No. 08-1234

IN THE

Supreme Court of the United States

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

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

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, THE RUTHERFORD INSTITUTE, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SIDNEY S. ROSDEITCHER
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, NY 10036
(212) 382-6600

ALEX YOUNG K. OH
Counsel of Record
WHITNEY D. RUSSELL
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, NW, Suite 500
Washington, DC 20006
(202) 223-7300

Additional Counsel Listed on the Inside Cover

May 7, 2009

ELIZABETH GOITEIN
AZIZ HUQ
EMILY BERMAN
THE BRENNAN CENTER
FOR JUSTICE AT THE
NEW YORK UNIVERSITY
SCHOOL OF LAW
161 Avenue of the
Americas, 12th Floor
New York, NY 10013
(212) 998-6730

SHARON BRADFORD
FRANKLIN
THE CONSTITUTION
PROJECT
1200 18th Street, NW,
Suite 1000
Washington, DC 20036
(202) 580-6920

JOHN W. WHITEHEAD
THE RUTHERFORD
INSTITUTE
Post Office Box 7482
Charlottesville, VA 22906
(434) 978-3888

JEFFREY GREEN
MALIA N. BRINK
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L Street, NW, 12th Floor
Washington, DC 20036
(202) 872-8600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES

MISCELLANEOUS

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*, 128 S. Ct. 2229 (2008).

Amicus the Brennan Center for Justice at the New York University School of Law is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. We advocate for national security policies that respect the rule of law, constitutional and human rights, and fundamental freedoms. We are counsel in several cases involving Executive detention.

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

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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.

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 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 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 wrong-doing. 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 ARGUMENT

Amici agree with Petitioners that review by this Court is required because the court of appeals' decision in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), has the practical effect of nullifying this Court's landmark ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). *Amici* submit this brief to expand upon the history of the Great Writ and its vital

function in the constitutional scheme of Separation of Powers as a check on arbitrary or unlawful government detention, to illustrate that the courts' power to end unlawful detention is a critical and necessary component of *Boumediene*'s holding.

Amici demonstrate the following: first, the remedy of release is inherent in the Great Writ; second, the power to order release is pivotal to the function of the Suspension Clause in the Separation of Powers as a check on unlawful Executive detention; and third, without the authority to order release in this case, the judicial power of Article III courts to enter binding judgments not subject to revision by the political branches is vitiated.

Finally, *Amici* submit that there is an urgent need for this Court's review because the court of appeals' erroneous decision, as binding circuit precedent to the lower courts now entertaining more than 200 habeas petitions in the District of Columbia, compels the lower courts to disregard *Boumediene*. Indeed, one district court already has held that although there is no lawful basis to detain the petitioner in the case before it, it has no power to order his release in light of *Kiyemba*. *See Basardh v. Obama*, No. 05-889, 2009 WL 1033193, at *4 (D.D.C. Apr. 15, 2009). Sound principles of judicial economy therefore require this Court's intervention to restore the full meaning of *Boumediene*.

ARGUMENT

I. THE POWER TO ORDER RELEASE IS INHERENT IN THE GREAT WRIT, IS REQUIRED BY SEPARATION OF POWERS PRINCIPLES, AND IS NECESSARY FOR THE PROPER EXERCISE OF ARTICLE III JURISDICTION.

The Suspension Clause plays a critical role in the Constitution's Separation of Powers architecture. U.S. Const. art. I, § 9, cl. 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."). If courts have no ability to order a meaningful remedy in the face of unlawful Executive detention, as the court of appeals held, the Great Writ has no function in the Separation of Powers, and the Article III power of the courts is undermined. Only through *certiorari* review of the court of appeals' decision can this Court effectively preserve the full panoply of Article III powers as a check on unlawful Executive detention.

