No. 19-161

In The Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
Petitioners,
v.

VIJAYAKUMAR THURAISSIGIAM,
Respondent.

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

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the Ninth Circuit err in concluding that 8 U.S.C. § 1252 violates the Suspension Clause as applied to a noncitizen apprehended in the United States if it bars all review of his constitutional and legal claims in a court by any means, including habeas corpus?

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is the largest voluntary association of attorneys and legal professionals in the world. Members include attorneys in private practice, government service, corporate law departments, and public interest organizations. In addition to practicing lawyers, ABA's membership comprises judges, legislators, law professors, law students, and nonlawyer "associates" in related fields, and represents the full spectrum of public and private litigants. The ABA's "mission is to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."[2]

Since its founding in 1878, the ABA has worked to protect the rights secured by the United States Constitution, including the rights of noncitizens under the Due Process, Equal Protection, and Suspension Clauses. Given its role, the ABA has a special interest

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[1] This brief is filed with the written consent of all parties through letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*'s pro bono counsel made a monetary contribution intended to fund the brief's preparation or submission.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Counsel has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[2] ABA About Us, *available at* https://www.americanbar.org/about_the_aba/.

and responsibility in protecting the rights guaranteed by the Constitution and ensuring the sanctity of the rule of law. Preserving access to the writ of habeas corpus is crucial to these goals.

This matter directly concerns the ABA's core value of promoting robust judicial review of legislative and executive action, which goes hand-in-hand with the rule of law. The ABA has particular expertise in this area through its work to protect the habeas rights of persons deprived of their liberty by arrest or detention, and has previously submitted briefs as *amicus curiae* in several matters before this Court concerning the rights of noncitizens to obtain judicial review. *See, e.g.*, Br. of ABA, *Castro v. Department of Homeland Sec.*, No. 16-812, *cert. denied*, 137 S. Ct. 1581 (2017) (mem.) (writ of habeas corpus should extend to noncitizens in expedited removal proceedings); Br. of ABA, *Boumediene v. Bush*, 553 U.S. 723, 740 (2008) (Nos. 06-1195, 06-1196) (federal courts should have jurisdiction to hear challenges to detentions of Guantanamo detainees); Br. of ABA, *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (No. 00-1011) (federal courts should review final removal orders); Br. of ABA, *Ardestani v. INS*, 502 U.S. 129 (1991) (No. 90-1141) (Equal Access to Justice Act should apply to deportation proceedings); Br. of ABA, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (No. 89-1332) (federal courts should have jurisdiction to hear broad-based challenge to INS procedures affecting resident noncitizen farmworkers). The ABA has also established a "Rule of Law Initiative," a central part of which is the promotion of judicial review of executive action, both

domestically and internationally.[3] Moreover, the ABA has long advocated a policy of providing all noncitizens with "full, fair, and meaningful review in the federal courts where deportation or removal from the United States is at stake." American Bar Association, Policy Report 107C, at 1 (adopted 2006).[4]

The ABA is deeply concerned that the government's position, if adopted, will deprive noncitizens within the United States of meaningful judicial review. It would subject Respondent, whose asylum claim was rejected by Executive Branch officials alone, to removal from the United States without any judicial review. The ABA respectfully requests that the Court affirm the court of appeals' decision and uphold the fundamental right to habeas protection for all persons on American soil.

INTRODUCTION AND SUMMARY OF ARGUMENT

Shielding the removal process for noncitizens within the United States from judicial review contravenes fundamental principles of our constitutional system and this Court's precedent. This

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[3] *See* About the ABA Rule of Law Initiative, *available at* https://www.americanbar.org/advocacy/rule_of_law/about/origin_principles/.

[4] *Available at* https://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107c.pdf. In furtherance of its mission and goals, the ABA adopts policies that represent the ABA's official position on numerous legislative, national, and professional issues. The policies adopted by the ABA House of Delegates are each accompanied by a report, which provides background and insight into the reasoning underlying the ABA's adoption of the relevant policy.

Court has never excluded an individual on U.S. soil from the protections of the Suspension Clause absent a formal suspension of the habeas writ—and for good reason. To do so would flout judicial review, the Constitution, and the rule of law.

