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

AMICUS CURIAE BRIEF OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT COURT OF OREGON IN SUPPORT OF PETITIONERS

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Table of Contents

Table of Authorities

Page

FEDERAL CASES

FEDERAL STATUTES

OTHER AUTHORITY

Identity and Interest of *Amicus Curiae*

The Oregon Federal Public Defender provides indigent criminal defense pursuant to authority conferred by 18 U.S.C. § 3006A. Pursuant to appointment orders by the United States District Court for the District of Columbia, this office has represented prisoners at the United States Naval Station in Guantánamo, Cuba. After this Court's decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), the District Court granted habeas corpus relief for two clients who had not previously been transferred: *Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009), *final judgment*, 634 F. Supp. 2d 109 (D.D.C. 2009); and *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009) (appeal filed May 29, 2009). Because the petitioners could not safely return to their countries of origin, both cases resulted in denial of an order of release based on *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009). As a result of this representation, this office has expertise and interest in resolution of the question presented to establish both a right to a meaningful remedy and recognition of actual injury for present and potential future clients.[1]

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

Under Supreme Court Rule 37.1, *amicus curiae* seeks to bring to this Court's attention the construction of the Authorization for the Use of Military Force (AUMF) that would include interpretation of the detention power to confer on the Judiciary the authority to order conditional release in the United States of those unlawfully detained where the reasonably necessary time for repatriation has elapsed. This construction is squarely within the Question Presented, and the petition directs the Court's attention to the controlling precedent of *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005). Brief of Petitioner at 45-47. This brief elaborates on the manner in which the AUMF is susceptible to construction to avoid serious constitutional problems, the *stare decisis* interests compromised by *Kiyemba*, and the bases in habeas corpus law for the grant of relief.

I. This Court Should Reverse Because The Court Of Appeals Failed To Interpret The AUMF's Implied Power To Detain To Include Judicial Authority To Order Conditional Release Of Wrongfully Held Prisoners As Required By the Reasoning of *Hamdi*, *Zadvydas*, And *Martinez*.

The AUMF provides the only source of authority to detain Guantánamo prisoners and limits that authority to what is "necessary and appropriate" and "in order to prevent" future terrorism by the defined attackers and harborers:

> [The President is authorized] to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that have occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

AUMF, § 2(a), 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. V). Although the statute includes no express detention authority, this Court's plurality decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), found implicit authority for detention by incorporating that aspect of the law of war, addressing the question only in the limited context of an enemy fighter seized during an international armed conflict. Just as there is implicit authority to detain, this Court should find implicit authority to conditionally release in this Country persons found to be unlawfully detained in Guantánamo who cannot be repatriated within a reasonable time.

*A. The **Kiyemba** Court Vacated Post-**Boumediene** Orders Of Conditional Release By Making Constitutional Rulings The Court Of Appeals Should Have Avoided.*

The *Hamdi* plurality limited the detention authority conferred by the AUMF to its rationale –

preventing return to the battlefield. 542 U.S. at 518-19.[2] In *Boumediene*, this Court identified two responsibilities of the habeas corpus court: to determine whether the detention in a specific case is lawful, which in this context means authorized by the AUMF; and "to order the conditional release of an individual unlawfully detained." 128 S.Ct. at 2266. Despite this language, the Court of Appeals in *Kiyemba* vacated the District Court's grant of conditional release in the United States for Uighur detainees who the courts had determined were unlawfully detained.

The *Kiyemba* ruling was based on three controversial predicates: the availability of habeas corpus does not imply the availability of meaningful relief; no statute allows for conditional release; and the Due Process Clause does not apply to aliens held in Guantánamo. In permitting the indefinite detention of unlawfully held Guantánamo detainees, the *Kiyemba* court made broad rulings in contentious areas of constitutional law: that aliens held in violation of statute, on territory over which the United States exercises exclusive jurisdiction and control, can be indefinitely detained – or, for that matter, tortured and summarily executed – without offending the Due Process Clause; and that statutory and constitutional

[2] The government has abandoned any claim that its authority to detain persons in Guantánamo has any source other than the AUMF. Press Release, Department of Justice, *Department of Justice Withdraws "Enemy Combatant" Definition for Guantánamo Detainees* (March 13, 2009) ("The definition does not rely on the President's authority as Commander-in-Chief independent of Congress's specific authorization.").

habeas corpus do not incorporate authority to order release from custody. By reaching these serious constitutional issues, the Court of Appeals failed to adhere to rules of statutory construction by which the AUMF should be interpreted to avoid making any constitutional ruling.

