No. 08-1234

IN THE
Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,
Petitioners,
v.
BARACK H. OBAMA, *et al.*,
Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE BRENNAN CENTER FOR JUSTICE AT THE NEW YORK UNIVERSITY SCHOOL OF LAW, THE CONSTITUTION PROJECT, PEOPLE FOR THE AMERICAN WAY FOUNDATION, THE RUTHERFORD INSTITUTE, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amicus the Association of the Bar of the City of New York ("Association") is an independent professional association of more than 22,000 lawyers, judges, and legal scholars. Founded in 1870, the Association has long been devoted to promoting and preserving the role of the judiciary in our constitutional system of Separation of Powers as a check against unlawful government conduct that violates individual rights. In that role, the Association has filed amicus briefs with this Court in several cases involving the rights of Guantánamo detainees, including *Boumediene* v. *Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008).

Amicus the Brennan Center for Justice at the New York University School of Law ("Brennan Center") is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center advocates for national security policies that respect the rule of law, constitutional and human rights, and fundamental freedoms. The Brennan Center's attorneys have served as counsel in several cases involving Executive detention.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *Amici Curiae* to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission. *Amici Curiae* submit their own individual views and not those of their clients or employers.

Amicus the Constitution Project is an independent think tank that promotes and defends constitutional safeguards. After September 11, 2001, the Constitution Project created its Liberty and Security Committee, a bipartisan, blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties as we work to enhance our Nation's security. The committee develops policy recommendations on such issues as United States detention policies, which emphasize the need for all three branches of government to play a role in safeguarding constitutional rights.

Amicus People For the American Way Foundation ("People For") is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has hundreds of thousands of members and supporters nationwide. One of People For's primary missions is to educate the public on our tradition of liberty and freedom, and it defends that tradition, including the fundamental right to challenge the legality of one's detention, through litigation and other means. Accordingly, People For has filed amicus briefs before the Supreme Court in other cases involving these issues, including *Boumediene* v. *Bush*, *Rasul* v. *Bush*, and *Hamdan* v. *Rumsfeld*.

Amicus The Rutherford Institute is an international civil liberties organization that was founded in 1982 by its President, John W. Whitehead. The Rutherford Institute specializes in

providing legal representation without charge to individuals whose civil liberties are threatened or violated and in educating the general public about important constitutional and human rights issues.

Amicus the National Association of Criminal Defense Lawyers ("NACDL") is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for people accused of crime or wrongdoing. Chief among NACDL's objectives are promoting the proper and fair administration of criminal justice and preserving and protecting the U.S. Constitution.

SUMMARY OF THE ARGUMENT

Amici support Petitioners and urge the Court to reverse the decision of the court of appeals in *Kiyemba* v. *Obama*, 555 F.3d 1022 (D.C. Cir. 2009). The court of appeals' ruling is inconsistent with this Court's decision in *Boumediene* v. *Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008), which held that the Suspension Clause[2] applies to detainees at Guantánamo Bay, and that release for those who are unlawfully held at Guantánamo is a "constitutionally-required remedy." *Id.* at 2271. As Petitioners show, the court of appeals' ruling denies them that remedy.

Amici submit this brief to show that the court of appeals' ruling also undermines the "judicial Power" conferred by Article III of the Constitution and the role of an independent judiciary in our constitutional system of separated powers.

No one disputes that Petitioners are entitled to release. The court of appeals ruled, however, that the district court was powerless to order their release in the United States, and that it could not do "anything more" than accept the executive branch's representation that "it is continuing diplomatic attempts to find an appropriate country willing to admit [them.]" *Kiyemba*, 555 F.3d at 1029. *Amici* submit that the court of appeals' ruling, like the series of orders it has spawned in subsequent *habeas* cases involving Guantánamo detainees, eviscerates

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[2] "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. Const. art. I, § 9, cl. 2.

the "judicial Power" conferred by Article III by leaving Petitioners' unquestioned right to release entirely to the discretion of the executive branch and foreign governments. The court of appeals' decision flies in the face of the principle, established by this Court more than 200 years ago, that the "judicial Power" conferred by Article III is the power to issue enforceable remedies in the form of final judgments not subject to revision, except on review by appellate courts.

