

**[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 24, 2008]**

Consolidated Case Nos. 08-5424, 08-5425, 08-5426, 08-5428, 08-5429

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

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**JAMAL KIYEMBA, ET AL.,**  
*Petitioners-Appellees,*

v.

**GEORGE W. BUSH, ET AL.,**  
*Respondents-Appellants.*

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On Appeal from a Final Judgment of the  
United States District Court for the District of Columbia

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**BRIEF OF NATIONAL IMMIGRATION JUSTICE CENTER AND AMERICAN  
IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE*, SUPPORTING  
AFFIRMANCE**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

*Amicus curiae* respectfully submit this Certificate as to Parties, Rulings and Related Cases, pursuant to Circuit Rule 28(a)(1):

- A. Parties:** Except for the following, all parties and amici appearing before the district court and in this court are listed in the Brief for Appellants.

*Amici Curiae:*

- (1) The National Immigrant Justice Center.
- (2) The Brennan Center, The Constitution Project, and The Rutherford Institute;
- (4) the Uig The American Immigration Lawyers Association
- (3) hur American Association.
- (5) Law professors Susan Akram, Michael J Churgin, Sarah H. Cleveland, Niels W. Frenzen, Bill Ong Hing, Kevin R. Johnson, Daniel Kanstroom, Stephen H. Legomsky, Hiroshi Motomura , Gerald L. Neuman, Margaret Taylor, Charles D. Weisselberg, Michael J. Wishnie.
- (6) Legal and historian habeas scholars Paul Finkelman, Eric M. Freedman, Austin Allen, Paul Halliday, Eric Altice, Gary Hart, H. Robert Baker, William M. Wiecek, Abraham R. Wagner, Cornell W. Clayton, David M. Cobin, Mark R. Shulman, Marcy Tanter, Samuel B. Hoff, Nancy C. Unger, Karl Manheim, and Gabriel J. Chin.
- (7) The National Association of Criminal Defense Lawyers.

- B. Ruling Under Review:** Reference to the rulings at issue are listed in the Brief for Appellants.

- C. Related Cases:** References to related cases are listed in the Brief for Appellants.

/s/  \_\_\_\_\_

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## **GLOSSARY**

<b>AILA</b>	<b>American Immigration Lawyers Association</b>
<b>DHS</b>	<b>Department of Homeland Security</b>
<b>GAO</b>	<b>Government Accountability Office</b>
<b>ICE</b>	<b>Immigration &amp; Customs Enforcement</b>
<b>IIRIRA</b>	<b>Illegal Immigration Reform and Immigrant Responsibility Act of 1996</b>
<b>INA</b>	<b>Immigration and Nationality Act</b>
<b>LIRS</b>	<b>Lutheran Immigration and Refugee Services</b>
<b>NIJC</b>	<b>National Immigrant Justice Center</b>

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**[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 24, 2008]**

**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amicus* National Immigrant Justice Law Center is a Chicago-based non-profit organization that operates on a regional, national, and international scale, providing legal services for immigrants and engaging in national policy-reform advocacy with respect to immigration law. *Amicus* American Immigration Lawyers Association (“AILA”) is a national association with over 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States. *Amici* believes that, given the unique facts of this case, immigration law does not preclude or prohibit the release of the petitioners into the United States. We write to share our informed expertise on the immigration aspects of this case.

**SUMMARY OF ARGUMENT**

In challenging the District Court’s October 9, 2008 Order granting the Uighurs’ release, the Government relies extensively on the argument that immigration law prohibits the Uighurs’ release

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<sup>1</sup> This brief is filed with the consent of the parties.

into the United States, whether because the order intrudes upon the Government's plenary powers over immigration or because the immigration statutes themselves render the Uighurs inadmissible. However, the Government's arguments fundamentally mischaracterize the District Court's order and the impact of the immigration laws on the power of courts to release aliens into the United States pending the determination of their immigration status.

First, immigration law has little relevance to the District Court's order, which merely released from federal detention aliens who were brought involuntarily into the jurisdiction of the United States. The Uighurs have never sought admission under the immigration laws of the United States. Rather, they were involuntarily seized and brought by the Government into the jurisdiction of the United States at Guantanamo Bay, where the Government has detained them for almost seven years. Immigration law recognizes the distinction between aliens voluntarily seeking to enter the United States and those who were brought here involuntarily, and the limited relevance of exclusion to the latter. Moreover, the District Court's order did not purport to confer immigration status on the Uighurs, but only required their physical release inside the United States.

Second, the Government argues that 8 U.S.C. § 1182 precludes the Uighurs' release into the United States because they have no right to enter under § 1182. However, the Uighurs' status under § 1182 has no bearing on the District Court's authority to release the Uighurs from unlawful detention. Immigration laws should not be interpreted to nullify aliens' relief under habeas corpus. The Supreme Court has recognized that aliens, including those inadmissible under immigration laws, cannot be detained indefinitely pending efforts to remove them. Even inadmissible aliens who have been convicted of criminal offenses must be released into the United States pending efforts to remove them to another nation, where removal cannot be accomplished within a reasonable time period. Such a release neither depends upon nor impacts the alien's immigration status.

Indeed, the District Court's order does not restrict the Government's ability to pursue exclusion or institute removal proceedings, provided that the Uighurs are not unlawfully detained during those efforts. The purpose of detention pending removal proceedings is to effectuate removal, not to punish. Consequently, courts have recognized that indefinite detention without any reasonably foreseeable removal would raise serious constitutional questions and violate immigration law. Here, the Government concedes that the Uighurs cannot be returned to their home nation and, despite years of effort, no other nation has indicated a willingness to accept them. Consequently, both constitutional norms and immigration law prohibit the Uighurs' continued detention at Guantanamo or elsewhere, at least until removal is reasonably foreseeable.

