[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 24, 2008]

Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JAMAL KIYEMBA, Next Friend, *et al.,*
Petitioners-Appellees,
v.
GEORGE W. BUSH, President of the United States, *et al.,*
Respondents-Appellants.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____

BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Respondents-Appellants respectfully submit this Certificate as to Parties, Rulings and Related Cases:

(A) Parties:

Petitioners-Appellees:

Jamal Kiyemba, as next friend.

Abdusabur Doe

Abdusamad Doe

Abdunasir Doe

Hammad Doe

Hudhaifa Doe

Jallal Doe

Khalid Doe

Saabir Doe

Saadiq Doe

Ibrahim Mamet, as next friend

Edham Mamet

Usama Hasan Abu Kabir, as next friend

Sadar Doe

Arkeen Doe

Ahmad Doe

Abdur Razakah

Ali Thabid

Abdul Ghaffar

Adel Noori

Respondents-Appellants:

George W. Bush

Donald Rumsfeld

Jay Hood

Mike Bumgarner

(B) Ruling Under Review

The ruling under review is Judge Ricardo M. Urbina's decision granting petitioners' motion for final judgment and ordering the Government to bring them into the United States and release them here. On October 7, 2008, Judge Urbina orally granted petitioners' motion for final judgment on their habeas corpus petitions and ordered the Government to bring petitioners into the United States and to release them in this country. The district court memorialized its ruling in a written order and

opinion on October 8, 2008, the latter of which was amended on October 9, 2008 to correct typographical errors.

(C) Related Cases

In *Kiyemba v. Bush*, Nos. 05-5487, 05-5489 (D.C. Cir.), the Government appealed from two district court orders that prohibit the Government from removing some of the petitioners in this appeal from Guantanamo Bay, Cuba, unless thirty days' advance notice is given to the court and petitioners' counsel. That appeal was argued on September 25, 2008.

In *Parhat* v. *Gates*, 532 F.3d 834 (D.C. Cir. 2008), this Court, in a Detainee Treatment Act action filed by one of the petitioners here, directed the Government "to release or to transfer the petitioner, or to expeditiously hold a new CSRT." *Id.* at 854. This Court entered that judgment in four other Detainee Treatment Act actions, brought by four other petitioners in this case. *See Abdusemet* v. *Gates*, Nos. 07-1509 through 1512 (D.C. Cir. Sept. 12, 2008).

/s/ Sharon Swingle
Sharon Swingle
Counsel for Respondents-Appellants

GLOSSARY

CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act
ETIM	East Turkistan Islamic Movement
INA	Immigration and Nationality Act

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JAMAL KIYEMBA, Next Friend, *et al.,*
Petitioners-Appellees,
v.
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

STATEMENT OF JURISDICTION

The district court had jurisdiction over petitioners' claims under the Suspension Clause of the U.S. Constitution, Art. I, Section 9, cl. 2, as interpreted by the Supreme Court in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). On October 7, 2008, the district court orally granted petitioners' motion for final judgment on their habeas corpus petitions and ordered the Government to bring petitioners into the United States and to release them in this country. The district court memorialized its ruling in a written order and opinion on October 8, 2008, the latter of which was amended

on October 9, 2008 to correct typographical errors. The Government filed a timely notice of appeal of the district court's oral ruling on October 7, 2008 and an amended notice of appeal on October 23, 2008, encompassing the district court's written order and opinions of October 8 and 9, 2008. This Court has jurisdiction under 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1).[1]

STATEMENT OF THE ISSUE

Petitioners are aliens housed at Guantanamo Bay Naval Base, Cuba. The Government has determined that petitioners are not presently subject to detention as enemy combatants, but petitioners do not wish to return to their home country and have not yet identified another country willing to resettle them. The question presented is whether the district court, in these habeas actions, erred in requiring the Government to bring petitioners into the United States and release them here.

STATEMENT OF THE CASE

Petitioners in these consolidated actions filed petitions for writs of habeas corpus seeking release from detention as enemy combatants by the U.S. military at Guantanamo Bay Naval Base, Cuba. Following this Court's decision in *Parhat v.*

[1] Because the district court granted petitioners' motion for final judgment on their habeas petitions, the Government believes that this Court has appellate jurisdiction under 28 U.S.C. § 1291. To the extent there is any uncertainty, however, appellate jurisdiction would exist under 28 U.S.C. § 1292(a)(1) because the district court's order is an affirmative injunction against the Government.

Gates, 532 F.3d 834 (D.C. Cir. 2008), the Government determined that it would not seek to hold petitioners as enemy combatants. Because petitioners do not wish to return to their home country, they have remained housed at Guantanamo pending ongoing efforts to locate another country for their resettlement. Petitioners moved in the district court for an order requiring the Government to bring them into the United States and release them here, as final judgment on their habeas corpus petitions. On October 7, 2008, the district court orally granted petitioners' motions and ordered the Government to bring petitioners to the United States for release on October 10, 2008; the oral ruling was entered on the docket as a minute entry on October 7, 2008. On October 8, 2008, the district court issued a written order and opinion memorializing its ruling. On October 9, 2008, the district court issued an amended opinion to correct typographical errors and rescan the opinion for visual clarity. The Government filed a notice of appeal of the district court's oral ruling on October 7, 2008, and filed an amended notice of appeal on October 23, 2008, making explicit that the Government is also appealing from the district court's written order and opinions of October 8 and 9, 2008. The district court order has been stayed by this Court pending appeal.

STATUTORY AND REGULATORY PROVISIONS

The statutory and regulatory provisions at issue in this appeal are attached as an addendum to this brief.

STATEMENT OF THE FACTS

A. Factual and Procedural Background.

1. *Petitioners' Initial Detention As Enemy Combatants*. Petitioners are 17 Chinese nationals who are members of the Uighur ethnic group, a Turkic Muslim minority group in the far-western region of China. *See, e.g.,* J.A. 513-14; J.A. 477; J.A. 446; J.A. 411-412. Prior to September 11, 2001, petitioners traveled to Afghanistan, where Uighur camps had been established in the Tora Bora mountains. *See Parhat v. Gates*, 532 F.3d 834, 837, 843 (D.C. Cir. 2008); District Court Oct. 9, 2008 Opinion ("Opinion") 2, J.A. 1601; J.A. 516, 480, 414.

After the onset of hostilities in Afghanistan, many of petitioners fled to Pakistan. *See Parhat*, 532 F.3d at 837; Opinion 3, J.A. 1602; J.A. 414, 516, 477. Petitioners were subsequently apprehended by the Pakistan Government or coalition forces, and turned over to the U.S. military. *See* Opinion 3, J.A. 1602; J.A. 411-12, 516, 477.

The U.S. military transferred petitioners to Guantanamo Bay Naval Base, Cuba. *See* J.A. 418. At Guantanamo, petitioners were provided with hearings before

Combatant Status Review Tribunals (CSRTs) to determine whether they remained subject to detention as enemy combatants. *See, e.g.,* J.A. 799-827, 735-772, 774-794.

In testimony before the CSRTs or in separate statements that were submitted in the CSRT proceedings, nearly all of petitioners explained that they had traveled to Afghanistan to receive weapons training in order to fight against the Chinese Government. *See, e.g.,* J.A. 760-61, 916, 924, 846, 878-879, 881.[2]

Most petitioners also described receiving weapons training, primarily at military camps run by the East Turkistan Islamic Movement (ETIM). *See*, *e.g.*, J.A. 753-54, 846-847, 916, 878-879, 881; *see also* J.A. 1241 (stating petitioners' position that "[t]he remaining sixteen Uighur Petitioners are in all material respects identically situated to Parhat"). ETIM is a Uighur separatist group that was designated by the State Department in 2004 as a terrorist organization, *see* 69 Fed. Reg. 23,555-01 (2004), and has been found by the United Nations to be affiliated with al Qaida. *See* http://www.un.org/sc/committees/1267/consolidatedlist.htm.

The CSRTs determined on the basis of the information submitted that each petitioner was subject to detention as an enemy combatant.