A. History Shows That Release of Persons Unlawfully Detained Is the Object of the Great Writ.

There were various types of habeas corpus in existence by the end of the 16th century in England; of these, the "most important" was the "habeas corpus *ad subjiciendum*" — now known as the Great Writ — which was "the writ used to 'inquir[e] into illegal detention with a view to an order releasing the petitioner.'" *Preiser v. Rodriguez*, 411 U.S. 475, 484 & n.2 (1973) (quoting *Fay v. Noia*, 372 U.S. 391, 399 n.5 (1963)); *see Bushell's Case*, Vaughan, 135, 136,

124 Eng. Rep. 1006, 1007 (1670) ("The writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it."). At its core, habeas corpus is thus "an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Preiser*, 411 U.S. at 484.

Prior to its incorporation into the Constitution, the central function of the Great Writ at common law was to order the release of those who were unlawfully restrained. *See*, *e.g.*, 3 William Blackstone, *Commentaries* *129 (1768) ("[I]f a probable ground be shewn, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of habeas corpus is then a writ of right, which 'may not be denied . . . .'"); *see also Jones v. Cunningham*, 371 U.S. 236, 238 (1963) ("In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail.").[2]

Once incorporated into American law, federal courts quickly and unconditionally affirmed that release remained the means by which the Great Writ was effectuated. As Chief Justice Marshall explained: "The writ of habeas corpus is a high pre-

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[2] The scope and function of the Suspension Clause are informed by rights available at common law at the time of the founding. *See Rasul v. Bush*, 542 U.S. 466, 473 (2004); *Boumediene*, 128 S. Ct. at 2244 ("[T]o the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.").

rogative writ, known to the common law, *the great object of which is the liberation of those who may be imprisoned without sufficient cause*." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) (emphasis added). Early courts went further, and suggested that a federal court exercising habeas jurisdiction could order *only* the remedy of release, and could not tailor other remedies. *See*, *e.g.*, *Ex parte Randolph*, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558) (C.J. Marshall, on circuit) (holding that while the court could not order a recounting of the municipal authority's evidence against the debtor in custody, the court could order the debtor's release, which it did). Consistent with this understanding, over the years "the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law," whether ordered liberty is imperiled by the actions of the federal or the state government. *Preiser*, 411 U.S. at 485.

The central function of habeas — to liberate those subject to illegal detention — would be rendered meaningless if courts were powerless to order release in a case to which habeas jurisdiction extended under the Suspension Clause. As Chief Justice Marshall warned in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), the privilege of the Great Writ embodied in the Suspension Clause would be "lost" if there were no "efficient means by which this great constitutional privilege should receive life and activity." *Id.*; *see also* Brief of *Amici Curiae*, Legal and Historical Scholars, in Support of Pet'rs at 8-12, *Kiyemba v. Bush*, No. 08-5424-29, 2008 WL 4809207 (D.C. Cir. Oct. 31, 2008) (describing the history of the Great Writ in colonial American courts to dem-

onstrate that the writ is meaningless without a remedy).

B. The Suspension Clause Requires an Effective Remedy To Perform Its Critical Function as a Check on Executive Power in the Separation-of-Powers Scheme.

A federal court properly exercising jurisdiction under the Suspension Clause must have the practical power to remedy a concededly illegal detention in order to give effect to the Great Writ's crucial function in the Separation of Powers scheme. *See Boumediene*, 128 S. Ct. at 2246 ("[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."). As its common law history suggests, *see supra*, the Framers selected the Great Writ for inclusion in the Constitution because it alone among the prerogative writs could provide a practical and efficacious remedy against lawless Executive detention. The Great Writ "allows the Judicial Branch to play a necessary role in maintaining [the] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality).

