No. 02-1155

In the Supreme Court of the United States

COALITION OF CLERGY, LAWYERS & PROFESSORS, ET AL., PETITIONERS

v.

GEORGE WALKER BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General

ROBERT M. LOEB
SHARON SWINGLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners, an ad hoc group of clergy, lawyers, and professors with no relationship with any of the individuals on whose behalf they purport to sue, lack next-friend standing to seek a writ of habeas corpus on behalf of the alien detainees held by the United States military at the naval base at Guantanamo Bay, Cuba.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 310 F.3d 1153. The opinion of the district court (Pet. App. 30-59) is reported at 189 F. Supp. 2d 1036.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2002. A petition for rehearing was denied on January 15, 2003. The petition for a writ of certiorari was filed on February 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the wake of the September 11, 2001, terrorist attacks on the United States, the President, acting in his capacity as Commander in Chief and with the full backing of Congress,[1] dispatched armed forces to Afghanistan to fight the al Qaida terrorist network and the Taliban regime. In the course of those operations, the United States military and its allies captured or secured the surrender of thousands of armed combatants fighting for al Qaida and the Taliban. The United States military took control of many of these combatants, acting under the President's authority as Commander in Chief and under the laws and customs of war, which permit holding combatants in an armed conflict. The military subsequently transferred a number of such combatants to the United States Naval Base at Guantanamo Bay, Cuba.

Since their transfer to Cuba, detainees have been visited by the International Red Cross and by personnel from their home countries, and have been permitted to write to family members. See Pet. App. 12. "Family members have filed habeas petitions on the behalf of some detainees, and diplomats from several countries including Pakistan, Kuwait, Australia, and the United Kingdom have made inquiries into the status of the detainees and sought their release." *Ibid.* (citing *Rasul* v. *Bush*, 215 F. Supp. 2d 55, 57-58 (D.D.C. 2002), aff'd, 321 F.3d 1134 (D.C. Cir. 2003) (petitions brought on detainees' behalf by parents and other family members as next friends)); cf. *Hamdi* v. *Rumsfeld*, 296 F.3d 278, 280-281 (4th Cir. 2002) (*Hamdi II*) (habeas petition brought by detainee's father as next

[1] See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224.

friend on behalf of enemy combatant seized in Afghanistan and held at Guantanamo and then transferred to Norfolk Naval Station Brig).

2. The Guantanamo Naval Base is in the sovereign territory of the Republic of Cuba. The United States uses and occupies the base under a 1903 lease agreement with Cuba, which is continued in effect by a 1934 Treaty.[2] By its terms, the Lease Agreement provides that Cuba retains sovereignty over the leased lands:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased area], on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

Lease of Land for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (Lease Agreement). Under a supplementary agreement, the United States agreed to additional lease terms, including a limit on establishing commercial or industrial enterprises on the lands. See Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. III, T.S. No. 426.

3. Petitioners are an ad hoc "coalition" of clergy, lawyers, and professors who have filed a petition for a writ of habeas corpus challenging the military's detention at Guantanamo of combatants captured in Afghani-

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[2] See Lease Agreement, art. III; Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1683 (extending lease "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations").

stan. Petitioners did not allege that they were personally subject to or injured by the challenged conduct, nor did they allege any relationship between themselves and any of the detainees. Petitioners nonetheless claimed standing as "next friends" to seek habeas corpus relief on the detainees' behalf.

On February 21, 2002, the district court held that it lacked jurisdiction over petitioners' habeas claims. Pet. App. 33. Specifically, the court held that because petitioners lacked a "significant relationship" with detainees, they lacked next-friend standing to sue on their behalf. *Id.* at 40-45. The court emphasized that petitioners had *no* relationship with the detainees. See *id.* at 43-44. Accordingly, the court held that to permit petitioners or other self-appointed parties to file habeas petitions as next friends "would invite well-meaning proponents of numerous assorted 'causes' to bring lawsuits on behalf of unwitting strangers." *Id.* at 45.

