UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

TOFIQ NASSER AWAD AL BIHANI (ISN 893), ABDU LATIF NASSER (ISN 244), SHARQAWI AL HAJJ (ISN 1457), SANAD AL KAZIMI (ISN 1453), SUHAIL AL SHARBI (ISN 569), HANI SALEH RASHID ABDULLAH (ISN 841), ABDUL RABBANI (ISN 1460), AHMED RABBANI (ISN 1461), ABDUL RAZAK (ISN 685), ABDUL MALIK (ISN 10025), ABU ZUBAYDAH (ISN 10016), Petitioners, v. Donald J. Trump, *et al.*, Respondents.	Case Nos. 04-cv-1194 (TFH) (ISN 569) 05-cv-23 (UNA) (ISN 841) 05-cv-764 (CKK) (ISN 244) 05-cv-1607 (RCL) (ISNs 1460, 1461) 05-cv-2386 (RBW) (ISNs 893, 1453) 08-cv-1360 (EGS) (ISN 10016) 08-cv-1440 (CKK) (ISN 10025) 09-cv-745 (RCL) (ISN 1457) 10-cv-1020 (RJL) (ISN 685)

Brief of Proposed *Amici Curiae* Due Process Scholars in Support of Petitioners

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Tran v. Mukasey,
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Tuan Thai v. Ashcroft,
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Kan. Stat. Ann. § 59–29a02(b) (1994) 9

Other Authorities

American Bar Association, Task Force on Treatment of Enemy Combatants, Criminal Justice Section, Section of Individual Rights and Responsibilities, Report to the House of Delegates (Feb. 2003), http://news.findlaw.com/hdocs/docs/aba/abatskforce103rpt.pdf 18

1 W. Blackstone, Commentaries on the Laws of England (1765) 4

David S. Kris, *Law Enforcement As A Counterterrorism Tool*, 5 J. Nat'l Security L. & Pol'y 1 (2011) 5

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The Federalist No. 84, p. 444 (Alexander Hamilton) 4

Harold H. Koh, Legal Adviser, U.S. Dep't of State, How to End the Forever War?, Address Before the Oxford Union (May 7, 2013), *available at* http://graphics8.nytimes.com/packages/pdf/world/2013/KOHSPEECH.pdf 2

Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 Yale J. Int'l L. 307 (2011) 6

Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. Pa. L. Rev. 2017 (2005) 6

Michael J. Wishnie, *et al.*, America's Challenge: Domestic Security, Civil Liberties, And National Unity After September 11, Migration Policy Institute, March 2003, https://www.migrationpolicy.org/sites/default/files/publications/Americas_Challenges.pdf. 5

Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. Rev. 77 (2005) 19

Molly O'Toole, Guards and Detainees Alike Left in Limbo at Trump's Guantánamo, Foreign Policy, Feb. 20, 2017, http://foreignpolicy.com/2017/02/20/guards-and-detainees-alike-left-in-limbo-at-trumps-guantanamo/ 17

Monica Eppinger, *Reality Check: Detention in the War on Terror*, 62 Cath. U. L. Rev. 325 (2013) 12

Norman Abrams, *Addressing the Guantanamo "Legacy Problem": Bringing Law-of-War Prolonged Military Detention and Criminal Prosecution into Closer Alignment*, 7 J. Nat'l Security L. & Pol'y 527 (2014) 11

Pamela Engel, *Trump says there should be 'no further releases' from Guantanamo Bay*, Business Insider, Jan. 3, 2017, http://www.businessinsider.com/trump-guantanamo-bay-releases-2017-1 17

Paola Bettelli, *The Contours of Habeas Corpus After Boumediene v. Bush in the Context of International Law*, 28 N.Y. Int'l L. Rev. 1 (2015) 18

Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011) 12

Spencer Ackerman, *US lifts veil on Obama's Guantánamo detainee review process,* The Guardian, Jan. 28, 2014, https://www.theguardian.com/world/2014/jan/28/public-look-guantanamo-detainee-review-board-obama 12

Steve Coll, Name Calling, March 4, 2013, *available at* https://www.newyorker.com/magazine/2013/03/04/name-calling-2 19

U.S. Dep't of Def., The Periodic Review Board, http://www.prs.mil/About-the-PRB/ 12

