No. 08-1234

IN THE

Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,

Petitioners,

—v.—

BARACK H. OBAMA, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

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

[1] Pursuant to Supreme Court Rule 37, counsel of record for both parties have received timely notice of amicus' intention to file an *amicus curiae* brief in support of the petition for *certiorari*, and letters of consent to the filing of this brief are submitted to the Court with this brief. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amicus itself, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the critically important question whether the federal courts are powerless to grant effective habeas corpus relief to remedy the unlawful detention of foreign nationals at the Guantanamo Bay Naval Base. *Certiorari* is warranted to ensure that this Court's ruling in *Boumediene v. Bush*, 553 U.S. ---, 128 S. Ct. 2229 (2008), is not de facto negated by the District of Columbia Circuit's refusal to follow the Court's clear instruction.

Amicus addresses two specific points in this brief to demonstrate the fatal analytic flaws in the court of appeals' decision that underpin its ruling – flaws that will continue to permeate the D.C. Circuit's understanding of *Boumediene* in this and other cases involving claims by individuals whose detention is illegal, but nonetheless remain in United States military custody.

First, *amicus* demonstrates that the court of appeals' invocation of separation of powers to conclude that the Judiciary cannot order effective habeas relief was the same submission that this Court rejected in *Clark v. Martinez*, 543 U.S. 371 (2005), and *Zadvydas v. Davis*, 533 U.S. 678 (2001). In both cases, this Court granted habeas relief notwithstanding the government's vigorous arguments that court-ordered release of unlawfully detained aliens who had no right to enter or remain in the United States would constitute an impermissible intrusion into the political branches' immigration authority. To the contrary, the Court's

rulings confirm that a habeas court must have the power to grant an effective remedy to unlawful detention.

Second, *amicus* submits that the D.C. Circuit refused to acknowledge the central teaching of *Boumediene* on the application of the Constitution to foreign nationals outside the sovereign territory of the United States. Rather than applying the functional "impracticable and anomalous" test that *Boumediene* expressly adopted, the court of appeals applied a categorical rule to bar non-citizens "without property or presence" in the United States from asserting due process rights. The court of appeals thus invoked the very doctrine that *Boumediene* rejected. The D.C. Circuit decision thus makes clear that resolution of the dispute over the Constitution's application to Guantanamo detainees continues to require this Court's direct intervention.

ARGUMENT

I. A JUDICIAL ORDER OF RELEASE TO GRANT AN EFFECTIVE HABEAS CORPUS REMEDY DOES NOT VIOLATE SEPARATION OF POWERS.

1. As an initial matter, *amicus* agrees with petitioners that review of the court of appeals' decision denying habeas relief is warranted because it eviscerates the most essential protection of the Great Writ of Habeas Corpus: a judicial remedy for unlawful executive detention. Habeas corpus "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." *Boumediene*, 128 S. Ct. at 2247 (citation

omitted). *See also, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."); *St. Cyr*, 533 U.S. at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."). The very purpose of the writ would be negated if the Executive were capable of imposing forms of incarceration that render the Judiciary powerless to grant relief from unlawful custody.

Boumediene held, based squarely on the Constitution's Suspension Clause, that non-citizens detained at Guantanamo as enemy combatants "are entitled to the privilege of habeas corpus to challenge the legality of their detention." 128 S. Ct. at 2262. As the Court recognized, the "habeas court *must* have the power to order the conditional release of an individual unlawfully detained[.]" *Id.* at 2266 (emphasis added). The court of appeals' decision eviscerates *Boumediene* by rendering the Judiciary powerless to grant a remedy for unlawful detention. Its ruling cannot be reconciled with the purpose or the protections of the Great Writ.

2. Of critical significance, the court of appeals' ruling relied on its view that separation of powers principles denied the Judiciary the authority to grant an effective habeas remedy. In particular, the court of appeals concluded that an order mandating the

petitioners' release into the territory of the United States would impermissibly interfere with the political branches' exclusive authority over immigration matters. Pet. App. 4a-8a. The court of appeals reasoned that "the power to exclude aliens [is] 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government.'" Pet. App. 6a (citation omitted). As a result, the court of appeals concluded, the question whether non-citizens such as petitioners should be permitted to enter the United States is "a matter 'wholly outside the concern and competence of the Judiciary.'" Pet. App. 7a (citation omitted).