The district court alternatively held that, even if petitioners had standing, it lacked territorial jurisdiction to issue a writ of habeas corpus. The court invoked the "well-settled" rule that a district court's habeas corpus jurisdiction is limited to custodians within its territorial jurisdiction, and it explained that none of the named respondent custodians in this case was present within the Central District of California. See Pet. App. 46-49. Citing *Schlanger* v. *Seamans*, 401 U.S. 487, 490 n.4 (1971), and *Dunne* v. *Henman*, 875 F.2d 244, 248 (9th Cir. 1989), the court rejected petitioners' argument that 28 U.S.C. 1391(e) authorized it to issue a writ of habeas corpus to government officials anywhere in the country. Pet. App. 47.

Finally, the court held that, even apart from petitioners' lack of standing and its own lack of territorial jurisdiction, *Johnson* v. *Eisentrager*, 339 U.S. 763

(1950), would preclude it from exercising habeas corpus jurisdiction on behalf of the Guantanamo detainees. See Pet. App. 50-58. The court explained that the Guantanamo detainees are similar "[i]n all key respects" to the petitioners in *Eisentrager*, which held that the federal courts lacked jurisdiction to consider a petition for habeas corpus filed by German nationals taken into custody and held by United States military authorities in Germany. *Id.* at 53. The court rejected petitioners' argument that *Eisentrager* is distinguishable on the ground that the Guantanamo detainees are "'present' in the United States." *Id.* at 54; see *id.* at 55-57. In so doing, it found that Cuba retains sovereignty over Guantanamo, which is the "dispositive" factor under *Eisentrager*. *Id.* at 56.

4. The court of appeals unanimously affirmed, holding that "the Coalition lacks next-friend and third-party standing to bring a habeas petition on behalf of the detainees." Pet. App. 3. The court recognized that 28 U.S.C. 2242 permits federal habeas petitions to be brought "by someone acting [on] behalf" of a prisoner, and that the "actual practice codified by Congress" in the federal habeas statute was to allow "next-friend habeas standing" only where "there was a significant pre-existing relationship between the prisoner and the putative next friend." Pet. App. 5-7 (citing, *inter alia*, *Whitmore* v. *Arkansas*, 495 U.S. 149 (1990)).

The court held that petitioners failed to satisfy the requirements for next-friend standing because they had "not demonstrated *any* relationship" with the detainees, "either as to any individual detainee or to the detainees *en masse*." Pet. App. 16-17 (first emphasis added). Under *Whitmore*, the court recognized, the mere "concern[] * * * that 'unconstitutional laws [are being] enforced'" does not give rise to standing. Pet.

App. 13 (brackets in original) (quoting *Whitmore*, 495 U.S. at 166). The court found it unnecessary to decide how significant a next-friend relationship must be to satisfy constitutional and prudential requirements, because petitioners' inability to show "*any* connection or association * * * with any detainee" meant that they failed even the most lenient standard. *Id.* at 16-17 (emphasis added).[3] Finally, the court rejected petitioners' claim of third-party standing, holding that petitioners could not demonstrate either injury-in-fact or a close relationship with the detainees. *Id.* at 18-19.

The court of appeals declined to consider whether a federal court would have jurisdiction over a petition brought by a proper next friend on behalf of the detainees. Pet. App. 20-21. Reasoning that the district court should not have "adjudicate[d] the habeas rights of individual detainees, when [petitioners] lack standing and [individual detainees] were not before the court," the court of appeals vacated the district court's alternate holdings that it lacked jurisdiction because no custodian was within its territorial jurisdiction and that no court would have jurisdiction over a habeas corpus petition on behalf of the Guantanamo detainees under *Eisentrager*. *Ibid.*

Petitioners filed a petition for rehearing and suggestion of rehearing en banc, which was denied without dissent.

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[3] Because the court concluded that petitioners lacked an adequate relationship with the detainees, it declined to decide whether they met the second requirement for next-friend standing, that the detainees lack access to a court to litigate on their own behalf. Pet. App. 13.

ARGUMENT

The court of appeals properly, and unanimously, held that petitioners lack standing to bring a habeas petition on behalf of the Guantanamo detainees, with whom petitioners have no relationship whatsoever. That ruling is a straightforward and fact-specific application of this Court's decision in *Whitmore* and the well-established principle that "a generalized interest in constitutional governance" does not give rise to standing. 495 U.S. at 164. The decision below does not conflict with any decision of this Court or of any court of appeals. Accordingly, plenary review of that ruling by this Court is not warranted.