Amici also address the recently-enacted restrictions on appropriations ("Appropriations Acts") that purport to preclude the use of certain funds appropriated to the executive branch for the purpose of releasing Guantánamo detainees in the United States. The application of the Appropriations Acts to Petitioners, who already have won their right to release, would operate to suspend habeas in violation of the Suspension Clause. Like the court of appeals ruling, such a reading of the Appropriations Acts would conflict with *Boumediene* and would render the Acts unconstitutional. The canon of constitutional avoidance and the clear statement rule counsel that these restrictions should not be construed to prevent Petitioners' release in the United States, given that alternative constructions of the Acts are available.

ARGUMENT

I. THE COURT OF APPEALS' DECISION UNDERMINES THE JUDICIAL POWER CONFERRED BY ARTICLE III BECAUSE IT DENIES THE DISTRICT COURT THE POWER TO ISSUE A FINAL AND ENFORCEABLE REMEDY

Petitioners persuasively show that release is the mandated remedy where, as here, the government, in response to a habeas petition, is unable to show lawful authority to detain. (Pet. Br. at 25-29.) This is the unequivocal holding of *Boumediene.* Petitioners also show that release in the United States is the only enforceable remedy for the government's continuing unlawful detention of Petitioners, and that the court of appeals' decision improperly denies them that remedy. (Pet. Br. at 33-34.)

Inherent in the *Boumediene* majority opinion, and essential to its holding that courts must be able to grant the remedy of release, is the longstanding principle that the "judicial Power" vested by Article III in the federal courts must include the power to issue enforceable remedies. Such remedies must not be subject to subsequent revision by the political branches—and surely must not be contingent on the discretion of foreign governments over which the courts have no power. These attributes of the "judicial Power"—finality and enforceability§ are essential to the independence and autonomy of the federal courts and their role in our system of separation of powers as a check on the political branches. The court of appeals' ruling that the district court cannot "require anything more" than to

accept the United States government's efforts to persuade foreign governments to admit Petitioners—even as the government refuses to release Petitioners in the United States—makes the district court's order contingent on the executive branch's subsequent diplomatic efforts and the discretion of foreign governments. It thereby deprives the courts of the power to issue final and enforceable judgments for Petitioners' right to release. The ruling is inconsistent with the "judicial Power" conferred by Article III.

A. The Judicial Power Requires Federal Court Remedies to Be Final And Not Subject to Revision Except by Appellate Courts

Article III vests all federal courts with the "judicial Power of the United States." U.S. Const. art. III, § 1. This "judicial Power" is an independent grant of power that is not shared with the other branches. As this Court explained in *United States* v. *Nixon*, "the 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power . . . . Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." 418 U.S. 683, 704 (1974) (citing THE FEDERALIST No. 47, at 313 (Alexander Hamilton) (S. Mittell ed. 1938)); *see also Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 223 (1995) ("[T]he general liberty of the people can never be

endangered from [the courts] . . . so long as the judiciary remains truly distinct from both the legislative and the executive."); *Myers* v. *United States*, 272 U.S. 52, 116 (1926) (citing Madison, 1 Annals of Congress, 581) (noting that the Constitution "requires that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires").

Article III was thus crafted with "an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218-19 (emphasis in original); *Miller* v. *French*, 530 U.S. 327, 344 (2000) (noting that "the judicial power is one to render dispositive judgments") (internal quotation marks and citation omitted); *see also United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."); *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 58 (1991) (Scalia, J., dissenting) ("Some elements of [the Court's] inherent authority are so essential to '[t]he judicial Power,' U.S. Const., Art. III, § 1, that they are indefeasible.").

In this case, the district court and the court of appeals agreed that Petitioners are entitled to release. Imagining that an order directing release in the United States would tread upon the political branches' immigration authority, however, the court of appeals held that the district court could

effectuate the constitutionally mandated remedy of release only by directing the U.S. government to engage in good faith negotiations with other countries in an effort to persuade them to accept Petitioners. The decision that Petitioners are entitled to release was thus rendered entirely contingent, for its effectuation, on the exercise of diplomatic effort applied by the executive branch in its negotiations and the sovereign discretion of governments of the countries with whom the U.S. government intends to negotiate.