Finally, contrary to the Government's apparent assumption, neither release nor parole implies that the alien may "live at large" in the community. After considering any evidence that the Government decides to submit, the District Court may order both formal supervision and reasonable conditions of release. If any petitioner subsequently violates those conditions, his release can be revoked.

## **ARGUMENT**

### **I. IMMIGRATION LAW HAS LITTLE RELEVANCE TO A DISTRICT COURT'S ORDER TO RELEASE FROM FEDERAL DETENTION TO THE UNITED STATES ALIENS WHO WERE BROUGHT INVOLUNTARILY TO THE UNITED STATES.**

The Government seeks to recast this case as one mired in the intricacies of immigration law, despite the fact that the District Court did not act under the United States immigration laws, but rather under that "great bulwark of personal liberty," the writ of habeas corpus. 3 Joseph Story, Commentaries on the Constitution § 1333. The District Court ordered the Uighurs released into the United States because it concluded that the length and indefinite nature of their unlawful detention

required immediate release and the United States was the only country immediately available. *See* District Court Oct. 9, 2008 Opinion (“Opinion”) 16-17, J.A. 1615-16 (“[The Government’s] ‘best efforts’ to resettle the petitioners in another country . . . have failed for the last 4 years and have no foreseeable date by which they may succeed. . . . Because [the Uighurs’] detention has already crossed the threshold into infinitum . . . the court grants the petitioners’ petition for release into the United States.”). The Government has never contended that it can release the Uighur prisoners to another country without delay. *See* Appellants’ Br. at 8 (“[D]espite extensive diplomatic efforts on petitioners’ behalf, the Government has not to date located an appropriate country willing to accept them for resettlement.”).

The Government’s arguments that the Uighurs have “no right to admission” to the United States *see* Appellants’ Br. at 27, are misplaced. The Uighurs did not come within the jurisdiction of the United States voluntarily. They were captured by bounty hunters in Pakistan, ransomed to the U.S. military, and imprisoned for almost seven years in territory dominated by and under the indefinite control of the United States. *See* Opinion 3, J.A. 1602. Precedents in both the immigration field and in the federal courts limit the application of immigration law when an alien is involuntarily brought under United States jurisdiction. Moreover, the Uighurs’ habeas petition did not request admission, nor did the District Court purport to order that remedy. The District Court did not “admit” the Uighurs or make an unnecessary foray into immigration law. Rather, the District Court (1) ordered the release of the prisoners under the writ of habeas corpus, Opinion 17, J.A. 1616, (2) implicitly forbade the immediate re-imprisonment of the Uighurs by the Department of Homeland Security, *see* Transcript 60, J.A. 1592 (Judge Urbina declaring, “I do not expect that these Uighurs will be molested or bothered by any member of the United States Government” pending

further proceedings), and (3) expressed no opinion on the eventual application of the immigration laws to the Uighurs.

**A. Immigration Precedent Distinguishes Immigrants Who Voluntarily Seek Admission From Those Who Are Brought To The United States Against Their Will.**

The Government transported the Uighurs to a territory that “while technically not part of the United States, is under the complete and total control” of the United States Government.<sup>2</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008). Because the Uighur prisoners have unwillingly found themselves in the jurisdiction of the United States, *see Boumediene*, 128 S. Ct. at 2261; *Rasul v. Bush*, 542 U.S. 466, 480 (2006), they do not presently fall within the purview of immigration law as aliens seeking admission. That is, immigration concepts such as deportation, exclusion and incidental detention have little, if any, relevance to them, at least until they seek admission. Under immigration precedent, persons brought involuntarily into the United States, “per se” are not “applicants for admission” until they affirmatively seek admission or, until after having been released from captivity and given “a fair and reasonable opportunity to depart” the United States.

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<sup>2</sup> The Government relies heavily on 8 U.S.C. § 1101(a)(38), which defines the United States “in a geographical sense,” as not including Guantanamo Bay, to argue that petitioners’ available remedies are limited because they are not located within the physical boundaries of the United States. *See Appellants’ Br.* at 44, 49. This provision cannot bear the weight the Government seeks to place on it. That geographic location is not determinative under immigration law has long been evidenced by the “entry fiction,” *Rosales-Garcia v. Holland*, 322 F.3d 386, 391 n.2 (6th Cir. 2003), whereby an alien may be physically within our borders, but not “within the United States” for purposes of immigration law. *See Leng May Ma v. Barber*, 357 U.S. 185, 186 (1958) (holding that an alien who was paroled within the geographic boundaries of the United States was not “in the United States” for purposes of immigration law). Moreover, since 1996, admissibility determinations no longer take place solely within the United States, *see* 8 U.S.C. § 1225a (preinspection stations located abroad), and removal proceedings may now occur even while non-citizens reside abroad, *see* 8 U.S.C. § 1225(a)(3)(C). The precise status of Guantanamo under the immigration laws, however, need not be resolved here, because the District Court had authority under habeas to order that release, regardless of the legal status of Guantanamo.

