No. 08-1234

IN THE

Supreme Court of the United States

JAMAL KIYEMBA, *et al.*, *Petitioners*,

v.

BARAK OBAMA, *et al.*, *Respondents*.

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

BRIEF OF SCOTT C. BLACK, Lt. Gen. US Army (Ret.), JOHN D. ALTENBURG, Maj. Gen., US Army (Ret.), JAMES J. CAREY, Rear Adm., USN (Ret.), STEVEN B. KANTROWITZ, Rear Adm., USN (Ret.), MICHAEL NARDOTTI, Maj. Gen., U.S. Army (Ret.), THOMAS L. HEMINGWAY, Brig. Gen., USAF (Ret.), WASHINGTON LEGAL FOUNDATION, NATIONAL DEFENSE COMMITTEE, and ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Michael Rybak
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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QUESTIONS PRESENTED

Petitioners are aliens who have been cleared for release from detention in Guantanamo Bay, Cuba. Petitioners do not wish to return to China, their nation of citizenship, because they reasonably fear persecution if they return. The United States has been working to find other nations willing to accept Petitioners, and most have left Guantanamo Bay. But seven remain in detention, in two cases because final arrangements for their transfer have not been completed and in the other five because they have turned down offers from countries willing to accept them. In connection with pending habeas corpus petitions, Petitioners seek release into the United States. Congress and the President have determined that release into the United States would be contrary to the public interest. The questions presented are:

(1) Do Petitioners possess a substantive due process right, under the Due Process Clause of the Fifth Amendment, to an order directing their release into the United States, if the alternative is that they will continue to be detained at Guantanamo Bay while they await release to some other country?

(2) Does the Fourth Geneva Convention confer on Petitioners the right to an order directing their release into the United States?

This brief addresses only the first question.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Page(s)

Statutes and Constitutional Provisions:

Miscellaneous:

Page(s)

INTERESTS OF *AMICI CURIAE*

Amici curiae are six retired generals or admirals in the U.S. armed forces, and several organizations with an interest in national security issues.[1]

Lieutenant General Scott C. Black, U.S. Army (Ret.), served 35 years as a Soldier and lawyer, including service as The Judge Advocate General of the U.S. Army from October 2005 to October 2009. Previous military assignments included service as Commanding General and Commandant of the Judge Advocate General's Legal Center and School; Assistant Advocate General for Military Law and Operations; and Assistant Counsel to the President.

Major General John D. Altenburg, U.S. Army (Ret.), served two years as an enlisted man and 28 years as an Army lawyer. His Military Justice and Combat Operations and Peacekeeping Law experience included service or legal oversight in Vietnam, Special Operations, Operation Desert Storm-Kuwait/Iraq, Operation Restore Hope-Somalia, Operation Uphold Democracy-Haiti, Operation Joint Endeavor/Guard-Bosnia, and Joint Guardian-Kosovo, followed by four years as the Deputy Judge Advocate General (1997-2001). He served as the Appointing Authority for Military Commissions from 2004 to 2006.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to this filing; letters of consent have been lodged with the Court.

Rear Admiral James J. Carey, U.S. Navy (Ret.), served 33 years in the U.S. Navy and Naval Reserve, including service in Vietnam. He is a former Chairman of the U.S. Federal Maritime Commission and current Chairman of the National Defense Committee (NDC), which is also joining in this brief. The NDC is a grass roots pro-military organization supporting a larger and stronger military and the election of more veterans to the U.S. Congress.

Rear Admiral Steven B. Kantrowitz, U.S. Navy (Ret.), served on active duty and in the Reserve of the U.S. Navy from 1974 through 2005. He retired as a Rear Admiral in the Judge Advocate General's Corps. During active duty, he served as a judge advocate performing duties involving the full reach of military law practice. This includes service for three years as Special Assistant and Aide to the Judge Advocate General of the Navy. As a Flag officer, he served as the Assistant Deputy Advocate General of the Navy and Deputy Commander, Naval Legal Service Command.

Major General Michael J. Nardotti, U.S. Army (Ret.), served 28 years on active duty as a soldier and lawyer. A decorated combat veteran, he served in Vietnam as an Infantry platoon leader and was wounded in action. General Nardotti later earned his law degree and performed duties as a Judge Advocate in world-wide assignments for two decades. He culminated his service as The Judge Advocate General, the senior military lawyer in the Army, from 1993 to 1997.

Brigadier General Thomas L. Hemingway, U.S. Air Force (Ret.), served at the time of his retirement in May 2007 as the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions. He was commissioned as a second lieutenant in 1962 and entered active service in 1965 after obtaining a law degree. He has served as a staff judge advocate at the group, wing, numbered air force, major command, and unified command level. He was also an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush,* 128 S. Ct. 2229 (2008); *Rasul v. Bush,* 542 U.S. 466 (2004).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici are concerned that, should the Court recognize the constitutional rights being asserted by

Petitioners in this case, the Executive and Legislative Branches will be deprived of the flexibility necessary to confront the imminent threats posed to national security by terrorist groups throughout the world. No decision of the Court has ever afforded Fifth Amendment due process rights to military detainees who are nonresident aliens. Petitioners assert a substantive due process right to liberty, a right (they argue) that entitles them to release into the United States. *Amici* believe that granting substantive due process rights to all Guantanamo Bay detainees poses a significant threat of release into this country of individuals for whom the Executive Branch and Congress have legitimate national security concerns.