William Finnegan, President Trump's Guantánamo Delusion, The New Yorker, March 9, 2017, https://www.newyorker.com/news/daily-comment/president-trumps-guantanamo-delusion 17

Rules

Local Rule 7(o) 1

INTEREST OF *AMICI*

Amici curiae are professors, listed in the Appendix A, whose expertise and scholarship in the areas of criminal procedure or constitutional law address the issues involved in this case. Their interest in this litigation is to offer views regarding how Due Process Clause principles are implicated by the detention regime that the Executive has imposed upon Petitioners. *Amici* submit this brief with a motion for leave to file, as authorized by Local Rule 7(o), which is incorporated by reference as if fully set forth herein.

SUMMARY OF ARGUMENT

At issue in this case is a foundational principle of American Democracy: freedom from Executive detention without constitutional criminal process. *See, e.g.*, *In re Oliver*, 333 U.S. 257, 278 (1948) ("It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."); *Duncan v. State of La.*, 391 U.S. 145, 169 (1968) ("As early as 1354 the words 'due process of law' were used in an English statute interpreting Magna Carta, and by the end of the 14th century 'due process of law' and 'law of the land' were interchangeable."); *see also Boumediene v. Bush*, 553 U.S. 723, 739-40 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."). In this case, the Executive has detained Petitioners without charge or trial for between ten and sixteen years at the Guantánamo Bay Detention Camp. Pet'rs' Mot. for Order Granting Writ of Habeas Corpus, at 9.

The case is brought in the context of the Supreme Court having held that courts may exercise jurisdiction over the Executive's potentially indefinite detention of individuals held at Guantánamo, *Rasul v. Bush*, 542 U.S. 466, 485 (2004), having set forth the process afforded to those who contest the threshold question of whether they are "enemy combatants" that may be

detained,[1] *Hamdi v. Rumsfeld*, 542 U.S. 507, 525-39 (2004), and having made clear that, under the Suspension Clause, detainees "are entitled to the privilege of habeas corpus to challenge the legality of their detention." *Boumediene*, 553 U.S. at 771. But the Court has not yet addressed whether the alleged purpose of Petitioners' detention—to ensure that they do not return to the battlefield—justifies the unprecedented *duration* of their detention. *Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014) (statement of Justice Breyer respecting denial of certiorari) (explaining that the Court has not considered whether "either the [2001 Authorization for Use of Military Force] or the Constitution limits the duration of detention"). This current "Forever War"[2] has already lasted nearly four times the duration of War World II, and is longer than any U.S. war in history, as a result of which continued Executive detention has crossed any reasonable durational limit contemplated by Due Process, or by the Court's decisions in *Hamdi* and *Boumediene*.

Because *Amici* agree with Petitioners that the Due Process Clause applies to limit the detention of individuals at Guantánamo, the question remains whether, given this type of unending conflict, the Executive may continue to hold these Petitioners in perpetuity without ever charging them with any wrongdoing. Here, the Executive has not made the threshold showing, required by the law, of why the normal means of dealing with alleged terrorists through the criminal process would be insufficient. And critically, the Executive is unable to show that Petitioners' detention satisfies the narrow, limited exceptions that the Supreme Court has identified for non-criminal confinement—particularly given the continuing duration of their detention. Indeed, the Court's jurisprudence makes clear that individuals cannot be indefinitely

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[1] The plurality in *Hamdi* defined an "enemy combatant" as "an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." 542 U.S. at 516.

[2] Harold H. Koh, Legal Adviser, U.S. Dep't of State, How to End the Forever War?, Address Before the Oxford Union (May 7, 2013), *available at* http://graphics8.nytimes.com/packages/pdf/world/2013/KOHSPEECH.pdf.

detained based exclusively on their perceived dangerousness; to the extent that the Court has permitted pretrial detention at all, it has imposed strict durational limitations and strong procedural protections. Moreover, as set forth below, the Supreme Court has traditionally construed statutes imposing prolonged detention to contain implicit temporal limits in order to avoid the serious constitutional problems posed by indefinite detention. Here, the statute at issue, the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), must accordingly be construed, pursuant to the clear statement rule and canon of constitutional avoidance, to contain durational limits on the Executive's power to detain.