That assertion misses the point and fails to acknowledge that this Court rejected the same argument on two occasions with respect to release of aliens who had no right to enter or remain in the United States. In *Martinez* and *Zadvydas*, the government argued unsuccessfully that separation of powers and appropriate judicial deference to the political branches' immigration authority compelled the courts to deny habeas release where the result would be to grant such non-citizens freedom from custody (subject to appropriate conditions) inside United States. *See, e.g.*, *Zadvydas*, 533 U.S. at 695 (discussing government's contentions "that Congress has 'plenary power' to create immigration law, and that the Judicial Branch must defer to Executive and Legislative Branch decision making in that area"). At issue in *Zadvydas* and *Martinez* was whether the

government could, consistent with the Immigration and Nationality Act, indefinitely detain non-citizens subject to final removal orders when the government had not been able to effectuate their removal to another country. The Court held that once removal is no longer reasonably foreseeable, the detention is no longer authorized by statute and the alien is entitled to release. *Zadvydas*, 533 U.S. at 699-700; *Martinez*, 543 U.S. at 377-78, 386-87. The critical point in both cases is that the Court refused to accept the government's submission that separation of powers precludes a habeas court from ordering release into the United States of individuals who have no right to enter or remain in this country.

Martinez is particularly relevant because it was in that case that the Court ordered the release of aliens who had never been granted entry into the United States. The aliens in *Martinez* were detained, were deemed to be outside the country, and indisputably had no right to be admitted to the United States. *See* 543 U.S. at 374-75. They were detained because, like the petitioners here, they could not be removed to their home country and no other country would take them. They nonetheless asserted a right to be released from incarceration on the ground that their continued detention was unlawful. *See id.* at 374-75, 376. The Court held that their continued incarceration was without statutory authorization and that they must be released into the community. *See id.* at 386-87.

In opposing release on separation of powers grounds, the government argued that granting habeas relief to aliens who had never been admitted

would confer a judicially-ordered entry into our country over the objection of the political branches. The government specifically attempted to distinguish the Court's earlier decision in *Zadvydas* on the ground that it had addressed only aliens who previously had been lawfully admitted and then lost their right to remain. *See Zadvydas*, 533 U.S. at 682, 693. *See also* Brief for the Petitioners [United States] at 20, *Clark v. Martinez*, 543 U.S. 371 (2005) (No. 03-878), 2004 WL 1080689.

In contrast, the aliens in *Martinez,* the government argued, could not be released because they (like the petitioners here) had *never been admitted*. The government insisted that a judicial order of release would therefore pose grave separation of powers and national security concerns:

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

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

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

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

Yet the reasoning of the court of appeals in this case mirrors the arguments made by the government in *Martinez* and rejected by this Court. *Compare*, *e.g.*, Pet. App. 6a ("the power to exclude aliens [is] 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government'"), *with* Brief for the Petitioners [United States] at 16, *Martinez* (No. 03-878), 2004 WL 1080689 ("the power 'to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe,' is not only 'inherent in sovereignty,' but also 'essential to self-preservation.' That power is vital 'for maintaining normal international relations and defending the country against foreign encroachments and dangers'") (citations omitted).[3] Similarly, the court of

[3] *Compare also, e.g.*, Pet. App. 8a ("it 'is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien'") (citation omitted) *with* Brief for the Petitioners [United States] at 16, *Martinez* (No. 03-878), 2004 WL 1080689 ("'[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (citations omitted); Pet. App. 4a-5a ("There is first the ancient principle that a nation-state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission") (citations omitted) *with* Brief for the Petitioners [United States] at 16, *Martinez* (No. 03-878), 2004 WL 1080689 ("The singular authority of the political Branches over immigration derives from the "inherent and inalienable right of

appeals relied upon the same authorities that the government invoked unsuccessfully in *Martinez*. *Compare* Pet. App. 6a-7a (citing, *inter alia*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) ("The Chinese Exclusion Case"); *Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States,* 149 U.S. 698 (1893); *Knauff v. Shaughnessy*, 338 U.S. 537 (1950); and *Fiallo v. Bell*, 430 U.S. 787 (1977)) *with* Brief for the Petitioners [United States] at 15-16, *Martinez* (No. 03-878), 2004 WL 1080689 (citing same).[4]

Thus, the D.C. Circuit's conclusion that the Court's immigration jurisprudence prohibits granting meaningful judicial relief simply cannot stand in light of the Court's rejection of that reasoning in *Martinez*.