*United States v. Brown*, 148 F. Supp. 2d 191, 198 (E.D.N.Y. 2001), *abrogated on other grounds by United States v. Garcia-Jurado*, 281 F. Supp. 2d 498 (E.D.N.Y. 2003); *Matter of Badalamenti*, 19 I&N Dec. 623, 627 (BIA 1988). Because such aliens are not applicants for admission, they are not subject to exclusion or deportation proceedings, *Brown*, 148 F. Supp. 2d at 198, and such aspects of immigration law have no meaningful relevance to them. *See also Matter of Yam*, 16I. & N. Dec. 535, 537 (BIA 1978) (“[a]n alien does not effect an entry into the United States unless, while free from actual or constructive rerstraint, he crosses into the territory of the United States”; where noncitizen had not entered the United States voluntarily, the “immigration judge was without jurisdiction to determine the issue of deportability.”)

The Board of Immigration Appeals in *Badalamenti* addressed an analogous situation to that of the Uighurs. In *Badalamenti*, an Italian citizen was extradited to the United States “against his will,” for the purpose of criminal prosecution. *See Badalamenti*, 19 I&N Dec. at 626. After Mr. Badalamenti was acquitted of the charges against him, the Government revoked his parole, and immediately instituted removal proceedings. *Id.* at 625-27. The Board of Immigration Appeals explained that normally “when the purpose of parole has been served, . . . [an alien] shall continue to be dealt with in the same manner as that of any other applicant for admission,” and will “at some point become subject to exclusion proceedings as an applicant for admission.” *Id.* at 626. However, the Board was “not satisfied that Mr. Badalamenti [was] an applicant for admission to the United States” because “[h]e was brought here against his will.” *Id.* Furthermore, the Board held that Mr. Badalamenti would not become an applicant for admission until after he had been given a reasonable opportunity to depart the country voluntarily. The Board declined to identify the length of time required, but noted that relevant factors included “any particular difficulties the alien may have in departing,” and “[a]ny evidence that the United States Government impeded his efforts to depart.”

*Id.* at 627. The Board’s interpretation of the immigration laws receive *Chevron* deference, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Here, the Uighurs face “particular difficulties” in departing due at least in part to the Government’s actions.<sup>3</sup> The Uighurs cannot physically leave, because the Government currently holds them in prison in Guantanamo. And, as the Government has acknowledged, the Uighurs cannot return to their native country, China, because there they would face persecution and possible torture (in part due to the U.S. Government’s identification of them as Uighur separatists). *See* Appellants’ Br. at 8 (citing J.A. 425–26, 437–38, 440, 491, 503–505; 528, 538–40). Nor will any other country accept the Uighurs, at least in part because the Government has previously designated them “enemy combatants,” essentially labeling them terrorists. *See* Opinion 12, J.A. 1611. To the extent that the Government has impeded an alien from departing the country, as it has here, it cannot then detain the alien for not departing; our law does not compel the impossible. *See Matter of C-C-*, 3 I&N Dec. 221, 222 (BIA 1948) (holding under the doctrine of impossibility that an alien held in custody during trial could not be deported once acquitted for overstaying his visa);

While the Courts of Appeals have not addressed this legal issue, the Second Circuit has found that affirmative action by the government to entice or bring a non-citizen to the United States may confer protection under the Constitution. *See United States ex rel. Paktorovics v. Murff*, 260

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<sup>3</sup> The Government’s argument that it detains the Uighurs only to prevent them from voluntarily entering the territory of the United States takes too simplistic a view of the Uighurs’ circumstances. The Uighurs are not *voluntarily* seeking entry to the United States, and they are not seeking admission to the United States at all; as *Amici* understand their position, the Uighurs only seek release from prison. The Government has placed them in a Catch-22 position where the only effective release is within the United States’ geographical borders. But this cannot be held against the Uighurs. If the only door out of their legally unjustified prison leads across the United States’ geographical borders, the Uighurs must be permitted to take that route.

F.2d 610 (2d Cir. 1958). In *Paktorovics*, the Court found that a non-citizen had a Fifth Amendment due process right to a hearing prior to the revocation of his parole, despite the fact that he was “outside” the United States under the entry doctrine and, therefore, generally would not be entitled to such a hearing. The Court distinguished Paktorovics’s situation from *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), by noting that “Paktorovics was invited here pursuant to the announced foreign policy of the United States as formulated by the President,” and reinforced by Congress. *Paktorovics*, 260 F.2d at 614. The court concluded that “the tender of such an invitation and its acceptance by [Paktorovics]” effected “a change in the status of Paktorovics sufficient to entitle him to the protection of our Constitution.” *Id.* Of course, the Uighurs did not respond to an “invitation” as did Paktorovics, but the Government affirmatively brought them to Guantanamo and detained them there for almost seven years, approximately five years after the Government determined that the majority of them were eligible for release. *See* Opinion 3, J.A. 1602.

The Government, citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990), argues that the Uighurs’ lack of a voluntary connection to the United States cuts against constitutional status. That argument misreads *Verdugo*. First, *Verdugo* found that the Fourth Amendment did not apply to the search of a Mexican resident-citizen’s home *in Mexico*. *Id.* at 274–75. It said nothing about an alien’s constitutional rights while inside the jurisdiction of the United States. *See id.* at 264. To the contrary, Justice Kennedy expressly noted this important limitation on the decision: “The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the [alien] defendant.” *Id.* at 278 (Kennedy, J., concurring). Second, the Supreme Court noted that Fourth Amendment violations are unique because “a violation of the Amendment is ‘fully accomplished’ at

the time of an unreasonable governmental intrusion. . . . [T]herefore, if there were a violation, it occurred solely in Mexico.” *Verdugo*, 494 U.S. at 264. Here, in contrast, the violation was not accomplished elsewhere, but is continuing, and for purposes of applying habeas protections to individuals detained from the Afghanistan conflict, “[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.” *Boumediene*, 128 S. Ct. at 2261.

