IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Kelly Gutierrez Rubio and G.J.S.G. (a minor), *Petitioners*, v. U.S. Department of Homeland Security ("DHS"); U.S. Customs and Border Protection ("CBP"); U.S. Citizenship and Immigration Services ("USCIS"); U.S. Immigration and Customs Enforcement ("ICE"); Jeh Johnson, Secretary of DHS; Loretta E. Lynch, Attorney General of the United States; R. Gil Kerlikowske, Commissioner of CBP; Sarah Saldaña, Director of ICE; Leon Rodriguez, Director of USCIS; Velda Griffin, Philadelphia Field Director, CBP; Thomas Decker, Philadelphia Field Office Director, ICE; Diane Edwards, Director, Berks County Residential Center, *Respondents*.	CASE NO. 5:15-CV-06406-TJS

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMICI CURIAE

Movants, who are scholars in the fields of immigration law, federal courts and habeas corpus, respectfully move the Court for leave to file the attached Brief of Amici Curiae concerning the Court's authority to exercise jurisdiction over the habeas corpus petition in this matter. As set forth in the Interest of Amici Curiae section of the attached Brief, movants have a professional interest in ensuring that

the Court is informed of relevant precedent regarding the availability of habeas corpus in the circumstances of this case. Movants, therefore, request that the Court grant this Motion and consider the arguments in the attached Brief.

Respectfully submitted,

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BRIEF FOR SCHOLARS OF IMMIGRATION LAW, FEDERAL COURTS, AND HABEAS CORPUS INSUPPORT OF JURISDICTION

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INTEREST OF AMICI CURIAE

Amici curiae are scholars at universities across the United States with expertise in immigration law, federal courts, and habeas corpus. *Amici* have a professional interest in ensuring that the Court is fully and accurately informed as to relevant precedent regarding the availability of habeas corpus under the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, and particularly its availability to noncitizens who have entered the United States. *Amici* have no personal, financial, or other professional interest, and take no position respecting other issues raised in the case. *Amici*'s institutional affiliations are provided for identification purposes only.

Richard A. Boswell is a Professor of Law and the Director of the Immigration Law Clinic at UC Hastings College of Law. He has written extensively and taught on immigration law, federal courts, and habeas corpus throughout most of his career. He is the author of Immigration Law & Procedure: Cases and Materials and Essentials of Immigration Law which both deal with this subject matter

Gabriel J. Chin is the Martin Luther King Jr. Professor of Law University of California, Davis School of Law. He has written many articles on the history and constitutional law of immigration and immigration adjudication. This work has been cited in a number of federal courts, including the U.S. Supreme Court.

Bram T.B. Elias is a clinical associate professor at the University of Iowa College of Law. His work has focused on the intersection of immigration law and both federal habeas and state-level post-conviction review.

Eric M. Freedman is the Siggi B. Wilzig Distinguished Professor of Constitutional Rights at the Maurice A. Deane School of Law at Hofstra University. He is the author of the authoritative monograph HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (NYU Press 2003), and of numerous articles for scholarly and general publications concerning habeas corpus and related subjects.

Brandon L. Garrett is the Justice Thurgood Marshall Distinguished Professor of Law at University of Virginia School of Law. He is the co-author of the Foundation Press casebook on habeas corpus.

Jonathan Hafetz is an associate professor of law at Seton Hall University School of Law. He has written many articles on the subject of habeas and judicial review in the immigration context and his immigration habeas work has been cited by the United States Supreme Court.

Aziz Huq is a Professor of Law at the University of Chicago. His scholarship on habeas corpus, federal courts, and separation-of-powers issues have been published *inter alia* in the Stanford, Columbia, Chicago, Virginia, and California Law Reviews.

Jennifer Lee Koh is a Professor of Law and the Director of the Immigration Clinic at Western State College of Law. She has represented noncitizens in a range of immigration matters. Her scholarship focuses on procedural rights of individuals facing removal, including restrictions on judicial review.

Lee Kovarsky is a professor of law at University of Maryland Francis King Carey School of Law. He has published widely on habeas issues touching all forms of official custody. He is the co-author of the Foundation Press casebook on habeas corpus.

Stephen I. Vladeck is a professor of law at American University Washington College of Law. He is a leading scholar on the history and scope of habeas corpus, including the Suspension Clause and the federal habeas statutes, and his writings on the subject have appeared in the Yale Law Journal, the Harvard Law Review, the University of Pennsylvania Law Review, the Virginia Law Review, the Georgetown Law Journal, and the Cornell Law Review, among others.

