No. 08-1234

IN THE

Supreme Court of the United States

JAMAL KIYEMBA, ET AL.,

Petitioners,

—v.—

BARACK H. OBAMA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the principles of liberty and equality guaranteed by the Constitution and the laws of the United States. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I, including the prosecution of political dissidents and the denial of basic due process rights for non-citizens. The ACLU has frequently appeared before this Court during other periods of national crisis when concerns about security have been used by the government as a justification for abridging individual rights, and has participated in numerous cases before this Court involving the scope of habeas corpus and the rights of non-citizens, including as counsel in *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

SUMMARY OF ARGUMENT

This case addresses the critically important question whether the federal courts are empowered to grant effective habeas corpus relief to remedy the unlawful detention of foreign nationals at the

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[1] Pursuant to Supreme Court Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amicus itself, made a monetary contribution to the preparation or submission of this brief.

Guantanamo Bay Naval Base. This brief addresses two fatal analytic flaws in the court of appeals' decision, which erroneously found that the Petitioners could not obtain meaningful relief from the courts.

First, the decision below rests on a mistaken understanding of the proper exercise of judicial power and the legitimate sphere of executive power that this Court has twice rejected. In both *Clark v. Martinez*, 543 U.S. 371 (2005), and *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court ordered that habeas relief should be granted notwithstanding the government's vigorous arguments that court-ordered release of unlawfully detained non-citizens who had no right to enter or remain in the United States would constitute an impermissible intrusion into the immigration authority of the political branches. The Court's rulings in *Martinez* and *Zadvydas* confirm that a habeas court has, and must have, the power to grant an effective remedy to unlawful detention.

Rather than follow *Martinez* and *Zadvydas*, the D.C. Circuit purported to distinguish them and to rely instead on *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537 (1950), and *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953), for the broad and incorrect proposition that the courts are powerless to grant effective habeas relief to detained foreign nationals who have not been admitted to the United States. The court of appeals' distinctions of *Martinez* and *Zadvydas*, however, are not relevant to the separation of powers issue presented by this case. Moreover, even without taking *Martinez* and *Zadvydas* into account, the

court of appeals read this Court's earlier rulings in *Knauff* and *Mezei* far too broadly and neither the logic nor the holdings of those cases bar an effective habeas remedy in this case.

Second, the D.C. Circuit's due process analysis failed to acknowledge the central teaching of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), on the application of the Constitution to foreign nationals outside the sovereign territory of the United States and, as a result, reached the wrong conclusion. Rather than applying the functional "impracticable and anomalous" test that *Boumediene* expressly adopted, the court of appeals applied a categorical rule to bar non-citizens "without property or presence" in the United States from asserting due process rights—invoking the very doctrine that *Boumediene* rejected. Had the court of appeals engaged in a functional analysis of the due process issue, as this Court has directed, it would have found that in these circumstances the Petitioners' continued detention violates the Due Process Clause.

This Court's decision need not reach that ultimate question; habeas entitles the Petitioners to relief from detention that is not authorized by law without requiring any analysis of their Fifth Amendment rights. However, *amicus* submits that in light of the court of appeals' indication that it will continue to apply the categorical constitutional analysis that *Boumediene* rejected, at a minimum this Court should hold unequivocally that the Due Process Clause applies to Guantanamo under *Boumediene's* "impracticable and anomalous" test.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH THE SUSPENSION CLAUSE AND UNDERMINES RATHER THAN PROMOTES THE PRINCIPLE OF SEPARATION OF POWERS.

1. The D.C. Circuit's decision strips the writ of habeas corpus of its central purpose: providing a judicial remedy for unlawful executive detention. Habeas corpus "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." *Boumediene*, 128 S. Ct. at 2247 (citation omitted); *see also, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("[T]he Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."); *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."). The Suspension Clause would be rendered meaningless, and the very purpose of the writ negated, if in a context where the writ inarguably applies and is available, the executive remains free to render the judiciary powerless to grant relief from unlawful incarceration.

In *Boumediene*, this Court held, as a constitutional matter, that non-citizens detained at Guantanamo as enemy combatants "are entitled to the privilege of habeas corpus to challenge the

legality of their detention." 128 S. Ct. at 2262. As the Court explained, under the Supremacy Clause, a "habeas court *must* have the power to order the conditional release of an individual unlawfully detained[.]" *Id.* at 2266 (emphasis added). That recognition flows directly from the purpose and protections of the Great Writ; the court of appeals' decision, in contrast, can be reconciled neither with the Suspension Clause nor with this Court's decision in *Boumediene*.

2. The court of appeals' view that separation of powers principles bar any court from granting an effective habeas remedy to the Petitioners rests on a fundamental misunderstanding of this Court's precedents.

This Court has repeatedly rejected the assertion that habeas courts lack the power to order the release in the United States of foreign nationals, even if those foreign nationals lack any affirmative right to enter or remain in the country under the immigration laws. That is precisely what the government argued in *Martinez* and *Zadvydas*; yet, in both cases, this Court required that the habeas petitioners be released in the United States under appropriate conditions and supervision – just as the district court sought to do in this case.

