NOS. 09-5265, 09-5266, 09-5267

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

FADI AL-MAQALEH, *et al.*,
Petitioners-Appellees,
v.
ROBERT GATES, *et al.*,
Respondents-Appellants.

AMIN AL-BAKRI, *et al.*,
Petitioners-Appellees,
v.
BARACK OBAMA, *et al.*,
Respondents-Appellants.

REDHA AL-NAJAR, *et al.*,
Petitioners-Appellees,
v.
ROBERT GATES, *et al.*,
Respondents-Appellants.

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

JOINT PETITION FOR PANEL REHEARING

Barbara J. Olshansky
**Counsel of Record*
Tina Monshipour Foster
International Justice Network
P.O. Box 610119
New York, NY 11361
(917) 442-9580

Counsel for Petitioners Fadi Al-Maqaleh, Redha Al-Najar, and Amin Al-Bakri

Ramzi Kassem
Main Street Legal Services, Inc.
City University of New York
School of Law
65-21 Main Street
New York, NY 11367
(718) 340-4558

Hope R. Metcalf
National Litigation Project
Lowenstein Int'l Human Rights Clinic
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 432-0138
Counsel for Petitioner Amin Al-Bakri

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Treaties

SUMMARY OF ARGUMENT

Habeas Petitioners Fadi Al-Maqaleh, Amin Al-Bakri, and Redha Al-Najar respectfully petition this Court for a rehearing in order to allow the Panel to revisit its decision because it: (i) is premised on a factual foundation that is no longer operative given the Executive's recent decision to transfer virtually all of the Bagram detainees to the Afghan Government for further assessment and trial or release; (ii) conflicts with settled Supreme Court precedent; (iii) mistakenly overlooks the danger of Executive circumvention of the rule of law; and (iv) subordinates judicial authority to redress unlawful Executive detentions to the discretion of the political branches, at grave cost to the rule of law.

The matter adjudicated by the District Court below, *Maqaleh v. Gates, et al.*, 604 F. Supp. 2d 205 (D.D.C. 2009), and the appeal heard by a panel of this Court, *Maqaleh v. Gates, et al.*, No. 09-5265 (D.C. Cir. May 21, 2010) ("Slip Op."), is in reality a narrow one: whether, in light of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Great Writ is available to detainees who were seized outside of Afghanistan and imprisoned in the Bagram Theater Internment Facility ("Bagram Prison") operated by the U.S. military at Bagram Airbase in Afghanistan. That question involves the same essential issue adjudicated (albeit in slightly different contexts) , by the Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and

Boumediene (collectively, the "*Guantánamo* cases"): whether the Executive can seize and imprison individuals, *regardless* of whether they ever participated in or were anywhere near a zone of active hostilities, *regardless* of where they were seized and what they were doing at the time of their arrest, and *regardless* of whether the U.S. exercises *de jure* and *de facto* exclusive jurisdiction and control.

For upwards of eight years, Petitioners have languished in a legal chasm where they do not know the bases for their detention and lack the most basic legal tools needed to challenge them, where conditions of confinement have been—and continue to be—ghastly and alterable at will, and where these unbearable circumstances may continue for the indefinite duration of the campaign against transnational terrorism. The *Guantánamo* decisions expressly forbid the political branches from "govern[ing] without legal constraint," even outside the strict territorial boundaries of the United States. *Boumediene*, 128 S. Ct. at 2259. Our nation's highest court has ruled emphatically in four successive cases that the law—U.S. constitutional and military law *and* international human rights and humanitarian law—will not abide the Executive's deliberate creation of a legal vacuum in a place it exclusively operates and controls. *Rasul*, 542 U.S. at 481-82; *Hamdi*, 542 U.S. at 536; *Hamdan*, 548 U.S. at 576-77; *Boumediene*, 128 S. Ct. at 2259.

This Court should not be enticed into accepting Respondents' contentions

that their reading of *Johnson v. Eisentrager*, 339 U.S. 736 (1950), coupled with their bare pronouncement of likely logistical problems, lead inexorably to the conclusion that this country can deny its detainees seized in cities around the world with the most fundamental protections embodied in the rule of law. Neither the precedent, from *Eisentrager* to *Rasul* to *Boumediene*, nor the facts support Respondents' contention. This case presents a test of both the substance of the habeas right established by *Boumediene* and the role of the courts in maintaining the constitutional balance among the branches of government in times of conflict. A decision fully implementing *Boumediene* will comport with settled precedent, affirm this Court's leadership, validate its authority to reign in an overreaching Executive, and promote respect for the rule of law in this country as well as in states around the world.