Nor is certiorari warranted to review the second and third questions presented by the petition. The court of appeals expressly refused to rule on those questions and *vacated* the portions of the district court's decision addressing them. The court of appeals correctly reasoned, as respondents had urged in both the district court and court of appeals, that any rights of the detainees should not be litigated by persons without standing to represent the detainees. In any event, the district court's resolution of those questions was also correct and, accordingly, does not warrant further review by this Court.

1. a. The court of appeals correctly held that petitioners lack next-friend standing. In *Whitmore*, this Court set out the "two firmly rooted prerequisites for 'next friend' standing" in federal court: (i) there must be some barrier, "such as inaccessibility, mental incompetence, or other disability," that prevents the real party in interest from litigating on his own behalf; and (ii) "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to

litigate," as demonstrated by a "significant relationship" to the real party in interest. 495 U.S. at 163-164 (citation omitted).

It is clear that the lack of *any* relationship between petitioners and the detainees defeats petitioners' assertion of next-friend standing. Petitioners are "stranger[s] to the detained persons and their case," *Whitmore*, 495 U.S. at 164; they have no relationship whatsoever with any of the detainees; and they have asserted, at most, a desire to ensure that the military's treatment of the detainees complies with the United States Constitution and international law. See Pet. App. 17-18; Pet. 2. *Whitmore* makes clear that this type of "generalized interest in constitutional governance" is insufficient for next-friend standing. 495 U.S. at 164; see *id.* at 166 ("However friendly [concerned citizens] may be * * * and sympathetic for [a prisoner's] situation, however concerned [they] may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this.") (quoting *Gusman* v. *Marrero*, 180 U.S. 81, 87 (1901)).

Petitioners mistakenly argue that 28 U.S.C. 2242 does not require them to have a relationship with the detainees on whose behalf they seek to act. But, as this Court recognized in *Whitmore*, Section 2242 merely "codified the historical practice." 495 U.S. at 165; see 28 U.S.C. 2242 Historical and Revision Notes (amendment permitting next-friend petitions intended to "follow[] the actual practice of the courts"). That practice, dating back to the English common law, was to allow a petition to be filed by someone with a significant relationship with a detainee—a detainee's family member, close friend, or a person "authorized to act on

behalf of the one restrained of his liberty," *Collins* v. *Traeger*, 27 F.2d 842, 843 (9th Cir. 1928). However, that practice denied standing to "intruders or uninvited meddlers, styling themselves next friends," with no preexisting relationship with the detainee, *Whitmore*, 495 U.S. at 164 (quoting *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (2d Cir. 1921)); see Pet. App. 6-10 (discussing history of next-friend standing doctrine).[4]

Petitioners' contrary argument is based on the erroneous assertion that the requirement of a relationship between a next friend and the real party in interest is merely a prudential limit on standing that Section 2242 overrode. See Pet. 8-9. But that contention is doubly flawed. First, Section 2242 did not eliminate the significant relationship test, as *Whitmore* itself made clear. *Whitmore* both noted that Section 2242 codified prior practice and that prior practice required a significant relationship. Second, as this Court also recognized in *Whitmore*, the requirement of at least some relationship with the detainee is a constitutional imperative. See 495 U.S. at 155, 156 & n.1, 163-165. Without such a restriction, any person with a generalized interest in the treatment of a detainee unable to sue on his own behalf—*i.e.*, any person who wished to ensure that "the Government act[s] in accordance with law," *Allen* v. *Wright*, 468 U.S. 737, 754 (1984)—could "circumvent the jurisdictional limits

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[4] For this reason, the Fourth Circuit recognized in *Hamdi* v. *Rumsfeld*, 294 F.3d 598 (4th Cir. 2002) (*Hamdi I*), that this Court's decision in *Whitmore* is "most faithfully understood as requiring a would-be next friend to have a significant relationship with the real party in interest." *Id.* at 604. The court of appeals below cited this analysis favorably and viewed it as consistent with its prior decision in *Massie ex rel. Kroll* v. *Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001). Pet. App. 10, 15-16.

of Art. III simply by assuming the mantle of 'next friend.'" *Whitmore*, 495 U.S. at 164; see *Lenhard* v. *Wolff*, 443 U.S. 1306, 1312 (1979) (Rehnquist, J., in chambers) ("[H]owever worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case."); Pet. App. 16 ("*Whitmore* is [] most faithfully understood as requiring a would-be next friend to have a significant relationship with the real party in interest.") (citation omitted).

