No. _____

In The
Supreme Court of the United States

USAMA JAMIL HAMAMA, et al.,

Petitioners,

v.

REBECCA ADDUCCI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are Iraqis with final orders of removal who lived for years or decades in the United States under orders of supervision, because Iraq would not accept their repatriation. In 2017 Iraq indicated it might change its policy; it allowed repatriation of several Iraqis with final orders. Petitioners and others similarly situated were suddenly detained and threatened with immediate removal, without the opportunity to challenge their removal in immigration court. Petitioners, who include Christians, Yezidis, Kurds, and other religious and ethnic minorities in Iraq, faced likely torture and death in Iraq. After their final orders of removal were issued, country conditions in Iraq had changed drastically, such that Petitioners had strong claims for deportation protection under, *inter alia*, the Convention Against Torture. In order to assert those claims, Petitioners needed to move to reopen their final orders in the appropriate immigration court. The district court found that it was impossible for them to do so, given the short time frames involved. Petitioners requested a temporary stay of removal so they could access the immigration court system. The district court granted the stay, giving Petitioners 90 days after receipt of the necessary immigration court files to file motions to reopen in immigration court. The court of appeals reversed, holding that 8 U.S.C. § 1252(g) divested the district court of jurisdiction and that the elimination of jurisdiction was consistent with the Suspension Clause.

The question presented is whether, as applied to Petitioners, section 1252(g) is unconstitutional under the Suspension Clause.

PARTIES TO THE PROCEEDING

Petitioners were appellees in the court of appeals. They are: Usama Jamil Hamama, Atheer F. Ali, Ali Al-Dilami, Habil Nissan, Jihan Asker, Moayad Jalal Barash, Sami Ismael Al-Issawi, Abdulkuder Hashem Al-Shimmary, Qassim Hashem Al-Saedy, Abbas Oda Manshad Al-Sokaini, Mukhlis Murad, Adel Shaba, Kamiran Taymour, Jony Jarjiss, Jami Derywosh, and Anwar Hamad, for themselves and on behalf of a class of similarly situated individuals.

Respondents were appellants in the court of appeals. They are: Rebecca Adducci, Director of the Detroit District of United States Immigration and Customs Enforcement (ICE); Matthew Albence, Acting Director of ICE; and Kevin K. McAleenan, Acting Secretary of the United States Department of Homeland Security.*

RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

Hamama v. Adducci, No. 2:17-cv-11910, opinion entered July 11, 2017

Hamama v. Adducci, No. 2:17-cv-11910, judgment entered July 24, 2017

Hamama v. Adducci, No. 2:17-cv-11910, judgment entered January 2, 2018

Hamama v. Adducci, No. 2:17-cv-11910, judgment entered November 20, 2018

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* Kevin K. McAleenan is substituted for his predecessors Kirstjen M. Nielson and Elaine C. Duke. Matthew Albence is substituted for his predecessor Thomas D. Homan. *See* Sup. Ct. R. 35.3.

RELATED PROCEEDINGS – Continued

United States Court of Appeals (6th Cir.):

Hamama v. Adducci, No. 17-2171,
judgment entered December 20, 2018,
rehearing en banc denied April 2, 2019

Hamama v. Adducci, No. 18-1233,
judgment entered December 20, 2018,
rehearing en banc denied April 2, 2019

Hamama v. Adducci, No. 19-1080,
notice of appeal filed January 18, 2019

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INTRODUCTION

This case raises the issue whether a provision of the Immigration and Nationality Act, 8 U.S.C. § 1252(g), is unconstitutional under the Suspension Clause as applied to Petitioners. The Sixth Circuit's reversal of the district court's decision that the Suspension Clause was violated by the statute's invocation given the "extraordinary circumstances" here, Pet. App. 40a—sudden enforcement of long-dormant removal orders to a now-dangerous country without sufficient time to access the normal immigration-court process—is novel, important, and inconsistent with this Court's analysis of the Suspension Clause in *INS v. St. Cyr*, 533 U.S. 289 (2001).

