No. 08-1234

In The

Supreme Court of the United States

JAMAL KIYEMBA, *ET AL.*,

Petitioners,

v.

BARACK H. OBAMA, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRANT JUSTICE CENTER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ADVOCATES FOR HUMAN RIGHTS, NORTHWEST IMMIGRANT RIGHTS PROJECT, CENTRAL AMERICAN RESOURCE CENTER, IMMIGRANT LAW CENTER OF MINNESOTA, THE FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, AND PENNSYLVANIA IMMIGRATION RESOURCE CENTER IN SUPPORT OF PETITIONERS

Bernard Taylor
Christina McClain
Jeffrey Freeman
Angela Marston
Karen Carroll
Kirkland & Ellis LLP
300 N. LaSalle St.
Chicago, IL 60654

Charles Roth
Counsel of Record
National Immigrant Justice Center
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
312-660-1613

Stephen Manning
American Immigration Lawyers Association
333 SW 5th Avenue #525
Portland, OR 97204

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Immigration Law Has No Relevance To A District Court's Order To Release From Federal Detention Non-Citizens Who Were Brought Involuntarily Within The Jurisdiction Of The United States. 4

II. The Detention Of Petitioners Under The Immigration Authority Is Not Yet A Question For This Court; But Under The Facts, It Is Highly Unlikely That Detention Under Section 236 Would Be Permissible. 12

III. Release Of The Uighurs Into The United States May Be Supervised And Subject To Reasonable Conditions. 14

IV. It Is Unhelpful To Call The Government's Immigration Power Plenary, Because It Is Subject To Constitutional Limitations. 17

A. The Plenary Power Doctrine Is Subject To Constitutional Limitations. 17

B. In an Appropriate Case, The Plenary Power Doctrine Should Be Reexamined. 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Boumediene v. Bush,
128 S. Ct. 2229 (2008) 5, 9, 18, 19

Boutilier v. INS,
387 U.S. 118 (1967) 20

Brown v. Board of Educ.,
347 U.S. 483 (1954) 21

Chae Chan Ping v. United States,
130 U.S. 581 (1889) 17, 19

Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 22

Clark v. Martinez,
543 U.S. 371 (2005) 9, 14, 18, 21

De Geofroy v. Riggs,
133 U.S. 258 (1890) 21

Fiallo v. Bell,
430 U.S. 787 (1977) 20

Fong Yue Ting v. United States,
149 U.S. 698 (1893) 20

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999) 22

INS v. Chahda,
462 U.S. 919 (1983) 18

INS v. St. Cyr,
533 U.S. 289 (2001) 11

Jackson v. Indiana,
406 U.S. 715 (1972) 13

Kaplan v. Tod,
267 U.S. 228 (1925) 11

Kleindienst v. Mandel,
408 U.S. 753 (1972) 19

Leng May Ma v. Barber,
357 U.S. 185 (1958) 8, 10, 12

Matter of Badalamenti,
19 I. & N. Dec. 623 (BIA 1988) 6

Matter of Garcia-Garcia,
25 I. & N. Dec. 93 (BIA 2009) 15

Matter of Yam,
16 I. & N. Dec. 535 (BIA 1978) 6

Nishimura Ekiu v. United States,
142 U.S. 651 (1892) 12

Plessy v. Ferguson,
163 U.S. 537 (1896) 22

Rasul v. Bush,
542 U.S. 466 (2004) 5

Rosales-Garcia v. Holland,
322 F.3d 386 (6th Cir. 2003) 7

Sale v. Haitian Centers Council, Inc.,
509 U.S. 155 (1993) 6

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 18

South Dakota v. Dole,
483 U.S. 203 (1987) 21

Tuan Thai v. Ashcroft,
366 F.3d 790 (9th Cir. 2004) 13

United States ex rel. Paktorovics v. Murff,
260 F.2d 610 (2d Cir. 1958) 18, 19

United States v. Brown,
148 F. Supp. 2d 191 (E.D.N.Y. 2001) 6

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936) 21

United States v. Garcia Jurado,
281 F. Supp. 2d 498 (E.D.N.Y. 2003) 6

Wang v. Reno,
81 F.3d 808 (1996) 19

Wong Wing v. United States,
163 U.S. 228 (1896) 13

Zadvydas v. Davis,
533 U.S. 678 (2001) .....passim

STATUTES

8 C.F.R. § 212.5(d) 15

8 C.F.R. § 241.13(h) 15

8 U.S.C. § 1101(a)(13) 5, 8

8 U.S.C. § 1182(d)(5) 10, 15

8 U.S.C. § 1225(b) 15

8 U.S.C. § 1225a 8

8 U.S.C. § 1229a 10

8 U.S.C. § 1231(a)(3) 14

8 U.S.C. § 1253(b) 14, 15

Consolidated Natural Resources Act of 2008,
Title VII, Pub. L. No. 110-229, § 702(a) 8

