No. 10-775

In the Supreme Court of the United States

JAMAL KIYEMBA, ET AL., PETITIONERS

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioners are aliens who were previously detained as enemy combatants at Guantanamo Bay Naval Base, and who remain housed at Guantanamo Bay in a non-enemy status. The United States secured appropriate offers of resettlement for them from two different countries, but petitioners declined to accept either offer.

The question presented is whether petitioners have a habeas corpus right to be brought into the United States and released, outside the framework of the federal immigration laws and in contravention of specific statutory restrictions on their transfer to the United States, when they have been granted habeas corpus relief and received appropriate offers of resettlement from two different countries but have declined to accept those offers.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 605 F.3d 1046. This Court's order remanding the case to the court of appeals is reported at 130 S. Ct. 1235. The prior opinion of the court of appeals (Pet. App. 18a-54a) is reported at 555 F.3d 1022. The opinion of the district court (Pet. App. 55a-78a) is reported at 581 F. Supp. 2d 33.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2010. A petition for rehearing was denied on September 9, 2010 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on December 8, 2010. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are aliens who were previously detained as enemy combatants by the Department of Defense at the Naval Base at Guantanamo Bay, Cuba (Guantanamo Bay), and who remain housed at Guantanamo Bay in a non-enemy status. After petitioners filed for writs of habeas corpus, the government concluded that it would no longer seek to hold them as enemy combatants. Consistent with the longstanding policy of the United States not to transfer an individual to a country where he more likely than not would be tortured, the government has committed not to return petitioners to China and has engaged in extensive and high-level diplomatic efforts to arrange their resettlement in appropriate countries.

The United States secured offers of resettlement from two countries that the Executive Branch determined would be appropriate for petitioners' resettlement. Petitioners have declined to accept those offers. The United States continues its efforts to arrange the resettlement of petitioners in other countries, and also stands ready to reapproach one of the countries that previously offered resettlement to petitioners should they be willing to be resettled in that country.

Petitioners nonetheless assert that they are entitled to a judicial order mandating that they be brought into the United States and released here, outside the framework of the federal immigration laws and in contravention of specific statutory restrictions on their transfer to the United States. This Court previously granted certiorari to address whether petitioners had a right to be released into the United States at a time when not all of

them had received appropriate offers of resettlement. Once all petitioners had received appropriate offers of resettlement, this Court remanded the case to the court of appeals to consider the effect of these offers on their legal claim. On remand, the court of appeals held that petitioners are not entitled to release into the United States. Pet. App. 1a-15a.

1. Petitioners are the five remaining members of a group of 22 Chinese nationals of Uighur ethnicity who previously were detained as enemy combatants at Guantanamo Bay. See Pet. App. 3a, 18a-20a.[1] Prior to September 11, 2001, petitioners and the other Uighur detainees traveled to Afghanistan, where Uighur camps had been established in the Tora Bora Mountains. Pet. App. 19a-20a. After the onset of U.S. military operations in Afghanistan, petitioners and the other Uighur detainees were captured by Pakistani or coalition forces, transferred to U.S. military custody, and brought to the Guantanamo Bay Naval Base for detention under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (50 U.S.C. 1541 note). Pet. App. 19a; see *Boumediene* v. *Bush*, 553 U.S. 723, 732-735 (2008).

At Guantanamo Bay, all 22 Uighur detainees were given hearings before Combatant Status Review Tribunals (CSRTs) to determine whether they should be retained in military detention. Pet. App. 2a, 57a-58a. The CSRTs determined that five of the 22 Uighur detainees should no longer be considered enemy combatants; those five men were resettled in Albania in May 2006. See

[1] Although the cover of the certiorari petition lists Jamal Kiyemba as the lead petitioner, he is not listed as one of the parties to this proceeding, he is not a Uighur, and petitioners acknowledge that he is no longer at Guantanamo Bay. Pet. ii & n.1.

Notice of Transfer of Pet'rs at 1, *Mamet* v. *Bush*, No. 05-1886 (EGS) (D.D.C. May 5, 2006). The CSRT determined that the record supported continued detention of the other 17 Uighur detainees. Pet. App. 19a-20a. Only five of those 17 men are petitioners in this Court, see Pet. ii; all of the others have been successfully resettled. See p. 5, *infra*.

2. Habeas petitions were filed challenging the lawfulness of the detention of petitioners and the other Uighurs. Pet. App. 58a. In addition, most of the Uighur detainees sought judicial review of their CSRT determinations under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005, 119 Stat. 2740 (10 U.S.C. 801 note).

In *Parhat* v. *Gates*, 532 F.3d 834 (D.C. Cir. 2008), the court of appeals resolved a DTA case filed by a Uighur detainee, holding that the record before the CSRT did not support his detention as an enemy combatant. Following the *Parhat* decision, in September 2008 the government informed the district court in the habeas proceedings that it would no longer seek to hold any of the Uighur detainees as enemy combatants. See Pet. App. 56a. The government then moved petitioners and the other Uighurs to a new camp at Guantanamo Bay (Camp Iguana), where they are housed under less restrictive conditions, and where other successful habeas petitioners awaiting transfer have been housed. *Id.* at 20a, 59a; 08-1234 J.A. 231a-232a, 426a-427a, 439a n.3.

