[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 24, 2008]

Consolidated Case Nos. 08-5424, 08-5425, 08-5426, 08-5428, 08-5429

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, ET AL.,
Petitioners-Appellees,

v.

GEORGE W. BUSH, ET AL.,
Respondents-Appellants.

On Appeal from a Final Judgment of the
United States District Court for the District of Columbia

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE*, ADDRESSING *SHAUGHNESSY v. UNITED STATES ex rel. MEZEI* AND *CLARK v. MARTINEZ*, AND SUPPORTING AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel states:

(A) Parties. Except for (1) The Brennan Center, The Constitution Project, and The Rutherford Institute; (2)The National Immigrant Justice Center and American Immigration Lawyers Assocation; (3) the Uighur American Association; (4) Law professors Susan Akram, Michael J Churgin, Sarah H. Cleveland, Niels W. Frenzen, Bill Ong Hing, Kevin R. Johnson, Daniel Kanstroom, Stephen H. Legomsky, Hiroshi Motomura , Gerald L. Neuman, Margaret Taylor, Charles D. Weisselberg, Michael J. Wishnie; (5) Legal and historian habeas scholars Paul Finkelman, Eric M. Freedman, Austin Allen, Paul Halliday, Eric Altice, Gary Hart, H. Robert Baker, William M. Wiecek, Abraham R. Wagner, Cornell W. Clayton, David M. Cobin, Mark R. Shulman, Marcy Tanter, Samuel B. Hoff, Nancy C. Unger, Karl Manheim, and Gabriel J. Chin; (6) and the National Association of Criminal Defense Lawyers, all parties, intervenors, and *amici* appearing before the district court are listed in the Brief for Appellants.

(B) Rulings Under Review. References to the rulings under review appear in the Brief for Appellants.

(C) Related Cases. References to related cases appear in the Brief for Appellants.

/s/ Theodore D. Frank
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Disclosure Statement Pursuant to Rule 26.1

The Amici are submitting their Brief in their individual capacities and not on behalf of any of the institutions with which they may be employed or on behalf of any other person or entity. Accordingly, no additional disclosure is required under Local Rule 26.1.

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INTEREST OF *AMICI CURIAE*

Amici Curiae are the immigration and constitutional law professors whose individual names appear *ante*, page *ii*. *Amici* have expertise in the constitutional law of the United States relating to immigration and due process, as well as the statutes and rules governing entry, admission, detention and parole. With the consent of the parties,[1] we give our views here on the meaning of several of the major Supreme Court decisions affecting these issues, including *Shaughnessy v. United States ex rel. Mezei* ("*Mezei*"), 345 U.S. 206 (1953), *Clark v. Martinez* ("*Martinez*"), 543 U.S. 371 (2005) and *Zadvydas v. Davis* ("*Zadvydas*"), 533 U.S. 678 (2001). The government relies heavily on *Mezei*. Whatever our own views about whether *Mezei* was correctly decided fifty-five years ago, we all agree that *Mezei* today poses no meaningful barrier to the release of these habeas corpus petitioners into the United States. We believe that the Supreme Court's more recent decisions, especially *Martinez*, make the point clear. We write to share our expertise with the Court and to place *Mezei* in context so that its holding may be properly understood.

SUMMARY OF ARGUMENT

We address two issues in this Brief: first, whether *Mezei* necessarily stands for the proposition that the Judiciary is barred from compelling the release of aliens like the *Kiyemba* petitioners because they have not entered the United States; and second, whether the immigration laws prohibit the courts from ordering release into the United

[1] All of the parties have consented to the filing of this brief.

States as a remedy for unlawful detention. We do not address whether the petitioners are currently detained without authority or in violation of their constitutional or statutory rights; we assume that the district court correctly found that the petitioners are being unlawfully detained. We also do not address the authority of the federal habeas corpus statute to confer the power upon the Judiciary to order the petitioners discharged from custody, or whether denial of any such authority would violate the Suspension Clause or the principles set forth in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008). Our office is to discuss the reach of *Mezei*, and explain why an order releasing these petitioners into the United States does not invade the Executive's turf in any inappropriate way.

