Agency, Congress requires courts to allow erroneous removals to happen if the noncitizen has committed certain crimes, and if the agency error is not an error of law. The Court should reject that improbable result as of doubtful constitutionality.

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). Noncitizens have recognized due process rights prior to being removed. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903)).

To trigger due process protections, the Supreme Court requires that individuals show that they have a liberty interest in the remedy. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Some courts have held that a noncitizen has "no constitutionally-protected liberty interest in obtaining discretionary relief from deportation." *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000); *but see United States v. Copeland*, 376 F.3d 61, 70 (2d Cir. 2004) (distinguishing between eligibility for discretionary relief and denial of relief itself). Whatever the merits of that logic in other immigration matters, it could have no application to the mandatory protections provided by the CAT. Here, statute, regulation, and treaty provide "particularized standards or criteria [that] guide[s] the [agency's] decisionmakers." *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458, 467 (1981) (Brennan, J., concurring). It is not the case that an immigration judge "can deny the requested relief for any constitutionally permissible

reason or for no reason at all." *Id*. Congress has created a constitutionally protected liberty interest by requiring enforcement of the treaty on these terms. *See id*., at 466-67 (opinion of the Court).

In general, to assess a due process claim, courts look to (1) the "the private interest that will be affected"; (2) "the risk of an erroneous deprivation"; (3) "the probable value, if any, of additional or substitute procedural safeguards"; and (4) the Government's interest." *Mathews v. Eldridge*, 424 US 319, 335 (1976). But due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895 (1961). Rather, it is "flexible" and "calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U. S. 471, 481 (1972). All factors point towards more review here.

First, the stakes are substantial. Removal is a grave penalty even where death and torture are not involved. *See Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual. . . . That deportation is a penalty — at times a most serious one—cannot be doubted."). It is even more so when the stakes are torture. *See, e.g.*, *Devitri v. Cronen*, 289 F. Supp. 3d 287 (D. Mass. 2018) (finding liberty interests in class of Indonesian Christians fearing persecution). Given what is at stake, some "minimal procedural safeguards"—beyond agency level review—should be required. *Ohio Adult Parole Authority v. Woodard*, 523 U. S.

272, 289 (1998) (O'Connor, J., concurring in part and in judgment).

Second, the risk of erroneous deprivation without judicial review of fact errors is high. Adjudication of protection claims has verged on the arbitrary. *Ramji-Nougales et al.*, Refugee Roulette: Disparities in Asylum Adjudication, 60 STANFORD L. REV. 295, 329-30 (2007). Some courts suggest this challenge results from agency workload, *see supra* Part I.B, but whatever the cause, it could not excuse such errors, particularly when the stakes are so high.

Finally, the government's interests do not tip the balance. Noncitizens are already permitted to bring petitions for review to challenge legal and constitutional errors. 8 U.S.C. § 1252(a)(2)(D). Allowing review to encompass factual issues would impose some costs, but given that courts would already review that decision, the additional costs would not be grave. And given courts' reversal rates of Board decisions, *see Benslimane v. Gonzales*, 430 F.3d at 829, the value of court intervention could hardly by doubted.

* * * *

If the Government's reading would subject the statute to potential unconstitutionality, an alternate plausible reading should be preferred. *See United States v. Witkovich*, 353 U.S. 194, 195, 202 (1957); *Zadvydas*, 533 U.S. at 690. Of course, Amici submit that Petitioner has the better argument on the statutory text. But even if the textual balance were in equipoise—indeed, even if the Government had

the better textual arguments—the relevant test is whether Petitioner's reading would be "fairly possible." *Crowell v. Benson*, 285 U. S. 22, 62 (1932).

Under the Government's view, factual mistakes, illogical decision making, and the like are insulated from review whenever the noncitizen has committed a covered criminal offense, even if the outcome would be torture or death. The Court should reject those sweeping claims.

CONCLUSION

For the foregoing reasons Amici request that this Court find that Section 1252(a)(2)(C) does not impede judicial review of torture claims.

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