The Government also relies on *Sale v. Haitian Centers Council, Inc.* to argue that it is irrelevant under immigration law whether aliens are involuntarily brought to the United States. 509 U.S. 155 (1993). The Government posits that even though the Haitian and Cuban migrants were brought to Guantanamo involuntarily, this “had no effect on the Government’s authority to exclude them from the United States.” Appellants’ Br. at 44. However, the Government ignores the fact that while the migrants in *Sale* were indeed diverted to Guantanamo Bay, they were desperately and voluntarily trying to enter the United States to seek asylum protection when they were diverted. *See Sale*, 509 U.S. at 162–63 (detailing drowning deaths of Haitian refugees attempting to reach U.S. territories). Unlike the Haitian refugees, the Uighur prisoners had no intention of traveling to the United States—they were abducted and forcibly taken to Guantanamo Bay. Because *Sale* addresses aliens willingly seeking to enter the United States, *Badalamenti* remains the controlling precedent for aliens involuntarily brought to the United States.

Because the Uighurs were brought involuntarily to Guantanamo Bay, and were exonerated of the charges against them, the immigration laws present no obstacle to the Uighurs’ release into the United States to remedy their current detention.

**B. The District Court's Order Does not Unlawfully Challenge The Government's Power Under Immigration Law But Only Provides For Release Under Habeas Corpus.**

The District Court's order made no determination regarding the immigration status of the Uighurs. Rather, the District Court exercised its authority in habeas corpus proceedings. Opinion 10-17, J.A. 1609-16. The District Court did prohibited the immediate use of detention authorized by the Department of Homeland Security (DHS). It did not prohibit the institution of removal proceedings at some point in the future, and it made no final orders regarding when, or under what conditions, the Uighur detainees could be brought into DHS custody. *See id.* Thus, rather than impermissibly intruding on the power of the Executive, the District Court's order left the Uighurs' legal status an open question to be determined upon the petitioners' appearance in Judge Urbina's courtroom, where a representative from DHS will be present to advocate that agency's interests. Transcript 65, J.A. 1597.

**II. 8 U.S.C. § 1182 DOES NOT BAR THE RELEASE OF THE UIGHURS INTO THE UNITED STATES**

The Government argues that the Uighurs have no right to admission under the immigration laws, and contends that immigration law bars the Uighurs' release into the United States. Appellants' Br. at 27-31, 51-52; 8 U.S.C. § 1182. However, Supreme Court precedent recognizes that federal courts have the authority to release non-citizens from detention into the United States regardless of whether they are admissible under § 1182. *See Clark v. Martinez*, 543 U.S. 371 (2005). Furthermore, the release order does not admit the Uighurs into the United States for purposes of immigration law. Indeed, immigration law similarly provides for the parole of inadmissible aliens into the United States, without changing their immigration status. The District Court's order does not preclude the Government from instituting removal proceedings or taking other action under

immigration law to exclude the Uighurs. Nonetheless, because removal is not substantially likely in the reasonably foreseeable future, immigration law would forbid the Government from indefinitely detaining the Uighurs pending completion of such proceedings. Furthermore, the District Court order does not preclude the Government from imposing reasonable supervision and conditions on any release.

**A. Federal Courts May Order Release Of Aliens Inadmissible Under 8 U.S.C. § 1182 Without Impacting Their Legal Status.**

The Supreme Court has made clear that federal courts have the authority to order the release of non-citizens from detention into the United States—including non-citizens inadmissible under the immigration laws. *See Boumediene*, 128 S. Ct. 2229; *Martinez*, 543 U.S. 371.

In *Martinez*, the Supreme Court held that aliens could not be indefinitely detained, but must be presumptively released from detention into the United States after six months of detention, even though the aliens in *Martinez* were inadmissible under immigration law for having committed serious crimes. 543 U.S. 371. *Martinez* affirms the flexible nature of habeas corpus remedies, including the power to order the release from detention an inadmissible non-citizen into the United States. *Id.* at 374. As the *Boumediene* Court observed, “common-law habeas was, above all, an adaptable remedy”, and one that is not “static, narrow, [or] formalistic. . . .” 128 S. Ct. at 2267 (citation omitted). As the immigration laws did not prevent releasing inadmissible non-citizens into the United States in *Martinez*, so too the Uighurs’ purportedly inadmissible status should not bar their release from detention into the United States. In addition, the District Court’s order of release

does not “admit” the Uighurs for purposes of immigration law or otherwise confer legal status.<sup>4</sup> See *Martinez*, 543 U.S. at 386.

The Government seeks to distinguish *Martinez* by asserting that it applied a provision of the immigration laws that is not at issue in this case. Contrary to the Government’s reading, however, *Martinez* sets forth the broad principle that when the Government lacks a continued statutory basis for detaining inadmissible aliens, it must release them. Furthermore, the Court reiterated, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that statutes authorizing immigration detention ought not to be read to authorize indefinite detention because such a reading “would approach constitutional limits.” *Martinez*, 543 U.S. at 384; see *Zadvydas*, 533 U.S. at 696, 699 (applying doctrine of constitutional avoidance because allowing indefinite detention would present “a serious constitutional threat” to the alien’s rights under due process). Indeed, courts should not interpret immigration statutes to take away the constitutional rights of habeas corpus unless Congress expressly stated such intent. *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). Under the Court’s rulings in both *Martinez* and *Boumediene*, federal courts have the authority in habeas corpus proceedings to order the release from detention of inadmissible non-citizens. Nothing in § 1182 nullifies such individual’s habeas corpus rights, and § 1182 should not be construed to authorize that result.

