No. 08-681

IN THE

Supreme Court of the United States

JEAN MARC NKEN,

Petitioner,

—v.—

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

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

BRIEF *AMICUS CURIAE* OF LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The question in this case is whether temporary stays of administrative removal orders pending court review are governed by 8 U.S.C. § 1252(f)(2), which provides that "no court shall enjoin the removal of any alien pursuant to a final order … unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." This issue of statutory interpretation raises serious constitutional questions under the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. *Amici curiae* are law professors with expertise in immigration law and/or federal jurisdiction and have particular knowledge about the statutory system for judicial review of administrative removal orders, the historical role of the writ of habeas corpus in that system, and the constitutional rights of non-citizens. *Amici* have a professional and scholarly interest in providing the Court with an understanding of the constitutional problems that would arise if Section 1252(f)(2) were interpreted to apply to temporary stays of removal pending judicial review of the removal order.

Among the *amici* are authors or co-authors of the following: T. Alexander Aleinikoff, David A.

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Martin, Hiroshi Motomura & Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* (6th ed. 2008); Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* (5th ed. 2003); Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* (2008); Stephen H. Legomsky, *Immigration and Refugee Law and Policy* (4th ed. 2005 & Supp. 2007); Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (5th ed. 2005 & Supp. 2008); Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (1996); and Gerald L. Neuman, *Habeas Corpus, Executive Detention, and Alien Removal*, 98 Colum. L. Rev. 961 (1998). The *amici curiae* are:[2]

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SUMMARY OF ARGUMENT

The current statutory scheme for judicial review of removal orders places jurisdiction in the court of appeals through the mechanism of petitions for review. Historically, however, review of deportation orders was obtained through habeas corpus petitions and this Court has held that the Suspension Clause guarantees review of deportation orders. Thus, as a statutory substitute for habeas review, the petition-for-review system must meet Suspension Clause standards, which require at a minimum the scope of review at the time of the Founding. The historical scope of the writ gave courts not just the technical ability to exercise jurisdiction over a petition, but also the actual power to grant effective relief. Such powers included the authority to issue orders controlling the custody of the petitioner.

Interpreting 8 U.S.C. § 1252(f)(2) to apply to stays of removal pending judicial review would impose impermissible obstacles to the ability of the federal courts to exercise jurisdiction and to grant effective relief in a great number of cases, including those in which the petitioner faces torture, incarceration or execution upon return to the receiving country. For such a petitioner who is unable to obtain a stay at the outset of the case under Section 1252(f)(2)'s exceedingly high standard,

a court order ultimately vindicating his position on the merits will be rendered meaningless if the petitioner has already been delivered into a foreign prison, tortured or killed in the receiving country.

Under the Fourth Circuit's ruling, Section 1252(f)(2) improperly impedes the courts' power to issue temporary orders preserving their ability to grant effective relief on the merits. The statutory scheme for judicial review would thus fall below the minimum standards of the Suspension Clause. The doctrine of constitutional avoidance therefore provides an additional reason why the Court should interpret Section 1252(f)(2) not to apply to temporary stays of removal pending judicial review.

ARGUMENT

This case presents a critically important question about how a federal court of appeals reviews the immigration agency's administrative order removing an alien from the United States. By statute, an alien seeking judicial review of a removal order may seek a temporary stay of the order while the federal court of appeals decides whether the order is lawful. 8 U.S.C. § 1252(b)(3)(B). The question presented in this case is whether such stays of removal are governed by 8 U.S.C. § 1252(f)(2), which provides:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

In contrast to the view of eight other circuits, the Fourth and Eleventh Circuits have held that this provision applies.

Several circuits have warned that if Section 1252(f)(2) applies to temporary stays of removal, a petitioner would face a higher burden to obtain a temporary stay at the very outset of the case than to win ultimate relief on the merits. In significant categories of cases, including those filed by aliens facing torture, imprisonment or execution upon return, the court's inability to issue a stay under the Section 1252(f)(2) standard would render any eventual ruling in favor of the petitioner ineffective or impossible. As set forth below, imposing such a standard would violate the Suspension Clause. The Court should avoid that constitutional problem by interpreting Section 1252(f)(2) not to apply to stays of removal pending judicial review. Because Congress has not prescribed any specific statutory standard for stays of removal pending judicial review, the courts of appeals should remain free to apply traditional standards for preliminary relief, like those adopted by eight circuits. Unlike Section 1252(f)(2), such equitable standards give courts the flexibility to address the circumstances of each case and thus generally comport with the Suspension Clause's requirement that courts must be able to issue temporary stays when needed to preserve the court's ultimate ability to grant effective relief on the merits.