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[2] Both classified and unclassified records of proceedings before a Combatant Status Review Tribunal (CSRT) were submitted in habeas proceedings for 7 of the 17 detainees. In addition, petitioners urged the district court to act "for all * * * purposes" as if the CSRT records for all petitioners had been "produced as factual returns" in the consolidated habeas actions. J.A. 1218; *see also id.* 1214 (agreeing that petitioners may use CSRT records from DTA cases in habeas proceedings).

2. *Petitioners' Habeas Corpus And Detainee Treatment Act Actions, This Court's Decision In* Parhat v. Gates, *And The Government's Subsequent Determination Not To Detain Petitioners As Enemy Combatants.* During petitioners' detention at Guantanamo as enemy combatants, habeas corpus actions were filed by them or on their behalf. The habeas cases were stayed or, in some cases, dismissed without prejudice, pending a determination in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), whether a federal court has jurisdiction over habeas corpus actions brought by Guantanamo detainees. Following the *Boumediene* decision, the district court ordered all stays lifted, *see* Order, No. 08-442 MSC (D.D.C. July 29, 2008), and the dismissed cases were reopened. The habeas petitions of the 17 Uighur petitioners were then formally consolidated by the district court. *See* Opinion 3, J.A. 1602 (citing consolidation order).

In addition to their habeas petitions, all but one of petitioners filed suits under the Detainee Treatment Act seeking judicial review of the determination by CSRTs that they were enemy combatants. One of those actions was resolved by this Court in *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

The *Parhat* Court recognized that the CSRT had been presented with evidence, including "Parhat's own statements and those of other Uighur detainees," showing that he was connected with ETIM. 532 F.3d at 843. Specifically, the evidence showed that Parhat had attended a Uighur camp in the Tora Bora mountains of

Afghanistan that was "run by an ETIM leader," where Parhat "lived and received training on a rifle and pistol." *Id.* at 838; *see also id.* at 843-844.

However, the Court held that the record before the CSRT did not support Parhat's detention as an enemy combatant under the definition applied by the Department of Defense, because even if Parhat was "part of or supporting" ETIM — a question that the Court explicitly declined to decide, *see* 532 F.3d at 844 — there was insufficient reliable evidence to establish the second and third elements of the definition, *i.e.*, that ETIM was "associated with" al Qaida or the Taliban; and that ETIM engaged in hostilities against the United States or its coalition partners. *Id.* at 836, 843-844. The Court ordered the Government to "release Parhat, to transfer him, or to expeditiously convene a new CSRT." *Id.* at 851.

A number of similarly situated detainees, who are also petitioners in this case, subsequently moved for entry of the same judgment in their DTA cases. The Court granted their motion, while explicitly recognizing, in response to petitioners' argument that they had a right of release into the United States, that the Court was not deciding any "issue regarding the places to which these petitioners may be released." *Abdusemet v. Gates*, No. 07-1509, Judgment 3 (D.C. Cir. Sept. 12, 2008).

In the wake of this Court's rulings in *Parhat* and *Abdusemet*, the Government determined that it would not seek to hold the Uighur detainees at Guantanamo as enemy combatants. *See* Opinion 3, J.A. 1602; *see also* J.A. 1464-1465, 1259-1260.

Accordingly, the Government did not file factual returns to the habeas corpus petitions in these consolidated cases, which challenged petitioners' detention as enemy combatants.

3. *Post*-Parhat *Efforts To Resettle Petitioners.* Both before and after the Government's determination that it would not treat petitioners as enemy combatants, petitioners have vigorously opposed their return to their home country, China. *See, e.g.,* J.A. 528, 538-540 (asserting that petitioners' return to China "would very likely subject them to arbitrary arrest, torture or even death at the hands of the Chinese regime" and seeking injunction barring their return); J.A. 491, 503-505 (same); J.A. 459, 471-73 (same); J.A. 425-426, 437-438, 440; *see also Kiyemba v. Bush*, Nos. 05-5487, 05-5488, 05-5489, 05-5490, Supplemental Response Brief for Appellees/Cross-Appellants 8-9 (D.C. Cir. filed Sept. 4, 2008). Petitioners fear that they would be subject to mistreatment by the Chinese Government, and the United States Government, in an effort to protect petitioners, has committed not to return them to their home country.

However, petitioners have not identified another country that is willing to accept them and able to provide adequate assurance of their humane treatment. In addition, despite extensive diplomatic efforts on petitioners' behalf, the Government has not to date located an appropriate country willing to accept them for resettlement. We are informed by the State Department that those efforts are still ongoing. In the

meantime, the Government is not willing to bring petitioners to the United States. Nor have petitioners sought admission to the United States under the immigration laws, much less satisfied the procedural and substantive prerequisites for admission.

Accordingly, petitioners are currently housed at Guantanamo pending the identification of a third country where they may resettle. Petitioners are being housed in relatively unrestrictive conditions, given the status of Guantanamo as a U.S. military base. *See* J.A. 1246 & n.3 (describing conditions). Petitioners are in special communal housing with access to all areas of their camp, including an outdoor recreation space and picnic area. Petitioners sleep in an air-conditioned bunk house, and have the use of an activity room equipped with various recreational items, including a television with VCR and DVD players. Petitioners also have access to special food items, shower facilities, and library materials.

4. *District Court Order To Bring Petitioners Into The United States And Release Them In This Country.* Petitioner Parhat moved in July 2008 for an order of release into the United States, either as interim relief pending a ruling on his habeas corpus petition, or as final judgment on that petition. *See* J.A. 1106. The remaining petitioners subsequently requested the same relief, *see* J.A. 1466, all of which the Government opposed. The district court ultimately granted petitioners' motion for final judgment and ordered the Government to bring petitioners into the United States and to release them here. J.A. 1593.

The district court issued its ruling from the bench on October 7, 2008, ordering the Government to bring petitioners into the United States for a hearing on Friday, October 10, 2008, at 10:00 a.m., at which time petitioners were to be released. J.A. 1593, 1597. The district court made clear in its oral ruling that it would not impose any supervisory conditions of release on October 10, but would instead consider restrictions at a later hearing, to be held on October 16. *See* J.A. 1595-1596 (DOJ Counsel: "[I]n the meantime, from the Friday that they arrive until the Thursday of the hearing, there will be no supervision of them, is that my understanding of the Court's order?" Court: "That's right.").

The district court subsequently issued a written opinion and order on October 8, 2008; the opinion was reissued in slightly amended form on October 9, 2008 to correct typographical errors.

In its written opinion, the district court assumed that the Government acted lawfully in taking petitioners into U.S. military custody and holding them at Guantanamo pending a determination whether they were subject to detention as enemy combatants. Opinion 5, J.A. 1604. The court acknowledged that Congress had authorized the Executive to detain enemy combatants pursuant to the Authorization for the Use of Military Force. *Id.* The district court held that "the record is too undeveloped as to the circumstances regarding their transfer from Pakistan to United States custody to determine whether they were, at the time of their

capture, lawfully detained." *Id.* For purposes of the motion, therefore, the Court assumed "that the petitioners were lawfully detained and that the Executive [has] some inherent authority to 'wind up' wartime detentions." *Id.*

The district court nevertheless held that the Constitution prohibits the Government from housing petitioners at Guantanamo pending efforts to locate a country for their resettlement, and furthermore that it affirmatively requires the Government to bring petitioners into this country for release.

In reaching this conclusion, the district court relied on the Supreme Court's decisions in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005) — while recognizing that those statutory cases "are not strictly analogous to the present inquiry." Opinion 6, J.A. 1605. In *Zadvydas* and *Clark,* the district court noted, the Court construed a provision of the immigration laws to authorize detention of aliens subject to a final order of removal for the presumptively reasonable period of six months. Although the district court recognized that the statutory provision at issue in those cases is not applicable here, and that the only restraints on the Government's custody of petitioners in this case are constitutional ones, the district court nevertheless purported to derive the test for constitutionally permissible detention from the "principles espoused in the *Zadvydas* and *Clark* cases." Opinion 8, J.A. 1607.