Relying on *Mezei*, the government contends that because the petitioners are at Guantanamo Naval Base, have never been lawfully admitted to the United States and cannot be repatriated to their own or a third country, they may be detained at Guantanamo indefinitely. In *Mezei*, the Supreme Court held that an alien who presents himself as a new immigrant is "on the threshold of initial entry [and] stands on a different footing" from aliens "who have once passed through our gates." *Mezei*, 345 U.S. at 212. Though Mezei was actually on U.S. soil at Ellis Island, under what has been termed the "entry fiction," he was treated as if he was outside our border. The Court accordingly ruled, at a time when Cold War tensions were great, that Mezei could be excluded from the United States based on secret evidence concerning national security and without any opportunity for a hearing. As a consequence of his order of exclusion, Mezei was detained on Ellis Island after he was denied entry and no other country was willing to take him. The government claimed in *Mezei* that without the concurrent authority to detain, hostile nations could force their citizens upon us, and our country would be

powerless to protect itself. Critically, the Court said that to release an alien barred from entry on national security grounds would nullify the very purpose of exclusion. *See id*. at 216. Thus, there was a claim that on the unique facts of the case, the issues of exclusion and detention could not be broken apart.

But *Mezei* was a product of its time and the marriage of exclusion and detention is not always necessary. Mezei came to our shores on his own accord. The underlying facts and national security concerns in *Mezei* appear poles apart from this case, where the district court found that our government chose these petitioners, plucked them from Pakistan, brought them to Guantanamo Bay, and subsequently determined that they are not enemy combatants. Mem. Op. [Dkt. #184] at 3, *In re: Guantanamo Bay Detainee Litigation* (Oct. 9, 2008).[2] Since our country selected these men, and not the other way around, the district court's order of release on habeas corpus would not encourage a flood of other aliens to come directly to the United States. Nor, under these circumstances, would release into the United States undermine our nation's security in the way the Court feared in *Mezei*.

The government also contends that the decision whether to admit an alien into the United States rests solely with the political branches. Yet this is again not like *Mezei*; the government appears to turn *Mezei* on its head. In *Mezei*, detention was sought in order to effectuate a lawful order of exclusion. Here the Executive's assertion of authority to admit or exclude would continue to effectuate unlawful detention. The case at bench is

[2] The government has asserted that the petitioners are "no longer" enemy combatants. *See id*. The petitioners deny that they ever could have been characterized as enemy combatants.

about detention, not admission. In *Zadvydas* and *Martinez*, the Supreme Court recognized that admission and detention are distinct issues. *Martinez* required the release from confinement of even inadmissible immigrants when they could not be removed to other countries in the reasonably foreseeable future, and the decision left their immigration status untouched. Whatever is determined with respect to the immigration status of these petitioners at some later date and in some later proceeding, *Mezei* and its progeny pose no barrier to their transportation to the United States and release from confinement. Indeed, as we explain, the Court in *Martinez* rejected the same separation of powers and security concerns that the government raises here.

ARGUMENT

I. *MEZEI* PRESENTED UNIQUE FACTS AND NATIONAL SECURITY CONCERNS; IT DOES NOT PROVIDE BLANKET AUTHORITY TO DETAIN

The national security immigration cases decided in the early 1950's at the height of both the Korean War and the McCarthy era represent the modern zenith of the entry fiction and judicial deference to decisions regarding entry and detention. Those cases, and especially *Mezei*, were a product of their time and addressed specific national security concerns not present here.

In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Court affirmed the exclusion of the non-citizen wife of a U.S. soldier, based on secret evidence and national security grounds, and without a hearing. The Attorney General invoked provisions permitting exclusion without a hearing during time of war or national

emergency if entry would be "prejudicial to the interests of the United States."[3] Regardless of the rule applicable to persons "who have gained entry into the United States," said the Court, the decision to exclude an alien presenting herself at the border is "final and conclusive." *Id*. at 543. While Ellen Knauff was held on Ellis Island for a period of time, she could have left and returned to Europe. Ignatz Mezei, on the other hand, had nowhere to go.

Mezei was born in Gibraltar of uncertain parentage. He came to the United States in 1923 and lived in New York until 1948. That year, he left the United States voluntarily to visit his mother in Romania. He spent 19 months in Hungary, and then obtained a quota immigrant visa and made his way by ship to the United States. Mezei arrived at Ellis Island in February 1950, presenting himself as a new immigrant. He was excluded under the same provisions applied to Knauff. At that point, Mezei attempted to leave the United States. He twice tried to return to Europe, but France and Great Britain both refused him permission to land. The State Department could not negotiate his admission to Hungary. So he remained on Ellis Island. *See Mezei*, 345 U.S. at 208-11.

