No. 18-1432

IN THE
Supreme Court of the United States

NIDAL KHALID NASRALLAH,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, notwithstanding 8 U.S.C. § 1252(a)(2)(C), the courts of appeals possess jurisdiction to review factual findings underlying denials of withholding (and deferral) of removal relief.

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who have a vital interest in ensuring the proper development and application of U.S. immigration law, including the equitable and just administration of relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").

Amici come together because of their shared concern that the decision below fails to properly consider the United States' steadfast and absolute commitment to the prevention and eradication of torture in all its forms and fails to consider the importance of proper application of the CAT in meeting that commitment. *Amici* have a strong interest in ensuring that CAT protections are enforced as widely as Congress intended and consistent with the United States' international obligations.

Additionally, *Amici* are concerned that the decision below fails to give proper weight to this Court's strong presumption in favor of judicial review, particularly in the immigration context. *Amici* all agree that, for the reasons set forth in this brief, the decision below should be reversed.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice under Rule 37.2(a) of intent to file this brief was provided to the Petitioner and the Respondent, and both have consented in writing to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The stakes for a noncitizen facing deportation are extraordinarily high when removal from the United States is likely to result in torture. That such an outcome might arise as the result of an erroneous determination by an administrative agency is intolerable. Despite this, in recent years several courts of appeals declined to review factual determinations underlying denials of withholding or deferral of removal under the CAT, on the basis that Congress foreclosed judicial review. This abdication of judicial responsibility stands in direct contravention of federal and international law as well as longstanding norms, both procedural – including separation of powers principles – and substantive – including uncompromising opposition to torture sponsored or tolerated by a foreign state. For certain noncitizens, withholding or deferral of removal under the CAT is the only form of relief that stands between them and torture.

In the case at bar, the Eleventh Circuit read 8 U.S.C. § 1252(a)(2)(C) as divesting federal courts of jurisdiction to review adverse factual determinations by the Board of Immigration Appeals ("BIA"), an administrative agency, where withholding (or deferral) of removal is sought under the CAT. That decision is patently incorrect and *Amici* write to this Court to underscore three points.

First, the bipartisan legislative support for the CAT, its international adoption and the plain language of the treaty unequivocally confirm the treaty's special status and demonstrate the United States' ardent commitment to opposing and preventing torture.

This powerful history cannot be ignored when interpreting the CAT's interplay with federal law and counsels against a restrictive reading of its protections.

Second, *Amici* emphasize that CAT protection is available in all cases where a noncitizen's removal would likely result in her being tortured. Where a noncitizen satisfies the objective standard for CAT relief, there are no exceptions or further considerations that may limit that relief, and the government lacks any discretionary authority to remove that noncitizen to a country where she faces torture.

Third, when interpreting statutes, this Court has consistently applied the presumption in favor of judicial review of agency decisions. It is a basic tenet of statutory construction to favor interpretations that provide for judicial review of administrative action over competing readings. This presumption is even more significant in the immigration context, where ambiguities must be resolved in favor of the noncitizen. Moreover, the interpretive canon favoring judicial review is especially critical for claims arising under the CAT, which provides the sole form of immigration relief available to all noncitizens, including those with certain criminal convictions, who are facing the threat of torture.

ARGUMENT

I. THE SPECIAL STATUS OF THE CONVENTION AGAINST TORTURE, CONFIRMED BY BROAD BIPARTISAN SUPPORT, REFLECTS FUNDAMENTAL AMERICAN VALUES.

Periodically, governments and societies confront conduct so reprehensible and repugnant to a shared set of values that their response demands moral and legal clarity, no matter how fractured the society. In the 1980s, the United States faced one such challenge as it confronted the horrors of government-sponsored and government-acquiesced torture. In a bipartisan response and across multiple administrations, the United States took up the cause of opposing torture through the drafting, ratification and codification of a multi-national convention, the CAT. The basis for the United States' unequivocal position was simple: torture is fundamentally un-American. It violates our highest ideals and aspirations of justice and subverts the rule of law. Through the CAT, the United States provides absolute, unqualified protection to noncitizens who face torture in their home countries. It does so because remitting any person to that terrible fate tears at the very fabric of our shared humanity.