The district court rejected the Government's argument that the constitutional analysis in this case is controlled by *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). In *Mezei*, the Supreme Court held that the Constitution was not violated by the Government's indefinite detention at Ellis Island of an alien who was a long-time resident of the United States but who, following a trip abroad, and his return voyage (after being issued an immigrant visa), had been determined by the Government to be excludable on national security grounds. Because the alien could not locate another country willing to take him, he was effectively stranded in government custody at Ellis Island. The district court suggested that the constitutional holding in *Mezei* had been undermined by subsequent cases, in particular *Zadvydas* and *Clark*. Opinion 7, J.A. 1606. The district court also suggested that *Mezei* was distinguishable on factual grounds, identifying three possible differences: that the detention in *Mezei* was not, in the court's view, indefinite; that the Court in *Mezei* "was unaware of what evidence, if any, existed against the petitioner" supporting his exclusion from the United States; and that "the *Mezei* petitioner, unlike the current petitioners, came voluntarily to the United States." Opinion 7-8, J.A. 1606-1607.

The district court held that petitioners' continuing custody is unlawful because it has become effectively indefinite; there is a reasonable certainty that petitioners will not return to the battlefield to fight against the United States; and "an alternative

legal justification has not been provided for continued detention." Opinion 8-9, J.A. 1607-1608. In holding that petitioners' detention has become effectively indefinite, the district court pointed to the Government's unsuccessful diplomatic efforts dating back to 2003 to resettle petitioners, and the fact the Government has not identified a date by which it anticipates that petitioners can be released to another country. *Id.* The district court also held, relying on *Parhat,* that petitioners are not likely to return to the battlefield against U.S. forces. Opinion 9, J.A. 1608. Finally, the district court reasoned that, once the Government no longer sought to detain petitioners as enemy combatants, it had no legal authority to continue to hold them. *Id.*

The district court then analyzed the appropriate relief for what it had held to be unlawful detention. The district court recognized that the "[a]uthority to [a]dmit [a]liens" is "[h]istorically a [p]olitical [i]nquiry," and that the power to exclude an alien is "'inherent in the executive power to control the foreign affairs of the nation.'" Opinion 11, J.A. 1610 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950)); *see also id.* ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'" (citation omitted)). In light of the political branches' plenary authority over immigration, the district court recognized, an order to the Government to bring aliens into this country and release them here "strikes at the heart of our constitutional structure, raising serious separation-of-powers concerns." Opinion 12-13, J.A. 1611-1612.

The district court also recognized that the question of a court's authority to order that petitioners be brought into and released in the United States was not decided by this Court in *Parhat*. Opinion 13-14, J.A. 1612-1613. And the court recognized that the only other court to decide the question of a federal court's authority to order Uighur detainees released into the United States — the district court in *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005) — held that it did not have the power to order such a remedy. Opinion 14, J.A. 1613.

Nevertheless, the district court, citing the role of habeas corpus as a "stable bulwark of our liberties," Opinion 11, J.A. 1610 (quoting *Boumediene*, 128 S. Ct. at 2246), ordered the Government to bring petitioners into the United States and release them. The district court stated that its "authority to safeguard an individual's liberty from unbridled executive fiat" is at its "zenith" when "the Executive brings an individual involuntarily within the court's jurisdiction, detains that individual and then subverts diplomatic efforts to secure alternative channels for release." Opinion 15-16, J.A. 1614-1615; *see also* Opinion 12, J.A. 1611 (asserting that judicial intervention was warranted by "exceptional" circumstances, which the district court described as the Government having "stymied its own efforts to resettle the petitioners by insisting (until recently) that they were enemy combatants"). The district court ordered the Government to produce petitioners at a hearing before the court on October 10, 2008, for their subsequent release. Although the district court

had previously ruled orally that no supervisory conditions of release would be imposed between October 10 and a subsequent hearing on October 16, *see* Transcript 62-65, J.A. 1594-1597, the court's subsequent written order stated that the court would impose "such short-term conditions of release" on October 10, 2008, as it then considered "reasonable and appropriate." Order 2, Addendum 25a.

The Government filed a notice of appeal from the district court's ruling on October 7, 2008, and an amended notice of appeal on October 23, 2008.[3] The Government also moved on October 7, 2008, for an emergency temporary stay, which the Court granted on October 8. The Government moved on October 10, 2008, for a stay pending appeal and expedited appeal. The Court granted that motion on October 20, 2008.

SUMMARY OF ARGUMENT

The district court claimed the extraordinary authority to order petitioners to be brought into the United States and released here, in contravention to the judgment of the political branches, which have exclusive authority over the admission of aliens. That ruling is wrong — most obviously, because it is at odds with *Shaughnessy v. United States ex. rel Mezei*, 345 U.S. 206 (1953), in which the Supreme Court upheld

[3] The amended notice of appeal made explicit that, in addition to appealing the district court's oral ruling on October 7, 2008, the Government also appeals the district court's order and opinion of October 8, 2008, as amended on October 9, 2008, memorializing the oral ruling.

the detention of an alien at the border of the United States who was found to be excludable but could not locate another country to take him. *A fortiori*, that decision controls here, where petitioners are being held wholly outside the United States pursuant to the Government's inherent constitutional authority to prevent aliens from entering this country, and as a result of petitioners' unwillingness to return to China and inability to find another country to admit them.

Because the exclusion of aliens is a quintessential sovereign function exclusively assigned to the political branches of government, *see infra* Part A, and because petitioners do not have any statutory or constitutional right to be brought into the United States, *see infra* Parts B and C, this Court should reverse the decision below. In addition, even if the district court did have some authority to order that petitioners be brought here, its order was still erroneous because it failed to afford the Government a reasonable period to wind up petitioners' detention as enemy combatants and because it inexplicably disabled the Department of Homeland Security from enforcing the immigration laws. *See infra* Part D.

A. 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.

The Government's power to control admission into the United States includes the power to hold aliens incident to preventing their entry into this country, in order to effectuate that bar and the aliens' return to their home countries or resettlement elsewhere. As in *Munaf v. Geren*, 128 S. Ct. 2207 (2008), in which the Supreme Court refused to grant an order of habeas relief that would shield the petitioners from being taken into a separate form of lawful custody, the district court's grant of habeas to petitioners here relating to detention as enemy combatants does not extend to relieving them from being housed incident to their exclusion from the United States. The Government's willingness to accede to petitioners' request not to be returned to China does not disable it from exercising its sovereign power to control entry.

B. Petitioners do not have a statutory right to be brought into the United States. They have not sought entry under the exclusive scheme that Congress has established for the admission of aliens. Nor would they have been eligible — nor, crucially, would their exclusion have been reviewable — had they sought permission to enter.

Indeed, even if petitioners were standing at the borders of the United States, and even had they sought admission, they still would have no right to come into this country. They appear to be ineligible for admission under the statutory provisions governing aliens who take part in terrorist activities, broadly defined. *See* 8 U.S.C.

§ 1182(a)(3)(B). The procedural and substantive criteria for entry established by Congress should not be circumvented by a court.

Neither *Zadvydas v. Davis*, 533 U.S. 678 (2001), nor *Clark v. Martinez*, 543 U.S. 371 (2005), changes this analysis. Both were statutory decisions that addressed a statutory provision — 8 U.S.C. § 1231(a)(6) — that does not even apply to petitioners, who are detained outside the United States for purposes of the immigration laws. *See* 8 U.S.C. § 1101(a)(38) (defining the United States, for purposes of the Immigration and Nationality Act (INA), to exclude Guantanamo Bay Naval Base). Furthermore, in discussing the constitutional problems raised by construing § 1231(a)(6) to authorize indefinite detention of a long-term permanent resident in the United States subject to a final order of removal, the *Zadvydas* Court specifically recognized the "critical distinction" between aliens lawfully admitted into the United States, and those stopped at the border. 533 U.S. at 692-693. That analysis applies with even greater force to aliens who are wholly outside the country.