Mezei brought a petition for writ of habeas corpus to challenge his detention. The district court sought to review the government's confidential information *in camera*. The

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[3] Proclamation No. 2523, 3 C.F.R. §270-72 (1938-1943), *reprinted in* 55 Stat. 1696, 1698 (1942), *amended by* Proclamation No. 2850, 3 C.F.R. §27-28 (1949-1953), *reprinted in* 63 Stat. 1289, 1289-90 (1950); *see also* 8 C.F.R. §175.57(b) (Supp. 1945) (regulations issued by Attorney General permitting exclusion without a hearing on the basis of confidential information if disclosure would be similarly prejudicial.) Congress had previously authorized the President to promulgate restrictions on immigration during time of war or national emergency. *See* Act of June 21, 1941, ch. 210, 55 Stat. 252 (1942). The President had earlier declared a national emergency. *See* Proclamation No. 2487, 3 C.F.R. §234 (1938-1943), *reprinted in* 55 Stat. 1647 (1942).

government, however, refused to disclose its evidence and the district court ordered Mezei released on bond. *See id*. at 209. The court of appeals affirmed. *United States ex rel. Mezei v. Shaughnessy*, 195 F.2d 964 (2d Cir. 1952).

The United States then sought High Court review, presenting the case as involving our nation's ability to control its borders when non-citizens arrive voluntarily, seeking admission. Said the government in its petition: "Under [the court of appeals'] holding, therefore, any excludable alien who manages to get to our shores may nevertheless obtain most of the benefits of the entry, if, for some reason, the country from which he comes refuses to take him back and no other country is willing to take him." Petition for a Writ of Certiorari at 6-7, *Mezei* (No. 139) (excerpts reproduced in the Appendix, *infra*, at 21-22.) As the Cold War was heating up, the government raised national security concerns: "the decision below provides a ready tool for espionage. A hostile power could be certain of getting an agent into the United States by the simple expedient of sending him here and refusing to take him back." *Id*. at 7. In its merits brief, the government also described Mezei's act of coming ashore at Ellis Island as being "granted a haven, rather than being forced to remain aboard the vessel on which he arrived" while his claim to enter the country was adjudicated. Brief for the Petitioner [United States] at 16-17, *Mezei* (No. 139), 1952 WL 82476. And "[i]f this situation be considered a hardship, it is a result of the current international situation and does not itself call for extraordinary relief. Moreover, . . . 'hardships are part of war, and war is an aggregation of hardships.'" *Id*. at 31-32 (quoting *Korematsu v. United States*, 323 U.S. 214, 219 (1944)).

Thus, as the United States framed the case for review, two features stand out: First, Mezei came to the border on his own volition and was allowed to disembark on Ellis Island for his own benefit; the government was not responsible for his unfortunate situation. Second, according to the government, releasing Mezei from detention into the United States would undermine national security, and there was also need for a rule to protect our country in the event hostile nations tried to ship their citizens to us.

The Supreme Court, which reversed the court of appeals, saw the case in that light. In a five-to-four decision, with Justices Black, Frankfurter, Jackson, and Douglas dissenting, the Court held that Mezei was properly excluded and detained without a hearing under the same wartime provisions applied to Knauff. The majority viewed Mezei's detention on Ellis Island as an unfortunate consequence of the decision to exclude him. His "temporary harborage" on Ellis Island, "an act of . . . grace," bestowed no additional rights. *Mezei*, 345 U.S. at 215. Further, "to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding." *Id*. at 216. The majority distinguished *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), decided the same Term, which underscored just how much *Mezei* was based upon the concern that our nation might be forced to admit uninspected immigrants.

In *Kwong Hai Chew*, a resident merchant seaman sought entry to the United States after a temporary absence at sea. Though he was placed in exclusion proceedings, the Court had no difficulty in deciding to "assimilate" his status to that of an already-admitted resident alien. *See id*. at 596. This, said the *Kwong Hai Chew* Court, "does not leave an unprotected spot in the Nation's armor. Before petitioner's admission to permanent residence, he was required to satisfy the Attorney General and Congress of his

suitability for that status." *Id*. at 602. Mezei, by contrast, could be seen as "no more ours than theirs" and perhaps "other countries ought not shift the onus to us." *Mezei*, 345 U.S. at 216.