From its inception, the CAT was endowed with a special status in the United States, evidenced by deep bipartisan support.[2] The United States played an

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[2] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Exec. Rep. No. 101-30 at 13 (1990) (hereinafter "Senate Report").

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active, collaborative role in drafting the CAT, reflecting "the common understanding of torture as an extreme practice which is universally condemned." [3] During the drafting process, the Senate demonstrated the legislature's sweeping endorsement of the CAT by passing a joint resolution, sponsored by Senators Pell (D-RI) and Percy (R-IL), asserting the United States' opposition to torture and commitment to its eradication.[4]

The United States became a signatory of the CAT on April 18, 1988. When President Ronald Reagan transmitted the CAT to the Senate shortly thereafter, he emphasized that ratification would "clearly express United States opposition to torture," and "demonstrate unequivocally [the United States'] desire to bring an end to the abhorrent practice of torture."[5]

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[3] *See Convention Against Torture Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 7 (1990) (hereinafter "Senate Hearing") (statement of Hon. Abraham D. Sofaer, Legal Adviser, Dep't of State).

[4] *See* Senate Report at 2-3 ("The Convention itself was the product of 7 years of intense negotiations. . . . Congress demonstrated its support for these activities in 1984 through passage of a joint resolution, sponsored by Senators Pell and Percy, reaffirming the U.S. Government's opposition to torture and commitment to combat the practice of torture and expressing support for the involvement of the U.S. Government in the formulation of international standards and effective implementing mechanisms against torture.").

[5] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-

(cont'd)

The Senate responded rapidly, referring the treaty to the Committee on Foreign Relations by unanimous consent just three days after the President's transmittal.[6]

The special status of the CAT is further evidenced by the ratification process. During the Senate Hearing on ratification, Abraham D. Sofaer, Legal Adviser to President George H.W. Bush's State Department, remarked that the administration strongly supported the treaty as a demonstration of its "collective abhorrence and condemnation of torture."[7] At the conclusion of the hearing, the Senate Foreign Relations Committee adopted the CAT by unanimous consent,

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20 (1988), 1465 U.N.T.S. 85, iv. (Letter of Transmittal from the President to the Senate).

[6] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Senate Consideration of Treaty Document 100-20, congress.gov/treaty-document/100th-congress/20 (reflecting that President Reagan transmitted the treaty to the Senate on May 20, 1988, and the Senate unanimously referred the treaty to the Committee on Foreign Relations on May 23, 1988). The delay between referral to the Committee on Foreign Relations and the Senate providing advice and consent in 1990 arose from debate over the proposed reservations, understandings, and declarations that President Reagan submitted along with the treaty, rather than the treaty itself. *See* Oona A. Hathaway, Aileen Nowlan, & Julia Spiegel, *Tortured Reasoning: The Intent to Torture Under International and Domestic Law*, 52 Virginia J. of Int'l L. 791, 806 (2012).

[7] Senate Report at 7.

(cont'd)

reaffirming its fundamental importance as part of the United States' unequivocal commitment to condemning and preventing torture. The Reagan and Bush administrations' sentiments were later echoed by a group of Republican Senators who issued a joint statement proclaiming Republican support for the CAT.[8]

After the Senate provided advice and consent for the CAT in 1990, the United States formally ratified the treaty by depositing the instruments of ratification with the United Nations in 1994.[9] Thereafter, the CAT was implemented by the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"). The FARRA passed in the House by voice vote a week after its introduction. And less than a week later, the FARRA passed in the Senate with an overwhelmingly favorable vote of 90-5.[10] Given this legislative history, it is beyond dispute that the CAT represents the United States' inviolable and absolute commitment to oppose torture in all its forms.

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[8] Senate Report at 32 ("We believe that prompt ratification of the convention will demonstrate the abhorrence of our Nation toward torture, and encourage more widespread ratification of the convention among the community of nations.").

[9] *See* Cong. Research Serv., 106th Cong., Treaties and Other International Agreements: The Role of the United States Senate 290-291 (Comm. Print 2001).

[10] *See* Foreign Affairs Reform and Restructuring Act of 1998, H.R. 1757, 105th Cong. (as passed by Senate, June 17, 1997), https://www.congress.gov/bill/105th-congress/house-bill/1757/actions.