C. The Suspension Clause does not confer on petitioners the right to be brought into the United States and released here.

In *Mezei*, the Supreme Court held that an alien's detention incident to exclusion did not violate the Constitution, even though the alien was physically present in this country, of which he was a previous long-term resident, and had been issued a visa

to return. *A fortiori*, that holding applies to petitioners, who are wholly outside the country and have never invoked the statutory process to enter.

Boumediene establishes that aliens have a right to habeas corpus — as was also true in *Mezei* — but it does not empower a court to order petitioners to be brought into this country and released. The Supreme Court has repeatedly held that an alien outside the United States has no constitutional right to enter. Furthermore, the Supreme Court has recognized the constitutional significance of the distinction between aliens outside the United States, and those inside the country or at its borders — the same distinction that is the foundation for our immigration laws. *Boumediene* did not overrule these cases, and its holding regarding the Suspension Clause did not give aliens wholly outside the United States the same constitutional privileges granted to aliens that the political branches have chosen to admit. *See also Agostini v. Felton*, 521 U.S. 203, 258 (1997).

The fact that the Government initially took custody of petitioners as suspected enemy combatants — conduct that the district court specifically assumed was lawful — does not alter this analysis. The Haitian and Cuban migrants who were brought to Guantanamo in the 1990s also did not arrive there voluntarily, *see Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), but that had no effect on the Government's authority to exclude them and to house them at Guantanamo pending return or resettlement. And the district court's suggestion that diplomatic efforts to secure

petitioners' release have been inadequate is both erroneous, and impermissible under *Munaf*.

D. Even if the district court had some authority to order petitioners to be brought to the United States and released into the general population here, its order was still erroneous. The Government should be given a reasonable additional period to wind up petitioners' detention as enemy combatants, and should also be given a full opportunity to present any relevant information bearing on their detention or the conditions of their release before taking the drastic step of ordering petitioners brought here.

Furthermore, there was no basis for the district court's order that, once petitioners were in the United States, they were immune from the normal operation of the immigration laws. If petitioners were brought to the United States, they would be subject to immediate detention under the INA pending removal.

STANDARD OF REVIEW

The question of the district court's authority to order petitioners brought into this country and released here is reviewed *de novo*. *See Munaf v. Geren*, 128 S. Ct. 2207, 2220 (2008) (reviewing *de novo* the legal question of a federal court's authority to order habeas petitioners released without transfer to Iraqi Government).

ARGUMENT

THE DISTRICT COURT LACKED AUTHORITY TO ORDER THE GOVERNMENT TO BRING PETITIONERS TO THE UNITED STATES AND RELEASE THEM HERE

A. It Is Undisputed That The Power To Exclude Aliens From The United States Is A Quintessential Sovereign Power Exclusively Held By The Political Branches Of Government.

The district court has asserted the authority to order that 17 aliens who are outside the United States be brought into this country, and released here, over the objection of the Executive Branch and without regard for the legislative constraints imposed by Congress. That assertion of judicial power to contravene the judgment of the political branches in their exercise of inherent sovereign control over the admission of aliens — which the district court itself recognized "rais[es] serious separation-of-powers concerns," Opinion 12-13, J.A. 1611-1612 — was fundamentally wrong. The admission of aliens into the United States rests exclusively in the political branches, and the district court erred in seeking to abrogate the political branches' authority in this area.

1. The Supreme Court has long recognized that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, *for the power to admit or exclude aliens is a sovereign prerogative*." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (emphasis added); *see*

also United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (the "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government," which "must be exercised in accordance with the procedure which the United States provides"). The authority to exclude "is a fundamental act of sovereignty," which "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Id.*; *see also Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999) (sovereign government has "the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions").

The political branches' power is exclusive because our Nation's policy towards aliens is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952); *accord Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976). Requiring that an alien who has no right to be in this country nevertheless must be brought to and released here, when the Government cannot locate another country willing to accept that alien, poses a significant threat to the Nation's ability to "speak with one voice on immigration and foreign affairs matters." *Zadvydas*, 533 U.S. at 708, 711 (Kennedy, J., dissenting). Indeed, even the selection of the country to which an alien is removed from *within* the United States "may implicate our relations with foreign powers."

Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 349 (2005) (internal quotation marks omitted). If foreign relations concerns relating to release into the United States are acute even for aliens who are present in the United States and have been long-term residents of the United States with close and personal ties here, as in *Zadvydas*, *see* 533 U.S. at 708, 711, then the potential harms are all the greater when the aliens are outside the United States and the only connection between the aliens who seek admission and the United States is their prior detention by our military forces as enemy combatants.

Consistent with these principles, "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." *Knauff*, 338 U.S. at 543; *accord Saavedra Bruno*, 197 F.3d at 1159. When an alien who is outside the United States seeks admission to this country, the decision of the political branches to exclude that alien is conclusive and judicially unreviewable. Further, any constitutional limits on the Government's ability to detain indefinitely aliens *within* the United States simply do not affect "the political branches' authority to control *entry into* the United States." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (emphasis added).

2. Petitioners do not and cannot dispute that the power to exclude aliens is a quintessential sovereign function that is inextricably intertwined with foreign relations and national security. Petitioners point out that the Government is not

presently holding them on the basis that they are enemy combatants, but they understandably do not disagree that the power to control our Nation's borders provides an independent basis for retaining custody of aliens who are present on a military base abroad and have no right to enter this country. The Government thus is empowered to house petitioners at Guantanamo as an incident to preventing them from entering the United States, in order to effectuate the bar on entry and their resettlement in a third country. *See, e.g., Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (recognizing that Executive has authority to hold even aliens in custody in the United States pending proceedings to exclude them); *see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). That power is wholly independent of any authority to detain suspected enemy combatants, and it applies to petitioners in the same manner that it applies to migrants or any other aliens who happen to be brought to Guantanamo or otherwise manage to find their way there, as in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

Indeed, even aliens who have entered the United States can be detained under the immigration laws, following detention on other grounds that no longer apply. For example, after an alien's completion of his sentence or acquittal on criminal charges, he nevertheless remains subject to federal custody incident to the alien's removal under the immigration laws. *See, e.g.,* 8 C.F.R. § 287.7 (setting out procedure by which Department of Homeland Security files detainer for custody of immigrant,

prior to his release by another law enforcement agency); *cf. Wilkinson v. Dotson*, 544 U.S. 74, 85-86 (2005) (Scalia, J., concurring) ("when a habeas petitioner challenges only one of several consecutive sentences, the court may invalidate the challenged sentence even though the prisoner remains in custody to serve the others"). Any defect in the original criminal custody would not entitle the alien to an order of release from federal custody incident to his removal under the immigration laws. *A fortiori*, the same result must follow for petitioners, who are not (and never have been) in the United States.

The circumstances of petitioners' custody are also analogous to *Munaf v. Geren*, 128 S. Ct. 2207 (2008), in which two American citizens in Iraq filed petitions for habeas corpus seeking an order that would not only release them from the custody of the U.S. military, which had interned them for security reasons, but would also bar the United States Government from turning them over to Iraq for criminal proceedings. As the Supreme Court recognized, the Iraqi Government had a sovereign right to prosecute Omar and Munaf for crimes committed in that country, and to take custody of them for that purpose. *Id.* at 2221-2224. In light of that separate basis for custody, the Court refused to grant the *Munaf* petitioners an order of release that would shield them from being taken into Iraqi custody.

Moreover, unlike in *Munaf*, the custody here is for petitioners' own protection. Petitioners are free to go to any country that will take them, and indeed they would

not still be at Guantanamo if they were willing to return to their home country. Understandably, they do not wish to do so, and it is United States policy not to force their transfer to China. But the Government's willingness to accede to petitioners' request does not disable the Government from the exercise of its sovereign power under the Constitution and Acts of Congress to decline to bring petitioners to the United States and release them into this country.