STATEMENT OF THE CASE

When the Court issued its 2008 *Boumediene* decision, 17 of those being detained as "enemy combatants" in the U.S. military facility at Guantanamo Bay, Cuba were ethnic Uighurs, a Turkic Muslim minority in far-west China. Fourteen of those 17 are Petitioners in this case; the Court granted their petition for review of an appeals court decision that denied their *habeas corpus* requests for release into the U.S.

In 2001, the 17 Uighurs were in military "training camps" in Afghanistan acquiring weaponry skills. Pet.App.41a. They fled Afghanistan during fighting between U.S. allies and the Taliban, but were captured in Pakistan and sent to Guantanamo Bay, where they have been detained since June 2002. *Id.*

Although each of the 17 was determined by a

Combat Status Review Tribunal (CSRT), following a hearing, to be an "enemy combatant," the United States announced in 2008 that it no longer deemed any of the Uighurs to be enemy combatants and intensified efforts to find a country willing to accept them as residents. Because the 17 reasonably fear they will be persecuted if returned to China (where they are citizens), they do not want to be sent there; and it is United States policy not to return individuals to a country where they face persecution. Four of the 17 were later resettled in Bermuda, and six were resettled in Palau.

Of the seven who remain at Guantanamo Bay, two have agreed to resettlement in Switzerland. They will be sent to Switzerland as soon as arrangements for their transfer are completed. Five others (including the three Uighurs who did not join this petition) remain at Guantanamo Bay following their rejection of resettlement offers from Palau and a second, unidentified country. The Executive Branch continues in talks with other nations (including Palau) regarding their willingness to accept the five for resettlement. Petitioners insist they have waited long enough for an acceptable resettlement and argue that they are constitutionally entitled to a judgment ordering their release into the U.S.

Following the *Boumediene* decision, the 17 Uighurs were entitled to seek release pursuant to *habeas corpus* petitions they filed in district court. The judge hearing those petitions held that because the United States no longer deemed the Uighurs to be enemy combatants yet had not identified a country in which they could be resettled, they were entitled to

immediate release into the United States. Pet.App.38a-63a. The court held that immediate release of the 17 Uighurs into the United States was constitutionally mandated because three conditions had been met: (1) detention was "effectively indefinite"; (2) there was "reasonable certainty" that the detainees would not return to the battlefield to fight against the United States; and (3) "an alternative legal justification ha[d] not been provided for continued detention." *Id.* at 48a. The court's conclusion that the three conditions had been satisfied was based on: (1) the military's determination that the Uighurs should no longer be deemed enemy combatants; and (2) the U.S.'s inability to "provide a date by which it anticipates releasing or transferring the petitioners." *Id.* at 48a-50a.

The appeals court stayed the district court decision, *id.* at 65a-74a, and ultimately reversed. *Id.* at 1a-37a. The appeals court held that Petitioners had no substantive due process right to challenge their detention because "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Id.* at 8a-9a. The court went on to explain that even if the Uighurs could identify a cognizable right that entitled them to release from detention at Guantanamo Bay, they would still not be entitled to a judgment ordering their release into the U.S. because an alien who seeks admission into this country may not do so under any claim of right. *Id.* at 10a. The court stated that *Boumediene*'s holding that federal courts possessed jurisdiction to hear the Uighurs' *habeas corpus* claims did not require a contrary result and noted that *Boumediene* did not purport to overrule case law denying nonresident aliens "any claim

of right" to enter the country. *Id.* at 12a-13a.[2]

SUMMARY OF ARGUMENT

Boumediene indicated that a "*habeas* court must have the power to order the conditional release of an individual unlawfully detained." 128 S. Ct. at 2266. Based on that statement, Petitioners erroneously conclude that the decision below, by denying them a remedy, must conflict with *Boumediene*. Petitioners' conclusion overlooks *Boumediene*'s admonition that the power to release arises only *after* the court determines that a petitioner is being "unlawfully detained."

The United States has explained why Petitioners, although no longer deemed enemy combatants, are stuck in Guantanamo Bay: it has determined that permitting their entry into the United States is against the national interest, and no nation in which Petitioners are willing to resettle has agreed to accept them. To win release, Petitioners must demonstrate that they are being held "in custody in violation of the Constitution or laws or treaties of the United States." They have failed to make such a demonstration.

In particular, Petitioners have failed to demonstrate that detention violates their rights to

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[2] Judge Rogers concurred in the result. *Id.* at 22a-37a. She agreed with the district court that the Uighurs possessed an interest in release from detention that was protected by the Fifth Amendment, but she would have remanded to the district court to provide the government an opportunity to demonstrate that temporary detention was permissible under the federal immigration law. *Id.*

substantive due process under the Fifth Amendment. Indeed, federal courts throughout our history have decisively rejected claims that nonresident aliens possess any substantive due process rights. Moreover, courts and legal scholars at the Founding and at all times thereafter have agreed that when a sovereign nation denies entry to an alien, he is not entitled to appeal to some higher authority as a basis for overruling that denial.

Finally, *amici* are concerned that recognition of the constitutional rights asserted by Petitioners would raise serious national security concerns. If Petitioners are entitled to substantive due process protections, than so are all the other detainees being held at Guantanamo Bay, including some of the most dangerous terrorists in the world. If those avowed enemies of the U.S. are afforded full Fifth Amendment protections, the military's power to continue to detain them could be placed in serious jeopardy.