Here, without any relationship with the detainees, petitioners cannot demonstrate that they are "truly dedicated to the best interests of" the detainees. *Whitmore*, 495 U.S. at 163. They have no greater claim to represent the detainees than any other concerned individual. This problem is only underscored by petitioners' effort to represent the Guantanamo detainees *en masse*. Petitioners have no idea whether individual detainees actually desire to challenge their confinement by attempting to invoke the jurisdiction of the courts of the United States—a country against which they have engaged in hostilities—or which claims they would want to press. Some detainees might support this action, while others might want nothing to do with United States courts. Furthermore, there is no reason to believe that detainees wish to be represented by petitioners, with whom they have no relationship, rather than family members or others who might sue on their behalf. As the court of appeals recognized, family members of a number of detainees who petitioners at least initially purported to represent have already filed habeas corpus petitions on the detainees' behalf. Pet. App. 12 (citing *Rasul* v. *Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), aff'd, 321 F.3d 1134 (D.C. Cir. 2003);

Hamdi v. *Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (*Hamdi II*)); see Pet. App. 12 (concluding "the prisoners are not being held incommunicado"); see also *Al Odah* v. *United States*, 321 F.3d 1134, 1137-1144 (D.C. Cir. 2003) (addressing claims of certain Guantanamo detainees in a case brought by family members as the detainees' next friends).

Petitioners have not cited a single decision by this Court or a court of appeals in which a third party was permitted to litigate a next-friend action on behalf of a stranger, and the government is unaware of any such decision. The Fourth Circuit, in addressing similar efforts by strangers to file petitions for habeas corpus, held that an attorney and a private citizen with no prior relationship with a detained enemy combatant lacked standing to bring a habeas corpus petition on the detainee's behalf. *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 605-606 (2002) (*Hamdi I*). Allowing "a next friend who files suit on behalf of a total stranger" to proceed as a next friend, the Fourth Circuit reasoned, would be "in irreconcilable conflict with basic constitutional doctrine." *id.* at 607. As the Fourth Circuit recognized in *Hamdi I*, courts of appeals have overwhelmingly concluded that a would-be next friend must have *some* relationship with the prisoner he seeks to represent. See *id.* at 604-605 (collecting cases). The uniformity of precedent demonstrates the lack of any need for guidance from this Court about application of the principle that a "generalized interest * * * in constitutional governance" does not confer Article III standing. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

b. The court of appeals also correctly held that petitioners lack third-party standing "because neither [the Coalition] nor its members can demonstrate either

* * * an injury-in-fact or * * * a close relationship" with the detainees. Pet. App. 19. In order to satisfy Article III requirements for third-party standing, a would-be litigant must show that he *personally* has suffered an injury in fact. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102-104 (1998); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). A litigant must also show "a close relation to the third party" whose rights he invokes. *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991); *Shaw* v. *Hahn*, 56 F.3d 1128, 1130 n.3 (9th Cir.), cert. denied, 516 U.S. 964 (1995). Petitioners implicitly concede that they satisfy neither requirement, defeating their claim to third-party standing under the same constitutional principles that bar their standing as next friends.

c. This petition provides a particularly poor vehicle to consider the law of next-friend and third-party standing. Petitioners are in the relatively rare situation of attempting to litigate on behalf of detainees with whom they have *absolutely no relationship*. Whatever questions may arise as to the exact quantum of relationship that is required by Article III are not implicated in a case where no relationship at all is alleged. Moreover, this is not a case where in the absence of this litigation going forward there are no traditional next friends available to bring claims challenging the detention of enemy combatants held at Guantanamo. Such claims have been brought by family members, and the government has not raised any next-friend standing objections, although it has prevailed, to date, on alternative jurisdictional grounds. See *Al Odah*, 321 F.3d at 137-1144.[5]

