Nos. 06-1195 & 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*,

Petitioners,

—v.—

GEORGE W. BUSH, *et al.*,

Respondents.

KHALED A.F. AL ODAH, *et al.*,

Petitioners,

—v.—

UNITED STATES, *et al.*,

Respondents.

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

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

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. 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. In the intervening eight decades, 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.

In this case, the Court of Appeals did not even consider Petitioners' constitutional claims because it held, categorically, that Petitioners were not entitled to any constitutional rights. That ruling effectively deprives Petitioners of any ability to challenge the legality of their detention through the traditional common law writ of habeas corpus or to assert, among other things, that their confinement in military custody without charges or trial for more than five years violates fundamental principles of due process of law. The proper resolution of those issues is a matter of significant concern to the ACLU and its members.

Public Justice, P.C. (formerly known as Trial Lawyers for Public Justice) is a national public interest law firm specializing in precedent-setting and socially significant

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Some parties have submitted blanket consents to the filing of all *amicus* briefs; consent letters from the remaining parties have been submitted along with this brief. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief.

civil litigation, and dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, Public Justice prosecutes high-impact litigation designed to advance consumers' rights, workers' rights, civil rights and civil liberties, public health and safety, environmental protection, and the protection of the poor and the powerless. Public Justice appears as *amicus* in this case because it is committed to ensuring that the United States provides – and stands throughout the world as a beacon for – access to justice.

SUMMARY OF ARGUMENT

This case represents the latest stage in the government's ongoing effort to avoid any meaningful judicial review of its decision to hold hundreds of detainees without charges or trial at the U.S. Naval Base at Guantanamo Bay for as long as it chooses. The government is unapologetic about its position. In the government's view, its detention policies at Guantanamo Bay are not subject to any legal constraint beyond the plainly inadequate safeguards that Congress has belatedly enacted, for two simple reasons: the detainees are not U.S. citizens and they are imprisoned outside the United States.

For nearly eight centuries, the writ of habeas corpus has served as a check against arbitrary executive detention. The Framers regarded habeas corpus as so essential to ordered liberty that they included a provision in the Constitution providing that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2. The government does not argue that those conditions have been met. Instead, the government argues, and the Court of Appeals agreed, that "the Constitution does not confer rights on aliens without property

or presence within the United States." *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007).[2]

This Court has rejected such a categorical rule for more than a hundred years. In different decisions, the Court has emphasized different factors in determining whether the Constitution applies. Here, however, every standard that the Court has articulated is easily satisfied. First, petitioners are asserting fundamental rights. Second, the U.S. has exercised exclusive jurisdiction and control over Guantanamo Bay since 1903. Third, applying the Constitution to these facts would not be "impracticable and anomalous." Indeed, the constitutional anomaly in this case has been created by the decision below, which allows the government to act with impunity and outside any system of checks and balances.

Because it represents such a departure from this Court's longstanding jurisprudence, the decision below can and should be reversed on multiple grounds. Properly understood, the Suspension Clause operates as a direct restraint on the government regardless of where any particular habeas petitioner is detained. The alternative procedures established by Congress in the Military Commissions Act are a patently inadequate substitute for habeas corpus. Respondents' actions in this case are subject to constitutional scrutiny because of the special status of Guantanamo Bay. And, regardless of whether the Constitution applies in its entirety at Guantanamo Bay, Petitioners are entitled to invoke the Suspension and Due Process Clauses because both provisions protect fundamental rights.

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[2] The Court of Appeals first held that the federal habeas corpus statute, 28 U.S.C. § 2241, as amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), does not confer jurisdiction over habeas petitions filed by non-citizen prisoners captured abroad and detained as "enemy combatants" at the U.S. Naval Base at Guantanamo. 476 F.3d at 988.