Illegal Immigration Reform and Immigrant
Responsibility Act of 1998,
Pub. L. No. 104-208, 110 Stat. 3009 .....6, 7, 11

OTHER AUTHORITIES

3 Joseph Story,
Commentaries on the Constitution § 1333 4

Electronic System for Travel Authorization,
https://esta.cbp.dhs.gov/esta/esta.html 8

Henkin, Louis,
The Constitution And United States Sovereignty: A Century of Chinese Exclusion And Its Progeny,
100 Harv. L. Rev. 853 (Feb. 1987).....20

Spira, Peter J.,
Explaining The End Of Plenary Power,
16 Geo. Immigr. L.J. 339, 340 (Winter 2002).....20

U.S. Customs and Border Protection,
Border Patrol Sectors,
http://www.cbp.gov/xp/cgov/ border_security/
border_patrol/border_patrol_sectors 8

Vera Institute of Justice,
Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program,
August 2000, *available at*
http://www.vera.org/download?file=615/
finalreport.pdf 16

Pursuant to this Court's Rule 37.2, *amici curiae* respectfully file this brief in support of the petitioners.[*]

INTEREST OF *AMICI CURIAE*

Each *amici* is a non-profit with the mission of advocating reform of the immigration laws and advancing the legal rights of immigrants.[1] *Amici* believe that, given the unique facts of this case, immigration law does not preclude or prohibit the release of the petitioners into the United States. We write to share our informed expertise on the immigration aspects of this case.

---

[*] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

[1] A detailed list of *amici* and their particular interests in this case appears in Appendix A.

SUMMARY OF ARGUMENT

In overturning the District Court's October 9, 2008 Order granting the Uighurs' release, the Court of Appeals viewed this case as one turning on immigration law and on the power of the political branches to control the country's borders. However, this view of the case fundamentally mischaracterizes the District Court's Order and the impact of both the immigration laws and the Government's power to control the border on the power of courts to release non-citizens into the United States pending the determination of their immigration status.

First, immigration law has no relevance to the District Court's Order, which merely released from federal detention non-citizens who were brought involuntarily into the jurisdiction of the United States. The Uighurs have never sought admission under the immigration laws of the United States. Rather, they were involuntarily seized and brought by the Government into the jurisdiction of the United States at Guantanamo Bay, where the Government has detained them for more than seven years. Immigration law recognizes the distinction between non-citizens voluntarily seeking to enter the United States and those who were brought here involuntarily, as well as the limited relevance of exclusion to the latter. Moreover, the District Court's Order did not purport to confer immigration status on the Uighurs nor prevent their removal under appropriate removal procedures.

Second, the Government's argument that the District Court's Order contravenes the immigration laws sets up a false hypothetical. The Uighurs'

immigration status has no bearing on the District Court's authority to release the Uighurs from unlawful detention. Immigration laws should not be interpreted to nullify non-citizens' relief under habeas corpus. The Supreme Court has recognized that non-citizens, including those inadmissible under immigration laws, cannot be detained indefinitely pending efforts to remove them. Even inadmissible non-citizens who have been convicted of criminal offenses must be released into the United States pending efforts to remove them to another nation, when removal cannot be accomplished within a reasonable time period. Such a release neither depends upon nor impacts the non-citizen's immigration status.

Indeed, the District Court's Order does not restrict the Government's ability to institute removal proceedings. The purpose of detention pending removal proceedings is to effectuate removal, not to punish. Consequently, courts have recognized that indefinite detention without any reasonably foreseeable removal would raise serious constitutional questions and violate immigration law.

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

Finally, the plenary power doctrine cannot trump the District Court's habeas power. The power of the political branches to control the country's borders and, more broadly, to regulate immigration does not stand above the Constitution. Rather, the Court has repeatedly affirmed that the Government's powers are limited by the Constitution. Where a constitutional right is implicated, the Government must therefore exercise its control of the border in consonance with rather than in adversity to that right.

ARGUMENT

I. Immigration Law Has No Relevance To A District Court's Order To Release From Federal Detention Non-Citizens Who Were Brought Involuntarily Within The Jurisdiction Of The United States.

Because the individuals seeking release are non-citizens, the tendency to cast this case as an immigration dispute appears, on first glance, reasonable. The Government so argues and the Court of Appeals so believed.