Respondent Vijayakumar Thuraissigiam was arrested in the United States, placed into expedited removal proceedings, found not to have met the legal nexus required for asylum (even though his account of persecution was deemed credible), and ordered removed from the country. Not a single person outside of the Executive Branch reviewed his claims or the order removing him. And if the government's view prevails, no one outside of the Executive Branch ever will. Asylum seekers subject to expedited removal proceedings, like Respondent, do not receive a full immigration hearing, administrative review by the Board of Immigration Appeals ("BIA"), or direct judicial review in the courts of appeals. The expedited removal statute allows for habeas review of only three narrow claims regarding identity. *See* 8 U.S.C. § 1252(a)(2)(A), (e)(2). The government argues that Respondent is not entitled to any judicial review—including habeas review—beyond that.

The government's argument that the Suspension Clause affords no protections against removal in such circumstances cannot be reconciled with this Court's precedent. This Court has repeatedly affirmed the availability of judicial review in immigration cases, including where the government seeks to remove a noncitizen who has entered the country. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 300-301 (2001) (*citing Heikkila v. Barber*, 345 U.S. 229, 235 (1953)).

Denying habeas protections to noncitizens within the United States would have far-reaching implications beyond this specific case and raise analytical difficulties avoided by the categorical availability of habeas dictated by precedent. The expedited removal procedure (as DHS recently proposed) applies to any noncitizen who has not been admitted, anywhere in the country, for up to two years after his or her entry. So while Respondent was arrested near the border and soon after entering, the logic of the government's position would threaten judicial review for a much broader swath of noncitizens currently residing in this country. And that threat is no farfetched hypothetical: the government reportedly has deployed its expedited removal procedure against noncitizen students living in Michigan.

Although Congress enjoys broad powers to regulate immigration, those powers cannot be construed to override fundamental structural and individual constitutional protections. Habeas provides a "time-tested device" that "maintain[s] the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Boumediene v. Bush*, 553 U.S. 723, 745 (2008). To preclude noncitizens within our borders the protection of habeas corpus would be an affront to the Constitution and the rule of law.

Nor can a judicial inquiry limited to questions of mistaken identity be considered compatible with the Suspension Clause's guarantees. The government's contrary argument disregards both the meaning and purpose of the "Great Writ"—an instrument the Framers and the Court agree is crucial to both holding

government accountable and securing individual liberty. The government's concerns over delay in the removal context fare no better: such incidental delay, part-and-parcel of habeas review, cannot justify upending the historic role of the writ.

ARGUMENT

I. THE WRIT OF HABEAS CORPUS PROVIDES A CRUCIAL MECHANISM FOR JUDICIAL REVIEW FOR ALL PERSONS WITHIN THE UNITED STATES

A. Judicial Review Of Executive And Legislative Action Is Essential To A Functioning Democracy

Under our constitutional scheme, judicial review serves as a bulwark against impingement of the rule of law. *DOT v. Association of Am. R.R.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring) ("The 'check' the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review."). The Framers envisioned a system in which the powers of the U.S. government are split among three branches of government, each with the power to check the others. Judicial review of legislative and executive action is necessary to keep the political branches accountable and maintain the proper balance of powers. *See Nixon v. Fitzgerald*, 457 U.S. 731, 761 (1982) (Burger, J., concurring).

The genius of this structure is that it "serves not only to make Government accountable but also to secure individual liberty." *Boumediene*, 553 U.S. at 742; *see Loving v. United States,* 517 U.S. 748, 756

(1996) (noting that "[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty."). By helping to ensure that no branch aggrandizes power at the expense of any other, judicial review has played a crucial role in strengthening the separation of powers and protecting individual liberty throughout our Nation's history.

That longstanding commitment to judicial review helps explain why this Court has "constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme." *Johnson v. Avery*, 393 U.S. 483, 485 (1969). It "must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). That view, moreover, is consistent with the views of the Framers: the right to the habeas writ is "perhaps greater securit[y] to liberty and republicanism" than any of the separate rights mentioned in the Bill of Rights. THE FEDERALIST NO. 84 (Alexander Hamilton).

B. Both Precedent And Practice Dictate Habeas Review For Noncitizens On U.S. Soil

This Court has consistently made the writ of habeas corpus available to any person—citizen or not—within the United States (and even other areas under U.S. control). *Boumediene*, 553 U.S. at 779; *St. Cyr*, 533 U.S. at 305-306. To exclude individuals

placed in expedited removal from that tradition would contravene established precedent and practice.

