**C.A. No. 10-15873**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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**RAHINAH IBRAHIM,**

**Plaintiff-Appellant**

**vs.**

**DEPARTMENT OF HOMELAND SECURITY, et al.,**

**Defendant-Appellees**

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**Appeal from the United States District Court**
**For the Northern District of California**
**Honorable William Alsup, Judge Presiding**
**D.C. No. 06.0545 WHA**

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# AMICUS CURIAE BRIEF OF ASIAN LAW CAUCUS, CENTER FOR CONSTITUTIONAL RIGHTS, BILL OF RIGHTS DEFENSE COMMITTEE, ASIAN AMERICAN JUSTICE CENTER, SOUTH ASIAN AMERICANS LEADING TOGETHER, SIKH AMERICAN LEGAL DEFENSE FUND, SOUTH ASIAN NETWORK, ASIAN AMERICAN INSTITUTE, ASIAN PACIFIC AMERICAN LEGAL CENTER, SIKH COALITION IN SUPPORT OF PLAINTIFF-APPELLANT, RAHINAH IBRAHIM

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* Asian Law Caucus, Center for Constitutional Rights, Bill of Rights Defense Committee, Asian American Justice Center, South Asian Americans Leading Together, Sikh American Legal Defense Fund, South Asian Network, Asian American Institute, Asian Pacific American Legal Center, and Sikh Coalition state that they are non-profit organizations, they have no parent companies, and they have not issued shares of stock.

Dated: October 1, 2010

Respectfully submitted,

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## STATEMENT OF CONSENT

Appellants and Appellees have given *amicus* consent to file this brief.

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## STATEMENT OF IDENTITY AND INTEREST OF *AMICI*

Founded in 1972, The Asian Law Caucus is the nation's first legal and civil rights organization serving low-income Asian Pacific American communities. The ALC focuses on labor and employment issues, housing, immigration and immigrant rights, student advocacy, civil rights and national security, consumer rights, senior rights, and juvenile justice. As a member of the Asian American Center for Advancing Justice, the ALC also helps to set national policies in affirmative action, voting rights, census, and language rights. The ALC is perhaps best known for representing Fred Korematsu in his *coram nobis* case in which his Supreme Court conviction for defying the terms of Japanese American internment during World War II was overturned.

As Mr. Korematsu himself noted after September 11, his story and that of Japanese American detention have become increasingly relevant as civil rights are once again being curtailed in the name of national security. In this case, the district court did not even consider Petitioner's constitutional claims because it held, categorically, that Petitioner was not entitled to any constitutional rights. That ruling effectively deprives Petitioner and others like her of any ability to challenge both the legality of their placement on the no-fly list and the deleterious effect of this placement on their lives. The ALC represents dozens of innocent individuals

who are either on the no-fly list or the terrorist watchlist, and the proper resolution of this issue is a matter of significant concern for the ALC.

The Center for Constitutional Rights ("CCR") is a national nonprofit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. CCR has actively protected the rights of marginalized political activists for over forty years and litigated historic First Amendment cases including *Dombrowski v. Pfiste*r, 380 U.S. 479 (1965), *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310(1990). CCR is particularly interested in this case because of the denial of due process to Petitioner.

The Bill of Rights Defense Committee ("BORDC") is a national non-profit grassroots organization founded in 2001 to defend the rule of law and constitutional rights undermined by overbroad national security and counter-terrorism policies. BORDC supports an ideologically, ethnically, geographically, and generationally diverse grassroots movement to protect and restore these principles by encouraging widespread civic participation; educating people about the significance of our rights; and cultivating grassroots networks to convert concern, outrage, and fear into debate and action.