Michael Wishnie is the Deputy Dean for Experiential Education and the William O. Douglas Clinical Professor of Law at Yale Law School. He has written on the topic of judicial review and habeas in the immigration context.

SUMMARY OF THE ARGUMENT

Amici write to ensure that the Court is fully apprised of the unprecedented nature of the government's argument that habeas corpus under the Suspension

Clause extends only to lawfully admitted residents of the United States, a position which is contrary to Supreme Court precedent.

The Supreme Court has in fact affirmed that Suspension Clause protection has historically extended to noncitizens within U.S. borders. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301-304 (2001). Indeed, the Supreme Court has granted writs of habeas corpus to unlawful entrants. *See, e.g.*, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 262, 268 (1954). It has also consistently recognized that even noncitizens who arrive at the border—and thus have not been admitted at all—have historically been able to petition for habeas corpus. *See, e.g.*, *St. Cyr*, 533 U.S. at 305-306. And it has even recognized Suspension Clause protections for noncitizens held at Guantanamo Bay. *See Boumediene v. Bush*, 553 U.S. 723, 785-786 (2008). The Third Circuit has likewise recognized that the Suspension Clause protects noncitizens challenging their removal orders. *See, e.g., Sandoval v. Reno*, 166 F.3d 225, 237 (3d Cir. 1999)

To the extent the government argues that rights under the Suspension Clause apply only to individuals who also have recognized due process rights, that argument fails as well. *See Boumediene*, 553 U.S. at 785-786 (ruling that Guantanamo Bay detainees have the Suspension Clause right to petition for habeas corpus, while declining to determine whether they also had due process rights).

Noncitizens' ability to invoke the Suspension Clause is not lessened by the fact that they have been subjected to a statutory expedited removal procedure. The Suspension Clause is a limitation on Congress's power to restrict access to the writ of habeas corpus. Noncitizens who have entered the United States are entitled to Suspension Clause protection. *Amici* therefore respectfully suggest that the Court find jurisdiction over the habeas petition and reach the merits.

ARGUMENT

I. THE SUPREME COURT HAS NEVER RESTRICTED SUSPENSION CLAUSE PROTECTION TO LAWFULLY ADMITTED RESIDENTS.

The Supreme Court has never held that noncitizens who are not lawfully admitted may not invoke the Suspension Clause. The government can cite no Supreme Court authority for that proposition. In fact, the Supreme Court has held, without limitation, that the Constitution "unquestionably" requires judicial review in immigration cases. *See St. Cyr*, 533 U.S. at 300-301, 304 (citing *Heikkila v. Barber*, 345 U.S. 229, 234-235 (1953)). The Suspension Clause's breadth derived from its broad historical availability.

The Court first noted that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" *St. Cyr*, 533 U.S. at 301 (citation omitted), recognizing that—whether "[i]n England prior to 1789, in the colonies, [or] in this Nation"—the common law writ was "available to nonenemy aliens as well as to citizens," *id.* at 301-302 (citing, among other cases, *Somerset v. Stewart*, (1772) 98

Eng. Rep. 499 (K.B.), 509-510, 20 How. St. Tr. 1, 79-82 (granting the writ of habeas corpus to an African slave, detained aboard a ship in English waters); *Case of the Hottentot Venus*, (1810) 104 Eng. Rep. 344 (K.B.), 13 East 195 (reviewing the habeas petition of a South African woman, alleging that she was held in private captivity); *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (C.C.D. Mass. 1813) (granting the writ to Portuguese sailors detained in Boston as alleged deserters of a foreign ship)). Indeed, at English common law, all aliens within the realm were viewed as both "entitled to its benefits, and subject to its burdens." Brief *Amici Curiae* of Legal Historians in Support of Respondent, *INS v. St. Cyr*, 553 U.S. 289 (2001) (No. 00-767), *reprinted in* 16 Geo. Immigr. L.J. 465, 472 (2002); *see also Calvin's Case*, (1608) 77 Eng. Rep. 377 (K.B.) 383 ("When an alien … cometh into England … as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as has been said) draweth the other.").[1]

[1] *See also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 990-1004 (1998); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2517, 2523-2524 n.113-114 (1998); Brief *Amici Curiae* of Legal Historians in Support of Respondent, *INS v. St. Cyr*, 553 U.S. 289 (2001) (No. 00-767) *reprinted in* 16 Geo. Immigr. L.J. 465, 472 (2002); James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and* INS v. St. Cyr, 16 Geo. Immigr. L.J. 485, 496-499 (2002) (discussing habeas corpus for Acadian refugees in the American colonies in the 1750s).