The Constitution's Separation of Powers secures individual liberty from unlawful or arbitrary restraint and is one of freedom's first principles. *Cf. Boumediene*, 128 S. Ct. at 2277 ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to con-

sider petitions for habeas corpus relief derives."); *Hamdi*, 542 U.S. at 554-55 (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."); *accord INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

Only Congress can suspend the constitutional guarantee against arbitrary detention, and only under specific, narrow circumstances not present here. *See* U.S. Const. art. I, § 9, cl. 2. The Suspension Clause thus applies to Petitioners with undiminished force. To effectuate the role of the Great Writ within the scheme of Separation of Powers, therefore, the district court *must* have power to end Petitioners' concededly unsupportable detention. *See Boumediene*, 128 S. Ct. at 2269 (for the writ to have meaning and fulfill its constitutional role, it "must be effective"). Only release effectuates the Great Writ's constitutional function of ensuring that the Executive acts in accordance with law, and does not abuse the awesome powers delegated to it by the People in 1789. *See Wales v. Whitney*, 114 U.S. 564, 572 (1885) (any time there is "actual confinement or the present means of enforcing it," the Writ may issue, commanding release).

While the *Boumediene* majority and dissent disputed the extension of the Suspension Clause to Guantánamo, there was *no* dispute that once the Suspension Clause applied, courts had power to order release if they found petitioners' detention at Guantánamo to be unauthorized. All nine Justices agreed that the power to release was inherent in the Great Writ. Justice Kennedy, writing for the Court,

explained that release would be a "constitutionally required remedy" if a prisoner's detention at Guantánamo were to be found unjustified. *See Boumediene*, 128 S. Ct. at 2271. And the Chief Justice, in a dissent joined by Justices Scalia, Thomas and Alito, acknowledged that "because the 'unique purpose' of the writ is 'to release the applicant . . . from unlawful confinement,' . . . [the Detainee Treatment Act as a possible habeas substitute] can and should be read to confer on the Court of Appeals the authority to order release in appropriate circumstances." *Id.* at 2292 (internal citation omitted). It is thus beyond question that *Boumediene*'s constitutional holding itself confirms the federal courts' power to order release of detainees at Guantánamo who are unlawfully held — a power that the Court of Appeals has in effect nullified. This Court's intervention is required to reaffirm the holding of *Boumediene*.

1. The Political Branches' Plenary Authority in the Immigration Arena Does Not Vitiate the Suspension Clause's Guarantee of Individual Liberty Against Arbitrary Detention.

For Petitioners, simple release is not possible because of circumstances not of their creation. Unlike typical habeas petitioners, Petitioners here cannot simply go home. For Petitioners — who were brought to Guantánamo Bay involuntarily, who are conceded by the Government not to be Enemy Combatants, who cannot be sent back to their native China for fear of persecution, and for whom the Government has failed to locate any countries willing to receive them after years of negotiation — the

only effective remedy is release into the United States.

Turning these unique circumstances *against* Petitioners, however, the court of appeals bizarrely concluded that the district court was powerless to remedy their baseless detention by the Executive because such a remedy would intrude on the political branches' plenary authority in the immigration arena. This conclusion is inconsistent with this Court's precedents and vitiates the function of the Great Writ.

First, the court of appeals needlessly conjured a potential conflict between the Suspension Clause and the political branches' plenary powers by portraying Petitioners as aliens seeking admittance to the United States. Petitioners are not seeking to immigrate to the United States; they only seek freedom from concededly unlawful custody. It is specious to equate Petitioners — who were brought to Guantánamo against their will, and kept in shackles for eight years — with garden variety visa or asylum applicants.

Second, this Court's precedents leave no doubt that both Congress's plenary powers and the Executive's authority in immigration matters must be exercised consistently with important constitutional checks, such as the Suspension Clause. For example, in *INS v. St. Cyr*, this Court expressly held that "[b]ecause of [the Suspension Clause], some 'judicial intervention in deportation cases' is *unquestionably 'required by the Constitution.'*" 533 U.S. at 300 (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953) (emphasis added)).

The Court repeatedly has held that, even when they act in tandem, the political branches' plenary power in immigration matters is "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *accord INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (Congress must choose "a constitutionally permissible means of implementing" its plenary power) (citing *Buckley v. Valeo*, 424 U.S. 1, 132 (1976)); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (The Chinese Exclusion Case) (congressional authority limited "by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations"); *see also Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (the adequacy of procedures at an exclusion hearing of a resident alien must conform to the requirements of the *Mathews v. Eldridge*, 424 U.S. 319 (1976), due process test); *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 72-73 (2001) (a citizenship statute must satisfy "conventional equal protection scrutiny").

