No. 19-1937

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CHRISTIAN AGUASVIVAS,

Petitioner-Appellee,

v.

MICHAEL POMPEO*, et al.*,

***Respondents–Appellants*.**

On Appeal from the United States District Court
for the District of Rhode Island
No. 1:19-cv-00123-JJM-PAS

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND ACLU FOUNDATION OF RHODE ISLAND IN SUPPORT OF APPELLEE AND AFFIRMANCE

Lee Gelernt
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad St., 18th Floor
New York, NY 10004
Telephone: (212) 549-2660

Roberto Gonzalez #3619
Cooperating attorney
ACLU FOUNDATION OF RHODE ISLAND
Gonzalez Law Offices, Inc.
450 Warren Avenue
E Providence, RI 02914
Telephone: (401) 432-7500

Cody Wofsy
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0770

Lynette Labinger #1645
Cooperating attorney
ACLU FOUNDATION OF RHODE ISLAND
128 Dorrance Street, Box 710
Providence, RI 02903
Telephone: (401) 465-9565

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amici curiae the American Civil Liberties Union Foundation and ACLU Foundation of Rhode Island do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in any of the amici curiae.

/s/ Cody Wofsy
Cody Wofsy
November 27, 2019

INTEREST OF *AMICI*

Amicus American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU's Immigrants' Rights Project ("IRP") engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants. IRP has developed a particular expertise on judicial review, having litigated *INS v. St. Cyr*, 533 U.S. 289 (2001), as well as numerous jurisdictional cases addressing issues related to those presented here in the courts of appeals, including *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097 (9th Cir. 2019), *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc) (per curiam) (as amicus), and *Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008).

Amicus ACLU Foundation of Rhode Island ("ACLU-RI") is the state Affiliate of the ACLU. Like its parent organization, ACLU-RI is dedicated to promoting the principles of liberty and equality embodied in the laws and Constitution of the United States which protect the rights of immigrants. In furtherance of those principles, ACLU-RI, through its cooperating counsel, and often in conjunction with the ACLU, has appeared before this Court and the District of Rhode Island, both as party counsel and as *amicus curiae*, in a number of cases

addressing the rights of immigrants and the interpretation of federal immigration law. *See, e.g.*, *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014), 793 F.3d 208 (1st Cir. 2015), 235 F. Supp. 3d 388 (D.R.I. 2017); *Vieira-Garcia v. Immigration and Naturalization Service*, 239 F.3d 409 (1st Cir. 2001); *Fernandes v. Immigration and Naturalization Service*, 79 F. Supp. 2d 44 (D.R.I. 1999); and *Qu v. Central Falls Detention Facility Corporation*, 717 F. Supp. 2d 233 (D.R.I. 2010).

Amici submit this brief to address the government's arguments that the district court lacked jurisdiction over Petitioner's torture-related claims—an issue regarding which they have substantial experience and expertise. Amici also submitted an amicus brief in the district court and participated in oral argument.

This brief is filed with the consent of the parties. No party authored this brief in whole or in part. No party nor any other individual (other than *amici* and their counsel) contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

The federal government has already determined that Petitioner Cristian Aguasvivas is likely to be tortured if he is sent back to the Dominican Republic. Add. 62. The government is nevertheless now seeking to extradite him. It does not attempt to contest the likelihood of torture, instead arguing that the district court lacked jurisdiction to consider Petitioner's torture-related claims.

Amici write to explain why that is incorrect. The district court had subject matter jurisdiction to consider these claims. Indeed, the Suspension Clause of the Constitution guarantees the court's habeas jurisdiction, as reflected in a long history of habeas review over similar challenges to executive detention. No statute purports to strip the district court's jurisdiction over this case, and certainly does not do so with the clarity required to circumscribe habeas jurisdiction. And the rule of non-inquiry has no bearing at all on subject matter jurisdiction, and in any event does not apply where, as here, the government has *already* determined that a petitioner is likely to be tortured. If the Court reaches the torture issues, it should affirm the district court's exercise of jurisdiction. Amici do not address the government's ripeness arguments, or the merits of Petitioner's torture claims.