For BORDC, principles at issue in this case giving rise to our concern include the use of secret evidence, executive secrecy in the operation and

maintenance of the no-fly list, and denials of due process opportunities to individuals whose rights are affected.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization based in Washington, D.C., whose mission is to advance the civil and human rights of Asian Americans and build and promote a fair and equitable society for all. AAJC is a member of the Asian American Center for Advancing Justice. Founded in 1991, AAJC is a leading expert in areas such as immigration and immigrant rights, language access, census, voting rights, affirmative action, and race relations. AAJC is committed to challenging discrimination and preserving impacted individuals' access to due process.

South Asian Americans Leading Together ("SAALT") is a national non-profit organization whose mission is to elevate the voices and perspectives of South Asian American individuals and organizations to build a more just and inclusive society in the United States. SAALT's strategies include conducting public policy analysis and advocacy; building partnerships with South Asian organizations and allies; mobilizing communities to take action; and developing leadership for social change. As an organization committed to protecting the civil rights of the South Asian American community, SAALT joins this brief because of the impact that the no-fly list has on community members. Many South Asian and South Asian American passengers have been prevented from flying because of the

no-fly list; furthermore, the inclusion of community members' names are often the result of secret evidence making it nearly impossible for individuals to contest. SAALT joins this brief because we oppose policies that lack transparency and violate the due process rights of Americans and visitors to this country.

The Sikh American Legal Defense and Education Fund ("SALDEF") is a national civil rights and educational organization. Its mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations of Sikh Americans. SALDEF seeks to empower Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF believes that it can attain these goals by helping to protect the religious and civil liberties of people of all backgrounds. The outcome of this case has a significant and direct impact on the work of SALDEF. The deprivation of the Petitioner's basic civil rights, including the right of due process, threatens and erodes the applicability of the Constitution in circumstances where the government is taking action against individuals entitled to the protection of the highest law. Keeping the Constitution as a meaningful check on state action is at the core of SALDEF's mission. The resolution of this matter has far reaching implications for the vitality of civil liberties, and therefore, SALDEF is interested in its outcome.

The Asian American Institute ("AAI") is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower and advocate for the Asian American community through advocacy, coalition-building, education, and research. AAI is a member of the Asian American Center for Advancing Justice, whose other members include Asian American Justice Center, Asian Law Caucus, and Asian Pacific American Legal Center. AAI's programs include community organizing, leadership development, and legal advocacy. AAI is deeply concerned about the racial and religious profiling that Asian Americans and others face, including profiling in the name of national security. Accordingly, AAI has a strong interest in the outcome of this case.

South Asian Network ("SAN") is a grassroots, community based organization dedicated to advancing the health, empowerment and solidarity of persons of South Asian origin in Southern California. Founded in 1990, the overall goal of SAN is to inform and empower South Asian communities by acting as an agent of change in eliminating biases, discrimination and injustices targeted against persons of South Asian origin and by providing linkages amongst communities through shared experiences. Fundamental to our mission is equality for all people.

In light of this mission and vision, SAN is often the first place of contact for many members of the South Asian community in Southern California. As such, SAN is very much interested in seeking a just resolution to an issue that

significantly impacts members of our community who are regularly placed on the no-fly list without redress or recourse.

The Asian Pacific American Legal Center ("APALC") is the largest legal organization in the country serving the Asian and Pacific Islander communities. Founded in 1983 and based in Los Angeles, APALC is a unique organization that combines traditional legal services with civil rights advocacy and leadership development. Its mission is to advocate for civil rights, provide legal services and education, and build coalitions to positively influence and impact Asian Pacific Americans and to create a more equitable and harmonious society. APALC is a member of the Asian American Center for Advancing Justice. APALC is committed to challenging discrimination and safeguarding the constitutional and civil rights of the Asian Pacific American communities and other communities of color. Accordingly, APALC has a strong interest in the outcome of this case.

The Sikh Coalition was founded on September 11, 2001, to 1) defend civil rights and liberties for all people; 2) promote community empowerment and civic engagement within the Sikh community; 3) create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination; and 4) educate the broader community about Sikhism in order to promote cultural understanding and create bridges across communities.