2. The Holding of the Court of Appeals That Not Every Violation of a Right Yields a Remedy Raises Grave Constitutional Concerns.

Instead of looking to the history and function of the Suspension Clause as *Boumediene* directed, the court of appeals relied on an abstract principle that has no application to the scope of constitutional habeas jurisdiction: that "[n]ot every violation of a right yields a remedy, even when the right is constitutional." *Kiyemba*, 555 F.3d at 1027. In so doing, it not only eviscerated the Suspension Clause's express guarantee of a remedy and this Court's hold-

ing in *Boumediene*, but also triggered grave constitutional questions that should be resolved in the first instance by this Court.

While it is true that an individual whose constitutional rights have been violated may not be entitled to a particular remedy (*e.g.*, damages), this Court has cautioned repeatedly that a constitutional violation entitles the individual to *some* remedy. Any effort to eliminate *all* effectual remedies for a constitutional violation raises grave constitutional concerns. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *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) (same); *Weinberger v. Salfi*, 422 U.S. 749 (1975) (same); *accord Demore v. Kim*, 538 U.S. 510, 517 (2003); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.").[3]

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[3] *See also* 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

The cases on which the court of appeals relied do not support that court's conclusion that not every constitutional violation has a remedy. Indeed, they do not even concern habeas jurisdiction. *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67 (D.C. Cir. 1992), for example, involved the scope of remedies available under a complex federal regulatory regime, and did not hold that a remedy did not exist for a constitutional violation. Similarly, the Court in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), denied *Bivens* damages, but recognized that other judicial remedies were available. *Id.* at 2600-01. *See generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (stating that the "availability of federal equitable relief against threatened invasions of constitutional interests" is presumed). Moreover, contrary to the court of appeals' belief, *Alden v. Maine*, 527 U.S. 706 (1999), explicitly reaffirmed the availability of relief against state officers as a means to ensure some effectual remedy for states' constitutional violations. *Id.* at 757.

Whatever significance a hoary adage like "no remedy for every rights violation" might have in the common law, it has no place in habeas jurisprudence under the Suspension Clause — a constitu-

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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)); 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).

tional provision that enshrines beyond doubt the availability of a judicial remedy.

C. Article III Courts Must Have the Power To Issue a Remedy That Cannot Be Subject to Revision by the Political Branches.

The court of appeals' conclusion that the district court is powerless to order release was in error for the independent reason that Article III courts exercising their proper jurisdiction must have the power to issue a binding remedy not subject to revision by the political branches.

Article III vests the federal courts with the "judicial Power." U.S. Const. art. III, § 1. Under Article III, "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); *accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (Scalia, J., dissenting) (1991) ("Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks."). This judicial power includes several essential elements, including the power to issue final decisions that cannot be subject to change or revision by other branches of government.

Article III was crafted with "an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them conclusively, subject to review only by superior courts in the Article III hierarchy." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (em-

phasis in original). This Court has rejected as a violation of the Separation of Powers all attempts by either the legislative or executive branches to "revis[e]" or "contro[l]" the opinions or judgments of the courts. *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792); *see Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113-14 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); *Gordon v. United States*, 117 U.S. 697, 703 (1864) ("the exercise of a judicial power" cannot be subject to revision by another branch of government); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); 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) (noting that "revis[ion] and contro[l] by the legislature, and . . . the executive department . . . [are] radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important [Separation of Powers] principle which is so strictly observed by the constitution") (quoting *Hayburn's Case*, 2 U.S. (2 Dall.) at 411-12 n.d).