ARGUMENT

I. *BOUMEDIENE* GRANTED PETITIONERS THE RIGHT TO CONTEST THEIR DETENTION; IT DID NOT GRANT THEM ANY SUBSTANTIVE BASIS FOR DOING SO

Petitioners devote the bulk of their brief to what they view as a conflict between the decision below and this Court's decision in *Boumediene*. Pet.Br. 23-52. They note *Boumediene*'s reaffirmation of *habeas corpus*'s "indispensable" role in "maintaining 'the delicate balance of governance that is itself the surest

safeguard of liberty.'" *Id.* at 21-22 (quoting *Boumediene*, 128 S. Ct. at 2247). They state that the *Boumediene* "majority concluded that a '*habeas* court must have the power to order the conditional release of an individual unlawfully detained.'" *Id.* at 27-28 (quoting 128 S. Ct. at 2266).

Petitioners assert that the D.C. Circuit decision conflicts with *Boumediene* because it effectively denies *habeas* courts that relief authority. According to Petitioners:

> The panel majority held not that the Release Order was unwarranted on the record, but that the *habeas* court had no power at all. In this view, the Executive calls the Judiciary to account: "The critical question is: what law 'expressly authorized' the district court to set aside the decision of the Executive branch and to order these aliens brought to the United States and released in Washington, D.C.?" Pet.App.8a.

Pet.Br.25.

Petitioners base their assertion on a misunderstanding of both *Boumediene* and the decision below. It is premised on their belief that *Boumediene* requires a *habeas* court to recognize broad liberty rights for all those who come before the court, and to order the Executive Branch to cease all interference with those alleged rights unless the Executive fully satisfies the court that its actions are justified. *Boumediene* held no such thing. As the language quoted above indicates, the power of a *habeas* court to order release arises only *after*

the court determines the petitioner is being "unlawfully detained." 128 S. Ct. at 2266. In general, no such determination is appropriate unless the court concludes the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Nothing in *Boumediene* – which held that the Suspension Clause prevents Congress from depriving Guantanamo Bay detainees of access to the writ – suggests Petitioners' detention should be deemed "unlawful" in the absence of a finding that continued detention violates a specific law, treaty, or constitutional provision.

Petitioners have similarly misconstrued the decision below. The D.C. Circuit did not hold that federal courts lack the authority to order Petitioners' release from unlawful detention. Rather, the D.C. Circuit held that the military is not violating Petitioners' rights when its "detention" consists solely of preventing them from entering the United States at a time when they have no other location where they could live free from government constraints.[3] As the appeals court explained, "The question here is not whether petitioners should be released, but where." Pet.App.15a. When the United States tells a nonresident alien at Guantanamo Bay that he is free to leave and move anywhere other than the United States,

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[3] After determining that Petitioners should no longer be deemed "enemy combatants," the military moved them to Camp Iguana, "where they are housed under less restrictive conditions." U.S.Br.6. They are free to leave as soon as they locate a country willing to accept them. Whether the conditions of confinement at Camp Iguana are unnecessarily restrictive is not an issue in these proceedings.

it is up to him to point to some law, treaty, or constitutional provision to support his claim that exclusion from the United States is "unlawful" detention.

Boumediene explained that access to the writ of *habeas corpus* does not afford a detainee substantive rights, but rather provides "fundamental *procedural* protections." *Boumediene*, 128 S. Ct. at 2277 (emphasis added). The "privilege" of *habeas corpus* "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* at 2266 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)). A "meaningful opportunity" includes an opportunity "to rebut the factual basis" for continued detention by presenting witnesses and confronting government witnesses, *id.* at 2269, an opportunity to present his evidence to a judicial officer with "adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief," *id.* at 2271, and entitlement to "a prompt habeas corpus hearing." *Id.* at 2275.

Petitioners do not suggest the lower courts denied them any of those procedural rights. They have not claimed that they were denied an opportunity to provide relevant testimony in support of their petition, or that the lower courts lacked adequate authority to enter findings of fact or conclusions of law. Indeed, following the government's determination that it did not deem Petitioners to be enemy combatants, there were no

longer any disputed issues of material fact.[4] In the district court, the government filed no formal return to the *habeas* petitions and explained that it had abandoned any interest in Petitioners' continued "detention," as that term is normally understood. Instead, it explained that it was keeping Petitioners at Camp Iguana only until Petitioners (with the active, good-faith assistance of the government) could identify a location to which they were willing and able to move.

The D.C. Circuit rejected Petitioners' contention that, under those circumstances, the U.S. government was required as a matter of law to release them into the United States. Nothing in *Boumediene* addresses whether Petitioners possess a substantive right of that nature. It thus cannot be argued that in rejecting Petitioners' contention that they possessed such a substantive right, the D.C. Circuit was denying them any of the procedural protections guaranteed by *Boumediene*.

Nor is there any basis for asserting that Petitioners have not been afforded adequate procedures for pressing a claim that they are entitled to enter the United States. As the D.C. Circuit noted, federal immigration laws specify procedures that allow application for entry. Pet.App.16a-19a (citing, *inter*

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[4] Petitioners were not brought to Washington, D.C. to testify before the district court, but they do not contend that their live testimony was necessary for the purpose of addressing any material facts. In general, the federal *habeas* statute does not require a *habeas* petitioner's presence in court unless it is "necessary" for purposes of testifying or attending a trial. 28 U.S.C. § 2241(c)(5).

alia, 8 U.S.C. § 1101(a)(16) (application for immigrant visa); 8 U.S.C. § 1201(a)(1)(B) (application for a nonimmigrant visa); 8 U.S.C. § 1157(c)(1) (requirements for admission as a "refugee")). Petitioners specifically note that they have not sought entry under the immigration laws and insist that "[t]his case is not an immigration case," Pet.Br.22, but the existence of procedures for applying for entry under the immigration laws precludes any argument that they are being denied the opportunity to convince federal officials that they should be released into the U.S. as an alternative to detention.[5]

In sum, there is no basis for Petitioners' claim that the decision below conflicts with *Boumediene*. *Boumediene* established Petitioners' constitutional right to go into federal court to press a claim that they are being held "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

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[5] Petitioners' assertion that there is some great divide between immigration law and *habeas corpus* law is historically inaccurate. "Because federal immigration laws from 1891 until 1952 made no express provision for judicial review [of deportation and exclusion decisions], what limited review [that] existed took the form of petitions for writs of habeas corpus." *Demore v. Kim,* 538 U.S. 510, 538-39 (2003) (O'Connor, J., concurring in part and concurring in the judgment). Those being detained at the border in order to prevent their entry were granted access to the writ of habeas corpus – even when they could end the detention at any time by returning to their native country. *Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.").