Certain constitutionally protected rights, including the right to habeas review, have not been limited to U.S. citizens. This Court has long held that many of the guarantees of the Fifth and Fourteenth Amendments protect all "persons" within the United States, regardless of citizenship or status. For example, in *Mathews v. Diaz*, this Court explained that while aliens may not be "entitled to enjoy all the advantages of citizenship," "[e]ven one whose presence in this country is unlawful, involuntary, or transitory" is still entitled to fundamental constitutional protections. 426 U.S. 67, 77-78 (1976); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding that ordinance used to discriminate against persons from China violated Fourteenth Amendment). Those constitutional protections include due process in removal proceedings. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("But 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."); *see also, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) (affirming procedural due process rights in exclusion proceedings). Although Congress unquestionably enjoys broad powers to regulate immigration, that power cannot trump individual constitutional protections.

In recognition of that principle, as well as the essential role of judicial review, this Court has repeatedly affirmed "the strong presumption in favor

of judicial review of administrative action," including in the context of removal proceedings. *St. Cyr*, 533 U.S. at 298; *see also, e.g.*, *McNary v. Haitian Refugee Ctr., Inc.*,, 498 U.S. 479, 498 (1991); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). Without such a presumption, serious separation-of-powers questions would arise. *Webster*, 486 U.S. at 603. And with respect to habeas corpus specifically, this Court has recognized that the Suspension Clause "unquestionably require[s]" judicial review in deportation cases. *St. Cyr*, 533 U.S. at 300-301 (internal quotation marks omitted). Prohibiting noncitizens already within the United States from invoking the Suspension Clause—at least without requiring Congress to suspend the writ—would deprive those persons of "a vital instrument for the protection of individual liberty." *Boumediene*, 553 U.S. at 743, 745 (citing *Hamdi v. Rumsfield*, 542 U.S. 507, 536 (2004)).

Even noncitizens "on the threshold of initial entry" or "'assimilated to (that) status' for constitutional purposes," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 214 (1953) (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 599 (1953)), historically have been able to seek habeas relief. *See, e.g.*, *id.* at 208 (considering an alien's challenge to his exclusion on habeas review); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus*

to ascertain whether the restraint is lawful."). Indeed, this Court has held that such review is "required by the Constitution." *Heikkila*, 345 U.S. at 235.

This Court's prior affirmation that Suspension Clause protection extends to noncitizens within U.S. borders is also consistent with English common law, which recognized that the writ ran to all citizens and nonenemy foreigners within the realm. *See, e.g.*, *Boumediene,* 553 U.S. at 746, 771, 779; *see also id.* at 746 ("[A]t the absolute minimum the Clause protects the writ as it existed when the Constitution was drafted and ratified.") (internal quotation marks omitted); *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) ("[F]or the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law[.]"). At common law, for example, the writ was held to apply to noncitizens located overseas, as it was one of the main defenses for sailors facing impressment into the Royal Navy. Kevin Costello, *Habeas Corpus and Military and Naval Impressment, 1756-1816*, 29 J. LEGAL HIST. 215 (2008).

That precedent and history forecloses the government's attempt to deny habeas protections to persons already within U.S. territory. In seeking to restrict habeas, the government argues that recent unlawful entrants should be treated like noncitizens seeking to enter the United States, rather than those already in the United States. Even if that were appropriate, however, it cannot justify denying habeas review at the threshold here. Due process doctrine has distinguished between those seeking to enter and those in the country. *See Zadvydas*, 533 U.S. at 693 (noting "[t]he distinction between an alien who has

effected an entry into the United States and one who has never entered"); *Mezei*, 345 U.S. at 212 ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."). But that distinction has never been part of habeas law; habeas was always available regardless of entry. In fact, it was the availability of habeas that permitted adjudication of the extent of due process afforded to entering noncitizens in the first place. *See, e.g.*, *Plasencia*, 459 U.S. at 32; *Galvan v. Press*, 347 U.S. 522 (1954); *Mezei*, 345 U.S. 206; *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Carlson v. Landon*, 342 U.S. 524 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Zakonaite v. Wolf*, 226 U.S. 272 (1912); *Nishimura Ekiu*, 142 U.S. 651.