In *Dep't of Homeland Sec. v. Thuraissigiam*, No. 19-161, the United States has petitioned for certiorari on the closely related question whether a neighboring subsection of the same statute, 8 U.S.C. § 1252(e)(2), is unconstitutional under the Suspension Clause as applied to the Respondent there. Petitioners' counsel in *Thuraissigiam*, who are also counsel here, will oppose review in that case. If, however, the Court grants the petition in *Thuraissigiam*, its decision will shed light on the issues common to both cases, and may affect the validity of the Sixth Circuit's Suspension Clause analysis here. Petitioners therefore ask the Court to hold this petition pending disposition of the *Thuraissigiam* petition so that, if review is granted there, appropriate

relief, including a grant/vacate/remand order, can be considered.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit is reported at 912 F.3d 869 and reproduced in the Appendix at 1a. The opinion of the district court staying removal is reported at 261 F. Supp. 3d 820 and reproduced at 39a, and its prior opinion finding jurisdiction is reported at 258 F. Supp. 3d 828 and reproduced at 82a. A separate district court opinion regarding detention, which was consolidated for appeal below, is reported at 285 F. Supp. 3d 997 and reproduced at 112a.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2018. Petitioners moved for rehearing en banc on February 4, 2019. The rehearing petition was denied April 2, 2019. On June 17, 2019, Justice Sotomayor extended the time to file a petition for a writ of certiorari to August 30, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 9, cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

8 U.S.C. § 1252(e)(2) provides:

> **Habeas corpus proceedings**
>
> Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—
>
> **(A)** whether the petitioner is an alien,
>
> **(B)** whether the petitioner was ordered removed under such section, and
>
> **(C)** whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

8 U.S.C. § 1252(g) provides:

> **Exclusive jurisdiction**
>
> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

STATEMENT

Because Iraq has had a longstanding policy against forced repatriation, Iraqis with final orders of removal have lived in the community for years or decades after their removal orders were entered, with government approval. Pet. App. 41a-42a, 109a.[1] That changed suddenly on June 11, 2017, when ICE arrested over one hundred Iraqis en masse in the Detroit area, with the intention of immediately deporting them. *Id.* at 83a. Around the same time, ICE arrested

[1] The facts are largely taken from the district court's opinions on jurisdiction and on the motion for preliminary injunction. As noted in the dissent of Judge White below, "[t]he government did not contest this evidence [underlying those findings] and the majority does not find fault with the district court's findings. . . ." Pet. App. 29a-30a.

other Iraqis across the country, with approximately two hundred people detained nationwide during the initial raids. *Id.* at 83a.

ICE conducted the mass arrests and planned immediate mass deportations based on an apparent change in Iraq's willingness to accept forced repatriations. In 2017, Iraq was included in Executive Order 13769, which barred nationals from certain countries from entering the United States. In connection with negotiations to secure its removal from the list of countries included in the ban, Iraq agreed to reconsider its repatriation policy. *Id.* at 84a.

In the years or decades since Petitioners' removal orders were entered, conditions in Iraq had changed dramatically. ISIS secured control of significant portions of the country, leading to mass relocations, large-scale killings, and other atrocities. *Id.* at 87a-89a. "Religious minorities have fled the country for good reason" because they have been "abducted and subjected to sexual slavery, rape, and other atrocities" at the hands of ISIS. *Id*. at 88a. Petitioners include many religious and ethnic minorities in Iraq, "including Chaldean Christians, Kurds and Sunni and Shiite Muslims." *Id.* at 43a.[2] Moreover, the dangers are "not [] limited to just ISIS. . . . The record demonstrates that other Sunni groups, Shi'a militias backed by Iran, as well as Iraq's own security forces harbor prejudice against those

[2] While Iraq is a majority Shi'a country, Shi'a Muslims can be subject to sectarian torture and killing in Sunni-dominated areas.

affiliated with America," and that "Petitioners will be targeted for torture or death based solely on their association with America." *Id.* at 76a.