But it did not intimate that their detention constitutes such a violation, or that denying them entry into the United States effects a suspension of *habeas corpus*. Petitioners' assertion that the D.C. Circuit improperly held that it lacked the power to order their release into the United States from a detention that is "without authorization in law," Pet.Br.i (Question Presented), begs the question raised by this case: is their detention illegal under some statute, treaty, or constitutional provision?

II. THERE IS NO HISTORICAL BASIS FOR ANY CLAIM THAT PETITIONERS' DETENTION VIOLATES THEIR RIGHTS UNDER THE U.S. CONSTITUTION

Petitioners assert two constitutional claims: (1) the Executive Branch lacks constitutional authority to detain Petitioners now that it concedes they are not enemy combatants; and (2) their continued detention violates their rights under the Due Process Clause of the Fifth Amendment.

The first argument is frivolous. As the United States details at length in its brief, Congress has adopted numerous statutes authorizing the Executive Branch "to determine which aliens may enter the United States" and to detain aliens when necessary to prevent them from entering the country. U.S.Br.29-31. Given Petitioners' concession that Executive detention is permissible when authorized by Congress, the lack-of-

authorization claim is not tenable.[6] *Amici* also note that Petitioners have not identified any constitutional provision that is enforceable by nonresident aliens for the purpose of asserting a lack-of-authorization claim.

Petitioners' due process claims hinge at the outset on a determination that nonresident aliens possess substantive due process liberty interests of the sort being asserted by Petitioners. As the Court stressed in *Boumediene* and *Rasul*, the extent to which nonresident aliens should be deemed entitled to constitutional protections is informed largely by whether such protections have been recognized throughout Anglo-American legal history.[7] As shown

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[6] Petitioners argue alternatively that Congress has prohibited the Executive Branch from detaining excludable aliens for periods exceeding six months. Pet.Br.45-47. As discussed *infra,* Petitioners' six-months argument is based on a misreading of the Court's decision in *Clark v. Martinez*, 543 U.S. 371 (2005). The only statute cited by Petitioners, 8 U.S.C. § 1231(a)(6), is wholly inapplicable to the facts of this case. Nor can Petitioners' detention be fairly characterized as "indefinite," in light of the government's successful resettlement of 15 of the 22 Uighurs, the imminent resettlement of two more Uighurs, offers of resettlement from two other countries for each of the remaining five Uighurs, and the government's continuing good-faith efforts to find permanent homes that are acceptable to those five.

[7] *See Rasul v. Bush,* 542 U.S. at 481 (2004) ("application of the habeas statute to persons detained at [Guantanamo Bay] is consistent with the historical reach of the writ of habeas corpus"); *Boumediene*, 128 S. Ct. at 2278 (Souter, J., concurring) ("[N]o one who reads the Court's opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Courts's reliance on the historical background of habeas generally in answering the statutory question."); *see also, id.* at 2248-2251 (discussing at length

below, there is no historical support for recognition of Fifth Amendment substantive due process rights for nonresident aliens who object to Executive Branch detention. Moreover, there is no historical support for recognition of the right of nonresident aliens to enter the United States over the objections of Congress and the Executive Branch.

A. Throughout American History, Nonresident Aliens Have Been Denied Fifth Amendment Due Process Protections Because They Do Not Possess Meaningful Ties to American Society

Petitioners argue that regardless whether the government has provided them with sufficient procedural opportunities to assert their claims, continued detention violates their *substantive* due process rights – "a due process liberty right for Guantanamo detainees that gives effective relief from indefinite Executive imprisonment." Pet.Br.54. They cite *Boumediene* for the proposition that nonresident aliens at Guantanamo Bay are entitled to substantive due process protections in the absence of evidence that recognition of such a right at Guantanamo Bay would be "impracticable and anomalous." *Id.*

Petitioner's argument is based on a misreading of *Boumediene* and, if accepted, would require overturning

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the history of *habeas corpus* at common law before stating that "no certain conclusions" could be drawn regarding whether the common-law writ of *habeas corpus* ran only to those territories over which the British Crown was sovereign).

200 years of American constitutional history. *Boumediene* addressed the geographic scope of federal court jurisdiction; it determined that federal court *habeas corpus* jurisdiction extended to anyone located in a territory over which the United States exercises either *de jure* or *de facto* sovereignty, in the absence of evidence that the exercise of such jurisdiction would be "impractical or anomalous," *id.* at 2262, and that the Constitution's Suspension Clause limits Congress's power to contract that jurisdiction.[8] But the Court did not hold that everyone located in such territories is entitled to the full measure of constitutional rights. As noted above, the Court did not address which constitutional rights Guantanamo Bay detainees should be permitted to assert in their *habeas* proceedings.