C. Barring Habeas Review In This Case Threatens Noncitizens More Broadly

Treating noncitizens within the United States as equivalent to those standing on the "threshold of initial entry" undermines the rule of law. Under the government's view, it would proscribe judicial review for persons who fall within certain arbitrary categories, such as those without "sufficiently meaningful ties to the country" or who have not lived here "for some meaningful period." U.S. Br. 23, 25. Such an approach legitimizes the "manipulation" of the Suspension Clause, thereby undercutting the purpose of habeas review as "an indispensable mechanism for monitoring the separation of powers." *Boumediene*, 553 U.S. at 765-766. It also "would permit a striking anomaly in our tripartite system of

government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" *Id.* at 765 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

Limiting habeas protections for certain noncitizens based on such arbitrary distinctions additionally replaces a categorical rule—habeas is available to all within the United States—with an imprecise and case-specific alternative that will necessitate future litigation. Courts will wrestle to understand the boundary of the Suspension Clause for other aliens with a more "meaningful" presence in the United States than Respondent in this case. But as already explained, this Court's precedents demonstrate that any presence in the United States is sufficient to trigger the Clause's protections. *See supra* pp. 7-11. Because judicial review of removal orders is necessary to safeguard the separation of powers, the Suspension Clause's application cannot turn on nebulous factors such as exactly where and when a noncitizen is apprehended. Moreover, as an asylum seeker, Respondent's "ties" to the country cannot be measured simply by the number of days or feet he was in the country before his arrest.

Though it is critical for the Suspension Clause's protection to extend to all persons within U.S. borders, the rationale underlying the categorical rule is reinforced by the government's current position on the increased scope of its removal authority. Previously, the government limited application of the statutory expedited removal procedure to those aliens encountered within 14 days of entry without inspection and within 100 air miles of any U.S.

international land border. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004). But earlier this year, the government (as it acknowledges in a footnote, U.S. Br. 6 n.2) expanded expedited removal "to eligible aliens apprehended in *any part* of the United States who have not been admitted or paroled by immigration authorities, and who have been physically present in the country for" up to two years. HILLEL R. SMITH, CONG. RESEARCH SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 2 (2019); *see* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019); *see also* 8 U.S.C. § 1225(b)(1)(A)(iii). Thus, while the government in this case emphasizes Respondent's "momentary unlawful presence," U.S. Br. 17, its position also risks denial of Suspension Clause protections for a much broader group of noncitizens—including, under current DHS regulations, those located anywhere in the country two years after entry.

Under the government's logic, a noncitizen residing anywhere in the country for nearly two years could be arrested, placed into expedited removal proceedings, and deported without any judicial hearing. For example, federal immigration authorities could apprehend a group of noncitizens from the streets of Seattle, Topeka, or Detroit—potentially thousands of miles away from where they crossed the border years earlier—and still deport them via expedited removal.

That scenario is no mere hypothetical. According to news reports, months ago DHS set up a fake university to lure noncitizens, arresting a "total of

about 250 students *** who [were] enticed *** to attend the school that marketed itself as offering graduate programs in technology and computer studies." Niraj Warikoo, *ICE Arrests 90 More Students at Fake University in Michigan*, DETROIT FREE PRESS (Dec. 11, 2019).[5] Some students received a final order of removal, while others were "given an expedited removal by U.S. Customs and Border Protection." *Id.* In the government's view, the Suspension Clause offers that latter group of students no protections at all. Additionally, because the government also claims that due process is only available to those lawfully admitted, and ties habeas corpus to due process rights, the government's position would mean even those here far longer could constitutionally be removed without administrative or judicial review.

This is especially troubling given the types of claims foreclosed without the safeguard of habeas review. Respondent challenged his removal on the grounds that "the government failed to follow the required procedures and apply the correct legal standards when evaluating his credible fear claim." Pet. App. 37a. But it also forecloses reviewing denials of claims based on racial, ethnic, or religious animus. Without habeas, there would be no vehicle to review these blatantly unconstitutional actions.

In adopting its policy position, the ABA was guided by the consideration that, "[f]or many

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[5] *Available at* https://www.freep.com/story/news/local/michigan/2019/11/27/ice-arrested-250-foreign-students-fake-university-metro-detroit/4277686002/.

noncitizens, it is the right to go before a judge that differentiates the United States from other countries that lack the same commitment to the rule of law." American Bar Association, Policy Report 114D, at 3 (adopted 2010).[6] Indeed, the ABA highlighted the fundamental issue with prohibiting judicial review for persons within the United States based merely on the circumstances of their entrance: "The administration of our immigration and naturalization laws will thus become an administration of men rather than of laws." *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearing on S. 716, H.R. 2379, and H.R. 2816 Before the Subcomms. of the Comms. on the Judiciary*, 82nd Cong. 527 (1951) (statement of Jack Wasserman, American Bar Association), *as reprinted in* American Bar Association, Policy Report 119, at 23 (adopted 1983). The government's approach, which would deny judicial review to both Respondent *and* a greatly expanded category of people residing in the United States, makes that warning a reality.