Martinez and *Zadvydas* involved habeas petitions brought by individuals who were facing indefinite detention because no country would accept them and the government had determined not to release them in the United States. After noting that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem,"

the *Zadvydas* Court held that detention of a removable alien was not authorized by the Immigration and Nationality Act once removal is no longer reasonably foreseeable. 533 U.S. at 690, 699. Accordingly, the Court ruled, the habeas petitioners in *Zadvydas* were entitled to obtain their release in the United States under conditions, even though they had no right under the immigration laws to remain in the United States. *Id.* at 696. The Court emphasized that such release did not confer a legal right to "liv[e] at large," but merely a right to be "supervis[ed] under release conditions that may not be violated." *Id.*

In *Martinez*, the Court extended its holding to non-citizens who had never been granted entry into the United States, reasoning that the detention statute could not be read differently for such "inadmissible" petitioners than for the "removable" petitioners whose detention was at issue in *Zadvydas*. 543 U.S. at 377-78. Having found no statutory authorization for the petitioners' continued detention, the Court ordered the same relief as in *Zadvydas*: release in the United States under conditions, even though the *Martinez* petitioners were deemed to be outside the country and indisputably had no right to enter the United States under immigration law. *Id.* at 378, 386-87.

The Court did so, moreover, over the government's strenuous objection that granting habeas relief to foreign nationals who had never been admitted would confer a judicially-ordered entry into our country and thereby interfere with a constitutional function assigned to the political

branches. In raising this objection, the government specifically attempted to distinguish the Court's earlier decision in *Zadvydas* on the ground that it had addressed only foreign nationals who previously had been lawfully admitted and then lost their right to remain. *See Zadvydas*, 533 U.S. at 682, 693; *see also* Brief for the Petitioners [United States] at 20, *Martinez*, 543 U.S. 371 (2005) (No. 03-878).

In contrast, the government argued that the petitioners in *Martinez* could not be released because they (like the Petitioners here) had *never been admitted*. Brief for the Petitioners [United States] at 20, *Martinez* (No. 03-878). The government insisted that a judicial order of release would therefore pose grave separation of powers and national security concerns:

> That constitutional distinction [between non-citizens admitted by our government and those stopped at the border] rests not just on historical conceptions of the power of the national government to control immigration and the very limited rights of individuals arriving at the border, but also on practical separation-of-powers considerations in this sensitive area where foreign policy and national security intersect.
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> [W]hen the political Branches have stopped an alien at the border and have made the quintessentially political

> determination that he should not be admitted or released into the United States, a judicial order compelling his release into the country would *cause* an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations. It simply "is not within the province of the judiciary to order that foreigners who have never . . . even been admitted into the country" should "be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches."

Id. at 19-20 (citing cases). This Court necessarily rejected these arguments when it held that inadmissible non-citizens stopped at our border and denied entry must be released (subject to permissible conditions of supervision) if their detention becomes unlawful. *See Martinez*, 543 U.S. at 378, 386-87.[2]

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[2] *Martinez* arose in the context of Mariel Cubans, 543 U.S. at 374, but the holding applies to all "inadmissible aliens," specifically including aliens detained at the border who have never been physically present in the territory of the United States. *See id.* at 374; *id.* at 378 (recognizing that "inadmissible" aliens include "'[a]liens who have not yet gained initial admission to this country'" (citation omitted)); *see also id.* at 375 n.2 (explaining that "inadmissible" aliens are "aliens ineligible to enter the country").

The reasoning of the court of appeals in this case mirrors the arguments made by the government in *Martinez* and rejected by this Court. *Compare*, *e.g.*, Pet. App. 6a ("the power to exclude aliens [is] 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government'") *with* Brief for the Petitioners [United States] at 16, *Martinez* (No. 03-878), ("the power 'to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe,' is not only 'inherent in sovereignty,' but also 'essential to self-preservation.' That power is vital 'for maintaining normal international relations and defending the country against foreign encroachments and dangers.'" (citations omitted)).[3]

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[3] *Compare also, e.g.*, Pet. App. 8a ("it 'is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien'") (citation omitted) *with* Brief for the Petitioners [United States] at 16, *Martinez* (No. 03-878) ("'[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control'") (citations omitted); Pet. App. 4a-5a ("There is first the ancient principle that a nation-state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission") (citations omitted) *with* Brief for the Petitioners [United States] at 16, *Martinez* (No. 03-878) ("The singular authority of the political Branches over immigration derives from the 'inherent and inalienable right of every sovereign and independent nation' to determine which aliens it will admit or expel.") (citations omitted).