3. Because the Government has the sovereign constitutional prerogative and authority to prevent aliens abroad from entering the United States, petitioners cannot prevail in this litigation unless they can demonstrate that they nonetheless have either a federal statutory or constitutional right to enter the country. As shown below, they have neither.

B. Petitioners Have No Statutory Right To Be Brought Into And Released In The United States.

1. Petitioners have identified no statute that affords them the right to be brought into the United States. Indeed, they have not even attempted to do so. Pursuant to its plenary powers, Congress enacted the Immigration and Nationality Act (INA), which provides a detailed, comprehensive statutory scheme governing the admission of aliens. Petitioners have not tried to seek entry under the INA, and thus they have no statutory right to come to or be brought to this country and allowed to enter.

2. Even if petitioners had invoked the INA's provisions, they still would not have been entitled to enter the country. As an initial matter, petitioners unquestionably are aliens outside the United States for purposes of the federal immigration laws. *See* 8 U.S.C. § 1101(a)(38) (defining United States, for purposes of INA, to exclude Guantanamo Bay Naval Base). Accordingly, the Executive has unreviewable authority to decide whether petitioners should be allowed into the country. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("[I]t 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"); see also *Saavedra Bruno*, 197 F.3d at 1159 n.8 ("The power of Congress to exclude aliens altogether from the United States * * * and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications" (internal quotation marks omitted)).

But even if petitioners were standing at the Nation's borders, they still would have no right to admission. To gain admission, petitioners would first need a valid visa,[4] 8 U.S.C. § 1182(a)(7)(A), (B) — the first step in the process by which the

[4] With limited exceptions not relevant here, an officer cannot admit an alien without a valid visa. *See* 8 U.S.C. § 1187(a)(7)(A), (B). A visa does not confer any right of admission into the United States, but "merely gives the alien permission to (continued...)

Executive exercises the sovereign authority of the political branches to determine whether an alien shall be admitted to the United States — and they would also need to demonstrate to an immigration officer that they are "clearly and beyond a doubt entitled to be admitted," 8 U.S.C. § 1225(b)(2)(A). "If an immigration officer * * * *suspects* that an arriving alien *may be* inadmissible" on national security grounds, including grounds relating to terrorist activity, then the officer "*shall* * * * order the alien removed * * *." 8 U.S.C. § 1225(c)(1) (emphases added). The burden of proof is on the alien. *See* 8 U.S.C. § 1225(b)(2)(A).

Petitioners have not sought to invoke the INA's processes or to satisfy the statute's requirements, presumably because they could not meet those requirements. Unlike the alien in *Mezei*, who had an immigrant visa but was nonetheless excluded under a statutory provision allowing exclusion in the national interest and was housed at Ellis Island in the effectuation of his exclusion, *see Mezei*, 345 U.S. at 208, petitioners have not even sought a visa, and thus are not the beneficiaries of a

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[4](...continued)
arrive at a port of entry and have an immigration officer independently examine the alien's eligibility for admission." *Saavedra Bruno*, 197 F.3d at 1157. Visas are issued abroad by consular officers, "under the conditions" and "subject to the limitations" prescribed in the INA. 8 U.S.C. §§ 1104, 1201(a). A visa may not be issued if it "appears to the consular officer" that the applicant "is ineligible to receive a visa * * * under section 1182" of the INA, *id.* § 1201(g), which establishes grounds on which aliens "are ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a).

determination by the political branches that they may be eligible for admission under the general criteria of the INA.

Moreover, it appears doubtful that petitioners would be so eligible. An alien is inadmissible under Section 1182 if he has "engaged in a terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(I) – a term that is defined expansively to include "prepar[ing] or plan[ing]" the unlawful use of any "explosive, firearm, or other weapon or dangerous device" with the intent to endanger someone's safety, *id.* § 1182(a)(3)(B)(iii), (iv). An alien is likewise inadmissible if he is a "representative of a terrorist organization," *id.* § 1182(a)(3)(B)(i)(IV), has "received military-type training" in a terrorist organization, *id.*, or has committed an act "that the actor knows, or reasonably should know, affords material support, including * * * training * * * for the commission of terrorist activity," *id.* § 1182(3)(B)(iv)(VI). "Terrorist organization," in turn, is defined broadly to include "a group of two or more individuals, whether organized or not, which engages in" terrorist activities. See *Hussain* v. *Mukasey*, 518 F.3d 534, 537 (7th Cir. 2008) ("the statutory definition of 'terrorist organization' is broad enough to encompass a pair of kidnappers," and "someone who sold the kidnappers a gun and rope, unless he could prove he had no reason to know they were kidnappers, would be 'engaged in terrorist activity'").

Notably, Section 1182 is not limited in scope to individuals who are combatants against the United States or its allied forces in an armed conflict. Under

that provision, it is irrelevant that the terrorist organization the alien is linked to "does not appear to harboring any hostile designs against the United States; the statute does not require that the terrorist organization be a threat to us." *Hussain*, 518 F.3d at 538 (holding that a group representing Muslim refugees from India who had settled in Pakistan was a terrorist organization); *see also, e.g., In re S-K-*, 23 I. & N. Dec. 936 (B.I.A. 2006) (concluding the Chin National Front is a terrorist organization acting against the Government of Burma); *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004) (holding that militant Sikh organizations opposed to the Indian Government committed or planned to commit terrorist activities); *see also* 69 Fed. Reg. 23,555-01 (2004) (designating the East Turkistan Islamic Movement, ETIM as a terrorist organization); www.state.gov/s/ct/rls/fs/2004/32678.htm.[5]

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[5] Nor would the statutory provisions governing refugees be a proper basis for admission. The Executive Branch is authorized to admit into the United States persons who are unwilling or unable to return to their country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1102(a)(42)(A), 1157(c)(1). However, under 8 U.S.C. § 1252(a)(2)(B)(ii), the federal courts lack jurisdiction to review any decision "the authority of which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." There is an exception for the "granting of relief under section 1158(a) of [title 8]," but that section pertains only to asylum, which is only available to aliens who are "physically present in the United States or who arrive[] in the United States," 8 U.S.C. § 1158(a). It does not pertain to aliens abroad who seek refugee status. *See* 8 U.S.C. § 1157. And although the INA bars the removal of an alien in the United States to another country "if the Attorney General decides that the alien's life or freedom would be threatened in that country," 8 U.S.C.

(continued...)

In light of this statutory framework, petitioners presumably would not have been admitted into the country even if they had sought to rely on the INA. In any event, the courts may not permit petitioners to circumvent Congress's enactment by requiring that they be brought into the country despite never having even attempted to satisfy the INA's procedural or substantive requirements.

3. Although petitioners have no rights under the INA, petitioners nonetheless suggest that they can rely on two cases that interpreted the INA, neither of which concerned aliens abroad. Specifically, petitioners cited, and the district court relied upon, *Clark v. Martinez*, 543 U.S. 371 (2005), and *Zadvydas v. Davis*, 533 U.S. 678 (2001). Both decisions construed the scope of the Government's detention authority under a particular provision of the INA, 8 U.S.C. § 1231(a)(6). That provision concerns the detention of aliens *in the United States* who have been ordered removed under a final order of removal, pursuant to administrative proceedings applicable to such aliens. It has no application to the case at hand.

In *Zadvydas*, invoking the doctrine of constitutional avoidance, the Supreme Court construed the detention authority in § 1231(a)(6) to be limited to the time

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[5](...continued)
§ 1231(b)(3)(A), that provision applies only to aliens who are present in the United States, *not* to aliens in U.S. Government custody outside the United States, including Guantanamo. *See Sale*, 509 U.S. at 177. We note that, as a matter of policy, the United States Government does not transfer a person to a country if it determines it is more likely than not that the person will be tortured.

"period reasonably necessary to bring about that alien's removal from the United States" following entry of a final order of removal. 533 U.S. at 689. Reasoning that the indefinite detention of the petitioners — two long-term, lawful permanent residents of the United States who were physically present in this country, but were subject to orders of removal — would raise serious constitutional concerns, and noting the lack of clear congressional intent to grant such authority, the Court interpreted the statute not to authorize indefinite detention. *Id.* at 684-685, 689, 697.