3. When a person is released from military detention based on enemy status, the assumption is that he will be returned to his home country. Petitioners and the other Uighur detainees have opposed return to their home country, the People's Republic of China, and the United States has agreed not to return them there, con-

sistent with its longstanding policy not to transfer a detainee to a country where he is more likely than not to be tortured. Pet. App. 20a; see *Munaf* v. *Geren*, 553 U.S. 674, 702-703 (2008). Accordingly, since September 2008, the government has engaged in sustained diplomatic efforts to arrange with other countries for the resettlement of petitioners and the other Uighur detainees. Pet. App. 3a-4a, 7a, 20a. Those resettlement efforts intensified after the President issued Executive Order No. 13,492 in January 2009, directing a "prompt and thorough review" of each detainee at Guantanamo Bay and instructing the State Department to negotiate with foreign governments concerning repatriation or resettlement of detainees cleared for transfer. 3 C.F.R. 204 (2009).

Those diplomatic efforts have been successful. Of the 22 Uighur detainees originally held at Guantanamo Bay, only the five petitioners remain. As mentioned above, the United States transferred five Uighurs to Albania in May 2006. The United States then transferred four Uighurs to Bermuda in June 2009, and six to Palau in October 2009.[2] Two Uighurs were transferred to Switzerland in March 2010.[3]

The five Uighurs who remain at Guantanamo have been offered resettlement both in Palau, which they rejected, and also in another country deemed appropriate

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[2] See 08-1234 Letter from Hon. Elena Kagan, Solicitor General, to Hon. William K. Suter, Clerk of Court 1 (June 11, 2009) (Bermuda transfer); *United States Transfers Six Uighur Detainees from Guantanamo Bay to Palau* (Oct. 31, 2009) <http://www.justice.gov/opa/pr/2009/October/09-ag-1179.html>.

[3] See *United States Transfers Two Uighur Detainees from Guantanamo Bay to Switzerland* (Mar. 24, 2010) <http://www.justice.gov/opa/pr/2010/March/10-ag-301.html>.

for resettlement by the United States, which withdrew the offer after several months when it was not accepted.[4] Although the United States deemed both of those countries appropriate for resettlement, the countries made their offers conditional on petitioners' consent, and petitioners' refusal to accept resettlement in these countries therefore meant that the United States could not effect petitioners' resettlement. Pet. App. 7a (Rogers, J., concurring in the judgment).

Petitioners do not contend that they would face torture or mistreatment in the countries that have offered them resettlement, or that those countries would return them to China. Instead, their insistence on release into the United States is apparently based on such things as "the desire for citizenship, ownership of property, cultural affinity, and employment." Pet. App. 10a n.3 (Rogers, J., concurring in the judgment); see Pet. 15, 17. The United States continues its efforts to identify an additional appropriate country or countries for petitioners' resettlement, and is prepared to reapproach Palau should petitioners indicate a willingness to resettle there.

4. After the court of appeals' decision in *Parhat*, petitioners moved for judgment on their habeas corpus petitions. See Pet. App. 59a. They contended that they were entitled to release from detention, and that, because they cannot be returned to China and had not

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[4] In addition, in December 2008, another country offered resettlement to all of the Uighurs then held at Guantanamo Bay. As the government informed the court of appeals in January 2009, in a filing made under seal, the government viewed that country as an appropriate destination for the Uighurs' resettlement only if they wished to go there, which they did not. See Pet. App. 6a-7a (Rogers, J., concurring in the judgment).

been offered resettlement elsewhere, "'release' can only mean * * * to the United States." 08-1234 J.A. 175a-176a.

The district court ordered the government to bring petitioners into the United States and release them in Washington, D.C. Pet. App. 79a-80a. The court acknowledged that its order "strikes at the heart of our constitutional structure" and raises "serious separation-of-powers concerns" by "insinuat[ing] itself" into the political Branches' authority over the admission of aliens. *Id.* at 71a-72a. But the court decided that, because the government could no longer detain petitioners as enemy combatants and could not identify another country willing to accept them, petitioners were entitled to release in the United States. *Id.* at 62a-66a, 75a-77a.

5. The court of appeals reversed. Pet. App. 18a-54a. The court acknowledged that, under *Boumediene*, petitioners have a right to habeas corpus review, and that the traditional habeas remedy has been "to order the prisoner's release if he was being held unlawfully." *Id.* at 30a. But the court explained that "petitioners are not seeking 'simple release'"; instead, they seek "a court order compelling the Executive to release them into the United States outside the framework of the immigration laws." *Ibid.* The court determined that "never in the history of habeas corpus has any court thought it had the power to order an alien held overseas brought into the sovereign territory of a nation and released into the general population." *Id.* at 32a; see *id.* at 30a. The court declined to issue such an order, explaining that the authority to exclude aliens rests exclusively in the political Branches, *id.* at 21a-25a, and it "is not within the province of any court, unless expressly authorized by law, to review [that] determination," *id.* at 25a (quoting *United*

States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537, 543 (1950)).