Similarly, the court of appeals relied upon the same authorities that the government invoked unsuccessfully in *Martinez*. *Compare* Pet. App. 6a-7a (citing, *inter alia*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) ("The Chinese Exclusion Case"); *Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States,* 149 U.S. 698 (1893); *Knauff*; and *Fiallo v. Bell*, 430 U.S. 787 (1977)) *with* Brief for the Petitioners [United States] at 15-16, *Martinez* (No. 03-878) (citing same).[4]

The court of appeals addressed *Martinez* and *Zadvydas* only briefly, distinguishing the cases on three grounds: first, that they were statutory cases "rest[ing] on the Supreme Court's interpretation, not of the Constitution, but of a provision in the immigration laws"; second, that *Zadvydas* drew a clear line between non-citizens within the United States and those outside the country; and third, that "[s]ince petitioners have not applied for admission, they are not entitled to invoke [the] judicial power." Pet. App. 11a-12a & n.12, 21a. It is not entirely clear whether the court of appeals considered each distinction relevant to its separation of powers analysis, as opposed to its due process analysis (which we address separately below). In any event,

[4] In the instant case, the government raised identical arguments regarding separation of powers in the courts below. *See, e.g.*, Brief for Appellants [United States] at 16, *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429) ("The power to admit an alien into the United States is a sovereign function exercised solely by the political branches. Unless otherwise authorized by law, no court has the power to review the Executive's decision to exclude an alien from this country.").

none of these distinctions is a meaningful or persuasive reason to ignore that this Court has required precisely the sort of habeas release order that the court of appeals regarded as beyond the judiciary's power.

The court of appeals' first ground for distinguishing *Martinez* and *Zadvydas* – the characterization of those cases as statutory, rather than constitutional – is not relevant to the separation of powers issue. On that issue – the power of the courts to order the release in the United States of unlawfully detained foreign nationals who have no affirmative right to be here – *Martinez* and *Zadvydas* are no more statutory than this case. The statutory question that the Court resolved in *Martinez* and *Zadvydas* is whether 8 U.S.C. § 1231(a)(6) authorizes the indefinite detention of individuals whose removal from the United States is not reasonably foreseeable. The Court ruled in both cases that the statute does not authorize such detention. That statutory holding merely serves to put the petitioners in those cases on the same footing as the Petitioners here: they were foreign nationals held by the executive without lawful authority for their continued detention, but the executive had full authority to deny them entry and residence in the United States under the immigration laws – indeed, they had already been personally ordered removed from the country.

Critically, once the Court determined that the *detention* of such habeas petitioners was unauthorized, their *release* in the United States followed as a matter of course. And for good reason:

no such concerns arise when a court is exercising its core habeas power to order release from unlawful executive detention. *See Zadvydas*, 533 U.S. at 595-96 (emphasizing distinction between ordering release and conferring status or entry under immigration laws).

The court of appeals' second ground for distinguishing this Court's precedent – the distinction between aliens inside and outside our borders – simply fails to acknowledge what was at issue in *Martinez*. In response to Judge Rogers' concurring opinion, the panel majority wrote that "as far as a court's releasing an alien into the country temporarily pursuant to statutory authority, there [is] a clear distinction between aliens within the United States and those 'outside our geographic borders.'" Pet. App. 21a (citing *Zadvydas*, 533 U.S. at 693.) However, the government relied on that very same distinction when it tried, and failed, to convince this Court not to extend *Zadvydas*'s holding in *Martinez*. Contrary to the view of the D.C. Circuit, *Martinez* demonstrates that a habeas court can order the release in the United States of inadmissible aliens who are stopped at our threshold, including inadmissible aliens who have never physically entered the United States.

The court of appeals' third ground for distinguishing these cases appears to rest on a misunderstanding of the process by which the petitioners in *Martinez* and *Zadvydas* sought the judicial orders that they were ultimately granted. In a footnote, the court of appeals stated that "The Judiciary only possesses the power Congress gives it

– to review Executive action taken within [the] framework [of entry according to the immigration laws]. Since petitioners have not applied for admission, they are not entitled to invoke that judicial power."[5] The court of appeals thus appeared to view this Court's orders in *Martinez* and *Zadvydas* as deriving from an immigration statute providing for judicial review of the petitioners' underlying removal orders. But those cases did not arise under any removal review procedure in the immigration code. They arose under the courts' habeas jurisdiction, and this Court took pains to point out that it was *not* ordering entry pursuant to the immigration statutes or upsetting the underlying removal orders that had been issued in those cases. Instead, it simply ordered the appropriate remedy on habeas for unlawful detention: release.[6]

3. In reaching its separation of powers conclusion, the court of appeals not only improperly

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[5] *Cf. Boumediene*, 128 S. Ct. at 2246 (noting evidence of Framers' understanding of the "Suspension Clause as an 'exception' to the 'power given to Congress to regulate courts'" and the "guarantee[of] an affirmative right to judicial inquiry into the causes of detention").