Indeed, this Court has repeatedly held that even when aliens are permitted to invoke federal court jurisdiction, they are entitled to significantly fewer constitutional protections than citizens. For example, in *Demore v. Kim,* 538 U.S. 510 (2003), the Court held that a resident alien subject to removal proceedings may be detained by immigration authorities for the duration of those proceedings, even absent a finding that the alien poses either a flight risk or a danger to the community. It rejected the alien's claim that a statute mandating detention violated his substantive due process rights. 538 U.S. at 528. The Court readily acknowledged that detention of citizens under similar circumstances would have been unconstitutional, but it

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[8] As an example of a setting in which exercise of *habeas* jurisdiction would be "impractical or anomalous," the Court cited a detention facility "located in an active theater of war." *Id.*

explained that "this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Id.* at 522.

Importantly, the reduced constitutional protections afforded aliens has nothing to do with their geographic location; the resident alien in *Demore* had lived in the United States virtually his entire life. *Id.* at 513. The Court has repeatedly held that even when the federal courthouse door is open to resident or nonresident aliens, they enjoy considerably fewer constitutional protections than citizens. *See, e.g., Zadvydas v. Davis,* 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens"); *Reno v. Flores,* 507 U.S. 292, 305-06 (1993) ("Thus, in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens"); *United States v. Verdugo-Urquidez,* 494 U.S. 259, 273 (1990); *Mathews v. Diaz,* 426 U.S. 67, 79-80 (1976).

1. Constitutional Rights Are Conferred Based on the Extent of an Alien's Ties to American Society

The Court has based the level of constitutional protection afforded an alien on the extent of his or her ties to American society, not on geography. Lawful resident aliens possess constitutional rights almost on a par with those of citizens, based on their "significant voluntary connection with the United States," even

when they leave the country temporarily. *Verdugo-Urquidez,* 494 U.S. at 271. *See also Landon v. Plascencia,* 459 U.S. 21, 32 (1982) (resident aliens are entitled to significant constitutional rights because they have "beg[un] to develop the ties that go with permanent residence."); *Johnson v. Eisentrager,* 339 U.S. 763, 777-78 (1950) (resident aliens have been afforded legal rights because "permitting their presence in the country implied protection.").

Aliens who enter the country illegally but who have lived in the country long enough to develop ties with American society also are entitled to substantial constitutional protection. *See, e.g., Plyler v. Doe,* 457 U.S. 202, 211-12 (1982) (illegal aliens protected by Equal Protection Clause); *Verdugo-Urquidez,* 494 U.S. at 271. Any alien who has lived in the country long enough to "become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here," has a constitutional right "to be heard upon the questions involving his right to be and remain in the United States." *The Japanese Immigrant Case,* 189 U.S. 86, 101 (1903).

By contrast, aliens who have not developed ties with American society have rarely, if ever, been afforded protection under the Constitution.[9] Thus, the Court has

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[9] Physical presence in the United States is not the only means by which an alien can develop the necessary ties with American society, as the D.C. Circuit recognized. Pet. App. 8a-9a (Due Process Clause can apply to aliens with property in the United States). On the other hand, physical presence is not necessarily a sufficient condition. Thus, *Verdugo-Urquidez* rejected a Mexican citizen's arguments that he was entitled to invoke the Fourth

repeatedly held that aliens seeking admission to the United States cannot invoke the Due Process Clause as a basis for challenging their exclusion. *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 542 (1950) ("an alien who seeks admission into this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government."); *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 212 (1953) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). In most such cases the alien is physically present in the United States. In *Mezei,* for example, the alien seeking admission reached Ellis Island, New York before being denied admission. It was lack of sufficient ties to American society, not lack of physical presence in the country, that caused the Court to rule those individuals lacked constitutional protection.

Amendment to suppress evidence against him, even though he was physically present in a California prison cell after his arrest in Mexico. The Court explained that "this sort of presence – lawful but involuntary – is not of the sort to indicate any substantial connection with our country." *Id.* at 271. Physical presence is also insufficient to support a claim of constitutional entitlement if one is a citizen of a nation at war with the United States. Such "enemy aliens" are denied "the constitutional immunities of citizens." *Eisentrager,* 339 U.S. at 775. Severe restraints on enemy aliens who are physically present in the United States have been in place since 1798. *Id.* at 773-75 & n.6 (describing the Alien Enemy Act of 1798, 1 Stat. 577, 50 U.S.C. § 21.). The Act was first employed during the War of 1812, for the purpose of detaining and deporting British citizens without legal process. *See* David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb,* 121 HARV. L. REV. 941, 972 (Jan. 2008).

Knauff and *Mezei* are not aberrations. Throughout American history, courts have not permitted nonresident aliens to challenge exclusion orders on the basis of a claim of right. In the Nation's early years, immigration control was largely a State function. In *New York v. Miln,* 36 U.S. 102 (1837), the Court upheld New York's authority to exclude aliens without providing legal process. The 1824 New York statute at issue was typical of the era; it permitted officials to order the removal of any arriving alien "deemed liable to become chargeable on the city." 36 U.S. at 105. The Court said that in carrying out its "legitimate power" to control immigration, New York was free to use "whatever means, being appropriate to the end, it may think fit." *Id.* at 137.

Similarly, in *Ekiu v. United States,* 142 U.S. 651 (1892), the Court rejected a constitutional challenge to an immigration statute that denied arriving aliens any right to judicial review of an immigration official's decision that a nonresident alien was ineligible for admission. The Court stated:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due

process of law.

Id. at 660. The appeals court cited numerous other, more recent decisions to the same effect. Pet.App.6a-9a.

