

No. 08-1234

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In the Supreme Court of the United States

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JAMAL KIYEMBA, ET AL., PETITIONERS

v.

BARACK H. OBAMA, PRESIDENT OF THE  
UNITED STATES OF AMERICA, ET AL.

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

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### QUESTION PRESENTED

Petitioners are aliens who were previously detained as enemy combatants at Guantanamo Bay Naval Base, and who are now housed at Guantanamo Bay in a non-enemy combatant status. Petitioners do not wish to return to their home country because they fear inhumane treatment there, and the United States government is therefore attempting to locate an appropriate alternate country for resettlement. The question presented is whether a federal court exercising its habeas corpus jurisdiction may order the United States government to bring petitioners into the United States for release, outside of the framework of the federal immigration laws.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 555 F.3d 1022. The opinion of the district court (Pet. App. 38a-61a) is reported at 581 F. Supp. 2d 33.

**JURISDICTION**

The judgment of the court of appeals was entered on February 18, 2009. The petition for a writ of certiorari was filed on April 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Petitioners are aliens who were previously detained as enemy combatants by the Department of Defense at the Naval Base at Guantanamo Bay, Cuba (Guantanamo

Bay), and are now being housed at Guantanamo Bay in a non-enemy combatant status. Petitioners are free to return to their home country, but they understandably do not wish to do so, because they fear inhumane treatment there. Petitioners are also free to go to any other country that is willing to accept them. And the United States government is engaged in extensive and high-level efforts to arrange their resettlement in other countries. Petitioners filed petitions for writs of habeas corpus, and subsequently sought a court order seeking to be brought to the United States and released here. The district court ordered that they be brought to the United States and released, without regard to the federal immigration laws. The court of appeals held that the district court lacked the authority to order Executive Branch officials to bring petitioners into the United States and release them here.

1. Petitioners are fourteen Chinese nationals who are members of the Uighur ethnic group, a Turkic Muslim minority group in the far-western region of China. Pet. App. 1a-2a; see Pet. ii.<sup>1</sup> Prior to September 11, 2001, petitioners traveled to Afghanistan, where Uighur camps had been established in the Tora Bora mountains. *Id.* at 2a. The camps were run by the Eastern Turkistan Islamic Movement (ETIM), *id.* at 3a, a Uighur separatist group that was designated by the State Department as a terrorist organization in 2004, 69 Fed. Reg. 23,555 (2004). Many of the petitioners subsequently acknowledged that they had gone to the camps to obtain weapons training in order to fight against the Chinese gov-

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<sup>1</sup> After the petition was filed, three other Uighur detainees who were petitioners in the district court and court of appeals, but were not listed as petitioners in the petition, Pet. ii n.2, filed a letter with this Court stating that they "wish to remain Petitioners in this court."

ernment. Pet. App. 2a-3a; see C.A. App. 753-754, 760-761, 846-847, 878-879, 881, 916, 924.

After September 11, 2001, many of the petitioners fled to Pakistan from the camps in the Tora Bora mountains. Pet. App. 2a. Petitioners then were captured by Pakistani or coalition forces, and were transferred to United States military custody. *Ibid.* The United States military sent petitioners to Guantanamo Bay Naval Base, Cuba. *Ibid.* There, petitioners were given hearings before Combatant Status Review Tribunals (CSRTs) to determine whether they should remain subject to detention as enemy combatants. *Id.* at 2a, 40a; C.A. App. 735-773, 774-794, 799-827. A CSRT issued a final determination for each petitioner that the record supported his continued detention as an enemy combatant. Pet. App. 2a-3a.

While petitioners were detained at Guantanamo Bay, habeas petitions were filed challenging the lawfulness of their detention. In addition, all but one of the petitioners filed petitions for review under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739, seeking judicial review of the CSRTs' determinations that they were enemy combatants.

In *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), the court of appeals resolved one of the DTA cases, holding that the record before the CSRT did not support petitioner Parhat's detention as an enemy combatant under the definition applied at that time by the Department of Defense. The court explained that, although the evidence showed that Parhat had lived and received weapons training at a Uighur camp in Afghanistan that was "run by an ETIM leader," *id.* at 838, 843, there was insufficient reliable evidence in the record to establish



that ETIM was “associated with” al Qaeda or the Taliban or that ETIM engaged in hostilities against the United States or its coalition partners—two criteria that the government acknowledged were necessary to justify Parhat’s long-term detention, *id.* at 836, 843-844, 850. In particular, the court determined that the CSRT could not rely on unsourced intelligence reports because they did not contain sufficient explanation to allow the CSRT or the court to assess their reliability. *Id.* at 846-850. The court of appeals therefore ordered the government to “release Parhat, to transfer him, or to expeditiously convene a new CSRT.” *Id.* at 851 (footnote omitted). Following the *Parhat* decision, the government determined that it would no longer seek to hold any of the Uighur detainees as enemy combatants. See Pet. App. 3a.