Both are mistaken. The judicial power to order release emanates under that "great bulwark of personal liberty," the writ of habeas corpus, 3 Joseph Story, Commentaries on the Constitution § 1333, and a non-citizen's immigration status poses no obstacle to the issuance of the writ here. The immigration statutes are, by their design, intended to encompass situations such as the one presented here. Indeed, to the extent that there is an immigration question implicated here, the Immigration and Nationality Act provides a complete solution for the Government

to adhere to the release order, preserve the status quo of the petitioners' immigration dispute, and safeguard the security of the country.

The Government and the Court of Appeals have relied upon three misconceptions about immigration law. *Amici* address those misconceptions here:

First, for purposes of immigration law, it is significant that the Uighurs did not come within the jurisdiction of the United States voluntarily. Immigration law, at its base, is about the admission or expulsion of non-citizens from the jurisdiction of the United States. The petitioners here are not seeking admission to the United States and, moreover, the term "admission" is a statutorily defined term. 8 U.S.C. § 1101(a)(13)(A). The petitioners were captured by bounty hunters in Pakistan, ransomed to the U.S. military, and imprisoned for almost seven years in territory dominated by and under the indefinite control of the United States. Pet. App. 41a; J.A. 28a-29a, 33a-34a, 164a-166a. The Government transported the Uighurs to a territory that "while technically not part of the United States, is under the complete and total control" of the United States Government. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008). Because the Uighur prisoners have unwillingly found themselves in the jurisdiction of the United States, *see id.* at 2261; *Rasul v. Bush*, 542 U.S. 466, 480 (2004), they would not immediately fall within the purview of immigration law as non-citizens seeking admission merely because they are released into the United States under the habeas power. *United States v. Brown*, 148 F. Supp. 2d 191, 198 (E.D.N.Y.

2001), *abrogated on other grounds by United States v. Garcia Jurado*, 281 F. Supp. 2d 498 (E.D.N.Y. 2003); *Matter of Badalamenti*, 19 I. & N. Dec. 623, 627 (BIA 1988); *see also Matter of Yam*, 16 I. & N. Dec. 535, 536–37 (BIA 1978) ("[a]n alien does not effect an entry into the United States unless, while free from actual or constructive restraint, he crosses into the territory of the United States;" where non-citizen had not entered the United States voluntarily, the "immigration judge was without jurisdiction to determine the issue of deportability").

The decision in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), *superseded in part by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1998, Pub. L. No. 104-208, 110 Stat. 3009, does not address the situation of the petitioners. Opp. to Cert. at 19. The migrants in *Sale* were arguing for statutory rights while intercepted on the high seas, not while at Guantanamo Bay, and were desperately and voluntarily trying to enter the United States to seek asylum protection when they were diverted. *See Sale*, 509 U.S. at 162–63. Because *Sale* addresses non-citizens willingly seeking to enter the United States, it has nothing to say about non-citizens involuntarily brought to the United States. The Board's decision in *Matter of Badalamenti* is the sole relevant authority on this particular legal and policy point.

The Uighurs' habeas petition did not request admission, nor did the District Court purport to order that remedy. The District Court did not order the Government to "admit" or "parole" the Uighurs as those terms are used in immigration law, and it

expressed no opinion on the eventual application of the immigration laws to the Uighurs. Nor did the District Court make a determination regarding the immigration status of the Uighurs. It did not prohibit the institution of removal proceedings at any point, and it made no final orders regarding when, or under what conditions, the Uighur detainees could be brought into DHS custody. Opinion 10-17, J.A. 1609-16. Rather, the District Court exercised its authority in habeas corpus proceedings. Opinion 10-17, Pet. App. 57a-59a. Thus, rather than impermissibly intruding on the power of the Executive, the District Court's order maintained the status quo of the Uighurs' immigration status.

Second, the concept of the geographic United States — while relevant at a basic level of analysis in immigration law — is, in this situation, a distraction. The Government relies heavily on the notion that the District Court's Order would blur what it describes as "the previously clear distinction between aliens outside the United States and aliens inside this country or at its borders." Opp. to Cert. at 22. While the physical location of the non-citizen may have carried a broader significance at some point in the historical development of our nation's immigration laws, today it is clearly only significant to the basic questions of immigration law — none of which are implicated here. Geographic location has not been a determinative feature under immigration law for some time. Notably, the "entry fiction," *Rosales-Garcia v. Holland*, 322 F.3d 386, 391 n.2 (6th Cir. 2003), *superseded in part by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1998, Pub. L. No. 104-208, 110 Stat. 3009,