I. THE SUSPENSION CLAUSE GUARANTEES JUDICIAL REVIEW OF REMOVAL ORDERS AND SUCH REVIEW NECESSARILY MUST INCLUDE THE POWER TO PROVIDE AN EFFECTIVE REMEDY

A. The Suspension Clause Guarantees Judicial Review of Removal Orders

It is well-settled that the Suspension Clause applies to the judicial review of the government's decisions to remove aliens from the United States. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (noting that Suspension Clause requires "some 'judicial intervention in deportation cases'") (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)). Removal in itself, as well as physical detention preliminary to removal, involves placing an individual in government custody. Thus, historically removal orders have been reviewed by habeas corpus or a statutory substitute. *See St. Cyr*, 533 U.S. at 305-08 (setting forth history of judicial review of immigration decisions). The current statutory scheme provides for judicial review of a final removal order through a petition for review in the court of appeals. 8 U.S.C. § 1252(a)(5). The most recent amendment expanded the scope of review in the court of appeals while generally eliminating the alternative of district court habeas actions. REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii),

199 Stat. 231, 310.[3] As a statutory substitute for habeas corpus review, the petition-for-review mechanism must be adequate and effective under constitutional standards. *See St. Cyr*, 533 U.S. at 300-05.

This Court has held that the Suspension Clause guarantees a minimum level of federal court review when, as in removal proceedings, the Executive Branch acts to deprive a person of his liberty. Most recently, in *Boumediene v. Bush*, __ U.S. __, 128 S. Ct. 2229 (2008), the Court considered whether the Constitution permits Congress to eliminate the habeas corpus jurisdiction of the federal courts to review Executive Branch decisions to detain persons as enemy combatants under the Military Commissions Act of 2006. *Boumediene* first reaffirmed that "'at the absolute minimum' the [Suspension] Clause protects the writ as it existed

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[3] Although the REAL ID Act of 2005 generally repealed habeas corpus review of removal orders and placed jurisdiction for such review in the courts of appeals, it did not eliminate all habeas corpus jurisdiction in the immigration context. For example, habeas corpus remains the vehicle for challenges to immigration detention. *See*, *e.g.*, *Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006) (observing that REAL ID Act "did not eliminate a district court's jurisdiction to review habeas petitions challenging an alien's detention."). *See also* H.R. Rep. No. 109-72, at 174, *reprinted in* 2005 U.S.C.C.A.N. 240, 300 (2005) (noting that REAL ID Act "would not preclude habeas review over challenges to detention that are independent of challenges to removal orders"). In addition, to the extent that any statutory scheme for review of removal orders does not provide an adequate and effective substitute for habeas corpus, the Suspension Clause would require that habeas review remain available.

when the Constitution was drafted and ratified." *Id.* at 2248 (quoting *St. Cyr*, 533 U.S. at 301). That, the Court emphasized, included at least "a meaningful opportunity to demonstrate ... 'the erroneous application or interpretation' of relevant law." *Boumediene*, 128 S. Ct. at 2266 (quoting *St. Cyr*, 533 U.S. at 302). The Court then pointed out that the Framers were particularly concerned about the availability of court review when an individual is subject to executive detention. *Id.* at 2269. Based upon core separation-of-powers principles, *Boumediene* concluded that the Suspension Clause "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." *Id.* at 2247 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)).