[6] In at least one significant respect, the district court's order mandating release of the petitioners in this case has far more limited implications than the release ordered under *Martinez*. The release mandated pursuant to *Martinez* is applicable to *any* inadmissible alien, including any alien who voluntarily comes to our shores without authorization and whose arrival is outside the control of our government. In this case, by contrast, the petitioners include only those whom the government itself captured abroad and transported to Guantanamo and who are now unlawfully detained there.

disregarded this Court's actions in *Martinez* and *Zadvydas*, but also mistakenly read *Mezei* and *Knauff* far more broadly than those cases can sustain. The panel majority proceeded as if *Knauff*'s statement that it "is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien" precludes relief in this case. Pet. App. 8a, 20a. But – even leaving *Martinez* and *Zadvydas* aside – *Knauff* itself does not support that conclusion. *Knauff* was not a case about detention, but rather a challenge to the government's decision to exclude the petitioner.[7] Because there was no suggestion that the petitioner in *Knauff* would be unable to return to her native country if her exclusion were upheld, *Knauff*'s statement about the reviewability of exclusion orders – whatever the statement's accuracy or continued validity[8] – plainly does not resolve the separate question of what remedy a habeas court can properly order when it determines that an individual is being detained unlawfully.

Nor does *Mezei* resolve that question. In *Mezei*, as in *Knauff*, the Court regarded the case as

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[7] As it turned out, even though this Court upheld *Knauff's* exclusion, the Attorney General subsequently reopened her case and she was eventually ordered admitted to the United States. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 961-64 (1995).

[8] *See St. Cyr*, 533 U.S. at 306-07 & nn.28-30 (collecting cases where habeas courts reviewed immigration decisions, including exclusion decisions).

primarily raising a challenge to the exclusion of the non-citizen petitioner under the immigration statutes. 345 U.S. at 210-11 & n.7. Having found that Mezei's exclusion was lawful, *id.* at 214-15, the Court declined to order his release in the United States, *id.* at 215-16. The *Mezei* decision has been strongly – and correctly – criticized from the time it was issued, and many aspects of the decision cannot be reconciled with this Court's prior and subsequent jurisprudence, including, most recently, *Boumediene*. *See generally* Br. of *Amici Curiae* Law Professors. In any event, for separation of powers purposes, it is sufficient to note that in *Mezei* the Court never confronted the question presented in this case and answered in *Martinez* and *Zadvydas*. Specifically, the Court never found that Mezei was subject to unlawful detention, so it never considered what remedy would be within the Court's powers and it certainly never held that a habeas court would be powerless to grant meaningful relief from unlawful detention. And any suggestion to the contrary is plainly negated by this Court's decisions in *Martinez* and *Zadvydas*.

In addition, while *Mezei* is not a separation-of-powers case, it is worth noting that aspects of *Mezei* that were crucial to the Court's analysis simply are not present here. Mezei applied for admission and was ordered excluded, so the Court might have plausibly focused on the validity of the exclusion order and the operation of the immigration statutes in his case. Here, as the court of appeals itself acknowledged, "the government has never asserted . . . that it is holding petitioners pursuant to the

immigration laws. None of the petitioners has violated any of our immigration laws." Pet. App. 16a. Indeed, "[n]one of the petitioners has even applied for admission." *Id.* This is not, in short, an immigration case. It does not involve an exclusion order or any statute governing admission.

Equally important, in *Mezei* the Court emphasized that the petitioner's "temporary harborage" on Ellis Island was "an act of legislative grace" pursuant to Congress' "generous" decision to allow aliens who chose to come to the United States to be "temporar[ily] remov[ed] from ship to shore" rather than being kept "aboard the vessel [they arrived on] pending determination of their admissibility, resulting [in] hardships to the alien and inconvenience to the carrier." 345 U.S. at 215. These circumstances, in the Court's view, also justified its treatment of Mezei's case as one of "continued exclusion" rather than detention. By contrast, Petitioners here never sought to come to the United States; they were forcibly brought from half-way across the world, and their unlawful imprisonment by the United States government—now in its eighth year—cannot be characterized as an "act of … grace," "generous," or "temporary."

In sum, this case squarely presents the fundamental violation that habeas addresses: unlawful executive detention. For that reason, it calls for the fundamental remedy that habeas provides: release. This Court ordered that remedy in *Martinez* and *Zadvydas* over the same objections presented by the government in this case, and was correct to do so. The separation of powers is not

served by allowing the executive, either alone or in concert with the legislature, to annul the judiciary's habeas authority for a category of petitioners and to keep them confined in perpetuity, even as it agrees (or at least does not dispute) that they are entitled to some sort of habeas "relief." Rather, the separation of powers *requires* that the judiciary be able to fulfill its historic and constitutionally mandated role by ordering an effective habeas remedy for unlawful detention. *Accord Boumediene*, 128 S. Ct. at 2259 ("[T]he writ of habeas corpus is . . . an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.").

II. PETITIONERS' INDEFINITE DETENTION VIOLATES DUE PROCESS ON THE FACTS OF THIS CASE.

The Court need not reach the merits of the Petitioners' Fifth Amendment Due Process claim in this case: The government has clearly failed to meet its core burden in habeas proceedings—to show that its continued detention of the Petitioners is authorized by law; and, as discussed above, the Petitioners are entitled to an effective remedy for their unlawful detention.