explains that a non-citizen may be physically within the geographic borders, but not "within the United States" for purposes of immigration law. *See Leng May Ma v. Barber*, 357 U.S. 185, 186 (1958) (holding that a non-citizen who was paroled within the geographic boundaries of the United States was not "in the United States" for purposes of immigration law). Conversely, Congress has acted to expand the power of admissibility review to non-citizens located beyond the geographic United States. In 1996, Congress created an extra-territorial power to make admissibility determinations. Under 8 U.S.C. § 1225a, an immigration officer may engage in the most basic immigration function of determining admissibility at any one of several pre-inspection stations located outside the country. *See* U.S. Customs and Border Protection, Border Patrol Sectors, http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_sectors (listing various reinspection stations) (last visited Dec. 9, 2009). Section 8 U.S.C. § 1225(a)(3)(C) authorizes removal proceedings even when a non-citizen resides abroad. The definition of what it means to be "admitted" to the United States turns not on geography, but on legality. 8 U.S.C. § 1101(a)(13)(A); Title VII of the Consolidated Natural Resources Act of 2008 ("CNRA"), Pub. L. No. 110-229, § 702(a), 122 Stat. 754, 853 (2008) (providing that U.S. immigration laws will apply to the Commonwealth of the Northern Mariana Islands beginning November 28, 2009); *see also* Electronic System for Travel Authorization, https://esta.cbp.dhs.gov/esta/esta.html (pushing admissibility review to the home of the non-citizen by means of the Internet) (last visited Dec. 9, 2009).

Third, Congress has provided a statutory tool to maintain the status quo on the petitioners' immigration question even if their release from unlawful custody is required. Thus, the Government's argument posits a false hypothetical when it asks whether Judge Urbina's order was inside or outside the immigration law framework. The habeas power and the immigration power are not in competition.

This Court has made clear that federal courts have the authority to order the release of non-citizens from detention into the United States — including non-citizens inadmissible under the immigration laws. *See Boumediene*, 128 S. Ct. 2229; *Clark v. Martinez*, 543 U.S. 371 (2005). Under the Court's rulings in both *Martinez* and *Boumediene*, federal courts have the authority in habeas corpus proceedings to order the release from detention of inadmissible non-citizens if that is what is required to give effect to a statutory or constitutional prohibition on non-lawful detention.[2]

---

[2] The Government seeks to distinguish *Martinez* by asserting that it applied a provision of the immigration laws that is not at issue in this case. But the relevance of *Martinez* lies in its holding that an individual's lack of immigration status cannot supply indefinite detention authority to the Government. *Martinez* followed the simple principle that when the Government lacks a continued statutory basis for detaining someone, even an inadmissible non-citizen, it must release them. The Court having already interpreted the statute to provide no authority to detain, *see Zadvydas v. Davis*, 533 U.S. 678, 699 (2001), the presence or absence of a statutory "status" which could be applied to a non-citizen upon release was not relevant to the appropriate remedy.

However the Government may choose to effectuate a valid habeas release order, the immigration statute serves to implement the lawful order, not to obstruct it. 8 U.S.C. § 1182(d)(5)(A). Section 1182(d)(5)(A) authorizes the physical transfer or entry of a person into the United States while maintaining the immigration status quo. A "parole" under that section would not effect an admission of the Uighurs into the United States, 8 U.S.C. § 1182(d)(5)(A) ("[S]uch parole of such alien shall not be regarded as an admission of the alien . . . ."), create any substantive rights they do not already possess, or favor them under the immigration statute in any meaningful way. An individual who is paroled may be detained, deported, granted admission, or authorized to stay, among other results. With the creation of the parole power, Congress meant to eliminate the conflict that the Government asserts exists. It is a common sense statute created by Congress for the precise purpose presented here: when a human being must come into the United States but the immigration question is still one to be reserved, he may be paroled.

Thus, the question of admissibility is not properly before the judicial branch at this time; and, furthermore, the statutory process under 8 U.S.C. § 1229a would likely resolve any disputes which arose. In the meantime, granting habeas release into the United States does not upend the immigration apple-cart. Were the Government to parole the petitioners into the United States, the Government would retain every power under the Immigration and Nationality Act that it holds now. *See Leng May Ma*, 357 U.S. at 190, *superseded in part by statute*, Illegal Immigration Reform and Immigrant Responsibility

Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status."); *Kaplan v. Tod*, 267 U.S. 228, 229–30 (1925) (inadmissible alien paroled into the United States for over ten years held not to have made "entry" under immigration law).

Accordingly, the Uighurs' § 1182 admissibility is irrelevant to the determination of whether they could be released into the United States under habeas corpus.