The idea that the judgment of a court should depend for its effectuation upon the subsequent discretionary actions of other branches of government—let alone the discretion of foreign sovereigns—directly conflicts with the Constitution's scheme of separated powers. Such an idea was rejected as early as 1792, in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). In that case, a circuit court was asked to decide whether a petitioner was entitled to a pension under a recently enacted statute. The statute made any disbursement of the pension, however, subject to stay by the Secretary of War and was dependent on subsequent appropriations by Congress. Any decision of the court would thus not be self-executing, but subject to revision by the political branches. Such a scheme, this Court held, was unacceptable because "no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension . . . ." *Hayburn*, 2 U.S. (2 Dall.) at 410 n.* (statement of Iredell, J., and Sitgreaves, J.); *see also id.* ("Such [legislative] revision and control we deemed radically

inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle [of separation of powers] which is so strictly observed by the constitution of the United States.") (statement of Wilson, J., Blair, J., and Peters, D.C.J.); *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852) (applying *Hayburn's Case*); *Chicago & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 114 (1948) (noting that Article III courts "render no judgments…that are subject to later review or alteration by administrative action"); *see also* James S. Liebman & William Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 786 (1998) (discussing *Hayburn* and describing Framers' understanding of the scope of judicial power set forth in Article III).

In the case at bar, as in *Hayburn's Case*, the courts have determined that Petitioners are entitled to relief, and relief in the context of habeas, as Petitioners have shown (Pet. Br. at 25-29), means release. Subjecting that entitlement to the uncertain outcome of future executive negotiations with foreign governments allows the executive branch to work a *de facto* revision of the courts' judgment. The determination that Petitioners are entitled to release, however, may not be subject to revision by other governmental branches or contingent on the good will of foreign governments. The fact that the court of appeals here acquiesced in the executive's effort to render an Article III judgment advisory does nothing except compound the constitutional problem.

B. The Judicial Power Includes the Power to Issue Enforceable Remedies

The "judicial Power" granted by the Constitution includes the power to effectuate remedies in those cases where a federal court properly exercises jurisdiction. As Justice Johnson explained, riding circuit in 1808, "[t]he term 'judicial power' conveys the idea, both of exercising the faculty of judging and of applying physical force to give effect to a decision. *The term 'power' could with no propriety be applied, nor could the judiciary be denominated a department of government, without the means of enforcing its decrees.*" *Gilchrist* v. *Collector of Charleston*, 10 F. Cas. 355, 361 (C.C.D.S.C. 1808) (Johnson, J.) (emphasis added). Indeed, if the power to effectuate remedies independently were not part of the "judicial Power" granted to the courts by the Constitution, the power of the courts to "say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), would be a functional nullity in the face of any contrary whim of the political branches and courts would be relegated to the issuance of hortatory advisory opinions. *See Michaelson* v. *United States*, 266 U.S. 42, 66 (1924) (recognizing, in the context of a discussion of courts' inherent contempt power, that "the attributes which inhere in [judicial] power and are inseparable from it can neither be abrogated nor rendered practically inoperative"). The "judicial Power," of course, embodies a far more substantial power.

The heart of the "judicial Power" vested by Article III in the several federal courts is the power to speak authoritatively and finally on any matter of law over

which they have jurisdiction, as this power sustains the judiciary's independence. "At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law." *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 354 (2006) (internal quotation marks omitted) (citing *Williams* v. *Taylor*, 529 U.S. 362, 378-79 (2000)). The Court maintains its independence because this power to declare the law is the power to do so through orders and judgments that are binding and enforceable. That is, the Court acts only when its judgment on the law is not merely advisory, but effective.

This Court's 1864 ruling in *Gordon* v. *United States* is on point here. In *Gordon*, the Court held that because a federal statute required an appropriation by the Secretary of the Treasury before any judgments by the Court of Claims could be paid, the Court of Claims was not able to exercise its "judicial power." 117 U.S. 697, 699 (1864, reported 1885). The Court identified the constitutional flaw in the statute as follows: "[W]hether [the judgment] is paid or not, does not depend on the decision of either court [the Court of Claims or the United States Supreme Court], but upon the future action of the Secretary of the Treasury, and of Congress." *Id*. The Court made plain that, without the actual award of execution, "the judgment would be inoperative and nugatory"—an impermissible result. *Id.* at 702; *see also Chicago & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 113-14 (1948) (noting that "[i]t has . . . been the

firm and unvarying practice of the Constitutional Courts to render no judgments not binding and conclusive on the parties"). The capacity of the judiciary to effectuate remedies issued in final judgments of federal courts is "an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it." *Gordon*, 117 U.S. at 702.