Rather than repeat these arguments, each of which is discussed at length by petitioners and other *amici*, this brief focuses on the "impracticable and anomalous" test first articulated by Justice Harlan in 1957, elaborated upon by Justice Kennedy in 1990, and implicitly endorsed by a majority of this Court in 2004. We begin, in Point I, by arguing that the categorical rule adopted by the Court of Appeals is inconsistent with this Court's precedents. In Point II, we examine the genesis and reasoning of the "impracticable and anomalous" test. Finally, in Point III, we explain why that test requires reversal of the decision below. By clearly holding that government officials operating outside the United States are obligated to obey the Constitution unless it is "impracticable and anomalous" to do so, this Court will provide the lower courts with needed guidance on a critical question of constitutional law. Equally significant in light of past history, it will discourage the government from seeking to evade the effect of an adverse ruling by transferring petitioners to another facility located outside the United States or by incarcerating future detainees in such facilities.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN STATING CATEGORICALLY THAT THE CONSTITUTION ENFORCES NO CONSTRAINT ON U.S. GOVERNMENT CONDUCT WITH RESPECT TO NON-U.S. CITIZENS OUTSIDE THE UNITED STATES

The Court of Appeals erroneously interpreted this Court's precedents in stating that "the Constitution does not confer rights on aliens without property or presence within the United States," 476 F.3d at 991. For at least 100 years, this Court has rejected such categorical pronouncements in

deciding whether the U.S. government is subject to constitutional constraints outside the United States. Rather, when confronted with claims of constitutional violations outside the United States, this Court has examined the particular circumstances of each case and reached various conclusions as to whether and how the U.S. Constitution applies. Beginning with the Insular Cases of the early twentieth century, the Court has evaluated many relevant factors, such as the nature of the right, the context in which the right is asserted, the nationality of the person asserting the right, and whether recognition of the right would conflict with any foreign sovereign's laws or customs. That case-by-case evaluation belies the Court of Appeals' categorical holding that the Constitution can never constrain the government's conduct with respect to a non-U.S. citizen without property or presence within the United States.

Unlike the Court of Appeals, this Court has not even purported to rely on such a categorical rule since the late nineteenth century. In *Ross v. McIntyre (In re Ross)*, 140 U.S. 453 (1891), a merchant seaman was charged with murdering his shipmate on board a U.S. vessel at port in Japanese waters.[3] The defendant was convicted by a U.S. consular tribunal in Japan. He filed a habeas petition challenging his conviction on the ground that the proceedings violated his Fifth Amendment right to indictment by grand jury and his Sixth Amendment right to a jury trial. This Court denied the petition and, relying on the language of the Preamble to the Constitution, stated that the Constitution is "ordained and established 'for the United States of America' and not for countries outside of their limits." *Id.* at 464. For that reason, the Court held that the Fifth and Sixth

[3] The petitioner in *Ross* claimed to be a British national, while the government contended that he was a U.S. citizen. *Id.* at 454, 457-58. The Court concluded that because the petitioner had enrolled on a U.S. vessel, he should be treated as a U.S. seaman and subject to U.S. laws, including the jurisdiction of the consular tribunal. *Id.* at 472-75.

Amendments "apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad....The constitution can have no operation in another country." *Id.* (citation omitted). As set forth below, that broadly worded proposition has long since been superseded. *See Reid v. Covert*, 354 U.S. 1, 12 (1957).

But even in *Ross*, the Court softened its categorical statement with its actual, context-specific reasoning. In addition to quoting the language from the Preamble, the Court also relied upon two very practical concerns. First, the Court espoused a contract theory about the relationship between the United States and foreign countries, noting that when U.S. officers act in foreign countries, "it must be on such conditions as the two countries may agree; the laws of neither one being obligatory upon the other." 140 U.S. at 464. Thus, the Court expressed a concern about possible conflicts between the United States and another sovereign power. Second, the Court reasoned that recognition of the claimed Sixth Amendment rights in the context of consular trials in foreign countries would be "impracticable from the impossibility of obtaining a competent grand or petit jury." *Id.*

Since *Ross*, the Court has continued to engage in circumstance-specific analysis and has repudiated categorical rules limiting the force of the Constitution abroad. *See Reid*, 354 U.S. at 12 (noting that the "approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases"). In the Insular Cases of the early twentieth century, the Court confronted various constitutional claims arising out of newly acquired territories of the United States. In each of those cases, the Court declined to follow *Ross*'s broad statement and instead evaluated the specific circumstances of each case, with particular emphasis on the nature of the right asserted. In

Downes v. Bidwell, 182 U.S. 244 (1901), the Court considered whether the revenue clauses of Article I applied to Puerto Rico, which had recently been ceded by Spain to the United States. The Court noted that the "personal rights" of territorial inhabitants could not be "unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress," *id.* at 283, even though the Court ultimately rejected the plaintiff's efforts to recover tariffs imposed on his goods imported from Puerto Rico to New York. While reserving opinion on the exact contours of such fundamental rights, the Court emphasized that citizens and non-citizens alike are protected against violations of *fundamental* constitutional rights. *Id.* at 268, 282-83. "Even if regarded as aliens," the residents of the territories "are entitled under the principles of the Constitution to be protected in life, liberty, and property." *Id.* at 283.