ARGUMENT

I. THE SUSPENSION CLAUSE GUARANTEES REVIEW OF PETITIONER'S CLAIMS.

The Constitution guarantees the district court's jurisdiction. Const. art. I, § 9, cl. 2. Indeed, habeas has always been available to test the lawfulness of Executive restraints on liberty, and in the Suspension Clause the Framers of the Constitution specifically enshrined the Writ as a critical safeguard to ensure individual liberty. *See Boumediene v. Bush*, 553 U.S. 723, 743-45 (2008). As the Supreme Court has explained, the Clause "is designed to protect against" lawless detention and "maintain the 'delicate balance of governance'" by "affirming the duty and authority of the Judiciary to call the jailer to account." *Id.* at 745; *see also INS v. St. Cyr*, 533 U.S. 289, 301-02 (2001); *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1105 (9th Cir.), *cert. granted*, 2019 WL 5281289 (2019).

Three principles are particularly important in guiding the Suspension Clause analysis. First, habeas in the civil context—unlike in the criminal area—implicates the core purposes of the writ. *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."); *see also Boumediene*, 553 U.S. at 780 (observing that "the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for

detention"); *id.* at 783 ("Where a person is detained by executive order, rather than . . . after being tried and convicted in a court, the need for collateral review is most pressing.").

Extradition represents an instance of executive detention. *See Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc) (per curiam). In his torture claims, Petitioner is not seeking collateral review of any judicial judgment. *See St. Cyr*, 533 U.S. at 300-01 (cautioning against conflating criminal cases involving post-conviction relief with cases where prior judicial review is absent). Rather, he challenges the Executive's ability to detain and extradite him without court involvement. Those claims thus lie within the "historical core" of the Writ, where "its protections have been strongest." *Id*. at 301.[1]

Notably, in the course of assessing the Suspension Clause questions raised in an immigration case, this Court looked to the long history of habeas for noncitizens, explaining that: "Even before the federal government took on the task of regulating immigration, federal courts employed the writ of habeas corpus to inquire into the lawfulness of," among other things, "extradition of aliens accused of crime." *Saint Fort v. Ashcroft*, 329 F.3d 191, 197 (1st Cir. 2003) (quoting G.L. Neuman,

[1] Habeas is also available, as the government concedes, to review Petitioner's non-torture claims. Gov't Br. 1, 17.

Jurisdiction and the Rule of Law After the 1996 Immigration Act, 113 Harv. L.Rev.1963, 1966 (2000)) (internal quotation marks omitted); *see also id*. at 201-02.

The government dismisses *Saint Fort* and *St. Cyr* because they did not speak to the historical availability of habeas in this precise context: "Whether fugitives historically had a right to judicial review of the treatment they anticipate receiving in the foreign country in connection with a habeas challenge to extradition." Gov't Br. 41-42. But the Supreme Court's Suspension Clause cases do "not focus narrowly, as the Government would have us do, on whether there was a history of *habeas* review of the exact claims at issue in that case"; rather, they use a "broad lens" to assess the "historical availability of the writ." *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 220 (3d Cir. 2003) (discussing *St. Cyr*). In *Boumediene*, for example, the Court did not examine whether there was a history of the precise type of claims at issue—alleged enemy combatants challenging military tribunals. Instead, it looked to general categories of claims that fell within the traditional writ and the purposes of the Suspension Clause, including guaranteeing liberty and the separation of powers. 553 U.S. at 739-746; *see id.* at 752 ("common-law courts simply may not have confronted cases with close parallels to this one").[2]

[2] To the extent the government's point is the Clause does not apply because the non-inquiry rule has historically divested jurisdiction over claims like these, that argument is misplaced—both because that rule is not about a court's habeas *jurisdiction*, and because the rule is inapplicable here in any event. *See infra* Part II.

Second, the minimum scope of judicial review protected by the Suspension Clause must include at least review of legal and constitutional challenges. *See Boumediene*, 553 U.S. at 779; *St. Cyr*, 533 U.S. at 302; *see also Saint Fort*, 329 F.3d at 203. Petitioner's torture claims fall within the required scope of habeas review. *See Trinidad y Garcia*, 683 F.3d at 956 (Suspension Clause guaranteed review of legal challenge to extradition); *see also Thuraissigiam*, 917 F.3d at 1117 (scope includes mixed questions of law and fact).