Since the tragic September 11th terrorist attacks, Sikhs have been subject to heightened discrimination, profiling, and government scrutiny because of their religious, racial, and/or ethnic appearance. Combating these forms of discrimination is a cornerstone of the organization's work. The Sikh Coalition joins this amicus brief out of the belief that it is a fundamental right for minorities to be free from heightened government scrutiny based upon their religion, ethnicity and/or race.

## SUMMARY OF ARGUMENT

This case represents the latest stage in the government's ongoing effort to avoid any meaningful judicial review of its decision to place individuals on the no-fly list. In the government's view, its restriction of Petitioner's right to travel to the United States, on U.S. carriers anywhere in the world, and over U.S. territory is not subject to any legal constraint for two simple reasons: Petitioner is not a U.S. citizen and she is outside of the United States.

The government's position and the district court's order allow the government to act with impunity. First, Petitioner was living lawfully within the United States, studying at Stanford University for her Doctorate Degree. Petitioner was put on the no-fly list using secret evidence. Then, the government revoked her visa *because* she is on the no-fly list, thus preventing her from returning to her home in the United States. Now, the government argues, and the district court

agreed, that she cannot sue to challenge her name on the no-fly list because she is outside of the United States. This reasoning undermines our system of checks and balances and allows the government to violate the constitutional rights of any individual lawfully within U.S. boundaries, without any consequence.

This case is ripe for judicial review, as it has broader implications for due process, balance of powers, and public policy. Petitioner is one of several thousand individuals worldwide who is affected by the government's secret no-fly list.[1] Independent reports, complaints, and government audits over the past several years have stressed both the list's inaccuracy and the lack of effective due process to challenge one's presence on it. As media and civil rights groups, including *amici*, have attested, most of those individuals who have come forward to oppose their presence on the list are of South Asian, Arab, and/or Muslim origin, suggesting the unconstitutional use of racial and religious profiling.[2]

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[1] The *Washington Post* recently reported that prior to December 2009, four thousand individuals were on the no-fly list. Since this time, according to the *Post*, officials have indicated that the number has greatly increased. Peter Finn, *ACLU Mounts First Legal Challenge to the No-fly List.* WASHINGTON POST, June 30, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062904339.html

[2] *See, e.g.* Shirin Sinnar and Veena Dubal. *Returning Home: How U.S. Government Practices Undermine Civil Rights At Our Nations Doorstep.* [hereinafter *Returning Home*] Asian Law Caucus and Stanford Law School Immigrant Rights' Clinic Report. March 2009. 24. Available at http://www.asianlawcaucus.org/alc/publications/us-border-report-returning-home/.

The district court avoided these grave issues when it erroneously interpreted Supreme Court precedent by concluding that Petitioner has no constitutional right to assert her claims because of her status as an alien outside of the country. As Petitioner effectively argues, extraterritorial application of the Constitution is not required in the case at hand as Petitioner was lawfully present in the United States when she was injured. Rather than repeat these arguments, this brief contends that even if extraterritorial application of the Constitution were at issue, Petitioner would have standing.

The Supreme Court has long rejected any categorical rule denying extraterritorial application of the Constitution. The Supreme Court's jurisprudence on this issue has not been uniform, but rather dependent on specific factors unique to each case. That case-by-case evaluation belies the district court's categorical holding that the Constitution cannot constrain government conduct with respect to a non-citizen without presence in the United States. Specifically, the "practicality" test recently applied by the Supreme Court in *Boumediene v. Bush* and the jurisprudence from which that test was derived to determine when a non-citizen outside of the United States may be accorded constitutional rights is of particular importance given that this case has much broader public policy implications for U.S. citizens and non-citizens lawfully within this country.

## ARGUMENT

### I. IF UPHELD, THE DISTRICT COURT'S DECISION WILL RESULT IN THE CONTINUED VIOLATION OF INDIVIDUAL CONSTITUTIONAL RIGHTS UNCHECKED BY JUDICIAL REVIEW.