Dissenting, Justice Jackson stressed the difference between exclusion and detention that the Court has subsequently recognized. He argued:

> It is evident that confinement of respondent no longer can be justified as a step in the process of turning him back to the country whence he came. Confinement is no longer ancillary to exclusion; it can now be justified only as the alternative to normal exclusion. It is an end in itself.

Mezei, 345 U.S. at 227 (Jackson, J., dissenting).

Mezei (and *Knauff*) were heavily criticized in their day.[4] Scholarly[5] and judicial criticism[6] have continued unabated. Without doubt, *Mezei* represents the high-water-

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[4] *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1390-96 (1953); John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. Chi. L. Rev. 212, 231-32 (1954); *see also* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 985 n. 267 (1995) (collecting sources).

[5] *See, e.g.*, T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 Geo. Immigr. L. J. 365, 374 (2002); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 Wm. & Mary L. Rev. 11, 27 (1985); Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 200-01 (1987); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165, 173-76 (1983); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1642, 1650-56 (1992); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 1052-53 (1998); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 20 (1984).

[6] The decision has been excoriated in the courts. *E.g.*, *Trop v. Dulles*, 356 U.S. 86, 102 n.36 (1958) (Warren, C.J.) (plurality opinion) (*Mezei*'s extended confinement without judicial review was "intolerable"); *Jean v. Nelson*, 472 U.S. 846, 869 (1985) (Marshall, J., dissenting) (The "broad dicta [of *Mezei*] can withstand neither the weight

mark of the government's power to detain inadmissible aliens. In the next part of this Brief, we show that the water has substantially receded. But before addressing those newer authorities, it is important to recognize that when light was eventually shone on the government's national security claims in *Knauff* and *Mezei*, the allegations did not stand up to scrutiny.

The Court's ruling in *Knauff* prompted a substantial response in Congress and elsewhere. Following numerous congressional hearings and critical newspaper reports, the Attorney General reopened Mrs. Knauff's case. After she was able to see and contest the evidence against her, she was ultimately ordered admitted to the United States. The Board of Immigration Appeals determined that the allegations against her amounted to uncorroborated hearsay that could not sustain her exclusion.[7]

Mezei likewise provoked considerable public outcry. Editorials condemned the decision. Two private bills were introduced in Congress on Mezei's behalf. Attorney General Brownell eventually agreed to grant Mezei an exclusion hearing before a Board of Special Inquiry. The Board found that Mezei was excludable: in 1935, he had received several bags of stolen flour and pleaded guilty to petty larceny, which was a crime of moral turpitude. But the real reason why the government wanted to exclude him

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of logic nor that of principle, and has never been incorporated into the fabric of our constitutional jurisprudence."); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387, 1388 (10th Cir. 1981) (rejecting "euphemistic fiction" that detention of excludable aliens is merely a "continuation of the exclusion" without Fifth Amendment implications and describing Mezei as "the nadir of the law with which the opinion dealt").

[7] *See* Weisselberg, *supra* note 4, at 958-64 (describing Knauff's history); *see also Mezei*, 345 U.S. at 225 (Jackson, J., dissenting) (describing *Knauff* as "a near miss, saved by further administrative and congressional hearings from perpetrating an injustice"; citation omitted).

was that Mezei had been affiliated with a lodge of the International Workers Order, which had been listed as a communist organization. Yet after the Board heard the government's evidence about Mezei's activities, it found that he played no more than a minor role in the Communist Party, such as attending meetings and demonstrations, and distributing literature. On the basis of the Board's off-the-record recommendation, the Attorney General paroled Mezei into the United States, where he lived for many years.[8]

The lesson of *Mezei*, then, is that aliens who come to our shores on their own, who seek to enter for the first time, and who fall under some specific ground such as the security-related grounds of inadmissibility invoked in *Mezei* and *Knauff*, may be denied

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[8] *See* Weisselberg, *supra* note 4, at 970-85 (describing Mezei's history); *see also* Richard A. Serrano, *Detained, Without Details; As the Supreme Court considers whether to hear Guantanamo Bay prisoner petitions, both sides cite a case from the Red scare of the 1950s,* L.A. Times (Nov. 1, 2003) at A1 (describing case and interviewing family members).