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<sup>4</sup> Given that the Uighurs did not seek refugee status, 8 U.S.C. § 1157, nor did the District Court grant that status, the Government’s reference to 8 U.S.C. § 1252(a)(2)(B)(ii) is inapt. Appellants’ Br. at 30 n. 5. Moreover, 8 U.S.C. § 1252(a)(B)(ii) only precludes review of discretionary decisions, not legal or constitutional matters. See e.g., *Nolan v. Holmes*, 334 F.3d 189, 194 (2d. Cir. 2003) (“purely legal challenge” of statutory construction justiciable, not within purview of § 1252(a)(2)(B)); *Gonzalez-Oropeza v. Attorney Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003) (“Notwithstanding this jurisdictional bar ... § 1252(a)(2)(B) allows review of substantial constitutional challenges to the INA”); *Sierra v. I.N.S.*, 258 F.3d 1213, 1217 (10th Cir. 2001) (“It is never within the Attorney General’s discretion to act unconstitutionally.”).

**B. Immigration Law Further Reflects That The Uighurs Could Be Paroled Into The United States Without Determining Admissibility Under 8 U.S.C. § 1182 Or Their Legal Status.**

The Government argues that the District Court erred in granting the *release* of the Uighurs into the United States, because (it argues) they are inadmissible under 8 U.S.C. § 1182(a). As noted by other amici, the Government could comply with District Court's order, if it chose, by paroling the Uighurs into the United States. 8 U.S.C. § 1182(d)(5)(A). Section 1182 makes clear that such parole would not effect an admission of the Uighurs into the United States. 8 U.S.C. § 1182(d)(5)(A) (“[S]uch parole of such alien shall not be regarded as an admission of the alien. . . .”).

Further, Supreme Court precedent plainly establishes that parole does not require admission of the alien, and confers no legal status. *See Leng May Ma*, 357 U.S. at 190, *superseded in part by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, *as recognized in Fieran v. I.N.S.*, 268 F.3d 340, 343–44 (6th Cir. 2001) (“The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien’s status.”); *Kaplan v. Tod*, 267 U.S. 228, 229-30 (1925) (inadmissible alien paroled into the United States for over ten years held not to have made “entry” under immigration law). Accordingly, the Uighurs’ § 1182 admissibility is irrelevant to the determination of whether they could be released into the United States under habeas corpus.

**C. Regardless Of Whether The Uighurs Were Released Or Paroled Into The United States, The Government Could Pursue Removal Proceedings, Provided They Are Not Unlawfully Detained.**

Releasing the Uighurs into the United States does not preclude the Government from seeking their subsequent removal, and nothing in the District Court’s order is to the contrary. Upon their arrival, however, the Government may not simply detain the Uighurs anew under the pretext of

effectuating removal. *Contra* Appellants' Br. at 51 ("Finally, even if petitioners were somehow entitled to be brought into and released in the United States, it is clear that the INA also permits the Government to immediately take petitioners into custody and detain them pending removal to another country upon their arrival."). Detention is not an automatic corollary to removal proceedings. Removal proceedings can, and often are, commenced and concluded without the alien ever being detained. *See, e.g., Zadvydas*, 533 U.S. at 683; *Leng May Ma*, 357 U.S. at 190 ("Physical detention of aliens is now the exception, not the rule. . . ."); *see also Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (discussing the legal status of an alien immediately released to the custody of the Methodist Episcopal Japanese and Chinese Mission pending her removal). Under these facts, immigration detention would be constitutionally dubious, even if it were not (as apparently perceived by the District Court) merely an end run around the District Court's order.

**1. Immigration detention is intended only to facilitate removal, not to punish.**

The purpose of immigration detention is not to punish those in the United States without right; the purpose is to effectuate their removal or exclusion. *Zadvydas*, 533 U.S. at 690 ("The proceedings at issue here [detention pending execution of a removal order] are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Supreme Court clarified that immigration detention "is not a punishment for crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend." *Id.* at 236.

Once it is clear that continued detention will not serve the purpose of removal or exclusion – because the aliens' removal or exclusion is not "practically attainable" – immigration detention

becomes solely punitive in nature. *Zadvydas*, 533 U.S. at 690-700 (“[W]here detention’s goal is no longer practically attainable, detention no longer ‘[b]ears [a] reasonable relation to the purpose for which the individual was committed.’”) (quoting *Jackson v. Indiana*, 406 U.S. 715 (1972)); *see also*, e.g., *Tuan Thai v. Ashcroft*, 366 F.3d 790, 798 (9th Cir. 2004) (forbidding further detention of a Vietnamese alien because his criminal history, combined with the United States’ lack of a repatriation agreement with Vietnam, rendered his removal “not reasonably foreseeable.”). As held in *Wong Wing* and *Zadvydas*, without due process of law, punitive detention of aliens is prohibited, not mandatory. *Zadvydas*, 533 U.S. at 699–700 (“[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.”).

**2. Indefinite detention while removal is not reasonably foreseeable would be unlawful.**

Moreover, indefinite detention raises serious constitutional concerns. The Supreme Court has recognized the grave constitutional questions that would be raised by using immigration detention – a civil proceeding – to hold people indefinitely. *See Zadvydas*, 533 U.S. at 690 (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem.”). Contrary to the Government’s assertion, this concern does not disappear merely because the non-citizen has not been admitted. *See Martinez*, 543 U.S. at 378-79 (holding that the limiting construction of statute authorizing detention of admitted but removable aliens, which was necessary to avoid this grave constitutional concern, applies equally to provisions authorizing detention of inadmissible aliens); *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003) (“[T]he *Zadvydas* Court left open the question whether the indefinite detention of excludable aliens raises the same constitutional concerns under those clauses as the indefinite detention of aliens who have entered the United States. We now conclude that it does.”).