After *Downes*, the Court repeatedly assessed whether an asserted constitutional right is "fundamental" in determining whether it constrained government action outside the United States. For example, in *Territory of Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), the Court confronted claims by criminal defendants in the newly acquired territories of Hawaii, the Philippines and Puerto Rico, respectively, that their constitutional right to trial by jury had been violated. In all three cases, the Court emphasized, as it had in *Downes v. Bidwell*, that fundamental constitutional rights apply outside the United States. In *Mankichi*, the Court rejected the petitioner's claim on the ground that the asserted rights "are not fundamental in their nature." 190 U.S. at 218. In *Dorr v. United States*, the Court cited its earlier opinions in noting that if the right to a jury trial were "fundamental," it had to apply within the territory. 195 U.S. at 148. And in *Balzac*, the Court emphasized that while a non-fundamental constitutional right may or may not apply in a given situation,

"[t]he guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without the due process of law," must always apply. 258 U.S. at 312-13. *See also Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976) (noting that in the Insular Cases, the Court held that for "territories destined for statehood from the time of acquisition, ... the Constitution ... applied ... with full force," while in unincorporated territories, "only 'fundamental' constitutional rights were guaranteed to the inhabitants"). In each case, however, the Court concluded based on the circumstances that the right to a jury trial was not fundamental.[4] Thus, in the criminal process cases, the Court's analysis was premised entirely on the holding that fundamental constitutional rights apply outside the United States.

While *Downes*, *Mankichi*, *Dorr* and *Balzac* concerned the assertion of constitutional rights in unincorporated U.S. territories, the fundamental rights doctrine that those decisions espouse has not been limited to such territories. Later in the twentieth century, the Court cited the fundamental rights doctrine from the Insular Cases when it had occasion to consider the application of the Constitution in a sovereign foreign country. In *Reid v. Covert*, 354 U.S. 1 (1957), the petitioners, civilian spouses of U.S. servicemen stationed on U.S. military bases in Japan and England, were tried, convicted and sentenced to death by courts-martial for

[4] Those conclusions were based in large measure on a practical consideration – that the territories already had criminal justice procedures in place and that imposing the Anglo-American system of indictment and trial would wreak havoc on the existing system. *Mankichi*, 190 U.S. at 215-16; *Dorr*, 195 U.S. at 148; *Balzac*, 258 U.S. at 309-10 (noting that Puerto Rico, which had an existing criminal justice system based on the Spanish civil law model, could be distinguished from Alaska, which was sparsely populated when acquired by the United States and more easily accessible, and therefore applying U.S. laws did not pose same practical difficulty).

the murder of their husbands. The petitioners claimed that the court-martial proceedings violated their Fifth Amendment right to indictment by grand jury and Sixth Amendment right to trial by petit jury. As in the Insular Cases, the Court's analysis in *Reid* focused on the importance of the constitutional right asserted rather than on the location of the alleged constitutional violation. Indeed, in his opinion for the four-member plurality, Justice Black criticized the Insular Cases' fundamental rights doctrine for not going far enough where U.S. citizens are concerned:

> This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.

354 U.S. at 8-9 (footnotes omitted). Thus, the plurality in *Reid* would have held that U.S. citizens enjoy the full panoply of constitutional rights wherever in the world their government acts against them.[5] The Court noted that the assertion in *Ross* that the Constitution did not apply outside the United States "cannot be understood except in its peculiar setting; even then, it seems highly unlikely that a similar result would be reached today." *Id.* at 10.

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[5] In his concurring opinion, Justice Harlan rejected the idea that U.S. citizens enjoy every constitutional right everywhere in the world. 354 U.S. at 74 (Harlan, J., concurring). That issue is not presented by this case, however, which involves only the rights of non-citizens outside the United States. Nothing in *Reid* curtailed the fundamental rights doctrine as it already applied to non-U.S. citizens.

