No. 16-812

IN THE

Supreme Court of the United States

ROSA ELIDA CASTRO, *et al.*,

Petitioners,

—v.—

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Third Circuit held, for the first time in the country's history, that individuals on U.S. territory are "prohibited from invoking the protections of the Suspension Clause" due to the manner and timing of their entry. App. 60a. The government does not dispute that this holding was the *sole*, outcome-determinative basis on which the court of appeals rejected petitioners' argument that the Suspension Clause requires judicial review of their removal order challenges. Nor does the government claim that there is any obstacle that would prevent this Court from reaching the issue. BIO 12-13. The government also does not dispute that the Third Circuit's ruling is unprecedented. As the ABA brief observes: "Until the Third Circuit's decision, no individual found on U.S. soil has been deemed outside the protections of the Suspension Clause absent a formal suspension of the habeas writ." ABA Br. 5. Most tellingly, the government does not defend the Third Circuit's view that petitioners cannot invoke the Suspension Clause, noting that it "pressed a somewhat different rationale" below and that Judge Hardiman did not adopt the majority's analysis. BIO 14-15, 18.

The government nonetheless opposes review, principally asserting that the judgment can be defended on other theories having nothing in particular to do with the Suspension Clause. But the government's proffered defenses provide no basis for the Court to leave in place this extraordinary ruling. Having held for the first time ever that Congress can deny the Suspension Clause's protections to individuals inside the United States, the Third Circuit offered no method for determining under

what circumstances this is permissible, once that determination is untethered from the clear textual command of the Clause limiting suspension to a declared rebellion or invasion. *See* Pet. 4-5, 23-25. In fact, although the Framers enacted "specific language" to secure habeas as a "structural" check on the political branches, *Boumediene v. Bush*, 553 U.S. 723, 740, 745 (2008), the Third Circuit candidly acknowledged that its decision will require case-by-case line drawing based on a series of undefined factors. The government ignores this problem entirely.

The implications of the Third Circuit's decision were already far-reaching at the time the petition was filed. They are even more so now that the Secretary of Homeland Security has announced that he intends to exercise his authority to expand expedited removal. BIO 4 n.1. The Court should grant the petition to clarify that the Suspension Clause continues to protect all persons inside our borders.

ARGUMENT

I. THE GOVERNMENT'S ALTERNATIVE THEORIES FOR DEFENDING THE JUDGMENT ARE NOT A BASIS FOR DENYING REVIEW.

The Third Circuit's holding that petitioners cannot invoke the Suspension Clause conflicts with *Boumediene* and centuries of habeas law. *See* Habeas Scholars Brief. Indeed, *Boumediene* only examined whether the petitioners in that case were "barred from . . . invoking the protections of the Suspension Clause," 553 U.S. at 739, because they were alleged

enemy combatants who were *not* on U.S. soil. The government offers no analysis of the Suspension Clause to justify the Third Circuit's decision. That silence is telling, underscoring that the Third Circuit's rationale is not just unprecedented, but also indefensible on its own terms. Instead, the government defends the judgment on two alternative theories, neither of which is a basis for denying review.

A. The Government's Due Process Theory Is Misplaced And Wrong.

1. The government notes that noncitizens arriving at *ports of entry* generally lack procedural due process rights with respect to their admission and argues that because petitioners were very recent unlawful entrants, they should be "assimilated" to the same constitutional status as those noncitizens and likewise denied procedural due process. The government then argues that because petitioners lack due process rights, they also lack habeas rights. BIO 16-21. But that conflicts squarely with *Boumediene*, which held that Suspension Clause rights do *not* hinge on the existence of due process rights, a holding that the government wholly ignores. 553 U.S. at 785. Thus, even if petitioners did lack due process rights, that would not determine whether they can invoke the Suspension Clause. Habeas corpus must be available for review of *statutory* and *regulatory* claims (which petitioners have raised). Pet. 25, 34-35; Habeas Scholars Br. 17-18; Immigration Profs. Br. 4-5.

This is why even arriving noncitizens at ports of entry have always had habeas rights to enforce their statutory and regulatory rights, even if they

may have lacked procedural due process rights. That historical body of habeas law was central to the Court's reasoning in *INS v. St. Cyr*, 533 U.S. 289, 300-08 (2001), yet the government relegates it to a cursory footnote. BIO 26 n.8. *See* Pet. 27-28 (discussing habeas review for arriving noncitizens at ports of entry); Habeas Scholars Br. 14-15 (same). In short, the government's extended discussion of its due process theory is beside the point, because the Suspension Clause applies even to those who lack due process rights.