Both before and after that governmental determination, petitioners have vigorously opposed their return to their home country, the People’s Republic of China. See, *e.g.*, C.A. App. 425-426, 437-438, 440, 459, 471-473, 491, 503-505, 528, 538-540. As the court of appeals noted, “[p]etitioners fear that if they are returned to China they will face arrest, torture or execution.” Pet. App. 3a. The United States, which weighs humane treatment concerns in determining destinations for detainees who leave Guantanamo Bay and does not forcibly transfer detainees to countries where it determines they are more likely than not to be tortured, has committed not to return petitioners to their home country without their consent. *Ibid.*

Although the President has ordered the closure of the detention facility at Guantanamo Bay and petitioners have been approved for transfer or release from Guantanamo Bay (see pp. 10-11, *infra*), that decision has

not yet been effectuated. Petitioners have not identified another foreign country that is willing to accept them and able to provide adequate assurance of their humane treatment. The government has engaged in extensive diplomatic efforts to resettle petitioners, but it has not yet located an appropriate foreign country willing to accept them. Pet. App. 3a. These resettlement efforts remain ongoing.

Accordingly, petitioners are currently housed at Guantanamo Bay pending efforts to locate an appropriate country for resettlement. In contrast to individuals currently detained as enemies under the laws of war, petitioners are being housed under relatively unrestrictive conditions, given the status of Guantanamo Bay as a United States military base. Pet. App. 3a (characterizing conditions as “the least restrictive conditions possible”); see C.A. App. 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. *Ibid.* 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, a stereo system, and sports equipment. *Ibid.* Petitioners also have access to special food items, shower facilities, and library materials. *Ibid.*

2. Following the court of appeals’ decision in *Parhat v. Gates, supra*, petitioner Parhat moved for an order compelling his release in the United States, either as interim relief pending a ruling on his habeas corpus petition, or as a final judgment on the petition. See Pet. App. 4a, 42a. The other petitioners subsequently requested the same relief. See *ibid.*

The district court, ruling from the bench, ordered the government to bring petitioners into the United States and to release them in the Washington, D.C., area. C.A. App. 1560-1575; see Pet. App. 4a & n.2. It then issued a written opinion explaining its ruling. *Id.* at 38a-61a. The district court assumed that the government had acted lawfully in taking petitioners into United States military custody and holding them at Guantanamo Bay pending a determination whether they were subject to detention as enemy combatants. *Id.* at 44a. But the court held that petitioners' continued detention violated the Constitution and that, because no other country had been identified that would accept them, the government was required to bring petitioners into the United States for release. *Id.* at 43a-44a, 46a-50a, 59a-60a.

The district court noted this Court's holding in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), that the indefinite confinement of an alien who was excludable from the United States and harbored at Ellis Island did not violate the Constitution. *Id.* at 215-216. But the court decided that it was not required to follow that holding, because the *Mezei* Court "was not intending to tackle the constitutionality of indefinite detention," Pet. App. 47a, because *Mezei* "has either been distinguished or ignored by subsequent courts," *ibid.*, and because *Mezei* differs from this case factually, especially in that the alien in *Mezei* "came voluntarily to the United States," *id.* at 48a.

The district court also acknowledged that admission of aliens to the United States has long been entrusted to the political Branches, and that, in particular, Congress has conferred on the Secretary of Homeland Security the authority to decide whether to admit or parole aliens into the United States. Pet. App. 53a-54a. The court

further observed that the Secretary “has not acted on this authority with respect to” petitioners, and that the court’s interference with that responsibility would “strike[] at the heart of our constitutional structure” and raise “serious separation-of-powers concerns.” *Id.* at 54a-55a. Nonetheless, the court decided that, because the government was no longer detaining petitioners as enemy combatants at Guantanamo Bay, and because in its view petitioners’ detention at Guantanamo Bay had become effectively indefinite as a result of the government’s inability to resettle them, petitioners must be released into the United States. *Id.* at 60a-61a.