Critically, the *Zadvydas* holding was based on the statute. The Court did *not* hold that indefinite detention would be unconstitutional, 533 U.S. at 698-699, and indeed the Court distinguished (and did not disturb) *Mezei*, which had held that indefinite detention of an excluded alien passes constitutional muster. *Id.* at 693. Furthermore, the Court explicitly recognized that "the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate" under applicable statutes and regulations. *Id.* at 700.

Likewise, in *Clark v. Martinez*, 543 U.S. 371 (2005), the Court held that, as a matter of statutory construction, the interpretation of section 1231(a)(6) adopted in *Zadvydas* applied to the detention of aliens stopped at the border of the United States, who were placed in removal proceedings and were subject to a final order of removal. The Court observed that the question whether the Constitution permitted indefinite detention of an alien stopped at the border was "indeed different" from the question

in *Zadvydas* regarding indefinite detention of aliens who previously had been admitted as lawful permanent residents. *Id.* at 379-380. The *Clark* Court also noted that it was not unusual to give a statutory provision "a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation." *Id.* at 380; *see also id.* at 381-382, 386. Far from suggesting that indefinite detention of an alien stopped at the border would be unconstitutional, therefore, *Clark* reinforces the conclusion that it would not.

Here, petitioners are not detained pursuant to the Government's authority over detention following entry of an order of removal under the INA. They are in custody pursuant to the Government's inherent constitutional authority to prevent aliens from entering the United States, and to house them at Guantanamo for their own protection pending their departure for another country that will accept them. *See Mezei*, 345 U.S. 206. Accordingly, the statutory holdings in *Zadvydas* and *Clark* have no relevance to the scope of the Government's authority to house petitioners at Guantanamo as a necessary incident to preventing them from entering the United States. *See also Bolante v. Keisler*, 506 F.3d 618, 621 (7th Cir. 2007) (holding that alien has no right to interim release from government custody under *Zadvydas* where his detention is not pursuant to statutory provision governing detention following a

final order of removal, but instead pursuant to statutory provision governing detention of arriving alien seeking asylum).

C. Petitioners, Who Currently Remain At Guantanamo Because They Do Not Wish To Return To Their Home Country, And Have Not Found Another Country To Take Them, Have No Constitutional Right To Be Brought Into The United States And Released Here.

The district court did not suggest that petitioners have established any right under the INA to enter the United States. Instead, the court invoked the Constitution's Suspension Clause as the purported basis for its authority to order the Government to bring petitioners to the United States and release them into the general population. But the court's power to order habeas petitioners released from their detention as enemy combatants does not encompass the fundamentally different authority to order them brought into the United States from abroad, in contravention of the immigration laws and the judgment of the political branches.

1. The Supreme Court has already considered the constitutionality of an alien's indefinite detention by the Government incident to his exclusion from the United States, and has held that such detention does not violate the Constitution. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Supreme Court held that an alien detained indefinitely at Ellis Island because he had been permanently excluded from this country under the immigration laws, and could not find another country willing to admit him, had no constitutional right to be released

into the United States. That was so even though the alien was physically present in the United States, where he had previously resided for 25 years, had been issued an immigrant visa to return, and the grounds for his exclusion were undisclosed.

In *Mezei*, a divided panel of the Second Circuit had held (over a dissent by Judge Learned Hand) that the Constitution was violated by continuation of Mezei's "confinement beyond that moment when deportation becomes patently impossible." 345 U.S. at 206 (internal quotation marks omitted). The Supreme Court reversed, holding that Mezei's continuing detention incident to exclusion was lawful, and that Mezei gained no greater rights to enter the country by virtue of his "harborage at Ellis Island." *Id.* at 213, 215.

The Court recognized in *Mezei* that an alien's "exclusion by the United States plus other nations' inhospitality results in present hardship [that] cannot be ignored." 345 U.S. at 216. The dissenting Justices asserted, and the majority did not disagree, that the practical effect of the alien's exclusion from the United States and inability to gain entry elsewhere was "incarcerat[ion] by a combination of forces which keep[] him as effectually as a prison." 345 U.S. at 220 (Jackson, J., dissenting). But *all* nine Justices in *Mezei* presumed that an alien in Mezei's circumstances could be detained indefinitely, *see id.* at 213, 215-216 (majority opinion); *id.* at 218 (Black, J., dissenting); *id.* at 223-224 (Jackson, J., dissenting) — the *only* disagreement was whether the alien was entitled to be informed of the grounds for his exclusion and

given an opportunity to respond. *See id.* at 227 (Jackson, J., dissenting). If an alien in those circumstances had a right to entry, the majority emphasized, other countries could "shift the onus to us" by effectively forcing the United States to accept inadmissible aliens as a result of other countries' refusal to permit their entry elsewhere. *Id.* at 215-216 (noting that Congress may have concluded that "an alien in respondent's position is no more ours than theirs"). The *Mezei* Court concluded that the alien's indefinite detention in those circumstances did not violate the Constitution.

A fortiori, *Mezei* controls here, because petitioners are outside the United States, have never previously been in this country, have never been issued an immigrant visa, and indeed have never applied for admission to the United States, thereby triggering the statutory processes for seeking entry. Similar to the alien in *Mezei*, the fact that they are currently housed by the Government at Guantanamo, rather than at liberty elsewhere, arises from the twin factors of the Government's barring their entry to the United States unless and until they are admitted under the immigration laws, and their unwillingness to return to China and their inability to date to find another country to admit them. As in *Mezei*, the Constitution does not prohibit their continued harborage at Guantanamo as an incident of barring them from the United States.

2. The district court suggested that *Mezei*'s constitutional holding was undermined by the Supreme Court's ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that the Suspension Clause applies to aliens detained at Guantanamo.

But those decisions are fully consistent: *Boumediene* establishes that aliens at Guantanamo have a constitutional right to habeas corpus, including a right, where applicable, to an order of release from unlawful detention. It does not entitle aliens to an order requiring them to be brought to and released into the United States without regard for the plenary power of the political branches under the Constitution over the admission of aliens and the statutory restrictions on admission.

In *Mezei* itself, the alien in government detention had the right to challenge his detention through a petition for a writ of habeas corpus. *See Mezei*, 345 U.S. at 213 ("Concededly, [Mezei's] movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion."). Nonetheless, the Court held that Mezei had no right to be released into the United States, despite his physical presence in the United States and his indefinite detention incident to exclusion. *A fortiori*, the availability of habeas corpus does not empower a court to order petitioners to be brought into the United States and released. Indeed, *Boumediene* itself recognized that, even as it related to release into *another* country, an order of release "need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." *Boumediene*, 128 S. Ct. at 2266. That

principle applies with far greater force to a habeas corpus claim brought by aliens outside the United States, seeking an order requiring the Government to bring them into this country for release.

Furthermore, the district court's constitutional analysis in this case was predicated on its assumption that petitioners' custody is unlawful. Although the Government does not seek to detain petitioners as enemy combatants — the only basis of detention authority at issue in *Boumediene* — that does not mean the Government is constitutionally disabled from holding petitioners incident to some other legal authority. The Suspension Clause does not confer on petitioners the right to be free from lawful custody as a corollary to excluding them from the United States. This limitation is clear from *Munaf*, where the Supreme Court declined to issue an order of release that would have interfered with the sovereign prerogative of the Iraqi Government to criminally prosecute the habeas petitioners. 128 S. Ct. at 2224-2225. Just as the Court emphasized the need for comity and respect for a *foreign* sovereign government in that case, *id.* at 2224, here, too, the district court was required to exercise its habeas jurisdiction in a manner consistent with the plenary authority over immigration vested by the Constitution itself in the political branches of *this* Government.