*B. Under **Zadvydas** And **Martinez**, The **Kiyemba** Court Should Have First Construed The AUMF To Avoid Serious Constitutional Problems By Finding Statutory Authority For The Orders Of Conditional Release.*

Both *Zadvydas* and *Martinez* provide governing precedent for the proposition that the *Kiyemba* court should have avoided the difficult constitutional issues by finding that the AUMF confers judicial authority to grant relief in the form of conditional release in the United States. *Zadvydas* and *Martinez* involved 8 U.S.C. § 1231(a), an immigration statute that, on its face, could be found to allow for indefinite detention of criminal aliens who were either deportable (removable) or excludable (inadmissible and removable), but could not actually be sent home. The statute required removal within 90 days of the final order, but did not address the problem of aliens who could not be repatriated. The government claimed in *Zadvydas* that indefinite detention was approved for aliens who entered the United States, committed a crime and served the sentence, but could not be deported because the home country was not safe.

As a cardinal principle of statutory interpretation, the Court in *Zadvydas* required, as a first step, construction of the detention statute to avoid difficult constitutional questions. 533 U.S. at 689. The Court recognized that a statute permitting indefinite detention of aliens might be unconstitutional: "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. To avoid deciding what due process liberty interests were implicated by indefinite detention of criminal aliens, the Court interpreted the statute to limit the duration of detention to as long as "reasonably necessary" to accomplish the purpose of detention. The Court found that, beyond six months, the purpose of detention – removal from the United States – was not being accomplished, so the statute required that the alien be conditionally released in the United States. *Zadvydas*, 533 U.S. at 701.

In *Kiyemba*, the court failed to look first to the AUMF, the statute upon which the detention was based, to determine whether a construction was fairly possible by which the constitutional questions could be avoided. In contrast to the criminal aliens in *Zadvydas*, the Uighurs held in Guantánamo have been judicially determined to be unlawfully held by the United States. Further, they were involuntarily transported by the government to territory over which the United States wields complete jurisdiction and control. Moreover, the relevant statute in the present cases includes no specific authorization for detention. Because the constitutional dangers are as serious or

greater than in *Zadvydas*, the *Kiyemba* court's failure to first resort to construction of the detention statute itself – here the AUMF – to avoid the constitutional question requires reversal under this Court's precedent.

The error in failing to interpret the AUMF is reinforced by *Martinez*, which involved excludable Mariel Cubans who had been indefinitely detained under the same statute as in *Zadvydas*. Under a fiction of immigration law, Mariel Cubans were considered to have never "entered" the country and, the government argued, had fewer rights than deportable aliens. The language of the statute did not differentiate between the treatment of deportable aliens and those who, under the immigration laws, were deemed never to have entered the country. Justice Scalia, who had dissented in *Zadvydas*, wrote for the Court in *Martinez* and construed the statute to apply equally to Mariel Cubans. 543 U.S. at 386-87.

The Court in *Martinez* held that only a single reading of the statute was proper where the text did not distinguish among classes of persons affected. 543 U.S. at 378. The Court elaborated on principles of statutory construction relevant to the present case. First, the constitutional concerns need only apply to some of the persons affected by the statute. *Martinez*, 543 U.S. at 380 ("The lowest common denominator, as it were, must govern."). Second, the application of the canon of constitutional avoidance results in a purely statutory decision. *Id.* ("[Constitutional avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the

reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."). Third, the constitutional limits should be avoided even where the text could be read to permit indefinite detention. *Id.* at 384 ("[S]ince interpreting the statute to authorize indefinite detention (one plausible reading) would approach constitutional limits, the statute should be read (in line with the other plausible reading) to authorize detention only for a period consistent with effectuating removal.").