3. The court of appeals reversed. Pet. App. 1a-37a. The court began its analysis by recognizing 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”—a principle that has been an “important postulate” of the foreign relations of the United States since the Constitutional Convention. *Id.* at 4a-5a. The court of appeals noted that this Court long has recognized that the power to exclude aliens is “inherent in sovereignty,” and that the power to decide which aliens may enter the United States, and on what terms, rests exclusively in the political Branches. *Id.* at 6a-7a (citation omitted) (collecting cases). “As a result,” the court explained, “it ‘is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch[es] of the Government to exclude a given alien.’” *Id.* at 8a (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)).

In this case, the court pointed out, the Executive Branch had not decided to allow petitioners to enter the United States. Pet. App. 8a. The court of appeals

therefore considered whether any law permitted the district court to set aside that determination and order petitioners to be brought to the United States and released here. *Ibid.* The court noted that the district court did not cite any statute or treaty authorizing its order, instead stating that “constitutional limits” on detention—apparently drawn from the Due Process Clause—required petitioners’ release. *Ibid.* (quoting district court opinion).

The court of appeals rejected the view that the Constitution empowered the district court to order the government to bring petitioners into this country for release. Pet. App. 8a-14a. In particular, the court held that petitioners do not have a due process right to be brought into the United States outside the framework of the immigration laws and without regard to the view of the Executive Branch. *Id.* at 8a-9a. The court emphasized the “established law that an ‘alien who seeks admission to this country may not do so under any claim of right.’” *Id.* at 10a (quoting *Knauff*, 338 U.S. at 542).

The court of appeals also rejected the assertion that the petitioners’ constitutional right to habeas corpus review under *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), empowered the district court to order the government to bring petitioners into this country for release. Pet. App. 9a-13a. The court distinguished between an order of “simple release,” and an order overriding the decision of the political Branches not to allow an alien to enter the United States. *Id.* at 13a (citing *Munaf v. Geren*, 128 S. Ct. 2207 (2008)). While there is no dispute that “petitioners should be released,” the court explained, there is no historical or legal basis for the “extraordinary remedy” of “order[ing] an alien held overseas [to be] brought into the sovereign territory of

a nation and released into the general population.” *Id.* at 13a, 15a; see *id.* at 12a-13a.

In so holding, the court of appeals analogized petitioner’s case to the situation of the alien in *Shaughnessy v. United States ex rel. Mezei*, *supra*. In *Mezei*, the court of appeals explained, “[t]he government held an alien at the border” who had “been denied entry into the United States under the immigration laws,” and “no other country was willing to receive him.” Pet. App. 11a. On habeas corpus review, this Court upheld the constitutionality of the alien’s effectively indefinite detention, explaining that the alien “had not been deprived of any constitutional rights” and was not “entitled \* \* \* to a court order requiring the Attorney General to release him into the United States.” *Ibid.* (citing *Mezei*, 345 U.S. at 212, 215). The court of appeals held that petitioners likewise are not entitled to be released into the United States, because they are being held outside of the United States, and, like the alien in *Mezei*, have not obtained authorization to enter the United States under the immigration laws, have not been accepted by another country, and are seeking to be released into the United States through a writ of habeas corpus. *Id.* at 3a-4a, 9a n.9, 11a-12a, 16a.

The court of appeals rejected petitioner’s contention that *Mezei* has been undermined by *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), explaining that those cases were based on this Court’s interpretation of a statutory provision of the Immigration and Nationality Act, which Congress may

alter. Pet. App. 11a-12a.<sup>2</sup> The court therefore concluded that, like the alien in *Mezei*, petitioners have no constitutional right to a court order compelling the Executive to release them in the United States, “outside the framework of the immigration laws.” *Id.* at 12a-13a.

Judge Rogers concurred in the judgment. Pet. App. 22a-37a. She disagreed with the majority’s conclusion that the district court lacked the authority to order that petitioners be released into the United States. *Id.* at 22a, 29a-31a, 35a-37a. But she determined that reversal was required because the district court failed to consider whether the immigration laws provide a valid basis for petitioners’ continued detention. *Id.* at 25a-27a.

4. On January 22, 2009, the President issued Executive Order 13,492. The Executive Order directs the Executive Branch to undertake “a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at [Guantanamo Bay],” and to close the detention facilities at Guantanamo Bay “as soon as practicable, and no later than 1 year from” January 22, 2009. *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, Exec. Order No. 13,492, §§ 2-3, 74 Fed. Reg. 4897-4898.