ARGUMENT

I. THE PANEL SHOULD REVISIT ITS OPINION AND REMAND THE MATTER FOR FURTHER ADJUDICATION IN LIGHT OF THE EXECUTIVE'S DECISION TO TRANSFER THE PRISON TO THE AFGHAN GOVERNMENT WHILE RETAINING CUSTODY OF SOME BAGRAM DETAINEES.

After this matter was submitted to the Panel for decision on January 7, 2010, Respondents announced and began implementing a number of significant changes to the U.S. detention system at Bagram, including: (a) on January 9, 2010, the U.S.

and Afghan governments first announced that they had reached an agreement to transfer certain detainees held at Bagram Prison to Afghan control, resulting in numerous transfers to the "Parwan Facility," located on the edge of the Bagram Airbase;[1] (b) in March 2010, Respondents announced their decision to hand over control of the Bagram detention facilities *and* custody of the Afghan detainees held in those facilities, to the Afghan government in 2011;[2] (c) on June 1, 2010, the U.S. military allowed Afghan prisoners held in Bagram Prison to appear for the first time in a jointly U.S.-Afghan run proceeding similar to an indictment;[3] (d) on June 8, 2010, the Executive announced they intend to retain control over a section of the Parwan Facility;[4] and (f) on June 9, 2010, the Executive stated that the plan was to use the U.S.-controlled portion of the Facility to hold and interrogate people seized

[1] *See* Press Release, United States Central Command, JTF 435, "Afghan ministers accept responsibility of Parwan Detention Facility," Jan. 10, 2010, *available at* www.centcom.mil/news/afghan-ministers-accept-responsibility-of-parwan-detention-facility; Heidi Vogt, *US prison in Afghanistan to hold first trial*, The Boston Globe, May 26, 2010, *available at* www.boston.com/news/world/asia/articles/2010/05/26/ (by May 2010, detainees were housed in the Parwan Facility).

[2] *See* Press Release, International Security Assistance Force, Afghanistan, "ISAF hosts Afghan corrections conference," Mar. 27, 2010, *available at* www.isaf.nato.int/article/news/isaf-hosts-afghan-corrections-conference.html (U.S. and Afghan officials state that "the full responsibility of the [Parwan] Detention Facility" will be handed to the Afghans in 2011).

[3] *See* Jonathon Burch, *First all-Afghan trial opens in US jail at Bagram*, Reuters, June 1, 2010, *available at* www.reuters.com/article/idUSSGE651053 (noting this represents "a step towards letting Afghans be tried by their own countrymen," while implicitly recognizing that it does not address the detention of foreigners on Afghan soil).

[4] *See* Julian Barnes, *U.S. may seek use of Afghan prison*, L.A. Times, June 8, 2010, *available at* www.latimes.com/sc-dc-bagram9-20100608,0,6124146.story.

from countries *outside* Afghanistan.[5] In none of these announcements was any mention made of the process to be the individuals—like Petitioners—who will continue under U.S. control at Bagram. That omission, coupled with the Administration's May 2010 statement *preserving for the Executive the option of detaining individuals indefinitely without charge*,[6] indicates the Executive's plan to imprison people like Petitioners on Bagram Airbase for the foreseeable future. That position flatly contradicts Respondents' statements before the Panel that it does *not* intend to occupy Bagram for the long term, and thus undermines the Panel's holding. Slip op. at 22. These changes significantly implicate the Panel's *Boumediene* calculus, and this Court should grant Petitioners' rehearing request to revisit its opinion and remand the case to the district court for further proceedings. *See Natural Res. Def. Council v. EPA*, 446 F. 3d 1, 3 (D.C. Cir. 2006).