As in the Insular Cases, the Court in *Reid* examined the actual circumstances of the case and assessed the practical effect of its decision. The Court noted that the practical concerns that had animated the Insular Cases' holdings – that the territories in question had "wholly dissimilar traditions and institutions" – were not present in *Reid*. *Id.* at 14. The Court also considered the government's arguments that the Constitution could not apply "in the field" because of "conditions of world tension," but concluded that enforcing the petitioners' asserted Fifth and Sixth Amendment rights would not have any deleterious effect on U.S. military operations because there were no active hostilities in the area. *Id.* at 34-35. The Court emphasized, however, that "[e]ven during time of war the Constitution must be observed." *Id.* at 35 n.62. Thus, the plurality opinion in *Reid* carefully weighed the practical considerations involved in applying the Fifth and Sixth Amendments on the facts presented and the essential civil liberties that those amendments protect. On balance, the Court concluded, the *Reid* petitioners enjoyed those rights even when the U.S. government acted against them in a sovereign foreign country.

Thus, contrary to the Court of Appeals, this Court has declined to pronounce categorical rules against the application of the Constitution outside the United States. Instead, the Court has examined the particular circumstances in individual cases to determine whether an asserted right should apply. To the extent the Court has pronounced categorical rules, they have been in favor of constitutional rights – as in the Insular Cases, which held that fundamental rights are always protected regardless of alienage, or *Reid v. Covert*, where a plurality of the Court concluded that U.S. citizenship should carry full constitutional protections worldwide. Nonetheless, the Court of Appeals set forth a categorical rule that "the Constitution does not confer rights on aliens without property or presence within the United

States." 476 F.3d at 991. In support of that statement, the Court of Appeals cited three decisions of this Court: *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); and *Zadvydas v. Davis*, 533 U.S. 678 (2001). 476 F.3d at 991-92. None of those decisions remotely supports the Court of Appeals' categorical rule.

Rather than espouse any categorical rule against application of the Constitution to non-U.S. citizens outside the United States, *Eisentrager* actually reflects a nuanced analysis of all the circumstances in the particular case.[6] In *Eisentrager*, the petitioners were German prisoners of war whom the United States had captured in China. They were convicted of war crimes by U.S. military commissions in China, which were established with the consent of the Chinese government, and were committed to serve life sentences at a U.S. military base in Germany. 339 U.S. at 766. The petitioners challenged their convictions on due process and other constitutional grounds. *Id.* at 767. The Court rejected the petitioners' claims and held that they were not entitled to any process greater than what they received in their military commission trials. *Id.* at 785. *Eisentrager* does not, however, set forth a categorical rule that non-citizens are not entitled to any constitutional rights outside the United States. To the contrary, the Court took pains to enumerate all of the factors justifying its holding:

> We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that

[6] Moreover, this Court recently noted in *Rasul v. Bush*, 542 U.S. 466, 479 (2004) that *Eisentrager* has been overruled at least in part. To the extent that *Eisentrager* held that the habeas corpus statute, 28 U.S.C. § 2241, did not provide jurisdiction over petitions filed by non-citizens outside the United States, it is no longer good law. *Id.*

> assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

339 U.S. at 777.[7] Indeed, in its recent decision in *Rasul v. Bush*, this Court emphasized that "the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant ... to the question of the prisoners' *constitutional* entitlement to habeas corpus." 542 U.S. at 476 (emphasis in original).[8] In short, *Eisentrager* was limited to

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[7] In addition to relying upon these facts, *Eisentrager* noted the practical difficulties that would have attended recognition of habeas corpus rights at that time. The Court worried that "[t]o grant the writ to these prisoners might mean that our army must transport them across the seas for hearing." *Id.* at 778-79. These considerations, of course, are generally less applicable today, as the habeas statute no longer requires physical production of the detainee in court. Lower courts have construed 28 U.S.C. § 2243 to require production of the petitioner in court only when the district court issues an order to show cause and schedules an evidentiary hearing, and the case presents issues of fact. *See Roman v. Ashcroft*, 162 F. Supp. 2d 755, 760 (N.D. Ohio 2001). In practice, those circumstances are rare. *Id.*; *see also* 1 J. Liebman & R. Hertz, Federal Habeas Corpus Practice & Procedure § 2.4b n.26 (5th ed. 2005) (noting that federal district courts ordered hearing in less than 1.17% of habeas corpus cases).