(cont'd)

Through the CAT, the United States sought "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."[11] It reflects our values-based commitment to protect the at-risk noncitizen from torture in her home country because permitting such conduct debases the United States. The Senate Committee on Foreign Relations recommended ratification by emphasizing that it would "demonstrate clearly and unequivocally U.S. opposition to torture and U.S. determination to take steps to eradicate it."[12]

The evidence of this unequivocal, unqualified stance on preventing torture through the CAT is pervasive, seen not just in the text of the treaty itself but also in its legislative history, judicial interpretations and commentary by notable scholars worldwide.

First, the plain language of the treaty demonstrates that the CAT is unequivocal and unqualified about whom it protects. The CAT applies to any noncitizen with no exceptions for those with a criminal history, thus providing an absolute prohibition on the return or extradition of a person to another state where there are substantial grounds for believing that she would be subject to torture.[13] Article 3 of the CAT

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[11] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, pmbl.

[12] Senate Report at 3.

[13] CAT, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, art. 3 ("No State Party

(cont'd)

thus serves as the last line of defense for noncitizens who fear persecution or torture in their home country but are otherwise ineligible for asylum and withholding of removal due to certain criminal convictions or for other reasons.[14]

Second, the legislative history of the CAT emphasizes that it was adopted to reflect a special commitment to taking a universal stance against torture and in support of maximum protection for victims and potential victims. As explained at the House Hearing, "the obligation to refrain from removing an alien who faces torture is absolute," and thus the Department of Homeland Security has "always been mindful of the fact that there would be situations where criminal aliens ineligible for other forms of immigration relief or protection might qualify for [CAT] protection." [15]

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shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."); FARRA, Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681, 2681-822 ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

[14] *See, e.g.*, 8 U.S.C. § 1158(b)(2); 8 U.S.C. § 1231(b)(3)(B), 8 C.F.R. § 1208.16.

[15] *Immigration Relief Under the Convention Against Torture for Serious Criminals & Human Rights Violators: Hearing Before the Subcomm. On Immigration, Border Sec., & Claims of the H. Comm. on the Judiciary*, 108th Cong. 12 *(cont'd)*

Similarly, as explained at the Senate Hearing, the "negotiating record is clear that the purpose of Article 3, not surprisingly, was to afford the greatest possible protection against torture and that the evidentiary requirement should not be too rigorous and should be kept to a minimum."[16] It is precisely for this reason that "Article 3 does not permit any discretion or provide for any exceptions." *Id.* at 18 (statement of Mark Richard, Deputy Ass't Att'y Gen., Crim. Div., Dep't of Justice). This absolute mandate against removal and the lack of a criminal bar exception further emphasize that the United States' purpose in ratifying the CAT was to "clearly express United States opposition to torture."[17]

Third, courts worldwide have emphasized that the CAT's special commitment to preventing torture is without exceptions. Indeed, this Court and lower courts have observed the lack of exceptions in the CAT.

(2003) (hereinafter "House Hearing") (statement of C. Stewart Verdery, Asst. Sec'y for Border and Transp. Sec. Policy, Dep't of Homeland Sec.); *see also id.* at 15 (statement of Eli Rosenbaum, Dir., Office of Special Investigations, U.S. Dep't of Justice) (emphasizing the "strong policy reflected in the implementation of the [CAT] is that no person, regardless of his or her past conduct, should be deported to another country to face torture").

[16] Senate Hearing at 69 (statement of James R. Silkenat, Chairman Section of International Law and Practice, American Bar Association).

[17] CAT, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, iii (Letter of Transmittal from the President to the Senate); *see also id.* at iv.

(cont'd)

See, e.g., *Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (2013) ("[T]he Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility. A conviction of an aggravated felony has no effect on CAT eligibility."); *Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011) ("CAT 'does not permit any discretion or provide for any exceptions.'") (citation omitted). Courts in some of the more than 150 foreign jurisdictions to adopt the CAT,[18] too, hold that it is free of exceptions. *See*, *e.g.*, *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553, 585 ¶ 62 (1996) ("Article 3 makes no provision for exceptions and no derogation from it is permissible . . . even in the event of a public emergency threatening the life of the nation."); *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413, 456-57 (1996) ("The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the [CAT] prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.").