The government contends that Petitioner's claims fall outside the Clause because the Secretary of State's decision to extradite involves an exercise of discretion. Gov't Br. 39. But Petitioner is arguing that his extradition is legally prohibited—i.e. that the Secretary has *no* discretion to extradite him. *See Mironescu v. Costner*, 480 F.3d 664, 670 (4th Cir. 2007) (cited by government) ("although the Executive has unlimited discretion to *refuse* to extradite a fugitive, it lacks the discretion to extradite a fugitive when extradition would" be unlawful); *cf. St. Cyr*, 533 U.S. at 307-08 (similar).

Third, history figures prominently in determining the contours of the writ. *See, e.g.*, *Boumediene*, 553 U.S. at 739-52, 779-82 (analyzing the writ's history at length); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) ("for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law"); *Peyton v. Rowe*, 391 U.S. 54, 59 (1968) ("[T]o ascertain its meaning and the

appropriate use of the writ in the federal courts, recourse must be had to the common law . . . and to the decisions of this Court interpreting and applying the common-law principles.") (internal quotation marks omitted). "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301. But the Supreme Court "has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ." *Boumediene*, 553 U.S. at 746.

As extensively detailed by the Supreme Court in *St. Cyr*, "[i]n England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government," noncitizens as well as citizens had access to the writ to challenge a broad variety of restraints on liberty. 533 U.S. at 301 (footnote omitted). Because England was not a party to an extradition treaty before 1776, there were no common law cases specifically concerning "extradition" in the modern sense. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 995 (1998). But the breadth of habeas jurisdiction exercised at common law provides strong support for the conclusion that habeas courts had power to inquire into the lawfulness of an individual's transfer to locations outside the kingdom. *See St. Cyr*, 533 U.S. at 302 (noting that, for example, the writ "was used to command the discharge of seamen who had a statutory exemption from

impressment into the British Navy, to emancipate slaves, and to obtain the freedom of apprentices and asylum inmates") (citing cases, footnotes omitted).

Of particular importance here, historical practice indicates common law habeas courts exercised their jurisdiction to prevent the transfer of individuals to places outside of England, including for the purpose of criminal prosecution abroad. *Murray's Case* is one such example. Robert Murray was imprisoned in 1677 on two occasions for "defamation of his majesty and his government" and "in order to his being sent into Scotland to be tried there according to law for several crimes." Paul D. Halliday, *Habeas Corpus: From England to Empire*, 236 (Belknap Press of Harvard Univ. Press 2010) (hereinafter "Halliday"). The King's Bench issued the writ to inquire into Murray's removal, and ultimately bailed him and thus prevented him from being sent outside the kingdom. *Id.*[3]

Since the framing of the Constitution, habeas courts in the United States have consistently exercised jurisdiction to review the lawfulness of extradition decisions. The government suggests that habeas jurisdiction in the extradition context has been limited to claims alleging noncompliance with the extradition treaty or statute.

[3] The well-known *Somerset's Case*, 20 How. St. Tr. 1 (K.B. 1772), likewise provides precedent for the power of the habeas courts to inquire into an individual's transfer to a location outside the realm. In *Somerset's Case*, the King's Bench issued the writ to prevent James Somerset, an individual allegedly bound to slavery, from being sent to Jamaica. *See* Halliday 174-76 (providing account of *Somerset's Case*); *see also St. Cyr*, 533 U.S. at 302 n.16 (citing *Sommersett v. Stewart*, 20 How. St. Tr. 1, 79-82 (K.B. 1772)).

Gov't Br. 40. But that is not so. Rather, courts have always entertained a wide variety of arguments that extradition is unlawful for reasons other than failure to comply with the extradition statute or treaty at issue.