[8] The *Rasul* Court's characterization of *Eisentrager* helps to place in context Justice Jackson's observation, in *Eisentrager*, that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of right as he increases his identity with our society," 339 U.S. at 770. While Justice Jackson noted that "most" cases extending rights to aliens involved aliens within the territorial jurisdiction in the United States, *id.* at 771, he did not say that

its facts and the Court of Appeals therefore erred in relying upon it for its categorical rule.

The Court of Appeals also erred in relying upon *Verdugo-Urquidez*. As in all of the foregoing cases, the Court engaged in a careful analysis of all the circumstances, including practical considerations, before holding that a non-U.S. citizen who was abducted from his home in Mexico at the direction of U.S. government agents and tried for drug offenses in U.S. courts was not protected by the warrant clause of the Fourth Amendment. Writing for a majority of five, Chief Justice Rehnquist examined the history of the Fourth Amendment and concluded that the Framers intended only to restrict searches and seizures within the United States.[9] *Id.* at 266. In addition, *Verdugo-Urquidez* rested

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such presence is a *sine qua non*. Had that one factor been dispositive, it would have been unnecessary for Justice Jackson to offer six different reasons why constitutional habeas was unavailable in that case.

[9] Chief Justice Rehnquist also mentioned in passing the textual distinction between the Fifth Amendment's use of the word "persons" and the Fourth Amendment's use of the term "the people." While acknowledging that this "textual exegesis is by no means conclusive," he suggested that the phrase "the people" might signify a narrowly defined "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265; *see also id.* at 271 (distinguishing immigration decisions cited by petitioner as establishing "only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"). This view did not command a majority of the Court. Justice Kennedy, who provided a fifth vote for the majority, expressly disagreed that the difference between "the people" and "persons" had any significance. *Id.* at 276 (Kennedy, J., concurring). More generally, Justice Kennedy rejected any categorical rules about the applicability of the Constitution to non-citizens outside the United States. *Id.* Thus, Chief Justice Rehnquist's language about "sufficient" or "substantial connection" (1) was dicta; (2) related to the *Fourth Amendment* issue in *Verdugo-Urquidez;* and (3) was rejected by a majority of the Court.

Nonetheless, the D.C. Circuit has relied upon this dicta from *Verdugo-Urquidez* to state broadly that a non-citizen without a connection to the

upon practical considerations. As the Court noted, application of the Fourth Amendment's warrant requirement to searches in other countries would plunge courts into a "sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." *Id.* at 274. Moreover, the Court noted, any warrant issued by a magistrate "would be a dead letter outside the United States." *Id.*; *see also id.* at 278 (Kennedy, J., concurring) ("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all

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United States can never have any constitutional rights. The Court of Appeals below relied on two such opinions. 476 F.3d at 992 (citing *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *32 County Sovereignty Comm. v. U.S. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002)). Other circuits have made similarly broad statements. *See, e.g.*, *Al-Marri v. Wright*, 487 F.3d 160, 174-75 (4th Cir. 2007); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1352 (Fed. Cir. 2004). Those decisions are inconsistent with longstanding decisions recognizing that non-U.S. citizens have rights under the Due Process Clause, regardless of whether they have entered the United States voluntarily or formed ties with the United States. For example, this Court has held that non-U.S. citizens without ties or presence in the United States are entitled to due process rights when they are sued in U.S. courts. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108-09 (1987) (defendant non-resident, non-U.S. corporation without minimum contacts in forum state was protected by Fourteenth Amendment's Due Process Clause against exercise of personal jurisdiction by state court); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (same); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (recognizing that non-resident, non-U.S. corporations have individual liberty interest under Fifth Amendment Due Process Clause but holding on the merits that defendants' due process rights were not violated). In these decisions, it is the very lack of a substantial connection with the United States that triggers the due process right not to be haled into a U.S. court. Although these cases concerned foreign business entities, there is no reason the U.S. Constitution should confer fewer rights on a non-citizen human being than on a non-citizen corporation.

indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country."); *id.* at 279 (Stevens, J., concurring in the judgment) ("I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches."). Thus, like all the Court's other decisions on application of the Constitution outside the United States, *Verdugo-Urquidez* set forth no categorical rules but rested instead on an evaluation of myriad relevant factors.