2. In any event, petitioners *are* entitled to due process, so the government's premise is also mistaken. The government's "assimilation" theory is in conflict with this Court's decisions and the uniform rulings of other circuits, and is inconsistent with the position to which the government itself has long adhered. Pet. 30-34; Immigration Profs. Br. 2-3, 5-10. Indeed, the government has not cited a *single* decision of this Court or any circuit that denies due process rights to an individual who has entered the country.

The government seeks support for its assimilation theory in century-old *dicta* in *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903), where the Court left "on one side" whether a noncitizen who entered "clandestinely" and "who has been here for too brief a period to have become, in any real sense, a part of our population" is entitled to due process. But *Yamataya* found that the petitioner *did* have due process rights, even though she had been in the country for only *four* days. *Id.* at 87, 100-01. Moreover, contrary to the government's current characterization of the case, BIO 17, the petitioner

did not enter legally at a port of entry, but "'had surreptitiously, clandestinely, unlawfully, and without any authority come into the United States,'" *Yamataya*, 189 U.S. at 87 (quoting government's habeas return). *See also* Br. for the United States in *Yamataya v. Fisher*, Case No. 171, at 12 (stating petitioner entered "clandestinely and illegally"). Since *Yamataya*, this Court has repeatedly reaffirmed that noncitizens are entitled to due process once they enter the country—regardless of whether their presence is "temporary" or "unlawful." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). *See* Pet. 30-32; Immigration Profs. Br. 2-3. The other courts of appeals have likewise recognized that the question is settled, and the government has cited no case to the contrary. BIO 28-30. *See* Pet. 33-34 (citing cases holding due process applies even to very recent entrants); Immigration Profs. Br. 5-8.[1]

The government also fails to address its own prior acknowledgment of this bright-line rule. Pet. 32-33 (citing government briefs); Immigration Profs. Br. 8-10 (same).[2]

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[1] The government notes, BIO 30, that in *Borrero v. Aljets*, 325 F.3d 1003 (8th Cir. 2003), the individual was inside the country but still found to have limited entitlement to due process. But that individual was a *parolee* stopped at a port of entry, and did not make an entry**.** Parolees have long been treated for constitutional purposes as if they remained at a port of entry. *See* Immigration Profs. Br. 3.

[2] This exchange is illustrative of the government's consistent position prior to this litigation:

> JUSTICE BREYER: A person who runs in illegally, a person who crosses the border illegally, say, from Mexico is entitled to these rights when you catch him.

The government nonetheless defends an "assimilation" rule on the ground that recent entrants have a diminished liberty interest. BIO 15, 17-18. But that is certainly not true where individuals are fleeing for their lives and invoking statutory asylum rights, as are the mothers and children here. The government also criticizes the bright-line rule (which it previously acknowledged) as creating an incentive for individuals to enter clandestinely. BIO 21. That overestimates the extent to which nuances of U.S. constitutional law affect decisions by asylum seekers, who must flee their countries and attempt to reach the U.S. wherever and however they can. *See* Refugee Groups Br. 24-25. Moreover, this Court has long been aware of the advantages and disadvantages of a bright-line rule and has never chosen to adopt the vague and undefined test now advocated by the government. *See* Immigration Profs. Br. 11-12 (explaining difficulty with jettisoning the current bright-line rule). And, in any event, as explained above, the *Suspension Clause* would still apply *even if* petitioners were treated as if they were at a port of entry.

That *Congress* has now chosen to label individuals who enter without inspection as applicants seeking admission does not and cannot alter the constitutional rule; otherwise Congress could dictate the scope of the Due Process Clause

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> [DEPUTY SG]: He's entitled to procedural due process rights.

Transcript of Oral Argument at *25, *Clark v. Martinez*, 543 U.S. 371 (2005) (Nos. 03-878, 03-7434).

simply by renaming deportations "denials of admission." *See* Immigration Profs. Br. 12. Moreover, allowing such an end-run around due process would be especially problematic in this context, because by statute expedited removal can be used for individuals who have resided anywhere in the country for up to two years and, as noted, DHS has announced its intent to use this authority.[3]

B. The Government Cannot Justify The Third Circuit's Decision Under The Second *Boumediene* Step.

The government argues in the alternative that even if petitioners may invoke the Suspension Clause, the petition should be denied because the statutory scheme satisfies the constitutionally-required level of review, an issue the Third Circuit expressly declined to reach. App. 52-53a. That is not a basis for denying the petition, especially because the statutory scheme is plainly inadequate to satisfy constitutional habeas requirements.