The fundamental unfairness of the below court's decision is compounded by the discriminatory reach this decision has. There is pressing need for judicial review of the no-fly list given the excess of complaints, reports, and government audits stressing its inaccuracy and lack of effective due process to challenge one's presence on it.

By denying Petitioner the right to challenge her inclusion on the no-fly list, the district court failed to provide a judicial check on the muddied process by which the government places people on the no-fly list. The court also ignored the weight of societal costs and basic principles of fairness and equality in examining who the no-fly list affects.

#### A. MANY INNOCENT INDIVIDUALS ARE WRONGLY PLACED ON THE NO-FLY LIST.

In theory, before a name is added to the terrorist watchlist and no-fly list, multiple agencies review the factual evidence against a person and approve his or her inclusion. But in practice, government agencies fail to follow important steps to ensure that the watchlist and no-fly list only include those who present real threats.

A March 2008 Department of Justice Inspector General's ("DOJ IG") report concluded that the FBI's process for submitting names could lead to the inclusion of inaccurate and outdated data on the lists.[3] The DOJ IG found that the FBI field offices were generally not reviewing nominations by individual field agents, bypassing an important internal level of review.[4] Worse still, the FBI not only often failed to remove or modify watchlist records—even after closing an investigation on or receiving new information about an individual—but also lacked procedures for the removal of certain classes of watchlisted individuals.[5] The DOJ IG concluded that "the potential exists for watchlist nominations to be inappropriate, inaccurate, or outdated because watchlist records are not appropriately generated, updated or removed as required by FBI policy."[6]

Moreover, the National Counterterrorism Center ("NCTC") and the Terrorist Screening Center ("TSC"), both tasked to review names nominated for the watchlist and no-fly list, often defer to agencies supplying nominations rather than seriously vetting the submissions. The NCTC, which is supposed to determine whether there is "reasonable suspicion" to list a person, relies upon the originating

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[3] U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 08-16, AUDIT OF THE U.S. DEP'T OF JUSTICE TERRORIST WATCHLIST NOMINATION PROCESS [hereinafter DOJ NOMINATION PROCESS] 10 (March 2008), *available at* http://www.justice.gov/oig/reports/plus/a0816/index.htm

[4] *Id.* at 14.

[5] *Id.* at 2, 9-10.

[6] *Id.* at 10.

agency's determination that the person meets the standard; the NCTC will accept the FBI's determination that a person qualifies unless it has "specific and credible" information that the designation was not appropriate. Similarly, the TSC relies primarily on nominating agencies to determine whether or not a person meets the standard and has rejected only one percent of nominations.

Further, recent government investigations have confirmed significant problems with the accuracy and quality of watchlist records. According to a September 2007 DOJ IG audit, when the TSC reexamined watchlist files in response to individuals' complaints about law enforcement encounters, nearly half of the watchlist records required changes or removal from the list.[7] In addition, when the TSC conducted a "special quality assurance" review of the no-fly list, the list was cut in half.[8] Unfortunately, this special quality assurance only covered a small fraction of the database – some 71,000 records of what is now over one million records.[9]

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[7] U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL (OIG). FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER 7 (Sept. 2007) [hereinafter 2007 FOLLOW-UP AUDIT], *available at* http://www.usdoj.gov/oig/reports/FBI/a0741/final.pdf

[8] *Id.* at 31-33; Letter from Willie T. Hulon, Executive Assistant Director, National Security Branch, Federal Bureau of Investigation to Glenn A. Fine, Office of the Inspector General, August 28, 2007, in Appendix V, 2007 FOLLOW-UP AUDIT, *supra* note 7, at 71.

[9] 2007 FOLLOW-UP audit, *supra* note 7, at xiii, xvi-xviii.

### B. THE DECISION BELOW VIOLATES PUBLIC POLICY AND ALLOWS THE GOVERNMENT TO RELIGIOUSLY AND RACIALLY PROFILE WITH IMPUNITY.