In light of the court orders pertaining to petitioners and the government’s decision not to seek to detain petitioners as enemy combatants, the inter-agency task force charged with reviewing the Guantanamo Bay detainees made the review of petitioners one of its first priorities. As a result of that review, petitioners were all approved for transfer or release from Guantanamo

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<sup>2</sup> The court also observed that this Court’s discussion of due process in *Zadvydas* was carefully restricted to the context of “aliens who had already entered the United States.” Pet. App. 11a-12a.

Bay. The United States is now in the process of attempting to resettle petitioners. Under the President's Executive Order, it is expected that all of the petitioners will be transferred from Guantanamo Bay by January 22, 2010.

#### ARGUMENT

Petitioners seek review of the court of appeals' determination that the federal courts may not order the government to bring petitioners to the United States and release them here, outside of the framework of the immigration laws. Pet. i. Review is not warranted, because the court of appeals' decision is correct.

Petitioners have already obtained relief. They are no longer being detained as enemy combatants, they are free to leave Guantanamo Bay to go to any country that is willing to accept them, and in the meantime, they are housed in facilities separate from those for enemy combatants under the least restrictive conditions practicable. Moreover, the government is actively seeking to resettle petitioners, and the President has ordered the closure of the Guantanamo Bay detention facility by January 22, 2010.

Petitioners would like the federal courts to order that they be brought to the United States, because they are unwilling to return to their home country. But they have no entitlement to that form of relief. As this Court has recognized repeatedly, the decision whether to allow an alien abroad to enter the United States, and if so, under what terms, rests exclusively in the political Branches. In determining that petitioners have no constitutional right to release into the United States, the court of appeals followed settled law, including this Court's decision in *Shaughnessy v. United States ex rel. Mezei*,



345 U.S. 206 (1953), which squarely rejected a claim that is indistinguishable from the one petitioners now make. Further, the court of appeals' holding is fully consistent with this Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), because that case did not purport to address whether detainees who demonstrate an entitlement to release from detention as enemy combatants have a further and distinct constitutional right to enter the United States—wholly outside of the framework of the federal immigration laws, through which the political Branches have comprehensively addressed the subject of admission of aliens into this country. Nor do petitioners contend that the decision below conflicts with any decision of another court of appeals.

Petitioners' continued presence at Guantanamo Bay is not unlawful detention, but rather the consequence of their lawful exclusion from the United States, under the constitutional exercise of authority by the political Branches, coupled with the unavailability of another country willing to accept them. Because the bar to petitioners' entry into the United States is constitutionally valid, their resulting harborage at Guantanamo Bay is constitutional as well. As the court of appeals recognized, there is a fundamental difference between ordering the release of a detained alien to permit him to return home or to another country and ordering that the alien be brought to and released in the United States without regard to immigration laws. The court of appeals properly determined that there is no basis for that extraordinary relief.

1. The court of appeals correctly held that the district court lacked the authority to order the Executive to bring petitioners to the United States for release in this country, wholly outside the framework of the immigra-

tion laws. Pet. App. 9a-13a. Petitioners repeatedly assert that they seek only release in habeas. See, *e.g.*, Pet. i, 15, 18, 22-25. Petitioners, however, already have obtained that form of relief. They are no longer being detained as enemy combatants, and they are free to leave Guantanamo Bay to go to any country that will agree to take them. The question here is whether petitioners have a constitutional right to enter the United States, outside the authority of, and absent compliance with, federal immigration laws. This Court's well-settled precedents foreclose such a claim.

a. The court of appeals properly recognized that whether to admit an alien into the United States presents a question wholly distinct from issues concerning detention abroad—and a question that is reserved to the political Branches. Pet. App. 9a-13a (citing cases). The court of appeals' decision is fully consistent with this Court's rulings. The Court has repeatedly stressed that whether to allow an alien into the United States is a sovereign prerogative that requires the consent of the political Branches. In *Landon v. Plasencia*, 459 U.S. 21 (1982), for example, the Court 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.*” *Id.* at 32 (emphasis added). Similarly, in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court described the authority to exclude aliens from the United States as “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.* at 542.

In rejecting petitioners' claim that a habeas court may override the decision of the political Branches to bar an alien from entering the United States, the court of appeals cited an unbroken string of this Court's decisions dating back more than a century. See Pet. App. 6a-7a. As this Court has observed, "there is not merely a page of history," supporting the political Branches' exclusive authority in this area, "but a whole volume." *Galvan v. Press*, 347 U.S. 522, 531 (1954) (internal quotation marks and citation omitted). Accordingly, 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. Indeed, even the district court recognized that ordering that petitioners be brought to and released in the United States would "strike at the heart of our constitutional structure" and raise "serious separation-of-powers concerns." Pet. App. 55a.