In this case, only release in the United States can satisfy the constitutional requirement of a judicially enforceable remedy. The court of appeals' proposed remedy—an exhortation to the executive to try harder—merely endorses the status quo ante. Diplomatic attempts to persuade other countries to accept Petitioners have been ongoing for years, and the government has been unable to negotiate a place to resettle all Petitioners. Even if these attempts held some promise, the fact remains that the only judicially enforceable aspect of the court of appeals' judgment is its requirement of negotiations – which, of course, are not in themselves an effective remedy for unlawful detention. Under the court of appeals' ruling, even though Petitioners are entitled to release, the courts have no means of ensuring that release *actually occurs*, because it would be difficult for a court to second-guess the executive branch's negotiating efforts, and a court certainly cannot force other countries to accept Petitioners or to follow through on promises to accept them.

Indeed, the court of appeals made no pretense that it was merely cutting off one possible remedy while leaving another in place. Instead, the court of appeals implicitly acknowledged that its ruling left

Petitioners without a remedy, asserting that "[n]ot every violation of a right yields a remedy, even when the right is constitutional." *Kiyemba*, 555 F.3d at 1027. This assertion, however, is inconsistent with the concept—noted above—that the "judicial Power" is a power to issue enforceable remedies in cases that fall within the courts' jurisdiction. The "political question" doctrine, which the court of appeals cited to support its hypothesis of "rights without remedies," is a false analogy. That doctrine operates to remove the courts' authority to decide certain inherently political questions; it does not deprive the courts of the ability to issue remedies in cases that they have jurisdiction to resolve on the merits. *See, e.g.*, *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (noting that the "political question" doctrine, like standing, is a "jurisdictional limitation[]," and "the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by a complaining party"). Here, it is undisputed that Article III conferred on the district court jurisdiction to entertain the petitions for habeas corpus in this case. Indeed, the power to entertain such petitions is central to the "judicial Power" conferred by Article III, and the constitutional power to entertain such petitions by persons detained at Guantánamo is confirmed by *Boumediene*.

Moreover, the court of appeals' assertion is at odds with this Court's repeated warning that denial of *any* judicial remedy for a constitutional violation properly within the federal courts' jurisdiction would raise serious constitutional issues. *See Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (stating that a "serious

constitutional question" would arise if the Court were to construe a federal statute as denying "any judicial forum for a colorable constitutional claim") (citing *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)); *Johnson* v. *Robison*, 415 U.S. 361, 366-67 (1974) (construing a statute to "bar[] federal courts from deciding the constitutionality of veterans' benefit legislation . . . would, of course, raise serious questions concerning the constitutionality" of the statute); *see also Davis* v. *Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, [those harmed] *must* be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.") (emphasis added); *Bivens* v. *Six Unknown Named Agents of The Fed. Bureau of Narcotics*, 403 U.S. 388, 407, 410 (1971) (Harlan, J., concurring) (stating that "the judiciary has a particular responsibility to assure the vindication of constitutional interests" and that inferring from the Constitution a cause of action for damages was necessary because for plaintiff, it was "damages or nothing"); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) (arguing that the Constitution requires that "some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation") (citing Richard H. Fallon, Jr. *et al*., *Hart and Wechsler's The Federal Courts and the Federal System*, 345-57 (5th ed. 2003), and Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts:*

An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1372 (1953)).

The cases upon which the court of appeals relies do not support the court's assertion that not every constitutional violation has a remedy. While the Court in *Wilkie* v. *Robbins*, 551 U.S. 537, 553-55 (2007), denied *Bivens* damages for an alleged constitutional violation, it did not cut off all avenues of judicial relief; to the contrary, it emphasized that other judicial remedies were available. *See id.* at 539, 555 (noting that "Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints," and distinguishing the case from other cases that "call for creating a constitutional cause of action for want of other means of vindication").