For example, in *Rice v. Ames*, 180 U.S. 371 (1901), the Supreme Court reviewed a state statutory claim that the habeas petitioners' extradition was unlawful because the government had obtained a continuance of the proceedings in excess of the amount of time permitted for continuances under Illinois law. *Id.* at 376. In addition to the statutory claim, *Rice* also reviewed a constitutional challenge to the statute concerning procedures and appointment of extradition commissioners. *Id.* at 378. Neither of these claims were about compliance with the statute or treaty, but both were decided on the merits. The lower courts have routinely followed suit. *See, e.g.*, *Martin v. Warden*, 993 F.2d 824, 827-29 (11th Cir. 1993) (reviewing claim that 17-year delay in pursuing extradition violated due process, and emphasizing that "[t]he United States' actions in reviewing a request for extradition are, of course, subject to the constraints of the Constitution"); *see also*, *e.g.*, *Vo v. Benov*, 447 F.3d 1235, 1245-48 (9th Cir. 2006) (reviewing and rejecting habeas petitioner's due process challenges to extradition); *Lo Duca v. United States*, 93 F.3d 1100, 1104, 1108-11 (2d Cir. 1996) ("assess[ing] on their merits" habeas petitioner's claims that extradition statute violates separation of powers, Appointments Clause, and Federal Magistrates Act, 28 U.S.C. § 646(b)); *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352-56

(6th Cir. 1993) (reviewing whether prosecutors had committed fraud on the court by failing to disclose exculpatory evidence in extradition proceedings, and vacating district court's denial of habeas); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1408 (9th Cir. 1988) (reviewing and rejecting claim that judge presiding over extradition hearing was required to recuse himself from habeas proceeding); *Romeo v. Roache*, 820 F.2d 540, 543-44 (1st Cir. 1987) (reviewing and rejecting habeas petitioner's claim that his Sixth Amendment right to counsel and due process require competency hearing in extradition proceedings); *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir. 1984) (reviewing and rejecting habeas petitioner's claim that due process required the application of U.S. limitations statute to prevent his extradition); *David v. Attorney General*, 699 F.2d 411, 416 (7th Cir. 1983) (reviewing claim that the judge who presided at the extradition hearing was required to recuse himself from the habeas proceeding).

Moreover, in a number of cases the courts of appeals have entertained claims on the merits that the prior conduct or commitments of the federal government prevented it from extraditing an individual—regardless of whether those actions violated the extradition statute or treaty. Like Petitioner's argument based on the government's already completed assessment that he is likely to be tortured, such cases recognize that "federal courts undertaking habeas corpus review of extraditions have the authority to consider . . . the substantive conduct of the United

States in undertaking its decision to extradite if such conduct violates" its legal obligations. *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984).

In *Plaster v. United States*, for example, the Fourth Circuit specifically rejected the government's argument that the habeas court had no jurisdiction to consider a constitutional claim that the petitioner's extradition would violate his agreement with the United States granting him immunity from any prosecution, 720 F.2d 340, 347-49, 351-55 (4th Cir. 1983); *see also, e.g.*, *Valenzuela v. United States*, 286 F.3d 1223, 1229-30 (11th Cir. 2002) (granting habeas petition where petitioner asserted due process claim based on prosecutor's breach of immunity agreement, and emphasizing that "[d]espite our limited role in extradition proceedings, the judiciary must ensure that the constitutional rights of individuals subject to extradition are observed"); *Geisser v. United States*, 627 F.2d 745, 749-50 (5th Cir. 1980) (reviewing claim that habeas petitioner's extradition would violate plea agreement with the United States, and determining whether State Department's communications with Swiss government were sufficient to fulfill plea agreement).

Indeed, *Plaster* expressly recognized that review of the habeas petitioner's legal claim was required by the Suspension Clause: "[B]ecause a claim of unconstitutional governmental conduct is within the scope of habeas corpus review *mandated by both the Constitution itself, U.S. Const. art. I, sec. 9, cl.2,* and the applicable federal statute, 28 U.S.C. § 2241 . . ., we conclude that the district court

was correct in entertaining Plaster's claim." 720 F.2d at 348 (emphasis added). Here, likewise, Petitioner alleges that his extradition would represent illegal government conduct, given that the government has already concluded he is likely to be tortured if returned to the Dominican Republic.

Thus, the Government is incorrect, Gov't Br. 40, that in the extradition context habeas has been limited to the particular issues noted in *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925). That decision addresses the scope of review of the magistrate judge's extraditability determination—not the scope of habeas altogether, regardless of the other ways in which an extradition may be unlawful. *See Burt*, 737 F.2d at 1484 (rejecting government's broad reading of *Fernandez*); *Plaster*, 720 F.2d at 348 (same). To the contrary, where, as here, an individual claims his extradition is unlawful, he is entitled by force of the Suspension Clause to habeas review of that claim.