Although the no-fly list is secret, the overwhelming number of individuals who have come forward who have been prevented from flying are of South Asian, Arab, and/or Muslim origin.[10] Indeed, the petitioner in this case is a Muslim Malaysian woman. The no-fly list clients of *amicus* the Asian Law Caucus are all of South Asian, Arab, and/or Muslim descent.

The impact of profiling of individuals, citizens and non-citizens, extends beyond those whose rights are terminated and has broader implications for all communities – both inside and outside the United States. Inside the country, profiling conveys to others outside targeted communities that particular races or ethnicities are disloyal or suspicious. Sometimes that message has been explicit: one FBI agent told a Muslim U.S. citizen client of the Asian Law Caucus who is stuck abroad due to his placement on the no-fly list, "You're a foreigner. You may be a citizen, but you're not going back to the U.S." As this Court has noted in another context, "Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of

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[10] *See Returning Home*, *supra* note 2, at 24. *See also* Scott Shane, *American Man in Limbo on No-fly List.* NEW YORK TIMES, June 15, 2010, available at: http://www.nytimes.com/2010/06/16/world/middleeast/16yemen.html?ref=airport_security.

their skin alone . . . [and that they] enjoy a lesser degree of constitutional protection – that they are in effect assumed to be potential criminals first and individuals second." *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000).

Further, the impact the no-fly list has on individuals and communities breaks down much needed trust between U.S. law enforcement among impacted communities at home and abroad. This has rippling effects, straining cultural exchange and U.S. diplomatic relationships around the world. A 2006 field study commissioned by the Justice Department found that Arab Americans reported significant fear and suspicion of federal law enforcement agencies as a result of government policies, and community members and law enforcement officers alike identified diminished trust as the most significant barrier to greater cooperation.[11]

Another no-fly list client of the Asian Law Caucus, a Muslim American U.S. citizen client who had cooperated with the Federal Bureau of Investigation ("FBI") and was subsequently put on the no-fly list, stated:

> I wish that I had never cooperated with the FBI or even spoken with them. I'm an innocent man, but now I can't even fly to visit my children and dying mother abroad.

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[11] VERA INSTITUTE OF JUSTICE, LAW ENFORCEMENT AND ARAB-AMERICAN COMMUNITY RELATIONS AFTER SEPTEMBER 11, 2001: ENGAGEMENT IN A TIME OF UNCERTAINTY 13, 21 (2006).

This client, like other ordinary Muslim Americans, has informed civil rights organizations that he was placed on the no-fly list after refusing to be an informant for the FBI. This misuse of the list has the further effect of isolating communities and diminishing trust between them and law enforcement.

The district court's decision effectively allows the government to continue its abusive practice of racial and religious profiling without any judicial review. If unchecked, the Executive's practices will continue to violate the civil and constitutional rights of innocent individuals.

## II. PETITIONER HAS STANDING TO VINDICATE HER FUNDAMENTAL CONSTITUTIONAL RIGHTS.

For at least 100 years, the Supreme Court has rejected categorical pronouncements in deciding whether the U.S. government is subject to constitutional constraints outside of the United States. Beginning with the development of the "fundamental rights" doctrine in the late nineteenth century and early twentieth century, the Supreme Court has long evaluated many relevant factors in determining when and where the Constitution should apply.

Here, every standard that the Supreme Court has articulated is easily satisfied. First, Petitioner is asserting her fundamental rights. Second, Petitioner's injuries occurred on U.S. soil, and she is asserting rights and interests that affect her while on U.S. soil, while traveling over U.S soil, and while traveling on U.S. carriers. Third, applying the Constitution to these facts would not be

"impracticable." Indeed, the constitutional anomaly in this case has been created by the district court's order, which allows the government to act with impunity and absent checks and balances.

### A. THE DISTRICT COURT ERRED IN CATEGORICALLY HOLDING THAT THE CONSTITUTION PROVIDES NO CONSTRAINTS ON U.S. GOVERNMENT CONDUCT WITH RESPECT TO NON-CITIZENS OUTSIDE THE U.S.