Even where Congress has statutorily mandated detention, *see, e.g.*, 8 U.S.C. § 1226(c), such mandates are subject to constitutional limits, chief among them a prohibition on indefinite detention. *See, e.g., Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008) (affirming release into United States of alien held in custody for six months whose removal was not reasonably foreseeable); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082-83 (9th Cir. 2006) (inadmissible alien released from five-year detention); *Ly v. Hansen*, 351 F.3d 263, 273 (6th Cir. 2003) (holding that aliens may only be held under 8 U.S.C. § 1226(c) “for a reasonable period of time required to initiate and conclude removal proceedings promptly”). Thus, assuming the Government’s assertion that 8 U.S.C. § 1182(a)(3), and thus 8 U.S.C. § 1226(c), would apply to the Uighurs – a fact that is by no means clear – these laws do not (and cannot) mandate the Uighurs’ detention where there is no reasonably foreseeable end to it. To mandate such indefinite detention would violate both the Constitution and immigration law, because “[w]hile it is true that a removable alien has no right to be in the country, it does not mean that he has no right to be at liberty.” *Ly*, 351 F.3d at 269.

Nor is it fruitful to engage in speculation – as the Government invites this court to do – about whether the Uighurs could be detained under provisions of the USA Patriot Act. *See* Appellants’ Br. at 51; 8 U.S.C. § 1226(a). Not only would such speculation be premature – since the Attorney General has not designated the Uighurs as terrorists under § 1226a(a)(3) and the only question at this stage is whether the writ of habeas corpus entitles the Uighurs to release – worse, it appears to conflict with the Government’s own admissions. The Government has already conceded that the Uighurs are not enemy combatants – (its first justification for holding them indefinitely without trial) and does not appear to persist in arguing that they are dangerous. As such, since they cannot be removed to any country, even if 8 U.S.C. § 1226a were invoked, the Uighurs’ continued detention

would likely be barred by 8 U.S.C. § 1226a(a)(6) (detention precluded unless detainee's release would "threaten the national security . . . or the security of the community or any person").

**3. Because it would be both punitive and indefinite, detention of the Uighurs under the pretense of removal would be illegal.**

Detaining the Uighurs pending any removal proceedings would precisely embody the punitive, indefinite immigration detention the courts have forbidden. It is uncontroverted that the Uighur detainees cannot be returned to their home country of China, *see, e.g.*, Appellants' Br. at 8 ("Petitioners fear that they would be subject to mistreatment by the Chinese Government, and the United States Government, in an effort to protect petitioners, has committed not to return them to their home country."), and, despite vigorous efforts by the Department of State, no other country willing to accept the Uighurs has yet been identified by the Government. *See id.* ("[D]espite extensive diplomatic efforts on petitioners' behalf, the Government has not to date located an appropriate country willing to accept them for resettlement.") Furthermore, the Government's mission to locate such a "willing country" may be stymied by the accusations of potential terrorism they have recently leveled against the Uighurs. *See Gov't's Mot. to Stay* at 13–14 (classifying the Uighurs as "individuals who seek to commit terrorist acts against a sovereign Government—and who receive weapons training for the purpose of doing so."). To the extent that successful removal is not reasonably foreseeable at this time, and the Government has proposed no realistic timeline for removal, detention of the Uighurs would be both punitive and indefinite. The Government gives no real reason for requiring their continued detention; but the failure to consider "alternative and less harsh methods" to achieve a non-punitive objective can show that the purpose of the Government action is to punish. *Bell v. Wolfish*, 441 U.S. 520, 539, n. 20 (1979). The District Court did not err in enjoining the Government from imposing such detention.

### **III. RELEASE OF THE UIGHURS INTO THE UNITED STATES MAY BE SUPERVISED AND SUBJECT TO REASONABLE CONDITIONS**

#### **A. Non-Citizens Released Under *Zadvydas* Or *Martinez* Are Subject to Supervision.**

Whether release is authorized by parole or terms of supervision, such aliens are not necessarily free from supervision by the Government. Although *Zadvydas* and *Martinez* preclude the Government from detaining certain aliens beyond “a period reasonably necessary to bring about that alien’s removal from the United States,” *Zadvydas*, 533 U.S. at 689; *Martinez*, 543 U.S. at 378, the Supreme Court clarified that the choice is not simply “between imprisonment and the alien ‘living at large.’” *Zadvydas*, 533 U.S. at 696. Rather, “the choice at issue here is between imprisonment and supervision under release conditions that may not be violated.” *Id.* at 679-80; 8 C.F.R. § 241.5 (establishing conditions of release after removal period). In fact, violation of the terms of supervision may result in the alien being taken into custody again. 8 U.S.C. § 1253(b).

Such government supervision may include periodic appearances before an immigration judge and reasonable restrictions on conduct or activities. 8 U.S.C. § 1231(a)(3). In fact, regulations that detail the conditions of release for aliens with no significant likelihood of removal specify that the order of supervision may “include any other conditions” that the Secretary of Homeland Security considers necessary to “guarantee the alien’s compliance,” including, *e.g.*, “attendance at any rehabilitative/sponsorship program.” 8 C.F.R. § 241.13(h); 8 U.S.C. § 1253(b); *see also Zadvydas*, 533 U.S. at 695 (holding that Congress may subject aliens “to supervision with conditions when released from detention or [] incarcerate them where appropriate for violations of those conditions”).