II. NO STATUTE PURPORTS TO DIVEST THE DISTRICT COURT OF JURISDICTION, AND THE RULE OF NON-INQUIRY IS INAPPOSITE.

In the face of the Suspension Clause's guarantees, the government offers two arguments that the district court lacked jurisdiction: First, that federal statutes "preclude judicial review" here, Gov't Br. 36, and second, that the rule of non-inquiry bars this case. Both lack merit.

1. The district court had statutory jurisdiction "pursuant to 28 U.S.C. § 2241, which makes the writ of habeas corpus available to all persons 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Trinidad y Garcia*, 683 F.3d at 956. The government contends, however, that the Convention Against Torture ("CAT") and federal statutes stripped the court's jurisdiction. Gov't Br. 36. That argument is incorrect.

As the Ninth Circuit has explained, a "statute must contain 'a particularly clear statement' before it can be construed as intending to repeal habeas jurisdiction." *Trinidad y Garcia*, 683 F.3d at 956 (quoting *Demore v. Kim*, 538 U.S. 510, 517 (2003)). "Even if a sufficiently clear statement exists, courts must determine whether 'an alternative interpretation of the statute is fairly possible' before concluding that the law actually repealed habeas relief." *Id.* (quoting *St. Cyr*, 533 U.S. at 299-300). That is so because, in a case like this one, a statute stripping habeas jurisdiction would—to say the least—"raise serious constitutional problems" under the Suspension Clause. *St. Cyr*, 533 U.S. at 300; *see supra* Part I.

The government invokes the CAT itself as stripping jurisdiction over this case. Br. 30. That argument is foreclosed, as this Court has held that the Foreign Affairs Reform and Restructuring Act ("FARRA"), 8 U.S.C. § 1231 note, "gives the CAT domestic effect," and "FARRA and the regulations are now the positive law of the United States, and, as such, are cognizable under habeas," *see Saint Fort*, 329

F.3d at 202. Moreover, the government points to nothing in the text of the Convention to support the argument that it strips jurisdiction. Instead, it points only to a reference in the Senate report about the convention not being self-executing. That plainly cannot amount to a particularly clear statement *in* the convention. *See Trinidad y Garcia*, 683 F.3d at 956 (holding district court had jurisdiction); *St. Cyr*, 533 U.S. at 299 ("Implications from . . . legislative history are not sufficient to repeal habeas jurisdiction . . . .").

The government's reliance on FARRA is likewise foreclosed by circuit precedent. This Court has held that FARRA must be read "in terms of its language and no more broadly," and that because it "does not expressly refer to 28 U.S.C. § 2241 or to habeas review," this Court refused to "imply an intent to repeal habeas jurisdiction from silence." *Saint Fort*, 329 F.3d at 201. The government emphasizes that FARRA says "nothing in this section shall be construed" to provide jurisdiction "except as part of the review of a final order of removal." Gov't Br. 32 (quoting 8 U.S.C. § 1231 note) (emphasis omitted). But this Court has explained that there "are a number of problems" with relying on that language to strip habeas jurisdiction, including that "the clause says it 'does not provide' jurisdiction, not that it repeals jurisdiction." *Saint Fort*, 329 F.3d at 201.

Numerous other courts of appeals have agreed with this Court's conclusion. *See Trinidad y Garcia*, 683 F.3d at 956; *Cadet v. Bulger*, 377 F.3d 1173, 1182 (11th

Cir. 2004); *Wang v. Ashcroft*, 320 F.3d 130, 141 (2d Cir. 2003); *Ogbudimkpa*, 342 F.3d at 221. Notably, in *Mironescu*, on which the government relies, the Fourth Circuit found no habeas jurisdiction over a CAT challenge to extradition but expressly stated that it was not considering the Suspension Clause and therefore failed to interpret FARRA in light of constitutional concerns. 480 F.3d at 677 n.15 ("We [] note that Mironescu does not argue that denying him the opportunity to present his CAT and FARR Act claims on habeas review violates the Suspension Clause. We therefore do not address that issue."); *see also Zhenli Ye Gon v. Dyer*, 651 F. App'x 249, 252 (4th Cir. 2016) (unpublished) (holding only that court was "bound to reject the claim under *Mironescu*"). And *Omar v. McHugh*, a challenge to the transfer of an individual detained in Iraq, not the extradition of a person within the United States, in fact concluded that the court *did* "have jurisdiction to consider his habeas petition." 646 F.3d 13, 14 (D.C. Cir. 2011).