In summary, the immigration laws are irrelevant to this case. To employ the immigration laws in the manner urged by the Government would turn them into a sword against constitutional rights. Even were such a reading possible, it would be highly disfavored. *Zadvydas v. Davis*, 533 U.S. 678, 696, 699 (2001) (applying doctrine of constitutional avoidance after finding that indefinite detention would present "a serious constitutional threat" to the non-citizen's rights). Given that this Court, in *Boumediene,* has already found a habeas right for Guantanamo detainees that is of constitutional dimension, to interpret immigration statutes as posing an intractable barrier to a district court's ability to make habeas corpus functional would place those laws in direct conflict with the Constitution. Laws repealing habeas corpus are also heavily disfavored. *See INS v. St. Cyr*, 533 U.S. 289 (2001). The Court should eschew such a reading.

II. The Detention Of Petitioners Under The Immigration Authority Is Not Yet A Question For This Court; But Under The Facts, It Is Highly Unlikely That Detention Under Section 236 Would Be Permissible.

Releasing the Uighurs into the United States does not preclude the Government from seeking their subsequent removal, and nothing in the District Court's Order is to the contrary. The District Court did implicitly preclude the Government from detaining the Uighurs immediately upon arrival. But detention is not an automatic corollary to removal proceedings. Removal proceedings can be, and often are, commenced and concluded without the non-citizen ever being detained. *See, e.g., Zadvydas*, 533 U.S. at 683; *Leng May Ma*, 357 U.S. at 190 ("Physical detention of aliens is now the exception, not the rule . . . ."); *see also Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (discussing the legal status of a non-citizen immediately released to the custody of the Methodist Episcopal Japanese and Chinese Mission pending her removal).

Under the unique facts of this case, immigration detention would have been constitutionally dubious, even if it were not (as apparently perceived by the District Court) merely a pretextual end-run around the District Court's Order.

The purpose of immigration detention is not to punish those in the United States without right; the purpose is to effectuate their removal or exclusion. *Zadvydas*, 533 U.S. at 690 ("The proceedings at issue here [detention pending execution of a removal

order] are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Supreme Court clarified that immigration detention "is not a punishment for crime . . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend." *Id*. at 236**.**

Once it is conceded that detention will not serve the purpose of removal or exclusion — because the non-citizens' removal or exclusion is not "practically attainable" — immigration detention lacks a valid, non-punitive purpose. *Zadvydas*, 533 U.S. at 690–700 ("[W]here detention's goal is no longer practically attainable, detention no longer 'bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.'") (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); *see also, e.g., Tuan Thai v. Ashcroft*, 366 F.3d 790, 798 (9th Cir. 2004) (forbidding further detention of a Vietnamese non-citizen because his criminal history, combined with the United States' lack of a repatriation agreement with Vietnam, rendered his removal "not reasonably foreseeable").

It is uncontested that the Uighurs cannot be returned to China because they would be tortured there. The Government has not suggested any other country to which they might be ordered removed. Thus, the purpose of immigration detention — that is, removal — was concededly impossible at the time of the hearing before Judge Urbina. Under these facts, any immigration detention would at best have

been of dubious constitutionality, a fact which the District Court would have been entitled to take into account.

III. Release Of The Uighurs Into The United States May Be Supervised And Subject To Reasonable Conditions.

In addition to whatever release conditions the District Court might have imposed in the exercise of its own authority, non-citizens allowed temporarily into the United States are also subject to supervision by the immigration authorities. Such supervision may be as intense as the circumstances require.

In a not dissimilar circumstance, where *Zadvydas* and *Martinez* preclude the Government from detaining certain non-citizens beyond "a period reasonably necessary to bring about that alien's removal from the United States," *Zadvydas*, 533 U.S. at 689; *Martinez*, 543 U.S. at 378, the choice is not simply "between imprisonment and the alien 'living at large.'" *Zadvydas*, 533 U.S. at 696. Rather, "the choice at issue here is between imprisonment and supervision under release conditions that may not be violated." *Id.* at 679–80; 8 C.F.R. § 241.5 (establishing conditions of release after removal period). In fact, violation of the terms of supervision may result in the non-citizen being taken into custody again. 8 U.S.C. § 1253(b).