The *habeas corpus* petitioners in *Knauff, Mezei, Miln,* and *Ekiu* were all physically present in the United States, yet each of their petitions was denied on the ground that – as nonresident aliens without significant ties to American society – they were not entitled to protection under the Due Process Clause. Petitioners are not even physically present in the United States; they have been permitted to file *habeas corpus* petitions based on *Boumediene's* determination that Guantanamo Bay, although part of Cuba, is an area over which the United States exercises "*de* facto sovereignty." 128 S. Ct. at 2262. But as *Knauff, Mezei, Miln,* and *Ekiu* demonstrate, that a nonresident alien possesses the right to file a *habeas corpus* petition does not mean that he or she is entitled to the protections of the Fifth Amendment. And if nonresident aliens detained after reaching a U.S. port of entry are denied due process rights, there can be no historical basis for extending such rights to those, such as Petitioners, who have not even made it that far and who similarly lack any ties to American society.

Petitioners seek to distinguish themselves by noting that while Ignatz Mezei came to the United States voluntarily, they were brought involuntarily to U.S.-controlled territory. Pet.Br.37. But Petitioners fail to explain why that distinction is of constitutional importance. The Court has made clear that constitutional rights are conferred based on an alien's

ties to American society, and the involuntary nature of Petitioners' arrival at Guantanamo Bay does nothing to strengthen their claims to such ties. Indeed, *Verdugo-Urquidez* explicitly rejected the assertions of a Mexican citizen that his involuntary removal from Mexico to a California prison strengthened his claim to Fourth Amendment protections. *Verdugo-Urquidez,* 494 U.S. at 271.

2. Due Process Rights Conferred on Aliens Generally Have Been Limited to Procedural Due Process

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

The Court has recognized that it also includes a categorical prohibition against certain extreme forms of government conduct that results in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," prevents the government from engaging in conduct that "shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno,* 481 U.S. 739, 746 (1987) (internal quotations omitted). Petitioners are pursuing a substantive due process claim; they urge the Court to rule that no matter how much process the government affords them,

their continued detention at Guantanamo Bay "shocks the conscience" in light of the military's determination they no longer be deemed enemy combatants.

Amici submit that there is no historical support for conferring substantive due process protections on nonresident aliens. While, as discussed above, the Court has rarely conferred any rights under the Due Process Clause on nonresident aliens, the few occasions on which it has have involved *procedural* due process rights.

In the nineteenth century, aliens were generally deemed to lack any constitutional rights unless they had well-established ties with American society. *The Japanese Immigrant Case,* 189 U.S. 86 (1903), has often been viewed as a breakthrough for the due process rights of aliens. The petitioner had only recently settled in the San Francisco area when immigration authorities charged her with entering the country illegally and initiated deportation proceedings. The Court nonetheless held that the Fifth Amendment required she be provided "all opportunity to be heard upon questions involving [her] right to be and remain in the United States." 189 U.S. at 101. The process required under the immigration statute upheld in the case was actually quite limited, *id.* at 100, but the case established for the first time that the Due Process Clause prevented the summary deportation of aliens living in the United States and suspected of having entered the country illegally. The case was followed in the ensuing decades by a series of cases that firmly established procedural due process rights in deportation cases. *See, e.g., Chin Yow v. United States,* 208 U.S. 8,

12-13 (1908) (one facing exclusion has a due process right to a hearing on his claim that he is a U.S. citizen).

Knauff and *Mezei* held that procedural due process rights would not similarly be extended to excludable aliens. The Court drew a bright line between aliens who had managed to get past the port of entry and those (such as Ellen Knauff and Ignatz Mezei) who were detained ("excluded") at the port. The Court determined that aliens who are denied entry at the port lack any meaningful ties to American society and thus are not entitled to any procedural due process protection. The result was that Mezei was denied entry even though he was never told the rationale for his exclusion and thus had no opportunity to respond. *Mezei,* 345 U.S. at 208-09.

As Petitioners point out, Pet.Br.37, *Mezei* has been subject to considerable criticism. But Petitioners fail to note that the criticism has focused principally on the Court's refusal to accord any procedural due process rights to excludable aliens. *See, e.g.,* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390-95 (1953). There has been very little criticism of the Court's rejection of Mezei's substantive due process claim.[10]

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[10] After he was denied entry into the United States, Mezei was unable to find any country willing to accept him. Thus, the effect of the denial of entry was Mezei's indefinite detention at Ellis Island. The Court rejected Mezei's claim that the indefinite detention violated his substantive due process rights; the Court held that Mezei, as an excludable alien, had no substantive due process right to be free from indefinite detention. 345 U.S. at 216.

Indeed, the four *Mezei* dissenters focused their criticisms solely on the rejection of Mezei's procedural due process claim that he was entitled to a hearing. *Mezei*, 345 U.S. at 218 (Black, J., dissenting); *id.* at 227 (Jackson, J., dissenting) ("[W]hen indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them."). Justice Jackson explicitly rejected Mezei's claim that his indefinite confinement violated his substantive due process rights:

> Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances. . . . Nor do I think the concept of due process so paralyzing that it forbids all detention of an alien as a prevention measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. . . . I conclude that detention of an alien would not be inconsistent with substantive due process, provided – and this is where my dissent begins – he is accorded procedural due process of law.

Id. at 222-24.

Later decisions of the Court have done nothing to undermine the vitality of *Mezei* (and Justice Jackson's dissenting opinion) with respect to the substantive due process rights of aliens, and of excludable aliens in particular. *See, e.g., Demore,* 538 U.S. at 521-22

(upholding detention of aliens even though substantive due process principles would have prohibited detention of citizens in similar circumstances); *Zadvydas,* 533 U.S. at 693 (noting, in connection with discussion of substantive due process rights, that "the distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.").