The political Branches have comprehensively addressed the question of the entry of aliens into the United States through the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* (INA), which establishes statutory standards for admission and grants the Secretary of Homeland Security the authority to decide whether to admit or parole aliens into the United States. Pet. App. 17a-19a, 53a-54a. Petitioners have not established any entitlement to lawful admission into the United States pursuant to the statutory standards and procedures governing admissibility in the INA. See Pet. 25. Indeed, petitioners claim an entitlement to enter the United States *despite* the absence of any determination by the Secretary of Homeland Security that they are admissible under these usual standards.

Petitioners claim a constitutional right to override the judgment of the political Branches so that they may leave Guantanamo Bay. But this Court has specifically upheld against constitutional challenge the potentially indefinite confinement of an alien incident to his exclusion from the United States. In *Shaughnessy v. United States ex rel. Mezei*, *supra*, the Court held that an alien who was housed at Ellis Island because he had been permanently excluded from this country under the immigration laws, and could find no other country willing to admit him, did not have a constitutional right to be released into the United States. 345 U.S. at 212-215. The Court acknowledged that the alien had previously resided in the United States for 25 years; had been granted an immigrant visa to return; was physically present in the United States; was being excluded based on undisclosed grounds; and did not have any other country that would accept him. *Id.* at 208-209. Nonetheless, this Court recognized that “the power to expel or exclude aliens [i]s a fundamental sovereign attribute,” *id.* at 210, and it rejected the proposition that the alien’s “continued exclusion deprives him of any statutory or constitutional right,” *id.* at 215.

Importantly, all of the Justices in *Mezei* recognized that the alien’s confinement was effectively indefinite, and yet agreed that it would be permissible so long as the proper procedures were followed. See 345 U.S. at 213, 215-216 (majority opinion); *id.* at 218 (Black, J., dissenting); *id.* at 218, 222-224 (Jackson, J., dissenting). The only disagreement concerned 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).

*A fortiori*, *Mezei* controls here. Petitioners are outside the United States—not even on United States soil, as in *Mezei*. And also unlike in *Mezei*, petitioners have never previously been in this country, have never been issued an immigrant visa, and have never applied for admission to the United States, which would trigger the statutory processes for seeking entry. Pet. 25. That petitioners are currently located at Guantanamo Bay, rather than at liberty elsewhere outside the United States, does not furnish them a right to enter the United States. The alien in *Mezei* was physically housed in the United States (albeit at the border), yet that did not alter the result. See 345 U.S. at 213 (“Neither [the alien’s] harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding.”); see also *id.* at 215 (the alien’s “temporary harborage \* \* \* bestows no additional rights”). As the court of appeals correctly held, the Constitution likewise does not prohibit petitioners’ continued harborage at Guantanamo Bay while awaiting resettlement in another country. See Pet. App. 11a.

Petitioners have suggested (Pet. 27-28; see Pet. C.A. Br. 28-30) that *Mezei* and this Court’s other well-established precedents recognizing the political Branches’ exclusive authority over entry of aliens have been abrogated by *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005). But those decisions construed the scope of the government’s statutory detention authority under a particular provision of the INA, 8 U.S.C. 1231(a)(6). That statutory provision applies to aliens in the United States who have been ordered removed; it does not have extraterritorial application and therefore does not apply to petitioners at Guan-

tanamo Bay. See Pet. App. 9a n.9; see also 8 U.S.C. 1101(a)(38), 1231(a)(1).

In *Zadvydas*, this Court, invoking the doctrine of constitutional avoidance, construed this statutory detention authority with respect to the deportation of an alien previously admitted for lawful permanent residence. The Court held that the authority was limited to the time “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. *Zadvydas* specifically distinguished (and did not disturb) *Mezei*’s holding that indefinite harborage of an alien excluded at the border passes constitutional muster. See *id.* at 693, 695 (recognizing the critical “distinction between an alien who has effected an entry into the United States and one who has never entered,” and therefore determining that the case does not require the Court to consider “the political branches’ authority to control entry into the United States”).

Likewise, the Court’s statutory holding in *Clark v. Martinez*, *supra*—that the construction of Section 1231(a)(6) adopted in *Zadvydas* applies to the detention of aliens stopped at the border and placed in removal proceedings—casts no doubt on the continuing validity of *Mezei*. *Clark*, like *Zadvydas*, addressed only a question of statutory construction, not of constitutional right.