In citing *Verdugo-Urquidez* to support its broad categorical rule, the Court of Appeals relied primarily on Chief Justice Rehnquist's statement that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 476 F.3d at 991 (quoting 494 U.S. at 269). That reliance was misplaced for two reasons. First, it is clear from the context that the Chief Justice was not stating a categorical rule that the Court *always* rejects such claims, but merely making a prefatory remark before citing one particular instance – *Eisentrager* – in which the Court had held that a non-citizen did not have a Fifth Amendment right. 494 U.S. at 269. Second, even if Chief Justice Rehnquist had meant the statement to be categorical, it was dicta that has never been endorsed by a majority of the Court. In *Verdugo-Urquidez*, the Court granted *certiorari* solely on two Fourth Amendment questions, and there was no Fifth Amendment issue before the Court. 494 U.S. at 264 (noting that Fifth Amendment "is not at issue in this case"). Indeed, before the decision below, the D.C. Circuit acknowledged that *Verdugo-Urquidez*'s language about the Fifth Amendment was dicta.[10] *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir.

[10] As set forth below in Point II, Justice Kennedy – the fifth member of the majority – clearly rejected any categorical rules against application of the Constitution outside the United States, and therefore could not have agreed to any categorical rule about the Fifth Amendment.

2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004). Thus, *Verdugo-Urquidez* does not support the extreme categorical approach announced in the decision below.

Nor does this Court's decision in *Zadvydas v. Davis* support the Court of Appeals' view. In *Zadvydas*, the Court considered the constitutional claims of lawful permanent residents of the United States who were physically present in the United States. 533 U.S. at 684-86. The *Zadvydas* petitioners challenged their prolonged and indefinite detention while the government sought to remove them from the United States based on their criminal convictions. *Id.* The Court noted that "[a] statute permitting indefinite detention of an alien would raise serious constitutional problems," *id.* at 690, and therefore construed the Immigration and Nationality Act not to authorize detention when removal is not reasonably foreseeable. *Id.* at 699. The Court of Appeals below quoted dicta in *Zadvydas* stating that "certain constitutional provisions available to persons inside the United States are unavailable to aliens outside of our geographic borders." 476 F.3d at 991-92 (quoting *Zadvydas*, 533 U.S. at 693). This dicta, of course, does not support the Court of Appeals' conclusion that non-citizens outside the United States *never* have constitutional rights. The Court, rather, was emphasizing that once a non-citizen enters the United States, she has *full* protection under the Constitution. *Id.*

In short, none of this Court's modern precedents support the categorical rule applied by the Court of Appeals below.

II. THE "IMPRACTICABLE AND ANOMALOUS" TEST PROVIDES A SUITABLE FRAMEWORK FOR ANALYZING THE CONSTITUTIONAL CLAIMS IN THIS CASE

Although this Court long ago concluded that constitutional claims arising outside the United States must be evaluated on a case-by-case basis, its decisions in this area "have been neither unambiguous nor uniform," as the Court itself has acknowledged. *Examining Bd. of Eng'rs,* 426 U.S. at 599. That ambiguity may not matter in this case because Petitioners are entitled to prevail under the fundamental rights doctrine of the Insular Cases, standing alone. *See supra* at 6-9. Nevertheless, this case provides the Court with an opportunity to bring important clarity to the law by applying the "impracticable and anomalous" test to its consideration of Petitioners' constitutional claims.

The decision below is not the first by the D.C. Circuit misinterpreting this Court's precedents and stating that non-citizens outside the United States do not have any constitutional rights.[11] *See Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003) (noting that *Verdugo-Urquidez*'s discussion of the Fifth Amendment was dicta, but stating nonetheless that non-citizens without property or presence in the United States have no constitutional rights), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004). The Court should make a clear statement to prevent the lower courts from adopting such categorical rules with unforeseeable future consequences.

The "impracticable and anomalous" test was first articulated by Justice Harlan in his concurring opinion in *Reid v. Covert*, 354 U.S. 1. Like the plurality, *see supra* at 9-

[11] In contrast, other circuits have correctly recognized that *Verdugo-Urquidez*'s holding is limited to the Fourth Amendment's Warrant Clause. *See, e.g., United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991); *Lamont v. Woods*, 948 F.2d 825, 834 (2d Cir. 1991).