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[5] Petitioners themselves, moreover, have attempted to relitigate the decisions below by refiling essentially the same petition

2. a. Petitioners urge the Court to grant certiorari to review two additional questions: whether the fact that no custodians were within the district court's territorial jurisdiction would have barred the court's exercise of habeas jurisdiction; and whether, under this Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), any district court would have had jurisdiction over a habeas claim on behalf of aliens detained in the course of armed hostilities in a foreign country and held outside the sovereign territory of the United States. Neither of these questions, however, is properly presented by this petition. The court of appeals did not decide either issue, holding that it was both unnecessary and improper to reach them in light of the petitioners' obvious lack of standing to sue on the detainees' behalf. Indeed, the court of appeals expressly vacated the portions of the district court's decision addressing those questions. Pet. App. 20-21.

This Court should not reach out to decide the rights of detainees who are not present before the Court and to review a district court ruling that the Ninth Circuit has vacated. Generally, this Court "do[es] not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); accord *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). Here, not only did the court of appeals decline to resolve the second and third questions raised in the petition, it *vacated* the portions of the district court opinion addressing those questions, correctly concluding that it would be improper to resolve questions

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for writ of habeas corpus, with an additional allegation that they recently have on one occasion attempted to contact the detainees by letter. See Pet. for Habeas Corpus, *Coalition of Clergy* v. *Bush*, No. 02-9516 (C.D. Cal. filed Dec. 16, 2002).

concerning the rights of the detainees in a case where the claimed next friends lack standing because they have no relationship whatsoever to the detainees. If the Court were inclined to address the sole issue addressed by the Ninth Circuit, the normal course would be to address that issue alone and if it disagreed with the disposition below remand for the court of appeals to address the alternative grounds. Those principles apply with particular force in light of the sensitive constitutional and foreign policy issues implicated by the second and, in particular, third questions presented. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 660-661, 668 (1981).

b. Review of petitioners' second and third questions presented is also unwarranted because the district court's now-vacated ruling was correct on the merits and consistent with the other courts to address this issue directly. The district court correctly held that it lacked jurisdiction to consider the habeas petition because none of the named custodians was within the territorial jurisdiction of the Central District of California. Pet. App. 46-49. Because a writ of habeas corpus acts "upon the person who holds [the detainee] in what is alleged to be unlawful custody," *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494-495 (1973), a district court lacks jurisdiction to issue the writ unless the detainee's custodian is present within the court's territorial jurisdiction. See *Schlanger* v. *Seamans*, 401 U.S. 487, 491 (1971) ("absence of his custodian is fatal to * * * jurisdiction"); accord *Dunne* v. *Henman*, 875 F.2d 244, 248 (9th Cir. 1989); *Vasquez* v. *Reno*, 233 F.3d 688, 693 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); but cf. *Henderson* v. *INS*, 157 F.3d 106, 125-127 (2d Cir. 1998) (reserving judgment as to whether Attorney General might be proper custodian in immigration case

filed in New York), cert. denied, 526 U.S. 1004 (1999). This is true even if the custodians are government officials who are likely to have "minimum contacts" with the jurisdiction and who are subject to nationwide service of process under 28 U.S.C. 1391(e). See *Schlanger*, 401 U.S. at 488-489, 490 n.4, 491 (no jurisdiction over Secretary of the Navy).[6]

The district court also properly concluded that *Eisentrager* bars any attempt to secure habeas relief for the detainees petitioners purport to represent. Pet. App. 50-54. This Court in *Eisentrager* declined to exercise jurisdiction over a habeas petition filed by German nationals who had been seized by United States armed forces in China after the German surrender in World War II and subsequently imprisoned in a United States military prison in Landsberg, Germany. See 339 U.S. at 765-767. The Court held that the prisoners could not file a petition for habeas corpus in any court of the United States because they were aliens without connection to the United States who had been seized and at all times held outside the sovereign territory of the United States. The Court emphasized that aliens have been accorded rights under the Constitution and laws of the United States only as a consequence of their presence within the United States. As the Court put it, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial juris-