The AUMF provides greater textual bases than the *Martinez* statute for interpretation as providing judicial authority to order conditional release in the United States for wrongfully detained persons because the language appears to forbid such detention. Indefinite detention of such persons would be "[un]necessary and [in]appropriate" and not "in order to prevent" future terrorist acts. If the AUMF's silence can be read as either implicitly allowing persons unlawfully detained to remain in indefinite detention or to be subject to conditional release, then *Martinez* requires the plausible interpretation of conditional release.

C. In Addition To The Canon Of Constitutional Avoidance, Other Rules Of Statutory Construction Support Interpretation Of The AUMF As Authorizing The Conditional Release Orders.

Under other rules of statutory construction, the AUMF's limiting language on the use of force should

be interpreted to require conditional release in the United States of persons judicially determined to be detained in violation of law. As a rule of statutory construction, *ubi jus, ibi remedium* – where there is a right, there is a remedy – strongly supports the petitioners' statutory position that the implicit authorization for detention includes an implicit effective remedy for wrongful detention. *See Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916). The *Kiyemba* court's failure to interpret the AUMF before reaching constitutional questions led it to view this maxim as lacking an independent statutory or constitutional existence. 555 F.3d at 1027. However, as a canon of construction, especially related to the scope of remedy in the AUMF and the habeas corpus statutes, as opposed to an independent cause of action, the principle directly applies as an aid to interpretation of the AUMF. Similarly, given the implicit authority to transport aliens into the exclusive jurisdiction and control of the United States, the statute must also provide a balancing authority to release from prison a person wrongfully incarcerated to avoid fundamental unfairness. *See Wardius v. Oregon*, 412 U.S. 470, 477-78 (1973) (statute with express authorization only for government discovery either could be interpreted to provide reciprocal authorization for defense discovery or the discovery provision violated due process).

Given the AUMF's silence regarding indefinite detention of persons determined to be unlawfully held under its authority, the *Kiyemba* court also violated the clear statement rule: "In interpreting a wartime measure we must assume that [its] purpose was to

allow for the greatest possible accommodation between . . . liberties and the exigencies of war." *Hamdi*, 542 U.S. at 544 (Souter, J., concurring) (quoting *Ex parte Endo*, 323 U.S. 283, 300 (1944)). The AUMF includes no clear statement that a person found by the Judiciary to be unlawfully detained in territory controlled by the United States can continue for life in indefinite detention.

Unlawful detentions such as those before the Court, by definition, do not accomplish the only legitimate purpose of detention – prevention of return to the battlefield. The plain language of the statute permits detention only if needed – "necessary and appropriate" – to accomplish a specified purpose – "in order to" prevent attacks. Failure to construe the AUMF to authorize conditional release raises serious constitutional issues regarding life-long imprisonment, under extraordinarily harsh conditions, of persons for whom a federal judge has granted the writ of habeas corpus. The AUMF, when properly construed under the canons of statutory interpretation, authorizes Judicial action that effectively remedies wrongful detention that serves no permissible purpose of preventive detention.

II. The Lower Court Implicitly Overruled *Rasul* And Disregarded The Retroactivity Ruling Of *Hamdan* In Violation Of The Principles Of *Stare Decisis*.

The *Kiyemba* opinion is notable for never mentioning the seminal case regarding habeas corpus rights of Guantánamo detainees: *Rasul v. Bush*, 542

U.S. 466 (2004). In *Rasul*, this Court reviewed the Court of Appeals ruling that aliens outside the sovereign territory of the United States in Guantánamo had no cognizable rights. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The lower court strictly relied on Cuba's sovereignty over Guantánamo, regardless of this Country's plenary and exclusive jurisdiction pursuant to treaties and leases. The circuit court relied extensively on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to hold that aliens in Cuba had no habeas corpus or due process rights.