Although the Supreme Court long ago concluded that constitutional claims asserted by plaintiffs outside the United States must be evaluated on a case-by-case basis, its decisions in this area "have been neither unambiguous nor uniform," as the Supreme Court has itself acknowledged. *Examining Bd. Of Eng'rs, Architects, and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976). Rather, the Supreme Court has examined the particular circumstances of each case and reached various conclusions as to whether and how the Constitution applies. Beginning with the Insular Cases of the early twentieth century, the Court has evaluated relevant factors, such as the nature of the right, the context in which the right is asserted, the nationality of the person asserting the right, and whether recognition of that right would conflict with any foreign sovereign's laws or customs.

Unlike the district court below, the Supreme Court since the late nineteenth century has not even purported to rely on such a categorical rule that someone outside of the United States has no constitutional rights. *See Reid v. Covert*, 354

U.S. 1, 12 (1957). In the Insular Cases of the early twentieth century, the Court confronted various constitutional claims arising out of newly acquired territories of the United States. In each of those cases, the Court evaluated the specific circumstances of each case, with particular emphasis on the right asserted.

For example, in *Territory of Hawaii v. Mankichi* 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922), the Supreme Court confronted claims by criminal defendants in newly acquired territories that their constitutional right to trial by jury had been violated. Despite concluding that the right to a jury trial was not fundamental, the Court emphasized in all three cases that fundamental constitutional rights apply outside the United States.[12]

While these cases concerned the assertion of constitutional rights in unincorporated U.S. territories, the fundamental rights doctrine espoused by those

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[12] In *Mankichi*, the Court rejected the petitioner's claim on the ground that the asserted rights "are not fundamental in nature." 109 U.S. at 218. In *Dorr*, the Court cited its earlier opinions in noting that if the right to a jury trial were "fundamental," it had to apply with the territory. 195 U.S. at 148. And in *Balzac*, the Court emphasized that while a non-fundamental constitutional right may or may not apply given the situation, "[t]he guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without the due process of law," must always apply. 258 U.S. at 312-13. *See also Examining Bd. Eng'rs*, 426 U.S. at 599 (noting that in the Insular Cases, the Court held that for "territories destined for statehood from the time of acquisition, . . . the Constitution . . . applied . . . with full force," while in unincorporated territories, "only 'fundamental' constitutional rights were guaranteed to the inhabitants").

decisions has not been limited to such territories. Later in the twentieth century, the Supreme Court cited this fundamental rights doctrine when it had occasion to consider the application of the Constitution in a sovereign foreign country. In *Reid v. Covert*, 354 U.S. 1 (1957), the petitioners, civilian spouses of U.S. servicemen stationed on U.S. military bases in Japan and England, were tried, convicted, and sentenced to death by court-martial for the murder of their husbands. As in the Insular Cases, the Court's analysis in *Reid* focused on the importance of the constitutional right asserted rather than on the location of the alleged constitutional violation. The Court examined the actual circumstances of the case and assessed the practical effect of its decision.

Despite this history, the government relies upon *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990) and *Johnson v. Eisentrager*, 339 U.S. 76 (1950) to support its view that Petitioner does not have any constitutional rights. Rather than espouse any categorical rule against application of the Constitution to non-U.S. citizens outside the U.S., *Eisentrager* reflects a nuanced analysis. In *Eisentrager*, the petitioners were German prisons of war whom the U.S. captured in China. They were convicted of war crimes by U.S. military commissions in China, which were established with the consent of the Chinese government, and were committed to serve life sentences at a U.S. military base in Germany. 339 U.S. at 776. The petitioners challenged their convictions on due process and other constitutional

grounds. *Id.* at 767. The Court rejected the petitioners' claims and held that they were not entitled to any process greater than what they received in their military commission trials. *Id.* at 785. *Eisentrager* does not, however, set forth a categorical rule that non-citizens are not entitled to any constitutional rights. To the contrary, the Court took pains to enumerate all the factors justifying its holding:

> We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption that we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) **has never been or resided** in the United States; (c) was captured outside of our territory . . ; (d) was tried and convicted by a Military Commission sitting outside of the United States; (e) for offenses against laws of war committed outside of the United States; (f) and is at all times imprisoned outside of the United States.