B. To Meet the Minimum Requirements of the Suspension Clause, a Statutory Limitation on Judicial Review Cannot Interfere with the Courts' Ability To Grant Effective Relief

The Court's recent decision in *Boumediene* confirms that the Suspension Clause guarantees not just the right to go into court, but also the power of the court to provide effective relief. *Boumediene* held that the constitutionally guaranteed "privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held [unlawfully]," and also that "the habeas court must have the power to order the conditional release of an individual unlawfully detained…." 128 S. Ct. at 2266. For those constitutional rights to be effective in a habeas corpus proceeding or its equivalent, the court

must have the authority to control the location of the prisoner. As set forth below, the Framers understood the court's power to control a petitioner's custody as an essential part of the writ. The Great Writ was implemented in U.S. courts accordingly. Depriving the courts of the power to stay removal in appropriate cases therefore would curtail the scope of the writ as it existed in 1789 and would violate the Suspension Clause. *See Boumediene*, 128 S. Ct. at 2248.

The scope of the Great Writ both before and after the time of the Framing reached not just the court's jurisdiction to rule upon the lawfulness of the petitioner's custody, but also the court's power to ensure effective relief by controlling the location of the petitioner. Making that power more effective was one of the reforms pursued by the Habeas Corpus Act of 1679, which Parliament passed in order to remedy a series of abuses that had impaired the effectiveness of the writ.[4] Those abuses included the Crown's efforts to evade the writ by transferring prisoners from custodian to custodian, removal of prisoners to places like Scotland where the writ did not run, and outright refusal to comply with the writ. In response to the first problem, Section 9 of the Act regulated the transfer of prisoners and placed it under judicial control, with enumerated exceptions.

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[4] Historians have debated which features of the 1679 act were novel, and which features codified reforms that the common law courts had already been developing. *See*, *e.g.*, Helen A. Nutting, *The Most Wholesome Law – The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527, 539-40 (1960). This distinction does not matter to the issues before the Court.

Sections 2 and 3 set strict time limits for the custodian to produce the prisoner in response to the writ, and simplified the procedure for punishing noncompliance by eliminating intermediate stages that had facilitated delay. Section 12 prohibited and severely punished removal of prisoners from England, again with enumerated exceptions. *See* 4 William Blackstone, *Commentaries* *135-137 (extolling the act as "another *magna carta*"); 9 W.S. Holdsworth, *A History of English Law* 116-18 (1926); R.J. Sharpe, *The Law of Habeas Corpus* 18-20 (2d ed. 1989); Dallin H. Oaks, *Habeas Corpus in the States*, 32 U. Chi. L. Rev. 243, 252-53 (1965).

Courts in England regularly exercised this power to control the custody of the prisoner during the pendency of habeas cases. Although the 1679 Act applied by its terms only in "criminal or supposed criminal matters," the English courts adopted analogous reforms of the common law writ over the course of the Eighteenth Century. Oaks, *supra* at 253; Sharpe, *supra* at 20. The resulting rules for controlling custody of the prisoner were summarized by Justice Samuel Nelson in his separate opinion in the extradition case, *In re Kaine*:

> [P]ending the examination or hearing, the prisoner, in all cases, on the return of the writ, is detained, not on the original warrant, but under the authority of the writ of *habeas corpus*. He may be bailed on the return *de die in diem*, or be remanded to the same jail whence he came, or to any other place of safe keeping under the control of the court, or officer issuing the writ, and by its order

> brought up from time to time, until the court or officer determines whether it is proper to discharge or remand him absolutely. . . . The efficacy of the original commitment is superseded by this writ while the proceedings under it are pending, and the safe keeping of the prisoner is entirely under the authority and direction of the court issuing it, or to which the return is made.

55 U.S. (14 How.) 103, 133-34 (1853) (Nelson, J., concurring in part and dissenting in part) (citing Matthew Bacon, *A New Abridgement of the Law* (originally published in 1732), and earlier English cases); *see also Barth v. Clise*, 79 U.S. (12 Wall.) 400, 402 (1871); *Johnston v. Marsh*, 227 F.2d 528, 530 (3d Cir. 1955); *Principe v. Ault*, 62 F. Supp. 279, 282 (N.D. Ohio 1945) (immigration case); Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It* 324 (1858); William S. Church, *A Treatise on the Writ of Habeas Corpus* 266-68 (2d ed. 1895). Thus, the scope of the writ at the time of the Framing encompassed a court's power to order the government to produce a prisoner, or to control the government's movement of the prisoner – not only in criminal cases, but in any case brought to the courts via habeas corpus.