To the extent that Mezei's experience reflects the dangers of reliance on secret evidence, more recent incidents are worth noting. In the late 1980's and 1990's the Immigration and Naturalization Service relied on confidential information in numerous cases, resulting in months to four years of detention. Ultimately,

> the federal courts and the Board of Immigration Appeals found the government's use of secret evidence to detain and deport unconstitutional, required the government to declassify the evidence and produce it to the court, or obtained special clearance for a judge to review the evidence and determine its weight and relevance. In each of the cases in which the evidence was declassified or produced, it was found to be hearsay, conjectural, unreliable, or utterly unpersuasive of the government's charges.

Susan M. Akram and Maritza Karmely, *Immigration. and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. Davis L. Rev. 609, 618 (2005) (citing *United States v. Hamide,* 914 F.2d 1147 (9th Cir. 1990); *Al-Najjar v. Reno,* 97 F.Supp.2d 1329 (S.D. Fla. 2000); *Kiaraldeen v. Reno,* 71 F.Supp.2d 402 (D.N.J. 1999); *American-Arab Anti-Discrimination Committee v. Reno,* 883 F.Supp.1365 (C.D. Cal. 1995); *Rafeedie v. INS,* 795 F.Supp. 13 (D.D.C. 1992).

"admission" to the United States under our immigration laws and may be detained in conjunction with that denial. But the case does not stand for the proposition that aliens who are forced into the custody of the United States against their will, and whose detention has been found unlawful, cannot be granted release

from detention in the United States. Nor does *Mezei*, which addressed very specific national security concerns, establish that detention is *always* a permissible adjunct to exclusion or removal. We address the last point further in light of more recent case law below.

II. THE SUPREME COURT'S IMMIGRATION CASES DO NOT BAR THE JUDICIARY FROM ORDERING RELEASE OF UNLAWFULLY DETAINED NON-CITIZENS

Subsequent to *Mezei,* the Supreme Court has reiterated that the immigration power is substantially subject to constitutional constraints. The Court has applied ordinary due process analysis in the immigration context, *e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (applying the *Mathews v. Eldridge* balancing test to measure the procedures at a hearing to exclude a resident alien). The decision in *INS v. Chadha*, 462 U.S. 919 (1983), importantly invalidated a legislative veto over an immigration statute, holding that Congress' authority over immigration must be implemented through "a constitutionally permissible means." *Id*. at 941-42. In *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977), the Court acknowledged that there was a "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." And in *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001), the Court applied "conventional equal protection scrutiny" to a citizenship

statute. *Id*. at 72-73. But with respect to the cases at bench, the most significant rulings are *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Clark v. Martinez*, 543 U.S. 371 (2005). These decisions, especially *Martinez*, make plain that the judiciary may remedy unlawful detention without trenching upon the government's power to admit or remove non-citizens.

The district court's order in this case addressed the petitioners' motion for release into the United States as a remedy for their unlawful detention. Mem. Op. [Dkt. #184] at 9, 17, *In re: Guantanamo Bay Detainee Litigation* (Oct. 9, 2008). It did not enter an order directing that the petitioners be admitted under the immigration laws, be granted any particular status, or be immune from having their immigration status determined by the government as it would for other non-citizens, if the government so wishes. Quite significantly, the Executive has the statutory authority to release the petitioners into the United States, subject to restrictions and conditions, through a mechanism that would negate any claim that their presence in the United States would amount to an "entry" or an "admission." That is, the government is authorized by law to parole the petitioners into the United States.

The immigration statute's express mechanism of "parole" allows non-citizens to be brought to the United States, or released from detention, without conferring any of the statutory rights that would accompany "admission" or a legal "entry." *See* 8 U.S.C. §1182(d)(5)(A). The Supreme Court long ago recognized that allowing parole out of detention does not confer legal status on the alien:

> For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United

> States. . . . Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. . . . Congress specifically provided that parole "shall not be regarded as an admission of the alien[.]"

Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (citations omitted); *see also Kaplan v. Tod*, 267 U.S. 228, 230-31 (1925) (excludable alien paroled into country held not to have made an "entry" under the immigration statute). A paroled alien has long been deemed to remain in the same status as one "on the threshold of initial entry." *Mezei*, 345 U.S. at 212.