Such government supervision may include periodic appearances before an immigration officer and reasonable restrictions on conduct or activities. 8 U.S.C. § 1231(a)(3). In fact, regulations that detail the conditions of release for non-citizens with no significant likelihood of removal specify that the

order of supervision may "include any other conditions" that the Secretary of Homeland Security considers necessary to "guarantee the alien's compliance," including, for example, "attendance at any rehabilitative/sponsorship program." 8 C.F.R. § 241.13(h); 8 U.S.C. § 1253(b); *see also Zadvydas*, 533 U.S. at 695 (holding that Congress may subject non-citizens "to supervision with conditions when released from detention or [] incarcerate them where appropriate for violations of those conditions"). Not infrequently, the Government employs technology to keep close tabs on individuals released from immigration detention, such as through the Intensive Supervision Appearance Program. *See, e.g.*, *Matter of Garcia-Garcia*, 25 I. & N. Dec. 93, 94 (BIA 2009).

The statutory scheme for non-citizens paroled into the United States similarly provides for conditions and supervision. Non-citizens arriving on United States shores who apply for admission are generally categorized as "arriving aliens." *See* 8 U.S.C. § 1225(b). These non-citizens may be paroled into the United States by the Secretary of Homeland Security "under such conditions as he may prescribe." 8 U.S.C. § 1182(d)(5)(A). Regulations implementing this statute state that parole may be subject to "reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so." 8 C.F.R. § 212.5(d). In practice, non-citizens released on parole are frequently subject to various means of reporting and monitoring under 8 C.F.R. § 212.5(d)(3).

Amici submit that the involvement of local and religious groups would also have assisted in permitting effective supervision of the Uighurs. Counsel for the Uighurs proffered evidence to the District Court that the Lutheran Immigration and Refugee Services (LIRS) "is prepared to effect a long-term resettlement solution for the Uighur men." J.A. 445a-450a, 499a-505a. LIRS has a long history of resettling refugees, including hundreds of thousands over the past seven decades, and more than 9,000 in 2008 alone. *Id.* LIRS "organized a network of churches, mosques, synagogues, and other entities in the [Washington,] D.C. area to provide appropriate housing and support for all 17 of the Uighur men." *Id.* The Uighur counsel also put forth evidence that 17 Uighur families in the Washington, D.C. area have agreed to house the Uighurs upon release while LIRS makes permanent arrangements for them. *Id.* This type of community involvement would have made it less likely for the Uighurs to abscond. *See* "Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program," Vera Institute of Justice, August 2000, at 3–4, *available at* http://www.vera.org/download?file=615/finalreport.pdf (finding a 91% appearance rate where individuals released from detention were closely monitored and worked with local nonprofit group).

Upon release, the Uighurs' whereabouts would be known to the Government, to LIRS, and to their community sponsors. Again, the choice was not a binary one, limited to imprisonment and "living at large," *Zadvydas*, 533 U.S. at 696, but between indefinite detention that has been found to be unlawful and release under reasonable conditions.

IV. It Is Unhelpful To Call The Government's Immigration Power Plenary, Because It Is Subject To Constitutional Limitations.

The Court of Appeals relied on the theory that the Uighurs could be detained as an incident to "plenary," un-reviewable political branch power to control the nation's borders. The so-called plenary power doctrine should not have served as a basis to stay the District Court's Order of release, because the petitioners are entitled to constitutional protections which limit the exercise of the Government's powers with respect to them. As such, the plenary power doctrine does not preclude the release of the petitioners into the United States. Moreover, the doctrine itself is due for reexamination as it is outdated and outmoded, finds no support in the text of the Constitution, and is at odds with the fundamental premise that ours is a government of limited powers.

A. The Plenary Power Doctrine Is Subject To Constitutional Limitations.

Despite the name — "plenary" — assigned to this particular doctrine, the Court has long recognized that the powers of Congress and of the Executive are limited by the Constitution. The Court recognized in the *Chinese Exclusion Case* — the case in which the doctrine was born — that congressional authority is limited "by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations." In *Chae Chan Ping v. United States* (*"Chinese Exclusion Case"*), 130 U.S. 581, 604 (1889), the Court ordered, pursuant to a habeas petition and

over the objections of the government, the release from detention into the United States of non-citizens who had never been granted entry into the United States and who were deemed to be outside the country for immigration purposes. 543 U.S. at 374–75, 386–87.

Because the Court unequivocally established in *Boumediene* that constitutional habeas protections extend to those detained at Guantanamo Bay, 128 S. Ct. at 2229, the Government's means of exercising its power over the border with respect to those there detained is subject to the limitations embodied in the Suspension Clause, *INS v. Chahda*, 462 U.S. 919, 940–41 (1983) (while Congress undeniably has power over non-citizens, the issue of whether Congress chooses a constitutionally permissible means to implement that authority is subject to judicial review).