In the United States, the courts continued to exercise control over the petitioner during the pendency of habeas cases by issuing orders to respondent custodians to ensure effective relief. In the Nineteenth Century, U.S. courts used attachments for contempt to compel the obedience of

custodians who transferred detained persons in an effort to evade the writ. *See*, *e.g.*, *United States v. Davis*, 25 F. Cas. 775 (C.C.D.C. 1840) (Case No. 14,926) (holding custodian in contempt for removing alleged slaves from the District of Columbia to avoid writ for their freedom and then refusing to produce them when ordered to do so); *In re Hamilton*, 11 F. Cas. 319, 319 (S.D.N.Y. 1867) (Case No. 5,976) (discussing commitment of officer for contempt of the writ by transferring petitioner from Philadelphia to New York); *Ex parte Young*, 50 F. 526 (C.C.E.D. Tenn. 1892) (holding that a father was permissibly held in contempt for transferring his child out of state in order to avoid habeas); *United States v. Green*, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256) (Story, J.) (bypassing attachment where custodian was in court and could be compelled to testify); Hurd, *supra* at 240-42; *see also id.* at 237 ("In Maine, Massachusetts and Delaware, the concealing of the prisoner or changing his custody, with the intent to elude the service of the writ of habeas corpus, is prohibited under severe penalties . . . . In Indiana, Arkansas and Alabama, the act is declared a misdemeanor, and the offender subject to fine and imprisonment.").[5] Thus, U.S. courts exercising habeas corpus jurisdiction have consistently had the power not just to reach decisions on the lawfulness of

[5] Variations about whether the custodian's obligations are triggered only by *service* of the court's order, or even earlier by *notice* of the proceedings, are not relevant to the issues before the Court. *See*, *e.g.*, *United States ex rel. Nazaretian v. Tod*, 291 F. 665 (S.D.N.Y. 1923) (declining to hold immigration officer in contempt where the writ was not served until he had already transferred custody to the master of the vessel).

detention, but also to take steps to ensure that their orders will be carried out by respondents.

A similar concern about ensuring the ability of the court to provide effective relief underlies this Court's own Rule 36, which imposes limits on the transfer of a prisoner pending the Court's review of a decision on the prisoner's habeas corpus petition. That rule traces its lineage back to 1886, and was adopted in response to Congress's enactment of a right of appeal in habeas corpus proceedings. *See* Sup. Ct. R. 34 ("Custody of Prisoners on Habeas Corpus"), 117 U.S. 708 (1886); Act of Mar. 3, 1885, ch. 353, 23 Stat. 437.[6] The 1867 Habeas Corpus Act had already included an express provision staying all state proceedings pending this Court's review. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86; *see Barefoot v. Estelle*, 463 U.S. 880, 892-93 n.3 (1983). In short, since the Supreme Court acquired jurisdiction in appeal over habeas corpus proceedings, it has ensured its judicial authority to control the custody of the prisoner pending the appeal.

This authority of a habeas court to control the custody of a prisoner is no mere technical appendage to the historical writ, but an essential guarantee of its efficacy. Without the power to direct the disposition of the prisoner in appropriate cases, the court would often be unable to provide effective relief, or even to ensure that its jurisdiction is not vitiated by a *fait accompli*. This Court has

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[6] The 1885 act restored the avenue of appeal that the Reconstruction Congress had created in 1867 and then quickly repealed in 1868. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

recognized this principle consistently. For example, in *United States v. Shipp*, 203 U.S. 563 (1906), the Court considered a contempt proceeding brought after a sheriff permitted a lynch mob to murder a habeas petitioner who had obtained a stay of execution pending appeal. This Court rejected the sheriff's argument that the circuit court had no power to issue a stay unless it was first determined that the petitioner had been held in violation of the Constitution:

> Until its judgment declining jurisdiction should be announced, [the Court] had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time….The fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it.

Id. at 573. Similarly, in *Lonchar v. Thomas*, 517 U.S. 314, 319 (1996), the Court observed that the denial of a stay that is needed to prevent the death of the petitioner would be the effective equivalent of dismissing his petition and thus "denies the petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 324.