However, the Court should not leave intact the court of appeals' refusal to acknowledge or apply *Boumediene*'s holding on the proper test for determining when the protections of the Constitution apply to foreign nationals outside the sovereign territory of the United States. The court of appeals

concluded that as a categorical matter "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." Pet. App. 8a-9a. Rather than apply the functional analysis that *Boumediene* specifically instructed is applicable to non-citizens detained at Guantanamo, the court of appeals mechanically followed its own pre-*Boumediene* case law and a characterization of this Court's rulings that *Boumediene* expressly disavowed. As a consequence, the court of appeals wrongly concluded that the Petitioners' continued detention at Guantanamo without lawful authority does not violate due process.

The court of appeals' erroneous approach to the question of the Constitution's reach will, if left undisturbed, continue to infect rulings addressing the constitutional claims of detainees whose petitions are pending in the D.C. Circuit and district courts.

1. In *Boumediene*, the Court explicitly rejected the sweeping bright-line rule that "at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." *Boumediene*, 128 S. Ct. at 2253. This statement was made over the government's strenuous opposition and after years of litigation, including two prior decisions by the Court in which the government had urged such a rule. *See* Brief for the Respondents [United States] at 14-25, *Boumediene* (Nos. 06-1195, 06-1196); Brief for the Respondents [United States] at 43, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No 05-184); Brief for the Respondents [United States] at 26-38, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-

334, 03-343). The Court affirmed instead that the critical analytical framework for determining the geographic reach of the Constitution is the "impracticable and anomalous" test – a test first articulated by Justice Harlan in his concurrence in *Reid v. Covert*, 354 U.S. 1 (1957), but which, the Court noted, had long animated its extraterritoriality decisions. *Boumediene*, 128 S. Ct. at 2253-55 (discussing Insular Cases); *id.* at 2255-56 (discussing *Reid*). As the *Boumediene* Court explained, "whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'" 128 S. Ct. at 2255 (quoting *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)); *see also id.* at 2255-56 (citing Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990), for its application of the "impracticable and anomalous" test).

Disregarding this analysis, the D.C. Circuit relied on the precise rationale that *Boumediene* had explicitly rejected less than one year before and failed to undertake the functional analysis *Boumediene* plainly required. *See* Pet. App. 8a-9a & n.9 (noting, in concluding that petitioners are not entitled to invoke due process protections, that the "Guantanamo Naval Base is not part of the sovereign territory of the United States"). Indeed, in resting its due process pronouncement exclusively on the question of "property or presence in the sovereign

territory of the United States," Pet. App. 8a-9a, the court of appeals adopted reasoning identical to the reasoning that underlay its ruling in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), which this Court overturned. *Compare* Pet. App. 8a-9a ("the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States") *with* 476 F.3d at 991 ("the Constitution does not confer rights on aliens without property or presence within the United States").

The D.C. Circuit thus repeatedly asserted an understanding of this Court's precedents that *Boumediene* expressly rejected. For example, the court of appeals attempted to draw support from *Johnson v. Eisentrager*, 339 U.S. 763 (1950), for a categorical rule that the Constitution does not extend to aliens outside the United States. *See* Pet. App. 8a-9a (citing *Eisentrager*, 339 U.S. at 783-84). But this Court made clear in *Boumediene* that "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution[.]" 128 S. Ct. at 2258. Likewise, the court of appeals cited *Verdugo-Urquidez*, 494 U.S. at 274-75, in support of its conclusion that the Petitioners' lack of property or presence in the United States was determinative. *See* Pet. App. 8a-9a. But *Boumediene* expressly adopted the rationale contained in Justice Kennedy's concurrence in *Verdugo-Urquidez*, which applied the "impracticable and anomalous" test. *See Boumediene*, 128 S. Ct. at 2255-56 (citing Justice Kennedy's concurrence in *Verdugo-Urquidez*, 494 U.S. at 277-78, for its

application of the "impracticable and anomalous" test); *accord Rasul*, 542 U.S. at 483 n.15 (citing Justice Kennedy's concurrence in *Verdugo-Urquidez*, 494 U.S. at 277-78).

2. The court of appeals' failure to acknowledge *Boumediene*'s analysis also caused it to persist in mistakenly applying its own precedents resting on a reading of pre-*Boumediene* cases that this Court expressly disavowed. Pet. App. 9a (citing cases); *see Jifry v. Fed'l Aviation Admin.*, 370 F.3d 1174, 1182-83 (D.C. Cir. 2004) (citing, *inter alia*, *Eisentrager* and *Verdugo-Urquidez* and asserting that "'[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'" (citations omitted)); *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (asserting same); *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (citing dicta from *Verdugo-Urquidez* asserting the view that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("'[A]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country . . . .'" (citing *Verdugo-Urquidez*, 494 U.S. at 271)) (alterations in original); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam) (citing *Eisentrager* for the proposition that

"non-resident aliens [ ] plainly cannot appeal to the protection of the Constitution").