543 U.S. at 373, 377-380. And the Court specifically acknowledged that the “constitutional concerns that influenced [its] statutory construction in *Zadvydas* are not present for aliens \* \* \* who have not been admitted to the United States,” *id.* at 380, such as petitioners here. The *Clark* Court explained that its ruling followed from the Court’s prior interpretation in *Zadvydas* even though the same constitutional concerns were not present; the Court 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.” *Ibid.*; see *id.* at 381-382, 386. Like *Zadvydas*, *Clark* left *Mezei* wholly undisturbed. *Clark* thus supports, rather than undermines, the conclusion that the government acts lawfully in providing for the harborage of an alien outside the United States incident to his exclusion from this country and pending efforts to resettle him elsewhere.<sup>3</sup>

Petitioners also assert that because they were involuntarily taken into custody by the United States, the political Branches’ exercise of plenary authority over entry cannot limit the district court’s habeas release power. Pet. 24-25. But the absence of a voluntary connection to the United States does not confer on petitioners a constitutional right to be brought into this country. In this respect, petitioners are in fact in a similar situation to the thousands of Haitian migrants involuntarily

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<sup>3</sup> Petitioners also suggest (Pet. 29) that *Mezei* is distinguishable because the exclusion in that case was expressly authorized by statute. But here the bar to entry is also authorized by statute, because petitioners have not established an entitlement to enter under the INA and Congress has granted the Executive Branch broad authority to exclude aliens and to regulate their entry. See, e.g., 8 U.S.C. 1182(f), 1185(a)(1).

interdicted by the U.S. Coast Guard in the 1990s and held at Guantanamo Bay pending their resettlement or repatriation. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993). Whatever relevance petitioners' involuntary arrival at Guantanamo Bay may have for other purposes, it has no relevance to whether they have a constitutional right to enter the United States.

b. Petitioners' principal argument is that because they are entitled under *Boumediene* to habeas corpus review of the lawfulness of their detention as enemy combatants, they must necessarily be entitled to an order effectuating their release. Pet. 14-28. But the relief that petitioners seek is not simple release—the remedy envisioned by the Court in *Boumediene*, 128 S. Ct. at 2266. It is release *plus* an entirely distinct order requiring the government to bring petitioners into the United States and release them here. Nothing in *Boumediene*, or any other decision of this Court, suggests that the right to habeas corpus review also confers on a detainee the right to release in a particular country or the right to be brought into the United States.

Numerous decisions of this Court in fact confirm 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); *Knauff*, 338 U.S. at 542. *Boumediene* does not purport to overrule those cases. Furthermore, reading *Boumediene* to recognize a right in habeas corpus, derived from the Suspension Clause, to be brought into the United States for release would conflict with cases like *Mezei* and *Knauff*, which also involved habeas corpus challenges to the lawfulness of continued detention, see, *e.g.*, *Mezei*, 345 U.S. at 213; *Knauff*, 338 U.S. at 539-543, but recognized no such right of release.



By contrast, the court of appeals' reading of *Boumediene* is fully consistent with *Mezei*. Although *Boumediene* established that Guantanamo Bay detainees are "entitled to the privilege of habeas corpus to challenge the legality of their detention" as enemy combatants, 128 S. Ct. at 2262, the Court did not purport to address whether detainees who demonstrated a right to release from custody on that basis would be entitled to enter the United States, Pet. App. 15a. In *Mezei* itself, the Court recognized that an alien housed at Ellis Island incident to his exclusion had the right to challenge his confinement through a petition for a writ of habeas corpus, 345 U.S. at 213, but that right did not entitle the alien to be released into the United States, *id.* at 212-215. The availability of habeas corpus does not empower a court to order admission into the United States outside of the immigration laws. As the court of appeals observed, such an order "compelling the Executive to release [petitioners] into the United States outside the framework of the immigration laws" would constitute an "extraordinary remedy" without any legal or historical precedent. Pet. App. 13a.

Indeed, *Boumediene* itself recognized that, even in relation to release to 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." 128 S. Ct. at 2266. Similarly, this Court held in *Munaf v. Geren*, 128 S. Ct. 2207 (2008), that a habeas court should not grant release in a manner that would interfere with the United States' ability to respect the right of a foreign government to prosecute the habeas petitioners for crimes committed in that country. Because the United States Armed Forces with physical custody of the petitioners in *Munaf* were holding them

on behalf of the Iraqi government pending criminal proceedings, the Court held that “release of *any* kind” would be improper. *Id.* at 2223. In this case, too, the court of appeals properly refused to endorse a grant of release that would override the decision of the political Branches, in the exercise of their sovereign and exclusive authority over entry into the United States, not to allow petitioners into this country.