Thus, a court reviewing a claim of unlawful executive detention – including a petition for review of an administrative removal order – must have the power to issue orders that will preserve the

effectiveness of its decisions about the lawfulness of the detention.

II. APPLICATION OF 8 U.S.C. § 1252(f)(2) TO STAYS OF REMOVAL WOULD INTERFERE WITH THE COURTS' ABILITY TO GRANT EFFECTIVE RELIEF

In a significant number of cases, the application of the Section 1252(f)(2) standard would vitiate the court's ability to grant effective relief upon reaching the merits. In such cases, a court ruling for a petitioner who had failed to meet Section 1252(f)(2)'s exceedingly high bar would find that its decision was rendered meaningless, as the petitioner could no longer benefit from the court's order. As set forth above, denying the availability of an effective stay of removal is contrary to the common law history of the writ and therefore runs afoul of the Suspension Clause. There are several categories of immigration cases in which relief on the merits would be rendered meaningless without a stay of removal at the outset.

Aliens with Claims for Relief from Removal Based on Threats of Torture, Death, or Serious Forms of Persecution

For petitioners who seek relief from removal based on threats of torture, death or other serious forms of persecution, granting the writ after denying a stay would be no relief at all. An alien who seeks review of an administrative order denying his claim for asylum or for protection under the Convention Against Torture may not be able to demonstrate

immediately upon filing a petition for review that there is clear and convincing evidence that the removal order "is prohibited as a matter of law," 8 U.S.C. § 1252(f)(2). And after his removal, even if he may continue to pursue his claim on the merits, he may well be tortured or killed. As Judge Easterbrook noted in *Hor v. Gonzales*:

> The ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim. Yet under the Attorney General's reading of § 1252(f)(2) an alien who is likely to prevail in this court, and likely to face serious injury or death if removed, is not entitled to remain in this nation while the court resolves the dispute.

400 F.3d 482, 485 (7th Cir. 2005); *see also Tesfamichael v. Gonzales*, 411 F.3d 169, 175 (5th Cir. 2005); *Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc). In such a case, the court's eventual order in the petitioner's favor would be a dead letter because it would come too late to effect the relief requested.

Aliens Facing Incarceration by the Receiving Country

Similarly, in situations where the petitioner is incarcerated by the receiving government upon return, the court's subsequent order vacating the removal order will be ineffectual and meaningless. The U.S. court would at that point be powerless to compel the petitioner's release from the foreign prison, and the petitioner would be unable to return to the United States. Such incarceration may be

wholly unrelated to any asylum or torture-based claim for relief. For example, it is well-documented that some nations routinely incarcerate persons who are deported from the United States. *See*, *e.g.*, *Lin v. U.S. Dep't of Justice*, 432 F.3d 156, 158 (2d Cir. 2005) (noting that U.S. State Department reports establish that many repatriated Chinese citizens have been subjected to administrative detention); *Auguste v. Ridge*, 395 F.3d 123, 129 (3d Cir. 2005) (noting that Haitian government systematically incarcerates returning deportees); Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 Stan. J. Civ. Rts. & Civ. Liberties 195, 219 (2007) (noting that the national police in El Salvador instituted program of detaining returning deportees).

Some petitioners may be incarcerated upon return because that is the goal of the removal proceedings. If, for example, an alien is specifically wanted for prosecution or punishment by the receiving country, U.S. government officials may be seeking removal for the acknowledged purpose of delivering the petitioner to foreign authorities for incarceration. *See*, *e.g.*, *INS v. Doherty*, 502 U.S. 314, 318-19 (1992) (U.S. government resumed deportation proceedings to accomplish return of petitioner to home country for imprisonment after U.S. court denied extradition on grounds that alleged crimes were political offenses); *Ruiz Massieu v. Reno*, 91 F.3d 416, 417-18 (3d Cir. 1996) (U.S. government initiated deportation proceeding against petitioner after U.S. courts denied multiple extradition requests for lack of probable cause).

For a petitioner who will be incarcerated upon his return to the country of nationality, the denial of a stay of removal makes it impossible for the court to grant effective relief on the merits if the removal order is overturned. If the U.S. court of appeals ultimately were to decide in the petitioner's favor on the merits, it would be too late; the petitioner would be imprisoned or perhaps executed and beyond the power of the United States courts to grant relief from removal.