The court of appeals upended these principles. Without disturbing the district court's finding with respect to the Executive's lack of authority to hold Petitioners as "enemy combatants," the court of appeals nonetheless held that the district court erred because it failed to acknowledge the Executive's authority to deprive that judgment of effect on immigration grounds. In short, in the court of appeals' judgment, the Executive has the option not to give

effect to a district court's judgment that Petitioners may not be detained so long as the Executive "continu[es] diplomatic attempts to find an appropriate country willing to admit petitioners." *Kiyemba*, 555 F.3d at 1029.[4]

The court of appeals' judgment represents an impermissible abdication of responsibility to the Executive to revise, suspend, or simply disregard the final judgment of a federal court in violation of the principles of Separation of Powers embodied in *Hayburn's Case* and over 200 years of subsequent jurisprudence. Because Article III does not permit the political branches to undo a final judgment without violating a "fundamental principle" of the Constitution, *Plaut*, 514 U.S. at 219, the court of appeals' contrary decision must be reversed as a threat to the autonomy of Article III courts.

* * *

Petitioners, who are no longer designated by the Government to be Enemy Combatants, and who have no history of engaging in hostile activities against the United States, are better positioned than most detainees at Guantánamo for release into the United States. If Petitioners cannot obtain this remedy, then it is difficult to imagine what other petitioners could receive the remedy of release.[5]

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[4] In Petitioners' case, such diplomatic efforts have been ongoing for almost five years.

[5] There are only two ways of leaving Guantánamo: release into the United States and transfer to a foreign country. *Kiyemba* has foreclosed the remedy of release into the United States. Hypothetically, a detainee could be transferred if the Executive can identify a willing foreign country to take such a detainee. Because a court cannot order a foreign country to

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO ENSURE THAT LOWER COURTS CURRENTLY HEARING HUNDREDS OF HABEAS PETITIONS FILED BY GUANTÁNAMO DETAINEES FOLLOW *BOUMEDIENE*.

The court of appeals' holding that there is no remedy available to Petitioners under the Suspension Clause despite their detention by the Executive without authority directly conflicts with this Court's holding in *Boumediene*. The decision also erroneously forces the district court judges in the District of Columbia who are currently hearing the 200+ habeas petitions that have been filed by detainees at Guantánamo to disregard *Boumediene*.[6] *See Basardh*, 2009 WL 1033193, at *4 ("[T]he Court grants the petition for a writ of habeas corpus. The court further orders the government to take all necessary and appropriate diplomatic steps to facilitate petitioner's release forthwith. The Court, however, must deny petitioner's request that he be released into this country or be transported to a safe haven in light of *Kiyemba*"). This Court should grant *certiorari* and exercise its supervisory powers to ensure that the lower courts follow *Boumediene*.

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accept a detainee, however, such a result leaves the habeas remedy solely in the hands of the Executive, a result that cannot be squared with the Suspension Clause's role as a check on unlawful Executive detention, and with the Article III courts' power to issue final, effective relief.

[6] *See generally* Editorial, *The Terrorists Next Door,* Wall St. J., Oct. 10, 2008, at A16, *available at* http://online.wsj.com/article/SB122360-571398721971.html (noting that over 200 habeas petitions have been filed by Guantánamo detainees).

As *Amici* have shown, the court of appeals' judgment is plainly inconsistent with the *Boumediene* decision. Without overtly repudiating that binding authority, the Court of Appeals has rendered it a nullity. But Article III of the Constitution establishes one court that is "supreme" to the "inferior" courts that "Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This system of courts relies on the Supreme Court to play a supervisory role to ensure definitive settlement of legal issues and uniform application of federal law. *See*, *e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1371 (1997) (noting that the Supreme Court performs an important coordination function by settling what the law dictates); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817 (1994) (setting out historical, formalist, and consequentialist reasons why lower federal courts are bound by Supreme Court precedent).

Accordingly, holdings of Supreme Court decisions are binding on the federal appellate and trial courts. *Thurston Motor Lines Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("[O]nly this court may overrule one of its precedents."); *see Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

The court of appeals' opinion undermines that careful hierarchy. In *Boumediene*, the Court ex-

pressly held that the Suspension Clause extends to detainees held at Guantánamo Bay, and that "the habeas court must have the power to order the conditional release of an individual unlawfully detained . . . ." 128 S. Ct. at 2238 (internal citations omitted).[7] Indeed, this Court found the judicial review procedure outlined in the Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680 (2005) ("DTA") — which Congress intended as a substitute for habeas at Guantánamo — to be an inadequate substitute, in part, because of its ambiguity with respect to the courts' power to order the "constitutionally required" remedy of release. *See Boumediene*, 128 S. Ct. at 2271.

