No. 14-1495

IN THE

Supreme Court of the United States

ALVARO ADAME,

Petitioner,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONER

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
BRIANNE J. GOROD
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

July 20, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES – cont'd.

Page(s)

Books, Articles, & Other Authorities

TABLE OF AUTHORITIES – cont'd.

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari in this case presents an important question about whether courts of appeal have jurisdiction to review mixed questions of law and fact pursuant to a provision of the REAL ID Act, which provides that "[n]othing in [certain provisions that limit judicial review] shall be construed as precluding review of constitutional claims or questions of law," 8 U.S.C. § 1252(a)(2)(D). As the Petition explains, this provision was adopted by Congress to "'avoid the constitutional concerns outlined by [this] Court in [*I.N.S. v.*] *St. Cyr*,'" Pet. 5 (quoting *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 326 (2d Cir. 2006)), a case that recognized that "*some* 'judicial

[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* 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 *amicus* or its counsel made a monetary contribution to its preparation or submission.

intervention in deportation cases' is unquestionably 'required by the Constitution,'" *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001) (emphasis added) (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)).

Relying on its admittedly "strict" position on the meaning of that provision, the court below held that it could not review a BIA decision that rested on a mixed question of law and fact (in this case, whether the Immigration Judge properly required Petitioner Adame to provide additional evidence of continuous presence in the United States in the absence of a reasonable finding of lack of credibility and given that such evidence was not reasonably available). The effect of the court's decision is to deny Adame, who has lived in the United States since 1997 and whose removal was sought after he pleaded guilty to drinking in a public park, any judicial review before he is forced to leave this country, as well as his four children who are U.S. citizens and live with him here.

As the Petition demonstrates, this question is an important one not only to Adame, but also to the thousands of other individuals whose ability to seek judicial review of BIA decisions would be limited by the decision of the court below. Pet. 22-25; *see* Aaron G. Leiderman, Note, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 Colum. L. Rev. 1367, 1387 (2006) (noting that "[m]ixed questions of law and fact figure prominently in immigration law"). It is also a question on which, as the Petition shows and the court below acknowledged, there is a "serious" and long-standing conflict in the lower courts. Pet. App. 8a; *see* Pet. 9-15. As one of the courts on the other side of this entrenched split has explained, interpreting the provision at issue to permit judicial review of mixed questions of law and fact

is not only consistent with its text and history, but also is "compelled by principles of constitutional avoidance, precluding a constitutionally suspect alternative." *Ramadan v. Gonzales*, 479 F.3d 646, 654 (9th Cir. 2007). This brief in support of the Petition explains that interpreting the REAL ID Act to preclude judicial review of mixed questions of law and fact would raise serious constitutional questions because it would eliminate the judicial intervention in deportation cases that the Constitution requires. *Cf. St. Cyr*, 533 U.S. at 300.

When the Framers drafted our enduring national charter, they "viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). Article I thus makes explicit that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended," except in very limited circumstances, that is, "when in Cases of Rebellion or Invasion the public Safety may require it," U.S. Const. art. I, § 9, cl. 2. The Court has recognized that the Framers' inclusion of this specific language in the Constitution is testament to the central role that the writ plays in preserving liberty under our system of government. *Boumediene*, 553 U.S. at 739.

Indeed, in *I.N.S. v. St. Cyr*, this Court held that then-existing immigration laws did not preclude judicial review of questions of law because, in part, of the "serious" constitutional questions under the Suspension Clause that a contrary interpretation would produce. As the Court explained, "even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by respondent in this case could have been

answered in 1789 by a common-law judge with power to issue the writ of habeas corpus." *St. Cyr*, 533 U.S. at 304-05. Thus, the Court concluded, "a serious Suspension Clause issue would be presented if we were to accept the INS' submission" that such review is unavailable. *Id.* at 305.

Interpreting the provision of the REAL ID Act at issue here to preclude judicial review of mixed questions of law and fact, as did the court below, raises the same serious constitutional questions that this Court identified in *St. Cyr* because there is substantial evidence that the writ, as it existed in 1789, allowed for review of the types of questions that today are viewed as mixed questions of law and fact. Indeed, as this Court recognized in *St. Cyr*, "the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, *including the erroneous application or interpretation of statutes*." *Id.* at 302 (emphasis added). The existence of these serious constitutional questions presents an additional reason—in addition to the many reasons offered by the Petition, *see* Pet. 9-25—why the REAL ID Act provision at issue should not be interpreted to preclude judicial review of mixed questions of law and fact.