Aliens Facing Threats of Torture or Death Unrelated to Claims of Relief from Removal

In addition, many aliens face threats of irreparable injury or torture unrelated to the nature of their claims against removal. For example, in some countries, government authorities or unchecked civilian or paramilitary groups routinely detain and torture returning deportees as a form of summary punishment. *See Auguste*, 395 F.3d at 129 (noting U.S. State Department reports that returning deportees incarcerated by the Haitian government have been beaten, tortured by electric shock, burned with cigarettes, and subjected to eardrum damage by severe boxing on the ears); Kanstroom, *supra*, at 219 (noting reports that in El Salvador and Honduras, many deportees are hunted down and murdered by vigilantes). Even when the threat of such torture is not the basis for challenging removal, a petitioner facing such threats may need a stay in order to realize the benefit of any ultimate court decision vacating the removal order. Absent a stay at the outset of the case, such a petitioner may be killed or suffer grave or irreparable injury before winning on

the merits of his removal case.[7] As set forth in Part I *supra*, courts historically have had the power to prevent such harms from befalling a petitioner pending a final decision on the merits.

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Several circuits have warned that the Fourth Circuit's application of Section 1252(f)(2) makes it more difficult to obtain a stay than to obtain final relief. *See Arevalo v. Ashcroft*, 344 F.3d 1, 8 (1st Cir. 2003) (stating that application of Section 1252(f)(2) as stay standard would require full deliberation on the merits at the outset of a case and impose a greater burden to obtain a stay than ultimate relief on the merits); *see also Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Andreiu*, 253 F.3d at 482. Such a result would interfere with the courts' ability to grant effective relief for aliens who fall within the categories described above.

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[7] A petitioner may also encounter additional obstacles in attempting to return to the United States after winning on the merits. The Board of Immigration Appeals has suggested in dicta that an alien who has been removed from the United States is subject to the "nullification of legal status" and may find his re-entry into the United States barred under a ground of inadmissibility. *In re Armendarez-Mendez*, 24 I. & N. Dec. 646 (BIA 2008). Whether such bars to re-entry would apply to an alien who prevails on a petition for review is doubtful, but it is possible that the government may take such positions in future cases. That issue is not before the Court but underscores the multiple – and potentially evolving – consequences of departure that the federal court must be able to take into account in deciding whether to grant a stay pending its review of a removal order.

Amici do not contend that an automatic stay is required in order to avoid a Suspension Clause violation. For example, the equitable stay standards in eight circuits would permit the reviewing court to take into account the factors of irreparable harm and the likelihood of success on the merits without requiring an automatic stay. But Section 1252(f) as construed by the courts of appeals imposes a heightened and inflexible standard for temporary relief that is inconsistent with the core meaning and historical understanding of the Suspension Clause.[8]

III. THE COURT SHOULD INTERPRET SECTION 1252(f)(2) AS HAVING NO APPLICATION TO STAYS OF REMOVAL

If Section 1252(f)(2) imposes a standard that impedes the courts from issuing stays of removal that are necessary to ensure effective relief on the merits, then the statute is inconsistent with the Suspension Clause. The Court should avoid these constitutional problems by interpreting Section 1252(f)(2)'s operative phrase – "no court shall enjoin" – as not including temporary stays pending judicial

[8] Thus, it would be an error to rely, as the Fourth and Eleventh Circuits have, upon § 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), to justify the application of Section 1252(f)(2) to temporary stays of removal pending court review. Although IIRIRA § 306(b) provides that the courts of appeals continue to have jurisdiction over petitions for review after the petitioner is removed, the Suspension Clause requires more than the ability to exercise jurisdiction as a technical matter. It guarantees a court the power to grant effective relief and to issue orders necessary to preserve that power.

review within the category of injunctions. *See St. Cyr*, 533 U.S. at 299-300 (holding that "when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result" and construing statute to avoid constitutional problem).