Finally, the district court's analysis simply misreads *Boumediene*. There are a host of cases, both before and after *Mezei*, confirming that an alien outside the

United States has no constitutional right to entry or admission into this country. *See, e.g., Kleindienst v. Mandel,* 408 U.S. 753, 762 (1972); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). *Boumediene* does not purport to overrule those cases or *Mezei*, and it was error for the district court to assume that *Boumediene* had implicitly done so. *See, e.g., Agostini*, 521 U.S. at 258.

Indeed, in determining the reach of the Suspension Clause outside of the United States, *Boumediene* explicitly endorsed a test that examines, *inter alia*, "the practical obstacles inherent in resolving the prisoner's entitlement to the writ." 128 S. Ct. at 2259. Where aliens outside the United States claim a constitutional right to be brought into this country for release, the countervailing constitutional and practical obstacles are insuperable. Judicial recognition of a constitutional right of entry into the United States would substantially intrude on the political branches' exclusion of aliens — which is, as we have noted, a key component of our Government's sovereignty under the Constitution and the conduct of its foreign relations and national security. And it would supplant the political branches' control over the borders, and could make other countries less likely to participate in resettlement efforts.

Recognizing a constitutional right to enter the United States could also have the bizarre and highly undesirable consequence of giving aliens previously held at Guantanamo as enemy combatants — who as such have no voluntary connection to

this country — even greater rights than aliens at our borders. *See, e.g., Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004) (recognizing that, under "entry fiction," an alien seeking admission has not 'entered' the United States, even if the alien is in fact physically present"). Recognition of such a right would thus blur the previously clear distinction between aliens outside the United States, and aliens inside this country or at its borders. This basic distinction serves as the framework on which our immigration laws are structured, and our national sovereignty and security protected, and has been repeatedly recognized as significant, both as a matter of statutory and treaty law, *see, e.g., Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3 (1956) (holding that aliens physically present in United States can challenge exclusion order under Administrative Procedure Act, but explicitly excluding aliens outside the United States from its holding); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993) (holding that treaty limitations on "return" of alien to country where he faces mistreatment do not apply to aliens outside the United States at Guantanamo), and under the Constitution. *See Zadvydas*, 533 U.S. at 692-693.

3. Relatedly, the district court suggested that, because *Boumediene* holds that the Suspension Clause applies to aliens detained at Guantanamo, such aliens are now similarly situated as a constitutional matter to the aliens in *Zadvydas* and *Clark*. The district court purported to draw on what it regarded as the principles espoused in those cases to derive a constitutional test under which petitioners must be brought

to the United States, and released, once there exists no reasonable possibility, in the court's view, that another country will be found for their resettlement.

As we have already explained, both *Zadvydas* and *Clark* were decided on statutory grounds — with *Clark* specifically recognizing that the detention at issue there did not raise the same constitutional concerns as in *Zadvydas*. Accordingly, for purposes of assessing whether the Constitution authorizes a district court to order petitioners brought to the United States for release here, the guidance provided by their holdings, is inapposite.

Furthermore, even on its face, the constitutional avoidance analysis in *Zadvydas* does not apply here. Of the two regulatory aims served by the detention challenged in *Zadvydas*, one — ensuring the alien's appearance at future immigration proceedings — was inapplicable once there was no reasonable prospect of removal to another country. *See Zadvydas*, 533 U.S. at 690. Here, however, the interest served by housing petitioners at Guantanamo — effectuating their exclusion from the United States — is fully congruent with, and indeed a central aspect of, their exclusion until another country is found that will accept them. That factor was deemed significant by the Supreme Court in *Mezei* in upholding the detention in that case. *See Mezei*, 345 U.S. at 216 (emphasizing that admission of "an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding").

Finally, and most significantly, *Zadvydas* itself specifically recognized the "critical distinction" for constitutional purposes between aliens such as Mezei (and, *a fortiori*, petitioners), who have not been lawfully admitted to the United States, and aliens such as the *Zadvydas* petitioners, who had lawfully entered the country and indeed were lawful permanent residents. 533 U.S. at 692-693. *Zadvydas* also explicitly declined to consider whether "subsequent developments have undermined *Mezei*'s legal authority." *Id*. at 694. That reservation confirms that *Mezei* remains a binding precedent here, for it is the Supreme Court's prerogative to overrule its own decisions, and "lower courts lack authority to determine whether adherence to a judgment of [the Supreme] Court is inequitable." *Agostini*, 521 U.S. at 258. And to the extent *Clark* sheds any light on the constitutional question, it suggests that detention of an alien who is stopped at the border of the United States, like the petitioner in *Mezei*, does *not* raise the constitutional avoidance concerns implicated in *Zadvydas*. *See Clark*, 543 U.S. at 380, 384-385.[6]

[6] The district court also cited *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003), for the proposition that *Mezei* is no longer good law. *Rosales-Garcia* is only a statutory construction case, not a holding regarding the constitutional rights of aliens who have not made an entry into the United States. *Rosales-Garcia* also recognized that "special circumstances involving national security" present different issues from those present in ordinary immigration cases. *Id.* at 414. And in any event, *Rosales-Garcia*'s reasoning as to *Mezei* is fatally flawed, because it relies entirely on cases that do *not* involve aliens. *Id.*

4. In addition to questioning the validity of *Mezei*, the district court also sought to distinguish its holding on various grounds. None of the purported distinctions affects the legal analysis in this case.

First, the district court mistakenly suggested that the detention at issue in *Mezei* was not indefinite. Opinion 7, J.A. 1606. But the Supreme Court itself, in *Zadvydas*, described *Mezei* in those terms. 533 U.S. at 693 ("*Mezei*, like the present cases, involves indefinite detention."). And surely the Government's current detention of petitioners incident to their bar from entry into the United States, following the Government's decision just a few weeks ago not to seek to hold petitioners as enemy combatants, is no more "indefinite" than the 3+-year detention at issue in *Mezei*, or the six-month detention following a final order of removal (following lengthy periods of pre-removal detention) held presumptively reasonable in *Zadvydas*.

Next, the district court reasoned that the *Mezei* Court was "unaware of what evidence, if any, existed against the petitioner," because the Government had refused to provide any. Opinion 8, J.A. 1607. The Government's *refusal* to furnish the evidence supporting its decision not to admit an alien, however, does not give it *greater* latitude over the alien's detention. In any event, as explained above, petitioners themselves do not dispute that they lack any legal right under the immigration laws to be admitted into this country — the basis on which they are now being housed at Guantanamo pending resettlement elsewhere. Furthermore, it is

petitioners' burden, under the immigration laws, to seek and demonstrate eligibility for admission — which they have not done. The crucial question thus is not whether petitioners are properly prevented from entering, but the constitutional permissibility of holding the alien in order to effectuate his exclusion from the United States.

The district court also emphasized that the alien in *Mezei* came voluntarily to the United States. Opinion 8, J.A. 1607. But this distinction cuts against petitioners, who have not come to the United States *at all* under 8 U.S.C. § 1101(a)(38), and whose lack of any "voluntary connection" to the United States undermines their constitutional claims. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271-272 (1990). Similarly, the Haitian and Cuban migrants who were brought to Guantanamo during the migration cases in the 1990s, *see Sale*, 509 U.S. 155, did not arrive there voluntarily, but that had no effect on the Government's authority to exclude them from the United States and house them at Guantanamo until they could be sent to their home countries or third countries.

Moreover, even under the district court's reasoning, the petitioners were assumed to be lawfully detained at the outset, Opinion 5, J.A. 1604, pending a reasonable opportunity to determine they were in fact combatants against the United States and its coalition forces. The Government brought petitioners to Guantanamo in accord with established wartime practice to remove suspected enemy combatants from the field of battle to a safer location; this surely does not constitute

"manipulation," as the district court erroneously suggested. Opinion 16, J.A. 1615. To hold otherwise would be to create an incentive for armed forces to leave suspected enemy combatants close to the battlefield, at greater risk to them and the forces in whose custody they are taken.