Ordering the petitioners' release, which would afford the Executive an opportunity to exercise its statutory parole authority, would not run afoul of the separation of powers doctrine or usurp the role of the political branches. In both *Zadvydas* and *Martinez*, the Court rejected the government's submission that a court compelling the release into the community (under appropriate supervision) of aliens who had no right to enter or remain in the United States would exceed the judiciary's authority or violate the separation of powers. In both cases, the Court emphasized that such release from detention did not transgress the courts' proper role. The Supreme Court acknowledged that the practical result of such an order would be release into the community. But it emphasized that such release did not confer a legal right to "liv[e] at large" but merely a right to be "supervis[ed] under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696. As the Court made clear, "[t]he question before us is not one of 'confer[ring] . . . the right to remain against the national will' . . .. Rather, the issue we address is whether aliens that the Government finds itself unable to remove

are to be condemned to an indefinite term of imprisonment . . .." *Id*. at 695 (citations omitted).

Martinez is particularly relevant because in that case the Court confronted the situation of aliens who had never been granted admission to the United States. The Court's holding demonstrates that release is a judicially-enforceable remedy for the unlawful executive detention of aliens with no right to enter the United States. The aliens in that case were detained, were deemed to be outside the country and indisputably had no right to be admitted to the United States. *See id.*, 543 U.S. at 374-75. Those aliens were detained because, like the petitioners here, they could not be removed to their home country and no other country would take them. They nonetheless asserted a right to be released from incarceration on the ground that their continued detention was unlawful. *See id*. at 374-76. The Court held that their continued incarceration was without statutory authorization and that the petitions should have been granted. *See id.* at 386-87.

The government vigorously argued in *Martinez*, as it has in this case, that judicially compelled release of those individuals from detention would violate the separation of powers. In particular, the government asserted that granting habeas relief to aliens who had never been admitted would confer a judicially-ordered entry into our country over the objection of the political branches. The government specifically attempted to distinguish the Court's earlier decision in *Zadvydas* on the ground that it addressed only aliens who previously had been lawfully admitted and then lost their right to remain. *See Zadvydas*, 533 U.S. at 693. *See also* Brief for the Petitioners [United States] at 20, *Clark v. Martinez*, 543 U.S. 371 (2005) (No. 03-878), 2004 WL 1080689.

The aliens in *Martinez*, the government argued, could not be released because they (like the petitioners here) had *never been admitted*. Brief for the Petitioners [United States] at 20, *Martinez* (No. 03-878), 2004 WL 1080689. The government insisted that a judicial order of release would pose grave separation-of-powers and national security concerns:

> That constitutional distinction [between aliens admitted by our government and those stopped at the border] rests not just on historical conceptions of the power of the national government to control immigration and the very limited rights of individuals arriving at the border, but also on practical separation-of-powers considerations in this sensitive area where foreign policy and national security intersect.
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> * * *
>
> [W]hen the political Branches have stopped an alien at the border and have made the quintessentially political determination that he should not be admitted or released into the United States, a judicial order compelling his release into the Country would *cause* an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations. It simply "is not within the province of the judiciary to order that foreigners who have never . . . even been admitted into the country" should "be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches."

Id. at 19-20 (citing cases) (emphasis added).[9]

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[9] *See also* Brief for the Petitioners [United States] at 16-17, *Martinez* (No. 03-878), 2004 WL 1080689 (citations omitted):

> The singular authority of the political Branches over immigration derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. Indeed, the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe," is not only "inherent in sovereignty," but also "essential to self-preservation." That power is vital "for maintaining normal international relations and defending the country against foreign encroachments and dangers." The power to exclude is a legislative and an "inherent executive" power. Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental

The Supreme Court necessarily rejected the government's reasoning when it held in *Martinez* that inadmissible aliens stopped at our border and denied entry must be released (subject to permissible conditions of supervision) if their detention becomes unlawful. *See id.*, 543 U.S. at 378, 386-87.[10] The Court's decision ordering release from detention—and thus release into the country over the government's vehement objection—compels rejection of the argument that the Supreme Court's immigration jurisprudence prohibits granting meaningful judicial relief in this case. And it must be remembered that the orders of release in both *Zadvydas* and *Martinez* did not work any change to the aliens' immigration status. It merely freed them from indefinite detention.