II. THE PANEL'S DECISION CONFLICTS WITH THE SUPREME COURT'S RULINGS IN *EISENTRAGER, RASUL,* AND *BOUMEDIENE*.

The Supreme Court in *Boumediene* rejected the Executive's sweeping assertion that habeas jurisdiction turns on the existence of formal sovereignty over

[5] *See* Julian Barnes, *U.S. hopes to share prison with Afghanistan*, L.A. Times, June 9, 2010, *available at* www.latimes.com/2010/jun/09/world/la-fg-bagram-20100609.

[6] *See* The White House, National Security Strategy 36, May 27, 2010, *available at* www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (noting that the U.S. "will prosecute terrorists in Federal courts or in reformed military commissions" only "*when we are able*") (emphasis added).

the place of detention, holding instead that "[w]hether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it'" and, in particular, whether judicial enforcement would be "impracticable and anomalous." 128 S. Ct. at 2255-56. *Boumediene's* multi-factored test was designed to assist Article III courts in analyzing the totality of the circumstances of U.S. military detention of non-citizens when they are confronted with what should be *an extremely rare* Executive claim that an overseas prison is neither subject to judicial nor governed by any legal regime save one that the Executive fashions in its sole discretion.

Rather than hewing to the *Boumediene* test, the Panel's decision recasts the Supreme Court's rulings in this area to unduly emphasize geographic formalism. By accepting Respondents' mischaracterization of the meaning of *Eisentrager*, *see* Slip op. at 21-22, the Panel mistakenly employs a test for extraterritorial application of the Suspension Clause that is fundamentally at odds with precedent. Under *Eisentrager*, *Rasul*, and *Boumediene*, Petitioners are entitled to challenge the legality of their detention by means of the writ.

The Panel affords great weight to the site of detention factor, *see* Slip op. at 21-22, noting that it tips the balance more strongly against extraterritorial application than in *Boumediene* or *Eisentrager*. The Panel's decision is premised

on three flawed propositions. First, it cites no precedent to support its weighting of the *Boumediene* factors or its amplification of this single factor; the Panel notes only that de facto sovereignty was "the subject of much discussion in *Boumediene*." Slip op. at 22. Second, by uncoupling the two aspects of *Boumediene's* second set of factors, which look at "the nature of the site where apprehension *and* then detention took place," 128 S. Ct. at 2259 (emphasis added), it avoided examining the central issue here: the import of the seizure of Petitioners in third states and their rendition to a U.S. military base in a country where civil war hostilities are ongoing. And third, the Panel mistakenly adopts Respondents' argument that U.S. control over Bagram must be both exclusive and *permanent* for habeas jurisdiction to exist. *Boumediene* never delineated such a rule, and in any event, both the terms of the Lease, which does not require the U.S. to *ever* relinquish its unilateral control over Bagram Airbase, *see* J.A.72-73, and Respondents' plans for the Prison now belie this argument. *See* Part I.

The Panel's emphasis on the site of detention reveals a misinterpretation of *Eisentrager*. The *Eisentrager* Court fully addressed the merits of the German nationals' petitions after noting that the federal courts had authority over the Secretary of Defense, *Eisentrager*, 339 U.S. at 769, who, as custodian would have the authority to order the petitioners' release. *Id*. at 766-67. The *Eisentrager* Court *did not* decide the case on the ground that federal courts could not exercise habeas

jurisdiction over the detentions of non-citizens in a prison in occupied Germany.[7] Rather, it reviewed all of the petitioners' constitutional and jurisdictional claims, including whether the military tribunal in China had the authority to try them for the offenses charged, *see id.* at 778-91, a matter that the Court would have raised *only* if it had already concluded that it had the power to intervene should it determine that the tribunal had overstepped its boundaries.[8] *Eisentrager* was *not* a decision about territorial limits; it was a decision about the role of the courts in reviewing the mechanisms and decisions of the military justice system. *Id*. at 765. *Rasul* confirms this reading; it, too, grounded habeas jurisdiction over military detentions overseas in the courts' authority to reach government officials.[9] 542 U.S. at 474-75. And the Supreme Court has never shied away from exercising habeas jurisdiction in this context in order to ensure that an adjudicatory system is

[7] The *Eisentrager* petitioners were 27 German nationals taken into custody after the end of World War II, formally accused of violating the laws of war, fully informed of the charges against them, represented by counsel, and tried before a duly constituted military commission. *See* 339 U.S. at 766, 786. Six were acquitted and 21 convicted. *Id.* at 766. The sentences of those convicted were reviewed by a reviewing authority and upheld. *Id.* The petitioners did not allege their innocence or that they had been denied basic procedural rights; they alleged that the commission had no jurisdiction to try them. *See Eisentrager v. Forrestal*, 174 F.2d 961, 963 (D.C. Cir. 1949).