Moreover, by forcibly bringing the Uighurs into the jurisdiction of the United States, the Government itself arguably conferred additional constitutional rights on the petitioners, including due process under the Fifth Amendment. *See United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2d Cir. 1958). In *Paktorovics*, the Second Circuit held that a non-citizen had a Fifth Amendment due process right to a hearing prior to the revocation of his parole, despite the fact that he was "outside" the United States under the entry doctrine and, therefore, would not otherwise be entitled to a hearing. The Court distinguished *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) and other exclusion cases, noting that "Paktorovics was invited here pursuant to the

announced foreign policy of the United States as formulated by the President," and reinforced by Congress. *Paktorovics*, 260 F.2d at 614. The Court concluded that "the tender of such an invitation and its acceptance by [Paktorovics]" effected "a change in the status of Paktorovics sufficient to entitle him to the protection of our Constitution." *Id.*; *see also Boumediene*, 128 S. Ct. at 2260–61 (distinguishing cases denying full constitutional protections to territories not indefinitely governed by the United States because Guantanamo Bay is "in every practical sense . . . not abroad" but is "within the constant jurisdiction of the United States"); *Wang v. Reno*, 81 F.3d 808 (1996) (upholding permanent injunction precluding government from returning excludable non-citizen to China where non-citizen was brought involuntarily into the United States to testify at trial and thus was entitled to due process rights).

B. In an Appropriate Case, The Plenary Power Doctrine Should Be Reexamined.

As noted above, *Amici* do not believe that immigration law has any real relevance to this case or that it would apply to preclude the remedy granted by the District Court. To the extent that the Court concludes that the *Chinese Exclusion Case* and its progeny compel continued detention of the petitioners, those decisions should be reexamined.

The tenuous precedential value of those decisions has long been noted. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 781 (1972) (Douglas, J., dissenting) (noting that "cases holding that the power to exclude aliens is left exclusively to the

'political' branches of Government . . . are not the strongest precedents in the United States Reports"). The doctrine emerged in an era of extreme anti-Chinese sentiment in the United States and paved the way for other blatantly racist, xenophobic, and discriminatory immigration laws that would not pass constitutional muster if applied to United States citizens but were nonetheless upheld by the courts. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (expanding the reach of the plenary power doctrine to uphold the deportation of lawful permanent Chinese residents who were not able to provide a "credible white witness" to attest to their residency); *Fiallo v. Bell*, 430 U.S. 787 (1977) (upholding act conferring gender-based preferential immigration status); *Boutilier v. INS*, 387 U.S. 118 (1967) (upholding exclusion of Canadian citizen on the basis of his sexual orientation).[3] Further, the doctrine lacks any basis in the text of the Constitution. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299

[3] Scholars have overwhelmingly and unrestrainedly criticized the plenary power doctrine. *See, e.g.*, Peter J. Spira, *Explaining The End Of Plenary Power*, 16 Geo. Immigr. L.J. 339, 340 (Winter 2002) ("[T]he doctrine has long been relegated to a sort of constitutional hall of shame."); Louis Henkin, *The Constitution And United States Sovereignty: A Century of Chinese Exclusion And Its Progeny*, 100 Harv. L. Rev. 853, 863 (Feb. 1987) ("Chinese Exclusion — its very name is an embarrassment — must go."). Members of this Court have often engaged in similar criticism. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting) ("It is said that the power [to remove Chinese residents] is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced?").

U.S. 304, 318 (1936) (stating that "the power to expel undesirable aliens" is not "expressly affirmed by the Constitution"). And the Court has never explained why this extra-textual power should be considered unreviewable and thus held above even those powers explicitly conferred on Congress and the Executive by the Constitution. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (the "spending power is of course not unlimited" and is "instead subject to several general restrictions," including other provisions of the Constitution); *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the constitution, is in terms unlimited . . . . It would not be contended that it extends so far as to authorize what the constitution forbids . . . .").

Moreover, in recent years the Court has signaled a retreat from categorical application of the plenary power doctrine. In *Zadvydas v. Davis*, the Court rejected the government's argument that "the Judicial Branch must defer to Executive and Legislative Branch decision-making" in the area of immigration, noting that such "plenary power" "is subject to important constitutional limitations." 533 U.S. at 695 (citations omitted). And the Court's decision in *Martinez* demonstrates that the plenary power over immigration does not mandate judicial deference to the Executive's decision to indefinitely detain non-citizens who have never been granted entry into the United States. 543 U.S. at 374–75, 378. Although it is not possible to "turn the clock back" to 1889, *see Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954), nothing prevents the Court from correcting constitutional missteps, or correcting misinterpretations of its prior case law. *See id.* at 494–95 (overruling the "separate but equal" doctrine

as set forth in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Accordingly, should the Court be inclined to find the plenary power doctrine an obstacle to the assertion of constitutionally required habeas powers by a district court, the Court should reexamine that doctrine and apply the same level of judicial scrutiny over matters of immigration and control of the border that apply to the other powers granted to Congress or to the Executive under the Constitution. While deference to agency authority is certainly appropriate in many cases, *see Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999), and while Congress and the Executive may certainly act as authorized by statute and the Constitution, the Court should decline to find a freestanding bar to judicial intervention where such intervention is otherwise appropriate.