St. Cyr reinforced that the right to petition for habeas corpus endured in subsequent immigration schemes that did not provide for express statutory review procedures, holding that, at a minimum, the Constitution requires habeas review of legal and constitutional claims. *See St. Cyr*, 533 U.S. at 300-301, 304 (citing *Heikkila*, 345 U.S. at 234-235).

In *Heikkila*, recent legislation purported to preclude judicial review of "final" deportation orders. 345 U.S. at 234-235. The Court traced the "finality" of executive and administrative immigration decisions back to the Immigration Act of 1891, when Congress restricted judicial review over executive exclusion orders. *See id.* at 233. During this period, "habeas corpus was the only remedy by which deportation orders could be challenged." *Id.* at 230. The Court determined that, since 1891, these "final" administrative decisions were thus not subject to judicial review "except insofar as it was required by the Constitution," *see id.* at 234-235, and that habeas nonetheless remained, *see id.* at 235 ("Now, as before, [one] may attack a deportation order only by habeas corpus.").

The many habeas petitions heard during this time of executive "finality" therefore reflect the minimum protection required by the Constitution. *See St. Cyr*, 533 U.S. at 306, 307 n.28, 312 (noting that, before the Immigration and Nationality Act of 1952, "the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action," and discussing several

of such cases, including *Gegiow v. Uhl*, 239 U.S. 3, 8-10 (1915) (granting habeas corpus in an immigration case, and ruling that "when the record shows that a commissioner of immigration is exceeding his [statutory] power, the alien may demand his release upon habeas corpus"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 651, 660 (1892) (considering the habeas corpus petition of a Japanese citizen seeking admission at the U.S. border, stating that Congress may delegate "final" determination of facts to executive officers, but that noncitizens were "doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful")).

Accordingly, the Court in 2008 considered it "uncontroversial" that, under the Suspension Clause, the "privilege of habeas corpus" entitles a noncitizen to "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779 (quoting *St. Cyr*, 533 U.S. at 302).[2] Indeed, the Supreme Court has itself historically entertained—and even granted—habeas petitions by noncitizens unlawfully present in the country. *See Accardi*, 347 U.S. at 262, 268 (granting writ of habeas corpus to noncitizen who entered the country by train from Canada,

[2] *Boumediene* further suggests that the extent of factual inquiry in habeas corpus review may depend "in part … upon the rigor of any earlier proceedings." 553 U.S. at 780-781 (citing historical instances of introduction of exculpatory evidence in habeas proceedings). Such a factor would seem to weigh in favor of more, not less, judicial review in the case of truncated expedited removal proceedings.

"without immigration inspection and without an immigration visa"). Moreover, to determine the Suspension Clause's reach, the Supreme Court in *St. Cyr* invoked several cases involving noncitizen petitioners who had not entered the United States *at all*, but had only sought admission at the border. *See* 533 U.S. at 293, 304-307 ("In case after case, courts answered questions of law in habeas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws.") (citing, *inter alia*, cases involving "arriving aliens," including *Gegiow*, 239 U.S. at 8, 10 (granting habeas to Russian laborers "seeking to enter" the country); *Chin Yow v. United States*, 208 U.S. 8, 10-11, 13 (1908) (granting habeas to Chinese man "arbitrarily [] denied [] a hearing … to prove his right to enter the country"); *United States v. Jung Ah Lung*, 124 U.S. 621, 622-624, 635 (1888) (granting habeas to Chinese laborer attempting to re-enter the United States)). And, in *Boumediene*, the Court ruled that the Suspension Clause was available to noncitizens apprehended and detained outside the United States during a time of war. *See* 553 U.S. at 733-735. There is scarce reason to think that the Court would rule that the Suspension Clause was available to arriving noncitizens and to the *Boumediene* petitioners yet not to noncitizens like Petitioners who have entered the United States.

The Third Circuit has likewise reviewed the history of habeas corpus in the immigration area during the finality period. Like the Supreme Court, the Third

Circuit has recognized that habeas corpus was available to noncitizens challenging their removal orders during this era when judicial review was reduced to the constitutional minimum. *Sandoval v. Reno,* 166 F.3d 225 (3d Cir. 1999) ("Despite repeated congressional efforts since the late nineteenth century to confer finality on the immigration decisions of the Attorney General, the [Supreme] Court has consistently recognized the availability of habeas relief to aliens facing deportation.").