The government's interpretation of the statute, adopted by the Third Circuit, is that it precludes review even of constitutional claims and questions of law. BIO 7-8, 19-20; App. 21a. But as *Boumediene* makes clear, 553 U.S. at 779, the

[3] The government cites cases involving the definition of "entry" under a particular *statute*. BIO 22-23. Those cases have no bearing on the constitutional line, and in any event arose in the very different context of third parties aiding border crossings; in other contexts, courts have held that individuals apprehended a short distance inside the country have "entered" even for statutory purposes. *See, e.g.*, *Nyirenda v. INS*, 279 F.3d 620, 623-25 (8th Cir. 2002) (2 miles).

Suspension Clause *requires* review of questions of law. Pet. 28 (discussing *Boumediene* and *St. Cyr*); *see also* Habeas Scholars Br. 12.[4]

The government suggests that although the statute does not permit review of legal claims, that defect is not fatal because the *administrative* process is sufficient. BIO 19-20, 31. But the administrative process is anything but robust, and widespread errors in the expedited removal process are well documented. *See* Pet. 9, 13; Refugee Groups Br. 11-21 (discussing problems and need for judicial oversight). More fundamentally, legal claims must be judicially reviewable *even if* the underlying administrative process satisfies due process. As the Court held in *Boumediene*, 553 U.S. at 785, "[e]ven if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry" because habeas is still required.[5]

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[4] The government notes that the district court characterized one of petitioners' substantive claims as involving the application of law to *disputed* fact. BIO 20; *see also* BIO 20-21 (addressing review of *factual* claims). The district court's characterization was wrong. The claim is that the agency applied an erroneously high asylum standard to the facts found by the asylum officer. In any event, neither the district court nor the government has suggested that *all* of petitioners' claims are factual, nor could they. Pet. 10, 13. And, because it deemed the Suspension Clause inapplicable at the threshold, the Third Circuit did not assess the nature of petitioners' claims, and simply noted that the habeas petitions alleged violations of the Constitution, statute and regulations. App. 15a.

[5] The government cites 8 U.S.C. § 1252(e)(3), but fails to note that it applies only to challenges to "written" policies. Pet. 14 n.7 (discussing inapplicability of provision).

The government also cites a few decisions involving the expedited removal jurisdictional provisions, BIO 23-24, but none of the cases contains any analysis of the Suspension Clause (much less holds that petitioners could not even invoke the Clause), and the Third Circuit understandably did not rely on them in its Suspension Clause analysis. Pet. 16 n.8.[6]

II. THE GOVERNMENT'S POLICY-ORIENTED ARGUMENTS ARE NOT A BASIS FOR DENYING REVIEW.

The government argues that the Court should decline to hear this case because the expedited removal process could not function with habeas. That is an overstatement for many reasons, including that as a practical matter few petitioners have been or will be in a position to file habeas petitions; review of legal claims will not require extended litigation once these jurisdictional issues are resolved; rulings on the legality of certain practices will reduce the need for further cases; and the district courts will have the ability to streamline procedures. *See Boumediene*, 553 U.S. at 796 (emphasizing courts' latitude to fashion habeas procedures). More fundamentally, every restriction on habeas can be explained by a desire to streamline the process, which is precisely why the Framers included "specific language" in the Suspension

[6] Only one of them was even a habeas case. *See*, *e.g.*, *Pena v. Lynch*, 815 F.3d 452, 456 (9th Cir. 2016) (noting that Pena filed a petition for review, had "not filed a habeas petition" and his only merits claim was not "colorable"). *See also* Pet. 16 n.8.

Clause providing the exclusive circumstances for restricting the writ. *Id*. at 740. This Court, moreover, has already rejected these same types of policy arguments for eliminating habeas. *Id*. at 796-98; Pet. 24.

Finally, the government argues that the decision below is narrow because the court left open the possibility that the Suspension Clause could be invoked to challenge a criminal prosecution or detention *conditions* (though the government notably does not mention release from detention). BIO 25. But those possibilities do not alter the significance of the Third Circuit's historically unprecedented holding denying noncitizens within our borders the right under the Suspension Clause to challenge their removal. *See St. Cyr*, 533 U.S. at 300-03 (reviewing history).

* * *

The government tries to make this case about due process, border searches, and criminal prosecutions—everything except the Great Writ itself. But this is a Suspension Clause case raising a foundational question: Whether Congress, for the first time, can deprive individuals on U.S. soil of the protections of the Clause where there has been no rebellion or invasion. This Court should decide that historic question.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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