CONCLUSION

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

Respectfully submitted,

Bernard Taylor
Christina McClain
Jeffrey Freeman
Angela Marston
Karen Carroll
Kirkland & Ellis LLP
300 N. LaSalle St.
Chicago, IL 60654

Charles Roth
Counsel of Record
National Immigrant
Justice Center
208 S. LaSalle St., Suite 1818
Chicago, IL 60604
312-660-1613

Stephen Manning
American Immigration
Lawyers Association
333 SW 5th Avenue #525
Portland, OR 97204

Attorneys for *Amici Curiae*

December 11, 2009

APPENDIX A - INTEREST OF *AMICI CURIAE*

Each *amici* is a non-profit with the mission of advocating reform of the immigration laws, and advancing the legal rights of immigrants. *Amici* believe that, given the unique facts of this case, immigration law does not preclude or prohibit the release of the petitioners into the United States. We write to share our informed expertise on the immigration aspects of this case.

Amicus Heartland Alliance's National Immigrant Justice Center ("NIJC") is a non-profit organization accredited by the Board of Immigration Appeals ("BIA") to provide immigration assistance since 1980. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence and victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2008, NIJC provided legal services to more than 8,000 non-citizens.

Amicus American Immigration Lawyers Association ("AILA") is a national association with over 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration,

nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

Amicus Advocates for Human Rights is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages nearly 1000 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights provides pro bono legal assistance to indigent asylum seekers in the Upper Midwest. The Advocates for Human Rights has a strong interest in seeing that the United States construe legal protections for refugees and for those in danger of torture in a way that is consistent with international human rights standards in the Convention relating to the Status of Refugees and the Convention Against Torture.

Amicus Northwest Immigrant Rights Project (NWIRP) promotes justice for low-income immigrants by pursuing and defending their legal

status. NWIRP focuses on providing direct legal services, supported by education and public policy work. NWIRP is the only organization providing comprehensive immigration legal services to low-income individuals and families in Washington State. NWIRP currently serves low-income immigrants and refugees from more than 100 countries across Latin America, Asia, the Middle East, Eastern and Western Europe and Africa.

Amicus Central American Resource Center (CARECEN) was founded by a group of Salvadoran refugees in the early 1980s, with the goal of securing legal status for the Central Americans fleeing civil war. Over the past 25 years, CARECEN has transformed itself from a small grassroots group to the largest Central American organization in the country.

Amicus Immigrant Law Center of Minnesota is a Minnesota-based organization that engages in advocacy, direct services, education, outreach, and impact litigation to protect the civil rights of immigrants.

Amicus The Florence Immigrant and Refugee Rights Project (FIRRP) provides free legal services to over 10,000 immigrants, refugees, and U.S. citizens a year detained in Arizona by Immigration and Customs Enforcement (ICE). Through its Know-Your-Rights presentations, workshops, legal representation, and targeted services, FIRRP regularly identifies and assists persons who are held in detention while pursuing meritorious claims before an immigration judge, the Board of

Immigration Appeals (BIA), and the Ninth Circuit Court of Appeals.

Amicus Pennsylvania Immigration Resource Center (PIRC) is a non-profit legal services organization founded in 1996 in the aftermath of the Golden Venture catastrophe. The Golden Venture ship beached off the coast of Long Island with nearly three hundred Chinese refugees aboard who were fleeing persecution. Consequent to immigration policies that mandate the detention of some asylum seekers, many Golden Venture refugees were detained at York County Prison in York, Pennsylvania, by the current Department of Homeland Security (DHS). Today, PIRC continues to provide legal services for vulnerable populations detained in Pennsylvania, including families and survivors of torture. In providing legal and educational resources to detained populations, PIRC seeks to empower unrepresented immigrants to evaluate and manifest their defenses against deportation from the United States. PIRC believes that detained immigrants have a right to adequate information concerning their immigration status and access to effective legal resources. Our goal is to ensure access to justice for immigrants who are detained by ICE and facing removal from the United States.