To be sure, the detention in the instant case does not arise under the identical statute that was at issue in *Martinez* and *Zadvydas*. But the principle at stake is the same, namely that a habeas court may order release into the community of an alien with no

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every sovereign and independent nation" to determine which aliens it will admit or expel.") (citations omitted).

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

right to enter or remain in the United States.[5] Moreover, in at least one significant respect, the district court's order mandating release of the petitioners in this case has far more limited implications than the release ordered under *Martinez*. The release mandated pursuant to *Martinez* is applicable to *any* inadmissible alien, including those who voluntarily come to our shores without authorization and whose arrival is outside the control of our government. In this case, by contrast, the petitioners include only those whom the

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[5] As the Court explained in *Zadvydas*, although the practical result of an order mandating release from detention would be release into the community, such an order did not confer a legal right to "liv[e] at large" but merely a right to be "supervis[ed] under release conditions that may not be violated." 533 U.S. at 696 (citation omitted).

The immigration statute provides a specific mechanism, "parole," by which noncitizens can be brought to the United States, or released from detention, without conferring any of the statutory rights that would accompany "admission" or "entry." *See* 8 U.S.C. § 1182(d)(5)(A). The Court long ago recognized that allowing parole out of detention does not confer legal status on the alien:

> For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. . . . Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. . . . Congress specifically provided that parole "shall not be regarded as an admission of the alien[.]"

Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (citations omitted).

government itself captured abroad and transported to Guantanamo and who are now unlawfully detained.

In sum, *Martinez* and *Zadvydas* refute the court of appeals' assumption that a habeas court's order mandating release from unlawful detention, and thus release into the country, of non-citizens with no right to enter or remain in the United States is outside the proper authority of the Judiciary.

II. THE RULING BELOW DIRECTLY CONTRAVENES *BOUMEDIENE*'S TEST FOR DETERMINING EXTRA-TERRITORIAL APPLICATION OF THE CONSTITUTION.

Immediate review is also essential because the court of appeals' decision refused to acknowledge or apply *Boumediene*'s holding on the proper test for determining when the protections of the Constitution apply to foreign nationals outside the sovereign territory of the United States. The court of appeals concluded that as a categorical matter "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." Pet. App. 8a-9a. Rather than faithfully apply the functional analysis that *Boumediene* specifically instructed is applicable to non-citizens detained at Guantanamo, the court of appeals mechanically followed its own pre-*Boumediene* case law and a characterization of this Court's rulings that *Boumediene* expressly disavowed. While the Court need not reach the merits of petitioners' due process claim to grant an

effective habeas remedy, if left intact the court of appeals' analysis will continue to delay and deny proper resolution of the claims of these petitioners and other Guantanamo detainees whose petitions are pending in the D.C. Circuit and district courts.[6]

1. In *Boumediene* the Court explicitly rejected the sweeping bright-line rule that "at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." *Boumediene*, 128 S. Ct. at 2253. The Court affirmed instead that the critical analytical framework for determining the geographic reach of the Constitution is the "impracticable and anomalous" test – a test first articulated by Justice Harlan in his concurrence in *Reid v. Covert*, 354 U.S. 1 (1957), but which, the Court noted, had long animated its extraterritoriality decisions. As the *Boumediene* Court explained, "whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and

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[6] *Amicus* notes its agreement with petitioners' assertion that the Due Process Clause applies to them and that it prohibits their continued detention. Pet. for Cert. [Kiyemba et al.] at 31-33, *Kiyemba v. Obama* (No. 08-1234). *See also, e.g.*, *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment-from government custody, detention, or other forms of physical restraint-lies at the heart of the liberty th[e] [Fifth Amendment Due Process] Clause protects."); *Hamdi*, 542 U.S. at 529 (plurality opinion) ("the most elemental of liberty interests [is] the interest in being free from physical detention by one's own government").

anomalous.'" 128 S. Ct. at 2255 (quoting *Reid*, 351 U.S. at 74-45 (Harlan, J., concurring)). *See also id.* at 2255-56 (citing Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990), for its application of the "impracticable and anomalous" test).