The other cases cited by the court of appeals involved statutory rather than constitutional claims, and do not support the court's "rights without remedies" theory in any event. In *Towns of Concord, Norwood & Wellesley* v. *FERC*, 955 F.2d 67 (D.C. Cir. 1992), the Court simply acknowledged the truism that individuals pressing statutory claims "possess only the 'rights' the [statute] confers, no more, no less." *Id.* at 73. The plaintiffs in that case were unable to obtain the remedy of restitution to recover overcharges resulting from an alleged violation of the Federal Energy Regulatory Commission's regulations because the Commission properly exercised its statutory discretion to conclude that there was no "unjust enrichment" entitling plaintiffs to relief. *See id.* at 76. In *Alden* v. *Maine*, 527 U.S. 706 (1999), the Court held that "suits against nonconsenting States

are not properly susceptible of litigation in courts," and therefore "[t]he entire judicial power granted by the Constitution does not embrace authority to entertain such suits in the absence of the State's consent." *Id.* at 754 (internal quotation marks and citation omitted). As noted above with respect to the political question doctrine, lack of Article III authority to hear a claim is very different from lack of authority to provide a remedy in cases that the courts are authorized to hear. Furthermore, *Alden* states that even in cases where sovereign immunity bars a court from entertaining a claim for damages against a state, it does not withdraw judicial authority to hear and provide a remedy for "certain actions against state officers for injunctive or declaratory relief," and "[e]ven a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct . . ." *Id.* at 757; *see also Ex parte Young*, 209 U.S. 123, 144-45, 167 (1908) (holding that the Court had federal question jurisdiction and authority to issue an injunction against a state official to prevent the enforcement of legislation because of the legislation's alleged violation of Due Process).

Finally, whatever traction a hoary adage like "no remedy for every rights violation" might have in the common law, it has no place in an Article III court's exercise of "judicial Power" under the Suspension Clause—the only textual provision of the Constitution to enshrine beyond doubt the availability of a judicial remedy. This Court in *Boumediene* recognized the centrality of release as a remedy in habeas cases and established that the

courts' power to entertain habeas petitions by persons such as Petitioners necessarily includes the power to order their release. 553 U.S. __, 128 S. Ct. at 2266-67.

II. ANY READING OF RECENT APPROPRIATIONS ACTS TO PROHIBIT PETITIONERS' RELEASE IN THE UNITED STATES WOULD VIOLATE THE SUSPENSION CLAUSE OF THE CONSTITUTION AND SHOULD BE AVOIDED BY A NARROWING CONSTRUCTION

Congress recently enacted three appropriations acts (hereinafter the "Appropriations Acts") that purport to restrict the use of certain funds by the Departments of Defense ("DOD"),[3] Homeland

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[3] The National Defense Authorization Act reads, in relevant part:

> (a) RELEASE PROHIBITION.—During the period beginning on October 1, 2009, and ending on December 31, 2010, the Secretary of Defense may not use any of the amounts authorized to be appropriated in this Act or otherwise available to the Department of Defense to release into the United States, its territories, or possessions, any individual described in subsection (e).
>
> …
>
> (e) DETAINEES DESCRIBED.—An individual described in this subsection is any individual who is located at United States Naval Station, Guantánamo Bay, Cuba, as of October 1, 2009, who—
>
> (1) is not a citizen of the United States; and
>
> (2) is—
>
> (A) in the custody or under the effective control of the Department of Defense; or

Security ("DHS"),[4] and the Interior ("Interior")[5] for

(B) otherwise under detention at the United States Naval Station, Guantánamo Bay, Cuba.

National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454-55 (2009).

[4] Section 552 of the Department of Homeland Security Appropriations Act 2010 reads, in relevant part:

> None of the funds made available in this or any other Act may be used to release an individual who is detained, as of June 24, 2009, at Naval Station, Guantánamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI).

Pub. L. No. 111-83, § 552(a), 123 Stat. 2142, 2177 (2009). It continues,

> None of the funds made available in this Act may be used to provide any immigration benefit (including a visa, admission into the United States or any of the United States territories, parole into the United States or any of the United States territories (other than parole for the purposes of prosecution and related detention), or classification as a refugee or applicant for asylum) to any individual who is detained, as of June 24, 2009, at Naval Station, Guantánamo Bay, Cuba.

Id. § 552(f), 123 Stat. at 2179.

[5] The Interior Department Appropriations Act reads:

> None of the funds made available in this or any other Act may be used to release an individual who is detained, as of June 24, 2009, at Naval Station, Guantánamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, into any of the United States territories of Guam, American Samoa (AS), the United States Virgin Islands (USVI), the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands (CNMI).

the purpose of resettling in the United States described as detainees at Guantánamo Bay.[6] There is no express statement in the Appropriations Acts that they are intended to apply to detainees at Guantánamo whose habeas petitions have been granted; nor is there any statement in the Acts that Congress intended to strip the courts of the power to grant relief under properly exercised habeas jurisdiction.