[8] *See* James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 Cornell L. Rev. 497, 519-21 (2006).

[9] The *Rasul* Court stated that at common law, "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" 542 U.S. at 482. At common law, the writ would issue if the Crown exercised jurisdiction over the jailer. *See Boumediene*, 128 S. Ct. at 2245; *Padilla v. Rumsfeld*, 542 U.S. 426, 435 (2004) (citing *In re Jackson*, 15 Mich. 417, 439-440 (1867) and noting that "[Habeas] provisions contemplate a proceeding against some person who has the *immediate* custody of the party detained.").

available to a prisoner to test the legality of his detention. *See, e.g., Burns v. Wilson*, 346 U.S. 137, 142 (1953) ("Had the military courts manifestly refused to consider [petitioners' claims], the District Court was empowered to review them *de novo.*"); *Gusik v. Schilder*, 340 U.S. 128, 131-32 (1950) (petitioner must exhaust available remedies in military system).[10]

Finally, the Panel erred by accepting the Executive's plea regarding the weight to be allocated to the site of detention factor given that this is not a case about battlefield captures; it is a case about the Executive's decision to bring Petitioners to a place where hostilities were ongoing at the time of their rendition. The Court should not allow the Executive to benefit from taking a lawless position, claiming that the laws of war authorize the seizure of individuals from locales around the globe while concomitantly refusing to adhere to the Geneva Conventions and transferring Petitioners and other "war on terror" detainees to Bagram Prison where it has held them for nearly eight years without due process

[10] The Court has long recognized that federal habeas is available to fill the void created by an inadequate remedy in the coordinate system of justice. *See, e.g., Chin Yow*, 208 U.S. 8, 11-13 (1908); *Kwack Jan Fat v. White*, 253 U.S. 454, 457-58 (1920) (immigration findings by Executive are conclusive unless petitioner establishes on habeas that "the proceedings were manifestly unfair, were such as to prevent a fair investigation, or show manifest abuse of the discretion committed to the executive officers by the statute, or that their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law."); *Moore v. Dempsey*, 261 U.S. 86, 91 (1923) (if state fails to provide an adequate "corrective process" to a trial dominated by mob sentiment, petitioner may seek review on habeas); *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) (habeas must be available to provide remedy for constitutional violations that, through no fault of the petitioner, cannot be remedied elsewhere).

and contrary to the laws of war.[11] It would be greatly troubling if the Panel's decision were permitted to stand as is, given that despite the Executive's reliance on *Eisentrager*, it has pointedly refused to heed the *Eisentrager* Court's admonition that the prisoners were entitled to the protections of the Geneva Conventions. 339 U.S. at 789, n.14.

The Panel's error of misplaced emphasis on territoriality is exacerbated by its factually flawed analysis of the practical obstacles that might arise if Petitioners are accorded access to the writ. In fact, Petitioners' circumstance is virtually identical to that of the Guantánamo detainees with respect to the existence or import of any such obstacles. And the facts of the Guantánamo habeas hearings held to date firmly establish that the courts are more than capable of handling these habeas proceedings by tailoring procedures to accommodate Respondents' concerns about the practical burdens of extending the writ to people captured in the context of overseas combat operations, a situation *not* at issue here, and ensure that only proven enemy combatants are being held.[12]

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[11] The Third Geneva Convention ("GCIII") requires that a capturing state bring individuals seized during a conflict to a place of safety. Geneva Convention Relative to the Treatment of Prisoners of War, art. 19, Aug. 12, 1949, 75 U.N.T.S. 135.

[12] *See* Br. for Non-Governmental Organizations As *Amici Curiae* in Support of Appellees at 15-19, 23, 26 (finding (a) government processes highly deficient because district judges found insufficient evidence to sustain detention of 30 of the 38 cases resolved on the merits; (b) district courts crafted procedures to ameliorate any practical burdens on military (*e.g.*, detainee hearing participation by telephone, testimony given by videoconference, hearsay accepted from military officers, scope of discovery curtailed, exculpatory evidence limited to that "reasonably available").