Fourth, long after ratification, many scholars have continued to reiterate the CAT's special commitment to a zero-tolerance policy on torture, emphasizing that the Article 3 non-return provision is absolute. *See*, *e.g.*, Deborah E. Anker, *Law of Asylum in the United States* 685 (2019) ("[P]rotection under Article 3 of the Torture Convention . . . is absolute."); *see also* Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture* 129 (2008) ("Article 3 [of the] CAT

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[18] *See* CAT, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en (last visited Dec. 13, 2019).

guarantees an absolute right which is not subject to any exclusion or limitation clause.").

It is undeniable that the text of the treaty itself, its corresponding legislative history, the interpreting judicial bodies and the work of academic scholars all confirm that the CAT intended to advance a special commitment by the United States to offer the broadest protection possible against torture. It is this powerful history that must inform any interpretation of the CAT under federal law and cautions against a restrictive reading of its protections.

II. RELIEF UNDER THE CAT IS UNIVERSALLY AVAILABLE AND WITHOUT EXCEPTIONS.

One element of the CAT, perhaps more than any other, animates its special status and its broad principles opposing torture: the absoluteness of relief when a noncitizen confronted with torture in her home country faces removal by U.S. authorities. CAT protection is universal; it is the sole form of immigration relief without any criminal bar and, in some cases, the sole form of protection available to noncitizens facing the threat of torture.

A noncitizen who fears persecution or torture in her country of origin generally may seek asylum, 8 U.S.C. § 1158, withholding of removal, 8 U.S.C. § 1231(b)(3)(A), withholding of removal under the CAT, 8 C.F.R. § 1208.16, or deferral of removal under the CAT, 8 C.F.R. § 1208.17. CAT relief, however, addresses "concerns different from those addressed by" asylum and withholding of removal. *Negusie v. Holder*, 555 U.S. 511, 536 n.6 (2009) (Stevens, J., concurring in part and dissenting in part). In particular, CAT

relief is limited to those who are more likely than not to be subjected to "acts 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,' while asylum and withholding of removal are available to victims of harm inflicted by private actors, without regard to state involvement." *Id.* (citations omitted). CAT relief also requires a showing of a "greater likelihood of persecution or torture at home than is necessary for asylum." *Moncrieffe*, 569 U.S. at 187 n.1. And unlike asylum and withholding of removal, CAT relief does not require that a risk of persecution be based on race, religion, nationality, membership in a particular social group, or political opinion. *Compare* 8 U.S.C. § 1158(b)(1)(B)(i) and 8 U.S.C. § 1231(b)(3)(A), *with* 8 C.F.R. § 1208.16(c).

Some noncitizens are ineligible for asylum and withholding of removal because certain criminal convictions bar them from such relief. *See* 8 U.S.C. § 1231(b)(3)(B)(ii); 8 C.F.R. § 1208.16(d)(2). By contrast, the CAT sets forth "no exceptions to protection from removal." House Hearing at 15 (statement of Eli Rosenbaum, Dir., Office of Special Investigations, U.S. Dep't of Justice) (explaining that "there are no exceptions to protection from removal" under the CAT). As the Department of Justice has more recently emphasized, "[t]he strong policy reflected in the implementation of the [CAT] is that no person, regardless of his or her past conduct, should be deported to another country to face torture."[19] CAT protection is thus the only

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[19] House Hearing at 15 (statement of Eli Rosenbaum, Dir., Office of Special Investigations, U.S. Dep't of Justice); *accord* House Hearing at 12 (statement of C. Stewart Verdery,

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hope for some noncitizens facing a likelihood of torture upon their removal from the United States. *See Moncrieffe*, 569 U.S. at 187 n.1 (noting that, while a noncitizen who has been sentenced to an aggregate term of imprisonment of at least five years for any aggravated felony would be ineligible for withholding of removal, "[a] conviction of an aggravated felony has no effect on CAT eligibility").[20]

Asst. Sec'y for Border and Transp. Sec. Policy, Dep't of Homeland Sec.) ("Because the obligation to refrain from removing an alien who faces torture is absolute, [the Department of Homeland Security] ha[s] always been mindful of the fact that there would be situations where criminal aliens ineligible for other forms of immigration relief or protection might qualify for [CAT] protection."); Senate Hearing at 18 (statement of Mark Richard, Deputy Asst. Att'y Gen., Crim. Div., Dep't of Justice) ("Because Article 3 does not . . . provide for any exceptions, it is not completely analogous to current immigration law where withholding of deportation allows exceptions . . . .").