To the extent the government suggests the regulations implementing FARRA stripped the district court of habeas jurisdiction, Gov't Br. 32, it is wrong. As explained above, if access to habeas is to be curtailed, it must be done by *Congress* and with the utmost clarity. The Executive cannot itself control when habeas will be available. *See Boumediene*, 553 U.S. at 765-66 (constitutional availability of habeas "must not be subject to manipulation by those whose power it is designed to restrain."). Moreover, even on their own terms the regulations are not sufficiently

clear to eliminate habeas jurisdictions. *Compare* Gov't Br. 32 ("The regulations expressly state that the Secretary's surrender decisions are 'matters of executive discretion not subject to judicial review.'") (quoting 22 C.F.R. § 95.4), *with St. Cyr*, 533 U.S. at 311-13 (holding that, because "'judicial review' and 'habeas corpus' have historically distinct meanings," statutes barring judicial review did not "speak[] with sufficient clarity to bar jurisdiction pursuant to the general habeas statute").

The government's reliance on the REAL ID Act, 8 U.S.C. § 1252(a)(4), is likewise unavailing. As the Ninth Circuit explained, "[t]he REAL ID Act can be construed as being confined to addressing final orders of removal, without affecting federal habeas jurisdiction." *Trinidad y Garcia*, 683 F.3d at 956. "The purpose of the REAL–ID Act's jurisdiction-stripping provisions was to 'consolidate judicial review of immigration proceedings into one action in the court of appeals.'" *Id.* at 958 (Thomas, J., concurring) (quoting *St. Cyr*, 533 U.S. at 313). "Uncodified sections of the REAL ID Act state that the legislation was intended to apply only to 'final administrative order[s] of removal, deportation, or exclusion.'" *Id.* (quoting 119 Stat. 231, 311). No such order is at issue here.

The legislative history bears out the same point. The conference committee report recognized that "the bill would eliminate habeas review *only* over challenges to removal orders." H.R. Conf. Rep. No. 109-72, at 175 (emphasis added); *see id.* at 176 (same). Congress thus intended that "section 106" (referring to the section of

the REAL ID Act containing relevant amendments to § 1252) "would not preclude habeas review over challenges to detention that are *independent* of challenges to removal orders." *Id.* at 175 (emphasis added); *see also id.* at 176 (same). This Court has reached the same conclusion in a detention challenge, *Hernandez v. Gonzales*, 424 F.3d 42, 42-43 (1st Cir. 2005) (citing legislative history), as have numerous other courts of appeals, *see, e.g.*, *Ochieng v. Mukasey*, 520 F.3d 1110, 1115 (10th Cir. 2008); *Nnadika v. Att'y Gen.*, 484 F.3d 626, 632 (3d Cir. 2007); *Kellici v. Gonzales*, 472 F.3d 416, 419 (6th Cir. 2006); *Madu v. Att'y Gen.*, 470 F.3d 1362, 1367 (11th Cir. 2006). And, with regard to the particular provision the government invokes—8 U.S.C. § 1252(a)(4))—Congress addressed only "aliens in section 240 [8 U.S.C. § 1229b] removal proceedings," without mention of any intention to strip habeas review outside the removal context, H.R. Conf. Rep. No. 109-72, at 176.

"Given [this] plausible alternative statutory construction," the Court "cannot conclude that the REAL ID Act actually repealed the remedy of habeas corpus." *Trinidad y Garcia*, 683 F.3d at 956 (citing *St. Cyr*, 533 U.S. at 299-300). Indeed, in light of the extremely serious Suspension Clause questions that would be raised by construing any of the provisions on which the government relies to divest the district court of habeas jurisdiction, this Court is "obligated to construe the statute to avoid such problems." *St. Cyr*, 533 U.S. at 300.