10, Justice Harlan expressly rejected a categorical rule that the Constitution should never apply to the trial of U.S. citizens outside the United States. In his view, the question whether any asserted constitutional right applies outside the United States should depend upon an analysis of the particular circumstances of the case:

> [I]t seems to me that the basic teaching of *Ross* and the Insular Cases is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous....Decision is easy if one adopts the constricting view that these constitutional guarantees as a totality do or do not 'apply' overseas. But, for me, the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it. The question is one of judgment, not compulsion.

354 U.S. at 74-75 (Harlan, J., concurring).[12] Thus, Justice Harlan put into words what the plurality did in fact – examine all the relevant circumstances before drawing a conclusion about whether a constitutional right applies in the given circumstance.

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[12] For example, Justice Harlan stressed the fact that the petitioners were charged with capital offenses in concluding that they were entitled to trial rights under the Fifth and Sixth Amendments. *Id.* at 76-77 (Harlan, J., concurring). So did Justice Frankfurter. *Id.* at 49 (Frankfurter, J., concurring in the result). In later opinions, the Court held that the Fifth and Sixth Amendments applied even in cases where the offense did not carry the death penalty. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

Although the particular facts of *Reid* involved U.S. citizens in foreign countries, Justice Harlan's "impracticable and anomalous" test has not been limited to claims by U.S. citizens.[13] Justice Kennedy subsequently adopted and refined Justice Harlan's "impracticable and anomalous" test in *United States v. Verdugo-Urquidez*, which involved a constitutional claim by a Mexican citizen based on events arising in Mexico.[14] *Id.* at 277 (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). Justice Kennedy began his concurring opinion in *Verdugo-Urquidez* by noting that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277 (Kennedy, J., concurring). But, he concluded, "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous," based on various practical factors such as "[t]he absence of local judges or magistrates available to issue warrants." *Id.* at 278.

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[13] Justice Harlan himself obviously did not intend such a limitation. In setting forth the "impracticable and anomalous" test, he relied upon the Insular Cases, most of which involved non-citizen claimants. 354 U.S. at 74 (Harlan, J., concurring).

[14] Notably, in *Verdugo-Urquidez*, the government argued for the adoption of Justice Harlan's flexible approach and against categorical rules:

> [T]he decision whether to give extraterritorial application to particular constitutional provisions in particular contexts is not one that admits of categorical answers. Instead, it requires a careful assessment of several factors, including the nature of the underlying right, the character of the territory in which the constitutional claim arose, and the relationship of the claimant to the United States. That is the approach to questions of extraterritoriality articulated by Justice Harlan in his concurring opinion in *Reid v. Covert* [citation omitted]. That approach is also faithful to the analysis the Court has employed, and the results the Court has reached, in cases involving the extraterritorial application of the constitutional guarantees. We urge that approach here.

See Br. for the United States, *United States v. Verdugo-Urquidez*, No. 88-1353 (U.S.), 1989 WL 1127203 at *12-13.

Notwithstanding this conclusion, Justice Kennedy did not treat the "impracticable and anomalous" test as limited to the particular circumstances of *Reid* – *i.e.*, a constitutional claim by a U.S. citizen abroad. As he explained in *Verdugo-Urquidez*: "The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend ... on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of 'the people.'" *Id.* at 276 (Kennedy, J., concurring).

In one of its first cases implicating national security after September 11, 2001, a majority of this Court appeared to approve the Harlan-Kennedy "impracticable and anomalous" test. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court held that non-citizens detained by the United States at the U.S. navy base at Guanatanamo Bay had the right to pursue constitutional and statutory claims against the U.S. government through habeas petitions under 28 U.S.C. § 2241. 542 U.S. at 484. Although the Court's holding concerned statutory jurisdiction, the Court considered in a footnote whether the Guantanamo detainees in *Rasul* had alleged "custody in violation of the Constitution or laws or treaties of the United States," as required for jurisdiction under 28 U.S.C. § 2241(c)(3). The Court concluded that the detainees' allegations – of prolonged executive detention 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.'" 542 U.S. at 484 n.15 (quoting 28 U.S.C. § 2241(c)(3)). Immediately following this statement, the Court cited the portion of Justice Kennedy's *Verdugo-Urquidez* concurrence that set forth the "impracticable and anomalous" test and also the "cases cited therein." *Id.* (citing *Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring)). The Court of Appeals sought to minimize the significance of that footnote in *Rasul* by dismissing it as dicta. Whether

dicta or not, this Court's observation in *Rasul* was fundamentally sound and should now be reaffirmed.