The D.C. Circuit thus remains unwavering in its insistence that its precedents compel denying constitutional rights to non-citizens outside the United States despite this Court's repeated rejection of that proposition. *See Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003) (stating that a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'" (citation omitted)), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene*, 476 F.3d at 991 ("the Constitution does not confer rights on aliens without property or presence within the United States"), *rev'd*, 128 S. Ct. 2229 (2008).

Indeed, in one recently issued decision, the D.C. Circuit adhered to its bright-line rule even after this Court had remanded the specific case for further consideration in light of *Boumediene*. *See Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (per curiam) ("*Rasul II*"), *petition for cert. filed*, 78 U.S.L.W. 3099 (U.S. Aug. 24, 2009) (No. 09-227); *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), *vacated by* 129 S. Ct. 763 (2008). In *Rasul II*, the D.C. Circuit cited its decision in this case in support of its view that "*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." 563 F.3d at 529 (citing, *inter alia*, *Eisentrager*, *Verdugo-Urquidez*, and *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009)). The

D.C. Circuit effectively invited this Court to clarify *Boumediene*'s implications:

> Plaintiffs … maintain that *Boumediene* has eroded the precedential force of *Eisentrager* and its progeny. Whether that is so is not for us to determine; the [Supreme] Court has reminded the lower federal courts that it alone retains the authority to overrule its precedents.

Id.

In short, the D.C. Circuit has made clear that until this Court acts, it will continue to adhere to its pre-*Boumediene* precedents on the Constitution's extraterritorial application because, in its view, those authorities remain good law. *See id.* ("A panel of this court is under another constraint: we must adhere to the law of our circuit unless that law conflicts with a decision of the Supreme Court."). Without further enforcement by this Court of *Boumediene*'s unmistakable mandate, the D.C. Circuit's contrary approach will lead to further protracted delay in the resolution of Guantanamo detainees' rights and continued failure by the courts to follow *Boumediene*'s teaching with regard to extraterritorial application of the Constitution.

3. The D.C. Circuit suggested that it was entitled to set aside the Court's reasoning in *Boumediene* regarding the proper analysis of the geographic reach of the Constitution because that case "specifically limited its holding to the Suspension Clause." Pet. App. 21a. While the Court may have limited its *holding* in *Boumediene* to the

Suspension Clause, nothing in its *analysis* suggests that the functional test is only applicable to that single Constitutional provision. Rather, the Court drew on cases involving various other constitutional provisions in its analysis and plainly set forth general principles for deciding questions involving the Constitution's extraterritorial application.

In reaching its conclusion that non-citizens detained at Guantanamo were protected by the Suspension Clause, the Court first surveyed the historical record to determine whether historical evidence specific to habeas corpus and the Suspension Clause provided definitive guidance. However, the available evidence permitted "no certain conclusions." *Boumediene*, 128 S. Ct. at 2248. The Court therefore expanded its field of inquiry from the Suspension Clause to the Constitution as a whole, turning to precedents regarding "the issue of the Constitution's extraterritorial application." *Id.* at 2253.

The government's position was that "noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus." *Id.* at 2244; *see also id.* at 2258 ("[T]he Government's view is that the Constitution ha[s] no effect [], at least as to noncitizens, [where] the United States [has] disclaimed sovereignty in the formal sense of the term.").

In rejecting that position, *Boumediene* emphasized that the Court's many decisions concerning the extraterritorial application of the

Constitution refute the government's argument that noncitizens outside the sovereign territory of the United States are not entitled to constitutional protections. *Id.* at 2253. The Court's analysis demonstrated that its precedents simply did not support any such categorical rule.

The Court's repudiation of the government's proposed bright-line territorial rule was expressly *not* limited to considerations unique to the Suspension Clause. *Boumediene* discussed at length a series of cases, known as the Insular Cases, addressing the application of various other provisions of the Constitution to newly-acquired territories of the United States. *See id.* at 2254-55 (discussing, *inter alia*, *Downes v. Bidwell*, 182 U.S. 244 (1901) (revenue clauses of Article I), *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (indictment and trial by jury), and *Dorr v. United States*, 195 U.S. 138 (1904) (trial by jury)); *see also id.* at 2255 (discussing *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (trial by jury)). The Court emphasized that "'the real issue in the Insular Cases was not *whether* the Constitution extended to the Philippines or Porto Rico when we went there, but *which* of its provisions were applicable[.]'" *Id.* at 2254-55 (emphasis added) (citation omitted). Indeed, as the Court noted, the Court's precedents recognized early on that "even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Id.* at 2255 (citing *Balzac*, 258 U.S. at 312).

The Court also relied upon several precedents concerning the Constitution's application in a sovereign foreign territory. *Reid v. Covert*, 354 U.S. 1 (1957), for example, involved the applicability of the Fifth Amendment right to indictment by jury trial and Sixth Amendment right to trial by petit jury at United States military bases in Japan and England. *See Boumediene*, 128 S. Ct. at 2255-56 (discussing *Reid* as well as *In re Ross*, 140 U.S. 453 (1891), which likewise involved the jury provisions of the Fifth and Sixth Amendments); *see also id.* (citing Justice Kennedy's concurrence in *Verdugo-Urquidez*, which involved the applicability of the Fourth Amendment to a search conducted in Mexico). Only one case discussed at length by the Court, *Eisentrager*, specifically dealt with the extraterritorial application of the Suspension Clause.