*Boumediene* also endorsed the examination, in determining the reach of the Suspension Clause outside of the United States, of “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” 128 S. Ct. at 2259. If this Court were to hold, contrary to established precedent, that aliens outside the United States have a constitutional right to be brought into this country for release in the absence of authorization by the political Branches, it would substantially intrude on those Branches’ authority to manage the entry and exclusion of aliens and, more broadly, on their conduct of foreign relations and national security. See Pet. App. 6a-9a; see, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (“[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations.”) (internal quotation marks and citation omitted); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952) (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”). That intrusion into matters of foreign relations by mandating unilateral acceptance of aliens over the objections of the political

Branches could undermine the efforts of the Executive to resolve the situation of the Guantanamo Bay detainees, including through encouraging other countries to participate in resettlement efforts. Cf. *Zadvydas*, 533 U.S. at 711-712 (Kennedy, J., dissenting).

Recognizing a constitutional right to enter the United States also could have the undesirable consequence of blurring 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 repeatedly has been recognized as significant not just under the Constitution, but also as a matter of statutory and treaty law. See, e.g., *Sale*, 509 U.S. at 183 (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 Bay); *Brownell v. Tom We Shung*, 352 U.S. 180, 181, 184 n.3 (1956) (holding that aliens physically present in the United States can challenge exclusion orders under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, but explicitly not including aliens outside the United States in its holding). As the court of appeals recognized, the federal immigration laws are comprehensive and reticulated, providing clear guidelines for aliens who apply for one of the various forms of admission to the United States. Pet. App. 17a-19a. There is no warrant for affording aliens outside the United States a right of entry into this country outside of that statutory scheme.

c. In addition to invoking the Constitution, petitioners assert that the district court’s order to bring them into the United States for release was authorized under the statutory habeas provision, 28 U.S.C. 2241. Pet. 30-34. That argument was not addressed by the district

court or the court of appeals, and it therefore is not properly before this Court for review. See, *e.g.*, *NCAA v. Smith*, 525 U.S. 459, 470 (1999). In any event, petitioners are mistaken. The habeas statute recognizes a federal court's authority, protected by the Suspension Clause, to order release from unlawful government custody, but neither the habeas statute nor any other source of law gives petitioners the distinct right to be brought into the United States. To the contrary, that authority has long been vested exclusively in the political Branches under the INA. See pp. 13-14, *supra*.

In arguing for release into the United States, petitioners also challenge the court of appeals' reliance on decisions of this Court and the court of appeals for the proposition that the Due Process Clause does not apply to aliens without property or presence in the sovereign territory of the United States. See Pet. 31. For purposes of this case however, the dispositive question is not whether petitioners have any due process rights, but instead whether they have a due process right to enter the United States from abroad. As the court of appeals explained, it has long been established that aliens have no constitutionally protected interest in coming to the United States from abroad. Pet. App. 6a-9a; see pp. 15-18, *supra*.

Finally, petitioners rely on (Pet. 34) the Third and Fourth Geneva Conventions in support of their claim. See Geneva Convention Relative to the Protection of Civilian Prisoners in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. As an initial matter, Congress, in the Military Commissions Act of 2006, has

barred reliance on the Geneva Conventions as a source of any rights in habeas or other civil proceedings. See Pub. L. No. 109-366, § 5(a), 120 Stat. 2631 (“No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.”).

In any event, none of the cited provisions support the extraordinary relief petitioners seek. Common Article 3, which is found in both the Third and Fourth Geneva Conventions, guarantees the humane treatment of persons not actively engaged in hostilities, 6 U.S.T. at 3318, 3518; 75 U.N.T.S. at 136, 288; Article 118 of the Third Geneva Convention governs the release and repatriation of prisoners of war upon the cessation of active hostilities, 6 U.S.T. at 3406, 75 U.N.T.S. at 224; and Articles 132 through 135 of the Fourth Geneva Convention govern the release and return to last place of residence or repatriation of civilian internees upon the close of hostilities, 6 U.S.T. at 3606-3608, 75 U.N.T.S. at 376-378. Even setting aside that Common Article 3 does not speak of release or repatriation, and that neither Article 118 of the Third Geneva Convention nor Articles 132 through 135 of the Fourth Geneva Convention applies to the Uighurs, none of these provisions guarantees an individual’s right of release into a country where the individual is not a national and has never resided. Petitioners do not wish merely to be released from custody where they are or to be repatriated: they seek to enter the United States.