Amicus urges the Court to grant certiorari and reverse the erosion of the protections provided by the writ of habeas corpus countenanced by the decision below.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT, CONSISTENT WITH THE CONSTITUTIONAL GUARANTEE OF HABEAS CORPUS, THE REAL ID ACT GUARANTEES JUDICIAL REVIEW OF MIXED QUESTIONS OF LAW AND FACT

A. As this Court's Decision in *I.N.S. v. St. Cyr* Reflects, the Question Presented Implicates the Constitutional Guarantee of Habeas Corpus

Article I of the Constitution provides that "[t]he 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." U.S. Const. art. I, § 9, cl. 2. As this Court has long recognized, the Framers "viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." *Boumediene*, 553 U.S. at 739. In *Federalist 84*, for example, Alexander Hamilton explained that the "writ of habeas corpus" (along with the prohibition on ex post facto laws and titles of nobility) is "perhaps greater securities to liberty and republicanism than any [securities the New York Constitution] contains." *The Federalist No. 84*, at 479 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Of habeas corpus in particular, Hamilton noted that Blackstone is "everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls 'the BULWARK of the British Constitution.'" *Id.* at 480 (citing 4 William Blackstone, *Commentaries*, 438).

To ensure the continued existence of the writ, the Framers included "specific language in the Constitu-

tion to secure the writ and ensure its place in our legal system." *Boumediene*, 553 U.S. at 739-40; *see also id.* at 743 ("[t]hat the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension"). As one scholar has noted, "There was no provision relating to the writ of habeas corpus in the Articles of Confederation. The article which was introduced into the Constitution of the United States demonstrates how highly the privilege of the writ was valued, and how thoroughly it was supposed to be incorporated in the jurisprudence of the colonies." Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with it: with a View of the Law of Extradition of Fugitives* 122 (1858); *see* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 Colum. Hum. Rts. L. Rev. 555, 564 (2002) ("The Framers of the U.S. Constitution appreciated the importance of habeas corpus as a security for physical liberty.").

Indeed, as this Court observed in *Boumediene*, "[s]urviving accounts of the ratification debates provide additional evidence that the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme." *Boumediene*, 553 U.S. at 743; *id.* at 743-44 (noting that Edmund Randolph "referred to the Suspension Clause as an 'exception' to the 'power given to Congress to regulate courts'" (quoting 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 460-64 (Jonathan Elliot ed., 2d ed. 1876))). In fact, there was no disagreement about the importance of the writ at the Convention; what little debate existed centered on the question whether it should ever be

permissible to suspend the writ. *See, e.g.*, Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 Buff. L. Rev. 451, 456 (1996) ("Mr. Rutlidge was for declaring the Habeas Corpus inviolable—He did not conceive that a suspension could ever be necessary at the same time through all the States—"); Hurd, *supra*, at 123-24; Freedman, *supra*, at 455 (observing that the "overwhelming theme emerging from the historical materials . . . [is] that habeas corpus should be preserved in full vigor as a remedy . . . against potential governmental abuses").

Drawing on this history, this Court has recognized that "[t]he Clause protects the rights of the detained by a means consistent with the essential design of the Constitution," "ensur[ing] that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Boumediene*, 553 U.S. at 745 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality)).

Relying on this constitutional guarantee, the Court observed in *I.N.S. v. St. Cyr* that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution,'" 533 U.S. at 300 (quoting *Heikkila*, 345 U.S. at 235), and that conclusion figured prominently in its analysis in that case. In *St. Cyr*, this Court was asked whether the district court retained jurisdiction under the general habeas statute to consider the petitioner's claim that certain amendments to the immigration law did not apply retroactively to him, notwithstanding four provisions of the immigration laws that the government contended "stripped the courts of jurisdiction to decide the question of law presented by respondent's habeas corpus application." *Id.* at 298.

In concluding that the district court retained jurisdiction to consider St. Cyr's claim, this Court noted that "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions." *Id.* at 300. As the Court further explained, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" *id.* at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)), and "even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus," *id.* at 304-05.

For that reason, this Court concluded that "[i]t necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise." *Id.* at 305; *see also id.* ("The necessity of resolving such a serious and difficult constitutional issue—and the desirability of avoiding that necessity—simply reinforce the reasons for requiring a clear and unambiguous statement of congressional intent" to foreclose judicial review.). As the next Section demonstrates, the decision of the court below implicates the same "serious and difficult constitutional issue" identified by this Court in *St. Cyr*.