Any application of the Appropriations Acts' prohibition to Petitioners, who already have prevailed in their habeas petitions, would effectively suspend the writ of habeas corpus for Petitioners. In the absence of an adequate substitute for habeas, such a result violates the Suspension Clause. *See, e.g.*, *Boumediene*, 128 S. Ct. at 2273-74; *see also INS* v. *St. Cyr*, 533 U.S. 289, 314 & n.38 (stating that because no adequate substitute remedy was

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Department of the Interior – Appropriation, Pub. L. No. 111-88, § 428(a), 123 Stat. 2904, 2962 (2009).

[6] Language contained in a rider to the Supplemental Appropriations Act 2009, Pub. L. No. 111-32, 123 Stat. 1859, was the original model for the three subsequent Acts. The Supplemental Act withdrew Department of Defense funding for release in the United States of anyone detained at Guantánamo Bay on the date of enactment, June 24, 2009. This act expired on October 31, 2009. Additionally, legislation with language identical to that of the 2010 Department of Homeland Security Appropriations Act is currently pending as part of an omnibus appropriations bill that was reported out of a conference committee on December 8, 2009. Consolidated Appropriations Act, 2010, H.R. 3288, 111th Cong. Div. B, Tit. V, § 532 (2009). The same constitutional and statutory construction arguments *amici* submit here, *infra* pp. 20-26, are applicable to this omnibus appropriations legislation should it be enacted.

provided, a serious constitutional question would be raised by reading the statutes at issue to repeal habeas jurisdiction); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 Colum. L. Rev. 1533, 1576 & nn.213-14 (2007). The Suspension Clause is not satisfied by merely asking the executive to exercise its best efforts in the diplomatic sphere.

This Court's decision in *Boumediene* is controlling. In *Boumediene*, the Court struck down Section 7(a) of the Military Commissions Act of 2006 ("MCA"), which stripped federal courts of jurisdiction to issue the writ in all actions pertaining to Guantánamo detainees, as a *de facto* suspension of the writ in violation of the Suspension Clause. 128 S. Ct. at 2242-44. Even though Section 7(a) of the MCA "[did] not purport to be a formal suspension of the writ," this Court held that a statute which effectively strips the courts of habeas jurisdiction will avoid a conflict with the Suspension Clause only if it provides adequate substitute procedures. *Id.* at 2262. The Court found that the MCA was intended to create a review procedure more limited than habeas, and that this procedure was not adequate—in part because it was ambiguous as to whether it would fail to empower the courts to order release as a remedy—to meet the requirements of the Suspension Clause. *Id.* at 2274. The MCA, therefore, unconstitutionally suspended the writ. *Id.* at 2266, 2274.

The funding restrictions of the Appropriations Acts, if read to prevent Petitioners' release in the United States despite their having been granted the

writ of habeas corpus, would create the same *de facto* suspension of habeas that this Court struck down in *Boumediene*. Although the Appropriations Acts do not formally suspend the writ, they would deprive Petitioners of the remedy of release without leaving Petitioners an alternative remedy because, as Petitioners show, release in the United States is the only feasible way to bring a certain and timely end to their unlawful detention. Hence, a reading of the Acts to deny Petitioners such release plainly would violate the Suspension Clause under *Boumediene* and render the funding restrictions of the Acts unconstitutional.

This Court has instructed repeatedly that, if possible, a statute should be construed to avoid raising substantial constitutional issues. *See, e.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Judicial application of the avoidance canon respects Congress's equal commitment to constitutional values, a commitment that clearly is implicated where the right to be free from unlawful detention is at stake. *See Zadvydas* v. *Davis*, 533 U.S. 678, 689-90 (2001) (quoting *Crowell*, 285 U.S. at 62) ("[W]hen an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); *St. Cyr*, 533 U.S. at 300 ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (citations omitted); *supra* notes 3-5.