Judge Rogers concurred in the judgment. Pet. App. 39a-54a. She believed that the district court would have the power to order petitioners' release into the United States if detention were no longer justified and there was no other nation willing to accept them, *id.* at 53a-54a, but that the district court should not have done so here without first determining whether petitioners were excludable and could be detained under the immigration laws, *id.* at 42a-45a.

6. After the court of appeals' first decision in this case, Congress enacted several laws barring the use of certain appropriated funds to effect the transfer of any persons detained by the Department of Defense at Guantanamo Bay into the United States, except for criminal prosecution, and categorically prohibiting the use of such funds to effect release of such persons into the United States. Such statutory prohibitions remain in effect today. See pp. 23-25, *infra*.

7. Petitioners and other Uighur detainees filed a petition for certiorari, seeking review of the question whether a federal court exercising habeas jurisdiction has the power to order that Guantanamo Bay detainees be brought into the United States for release, "where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy." 08-1234 Pet. i. This Court granted certiorari. *Kiyemba* v. *Obama*, 130 S. Ct. 458 (2009).

In its merits brief and in a separate letter to the Court, the government notified the Court that each of the petitioners had received at least one offer of resettlement in another country, and suggested that those

offers eliminated the factual premise of the question presented (*i.e.*, that the petitioners had no other countries available for resettlement). See 08-1234 Gov't Br. 51-52; 08-1234 Letter from Hon. Elena Kagan, Solicitor General, to Hon. William K. Suter, Clerk of Court 4-8 (Feb. 19, 2010).

The Court then issued an order noting that "each of the detainees at issue in this case has received at least one offer of resettlement in another country" and that "[t]his change in the underlying facts may affect the legal issues presented." *Kiyemba* v. *Obama*, 130 S. Ct. 1235, 1235 (2010). The Court therefore vacated the court of appeals' judgment and remanded the case to the court of appeals to consider these new developments. *Id.* at 1235.

8. a. After supplemental briefing and oral argument, the court of appeals modified its prior opinion "to take account of new developments" and reinstated its judgment that petitioners have no right to be released into the United States. Pet. App. 1a-15a. The court emphasized that each of petitioners had received offers of resettlement to Palau and to another country, both of which have been determined by the United States to be appropriate for their resettlement. *Id.* at 3a-4a.[5] The court then reaffirmed that it is within "the exclusive

[5] Indeed, the court noted that its "original decision was made in the light of resettlement offers to all petitioners," because the government had notified the court in an under-seal filing that another country had offered resettlement to all petitioners. Pet. App. 3a. Although the government did not view that resettlement option as an appropriate one because petitioners did not wish to go to that country, see note 4, *supra*, the court stated that the offer made it "confident that the government was 'continuing diplomatic attempts to find an appropriate country willing to admit petitioners.' " Pet. App. 3a (quoting *id.* at 32a).

power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms." *Id.* at 4a (quoting *id.* at 32a).

The court explained that not only did petitioners have no habeas corpus right to be released into the United States, but also that release into the United States was restricted by statutes that prohibited the use of certain appropriated funds to bring any Guantanamo Bay detainee to the United States (except for purposes of criminal prosecution). Pet. App. 4a. The court rejected the argument that this legislation violated the Suspension Clause or constituted an unlawful bill of attainder, explaining that petitioners were not being deprived of any right they previously possessed. *Id.* at 5a.

Finally, the court rejected petitioners' suggestion that the case should be remanded to the district court "for an evidentiary hearing on whether any of the resettlement offers were 'appropriate,' " explaining that "it is for the political branches, not the courts, to determine whether a foreign country is appropriate for resettlement," and that, in any event, "no legally relevant facts are now in dispute" and "[n]one of petitioners' arguments turn[s] on particular factual considerations." Pet. App. 3a-4a.

b. Judge Rogers concurred in the judgment. Pet. App. 6a-15a. She explained that "the relief petitioners seek—release from indefinite and unlawful Executive detention at Guantanamo—is theirs upon consent," and petitioners therefore are not entitled to a judicial order of release into the United States. *Id.* at 9a-11a (internal citation omitted). Judge Rogers noted that petitioners did not claim that they feared torture if they were resettled in either of the countries that had offered resettlement, and that petitioners acknowledged that the United

States' diplomatic efforts on their behalf have been "strenuous" and "in good faith." *Id.* at 8a. She also determined that no further factual development was necessary to resolve petitioners' legal claim, because it was undisputed that petitioners had received two appropriate offers of resettlement. *Id.* at 10a n.3. Emphasizing that the habeas corpus right recognized in *Boumediene* is "above all, an adaptable remedy," 553 U.S. at 779, Judge Rogers concluded that it would be inappropriate for a district court to order release in the United States where the United States has arranged for petitioners' resettlement but petitioners have rejected those offers and therefore remain at Guantanamo Bay. See Pet. App. 13a-14a.

ARGUMENT

Petitioners seek review of the court of appeals' holding that they do not have a habeas corpus right to release into the United States, when petitioners have been offered resettlement in two different appropriate countries but have declined to accept those offers. The petition should be denied because the court of appeals' decision is correct.