Federal law prohibits removal to a nation where torture is more likely than not. 8 U.S.C. § 1231(b)(3); 8 U.S.C. § 1231 note; 8 C.F.R. § 208.16(c)(2). The district court found that "[e]ach Petitioner faces the risk of torture or death on the basis of residence in America and publicized criminal records; many will also face persecution as a result of a particular religious affiliation." Pet. App. 77a-78a.

Noncitizens who have final removal orders have the right to reopen their cases if, *inter alia*, they are seeking protection under the Convention Against Torture and the relief they are seeking is based on changed country conditions. 8 U.S.C. § 1229a(c)(7)(C)(ii). In order for Petitioners here to present claims that their removal would lead to torture or death, they thus needed to file motions to reopen their immigration proceedings. "[P]reparing a motion to reopen proceedings before the immigration courts is a difficult task." Pet. App. 48a. It "requires compiling files, affidavits, 'hundreds of pages of supporting evidence' and preparing the application for relief." *Id.* at 49a. The most important documents are the Alien File, showing the noncitizen's immigration history, and the Report of Proceedings before the Immigration Court and BIA. *Id.* These generally can be obtained only via a Freedom of Information Act request, a time-consuming process that "can often take over five months." *Id.* Filing a motion to reopen is also costly—attorneys typically

charge $5,000 to $10,000 just for the initial motion, and up to $80,000 for full proceedings. *Id.* Iraq's long-standing refusal to accept forced repatriation led Petitioners "to reasonably conclude that filing a motion to reopen was an academic exercise" making it "reasonable not to incur the prohibitive cost of filing a motion to reopen" during the years and decades they were living in the community with old removal orders. *Id.* at 63a.

Iraq's sudden change in position and ICE's mass arrests in anticipation of immediate removal "triggered a feverish search for legal assistance to assert rights against the removal of persons confronting the grisly fate Petitioners face if deported to Iraq." *Id.* at 40a. The detention of Petitioners "in facilities far from their homes" compounded the difficulties of promptly seeking relief through a motion to reopen. *Id.* at 50a. "Further, many Petitioners have been transferred multiple times." *Id.* Attorney telephone access was "extremely limited." *Id.* And "[a]ttempts to visit clients in person have also been impeded." *Id.*

On June 15, 2017 Petitioners filed a putative class action habeas petition in the U.S. District Court for the Eastern District of Michigan. *Id.* at 5a. The petition identified multiple bases for district court jurisdiction, including *inter alia*, 28 U.S.C. §§ 2241 et seq. and Art. I § 9, cl. 2 of the Constitution. Petitioners moved for a temporary restraining order to prevent removal "until an appropriate process has determined whether, in light of current conditions and circumstances, they are entitled to mandatory protection from removal."

Id. at 86a. Respondents opposed the stay request on jurisdictional grounds, asserting that the district court was stripped of jurisdiction by 8 U.S.C. § 1252(g). That section provides in pertinent part:

> Except as provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

The district court held that section 1252(g) "applies to divest this Court of subject matter jurisdiction, unless to do so would violate the Constitution." *Id.* at 102a. But the court found that, as applied to Petitioners, section 1252(g) effectively precluded them from seeking judicial review, and therefore violated the Suspension Clause, holding that:

> Petitioners are correct that extraordinary circumstances exist that will likely render their habeas claims meaningless, unless this Court intervenes to stay their deportation while review of their removal orders proceeds with the immigration courts and the courts of appeals.
>
> This Court concludes that to enforce the Congressional mandate that district courts lack jurisdiction—despite the compelling context of this case—would expose Petitioners to the substantiated risk of death, torture, or other grave persecution before their legal claims can be tested in a court. That would effectively

> suspend the writ of habeas corpus, which the Constitution prohibits.

Id. at 82a-83a. The court thus determined it had jurisdiction.