By adopting the "impracticable and anomalous" test, the Court would provide much-needed guidance to the lower courts in an age of increasing U.S. government activity outside the 50 states. The test permits courts to account for different conditions and locations, from sovereign foreign countries (as in *Reid* and *Verdugo-Urquidez*) to unusual leaseholds such as the U.S. Naval Base at Guantanamo Bay. The "impracticable and anomalous" test also strikes the proper balance between the Constitution's structure of limited government power, and the need of the U.S. government to act effectively in the global arena. By applying the test, U.S. courts can give due recognition to core constitutional rights – such as the right against indefinite executive detention without any charge and based on evidence obtained by torture – while abiding by the common-sense principle that not every person outside the United States may enjoy the full panoply of rights under the Constitution when he encounters an agent of the U.S. government.

III. PETITIONERS HAVE ASSERTED VALID CONSTITUTIONAL CLAIMS UNDER THE "IMPRACTICABLE AND ANOMALOUS" TEST

The validity of Petitioners' constitutional claims has been amply demonstrated in Petitioners' own briefs and in the briefs submitted by other *amici.* We will not repeat those arguments here. For present purposes, we note that if the Court does adopt the "impracticable and anomalous" test, Petitioners' constitutional claims are more than sufficient to meet that test. In a nation committed to the rule of law, it would be "impracticable and anomalous" to rule that Petitioners have no right to challenge their detention in

federal court after they have been held without charges or trials, in some instances, for more than five years.

As set forth above in Point I, this Court has considered a number of factors in its cases on the application of the Constitution outside the United States. Two of those factors are dispositive in this case. First, the Court has considered the nature of the constitutional provision asserted, as in the Insular Cases when it determined whether a given constitutional right is "fundamental."[15] *See Downes*, 182 U.S. at 282-83; *Balzac*, 258 U.S. at 312-13; *Mankichi*, 190 U.S. at 217-18. *See also Examining Bd. of Eng'rs*, 426 U.S. at 601 n.30. Under those precedents, when a right is fundamental, it must apply. Second, the Court has considered the relationship between the United States and the location in question – for example, whether exercise of the constitutional provision would interfere with another sovereign. *See, e.g., Eisentrager*, 339 U.S. at 766 (noting that Chinese government consented to the trial of detainees by U.S. military commission in China). In addition, the Court has also considered myriad other factors going to the practicability of applying an asserted constitutional right, from the logistical problems in obtaining a search warrant in a foreign country, *Verdugo-Urquidez*, 494 U.S. at 273-74, to the mischief that would be caused by inserting American constitutional procedures into an existing criminal justice system where they are unknown, *see, e.g., Dorr*, 195 U.S. at 148.

On the facts of this case, it would plainly be neither "impracticable" nor "anomalous" to recognize the constitutional rights that Petitioners assert. First, by challenging their indefinite detention by the Executive Branch without any charges or trial, Petitioners raise claims that lie at the very heart of the Bill of Rights and the

[15] Indeed, the Court has considered the importance of an asserted right even when it deems it not to be "fundamental." *Reid*, 354 U.S. at 8-9.

Suspension Clause. Accordingly, this case falls squarely within the longstanding fundamental rights doctrine from the Insular Cases. Under the Insular Cases, this alone is enough to require reversal of the decision.[16]

Second, there are no practical impediments, nor any risk of conflict between sovereign nations, in recognizing Petitioners' rights under the Fifth Amendment and the Suspension Clause. The petitioners are detained not in a sovereign foreign nation, but at the U.S. Naval Base in Guantanamo, which this Court has already held to be unique because the United States has "plenary and exclusive jurisdiction." *Rasul*, 542 U.S. at 475. Thus, there is no risk of any conflict between the rights under the Constitution that the Petitioners assert and foreign laws. Nor would recognition of Petitioners' rights in habeas corpus present undue logistical difficulties.

Based on all the circumstances, it would not be "impracticable and anomalous" to hold that core due process rights against indefinite executive detention apply at Guantanamo or to recognize Petitioners' access to the courts under the Suspension Clause. This Court has already implicitly taken that view in *Rasul*, 542 U.S. at 484 n.15, and should make that holding explicit here.

[16] *Amici* agree with Petitioners that the Suspension Clause is also applicable for a second and independent reason – namely, it constrains the government without respect to where an individual habeas petitioner is located.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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