The writ of habeas corpus is effective at Guantanamo Bay. Petitioners prevailed in habeas. They are no longer being detained as enemy combatants, and, because they fear return to China, the United States government arranged for their resettlement elsewhere. The only reason that petitioners remain at Guantanamo Bay is because they have declined to accept all appropriate offers of resettlement they have received. The court of appeals correctly ruled that petitioners' refusal to accept resettlement in other countries does not entitle them to a court order requiring the government to bring

them into the United States and release them here, outside the framework of the immigration laws and in contravention of specific statutory restrictions on their transfer to the United States. Further review is therefore unwarranted.

1. Contrary to petitioners' suggestion (Pet. i), this case does not raise far-reaching questions regarding whether a habeas court "has any judicial power to direct [a] prisoner's release." Instead, the only question here is whether these particular petitioners are entitled to be brought into the United States and released when the government has agreed not to return them to their home country but to arrange their resettlement in a safe third country, the United States obtained multiple offers of resettlement for them, and petitioners have not accepted any of those offers.

To be sure, for most of this litigation, petitioners attempted to raise a different question. Starting in the district court, and through their first certiorari petition to this Court, petitioners' argument was that they were entitled to be brought into the United States and released because they prevailed in habeas corpus, could not be returned to China consistent with United States policy, and no other nation had offered them resettlement. In particular, petitioners argued that, under *Boumediene* v. *Bush*, 553 U.S. 723 (2008), and the court of appeals' decision in *Parhat* v. *Gates*, 532 F.3d 834 (D.C. Cir. 2008), they were entitled to release, and because they could not return to China or elsewhere, "'release' *can only mean * * * release into the United States*." 08-1234 J.A. 175a-176a (emphasis added).

The theme that petitioners must be released into the United States because no other nation would accept them pervaded petitioners' presentations in the district

court and court of appeals.[6] The district court based its holding on the fact that petitioners had not received any offers of resettlement and that there was "no foreseeable date by which they may succeed." Pet. App. 77a. The court of appeals likewise recognized this fundamental premise of petitioners' argument. *Id.* at 20a-21a, 30a-31a. And when petitioners sought review in this Court, they asked the Court to decide the question whether they had a habeas corpus right to be brought into the United States and released, when "release into the continental United States *is the only possible effective remedy*." 08-1234 Pet. i (emphasis added).

It is now undisputed that the petitioners have been offered resettlement in two different appropriate countries.[7] Petitioners therefore can no longer claim that there has been no habeas corpus remedy available to them except release into the United States. As a result, on remand from this Court, petitioners raised a new argument, arguing to the court of appeals that they have

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[6] See, *e.g.*, 08-1234 J.A. 205a (stating that petitioners "are stranded because no foreign government has agreed to accept them"); *id.* at 208a ("Parhat is detained for the practical reason that no safe country has been found to take him."; "[A]ll efforts to persuade allies to accept him as a refuge have failed."); *id.* at 462a ("[T]here's only two places to go from Guantanamo. You can come here or you can go somewhere else in the world, but somewhere else in the world requires the cooperation of a foreign sovereign."); Pet. C.A. Br. 1, 9 (contending that "[r]esettlement has failed" and "[t]ransfer of [petitioners] is impossible"); *id.* at 9 ("After more than four years of failed resettlement efforts, there is no question that [petitioners'] detention is indefinite.").

[7] It is true that petitioners do not currently have resettlement offers outstanding, because they declined to accept the offers when they were made. But if petitioners were to express interest, the United States would again discuss the matter with the government of Palau. The United States also continues to work to find other options for resettlement.

a right to be brought into the United States and released because they prevailed in habeas, *even though* the United States arranged for their safe resettlement elsewhere. Pet. C.A. Reply on Mot. to Govern & for Remand 4-5, 12-14. The court of appeals correctly rejected that argument. Pet. App. 3a-4a.

Accordingly, this case does not present an occasion to consider the remedies available to prevailing Guantanamo Bay habeas petitioners more generally. Instead, it raises the narrow question whether these petitioners —individuals who have been offered resettlement in appropriate countries, but have declined to accept those offers—have a habeas corpus right to be brought into the United States and released. As explained below, petitioners have no such right.[8]

2. Petitioners contend (Pet. 19-20) that any prevailing Guantanamo Bay habeas corpus petitioner has a right to be brought into the United States and released, or the habeas corpus remedy envisioned in *Boumediene* will lack meaning. They are mistaken, both as a factual matter and as a legal matter.

As a factual matter, the writ of habeas corpus has been proven effective at Guantanamo Bay. In *Boumediene*, this Court held that foreign nationals in military detention at Guantanamo Bay are entitled to the writ of habeas corpus to challenge the lawfulness of their detention. 553 U.S. at 771. As the government explained in detail at an earlier stage of this case, since *Boumediene*,

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[8] No other Guantanamo detainees are similarly situated to the petitioners. Aside from petitioners in this case, every Guantanamo detainee with a final, non-appealable order granting a habeas petition has been transferred from Guantanamo Bay to another country. See p. 15, *infra*. The uniqueness of petitioners' situation is another reason that certiorari is not warranted here.

all of the detainees at Guantanamo Bay (including 17 Uighurs) who have prevailed in habeas proceedings under district court orders that are no longer subject to appeal have either been repatriated or resettled, or have received offers of resettlement. 08-1234 Gov't Br. 14-18. That is still true today.