2. The "rule of non-inquiry," on which the government relies, has no bearing on the district court's subject matter jurisdiction, and in any event does not apply.

The rule of non-inquiry is "a doctrine which forbids judicial authorities from investigating the fairness of a requesting nation's justice system when considering whether to permit extradition to that nation." *In re Extradition of Howard*, 996 F.2d 1320, 1329 (1st Cir. 1993). The rule is not constitutional, but rather a judge-made doctrine reflecting "that, *absent a contrary indication* in a specific instance, the ratification of an extradition treaty mandated noninquiry as a matter of international comity." *Id.* at 1330 n.6 (emphasis added).

Thus, the rule has no bearing on the district court's subject matter jurisdiction. The question whether a habeas court has power to hear a case is separate from the question whether it is appropriate for the court to grant relief. In *Munaf v. Geren*, on which the government heavily relies, for example, the Court first held the district courts *had* subject matter jurisdiction before ultimately concluding that it was not appropriate for them to grant relief on the merits. 553 U.S. 674, 685-88, 691-92 (2008). *Trinidad y Garcia* also rejected the argument that the rule of non-inquiry stripped habeas jurisdiction. 683 F.3d at 956.

The government asserts that it "makes no practical difference" whether non-inquiry is a jurisdictional doctrine. Gov't Br. 37. That is wrong. When a court lacks subject matter jurisdiction, that is the end of the story—it has no power to decide the

case, regardless of the circumstances. But prudential, court-made doctrines like non-inquiry are "flexible" and "subject to countervailing considerations that may outweigh the concerns underlying the usual reluctance to exert judicial power." *United States v. Windsor*, 570 U.S. 744, 757 (2013) (internal quotation marks and alteration omitted). Such considerations militate for review here.

In arguing that the circumstances warrant application of the non-inquiry rule, the government relies on *Munaf*. But that case could not be more different, as it involved a challenge to the transfer of individuals held overseas in a theater of war. 553 U.S. at 679-80, 689. The Court also recognized that the petitioners in that case had not properly raised a claim under FARRA or the CAT. *Id.* at 703. Moreover, *Munaf* itself acknowledged that the applicability of the rule of non-inquiry would need to be reexamined in "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." 553 U.S. at 702.

This Court has similarly taken care to note, in a case on which the government also heavily relies, that it could "imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the" rule of non-inquiry. *United States v. Kin-Hong*, 110 F.3d 103, 112 (1st Cir. 1997) (internal quotation marks omitted). As the district court observed, this is just such a case: The Executive

Branch has *already* determined that Petitioner is likely to be tortured if sent back to his home country, yet is seeking to extradite him anyway without judicial review of his CAT claim. Add. 62.

The government counters that it would nonetheless be "inappropriate" to decline to apply non-inquiry because the Department of State might be able to "mitigate[]" the already established likelihood of torture "through conditions, assurances, and diplomatic leverage." Gov't Br. 37. But the government already had the opportunity to obtain and rely on any such assurances during the course of the immigration proceedings, and did not do so. *See* 8 C.F.R. § 1208.18(c). Had it done so, the reliability and adequacy of any such assurances could have been tested—which is critical, particularly where the nation providing them has a history of torture or similar acts. *See id*. § 1208.18(c)(2) (requiring assessment of assurances); *see also Khouzam v. Attorney Gen. of U.S.*, 549 F.3d 235, 258 (3d Cir. 2008) (due process requires "the ability to test . . . assurances prior to removal").

Ultimately, the government argues that the district court must have been wrong because it was the "first court ever" to grant habeas relief on "[h]umanitarian" grounds. Gov't Br. 26, 36. But whatever the accuracy of that sweeping historical assertion, it ignores the importance of the CAT and FARRA and dramatically overreads the limited existing caselaw.