Thus, contrary to the government's argument based on *Mezei*, exclusion and detention need not go together. *Zadydas* and *Martinez*, and particularly *Martinez*, demonstrate that a court may grant a habeas corpus petition and release even an inadmissible alien into the United States.

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sovereign attribute exercised by the Government's political departments largely immune from judicial control."

* * *

> The political Branches' comprehensive control over immigration matters reaches its apex when dealing with aliens who are stopped at the border and are seeking admission to the United States[.]

[10] *Martinez* arose in the context of Mariel Cubans, who arrived at the border and were initially paroled into the United States, but the holding governs *all* "inadmissible" aliens, including specifically aliens detained at the border who have never been physically present in the territory of the United States at all.

CONCLUSION

The Supreme Court's decision in *Mezei*, and the Court's subsequent immigration jurisprudence, pose no meaningful barrier to the petitioners' release from detention into the United States.

Dated: October 31, 2008

Respectfully submitted,

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APPENDIX

Excerpts from:

Petition for a Writ of Certiorari,

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (No. 139)

No. 139

In the Supreme Court of the United States

OCTOBER TERM, 1952

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

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

a privilege granted him which conferred no status, and that the court had no authority to permit the entry of an alien whom the Attorney General had barred as potentially dangerous (R. 66-67).

REASONS FOR GRANTING THE WRIT

The decision below raises a very serious problem in the enforcement of the immigration laws, which has implications beyond the facts of this immediate case. The question is whether an alien properly excluded from the United States for any of the reasons specified by Congress must nevertheless be permitted physically to enter the United States and reside here for an indefinite period, whenever the United States is unable to effectuate his departure. Neither respondent nor the courts below question the propriety of respondent's exclusion;[4] the sole basis for his release is the fact that, in the period between his exclusion and the instant petition for habeas corpus, the United States has been unable to effectuate his departure.

Under this holding, therefore, any excludable alien who manages to get to our shores may nevertheless obtain most of the benefits of entry, if, for some reason, the country from which he comes re-

[4] The well-established proposition, that an alien who voluntarily leaves the United States, even though resident here, is, upon his return, subject to the same rules of exclusion as on initial entry, has not been questioned in this case. See, *e.g.*, *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547-548; *Hansen* v. *Haff*, 291 U.S. 559, 561-562; *United States ex rel Volpe* v. *Smith*, 289 U.S. 422, 425; *United States* v. *Corsi*, 287 U.S. 129, 132; *Lewis* v. *Frick*, 233 U.S. 291, 297; *United States ex rel Kwong Hai Chew* v. *Colding, et al.*, 192 F. 2d 1009 (C.A. 2), pending on writ of certiorari, No. 17, this Term.

fuses to take him back and no other country is willing to take him. Since ordinarily the most undesirable groups would have the greatest difficulty in securing acceptance by some other country, the result of the decision below may well be to foist on the United States the very aliens whom it is most desirable to exclude. Moreover, the decision below provides a ready tool for espionage. A hostile power could be certain of getting an agent into the United States by the simple expedient of sending him here and refusing to take him back.[5] Hence, the decision below very seriously affects the processes established by Congress for safeguarding the national security and enforcing the immigration laws.

We submit that there is no authority for the extraordinary relief granted by the court below. As Judge Learned Hand points out in his dissent (R. 66), respondent's rights must be judged as if he were still on board ship. Section 15 of the Immigration Act of 1917, 8 U.S.C. 151, commands immigration officers to conduct examinations on board a vessel and authorizes them to

> order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve vessels, the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United

[5] Countries to which the alien had no prior relationship could not be expected to admit him.

CERTIFICATE AS TO SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), counsel states that counsel states that this *amicus curiae* brief is being filed separately so that it may address solely those issues that are uniquely within the expertise of these law professor *amici*.

/s/ Theodore D. Frank
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because the Brief contains 4272 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and local Rule 32.(a)(2), (but including the list of *amici* law professors, *ante* page *ii*).

I hereby certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and local Rule 32(a) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Office Word 2003 in a proportional typeface with 13 point font in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that the Brief Of Law Professors As *Amici Curiae* was served electronically prior to 4:00 pm, and two copies were served on the following counsel by prepaid overnight delivery on October 31, 2008:

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