Petitioners' substantive due process argument relies heavily on *Clark v. Martinez*, 543 U.S. 371 (2005). That reliance is misplaced. *Martinez* involved two Cubans who were denied entry when they arrived in Florida during the 1980 Mariel boatlift. However, Cuba refused to allow them to return home, and they were temporarily paroled into this country. After both individuals committed numerous felonies while on parole, they were ordered deported and held in detention until such time as Cuba agreed to allow them to return. The Court held that this indefinite detention violated 8 U.S.C. § 1231(a)(6), which prohibits detention of an alien for more than six months after the alien has become subject to a final order of deportation. 543 U.S. at 386-87. That statute is totally inapplicable in this case because Petitioners are not subject to final orders of deportation. Moreover, Petitioners are simply wrong in asserting, Pet.Br.46, that the Court applied "the doctrine of constitutional avoidance" in construing § 1231(a)(6). *Martinez* was a straightforward statutory construction case made easy by the fact that *Zadvydas* several years earlier had provided a detailed interpretation of the same statute (in connection with the indefinite detention of permanent resident aliens).

In sum, there is a modicum of support in the case law for an argument that Petitioners and similarly situated nonresident aliens may be entitled to procedural protections in connection with their efforts to win their freedom. But Petitioners' Fifth Amendment due process claim is based on substantive due process, not procedural due process. There is zero support for such a claim in this Court's case law.

B. There Is No Historical Support for Recognition of the Right of Nonresident Aliens to Enter the U.S. Over the Objections of the Political Branches

Even if Petitioners could demonstrate they possess substantive due process rights, they would be only half-way home. They would still need to demonstrate that those rights are sufficient to overcome the opposition to their entry by both Congress and the Executive Branch. Petitioners have made no such demonstration. In support of its assertion that this Court "has, without exception, sustained the exclusive power of the political branches to decide which aliens may, and which may not, enter the United States, and on what terms," the D.C. Circuit cited a line of cases stretching more than a century. Pet.App.6a-7a. Petitioners have not cited a single case to the contrary.

The right of sovereigns to exclude from their territory any or all aliens was well accepted among legal theorists at the time of ratification of the Constitution and the Bill of Rights. For example, Swiss international law theorist Emmerich de Vattel wrote in 1758:

> The sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of domain and sovereignty.

Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law,* Book 2, Ch. 7, § 94 (1758). Permitting foreigners to go into a nation's courts and assert the right to enter over the objections of the nation's executive and legislative branches would not, of course, be consistent with exercise of the absolute discretion contemplated by Vattel.[11]

Similarly, Blackstone believed that aliens may acquire rights within a nation only while they are living in the nation. William Blackstone, *Commentaries on the Laws of England,* Book the First, Ch. 10, "Of People, Whether Aliens, Denizens, or Natives" (1765-1769). One who has never entered a nation and has never sworn allegiance to it has no basis for asserting any claim of right against that nation. *Id.*

At the time of the Founding, many States had quarantine laws, designed to prevent entry of those suspected of having contagious disease. These laws generally did not provide for any appeal from an official's quarantine decision, or an individualized

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[11] This Court has repeatedly cited Vattel's work in support of its conclusion that nonresident aliens do not possess due process rights. *See, e.g., Miln,* 36 U.S. at 132; *Ekiu,* 142 U.S. at 659.

examination of whether the quarantined individual was actually sick. Gerald Neuman, *Strangers to the Constitution,* at 42 (Princeton, 1996). Rather, quarantine decisions were based on a determination that the individual came from an area where the disease was prevalent. *Id.* Using quarantines to exclude a foreigner from one's jurisdiction without regard to the foreigner's individualized medical condition would have been difficult to square with an understanding that nonresident aliens were protected under the Fifth Amendment's Due Process Clause.

Petitioners cite *United States v. Libellants of Amistad,* 40 U.S. 518 (1841), as an example of a case in which the Court permitted nonresident aliens to enter the country over the objection of the Executive Branch. Pet.Br.44. That is not an accurate characterization of the case. The case involved a Spanish slave ship that arrived off the coast of Long Island after Africans on board the ship killed the crew. Before the Supreme Court, the Executive Branch never asserted a right to exclude the Africans from the United States. The principal issue before both the district court and the Supreme Court was whether the Africans were slaves and thus the property of Spaniards. Based on treaty obligations, the U.S. government prosecuted the property claim on behalf of Spain. It is true that in the district court the government also argued that, if the property claim were rejected, the court should not release the Africans in the United States but rather should allow the President to deport them directly to Africa. However, when the case reached the Supreme Court, the government dropped its deportation argument. The Court explicitly recognized that the

government was confining its argument to the return-the-slaves-to-Spain claim. *The Amistad,* 40 U.S. at 591 ("The United States do not assert any property [from the ship] in themselves, nor any violation of their own rights, or sovereignty, or laws, by the acts complained of. . . . They simply confine themselves to the right of the Spanish claimants to the restitution of their property.").

Justice Story found that the defendants were not slaves. In light of what he viewed as the government's abandonment of its deportation argument, *id.* at 596, he ordered the Africans released from their Connecticut jail cells. The place of release was clearly of relatively minor importance to the parties, because (as Petitioners concede, Pet.Br.44 n.40), the Africans had always made clear their desire to return home (which they did, in 1842).

Indeed, the procedural history of the case makes clear that the place of the African's release (if there was to be a release) was not important to the Executive Branch. The district judge ruled that the Africans were not slaves, but he granted the government's request that they be deported to Africa. The Executive Branch sought review of the "not slaves" decision in the Supreme Court but did not re-raise the deportation claim. Had the place of release been a high priority for the government, it likely would have chosen to preserve its victory on the deportation issue by declining to appeal.