*Id.* at 777. (emphasis added).

In short, *Eisentrager* was limited to its facts, and the facts of this case are quite different: Petitioner is not an enemy alien; she was lawfully present in the United States when she was placed on the no-fly list; she was detained and arrested while inside of the United States; and she has never had her day before a commission or court to challenge her presence on this list. Petitioner has never been charged or convicted with offenses of war against the U.S., and she, in fact,

had a dynamic personal and educational life during the time that she resided in the United States.

In relying upon *Verdugo-Urquidez* to support its broad categorical rule, the government also errs. The *Verdugo* court, as in all of the foregoing cases, engaged in a careful, fact specific analysis of all the circumstances, including practical considerations before holding that a non-U.S. citizen who was abducted from his home in Mexico at the direction of the U.S. government agents and tried for drug offenses in U.S. courts was not protected by the warrant clause of the Fourth Amendment. Writing for a majority of five, Chief Justice Rehnquist examined the history of the Fourth Amendment and concluded that the Framers intended only to restrict searches and seizures within the United States. 494 U.S. at 266. In addition, the Court's reasoning rested on practical considerations. As the Court noted, application of the Fourth Amendment's warrant requirement to searches in other countries would plunge the courts into a "sea of uncertainty as to what might be reasonable in the way of searches and seizures abroad." *Id.* at 274. Moreover, the Court noted, any warrant issued by a magistrate "would be a dead letter outside the United States." *Id.*

Thus, like all the Court's other decisions on application of the Constitution outside of the United States, *Verdugo-Urquidez* set forth no categorical rules but rested instead on fact-specific, practical factors. The Petitioner's case is quite

distinct. Most notably, her injury occurred *inside* the United States. Thus, granting her due process to challenge her name on the no-fly list will not open up a "sea of uncertainty."

Recently, the Supreme Court reviewed this extensive jurisprudence in *Boumediene v. Bush*, 128 U.S. 2229 (2008). There, non-citizen petitioners sought habeas review of their detention at Guantanamo Bay in Cuba. The Supreme Court held that the petitioners were "not barred from seeking the writ . . . because of their designation as enemy combatants or because of their presence at Guantanamo." *Id.* at 2235. The Supreme Court emphasized practical considerations and rejected the government's reading of the case law as adopting a formalistic test for determining when the Constitution applies extraterritorially. *Id*. at 2236. Specifically, the court wrote:

> A constricted reading of *Eisentrager* overlooks what the Court sees as a common thread uniting all these cases: the idea that extraterritoriality questions turn on objective factors and practical concerns, **not formalism**.

*Id.* (emphasis added).

While the Court did not question the government's position that Cuba maintains sovereignty over Guantanamo, it did not accept the government's premise that this was the touchstone of constitutional jurisdiction. The Court stated that even though the United States disclaimed formal sovereignty in its 1903 lease with Cuba, "The Nation's basic charter cannot be contracted away like this."

*Id*. Rather, the Court held that because of the petitioners' lack of due process to challenge their detention, the U.S. government's absolute control over their physical detention, and the lack of practical obstacles preventing their entitlement to the protection of writ, the petitioners were entitled to their constitutional protections. *Id.* at 2237.

As more than one hundred years of U.S. jurisprudence has shown, non-citizens outside of the United States are not categorically denied constitutional rights. Rather, practical and value-based considerations must play a role in determining when the Constitution reaches beyond U.S. borders. Petitioner's case falls squarely within the longstanding fundamental rights doctrine. First, by challenging her presence on the no-fly list without any charges or trial, Petitioner raises a claim that lies at the very heart of the Bill of Rights – due process. Under the Insular Cases, this claim alone is enough to require reversal of the decision.