The district court orders have adopted meaningful judicial remedies that have been effectuated by the political Branches. In cases in which the district court granted habeas corpus relief, the court typically entered an order "direct[ing]" the Executive Branch "to take all necessary and appropriate diplomatic steps to facilitate the [habeas petitioner's] release."[9] Consistent with those court orders, the government responded with substantial diplomatic efforts to repatriate or resettle the successful habeas petitioners. Those sustained efforts have paid off: aside from the petitioners in this case, every Guantanamo detainee with a final, non-appealable order granting a habeas petition has been transferred from Guantanamo Bay to another country. And petitioners have each been offered resettlement to two appropriate countries, but have declined to accept them. Petitioners thus are wrong to suggest that a district court order granting release from detention in enemy status at Guantanamo Bay is meaningless. Pet. 28-30.[10] To the contrary, the United States takes such orders seriously. It has responded promptly to them, and it has exerted substantial diplomatic efforts to ensure that the habeas corpus remedy is an effective one.

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[9] *Boumediene* v. *Bush*, 579 F. Supp. 2d 191, 198-199 (D.D.C. 2008); see 08-1234 Gov't Br. 14 n.13 (listing district court remedial orders).

[10] The specific cases petitioners cite (Pet. 29-30) were addressed in detail by the government at an earlier stage of this case. 08-1234 Gov't Br. 13-18.

As a legal matter, neither *Boumediene* nor any other decision of this Court supports petitioners' argument that the Suspension Clause requires that a successful habeas petitioner at Guantanamo Bay be permitted to choose release into the United States, outside of the immigration laws, especially when another safe country is willing to accept him. In *Boumediene*, this Court held that a habeas court must have the power "to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." 553 U.S. at 787. But the Court also recognized that "common-law habeas corpus was, above all, an adaptable remedy," and its "precise application and scope changed depending upon the circumstances." *Id.* at 779. The Court further indicated that the appropriate remedy can take into account equitable principles and practical constraints: Although "the habeas court must have the power to order the conditional release of an individual unlawfully detained," a detainee's immediate release "need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." *Ibid.*

This Court's decision in *Munaf* v. *Geren*, 553 U.S. 674 (2008), confirms that prudential and legal constraints shape the available habeas corpus remedy. In *Munaf*, the Court considered whether a habeas court reviewing the lawfulness of the detention of U.S. citizens by U.S. forces in Iraq could enjoin the transfer of those detainees to Iraqi custody. *Id.* at 679-680. The Court observed that "habeas corpus is 'governed by equitable principles,'" and "prudential concerns" may be considered in fashioning appropriate relief. *Id.* at 693. Turning to the specific relief requested in that case, the Court noted that the petitioners did not seek "simple

release," but something more—an injunction barring their transfer to Iraqi custody. *Id.* at 693-694. That relief, the Court held, would "interfere with Iraq's sovereign right to punish offenses against its laws committed within its borders," and would "intrude upon the authority of the Executive in military and national security affairs." *Id*. at 689, 692 (citations and internal quotation marks omitted). The Court thus concluded that petitioners were not entitled to their requested relief. *Id.* at 698-700.

Applying the equitable principles identified by the Court in *Boumediene* and *Munaf* here, it is clear that an order of release into the United States is not necessary to give effect to the habeas corpus right. The relief petitioners sought in habeas corpus—release from detention as enemy combatants—has been granted. The government has moved petitioners into less restrictive temporary housing at Guantanamo Bay pending their resettlement and procured for them two offers of resettlement in appropriate countries. Accordingly, as Judge Rogers explained in her concurring opinion below, "petitioners hold the keys to their release from Guantanamo: All they must do is register their consent." Pet. App. 9a. In these circumstances, equitable considerations weigh conclusively against an extraordinary judicial order requiring the Executive to bring petitioners into the United States and release them here, outside the framework of the immigration laws and in contravention of statutory restrictions on their transfer to the United States.

Petitioners rely (Pet. 15-16) on early habeas cases concerning release from custody to assert that the right to habeas corpus review necessarily confers an absolute right to release in the United States. These cases, how-

ever, did not involve aliens detained outside the United States claiming a right to enter the United States. Moreover, petitioner *have* been released from detention as enemy combatants. They are now housed in different facilities at Guantanamo Bay, pending their resettlement elsewhere. Moreover, at the time of the early cases on which petitioners rely, there were no relevant statutory restrictions on entry into the United States, see *Kleindienst* v. *Mandel*, 408 U.S. 753, 761 (1972), and in any event the question of a habeas court's authority to override the decisions of the political Branches restricting such entry was not presented. Decisions of this Court have since made clear that a successful habeas petitioner is not invariably entitled to immediate and outright release from all custody. See *Hilton* v. *Braunskill*, 481 U.S. 770, 775 (1987); *Coleman* v. *Tennessee*, 97 U.S. 509, 518-520 (1878). And it is well-settled in modern practice that a habeas petitioner has no absolute right to be physically produced before the court. See 28 U.S.C. 2243, 28 U.S.C. 2255(c) (Supp. III 2010).