II. SECTION 1252(E)(2) IS UNCONSTITUTIONAL AS APPLIED TO RESPONDENT

For all the reasons detailed in Part I, the Suspension Clause plainly applies to Respondent, who was apprehended within U.S. borders. That answer raises a further question: whether the review

[6] *Available at* https://www.americanbar.org/content/dam/aba/directories/policy/2010_my_114d.pdf.

provided in section 1252(e)(2) is an adequate substitute for habeas corpus.

Although this Court has not elaborated all "of the requisites for an adequate substitute," the Court deemed it "uncontroversial *** that the privilege of habeas corpus entitles the prisoner" to review of legal claims. *Boumediene*, 553 U.S. at 779. Because section 1252(e)(2) lacks this critical hallmark of habeas review, it cannot pass constitutional muster. And no argument grounded in efficiency can overcome that fatal constitutional flaw.

A. Section 1252(e)(2) Blocks Review Of Weighty Legal Questions That Habeas Historically Has Enabled Courts To Hear

To be an adequate substitute for habeas corpus, section 1252(e)(2) must be commensurate with the "necessary scope of habeas review." *Boumediene*, 553 U.S. at 779-783. Habeas provides a "critical check on *** Executive" power, *Hamdi*, 542 U.S. at 525, and is a "precious safeguard of personal liberty," *Bowen*, 306 U.S. at 26; *see also* Thomas Jefferson, First Inaugural (Mar. 4, 1802) (habeas corpus is one of the "essential principles of our Government"), *reprinted in Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 101-10, at 16 (1989).

These core habeas functions require a "judicial inquiry" into the legality of detention. *Boumediene*, 553 U.S. at 744. Thus, at a minimum, habeas review (or an adequate substitute) must provide "the prisoner *** [with] a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous

application or interpretation' of relevant law." *Id.* at 779. And a habeas court must be empowered to consider and adjudicate such legal claims. *Id.* at 787 (considering whether the procedures at issue "allow[ed] the *Court of Appeals* to conduct a proceeding meeting the[] standards" of habeas review) (emphasis added).

This Court has embraced that responsibility: it has used habeas cases as the vehicle for some of its most consequential constitutional rulings. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (whether Eighth Amendment bars executing juveniles); *Strickland v. Washington*, 466 U.S. 668 (1984) (what appropriate standard is for ineffective assistance of counsel); *In re Gault*, 387 U.S. 1 (1967) (whether Fourteenth Amendment due process requirements apply to juvenile court proceedings); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (whether Sixth Amendment right to counsel applies to defendants in state courts); *Yick Wo*, 118 U.S. at 373-374 (whether facially neutral law applied "with an evil eye and an unequal hand" could violate Equal Protection Clause). Even the cases the government cites as evidence of a noncitizen's *lack* of separate due process rights never would have been decided without the writ of habeas corpus. *See supra* p. 11.

The expedited removal provision, however, does not permit review of such fundamental constitutional questions. Under section 1252(e)(2), persons placed into expedited removal can raise only three challenges: (1) that they are not an alien, (2) that they were never in fact "ordered removed," and (3) that they are a legal permanent resident, "ha[ve] been admitted

as a refugee," or "ha[ve] been granted asylum." 8 U.S.C. § 1252(e)(2). That is all. A person cannot argue that he or she was "actually []admissible," *id.* § 1252(e)(5); that the agent incorrectly applied the law; or that the removal was unconstitutional on some other ground. At bottom, section 1252(e)(2) restricts judicial review to "questions relating to an alien's status or identity" and nothing else. U.S. Br. 20. But habeas was not designed for—let alone confined to—"claims of mistaken identity." Br. in Opp'n 4.

Restricting review to questions of mistaken identity prevents courts from considering the fundamental requirements of law. Without the ability to do so, courts are left to act as little more than rubber stamps—constrained to approve executive decisions without any real scrutiny at all.