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[6] *Braden*, relied on by petitioners, held that a *detainee* need not be present in the district in which he files his habeas petition, but it did not alter the requirement that the *custodian* be physically present. 410 U.S. at 500. *Ex parte Hayes*, 414 U.S. 1327 (1973) (Douglas, J., in chambers), did not decide whether jurisdiction would be proper, *id.* at 1329, and is not a holding of the Court.

diction that gave the Judiciary power to act." *Id.* at 771. Accordingly, the Court held that the writ of habeas corpus was unavailable because "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 778. The Court also held that the prisoners could not invoke the writ to vindicate the Fifth Amendment, because, as aliens abroad, they had no Fifth Amendment rights. See *id.* at 781-785.

Like the prisoners in *Eisentrager*, the detainees in this case are aliens who were seized abroad during military hostilities and are held at a location, the Guantanamo Bay Naval Base, outside the sovereign territory of the United States. See Lease Agreement, art. III (recognizing "ultimate sovereignty of the Republic of Cuba" over Guantanamo); Pet. App. 55-58; cf. *United States* v. *Spelar*, 338 U.S. 217, 219, 221-222 (1949) (distinguishing between "possessions" and "sovereignty," and recognizing that leased military base in Newfoundland was in "foreign country" and "subject to the sovereignty of another nation" rather than the United States). Under *Eisentrager*, such aliens held abroad do not enjoy "the privilege of litigation" in United States courts. 339 U.S. at 777; see Pet. App. 51-53.[7]

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[7] Petitioners falsely suggest that the government has interpreted the Lease Agreement to give it sovereignty over Guantanamo. The only source for this assertion is a privately-written history that was briefly posted on the Guantanamo Bay web site with the express caveat that "[i]t is in no way endorsed, certified as fact, or otherwise presented as 'official documentation' of events and historical policy at Guantanamo Bay by the United States

Not only was the district court's application of *Eisentrager* correct, it is entirely consistent with the United States Court of Appeals for the District of Columbia Circuit's recent conclusion in a group of cases raising virtually identical claims brought by family members of Guantanamo detainees. See *Al Odah* v. *United States*, 321 F.3d 1134, 1137-1144 (D.C. Cir. 2003), aff'g *sub nom. Rasul* v. *Bush*, 215 F. Supp. 2d 55, 57-58 (D.D.C. 2002) (opinion of Kollar-Kotelly, J.) (reaching same conclusion). Like the district court in this case, the D.C. Circuit in *Al Odah* concluded that "the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*. They too are aliens, they too were captured during military operations, they too were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States." 321 F.3d at 1140. Also like the district court below, the D.C. Circuit rejected the argument that the United States has de facto sovereignty over Guantanamo, *id.* at 1141-1142, as well as petitioners' other arguments for evading the plain meaning of *Eisentrager*, see *id.* at 1138-1144; *id.* at 1145-1150 (Randolph, J., concurring) (rejecting various international law claims).[8]

Government or its agencies." See *A Note from the Public Affairs Office* (last modified Mar. 26, 2003) <www.nsgtmo.navy.mil/history.htm>.

[8] Although the court of appeals in this case vacated the portion of the district court's order addressing *Eisentrager* because of petitioners' lack of standing, it expressed no disagreement with the merits of the district court's conclusion that *Eisentrager* precludes jurisdiction over habeas claims brought on behalf of aliens detained at Guantanamo. To the contrary, the Ninth Circuit emphasized that "[t]here is *no question* that the holding in [*Eisentrager*] repre-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
DAVID B. SALMONS
Assistants to the Solicitor General

ROBERT M. LOEB
SHARON SWINGLE
Attorneys

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sents a *formidable obstacle* to the rights of the detainees at [Guantanamo] to the writ of habeas corpus." Pet. App. 20 n.4 (emphasis added). The court of appeals further stated that it was "impossible to ignore" *Eisentrager*'s jurisdictional bar because that case "well matches the extraordinary circumstances here." *Ibid.*