Finally, the Panel's concern about unwarranted judicial intrusion into the Executive's ability to conduct military operations is similarly misplaced. Slip op. at 24. The circumstances of Petitioners' seizure simply do not implicate military operations in Afghanistan in any way. Mr. Al-Bakri, a businessman, was seized while working in Bangkok, Thailand, *see* J.A.476, and Mr. Al-Najar was seized in Karachi, Pakistan, where he was living with his wife and child. *See* J.A.620. Neither Mr. Al-Bakri nor Mr. Al-Najar was bearing arms at the time of their respective seizures. *See generally* J.A.476-77, 619-20.[13] None of the three Petitioners is even alleged to have committed hostile and warlike acts against the United States or its coalition partners in Afghanistan. *See generally* Resp. Br. at 12 (noting only that each Petitioner is "subject to detention as an 'unlawful enemy combatant.'" without further details as to the basis for that designation). To the extent that any additional—as yet unarticulated—difficulty might arise here because Respondents have confined Petitioners in Afghanistan, where hostilities are ongoing, as noted above, any such obstacle would not be present *but for* the Executive's decision to transfer Petitioners from other countries to Bagram Prison for interrogation and detention. Allowing the Executive to benefit from a situation of its own deliberation making would invite precisely the sort of maneuvering in the service of maintaining Executive detention the Great Writ is designed to

[13]Respondents have prevented Mr. Al-Maqaleh from detailing his seizure. J.A.15.

prevent. *Cf. Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959) ("To decide the case we need look no further than the maxim that no man may take advantage of his own wrong."). In short, this Panel need not accept the government's invitation to speculate about how to draw a line in absolutist terms in every imaginable future conflict. This case is a narrow one, one that in nearly every aspect has already been decided by the court in *Boumediene*. The district court adhered faithfully to the *Boumediene*, and this Panel must do so as well.

III. THE PANEL'S DECISION OVERLOOKS THE EXECUTIVE'S CIRCUMVENTION OF THE RULE OF LAW.

The Panel mistakenly faults Petitioners for failing to make a specific showing that the Executive brought them to Afghanistan with the specific intent of avoiding habeas jurisdiction. In *Boumediene*, the Court held that the denial of habeas for the Guantánamo detainees because of obstacles the Executive created would invite Executive gamesmanship. *See, e.g.*, 128 S. Ct. at 2259 ("The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain."). The same logic applies here. Executive decisionmakers need not have anticipated the complex litigation history and resulting opinions to have engaged in the manipulation barred by *Boumediene* and the Constitution. It is enough that the entire premise of the rendition program was to shield Executive detention and interrogation from

judicial scrutiny. Certainly, one *effect* of the Panel's decision—aside from maintaining the instant Petitioners in legal limbo—will be to invite the Executive to transfer more detainees from around the world to Bagram, where the Constitution is now switched off.

From its inception, Bagram was a "collection site" for Guantánamo,[14] where detainees faced further interrogation and indefinite detention; both were selected due to their perceived insulation from judicial scrutiny. The Executive only began using Guantánamo as a detention site after receiving reassurance from the Office of Legal Counsel that habeas jurisdiction was unlikely to reach Guantánamo.[15] Indeed, the heart of the Bagram/Guantánamo strategy was to take people *away from* rather than *to* justice, sharply deviating from settled law and practice.[16]

The Panel was correct to question whether the Executive preferred Bagram due to the reach of the courts' jurisdiction to Guantánamo, but it mistakenly

[14] *See* Memorandum to the U.S. Deputy Sec'y of State, from Gregory Suchan, Acting Asst. Sec'y for Political-Military Affairs, "Information Memorandum re: Nationalities at Bagram," Jan. 24, 2002, *available at* www.aclu.org/torturefoia/released/t2677_2679.pdf (describing Bagram Prison as a "collection center" for detainees awaiting transfer to Guantánamo).