The relief petitioners have sought throughout this litigation is extraordinary: they wish to be brought into the United States and released here, even though they are aliens housed abroad who have disavowed any intent to seek entry under the immigration laws and Congress has restricted their transfer to the United States. See Pet. App. 32a ("[N]ever in the history of habeas corpus has any court thought it had the power to order an alien held overseas brought into the sovereign territory of a nation and released into the general population."). Even assuming that such unprecedented relief could have been warranted at an earlier stage of this case, when the government had made significant diplomatic efforts to resettle petitioners in an appropriate country but those

efforts had not yet borne fruit, it is clear that such relief is not available now, when the United States obtained offers of resettlement but petitioners declined to accept them.

3. Petitioners contend (Pet. 21-22, 24-25) that the statutory restrictions on their transfer to and release into the United States pose certain constitutional concerns as applied to them. They are mistaken.

As an initial matter, this Court need not address the statutory restrictions on petitioners' release into the United States, because the fact that petitioners were provided multiple appropriate offers of resettlement means that the writ of habeas corpus is effective as to them, and that the courts therefore need not consider taking the unprecedented step of ordering their release into the United States. Pet. App. 9a (Rogers, J., concurring) (finding it unnecessary to decide "whether a habeas court ordering petitioners' release from the courthouse could overcome statutory barriers," because "the relief petitioners seek * * * is theirs upon consent"). In any event, petitioners had no right of release into the United States prior to the enactment of these statutes, and the statutes simply confirm that the order petitioners seek has no basis in our constitutional structure.

a. Even in the absence of the specific statutes restricting transfer of Guantanamo Bay detainees to the United States, petitioners had no right to be brought into the United States and released. As the court of appeals correctly explained in its prior decision, the right to control the admission of aliens and to set the conditions on which they will be allowed to enter is a key aspect of sovereignty. Pet. App. 21a-22a (noting the "ancient principle that a nation-state has the inherent right to exclude or admit foreigners and to prescribe applica-

ble terms and conditions for their exclusion or admission").

For centuries, the power to admit or exclude aliens has been recognized as a power "inherent in sovereignty, and essential to self-preservation." *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). That fundamental attribute of national sovereignty remains widely recognized in the international community in modern times.[11] The principle of sovereign control over national borders is reflected in the Convention Regarding the Status of Aliens, to which the United States has been a party since 1930,[12] and it is also evident in the various agreements relating to refugees, which establish that individuals have a right to seek asylum without imposing a concomitant duty on states to permit refugees to enter.[13]

In drafting the Constitution, the Framers conferred on the federal government sovereign rights and powers "equal to the right and power of the other members of

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[11] See, *e.g.*, *Case of Abdolkhani* v. *Turkey*, No. 30471/08, § 72 (2009) (Eur. Ct. H.R.) (recognizing the right of states "as a matter of international law and subject to their treaty obligations" to control the entry of aliens); accord, *e.g.*, *Rex* v. *Bottrill*, [1947] 1 K.B. 41, 51 ("One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State.") (quoting *Attorney Gen. for Canada* v. *Cain*, [1906] A.C. 542, 546 (P.C.)); *Musgrove* v. *Toy*, [1891] A.C. 272, 282 (P.C.) (appeal from Supreme Court of Victoria).

[12] Convention Regarding the Status of Aliens, art. 1, Feb. 20, 1928, 46 Stat. 2754, 132 L.N.T.S. 307 ("States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory.").

[13] See, *e.g.*, *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 179-187 (1993) (discussing Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6276, T.I.A.S. No. 6577).

the international family." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316-318 (1936). The Constitution thus vests the power to admit or exclude aliens "in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war." *Nishimura Ekiu*, 142 U.S. at 659. That power belongs, in particular, to the political Branches. *Ibid.*; see *Kleindienst*, 408 U.S. at 765-766 & n.6 (noting that "the Court's general reaffirmations" of the political Branches' exclusive authority to admit or exclude aliens "have been legion").

Control of the Nation's borders is vested in the political Branches because that control is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"—all matters "exclusively entrusted to the political branches of government." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Preserving the political Branches' authority to decide whether an alien should be allowed entry also serves "the obvious necessity that the Nation speak with one voice" on such matters. *Zadvydas* v. *Davis*, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting); accord, *e.g.*, *Munaf*, 553 U.S. at 702. That is especially true here, where an order of release into the United States could interfere with the United States' resettlement efforts generally, as well as undermine the incentives of detainees to cooperate in resettlement efforts. See *Zadvydas*, 533 U.S. at 711, 713 (Kennedy, J., dissenting).

Here, petitioners are aliens who are housed abroad and who are not seeking admission to the United States under the immigration laws. Indeed, they have affirmatively disavowed reliance on those laws. 08-1234 Pet.

Br. 35-36. The court of appeals therefore correctly concluded that no provision of the immigration laws authorized the district court to order that the petitioners be brought into the United States and released, and that such an order would contravene the judgment of the political Branches not to transfer petitioners to the United States. Pet. App. 25a.