B. Any Delay Incident To Habeas Review Does Not Warrant Discarding The Writ

The government warns that permitting habeas review in this case will "create[] a pathway for thousands of inadmissible aliens *** to delay their removal for potentially extended periods by filing a habeas petition." U.S. Br. 47. But the normal burdens of judicial review—*i.e.*, time and resources—have always been "necessarily and properly incident to the processing and adjudication of habeas corpus proceedings." *Harris v. Nelson*, 394 U.S. 286, 297 (1969); *see Boumediene*, 553 U.S. at 769 ("Compliance with any judicial process requires some incremental expenditure of resources."). Except in cases of formal suspension, neither the number of potential

petitioners nor the prospect of delay has ever justified diluting the writ's protections.

In 1882, for example, Congress passed the Chinese Exclusion Act, which "restrict[ed] the admission" of Chinese nationals. LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 7 (1995). Although a "collector of customs at each port" was charged with the enforcement of the act, Chinese nationals consistently challenged their denials "by filing petitions for writs of habeas corpus in the local federal courts." *Id.* at 18. As a result, thousands of habeas petitions were filed—many in just one court, the U.S. District Court in San Francisco. *Id.* at 74.

The number of filings impaired the ability of courts to adjudicate the cases. *See In re Tung Yeong*, 19 F. 184, 185 (D. Cal. 1884) ("The very great number of cases in which writs of habeas corpus have been sued out of this court by Chinese persons claiming to be illegally restrained of their liberty, and which were of necessity summarily investigated and disposed of, has rendered it impossible for the court to deliver a written opinion in each case."). The flood of cases also impaired the Executive Branch's ability to remove petitioners after cases were adjudicated. *See In re Chin Ah Sooey*, 21 F. 393, 394 (D. Cal. 1884) (explaining how remanding immigrant petitioners "to the custody from which [they] w[ere] taken, when such custody [wa]s found to be lawful, *** was impracticable" due to "the number of cases"; "for the ship would, in the ordinary course of her trade, have departed long before petitions could be heard").

Yet these practical burdens were insufficient to deny habeas review. As the federal district court explained:

> When, therefore, Chinese in large numbers arrived at this port, who were detained on board the ship by the master, at the instance of the customs-house authorities, their right to demand the judgment of the court whether they were lawfully restrained of their liberty could not be gainsaid. Writs of habeas corpus were accordingly issued in hundreds of instances.

Chin Ah Sooey, 21 F. at 393-394. When a customs inspector "suggested to a congressional subcommittee on immigration in 1890 that the problem of Chinese immigration could be solved by revoking the privilege of habeas corpus from the Chinese, Senator Watson C. Squire wryly queried: 'That would be a little inimical to the spirit of the Constitution?'" SALYER, *supra*, at 75.

The delay associated with habeas review is a cost this Court has been willing to impose for the "stable bulwark of our liberties." *Boumediene*, 553 U.S. at 742 (*quoting* 1 W. Blackstone, Commentaries 137). In *St. Cyr*, as here, the government argued that a ruling in respondent's favor would result in "significant delays" in removal proceedings. U.S. Br. 15-16, *St. Cyr*, 533 U.S. 289 (No. 00-767) ("The court of appeals['] *** conclu[sion] that the district court had authority to review respondent's challenge to his removal order by habeas corpus *** threatens to cause significant delays in the removal of criminal aliens from the

United States, despite Congress's manifest desire that removal of criminal aliens be expedited."). This Court affirmed the court of appeals' recognition of habeas jurisdiction anyway: "Because of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *St. Cyr*, 533 U.S. at 300.

To be sure, Congress has the power to ameliorate possible delay occasioned by habeas review. "[T]he Suspension Clause does not resist innovation in the field of habeas corpus." *Boumediene*, 553 U.S. at 795. And "[c]ertain accommodations can be made to reduce the burden of habeas corpus proceedings." *Id.* But those "accommodations" may not "impermissibly dilut[e] the protections of the writ." *Id.* Where this Court has upheld "habeas substitutes," the "statutes at issue were attempts to streamline habeas corpus relief, not to cut it back." *Id.* at 774.

By contrast, section 1252(e)(2)'s limitation of habeas review to three narrow, identity-focused issues is not merely "streamlining" habeas relief; it is gutting the writ's protections. Neither precedent nor practice countenances that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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