The Court's rejection of the government's exclusive focus on territoriality was thus based on precedents concerning the extraterritorial scope of several constitutional provisions, and was in no way limited to considerations specific to the Suspension Clause. The Court made clear that there was "a common thread uniting the Insular Cases, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Boumediene*, 128 S. Ct. at 2258.

In short, the Court first carefully determined that the "impracticable and anomalous" test was the proper analytical framework for determining whether a constitutional guarantee applies extraterritorially. Only then did the Court proceed

to reach a conclusion regarding the specific question whether the *Boumediene* petitioners were entitled to the protections of the Suspension Clause.

4. Applying the "impracticable and anomalous" test to this case, it is plain that the Petitioners can properly invoke the Due Process Clause.

In *Boumediene*, the Court looked to three factors "in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." 128 S. Ct. at 2259. The Court first found that "the status of [the petitioners] is a matter of dispute" and that "the procedural protections . . . fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." *Id.* at 2260. It then explained that while "the sites of their apprehension and detention are technically outside the sovereign territory of the United States . . . [,] a factor that weighs against finding that they have rights under the Suspension Clause," "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *Id.* at 2260-61. Finally, the Court found that while "[c]ompliance with any judicial process requires some incremental expenditure of resources, … [t]he Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction

to hear the detainees' claims." Moreover, because the United States is "answerable to no other sovereign for its acts [at Guantanamo]," adjudicating the habeas petitions was unlikely to "cause friction with the host government." *Id.* at 2262, 2261. Accordingly, the Court held "that Art. I, § 9, cl. 2, of the Constitution [the Suspension Clause] has full effect at Guantanamo Bay." *Id.* at 2262.

The factors analyzed in *Boumediene* are also relevant to the question of whether Petitioners in this case are protected against unlawful detention by the Due Process Clause. In *Boumediene*, the Court explained that it derived these factors not only from *Eisentrager*, in which the Court's holding turned on the Suspension Clause, but also from the Court's "other extraterritoriality opinions," which addressed other constitutional provisions as explained above. Furthermore, the due process right of the Petitioners, while arising under a different part of the Constitution than their right to habeas corpus, is closely related from a functional perspective: the gravamen of both claims is that the Petitioners' continued detention is unjustifiable and must end. Thus, it is reasonable to look to the *Boumediene* factors in analyzing the reach of the Due Process Clause as it relates to this case.

The first factor, the citizenship and status of the detainees, weighs more heavily in favor of the Petitioners here than it did in *Boumediene*. While the petitioners in both cases are foreign nationals, the government maintained that the *Boumediene* petitioners were enemy combatants. Here, of course, the government does not argue that the Petitioners

are enemy combatants, or undertook any hostile acts that would make them detainable under the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001), under any interpretation of that statute. And, to the extent that the government has allowed proceedings addressing their status to fully conclude, those proceedings have confirmed that the Petitioners are not enemy combatants. *See* Pet. App. 2a-3a.

With respect to the second factor, the sites of apprehension and detention, the Petitioners here are in substantially the same situation as the *Boumediene* petitioners. The Court found it significant in *Boumediene* that the petitioners were being held "within the constant jurisdiction of the United States." 128 S. Ct. at 2261. Here too that fact helps to demonstrate why it is neither impracticable nor anomalous to recognize that the Due Process Clause applies to the Petitioners' continued detention here.

The third *Boumediene* factor, the practical obstacles involved, again weighs more heavily in favor of these Petitioners than it did in *Boumediene*. In *Boumediene*, the Court acknowledged that recognizing habeas jurisdiction in domestic courts for Guantanamo detainees could impose some costs – both economic and non-economic – on the military. But it stressed that *Boumediene* did not pose the risks that the *Eisentrager* Court apparently perceived regarding "judicial interference with the military's efforts to contain 'enemy elements, guerilla fighters, and "were-wolves,"' noting that although the detainees were "deemed enemies of the United

States," who might be "dangerous . . . if released," they were "contained in a secure prison facility located on an isolated and heavily fortified military base." *Id.* at 2261 (quoting *Eisentrager*, 339 U.S. at 784).

In this case, allowing the Petitioners to assert their due process claim would add nothing, or virtually nothing, to the economic and procedural burdens that the Government already faces by virtue of the Petitioners' undeniable right to habeas corpus. Nor would it interfere with the military's activities against our enemies, since the United States does not even claim that the Petitioners are enemies – or, for that matter, that the military has any desire to continue to detain them.[9] Finally, neither this case nor *Boumediene* raises the specter of "friction with the host government," because the United States is "answerable to no other sovereign for its acts on the base." *Id.* at 2261.