Petitioners rely (Pet. 22-23) on *Clark* v. *Martinez*, 543 U.S. 371 (2005), and *Zadvydas*, *supra*, for the proposition that they are entitled to release into the United States without regard to any limitations imposed by the political Branches on their admission into this country. Neither decision supports that assertion. Both *Martinez* and *Zadvydas* concerned the interpretation of a statute, not the Suspension Clause, see *Martinez*, 543 U.S. at 378; *Zadvydas*, 533 U.S. 683-686, and neither case concerned an alien who was outside the United States, had not sought entry under the immigration laws, and who had been offered resettlement in another country but simply elected not to cooperate with the resettlement efforts.

Indeed, in identifying the relevant constitutional concerns, the Court expressly distinguished a situation in which an alien previously admitted to the United States is detained pending removal, from one in which (as here) an alien is stopped before entry and remains in U.S. custody pending disposition. *Zadvydas*, 533 U.S. at 682 ("Aliens who have not yet gained initial admission to this country would present a very different question."); *id.* at 693 (noting 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"); see *Clark*, 543 U.S. at 379-380 (situations of alien who had been lawfully admitted into the United States and

alien stopped at the border were "indeed different"). The *Zadvydas* Court therefore explained that its decision would not affect "the political branches' authority to control entry into the United States." *Zadvydas*, 533 U.S. at 695-696. Accordingly, neither *Zadvydas* nor *Clark* supports the proposition that the Suspension Clause gives habeas petitioners outside the United States an entitlement to release into the United States, without regard to immigration or other restrictions imposed by Congress, in contravention of the determination of the Executive Branch—and especially when, as in this case, the government has arranged for their resettlement abroad but the aliens declined to accept the offers.

b. Since the court of appeals' first decision in this case, Congress has enacted a series of specific restrictions on the use of funds to transfer detainees from Guantanamo Bay to the United States. See Supplemental Appropriations Act, 2009 (SAA), § 14103, Pub. L. No. 111-32, 123 Stat. 1920 (prohibiting use of any funds made available by that Act or any prior Act to release or transfer into the United States any individual detained as of June 24, 2009, at Guantanamo Bay, with a limited exception for transfers for the purpose of prosecution or detention during legal proceedings); Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, Div. B, §§ 106(3), 115, 123 Stat. 2045, 2046 (extending the SAA's transfer restrictions through October 31, 2009); Department of Homeland Security Appropriations Act, 2010 (DHS Act), Pub. L. No. 111-83, § 552, 123 Stat. 2177 (prohibiting the use of any federal funds to release in the United States or, with the same limited exception, to transfer into the United States any person detained at Guantanamo Bay as of June 24, 2009); Interior Depart-

ment and Further Continuing Appropriations, Fiscal Year 2010, Pub. L. No. 111-88, § 428, 123 Stat. 2962; Consolidated Appropriations Act (CAA), 2010, Pub. L. No. 111-117, § 532, 123 Stat. 3156; Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3466; see also National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2454 (prohibiting use of Department of Defense funds "to release into the United States, its territories, or possessions," any non-citizen at Guantanamo Bay who is "in the custody or under the effective control of the Department of Defense" or "otherwise under detention").[14] The statutory restrictions on transfer of petitioners into the United States are no less clear today: legislation enacted less than two months ago prohibits the Department of Defense from using any funds authorized to be appropriated by that legislation for fiscal year 2011 to transfer Guantanamo Bay detainees to the United States or release them here. H.R. 6523, 11th Cong., 2d Sess. 215-218 (2010) (Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1032-1034).[15]

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[14] Some of the enactments also bar the use of any funds they make available "to provide any immigration benefit (including a visa, admission into the United States or any of the United States territories, parole into the United States or any of the United States territories (other than parole for the purposes of prosecution and related detention), or classification as a refugee or applicant for asylum) to any individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba." DHS Act § 552(f), 123 Stat. 2179; CAA § 532(f), 123 Stat. 3157.

[15] Petitioners previously contended (08-1234 Pet. Br. 49-52) that these statutes should be construed not to apply to them. Petitioners do not renew those arguments at this stage, see Pet. 23-24, and in any event, the statutes plainly apply to them, see 08-1234 Gov't Br. 32-33.

This legislation lends additional support to the decision of the court of appeals that petitioners are not entitled to an order requiring that they be brought to the United States and released here, contrary to the determinations of the Branches of government charged with regulating admission of aliens into this country. Pet. App. 4a. The legislation is consistent with the Suspension Clause, because as discussed above (see pp. 14-23, *supra*), petitioners do not have a habeas corpus right to be brought into the United States and released here, especially when the United States obtained offers of safe resettlement for them but petitioners have declined to accept those offers. Further, contrary to petitioners' contention (Pet. 25 n.14), the statutory restrictions do not constitute unlawful bills of attainder. These statutes do not deprive petitioners of any right they previously possessed. See, *e.g., Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 474-475 (1977). In addition, they apply to all Guantanamo Bay detainees, not just petitioners, and serve the nonpunitive purpose of restricting the release of Guantanamo Bay detainees into the United States in accordance with Congress's control over the borders. See *id.* at 473-485.

4. In addition to invoking the Suspension Clause, petitioners assert (Pet. 11-14) that separation-of-powers principles require that the judicial Branch be solely responsible for fashioning and implementing habeas corpus remedies. As an initial matter, petitioners are simply wrong to claim (Pet. 3) that "*judicial* relief [is] categorically unavailable to the prevailing [Guantanamo Bay] *habeas* petitioner"; the habeas courts have ordered the release of prevailing habeas petitioners from detention as enemy combatants and have further ordered the

government to repatriate or resettle them, and the government has successfully done so. See pp. 14-16, *supra*.