The statutory scheme for non-citizens paroled into the United States similarly provides for conditions and supervision. Non-citizens arriving on United States shores who apply for admission are generally categorized as “arriving aliens.” *See* 8 U.S.C. § 1225(b). These aliens may be paroled

into the United States by the Secretary of Homeland Security “under such conditions as he may prescribe.” 8 U.S.C. § 1182(d)(5)(A). Regulations implementing this statute state that parole may be subject to “reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so.” 8 C.F.R. § 212.5(d). In practice, aliens released on parole are frequently subject to periodic reporting under 8 C.F.R. § 212.5(d)(3).

**B. Non-Government Organizations Effectively Monitor Aliens Who Are Released On Parole Or Supervision.**

Programs need not be implemented only by the Government or private contractors. Programs operated by non-governmental organizations have also monitored the location and activities of aliens with success. The Vera Institute of Justice, a not-for-profit organization, ran a demonstration program from 1997 to 2000 under a contract with the Immigration and Naturalization Service. At the end of the three-year program, 91% of intensive supervision participants in the Vera Institute’s demonstration program had appeared for all required hearings. *See* “Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program,” Vera Institute of Justice, August 2000, at 3-4, *available at* [http://www.vera.org/publication\\_pdf/aapfinal.pdf](http://www.vera.org/publication_pdf/aapfinal.pdf).

Counsel for the Uighurs proffered evidence to the District Court that the Lutheran Immigration and Refugee Services (LIRS) “is prepared to effect a long-term resettlement solution for the Uighur men.” J.A. 1469-72. LIRS has a long history of resettling refugees, including hundreds of thousands over the past seven decades, and more than 9,000 in 2008 alone. J.A. 1470. LIRS “organized a network of churches, mosques, synagogues, and other entities in the [Washington,] D.C. area to provide appropriate housing and support for all 17 of the Uighur men.” J.A. 1470. The Uighur counsel also proffered evidence that seventeen Uighur families in the

Washington, D.C. area have agreed to house the Uighurs upon release while LIRS makes permanent arrangements for them. J.A. 1471.


Accordingly, upon release, the Uighurs' whereabouts would be known to the Government, to LIRS, and to their community sponsors. The choice for the Uighurs is not between imprisonment and "living at large," *Zadvydas*, 533 U.S. at 696, but between indefinite detention that has been found to be unlawful and release under reasonable conditions.

## CONCLUSION

Immigration law poses no meaningful barrier to the petitioners' release from detention into the United States pursuant to the District Court's habeas corpus authority.

Dated: October 31, 2008

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,344 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 13-point font.



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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for National Immigrant Justice Center as *Amici Curiae* was served electronically, and two copies were served by overnight delivery, postage prepaid, on October 31, 2008:

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## **CORPORATE DISCLOSURE STATEMENT**


In accordance with D.C. Cir. R. 26.1 and F. R. App. P. 26.1, the National Immigrant Justice Center files this Corporate Disclosure Statement.

The National Immigrant Justice Center states that it is a program of Heartland Human Care Services, an Illinois nonprofit corporation, its parent nonprofit corporation is The Heartland Alliance for Human Needs and Human Rights, which has no corporate parents. It is not publicly traded. The National Immigrant Justice Center is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers. The National Immigrant Justice Center provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education.

The American Immigration Lawyers Association states that it has no corporate parents and is not publicly traded. Its statement of interest satisfies the disclosure rule.

**CERTIFICATE AS TO SEPARATE BRIEF**

Pursuant to Circuit Rule 29(d), counsel states that this amicus curiae brief is being filed separately so that it may address solely those issues that are uniquely within the realm of immigration law, a field in which the National Immigrant Justice Center and the American Immigration Lawyers Association has substantial expertise.

/s/  \_\_\_\_\_

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## **STATUTORY AND REGULATORY PROVISIONS**

The statutory and regulatory provisions at issue in this appeal are attached as an addendum to this brief. Except for the statutes and regulatory provisions reproduced in the addendum, all applicable statutes and regulatory provisions at issue in this appeal are contained in the Brief for Appellants.

# **ADDENDUM**

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# UNITED STATES CODE ANNOTATED

## TITLE 8

### Aliens and Nationality

§§ 1158 to 1182f

Comprising All Laws of a General  
and Permanent Nature  
Under Arrangement of the Official Code of  
the Laws of the United States  
with  
Annotations from Federal Courts

THOMSON  
WEST

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## TABL

Explanation .....
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showed that statement made as student to obtain entry was false. *Popa v. Ziff* (Mich.) 1930, 45 F.2d 54(9)

§ 213 of this title did not give immigration tribunals to issue on ground that visa was or improvidently granted or consul after exhaustion of all facts entitling alien to exist, in absence of whether visa, required by § 3(a) of this title, should be for consul to determine, 202 of this title. *Silva v. U.S.* C.Mass.1929, 36 F.2d 801. alien, with knowledge that passport were issued to another United States representative or other person, entry of "unlawful entry" and subsequent naturalization under citizenship alleging that it was fraudulently and illegally and the government was cancellation of certificate of U.S. v. Shapiro, S.D.Cal.1927. Aliens 46; Aliens

alien admittedly altered copy of Italian passport bearing entry by United States Consul as nonimmigrant visitor, alien could be excluded as immigrant without a proper alteration voided passport. U.S. ex rel. Di Mier, N.Y.1937, 18 F.Supp. 1010, 72d 92. Aliens 51.5

ations of former § 214 of this title exempt alien, ineligible for entry entered country through fraudulent documents without after effective date of law and deportation of such an alien after illegal entry, his deportation barred by lapse of 3-year period prescribed by former title. *Haruichi Yoshihara*, C.C.A.9 (Cal.) 1940, 115 F.2d 40

g tion proceedings on ground had entered as an immigrant possessing a valid immigration certificate to warn alien that he

the hearing might be used did not violate due process. *Catalano v. Shaughnessy*, U.S. 1952, 197 F.2d 65. Administrative Procedure 463.1; Constitutional Law 274.3