This Court reversed, holding that, where treaties and leases conferred on the United States exclusive jurisdiction and control over Guantánamo, the habeas corpus statute provided federal courts jurisdiction to determine whether the aliens were unlawfully held. The Court relied on the statutory and common law function of habeas corpus to interpret 28 U.S.C. § 2241 as providing federal courts jurisdiction to hear habeas corpus challenges brought by Guantánamo detainees. In response to the government's claims regarding *Eisentrager*, the Court extensively distinguished and limited its effect. *Rasul*, 542 U.S. at 475-79. The Court also noted that the habeas corpus statute "draws no distinction between Americans and aliens in federal custody," so the statute's protections should be coextensive. *Id*. at 481.

In *Kiyemba*, the court relied extensively on cases such as *Eisentrager* to analyze the rights of aliens outside the sovereign territory of the United States in terms indistinguishable from the *Al Odah* opinion reversed in *Rasul* almost five years earlier.

555 F.3d at 1026-27. The lower court's failure to cite *Rasul* appears to be based on the erroneous assumption that *Rasul* had been overruled by the Detainee Treatment Act of 2005. With no acknowledgment of the plenary jurisdiction the United States exercises over Guantánamo, the court found "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Kiyemba*, 555 F.3d at 1026. In support of application of this principle to Guantánamo prisoners, the court stated: "The Guantánamo Naval Base is not part of the sovereign territory of the United States. Congress so determined in the Detainee Treatment Act of 2005 § 1005(g), 119 Stat. 2743." *Id.* at 1026 n.9.[3]

The lower court profoundly erred in ignoring *Rasul*. The cited portion of the DTA is irrelevant to this Court's analysis in *Rasul*, which assumed that, in a geographic sense, Guantánamo is not part of the United States. The *Rasul* ruling was predicated on "the continuance of the ultimate sovereignty of the Republic of Cuba" while the United States exercised "complete jurisdiction and control" over the base. 542 U.S. at 471; *accord Boumediene*, 128 S. Ct. at 2261. Even if the statute were arguably relevant, the lower court should have deferred to this Court's judgment regarding the DTA's effect on this Court's precedent:

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[3] The DTA defines the United States as follows: "For the purposes of this section, the term 'United States', when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantánamo Bay, Cuba."

"[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). By ignoring this Court's careful analysis of the relevant treaties and leases and the unique role of habeas corpus in protecting liberty, the lower court treated aliens who have a judicial determination they are unlawfully in custody, after having been involuntarily transported to territory in the exclusive jurisdiction and control of the United States, as if they are none of this Country's business.

The lower court's failure to respect the *Rasul* holding is compounded by similar disregard of this Court's holding on retroactivity in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). If the DTA were relevant prospectively – which it is not – retroactive application to habeas petitions filed before its enactment would violate *Hamdan*. In that case, after the Court of Appeals upheld the military commissions' procedures for trying Guantánamo prisoners (*Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005)), the government asserted the intervening DTA, signed into law on December 30, 2005, as a bar to relief. This Court granted habeas corpus on the merits after holding that, applying ordinary principles of statutory construction, the DTA could not apply retrospectively to Guantánamo detainees whose petitions had already been filed. *Hamdan*, 548 U.S. at 576-77. Under *Hamdan*'s holding, the DTA could not be applied to Mr. Kiyemba, whose petition was filed on July 29, 2005, nor to Mr. Basardh and Mr. Ginco, whose

petitions were filed on May 30, 2005, and June 30, 2005, respectively.[4]

III. The District Court Orders Of Conditional Release Vindicate The Speedy Relief Required By Statutory And Constitutional Habeas Corpus.

The Court can reverse simply based on its holding and reasoning in *Boumediene*. Further, both constitutional and statutory habeas corpus include relief without delay for persons found to be unlawfully detained. The experience with aliens in the *Zadvydas* and *Martinez* classes establish the limited and necessary remedy available to the petitioners.[5]

Under 28 U.S.C. § 2243, "[T]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."[6] The lower

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[4] The *Kiyemba* majority's reliance on the DTA is also inconsistent with the court's opinions regarding *Boumediene*'s invalidation of the DTA, at least as far as nullifying the direct remedy in the court of appeals. *Bismullah v. Gates*, 551 F.3d 1068, 1070-75 (D.C. Cir. 2009); *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008).