Moreover, none of the decisions petitioners cite (Pet. 11-12) supports their assertion that a district court must have the authority to order their release into the United States, rather than ordering the Executive Branch to repatriate or resettle them. For example, the fact that the Executive Branch may need to expend diplomatic efforts to effect a habeas corpus judgment does not offend the "principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); see *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (establishing that principle). The Executive Branch is not reviewing the habeas courts' orders; it is complying with them through diplomatic means.

A judicial order contemplating that the Executive Branch will arrange for petitioners' resettlement likewise does not impermissibly delegate the habeas corpus remedy to the Executive Branch. See *Gordon* v. *United States*, 117 U.S. 697 (1864). The remedy is one fashioned by the court. The courts that have granted habeas relief for Guantanamo Bay detainees have typically ordered the Executive Branch to take necessary and appropriate steps to facilitate the habeas petitioner's repatriation or resettlement, see p. 15, *supra*, and the Executive Branch has respected and worked diligently to comply with those orders, including by engaging in diplomatic extensive negotiations with foreign countries. Further, contrary to petitioners' suggestion, this case is unlike *Plaut*, which addressed reopening of a final judgment. 514 U.S. at 214-215. Here, no efforts are being made to override the district court's remedial orders.

Finally, the statutory restrictions on petitioners' transfer to the United States are not impermissible attempts to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1872). *Klein*'s prohibition is inapplicable when Congress enacts legislation "establishing new standards for the enforcement of prospective [injunctive] relief." *Miller* v. *French*, 530 U.S. 327, 344-349 (2000). The comprehensive framework of the immigration laws, now supplemented by the statutory restrictions on using certain appropriated funds for petitioners' admission, prevent petitioners' entry into the United States. Such laws, enacted pursuant to the broad powers of the political Branches under the Constitution to control the Nation's borders, in accordance with the sovereign powers of nations generally, do not violate the Suspension Clause.

More generally, it is well-established that the ultimate decision whether and how a successful habeas petitioner will be released may in certain circumstances depend on a decision by the Executive Branch. See *Boumediene*, 553 U.S. at 779, 787. For example, where a criminal defendant successfully petitions for habeas corpus following a conviction, the decision whether the habeas petitioner will be immediately released may depend on whether the government decides to prosecute him again for the underlying crime. See *Chessman* v. *Teets*, 354 U.S. 156, 165-166 (1957). Similarly, the decision whether the habeas petitioners in *Munaf* could be transferred to Iraqi custody depended on a determination by the political Branches whether the likely result of transfer would be torture, as well as the fact that the petitioners would be detained by a separate sovereign. See *Munaf*, 553 U.S. at 700-701. The result here simi-

larly respects the separation of powers, because the political Branches are vested under the Constitution with the power to determine whether aliens may enter the United States and the responsibility for the conduct of foreign affairs.

5. Petitioners also contend (Pet. 26) that the Due Process Clause confers on Guantanamo Bay detainees a right to release into the United States, and they take issue with the court of appeals' statement in its first decision that the Due Process Clause does not apply to aliens without property or presence in the sovereign territory of the United States.

There is no occasion here to address any general questions concerning the application of the Due Process Clause to detainees at Guantanamo Bay. Whatever due process rights petitioners might otherwise claim while they are at Guantanamo Bay, this Court's precedent makes clear that aliens outside the United States have no substantive due process right to enter the United States outside the framework of the immigration laws and in contravention of other Acts of Congress. Even when an alien has been held indefinitely at the border of the United States, pending identification of another country willing to accept him, this Court has refused to order his release in the United States in contravention of the law and judgment of the political Branches. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). A fortiori that proposition applies to aliens who remain at Guantanamo Bay after declining to accept two prior offers of resettlement to appropriate countries. See *id.* at 215; see also *Harisiades*, 342 U.S. at 588-591.

6. Finally, petitioners suggest in passing (Pet. 17-18) that, even if a habeas court might lawfully withhold

an order of release in the United States to a detainee who has been offered but has declined to accept resettlement in a third country, this case should have been remanded to the district court for fact-finding on the details of prior resettlement offers. As the court of appeals correctly recognized, however, petitioners did not identify any "legally relevant facts" that are in dispute, and hence no factfinding is necessary. Pet. App. 3a; see *id.* at 10a n.3 (Rogers, J., concurring). In their certiorari petition, petitioners likewise do not identify any facts that are necessary to resolve their legal claim. See Pet. 17-18.

As it stands, petitioners do not contest that they were offered resettlement in two different countries determined by the Executive Branch to present appropriate destinations for petitioners' resettlement. See Pet. 6, 15; see also Pet. 5 n.6. Petitioners do not suggest that they would face a risk of torture or return to China in those countries. Rather, they claim a right to reject resettlement offers and insist instead on release in the United States. Pet. 15, 17. Petitioners have no such right in habeas corpus, see pp. 14-29, *supra*, and therefore no additional factfinding is required to decide their legal claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Acting Solicitor General is recused in this case.