Alien immigrant was entitled to fair hearing on charge that he entered United States unlawfully and that he had entered country without having an immigration visa. *Harris v. Richardson*, C.A.8 (Mo.) 1939, 100 F.2d 854. Aliens 54(4)

Alien who admitted that he entered United States surreptitiously and that he had resided falsely with respect to date and place of entry and that he was not rightful holder of documentary evidence he admitted, and that he attempted to use documents fraudulently, could not complain that findings of immigration authorities were arbitrary and that hearings were unfair. *Ex parte Singh*, N.D.Cal. 1935, 12 F.Supp. 147. Aliens 54.3(1)

13. Evidence Proofs in deportation proceeding were conclusive that alien seaman was in country without an unexpired immigration visa and that he had intention of staying as long as he could. *Tsimounis v. Holland*, C.A.3 (Pa.) 1956, 228 F.2d 907. Aliens 54.1(4.1)

14. Habeas corpus On habeas corpus by alien seaman claiming to have been previously admitted to the United States, evidence showed that he was not the person so previously admitted. *Taranto v. Haff*, C.C.A.9 (Cal.) 1937, 88 F.2d 85. Aliens 54.1(4.1); Habeas Corpus 727

The court in considering writ of habeas corpus sought by alien is bound by the record before it and cannot consider facts extrinsic thereto. *U.S. ex rel. Gaudio v. Commissioner of Immigration of Port of New York*, S.D.N.Y.1937, 18 F.Supp. 705. Habeas Corpus 727

On habeas corpus by alien ordered deported, evidence was insufficient to support charge that nonquota immigration visa held by the alien was not valid unexpired visa. *U.S. ex rel. Gaudio v. Commissioner of Immigration of Port of New York*, S.D.N.Y.1937, 18 F.Supp. 705. Habeas Corpus 727

15. Injunction

Injunction did not lie to restrain immigration inspector from interfering with alien's return to United States from Canada, notwithstanding alien offered evidence that he had been employed and engaged in business in United States since his entry prior to April of 1920, where alien had no unexpired immigration visa or re-entry permit, and did not allege that he offered evidence that he had been lawfully admitted into United States. *Rash v. Zurbrick*, C.C.A.6 (Mich.) 1935, 75 F.2d 934.

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds

(A) In general

Any alien—

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

n to the United States or suc  
ence.

ot apply—  
official of the United States  
e scope of his or her official

t official of any foreign gov-  
has been designated by the  
e Secretary's sole and unre-

child is located in a foreign  
the Convention on the Civil  
l Child Abduction, done at  
5, 1980.

n violation of any Federal,  
al provision, statute, ordi-  
issible.

o voted in a Federal, State,  
i initiative, recall, or refer-  
ful restriction of voting to  
nt of the alien (or, in the  
ch adoptive parent of the  
her by birth or naturaliza-  
sided in the United States  
, and the alien reasonably  
lation that he or she was  
e considered to be inad-  
f this subsection based on

ced citizenship to avoid

of the United States who  
citizenship and who is  
to have renounced Unit-  
e of avoiding taxation by

**(b) Notices of denials**

Subject to paragraphs (2) and (3), if an alien's application for a  
for admission to the United States, or for adjustment of status is  
by an immigration or consular officer because the officer  
determines the alien to be inadmissible under subsection (a) of this  
section, the officer shall provide the alien with a timely written notice

(A) states the determination, and

(B) lists the specific provision or provisions of law under  
which the alien is inadmissible or ineligible for entry or adjust-  
ment<sup>2</sup> of status.

(2) The Secretary of State may waive the requirements of para-  
graph (1) with respect to a particular alien or any class or classes of  
inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under  
paragraph (2) or (3) of subsection (a) of this section.

**(c) Repealed. Pub.L. 104-208, Div. C, Title III, § 304(b), Sept. 30,  
1996, 110 Stat. 3009-597**

**(d) Temporary admission of nonimmigrants**

(1) The Attorney General shall determine whether a ground for  
inadmissibility exists with respect to a nonimmigrant described in  
section 1101(a)(15)(S) of this title. The Attorney General, in the  
Attorney General's discretion, may waive the application of subsec-  
tion (a) of this section (other than paragraph (3)(E)) in the case of a  
nonimmigrant described in section 1101(a)(15)(S) of this title, if the  
Attorney General considers it to be in the national interest to do so.  
Nothing in this section shall be regarded as prohibiting the Immigra-  
tion and Naturalization Service from instituting removal proceedings  
against an alien admitted as a nonimmigrant under section  
1101(a)(15)(S) of this title for conduct committed after the alien's  
admission into the United States, or for conduct or a condition that  
was not disclosed to the Attorney General prior to the alien's admis-  
sion as a nonimmigrant under section 1101(a)(15)(S) of this title.

(2) Repealed. Pub.L. 101-649, Title VI, § 601(d)(2)(A), Nov. 29,  
1990, 104 Stat. 5076

(3)(A) Except as provided in this subsection, an alien (i) who is  
applying for a nonimmigrant visa and is known or believed by the  
consular officer to be ineligible for such visa under subsection (a) of  
this section (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii),  
(3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection),  
may, after approval by the Attorney General of a recommendation by  
the Secretary of State or by the consular officer that the alien be