[15] *See* Memorandum to the General Counsel, Dept. of Defense, from Patrick F. Philbin & John C. Yoo, Deputy Asst. Attorneys General, "Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba," Dec. 28, 2001, *available at* www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf; *see also Hamad v. Bush*, Case No. 05-cv-1009 (D.D.C.), Decl. of Colonel Lawrence B. Wilkerson, at ¶9c, *available at* www.truth-out.org/files/Wilkerson.pdf (noting that "the deliberate choice to send detainees to Guantánamo was an attempt to place them outside the jurisdiction of the U.S. legal system").

[16] *See, e.g.*, Margaret Satterthwaite & Angelina Fisher, *Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law*, 6 THE LONG TERM VIEW 46, 49-52 (2006) (contrasting Reagan-era rendition program with post-9/11 program).

considered only the Executive's conduct after the *Boumediene* ruling. *See* Slip op. at 25. From February 2002 on, the question of habeas jurisdiction over the Guantánamo detainees grew increasingly contested. *See, e.g., Rasul v. Bush,* 215 F. Supp. 2d 55, 68-72 (D.D.C. 2002) (inquiring into nature of sovereignty of base at Guantánamo). From 2004 to 2006, habeas review seemed likely. *Rasul*, 542 U.S. at 480-82; *Hamdan*, 548 U.S. at 572-84. Not coincidentally, the detainee population at Bagram increased dramatically during that same period,[17] while the number of transfers from Bagram to Guantánamo dropped significantly, a shift attributable, "according to military figures, [] in part [as] a result of a Bush administration decision to shut off the flow of detainees into Guantánamo after the Supreme Court ruled that those prisoners had some basic due-process rights."[18] Given the common-sense inferences from the public record and the Administration's newly articulated policy for the use of Bagram Prison to detain non-Afghans, remand for further consideration is necessary and appropriate.

IV. THE PANEL'S DECISION UNDERVALUES HABEAS REVIEW IN PRESERVING THE RULE OF LAW.

This case, like the *Guantánamo* cases before it, goes to the core of the

[17] Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan,* N.Y. Times, Jan. 7, 2008, *available at* www.nytimes.com/2008/01/07/world/asia/07bagram.html (noting that Bagram population was about 100 detainees in early 2004, but increased to more than 500 by 2007).

[18] Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo* , N.Y. Times, Feb. 26, 2006, *available at* www.nytimes.com/2006/02/26/international/26bagram.html.

Judiciary's role in the Constitution's separation of powers architecture. The Great Writ "allows the Judicial Branch to play a necessary role in maintaining [the] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536 (plurality op.). In a landmark case concerning the rights of U.S. citizens seized and detained by their own government overseas, the Court granted rehearing because of the larger systemic consequences of its decision. *See Reid v. Covert*, 352 U.S. 901 (1956). Like *Reid*, this is a case about the constitutional role of the habeas remedy as the guarantee for the right to individual liberty, and like the *Guantánamo* cases, it is a case about the critical place of the Judiciary in our system of checks and balances, where the writ "is an indispensable mechanism" "to maintain the delicate balance of governance that is itself the surest safeguard of liberty." *Boumediene*, 128 S. Ct. at 2247, 2259 (citations omitted).

CONCLUSION

For the foregoing reasons, and for those presented in Petitioners' brief and those of amici supporting them, Petitioners respectfully urge this Court to revisit and amend the Panel decision.

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Respectfully submitted,

____/s/_____
Barbara J. Olshansky*
Tina Monshipour Foster
Joshua Herlands**
International Justice Network
P.O. Box 610119
New York, NY 11361
(650) 388-2237
barbara.olshansky@ijnetwork.org

Counsel for Petitioners Fadi Al-Maqaleh, Redha Al-Najar, and Amin Al-Bakri

____/s/_____
Ramzi Kassem
Main Street Legal Services, Inc.
City University of New York School of Law
65-21 Main Street
Flushing, NY 11367
(718) 340-4558
ramzi.kassem@mail.law.cuny.edu

Hope R. Metcalf
Robert Braun**
Daniel Mullkoff**
Alexander Wong**
Lowenstein Int'l Human Rights Clinic
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 432-0138
hope.metcalf@yale.edu

Counsel for Petitioner Amin-Al Bakri

**Counsel of Record*
***Law Student Interns*