[5] The Oregon Federal Public Defender represented dozens of criminal aliens during the litigation leading to *Zadvyas* and *Martinez*.

[6] Because this Court in *Boumediene* held unconstitutional the amendment to § 2241 purporting to strip federal courts of habeas corpus jurisdiction, 128 S. Ct. at 2275, the same statutory jurisdiction for habeas corpus relief applies as this Court recognized in *Rasul*.

courts have heard and determined the facts: the petitioners are imprisoned in violation of law. What remains is for the Court to dispose of the matter "as law and justice require." Consistent with this Court's long-standing recognition of the equitable basis for habeas corpus relief, the statute itself should be read to encompass conditional release in the United States for persons unlawfully held on territory within the exclusive jurisdiction of the United States. *See Boumediene*, 128 S.Ct. at 2267 ("Habeas 'is at its core an equitable remedy'") (quoting *Schlup v. Delo*, 513 U.S. 298, 319 (1995)).

In other contexts, this Court has found that the traditional language requiring the court to "summarily" hear habeas cases, which has continued into the federal habeas corpus statue, reflects the need for "promptness," and action taken "without delay," in order to "speedily" provide liberty to the unlawfully detained. *Storti v. Massachusetts*, 183 U.S. 138,143 (1901); *accord Carafas v. LaVallee*, 391 U.S. 234, 238 (1968); *Stack v. Boyle*, 342 U.S. 1, 4 (1951). In *Boumediene*, the Court noted that in some Guantánamo cases "six years have elapsed without the judicial oversight required by habeas corpus" and that "the costs of delay can no longer be borne by those who are held in custody." 128 S.Ct. at 2275.

In the context of the AUMF, conditional release in the United States is a limited and appropriate means to achieve prompt relief for unlawfully detained aliens. In the courts that granted relief to indefinitely detained criminal aliens before *Zadvydas* and *Martinez*, the habeas judgments included conditions of

release to address the needs of the petitioners and the concerns of the community. The aliens did not have an immigration entry status, only an order of conditional release pending removal. Once conditions for removal are met, the alien did not have an independent basis to remain in the United States. Moreover, violation of conditions of release could result in sanctions including reincarceration.

Where the alternative is indefinite detention in an island prison in the sole jurisdiction and control of the United States, the limited grant of conditional release in the United States is a reasonable and necessary concomitant of the detention authority. Prisoners have been wrongfully held for years, including persons whose grounds for detention – when tested in the crucible of habeas proceedings – were found to "def[y] common sense." *Ginco*, 626 F. Supp. 2d at 128 (Leon, J.). Just as the AUMF provided authority to transport seized purported enemy combatants to Guantánamo, the AUMF authorizes conditional release in the United States to persons who the federal courts determine are being unlawfully detained.

Almost eight years of custody without relief – for persons with a judicial determination that there is no lawful basis for continued indefinite detention – is unconscionable. The rule of law requires that there be no further delay. The norm of speedy disposition codified in 28 U.S.C. § 2243 is made a mockery by the reality: the return "shall" be filed "within three days unless for good cause additional time, not to exceed twenty days, is allowed;" the hearing shall be set "not

more than five days after the return unless for good cause additional time is allowed." Without the availability of a meaningful remedy, the process itself becomes, in effect, a suspension of the Great Writ.

Conclusion

The petitioners demonstrated that the Court of Appeals in *Kiyemba* ruled inconsistently with *Boumediene* and exceeded constitutional limitations on preventive detention. For the writ of habeas corpus to have meaning in the real world, and to effectuate the rule of law, the Court should reinstate the District Court's grant of relief. The AUMF and the habeas corpus statutes should be construed to confer authority to order that the Executive conditionally release unlawfully held persons in the United States from territory over which the United States exercises sole jurisdiction and control.

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