d. Finally, petitioners' continued presence at Guantanamo Bay is independently justified as an incident to the exercise of what has been referred to as the government's "wind-up" authority—*i.e.*, the authority to arrange for their orderly resettlement. Through diplomacy, the government is actively seeking another country to accept petitioners. Historically, individuals previously 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. Following the initiation of cease-fire negotiations in the Korean War, for example, the United Nations Command held approximately 100,000 Chinese and North Korean prisoners of war who refused to return to their native countries, many for more than two years, pending a determination of how best to resettle them. See Jan P. Charmatz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 392 (1953); Christiane Shields 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. 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. Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* App. O, at O20 (Apr. 1992) <[http://www.dod.mil/pubs/foi/reading\\_room/404.pdf](http://www.dod.mil/pubs/foi/reading_room/404.pdf)>. Thus, quite aside from the lawfulness of petitioners' harborage at Guantanamo Bay incident to their exclusion from the

United States, the foregoing examples confirm that petitioners may be housed at Guantanamo Bay for a reasonable period of time incident to resettlement following a determination that they will no longer be treated as enemy combatants.

2. The efforts of the political Branches to resolve issues relating to petitioners and other individuals located at Guantanamo Bay provide a further reason for this Court to deny review. On January 22, 2009, the President issued Executive Order 13,492 “in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantanamo Bay Naval Base” and the closure of detention facilities at Guantanamo Bay. Exec. Order No. 13,492, 74 Fed. Reg. at 4897. The Executive Order directs the Executive Branch to undertake “a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at [Guantanamo Bay].” *Id.* § 2(d), 74 Fed. Reg. at 4898. The Executive Order requires the closure of the detention facilities at Guantanamo Bay “as soon as practicable, and no later than” January 22, 2010. *Id.* § 3, 74 Fed. Reg. at 4989.

The Executive Branch is implementing the Executive Order in an expeditious and appropriate manner. As a result of the inter-agency review process, all of the petitioners were approved for transfer or release from Guantanamo Bay. In order to effectuate that decision, the United States is aggressively pursuing diplomatic efforts to resettle petitioners. Under the President’s Executive Order, all of the petitioners are expected to be transferred from Guantanamo Bay by January 22, 2010.

Congress, through its recent actions, likewise has focused its attention on the closing of the detention facility at Guantanamo Bay. On May 14, 2009, the House of Representatives passed a supplemental defense appropriations bill. That bill contains a provision specifying that “[n]one of the funds made available in this or any prior Act may be used to release an individual who is detained, as of April[,], 30, 2009, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia,” at least through September 30, 2009, and requires the President (with limited exceptions) to “submit to the Congress, in writing, a comprehensive plan regarding the proposed disposition of each individual who is detained, as of April[] 30, 2009, at Naval Station, Guantanamo Bay, Cuba.” H.R. 2346, 111th Cong., 1st Sess. § 30004(a) and (c), at 72 (2009) (as passed by the House of Representatives); 155 Cong. Rec. H5632 (daily ed. May 14, 2009).

The Senate approved an amended version of the bill on May 21, 2009, which provides that “[n]one of the funds appropriated or otherwise made available under this Act or any prior Act may be used to transfer, release, or incarcerate any individual who is detained as of May 19, 2009, at Naval Station, Guantanamo Bay, Cuba, to or within the United States,” and also requires the President to provide periodic reports “on the prisoner population at the detention facility at Naval Station Guantanamo Bay, Cuba.” H.R. 2346, 111th Cong., 1st Sess. §§ 202(a)(1), 315, at 81, 104 (2009) (as amended and passed by the Senate); see 155 Cong. Rec. at S5804 (daily ed. May 21, 2009). The Senate has requested a conference with the House of Representatives to reconcile the differences in the two versions of the appropriations bill. *Ibid.* It is expected that the conference will



take place after Congress returns from its recess, likely during the week of June 1. This conference and other developments in the political Branches are likely to address many of the issues presented here.

Because the court of appeals' decision is correct and consistent with longstanding precedent, and because it presents no circuit conflict, this Court's review is not warranted. Activity in the political Branches on the disposition of detainees at Guantanamo Bay generally and petitioners particularly, including sensitive diplomatic undertakings, provides all the more reason for the Court to deny review.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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