The government maintains that restricted judicial review of expedited removal does not raise the constitutional problems alluded to in *St. Cyr* as long as the petitioner has not been lawfully admitted. The government's reliance on the Ninth Circuit's decisions for this proposition is misplaced. In *Li v. Eddy*, 259 F.3d 1132, 1135 (9th Cir. 2001), *vacated on reh'g as moot*, 324 F.3d 1109 (9th Cir. 2003), the Ninth Circuit noted that "this case does not implicate the jurisdictional issues that would be raised had Li been lawfully admitted to this country." The Ninth Circuit provided no reasoning for its proposition, and cited *St. Cyr* only once in the entire *Li* opinion. *Li* was also decided without the benefit of the Supreme Court's 2008 decision in *Boumediene*, which confirmed that *St. Cyr*'s reasoning is not limited to lawfully admitted immigrants. Furthermore, *Li* did not involve a noncitizen present within U.S. borders (such as Petitioners), but an *arriving alien*

who sought to "petition for entry … at the border." 259 F.3d at 1136. *Li* and cases relying on it accordingly are neither controlling nor persuasive here.[3]

Finally, the Supreme Court has never held that Suspension Clause rights hinge on entitlement to due process, contrary to the government's argument. Rather, habeas corpus review operates independently of whether due process rights exist or are satisfied by administrative procedures. *See Boumediene*, 553 U.S. at 785 (holding that noncitizens detained as "enemy combatants" are protected by the Suspension Clause, while leaving undecided their entitlement to due process). Even assuming administrative procedures satisfy due process standards, "it would not end [the] inquiry"; "the Suspension Clause remains applicable and the writ relevant."[4] *Id.* Accordingly, noncitizens may invoke the Suspension Clause even if they may not invoke due process.

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[3] The government has likewise relied upon *Garcia de Rincon v. Dep't of Homeland Security*, 539 F.3d 1133, 1133, 1135-1136 (9th Cir. 2008). That case involved an arriving alien, did not cite or discuss *Boumediene,* and was in any event wrongly decided even as to arriving aliens. The government has also relied heavily on the vacated decision in *M.S.P.C. v. U.S. Customs & Border Protection*, 60 F. Supp. 3d 1156 (D.N.M. 2014), *vacated as moot*. For the reasons discussed in text, the *M.S.P.C.* decision was wrongly decided based on a misunderstanding of Supreme Court precedent on both the Suspension Clause and the Due Process Clause.

[4] Even if the Suspension Clause were dependent upon the availability of due process rights, the Supreme Court has long affirmed that noncitizens who have entered this country *do* have due process rights, regardless of their immigration status. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

II. CONGRESS CANNOT DICTATE THE AVAILABILITY OF SUSPENSION CLAUSE PROTECTION.

Congress cannot suspend habeas corpus through immigration legislation absent "Cases of Invasion or Rebellion." *See Boumediene*, 553 U.S. at 743 ("That the Framers considered the writ a vital instrument … is evident from the care taken to specify the limited grounds for its suspension.").

The writ of habeas corpus has long been a safeguard of individual liberty as well as "an indispensable mechanism for monitoring the separation of powers." *Boumediene*, 553 U.S. at 739-744, 765. Thus, "[t]he test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Id.* at 765-766. Congress therefore may not manipulate the availability of habeas corpus under the Suspension Clause simply by applying expedited removal. The Supreme Court has made clear that Congress cannot control the scope of the Suspension Clause through legislation. *Boumediene*, 553 U.S. at 796-798 (invalidating jurisdictional limitations under the Suspension Clause, despite Congress's national security goals in a time of war, stating that "[s]ecurity subsists, too, in fidelity to freedom's first principles"); *Heikkila*, 345 U.S. at 234-235 (finding that habeas corpus remained, despite Congress's intent to make "administrative decisions nonreviewable to the fullest extent possible under the Constitution").

CONCLUSION

For the foregoing reasons, the Court should exercise jurisdiction over the petition and reach the merits.

Respectfully submitted,

December 4, 2015

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CERTIFICATE OF SERVICE

I, Jonathan H. Feinberg, hereby certify that on December 4, 2015 the foregoing MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMICI CURIAE and BRIEF FOR SCHOLARS OF IMMIGRATION LAW, FEDERAL COURTS, AND HABEAS CORPUS INSUPPORT OF JURISDICTION were filed via the Court's ECF system and are available for viewing and downloading by all counsel of record. An electronic copy of this submission was also sent via e-mail to Joel Sweet, Esq. (joel.sweet@usdoj.gov) and Erez R. Reuveni, Esq. (erez.r.reuveni@usdoj.gov).

/s/ Jonathan H. Feinberg

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