Disregarding this analysis, the D.C. Circuit relied on the precise rationale *Boumediene* explicitly rejected and failed to undertake the functional analysis *Boumediene* plainly required. *See* Pet. App. 8a-9a & n.9 (noting, in concluding that petitioners are not entitled to invoke due process protections, that "Guantanamo Naval Base is not part of the sovereign territory of the United States"). Indeed, in resting its due process pronouncement exclusively on the question of "property or presence in the sovereign territory of the United States," Pet. App. 8a-9a, the court of appeals' rationale is essentially identical to the reasoning that underlay its ruling in *Boumediene* itself, and that this Court overturned. *Compare* Pet. App. 8a-9a ("the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States") *with Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007) ("the Constitution does not confer rights on aliens without property or presence within the United States"), *rev'd*, 553 U.S. ---, 128 S. Ct. 2229 (2008).

The D.C. Circuit continued to rely on an understanding of this Court's precedents that *Boumediene* expressly rejected. For example, the court of appeals attempted to draw support from *Johnson v. Eisentrager*, 339 U.S. 763 (1950), for a categorical rule that the Constitution does not extend

to aliens outside the United States. *See* Pet. App. 8a-9a (citing *Eisentrager*, 339 U.S. at 783-84). But this Court made clear in *Boumediene* that "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution[.]" 128 S. Ct. at 2258. Likewise, the court of appeals cited *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990), in support of its conclusion that the petitioners' lack of property or presence in the United States was determinative. *See* Pet. App. 8a-9a. But *Boumediene* expressly adopted the rationale contained in Justice Kennedy's concurrence in *Verdugo-Urquidez*, which applied the "impracticable and anomalous" test. *See Boumediene*, 128 S. Ct. at 2255-56 (citing Justice Kennedy's concurrence in *Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990), for its application of the "impracticable and anomalous" test); *accord Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (citing Justice Kennedy's concurrence in *Verdugo-Urquidez*, 494 U.S. at 277-78, in support of the Court's statement recognizing that the *Rasul* petitioners' allegations regarding their detention at Guantanamo "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'").

2. The court of appeals' failure to acknowledge *Boumediene*'s analysis also caused it to persist in applying its own precedents that rest on a reading of pre-*Boumediene* cases that this Court expressly disavowed. Pet. App. 9a (citing cases). *See Jifry v. Fed'l Aviation Admin.*, 370 F.3d 1174, 1182-83 (D.C.

Cir. 2004) (citing, *inter alia*, *Eisentrager* and *Verdugo-Urquidez* and asserting that "'[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'") (citations omitted); *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (asserting same); *Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (citing dicta from *Verdugo-Urquidez* asserting the view that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"), *rev'd on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002); *People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("'[A]liens receive constitutional protections [only] when they have come within the territory of the United States and developed substantial connections with this country,'" citing *Verdugo-Urquidez*, 494 U.S. at 271) (alterations in original); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam) (citing *Eisentrager* for the proposition that "non-resident aliens [] plainly cannot appeal to the protection of the Constitution").

The D.C. Circuit remains unwavering in its insistence that its precedents compel denying constitutional rights to non-citizens outside the United States despite this Court's repeated rejection of that assertion. *See Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003) (stating that a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'") (citation omitted), *rev'd*

sub nom. *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene*, 476 F.3d at 991 ("the Constitution does not confer rights on aliens without property or presence within the United States"), *rev'd*, 128 S. Ct. 2229 (2008).