Section 1252(f)(2) cannot reasonably be interpreted to apply selectively to some applications for stays, but not to others. The provision reads in its entirety:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

The statute is indivisible. If this language applies to stays of removal at all, it applies to every case. Conversely, if Section 1252(f)(2) is construed not to apply to stays because of the Suspension Clause problems that would be present in some cases, then the same interpretation can and must govern all stay applications.

In *Clark v. Martinez*, 543 U.S. 371 (2005), this Court confronted a similar question of statutory construction, considering whether an immigration detention statute, 8 U.S.C. § 1231(a)(6), permitted the government to detain indefinitely an alien who had been put into deportation proceedings while seeking admission to the United States. Previously, the Court had held in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that Section 1231(a)(6) did not authorize

the indefinite detention of an alien who had been put into deportation proceedings after being admitted to the United States. *See Clark*, 543 U.S. at 377 (citing *Zadvydas*, 533 U.S. at 689, 699). The detention statute applied by its terms equally to both categories of aliens. *Clark* held that the operative language of the statute had to apply consistently to both categories of aliens, notwithstanding the government's argument that the two categories of aliens were differently situated and their detention implicated different constitutional concerns. *Clark*, 543 U.S. at 380. Justice Scalia, writing for the majority, explained that the process of interpretation was limited by the range of meanings that the statute could plausibly bear. "The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions *as a means of choosing between them*." *Id.* at 385. As a result, if one of two plausible interpretations "would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81.

In the instant case, the verb "enjoin" in Section 1252(f)(2) can be construed as including "stay" or as not including "stay," but it cannot plausibly be "interpreted to do both at the same time." *See Clark*, 543 U.S. at 378. There is at least a serious constitutional question as to whether 8 U.S.C. § 1252(f)(2) can apply to stays of removal for asylum applicants and others whose meritorious

claims cannot be remedied if they are removed while judicial review is still pending. Thus, the Court should construe the statute not to apply to stays.[9]

If Section 1252(f)(2) does not apply to stays of removal pending judicial review, no other subsection of 8 U.S.C. § 1252 appears to provide a specific statutory standard for such stays. The Suspension Clause requires that the courts have the power to ensure that the protections of the writ are fully and practically effectuated. While Congress might prescribe some standard for stays of removal without running afoul of the Suspension Clause, it may not impose a standard that would vitiate the writ by prohibiting courts from issuing a temporary stay when necessary to preserve the ability to grant relief on the merits. Nothing in the plain language of Section 1252 indicates that Congress intended to impose the severe Section 1252(f)(2) standard to temporary stays, and there is no reason to believe that Congress would intend the illogical and unconstitutional consequences of such a rule.

Although *amici* take no position on the precise standard that should be employed, we note that the normal stay standards prevailing in courts of appeals would permit a court the flexibility to decide in light of circumstances when a stay of removal is required

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[9] *Amici* observe parenthetically that the language of Section 1252(f)(2) states that "[n]otwithstanding any other provision of law, no court shall enjoin the removal" of particular aliens, in contrast with 8 U.S.C. § 1252(f)(1), which limits the authority of any "court (other than the Supreme Court)." Thus, if Section 1252(f)(2) were to apply to stays of removal, it would also appear to apply to stays of removal granted by this Court.

to preserve the court's ability ultimately to grant relief on the merits. Moreover, such flexible standards are consistent with the principle that the Suspension Clause does not prevent the courts from "dispos[ing] quickly, efficiently and fairly of first habeas petitions that lack substantial merit, while preserving more extensive proceedings for those petitions raising serious questions." *Lonchar*, 517 U.S. at 325. Historical practice, as well as sound policy, countenance the threshold rejection of a habeas petition – and any accompanying application for a stay – that demonstrates its own lack of merit. *See* Hurd, *supra* at 222-24; *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.) ("[T]he writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison."). But in cases that require more time for consideration, the Suspension Clause does demand that the courts have the authority to stop the custodian from placing the prisoner where the court will be powerless to provide effective relief.

CONCLUSION

Amici curiae respectfully urge the Court to reverse the decision of the Fourth Circuit and to hold that 8 U.S.C. § 1252(f)(2) does not apply to an application for a stay of removal pending decision on a petition for review.

Respectfully submitted,

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