The *Boumediene* factors, then, show that recognizing the Petitioners' due process right to be free from indefinite arbitrary detention raises fewer and less substantial functional concerns (if any) than recognizing the *Boumediene* petitioners' habeas rights did. Nor do any other factors from the Court's extraterritoriality cases – such as the possibility of cultural or legal incompatibility between the right

[9] In any event, in *Boumediene* the Court made clear that even if the government alleged that the petitioners were dangerous enemy forces that would not serve to deprive them of constitutional rights when they are actually housed in a secure facility where proceedings can be undertaken to test that allegation and the validity of their imprisonment.

recognized and the location of the person asserting that right, *see, e.g.*, *Downes,* 182 U.S. at 282 – raise any significant obstacle to recognizing the due process right at issue here. *Boumediene*'s analysis thus compels the conclusion that the Petitioners are entitled to challenge their ongoing detention under the Due Process Clause.[10]

5. If, as we submit, the Petitioners can invoke the Due Process Clause in these circumstances, there can be no doubt that its command is being violated.

As the Court explained in *Zadvydas*, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty th[e] [Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690; *see also Hamdi*, 542 U.S. at 529 (plurality opinion) ("the most elemental of liberty interests [is] the interest in being free from physical detention by one's own government"); *Rasul*, 542 U.S. at 483 n.15 (foreign nationals' allegations of over two years' imprisonment at Guantanamo "without access to counsel and without being charged with any wrongdoing . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" (citation omitted)).

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[10] *Accord Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992) ("applying the fifth amendment would not appear to be either 'impracticable' or 'anomalous'" with respect to Haitian refugees intercepted at sea and brought to Guantanamo (citing Justice Kennedy's concurrence in *Verdugo-Urquidez*)), *vacated as moot sub nom. Sale v. Haitian Centers Council, Inc.,* 509 U.S. 918 (1993).

The government has offered *no* justification for why these Petitioners must be detained that actually relates to the Petitioners themselves. The government has not claimed that the Petitioners are dangerous or that it would be impossible to keep track of the Petitioners if they were released on appropriate conditions. The government also has not claimed that releasing the Petitioners in the United States would cause friction with other countries or endanger our national security. (Thus, none of these issues is before the Court on this record.) The government's blank refusal to release cannot satisfy any conception of due process that actually considers the Petitioners' liberty interest in freedom from indefinite arbitrary imprisonment.

The government ignores this problem rather than address it. Echoing Justice Scalia's dissent in *Zadvydas,* 533 U.S. at 703, the government urges the Court to disregard the Petitioners' liberty interest by focusing "not on whether petitioners have any due process rights, but instead whether they have a due process right to enter the United States from abroad." BIO at 23. Seven members of the Court rejected that approach in *Zadvydas,* and the Court should again reject it here.

As the majority recognized in *Zadvydas,* "indefinite detention of an alien would raise a serious constitutional problem" under the Due Process Clause because it impinges on the alien's basic liberty interest. 533 U.S. at 690. Justice Kennedy's dissent, joined by Chief Justice Rehnquist, likewise acknowledged "the undeniable deprivation of liberty caused by the detention," and further noted that

"both removable *and inadmissible* aliens are entitled to be free from detention that is arbitrary and capricious." *Id.* at 724, 721 (Kennedy, J., dissenting) (emphasis added).

Reliance on *Mezei* to avoid the Petitioners' due process claim is equally misguided. It is true, of course, that the *Zadvydas* majority distinguished *Mezei* from the case at hand, explaining that *Mezei* "rested upon a basic territorial distinction" – *i.e.* that Mezei had not formally entered the United States – and limited its constitutional analysis to aliens who had made such an entry, while expressly declining to consider the question of *Mezei*'s continuing validity in light of subsequent developments. *Zadvydas*, 533 U.S. at 694.

After *Boumediene,* however, it is clear that the "territorial distinction" cited in *Mezei* does not deprive Guantanamo detainees of all constitutional rights and that the Petitioners cannot be denied the fundamental protections of the Due Process Clause. *See supra* p. 18-19, 27-31. Even on its own terms, moreover, *Mezei* does not support the government's effort to deprive Petitioners of all due process rights. As explained at greater length *supra*, *Mezei* addressed "temporary harborage" and "continued exclusion," not indefinite detention; the petitioner's presence at Ellis Island was not only the product of his voluntary decision to come to the United States, but also of the "generous" "act of legislative grace" that allowed him to come ashore from his ship; and he had actually applied for admission, had been ordered excluded on national security grounds, and was challenging that decision. 345 U.S. at 215.

Each of these facts was integral to the Court's statement that "[t]hus we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right." *Id*.

Mezei's due process analysis is a product of its peculiar facts, its historical context, and the comparatively undeveloped jurisprudence on the extraterritorial application of the Constitution at that time – four years before *Reid*, and decades before *Verdugo-Urquidez*, *Rasul*, and *Boumediene*. Should the Court reach the merits of the Petitioners' due process claim, the functional analysis that *Boumediene* requires compels the conclusion that the Due Process Clause applies and is violated by the Petitioners' continued detention.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

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