Second, there are no practical impediments in recognizing Petitioner's right. Petitioner is challenging her inclusion on a U.S. no-fly list. When the harm was caused, she was on U.S. territory. There is no risk of conflict between the right under the Constitution that Petitioner asserts and foreign laws. Nor would recognition of Petitioner's right present undue logistical difficulties. Based on all of these circumstances, it is practical to hold that the core right to due process applies to Petitioner's challenge against her inclusion on the no-fly list.

### B. THE DENIAL OF DUE PROCESS IN THE DECISION BELOW UNDERMINES A FUNDAMENTAL CONSTITUTIONAL RIGHT AND THE BALANCE OF POWERS.

As the Supreme Court affirmed in *Boumediene*, "Even when the United States acts outside of its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.' *Murphy v. Ramsey*, 114 U.S. 15, 44, 5 S. Ct. 747, 29 L.Ed. 47 (1885)." 128 U.S. at 2259. "To hold that the political branches have the power to switch the Constitution on and off at will permits a striking anomaly in our tripartite system of government." *Id.*

Here, the district court held that Petitioner does not have standing because she is a non-citizen outside the United States. However, Petitioner's placement on the government no-fly list by the TSC resulted not only in her inability to fly, but also in the revocation of her visa. The protection of individual liberty and the balance of powers must require that the test for determining the scope of due process not be subject to manipulation by those whose power it is designed to restrain. Here, Petitioner is being prevented from challenging her future inclusion on the no-fly list because she is out of the country. However, she is out of the country because the Executive revoked her visa. The district court's order preventing her from adjudicating her claims not only deprives her of due process of law but also upsets the balance of government power.

## CONCLUSION

Numerous civil rights reports and even government audits over the past several years have attested to the inaccuracy of the no-fly list and its impact on the lives of individuals – particularly those of South Asian, Arab, and/or Muslim descent. This case is ripe for judicial review as it has larger implications for due process, balance of powers, and public policy.

By adopting the fundamental rights doctrine articulated in the Insular Cases and the practical considerations the Supreme Court used in deciding *Boumediene*, this Court would provide much-needed guidance to the lower courts in an age of increasing government activity that reaches beyond our nation's borders. The analysis permits courts to account for different conditions and locations and strikes the proper balance between the Constitution's structure of limited government power and the need for the U.S. government to act effectively in the global arena. By applying this reasoning, U.S. courts can give due recognition to core constitutional rights – such as the right to due process of law – while abiding by the commonsense principle that not every person outside the United States may enjoy the full panoply of rights under the Constitution.

Because it represents a departure from both longstanding jurisprudence and good public policy, the decision below can and should be reversed on multiple grounds. Petitioner is entitled to invoke the Due Process Clause because it protects

her fundamental rights. Properly understood, the Due Process Clause operates as a direct restraint on overreaching government power when the injury occurs on U.S. soil, regardless of where the injured individual may be when she seeks justice. Moreover, the government's actions in this case are subject to constitutional scrutiny because of the special nature of the no-fly list and its extra-territorial implications.

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

Dated: October 1, 2010

Respectfully submitted,

By: /s/ Veena Dubal

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**CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1**
**For case number 10-15873**

Pursuant to FRAP Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points, and contains 5250 words.

10/1/10 /s/ Veena Dubal
Date Veena Dubal

9th Circuit Case Number 10-15873

**CERTIFICATE OF SERVICE**

I am a citizen of the United States. My business address is Three Embarcadero Center, San Francisco, CA 94111-4067. I am employed in the County of San Francisco, where this mailing occurs. I am over the age of 18 years, and not a party to the within action. I served the foregoing document described as:

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☒ (ELECTRONIC MEDIA) I hereby certify that on OCTOBER 1, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, for the following non-CM/ECF participants:

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

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