B. Interpreting the REAL ID Act To Preclude Judicial Review of Mixed Questions of Law and Fact Would Raise Serious Constitutional Questions

As just discussed, the Framers believed that the writ of habeas corpus was essential to the preservation of liberty, and thus ensured in the Constitution that the writ could be suspended only on certain narrow and specified grounds. Moreover, as this Court has recognized, the Suspension Clause protects, at minimum, the writ "as it existed in 1789." *St. Cyr*, 533 U.S. at 301; *see* Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2517 (1998) ("the Supreme Court has never wavered from the proposition that the Suspension Clause incorporates the common law writ of habeas corpus as it existed in 1789"). Interpreting the REAL ID Act provision at issue here to preclude any judicial review of mixed questions of law and fact would raise serious constitutional questions because there is substantial evidence that the 1789 writ permitted courts to inquire into such questions.

As scholars have recognized, "the common law writ of habeas corpus was not limited simply to 'jurisdictional' issues, but encompassed legal error, abuses of discretion, and, at times, factual findings." Hafetz, *supra*, at 2524; *see* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. Sch. L. Rev. 133, 141 (2006) ("case law of the pre-INA period and post-*St. Cyr* cases in the courts of appeals illustrate that the traditional scope of review also extends to 'mixed' questions of law and fact" (internal footnotes omitted)); James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and* INS v. St. Cyr, 16 Geo. Immigr. L.J. 485,

503 (2002) (noting the "substantial historical evidence that at common law the Great Writ was available to non-citizens to review a wide range of legal questions"). Indeed, "the writ's scope was always broadest where the commitment involved" the types of elements at issue in deportation proceedings, such as "the exercise of executive power" and "no safeguard of jury trial." Hafetz, *supra*, at 2524; *see St. Cyr*, 533 U.S. at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1238 (1970) ("While habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention."); *cf. Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) (noting that "the traditional Great Writ was largely a remedy against executive detention").

In *St. Cyr*, this Court recognized that "the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, *including the erroneous application or interpretation of statutes*." 533 U.S. at 302 (emphasis added). And, as the Petition discusses, there are numerous cases in which common-law courts viewed the writ as extending to such mixed questions of law and fact. *See* Pet. 20-21 (discussing cases). In *Swallow v. City of London*, for example, "a prisoner, committed for refusing to accept the office of alderman to which he had been elected, successfully confessed and avoided the return by demonstrating that as an officer of the King's mint he was legally

exempt from all city offices." Hafetz, *supra*, at 2531-32 (citing (1666) 82 Eng. Rep. 1110 (K.B.)); *see also* Hurd, *supra*, 270 ("Where the return shows that the prisoner is legally detained on a civil process, he may, by affidavit, show that he is privileged from arrest. . . . or that he was arrested on a privileged day, as on Sunday." (citation omitted)). In *King v. Nathan*, (1702) 93 Eng. Rep. 914 (K.B.); 2 Strange 880, the court held that a prisoner who had lied while under oath "must be discharged" because the statute required that "there should be interrogatories exhibited for his examination, that so he may have time to consider of his answer," which was not done in that case. "It is very dangerous," the court explained, "to let people depart from the words of the Act, where these special authorities are given. And this commitment not pursuing the words, the prisoner must be discharged." *Id.* at 914.

There is even evidence that common law courts allowed *factual* claims to be challenged at habeas. *See, e.g.*, Hafetz, *supra*, at 2535 ("Notwithstanding the rule against controverting the truth of the return, judges were not entirely precluded from reviewing facts on habeas corpus."); Brief *Amici Curiae* of Legal Historians Listed Herein In Support of Respondent, *I.N.S. v. St Cyr*, 533 U.S. 289 (2001) (No. 00-767), 2001 WL 306173, at *9 ("Common law judges in eighteenth-century England disagreed about the extent to which the truth of facts asserted in a return of a writ could be examined by the court in a *habeas* hearing without being put before a jury."). This Court need not resolve that question in this case because Adame does not dispute the historical facts at issue in this case—but the fact that there is evidence that common law courts sometimes considered factual disputes underscores the breadth of habeas review

at common law. Common law courts certainly would have reviewed a question such as the one at issue in this case involving the application of law to undisputed facts.

There is thus a serious question whether the REAL ID Act, if interpreted to preclude judicial review of mixed questions of law and fact, is constitutional. Such a serious constitutional question should inform the Court's interpretation of the REAL ID Act. As this Court has repeatedly recognized, "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830); *see, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 258 U.S. 22, 62 (1932))). The conclusion that the REAL ID Act provision at issue in this case permits judicial review of mixed questions of law and fact is amply supported by the statute's text and history, *see* Pet. 15-19, but these serious constitutional concerns—and the underlying constitutional values they reflect—present an additional reason why the REAL ID Act should not be interpreted to preclude review of mixed questions of law and fact.

This Court should grant certiorari to address the proper interpretation of 8 U.S.C. § 1252(a)(2)(D) and hold that it permits judicial review of mixed questions of law and fact.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
BRIANNE J. GOROD
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

July 20, 2015 * Counsel of Record