[20] *See also Negusie*, 555 U.S. at 514 (noting that the "so-called 'persecutor bar,'" which bars a noncitizen who fears persecution in his homeland from obtaining refugee status if he has persecuted others, applies to those seeking asylum or withholding of removal, but "does not disqualify an alien from receiving a temporary deferral of removal under the [CAT]."") (citation omitted); *id.* at 541 n.1 (Thomas, J., dissenting) ("'Deferral of removal' was created to accommodate Congress' direction to exclude those who fall within the INA persecutor bar '[t]o the maximum extent consistent with the obligations of the United States under the [CAT]' not to return an alien to a country in which he or she will be tortured.") (first alteration in original) (citation omitted); *Annachamy v. Holder*, 733 F.3d 254, 258 (9th *(cont'd)*

CAT relief for an eligible noncitizen is likewise mandatory. If a noncitizen satisfies the objective standard for CAT relief, the government "has no discretion to deny relief" to that noncitizen. *Moncrieffe*, 569 U.S. at 187 n.1; *see also* 8 C.F.R. § 1208.17(a) (noncitizen who satisfies the CAT standard "shall be granted deferral of removal"); 8 C.F.R. § 1208.16(c)(4) (applying similar standard to withholding of removal under the CAT); Senate Hearing at 18 (statement of Mark Richard, Deputy Asst. Att'y Gen., Crim. Div., Dep't of Justice) ("Because Article 3 does not permit any discretion . . . , it is not completely analogous to current immigration law where . . . the granting of asylum provides discretion to those who meet the threshold requirements."). Such mandatory protection codifies the purpose of Article 3 "to afford the greatest possible protection against torture." Senate Hearing at 69 (statement of James R. Silkenat, Chairman, Section of Int'l Law and Practice, American Bar Association) ("[T]he negotiating record is clear that the purpose of Article 3, not surprisingly, 'was to afford the greatest possible protection against torture and that the evidentiary requirement should not be too rigorous and should be kept to a minimum."). The CAT is thus unique; its protections are available to all noncitizens and its provisions divest the government of discretion to remove a qualifying individual.

Cir. 2013) ("An alien who has engaged in terrorist activities is ineligible for asylum [and] withholding of removal . . . , but remains eligible for deferral of removal under CAT."), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2013).

III. CANONS OF STATUTORY INTERPRETATION RESOLVE ANY AMBIGUITY IN FAVOR OF JUDICIAL REVIEW.

Well-established principles favoring judicial review of agency determinations, and particularly proceedings where a noncitizen's safety and well-being are at stake, dictate that judicial review must be available in cases arising under the CAT. To the extent there is any ambiguity in the statute, that ambiguity should be construed in favor of judicial review.

A. There Is a Strong Presumption in Favor of Judicial Review of Agency Decisions

A guiding canon of statutory interpretation is the "'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). That presumption has been consistently reaffirmed and applied by this Court, including in *Smith v. Berryhill*, 139 S. Ct. 1765, 1771 (2019), a case decided earlier this year. A key tenet of the presumption is that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach*, 135 S. Ct. at 1651. Only upon "a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (citation omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). And because the "'presumption favoring interpretations of statutes [to] allow judicial review of administrative action' is 'well-settled,'" courts "assume[] that 'Congress legislates with knowledge of'

the presumption." *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010) (first alteration in original) (citation omitted). Accordingly, "[i]f a provision can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part). Where a statute is susceptible to competing interpretations, courts should "adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Guitierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995). These principles demand that even if 8 U.S.C. § 1252(a)(2)(C) were ambiguous – and it is not (*see* Br. of Pet. Nasrallah pp. 23-36) – the Court should construe any ambiguity so as to permit judicial review.

B. Any Ambiguity Regarding the Availability of Judicial Review Should Be Resolved in Favor of the Noncitizen

The presumption in favor of judicial review is especially critical in the immigration context where this Court adheres to a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).[21] In *McNary v. Haitian*

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[21] *See also INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *Cardoza-Fonseca*, 480 U.S. at 449); *Dada v. Mukasey*, 554 U.S. 1, 19-20 (2008) (applying the same principle to hold that noncitizens have a right to move to reopen immigration cases even after accepting voluntary departure).