In further proceedings on the merits, the government again asserted that section 1252(g) deprived the district court of jurisdiction and the repeal of the district court's habeas jurisdiction was constitutional. The district court again rejected the argument, explaining that "[t]he Government's view ignores the compelling confluence of extraordinary circumstances presented here":

> In these singular circumstances, a federal district court is armed with jurisdiction to act as a first responder to protect the writ of habeas corpus and the allied right to due process, by allowing an orderly filing for relief with the immigration courts before deportation, thereby assuring that those who might be subjected to grave harm and possible death are not cast out of this country before having their day in court.

Id. at 40a.

On the merits, the district court determined that Petitioners had satisfied the elements for injunctive relief and temporarily enjoined removal of "any and all Iraqi nationals in the United States who had final orders of removal on June 24, 2017, and who have been, or will be, detained for removal by ICE." *Id.* at 79a. The order gave Petitioners 90 days after receipt of the

necessary immigration court files to file motions to reopen in immigration court. *Id.* at 79a-80a. Respondents appealed on September 21, 2017.[3]

By a 2-1 vote, the court of appeals reversed. The majority determined that section 1252(g) stripped the district court of jurisdiction and rejected Petitioners' claims under the Suspension Clause. The principal ground was that Petitioners were not seeking relief available in habeas, because they did not seek release from custody and because deferral or withholding of removal would only prevent them from being released into Iraq, not from being removed to some other safe place. *Id.* at 11a-12a. The court also stated that the Suspension Clause challenge failed because "Congress has provided an adequate alternative as applied to them." *Id.* at 13a. Specifically, the court of appeals believed that Petitioners could move to reopen and then ultimately file a petition for review in the court of appeals to obtain review of an adverse decision. *Id.* The Sixth Circuit did not, however, take issue with the district court's factual findings that Petitioners were unable to pursue such claims under the confluence of circumstances present in 2017 without a district court stay of removal. Rather, the panel majority held that Petitioners could have filed such motions at some time

[3] In October 2017, Petitioners amended their petition to assert claims challenging their continued and prolonged detention. Those claims were the subject of a second district court order entered on January 2, 2018. Pet. App. 112a-167a. Respondents appealed from that order on March 2, 2018 and the two appeals were consolidated. The claims in the second appeal are not presented here.

before the 2017 removal actions commenced, and that "they cannot now argue that the system gave them too little time." *Id.* at 14a.

Judge White dissented, agreeing with the district court's Suspension Clause ruling. In her view, "protection against the executive action of removal is within the recognized scope of habeas, and the petition-for-review procedure provides an inadequate substitute for habeas under the circumstances presented here." *Id.* at 23a. Judge White maintained that the majority's approach was directly at odds with the holding in *INS v. St. Cyr*, 533 U.S. 289 (2001), that "protection against deportation was within the core of the writ." Pet. App. 26a. And, she wrote, the majority, in finding the statutory avenues for stay and review to be adequate, "plainly ignores the facts on the ground," including the district court's findings that under "the present 'compelling confluence of grave, real-world circumstances,'" Petitioners had insufficient time to access the petition-for-review mechanism, and that "without a stay, deportations would commence immediately, with death, torture, and persecution probably resulting." *Id.* at 28a-30a.

The Sixth Circuit denied en banc review on April 2, 2019.

REASONS FOR GRANTING THE PETITION

The court of appeals here rejected an as-applied Suspension Clause challenge to provisions of the

Immigration and Nationality Act stripping district court jurisdiction in connection with removal actions against noncitizens. In 8 U.S.C. § 1252(g), Congress limited the availability of judicial review for noncitizens whose claim "'aris[es] from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this [chapter].'" *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 477-78 (1999). The court of appeals held that this provision divested the district court of jurisdiction to stay Petitioners' removal and that, despite the extraordinary and deadly circumstances of this case, such a jurisdictional limit does not run afoul of the Suspension Clause, even if it effectively precludes Petitioners from obtaining judicial review of their withholding and torture claims. The court of appeals reasoned that because those claims do not guarantee release into the United States but rather preclude removal to a specified country, they do not implicate habeas corpus or the Suspension Clause. Pet. App. 10a-14a.