Indeed, in one recently issued decision, the D.C. Circuit adhered to its bright-line rule even after this Court had remanded the case for further consideration in light of *Boumediene*. *See Rasul v. Myers*, Nos. 06-5209, 06-5222, -- F.3d. ---, 2009 WL 1098707 (D.C. Cir. April 24, 2009) (per curiam) ("*Rasul II*"); *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), *vacated by* 129 S. Ct. 763 (2008). In *Rasul II*, the D.C. Circuit cited *Kiyemba* in support of its view that "*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." 2009 WL 1098707, at *1 (citing, *inter alia*, *Eisentrager*, *Verdugo-Urquidez*, and *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009)). The D.C. Circuit effectively invited this Court to clarify *Boumediene*'s implications:

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

Id. at *2.

In short, the D.C. Circuit has made clear that until this Court acts, it will continue to adhere to its

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

3. The crux of the court of appeals' failure rests on its refusal to recognize that *Boumediene* "rejected th[e] territorial rationale as to Guantanamo." Pet. App. 21a (citation omitted). Instead the D.C. Circuit suggested that "*Boumediene* [] specifically limited its holding to the Suspension Clause." Pet. App. 21a. But this Court plainly did not limit its analysis of the proper framework for extraterritorial application of the Constitution to the Suspension Clause, and the D.C. Circuit's conclusion to the contrary flouts this Court's decision in *Boumediene*.

In reaching its conclusion that non-citizens detained at Guantanamo were protected by the Suspension Clause, the Court first surveyed the historical record to determine whether historical evidence specific to habeas corpus and the Suspension Clause provided definitive guidance. However, the available evidence permitted "no certain conclusions." *Boumediene*, 128 S. Ct. at 2248.

Therefore, the Court expanded its field of inquiry from the Suspension Clause to the Constitution as a whole and turned to precedents regarding "the issue of the Constitution's extraterritorial application." *Id.* at 2253. The government's position was that "noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus." *Id.* at 2244. *See also id.* at 2258 ("[T]he Government's view is that the Constitution ha[s] no effect [], at least as to noncitizens, [where] the United States [has] disclaimed sovereignty in the formal sense of the term.").

In rejecting that contention, *Boumediene* emphasized that the Court's many decisions concerning the extraterritorial scope of the Constitution refute the government's argument that noncitizens outside the sovereign territory of the United States are not entitled to constitutional protections. *Boumediene*, 128 S. Ct. at 2253. The Court's analysis demonstrated that its precedents simply did not support any such categorical rule.

The Court's repudiation of the government's proposed bright-line territorial rule was expressly *not* limited to considerations unique to the Suspension Clause. *Boumediene* discussed at length a series of cases, known as the Insular Cases, addressing the application of various other provisions of the Constitution to newly-acquired territories of the United States. *See* 128 S. Ct. 2254-55 (discussing, inter alia, *Downes v. Bidwell*, 182 U.S. 244 (1901) (revenue clauses of Article I), *Hawaii*

v. Mankichi, 190 U.S. 197 (1903) (indictment and trial by jury), and *Dorr v. United States*, 195 U.S. 138 (1904) (trial by jury)). *See also id.* at 2255 (discussing *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (trial by jury)). The Court emphasized that "'the real issue in the Insular Cases was not *whether* the Constitution extended to the Philippines or Porto Rico when we went there, but *which* of its provisions were applicable[.]'" *Boumediene*, 128 S. Ct. at 2254-55 (emphasis added) (citation omitted). Indeed, as the Court noted, the Court's precedents recognized early on that "even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Boumediene*, 128 S. Ct. at 2255 (citing *Balzac*, 258 U.S. at 312).

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

Eisentrager, specifically dealt with the extraterritorial application of the Suspension Clause.

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

In short, the Court first carefully determined that the "impracticable and anomalous" test was the proper analytical framework for determining whether a constitutional guarantee applies extraterritorially. Only then did the Court proceed to reach a conclusion regarding the specific question whether the *Boumediene* petitioners were entitled to the protections of the Suspension Clause.

Ignoring this extensive analysis, the court of appeals refused to apply the framework expressly mandated by this Court. *Certiorari* is therefore warranted to provide the definitive guidance, which the D.C. Circuit has itself requested, on the proper application of *Boumediene's* critical instruction that functional concerns – and not property or presence in the United States – determine the Constitution's reach abroad.

CONCLUSION

For the reasons set forth above, *amicus* respectfully submits that the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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