Similarly, this Court has made clear that statutes should not be construed to infringe fundamental liberty interests absent an express statement from Congress. For example, in *Ex parte Endo*, 323 U.S. 283 (1944), this Court reversed the denial of a petition for habeas corpus filed by a Japanese American internee during World War II. The Court rejected the government's argument that its continued detention of petitioner was authorized by a statute providing for "evacuation" that was intended to "protect the war effort against espionage and sabotage." *Id.* at 302-03. In interpreting the "war-time measure," the Court stated that "[w]e must assume, when asked to find implied powers in a grant of . . . executive [detention] authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.* at 300. Where individual liberty is at stake, as here, the clear statement doctrine ensures that the legislature has considered the serious constitutional issues that are raised by its enactments. *St. Cyr.*, 533 U.S. at 299-300, 304-05 (reaffirming "the longstanding rule requiring a clear statement of intent to repeal habeas jurisdiction"); *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991) ("In traditionally sensitive [constitutional] areas . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (internal quotation marks and citations omitted); *cf. Greene* v. *McElroy*, 360 U.S. 474, 507 (1959) (refusing to find that various statutes permitted an agency to take action infringing on fundamental liberties in the

absence of explicit authorization to curtail those liberties).

The application of the avoidance canon and the clear statement rule are appropriate here, where the statutes are amenable to alternative interpretations that would not tread upon Petitioners' fundamental constitutional rights. There are two grounds for applying limiting constructions to avoid reading the Appropriations Acts as an unconstitutional suspension of the writ.

First, the Appropriations Acts are devoid of the requisite "clear statement" that the terms "detained" and "under detention" (as used in the Acts) apply to individuals in Petitioners' position, *i.e.*, those who have won the constitutional right to be released but remain at Guantánamo due to the failure of the United States government's negotiations with foreign governments and the court of appeals' ruling preventing their release in the United States. The U.S. government itself has taken the position in this case that Petitioners "are no longer being detained as enemy combatants" and "are free to leave Guantánamo Bay to go to any country that is willing to accept them." (Resp'ts Br. in Opp'n to Cert. 11.) While the government's suggestion that Petitioners are "free to leave Guantánamo" cannot be taken seriously as a description of the Petitioners' actual situation, its statement is an implicit recognition that, having won their right to release, Petitioners (and others like them who have won their habeas cases) are in an entirely different category than other "detainees" at Guantánamo. Moreover, Congress must be presumed to act with the knowledge that (1)

Boumediene recognized release as the "required remedy" where, as here, the government does not have a lawful basis for continued detention; and (2) the government has failed to find other countries to accept Petitioners despite several years of negotiations, as recognized by the district court and court of appeals. *See, e.g., Abuelhawa* v. *United States*, ___ U.S. ___, 129 S. Ct. 2102, 2106 (2009) ("As we have said many times, we presume legislatures act with case law in mind[.]") (citing *Williams*, 529 U.S. at 380-81 & n.12). Given Petitioners' distinctive circumstances (as emphasized by the government itself) and Congress' presumed awareness of the serious constitutional issue that would be raised by denying them release in the United States, we think it is "fairly possible" to read the terms "detained" and "under detention" in the Appropriations Acts as inapplicable to Petitioners and others whose constitutional right to release has been established by the courts.

Second, in the absence of a clear indication that Congress intended the Acts to deprive Petitioners of their already established and undisputed right to release, any such reading would violate the presumption against statutory retroactivity. *See Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994). As this Court explained in *Hamdan* v. *Rumsfeld*, "[i]f a statututory provision would operate retroactively as applied to cases pending at the time the provision was enacted, then our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Hamdan*, 548 U.S. 557, 576 (2006) (internal quotation marks and citation omitted). The

requirement that Congress clearly convey its intent that a statute apply retroactively derives from the fact that retroactively applicable legislation "takes away, or impairs, rights vested, agreeably to existing laws." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (statement of Chase, J.); *see also Landgraf*, 511 U.S. at 270 ("The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact."). Here, Petitioners' cases were not only pending at the time the Acts were passed; Petitioners had prevailed, and neither the government nor the court of appeals has disputed their right to release. Thus, reading the Appropriations Acts to prohibit Petitioners' release in the United States – the only means of effectuating their right to release – would result in a retroactive denial of Petitioners' rights. As noted above, there is no clear indication that Congress intended such a result. Accordingly, the Acts should not be read to apply retroactively to Petitioners.

CONCLUSION

For all of the foregoing reasons, the decision of the D.C. Circuit below should be reversed, and this case should be remanded to the District Court for execution of its order of immediate release of Petitioners in the United States.

Respectfully
submitted,

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