Petitioners also point to the successful invocation of *habeas corpus* by foreigners impressed into the British navy as historical evidence to support their

cause. Pet.Br.30. Yet Petitioners fail to explain how the cited cases are relevant to their claim. That many foreign sailors used *habeas corpus* petitions to win their release is unremarkable; thousands of aliens have filed successful *habeas corpus* petitions in American courts as well. Petitioners have cited no evidence that any impressed foreigner was released *into Britain* over the objections of the Crown.

Moreover, impressed sailors did not win their release based on some common law or inherent right that is equivalent to a U.S. constitutional right. Rather, they did so on the basis of a 1740 statute that outlawed impressments of foreigners and granted them the right to sue for their release. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications,* 94 VA. L. REV. 575, 605 n.72 (2008) (The statute exempting foreigners was "the chief grounds on which [foreign] sailors used habeas corpus to challenge impressments."). Nor was the statute adopted for the purpose of protecting foreigners from press gangs. Rather, Britain had a strong interest in excluding foreigners to ensure that its navy was populated solely by sailors whose loyalty was assured.

The government's brief spells out in detail all the steps Congress has taken to prevent Petitioners' release into the United States. Petitioners have supplied no historical evidence to support their claim that nonresident aliens possess rights that would allow them to overcome the combined opposition of the political branches to their entry.

III. RECOGNITION OF THE CONSTITUTIONAL RIGHTS ASSERTED BY PETITIONERS WOULD RAISE SERIOUS NATIONAL SECURITY CONCERNS

Petitioners are asking the Court to rule that every detainee now being held at Guantanamo Bay possesses a substantive due process liberty interest protected by the U.S. Constitution. They further ask the Court to rule that any such detainee who succeeds in overturning his "enemy combatant" designation and who cannot be sent to his nation of citizenship must be released into the United States. They further ask for adoption of a rule that would require such release without regard to whether the political branches of government believe that release poses national security concerns.

Amici respectfully submit, based on their considerable military experience, that recognition of the constitutional rights asserted by petitioners would raise serious national security concerns. Congress and the Executive Branch have determined that national security dictates that the seven Uighurs remaining at Guantanamo Bay should not be released into the United States. Simply because the Uighurs are no longer deemed "enemy combatants" does not mean there can be adequate assurance they will not be disruptive if allowed to enter the United States. Each of them attended a military training camp in Afghanistan and acquired weaponry skills. Each was at one time determined to be an "enemy combatant" by a CSRT. More than a few of the individuals released from

Guantanamo Bay have returned to the battlefield to fight against the United States. *Boumediene,* 128 S. Ct. at 2295 (Scalia, J., dissenting). If the Executive Branch and Congress are sufficiently concerned about releasing the seven Uighurs into the United States to oppose such release, the courts – which have vastly fewer resources than the political branches and far less expertise in national security matters – should be extremely reluctant to second-guess that position.

The potential national security concerns at issue range far beyond how the Uighurs may conduct themselves once released into the United States. For example, China has stated in no uncertain terms that it wants the Uighurs returned to China and opposes permitting them to live freely in some other country. *See, e.g.,* Peter Spiegel and Barbara Demick, "Uighur Detainees at Guantanamo Pose a Problem for Obama," *Los Angeles Times* (Feb. 18, 2009) ("China is insisting that the Uighurs be sent home to face trial for separatist activities. It has further intimated that any country that offers them political asylum will in effect be harboring dangerous terrorists."); Bradley S. Klapper, "China to Swiss: Don't Take Uighurs from Guantanamo," *Miami Herald* (Jan. 8, 2010) ("China warned the Swiss government Friday against accepting two Guantanamo inmates as part of President Barack Obama's effort to close the detention center, calling them terrorist suspects who should face Chinese justice."). Releasing the seven Uighurs into the United States undoubtedly would have adverse effects on U.S. relations with China. *Amici* submit that the Executive Branch and Congress are better equipped than is the Court to weigh the costs of those effects against

whatever benefits might come from the Uighurs' release into the United States.

Moreover, every Guantanamo detainee, including some of the most dangerous terrorists in the world, has filed a *habeas* petition in the District of Columbia and will reap the benefits of a decision extending due process rights to nonresident aliens at Guantanamo Bay. Given the well-known difficulty that the military has experienced in handling the massive amounts of evidence relevant to each of the pending *habeas* petitions, it is within the realm of possibility that at least some of the most highly dangerous detainees will prevail in their habeas petitions. If that occurs and the detainee reasonably fears persecution in his home country, a decision favoring Petitioners in this matter could well lead to the release of dangerous terrorists into the United States. It would also compound the significant disruptions already being experienced by the military as it is forced to divert large amounts of its resources to defending against the *habeas* petitions filed by so many of its military detainees. *See* Gen. Thomas L. Hemingway, *Wartime Detention of Enemy Combatants: What if There Were a War and No One Could Be Detained Without an Attorney?,* 34 DENV. J. INT'L L. & POL'Y 63 (2006).

The district court ruled that release into the United States was required because the Uighurs are no longer deemed "enemy combatants" and have nowhere else to go. Under the district court's "all or nothing" standard, the political branches' considered views that the Uighurs could pose a threat to national security if released into the United States count for nothing –

because their evidence does not at present rise to the level necessary to support an "enemy combatant" designation. That decision is a sharp break from 220 years of constitutional history, during which the courts deferred considerably to the political branches' foreign affairs decisions, and raises serious national security concerns.

CONCLUSION

Amici curiae request that the Court affirm the the judgment below.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Michael Rybak
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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