Defying this holding of *Boumediene*, however, the court of appeals stated, "it 'is not within the province of any court, unless expressly authorized by law,'" to order Petitioners' release into the United States. *Kiyemba*, 555 F.3d at 1026. The Court of Appeals' ruling is a naked repudiation of the *Boumediene* judgment.[8]

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[7] "Conditional release" or "[c]onditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is *always release*." *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring) (emphasis added); *see Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (the conditional writ serves only to "delay the release . . . in order to provide the State an opportunity to correct the constitutional violation.").

[8] The court of appeals' reliance on *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), *see Kiyemba*, 555 F.3d at 1026-28, was also in error. *Verdugo-Urquidez* and *Zadvydas* are factually distinguishable. In *Verdugo-Urquidez*, the Court held that the Fourth Amendment's guarantee against unreasonable

As circuit precedent, *Kiyemba* also undermines the more than 200 petitions for writs of habeas corpus that have been filed by detainees at Guantánamo in the District Court for the District of Columbia. Unless this Court grants *certiorari* and reverses *Kiyemba*, the district courts hearing these habeas petitions will be left with no role but issuing advisory opinions. *See Parhat v. Gates*, 532 F.3d 834, 850 (D.C. Cir. 2008) (Garland, J.) (stating that the court's authority to order the release of a detainee is implicit in the DTA, for "[w]ere that not the case, the DTA would consign the court to issuing an endless series of effectively advisory opinions on the quality of the government's evidence").

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search and seizure did not apply to a Mexican national who was involuntarily brought to the United States for a few days. The Court expressly declined to decide whether such a constitutional right would attach to an individual involuntarily present in the United States "if the duration of [the individual's] stay . . . were to be prolonged — by a prison sentence, for example." 494 U.S. at 272. *Zadvydas* similarly denied the protections of the Due Process Clause only to aliens at the border who are *voluntarily* seeking to enter the United States. 533 U.S. at 693 (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953)). While the Court recognized 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," 533 U.S. at 693, the *Zadvydas* Court never had occasion to determine on which side of the distinction aliens — such as Petitioners — who were involuntarily brought to territory over which the United States has "complete jurisdiction and control" and held there, would fall. *Boumediene,* 128 S. Ct. at 2253. Even though Petitioners' case does not depend on the application of the Due Process Clause, these plain errors on vital questions of federal law further warrant correction.

This Court's intervention is necessary to provide much-needed guidance to the courts entertaining these petitions — at least on the question whether they have the power to order release, or whether they are simply engaged in the drafting of advisory opinions. *See City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 778 (2004) ("We granted certiorari in light of lower court uncertainty on this issue."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981) (stating that the Court's review is appropriate where question is "important" and "likely to recur").

CONCLUSION

The petition should be granted.

Respectfully submitted,

SIDNEY S. ROSDEITCHER
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, NY 10036
(212) 382-6600

ELIZABETH GOITEIN
AZIZ HUQ
EMILY BERMAN
THE BRENNAN CENTER FOR JUSTICE AT THE NEW YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6730

ALEX YOUNG K. OH
Counsel of Record
WHITNEY D. RUSSELL
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, NW
Suite 500
Washington, DC 20006
(202) 223-7300

JOHN W. WHITEHEAD
THE RUTHERFORD INSTITUTE
Post Office Box 7482
Charlottesville, VA 22906
(434) 978-3888

SHARON BRADFORD FRANKLIN
THE CONSTITUTION PROJECT
1200 18th Street, NW, Suite 1000
Washington, DC 20036
(202) 580-6920

JEFFREY GREEN
MALIA N. BRINK
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L St., NW, 12th Floor
Washington, DC 20036
(202) 872-8600

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Counsel for Amici Curiae