March 18, 2005

The Honorable William H. Frist, M.D.
Majority Leader
United States Senate
S-230 Capitol Building
Washington, DC 20510

Dear Mr. Majority Leader,

The Brennan Center for Justice at New York University — a nonpartisan organization that promotes equality and human dignity consistent with safeguarding fundamental freedoms — writes to urge you not to lend your support to the REAL ID Act of 2005 (as passed by the House of Representatives in H.R. 418) because it will undermine the rule of law.

Organizations representing the full political spectrum have already written about the destructive and potentially dangerous aspects of many of the bill's provisions, including i) the greatly increased barriers it raises for those with genuinely meritorious claims for asylum, ii) the possibility that the newly broadened definition of terrorism will adversely affect wholly innocent people, and iii) the increased security and safety risks posed to all of us when drivers' licenses are denied to undocumented immigrants.

In addition to these concerns, the proposed legislation contains a hastily passed amendment that would interfere with access to the courts and the rule of law in the following three respects:

First, as amended by Representative Sensenbrenner, §105(a)(2)(A) effectively eliminates the due process safeguard of a right to a "temporary stay" on removal while a petition is pending. The seemingly innocuous amendment would authorize actual and immediate deportation before a final order of removal is issued unless a person could provide clear and convincing evidence that removal would be prohibited as a matter of law.

Consequently, even before those charged with removal have their cases fully adjudicated, they may be deported. The proposed standard for staying deportation presents a nearly insurmountable barrier that has been rejected by most courts of appeals. Persons with valid claims of United States citizenship, lawful permanent residents with strong claims to stay with their families, and asylum seekers facing deportation to the country of their persecution, would be deported first and only later able to get a hearing in court. As the Supreme Court's unanimous decision in Leocal v. Ashcroft, 125 S. Ct. 377 (2004), last Fall reversing the government's litigation position demonstrated, many deportation orders are based on erroneous interpretations of the law that require careful consideration by the courts after full briefing. To change the stay standard to a "shoot first, ask questions later" approach runs counter to the bedrock principles of our justice system.

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Second, H.R. 418's sweeping eliminations of whole categories of judicial review raise grave concerns.

(1) Section 105(a)(1) would eliminate habeas and mandamus review, as well as the federal courts' general powers to issue writs, for a wide array of removal orders. §105(a)(1)(B)(5). These avenues to the courts, habeas in particular, have all historically provided an indispensable safeguard against potential miscarriages of justice when all other avenues for relief have been exhausted or are otherwise foreclosed. In light of the Board of Appeals ("BIA") recent actions in streamlining regulations to reduce the number of Board members and broadly expand expedited review procedures, we should be particularly wary of laws that further restrict federal court review of BIA decisions.

Making matters worse, the amendments invite argument that the law should be construed to eliminate or limit habeas review everywhere in the Immigration and Nationality Act ("INA") that judicial review or jurisdiction to review is already limited or eliminated. This result is brought about by text in the bill that redefines "judicial review" and "jurisdiction to review" to include habeas review wherever such review is "limited or eliminated" and that makes these changes for purposes of "this Act," presumably the INA. Under this broad reading of the bill, these jurisdiction-stripping changes eviscerate habeas and mandamus review not only for individuals contesting orders of removal, but also for individuals contesting their detention.

Notwithstanding assertions by supporters of the bill, the new law would not provide full and meaningful review over the legal validity of removal orders and therefore constitutes impermissible Congressional jurisdiction-stripping. Although the §105 amendments renounce any limitations on judicial review of constitutional claims or pure questions of law (§105(a)(1)(B)(5)), consistent with the Supreme Court's ruling in INS v. St. Cyr, 553 U.S. 289 (2001), they preclude review for claims that involve the application of law to fact and are strikingly inconsistent with St. Cyr's discussion of the historic coverage and importance of habeas review.

The final word on the legality of the proposed restriction on access to habeas review will be had by the Court, which has not yet been presented with the question of whether and to what extent Congress may properly limit judicial review of mixed questions of law and fact. This kind of confrontation with constitutional requirements warrants, at a minimum, serious hearings and careful deliberation. It is worth noting that litigation over the scope of the jurisdiction-stripping measures passed in 1996 is still in progress; the inherent difficulty in separating pure questions of law from mixed questions will result in great uncertainty and any hoped for efficiency gains will likely be mooted by a multitude of legal proceedings.

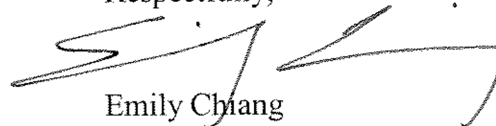
(2) Representative Sensenbrenner's amendments in §101(e) would insulate discretionary decisions made by the Department of Homeland Security and the Department of Justice from federal court review, even when those decisions are made outside the context of removal proceedings. The amendment would extend current limits on judicial review to nearly all of the discretionary decisions made by DHS and DOJ in an area of the law in which most decisions are discretionary. For example, decisions to revoke previously approved employment-based

immigrant visa petitions, to revoke advance parole status, or to deny applications for adjustment of status would all be untouchable. Not only does this sweeping action raise core due process concerns and the possibility of inconsistent treatment of similar cases, it also sets a dangerous precedent for other areas of the law that are carefully regulated by agencies, such as environmental law, and should be recognized for the Pandora's Box it is.

Third, the amended bill does not increase the nation's security and will cause unfair and unnecessary deportation of innocent individuals and families. The §105 amendments eliminating judicial review of mixed questions of law and fact are not only unconstitutional, but also unfairly and illogically punitive, increasing the number of baseless deportations with no justifiable benefit to the war on terror.

Our immigration laws are in need of substantive reform, but that reform must be accompanied by a respect for the process by which those laws are enforced, or we will have lost sight of what it means to be a free and fair society — and, it is important to remember, a free and fair society built by a nation of immigrants. Finally, it is worth noting that at least in the context of these amendments in §105, we do not have to choose between a free and fair society, and a safer society. Not one of the provisions discussed is calculated to provide us with more security, only less freedom.

Respectfully,



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