In this regard, petitioners are similarly situated to the aliens in *Sale*, who were interdicted by U.S. forces on the high seas, or in *Mezei* itself, where the fact that the alien was on U.S. soil was a result of the government's voluntary choice to allow him to disembark. Notwithstanding that the Government took physical custody over those aliens, the Government did not lose the authority to bar them from entering this country. Here, once the original enemy-combatant basis for detention was no longer in force, petitioners were entitled to release from that custody. As a practical matter, the reason they have not had the further freedoms of movement that otherwise would have flowed from that release from custody is that they do not wish to go back to the only country to which they have a legal right to return, China. That impediment to their return in no way means, however, that petitioners now have a constitutional right to enter the United States without regard to the constitutional prerogatives of the political branches over the admission of aliens and the defined and fundamental restrictions on entry under the immigration laws enacted by Congress pursuant to that plenary authority.

Finally, the district court suggested that it was not required to defer to the judgment of the political branches that petitioners should not be brought to the United States, because the Government assertedly had "subvert[ed] diplomatic efforts to secure alternative channels for release" by describing petitioners as "enemy combatants." Opinion 16, J.A. 1615; *see* Opinion 12, J.A. 1611 (asserting that Government's characterization of petitioners as "enemy combatants" has "stymied" efforts to locate a country willing to accept them). The district court's assertion that the United States has "stymied" its own diplomatic efforts is simply erroneous, as the classified declarations submitted in the district court make clear. *See* Classified Declaration of Pierre-Richard Prosper, Aug. 8, 2005, Classified J.A. 4-5; Classified Declaration of Clint Williamson, Aug. 19, 2008, C.J.A. 9-14; Classified Declaration of Clint Williamson, Oct. 3, 2008, C.J.A. 17-18. Furthermore, even putting aside the district court's correct assumption that petitioners "were lawfully detained" pending a definitive determination of their status as enemy combatants, Opinion 5, J.A. 1614, this is the same sort of judicial second-guessing of diplomatic negotiations with foreign governments that the Supreme Court recently made clear is improper. *Munaf*, 128 S. Ct. at 2226 (refusing to review adequacy of assurances that Iraqi Government would not torture habeas petitioners). Notably, in *Mezei*, the Government had apparently undertaken *no* diplomatic efforts on the alien's behalf to identify a country

for resettlement, and yet that did not affect the constitutional analysis. *Mezei*, 345 U.S. at 209-210.

D. Even If The District Court Had Some Authority To Order The Government To Bring Petitioners Into The United States For Release, Vacatur Of The Court's Order Would Still Be Required.

As we have shown, the district court's order was erroneous because it interferes with the political branches' plenary authority over the admission of aliens into the United States, and the petitioners have neither a statutory nor a constitutional right to admission into this country. But even if the district court did have some ultimate constitutional authority to order the Government to bring petitioners into the United States and release them here, the district court nevertheless erred in denying the Government a reasonable additional period in which to wind up petitioners' detention as enemy combatants. Before taking the drastic step of ordering petitioners to be brought into this country, the district court should have provided an opportunity for the aliens to present legal grounds for their admission to the United States and for the government to present any grounds for their inadmissibility and any other grounds for their detention. Furthermore, there was no basis for the district court to hold not only that petitioners are entitled to be brought into this country, but also that, once here, they are immune from the normal operation of the immigration laws — which, as we

show below, authorize petitioners' immediate detention if they are brought into the United States.

1. The Executive's authority to detain suspected enemy combatants must surely encompass the authority to return former enemy combatants, including individuals ultimately determined not to be proven enemy combatants, to their home country or another country — as the district court explicitly recognized. Opinion 8. The district court nevertheless held that authority inapplicable because, in the court's view, petitioners' detention has become effectively indefinite and further diplomatic efforts are unlikely to bear fruit. Opinion 8-9, J.A. 1607-1608. But the legal validity of petitioner Parhat's detention as an enemy combatant was resolved just weeks ago, and the Government's subsequent determination to apply that ruling to all Uighur petitioners is even more recent. Even assuming that a court could ever properly order that an alien who is outside the United States and has never been to this country nonetheless must be brought into the United States for release, surely the Government would be entitled to some reasonable period of time to continue its efforts to resettle petitioners, in light of recently changed circumstances.

Historically, individuals detained as enemy combatants who cannot be returned to their home countries have been held for lengthy periods after the conclusion of hostilities, pending repatriation. At the end of the Korean War, the United Nations Command held approximately 100,000 Chinese and North Korean prisoners of war

who refused to return to their native countries for more than a year and a half, pending a determination of how best to resettle them. *See* J. Charmatz & H. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 392 (1953); C. Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1, of the Third Geneva Convention Relative to the Treatment of Prisoners of War* 157-165 (1977). After World War II, Allied Forces spent several years dealing with issues relating to the repatriation of prisoners of war. *See id.* at 145-156 & n.53; Charmatz & Wit, *supra*, 62 Yale L.J. at 401 nn.46, 48, 404 n.70; C. Delessert, *Repatriation of Prisoners of War to the Soviet Union During World War II: A Question of Human Rights,* in *World in Transition: Challenges to Human Rights, Development and World Order* 80 (1979). Thousands of Iraqis were detained by the United States and its allies after the First Gulf War because they refused to be repatriated in their native country. *See* U.S. Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, at 707-708 (April 1992) (http://www.ndu.edu/library/epubs/cpgw.pdf). The wind-up detention challenged by petitioners is akin to these prior examples of continuing detention following the end of enemy combatant status, and also fits within the time period held to be presumptively reasonable in *Zadvydas*.

In addition, before taking the precipitous step of ordering petitioners to be brought into the United States and released into the general population, the court

should have acted incrementally and considered whether there is some other basis for petitioners' detention, *see, e.g.,* 8 U.S.C. § 1226a; whether it should impose conditions on their release; and any other relevant factors. In undertaking these inquiries, the district court should have ascertained whether the latest and best intelligence information was being brought to bear on the question; all else aside, the Government should be permitted to present any relevant information, including intelligence assessments that may have been generated only very recently. Even if this Court holds that the district court might have authority at some point to order petitioners to be brought into the United States and released here, therefore, it should nevertheless vacate the district court's judgment and remand for further proceedings, in order to give the Government an opportunity to present any relevant information it may have that bears on petitioners' release into the United States and on the conditions of release.[7]

[7] Initially, the district court scheduled a hearing to address supervisory conditions six days *after* petitioners were to have been released into the general population of this country, and held that *no* supervisory conditions could be imposed before that hearing. *See* Transcript 62-65, J.A. 1594-1597. Subsequently, the district court modified that ruling to permit immediate consideration of unspecified "short-term conditions of release" pending a subsequent, and more detailed, hearing. Order 2, Addendum 25a. Neither approach is appropriate; before ordering petitioners released into the general population, the district court should have permitted complete consideration of appropriate conditions.

2. Finally, even if petitioners were somehow entitled to be brought into and released in the United States, it is clear that the INA also permits the Government to immediately take petitioners into custody and detain them pending removal to another country upon their arrival. The INA provides for detention prior to the entry of a removal order, *see* 8 U.S.C. § 1226, as well as after, *see* 8 U.S.C. § 1231(a)(6). And *Zadvydas* and *Clark* establish that all aliens ordered removed are subject to post-order detention for at least the presumptively reasonable period of six months after the entry of the removal order.

Further, *Zadvydas* explicitly recognizes that Congress might authorize a longer period of detention for "particularly dangerous individuals, say, suspected terrorists" — and that, for detention under those circumstances, "special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 691, 696. In response to that decision, Congress made a legislative judgment that individuals who seek to engage in terrorist acts, defined broadly, should be detained for a lengthier period. *See* 8 U.S.C. § 1226a(a)(1), (3), (6). Even if the district court had authority to order petitioner brought to the United States, therefore, they would still be subject to immediate detention pending removal under the provisions of the INA. The district court accordingly erred in suggesting that the Government was

foreclosed from taking petitioners into immigration custody once they arrived in the United States.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated.

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CERTIFICATE OF COMPLIANCE

I hereby certified that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,463 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

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