(cont'd)

Refugee Center, Inc., 498 U.S. 479 (1991), this Court relied, in part, on the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action" to hold that the Immigration Reform and Control Act of 1986 (the "Reform Act") did not preclude judicial review of challenges to the administration of the Special Agricultural Worker ("SAW") program. *Id.* at 496-97.[22] Recognizing the importance of the freedoms provided by the program and the "well-settled presumption" in favor of judicial review, this Court held it "most unlikely that Congress intended to foreclose all forms of meaningful judicial review" for those noncitizens. *Id.* at 496.

Similarly, in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), this Court rejected a statutory interpretation "that would have amounted to 'the practical equivalent of a total denial of judicial review.'" *Id.* at 64 (citation omitted). Specifically, in reviewing the Immigration and Naturalization Service ("INS") policy that would have "effectively exclude[d] an applicant from access even to the limited administrative and judicial review procedures established by the Reform Act," this Court invoked the "'well-settled presumption'" favoring judicial review and refused "to impute to Congress an intent to preclude judicial review of the legality of INS action entirely." *Id.* at 63-64 (citation omitted). In 2001, this Court again affirmed its "strong presumption in favor of judicial review of administrative action" when it held that the 1996 amendments to the Immigration and Nationality Act ("INA") did not bar a noncitizen from seeking

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[22] The SAW program afforded temporary and permanent resident status to qualifying noncitizen farm laborers.

discretionary relief from a deportation order through habeas jurisdiction available under 28 U.S.C. § 2241. *St. Cyr*, 533 U.S. at 298.

In *Kucana*, this Court reiterated the "presumption favoring judicial review of administrative action," noting that it had "consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal court jurisdiction." 558 U.S. at 251. Specifically, this Court examined the text, context, and history of the jurisdictional bars codified at 8 U.S.C. § 1252(a)(2), and the character of a reopening motion as a procedural safeguard, to hold that only where the statute itself specified the broad discretion of the agency over the provision at issue would it proscribe judicial review, which 8 U.S.C. § 1252(a)(2)(B)(ii) did not. *Id.* at 242-50. Instead, highlighting the presumption favoring judicial review of agency action, this Court noted it was "unsurprising that Congress would leave in place judicial oversight of this 'important [procedural] safeguard' designed to 'ensure a proper and lawful disposition' of immigration proceedings." *Id.* at 250-51 (alteration in original) (quoting *Dada*, 554 U.S. at 18); *see also Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) ("We have long recognized that deportation is a particularly severe 'penalty[.]'" (citation omitted)).

The presumption in favor of judicial review is especially important in the CAT context, where an error could result in a petitioner being subjected to torture or death in her home country. *See Cardoza-Fonseca*, 480 U.S. at 449 ("Deportation is always a harsh measure [and] is all the more replete with danger when the [noncitizen] makes a claim that he or she will be

subject to death or persecution if forced to return to his or her home country.").

C. Principles of Statutory Construction Favor an Interpretation That Does Not Conflict with International Obligations

Construing 8 U.S.C. § 1252(a)(2)(C) to bar the judiciary from providing any check on factually erroneous withholding or deferral decisions under the CAT threatens the United States' compliance with its treaty obligations. The CAT provides that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." CAT art. 3, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. By its own terms, the CAT entitles a noncitizen meeting the burden of proof to mandatory relief from deportation, without exception. Thus, where withholding or deferral of removal is warranted but denied through an administrative proceeding, the United States fails to satisfy its obligations under the CAT. Yet that risk can be lessened by judicial review of fact finding in the CAT context. This Court has made clear that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also Weinberger v. Rossi,* 456 U.S. 25, 32 (1981) (recognizing maxim established in *Murray*). This principle protects the separation of powers, ensures respect for Congress, and helps prevent debacles in foreign affairs. *See* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic*

Statutory Construction, 43 Vand. L. Rev. 1103, 1130 (1990). This Court has emphasized that legislation should not be read, "absent clear [Congressional] statement, to place in executive hands authority to remove cases from the Judiciary's domain." *Kucana*, 558 U.S. at 237.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to reverse the judgment of dismissal entered by the court of appeals.

Respectfully submitted,

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APPENDIX

Appendix

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