That conclusion is wrong. *INS v. St. Cyr* made clear that review of deportation orders is protected by the Suspension Clause. 533 U.S. at 304-05. Indeed, longstanding case law guarantees habeas review where petitioners allege that removal to a particular country is unlawful. *See, e.g.*, *Wenglinsky v. Zurbrick*, 282 U.S. 798 (1930) (per curiam), rev'g 38 F.2d 985 (6th Cir. 1930). As this Court explained in *Boumediene v. Bush*, 553 U.S. 728, 779 (2008), describing the historically "uncontroversial" attributes of the "privilege of

habeas corpus," "release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." Rather, "common-law habeas corpus was, above all, an adaptable remedy," whose "application and scope changed depending upon the circumstances." *Id.* The court of appeals' conclusion—that habeas and the Suspension Clause do not extend to claims that removal to a particular country will result in torture or death—is contrary to *St. Cyr* and to longstanding habeas case law and warrants certiorari.

However, the better course would be to hold this petition pending the disposition of *Dep't of Homeland Sec. v. Thuraissigiam*, No. 19-161, which concerns the closely related question whether a similar bar on judicial review of removal orders violates the Suspension Clause, as applied. In *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097 (9th Cir. 2019), the Ninth Circuit addressed another subsection of the same section of the statute, 8 U.S.C. § 1252(e)(2), which, like section 1252(g), limits the availability of habeas review for certain noncitizens facing removal. Section 1252(e)(2)'s limitations on habeas cover "any determination made under section 1225(b)(1)" which applies to expedited removal. The *Thuraissigiam* court found a Suspension Clause violation as applied to a noncitizen who had recently entered the country and was seeking asylum, withholding, and torture relief. The government has filed a petition for certiorari, No. 19-161.

Should this Court grant certiorari in that action and rule on the applicability of the Suspension Clause, its resolution will very likely shed light on the issues in this case. The Court's discussion of the interaction of the Suspension Clause and the habeas rights of noncitizens would be a principal source of law in this area, especially because the "Court has rarely addressed who may invoke the Suspension Clause and the extent of review the Clause requires." *Thuraissigiam*, 917 F.3d at 1105. In that event, an order here granting certiorari, vacating the judgment below, and remanding for further proceedings (GVR) would be appropriate.

A GVR order is appropriate where an opinion of this Court casts doubt on an earlier appellate court opinion. As the Court explained in *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam), this occurs "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." A GVR order "alleviates the 'potential for unequal treatment' that is inherent in [the Court's] inability to grant plenary review of all pending cases raising similar issues." *Id.* The Court "regularly hold[s] cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate)

they may be 'GVR'd' when the case is decided." *Id.* at 180 (Scalia, J., dissenting) (emphasis in original).

Petitioners do not know whether this Court will grant the pending petition in *Thuraissigiam*. But if review occurs, the ultimate merits decision is likely to be relevant here, and justice would then be served by allowing the Sixth Circuit to address the law as announced by this Court. *See Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 914-15 (1996) (Scalia, J., concurring) ("[W]e have never regarded Rule 10, which indicates the general character of reasons for which we will grant *plenary consideration*, as applicable to our practice of GVR'ing. . . . Indeed, *most* of the cases in which we exercise our power to GVR plainly do not meet the 'tests' set forth in Rule 10.") (emphasis in original). Petitioners thus request that the Court hold this petition pending disposition of *Thuraissigiam*, followed by a grant/vacate/remand order if appropriate.

CONCLUSION

This petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded, if the petition in *Dep't of Homeland Sec. v. Thuraissigiam*, No. 19-161, is granted and results in

an "intervening development[]" that justifies further consideration by the court of appeals.

Respectfully submitted,

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