As the Fourth Circuit noted in *Mironescu*, on which the government relies, the CAT and FARRA, which was enacted in 1998, differentiate the current state of affairs from earlier humanitarian claims. The non-inquiry rule does not bar review where a petitioner claims that his extradition "would violate a federal statute" or the Constitution. *Mironescu*, 480 F.3d at 671-73. As a common-law doctrine "born by implication" from nineteenth century extradition cases, *id*. at 669 (internal quotation marks omitted), the rule is displaced where Congress acts to impose mandatory obligations on the government:

> [P]rior to the CAT and the FARR Act, the conclusion . . . that individuals being extradited are not constitutionally entitled to any particular treatment abroad rendered evidence of the treatment they were likely to receive irrelevant in the context of a claim on habeas that their detention contravened federal law. . . . However, the FARR Act now has given petitioners the foothold that was lacking . . . . [I]n light of the Secretary's conceded obligation under the FARR Act not to extradite Mironescu if he is likely to face torture, the rule of non-inquiry does not bar habeas review of the Secretary's extradition decision.

Id. at 671, 673. *Mironescu* thus explained that the existence of a right enforceable in habeas set that case (like this one) apart from *Neely v. Henkel*, 180 U.S. 109 (1901), on which the government relies heavily. *See Mironescu*, 480 F.3d at 671 (*Neely* meant only that "absent any federal right to particular treatment in the requesting country, any refusal of extradition based on the treatment a fugitive was likely to receive would have to be made by the Executive").

Likewise, the government's attempt to present the post-FARRA caselaw as if there were a consensus that non-inquiry applies to torture claims falls apart on examination. *Mironescu* in fact rejected application of the non-inquiry rule in this context (and its statutory jurisdictional holding did not address the Suspension Clause and its reasoning has already been rejected by this Court in an analogous case, *see supra*). The government also relies on *Hoxha v. Levi*, 465 F.3d 554 (3d Cir. 2006), but that case concluded only that the "humanitarian arguments" were "irrelevant *to the certification decision*" of extraditability, *id*. at 565 (emphasis added), and moreover declined to decide whether FARRA and the Administrative Procedure Act barred extradition apart from the certification decision, *id*. at 564-65 (concluding that there was not yet final agency action). And, as noted above, *Omar v. McHugh*, 646 F.3d 13, did not involve extradition at all, but rather (like *Munaf*) a challenge to a transfer of a person detained in Iraq.

That leaves the government with only *Trinidad y Garcia*. As noted above, in that case the Ninth Circuit rejected the government's jurisdictional argument and held that the rule of non-inquiry had no bearing on the district court's subject matter jurisdiction. 683 F.3d at 956. To the extent the court held that the rule of non-inquiry significantly narrowed the liberty interests the petitioner could assert on the merits, it was wrongly decided. *See id*. at 956-57; *see also id*. at 1002-09 (Pregerson,

J., dissenting in part).[4] But, in any event, unlike *Trinidad y Garcia*, here the government has already determined that Petitioner more likely than not will be tortured if he is sent back to the Dominican Republic. Thus, whatever the validity of the Ninth Circuit's view of the relevancy of the non-inquiry doctrine in that case, it does not control on the unique facts here, where the BIA has expressly held that Petitioner is more likely than not to be tortured if returned.

CONCLUSION

The Court should affirm.

Dated: November 27, 2019

Respectfully submitted,

/s/Cody Wofsy

Lee Gelernt
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad St., 18th Floor
New York, NY 10004
Telephone: (212) 549-2660

Cody Wofsy
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0770

Roberto Gonzalez #3619
Cooperating attorney
ACLU FOUNDATION OF RHODE ISLAND
Gonzalez Law Offices, Inc.
450 Warren Avenue
E Providence, RI 02914
(401) 432-7500

Lynette Labinger #1645
Cooperating attorney
ACLU FOUNDATION OF RHODE ISLAND
128 Dorrance Street, Box 710
Providence, RI 02903
(401) 465-9565

Attorneys for Amici Curiae

[4] Additionally, while the Ninth Circuit noted that the petitioner in that case raised a claim under the CAT, it only addressed the merits of his due process claims. *See* 683 F.3d at 955-57.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,699 words excluding those parts exempted by Fed. R. App. P. 32(f).

Dated: November 27, 2019

/s/ *Cody Wofsy*
Cody Wofsy
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0770

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on November 27, 2019. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

Dated: November 27, 2019

/s/ Cody Wofsy
Cody Wofsy
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0770