During times of fear and uncertainty, "our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi*, 542 U.S. at 532. Perpetual detention without charge is anathema to those very principles and the time has now come for this Court to make clear that this is so and to ensure the foundational principle of freedom from Executive detention without criminal process. Therefore, *Amici* respectfully submit that the Executive must charge or release Petitioners in order to comply with principles of liberty embodied in the Due Process Clause.

ARGUMENT

I. The Due Process Clause Protects Against Excessive Executive Detention

The Fifth Amendment's Due Process Clause forbids the Government from "depriv[ing]" any person of "liberty . . . without due process of law." Freedom from physical detention "is the most elemental of liberty interests," and "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Hamdi*, 542 U.S. at 529 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical

restraint—lies at the heart of the liberty that Clause protects.”). “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *Salerno*, 481 U.S. at 755. Criminal prosecutions—with their panoply of protections designed to ensure defendants receive a fair trial—ensure that we “incarcerate[] only those who are proved beyond reasonable doubt to have violated a criminal law.” *Foucha*, 504 U.S. at 83. Thus, the Executive “violates [the Due Process] Clause unless detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and ‘narrow’ nonpunitive ‘circumstances,’ where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’” *Zadvydas*, 533 U.S. at 690 (emphasis in original) (citations omitted); *see also* The Federalist No. 84, p. 444 (Alexander Hamilton) (“To bereave a man of life, . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person . . . is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.”) (quoting 1 W. Blackstone, Commentaries on the Laws of England 131-133 (1765)).

Despite the principle that the government may only impose detention after criminal trial and sentencing, here the Executive has “not explain[ed] why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct.” *Foucha*, 504 U.S. at 82. Indeed, this is a particularly glaring failure given that prosecutors have no shortage of crimes and sentencing enhancements to employ against alleged terrorists. *Hamdi*, 542 U.S. at 547 (2004) (Souter, J., concurring in judgment) (highlighting the “well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a

citizen sympathetic to terrorists might commit"); *id.* at 548 n.4 ("Even a brief examination of the reported cases in which the Government has chosen to proceed criminally against those who aided the Taliban shows the Government has found no shortage of offenses to allege."); David S. Kris, *Law Enforcement As A Counterterrorism Tool*, 5 J. Nat'l Security L. & Pol'y 1, 14-16 (2011) ("Since 9/11, the DOJ has convicted hundreds of defendants as a result of terrorism-related investigations . . . Many of the terrorism convictions obtained in federal court both before and after 9/11 have resulted in long sentences . . . .").

Yet for a decade or more, the Executive has disclaimed any intent to prosecute Petitioners, either in an Article III court or military commission. Without any justification for departing from the principle that the government may only impose detention after criminal trial and sentencing, the Executive cannot justify its detention of Petitioners under the Supreme Court's non-criminal confinement jurisprudence. *See Kansas v. Crane*, 534 U.S. 407, 412 (2002) (noting that civil commitment must not "become a mechanism for retribution or general deterrence"); *Schall v. Martin*, 467 U.S. 253, 269 (1984) ("It is axiomatic that '[d]ue process requires that a pretrial detainee not be punished.'") (quoting *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979)); *cf. Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting) ("It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing."). But to the extent that the Executive does seek to justify Petitioners' detention as a form of non-criminal confinement, its justification fails as a matter of the Due Process principles which are so fundamental to our system of government, as *amici*'s scholarship shows. *See, e.g.*, Michael J. Wishnie, *et al.*, America's Challenge: Domestic Security, Civil Liberties, And National Unity After September 11, Migration Policy Institute,

March 2003, https://www.migrationpolicy.org/sites/default/files/publications/Americas_Challenges.pdf.; Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 Yale J. Int'l L. 307 (2011); David Cole & Jules Lobel, Less Safe, Less Free: The Failure of Preemption in the War on Terror (New Press 2007); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. Pa. L. Rev. 2017 (2005); Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty (New York Univ. Press 2001).

II. Indefinite Detention of Petitioners, Without Charge or Trial, Violates the Due Process Clause

It is beyond cavil that non-criminal confinement, for any purpose, "constitutes a significant deprivation of liberty that requires due process protection," and, thus, the government "must have 'a constitutionally adequate purpose for the confinement.'" *Jones v. United States*, 463 U.S. 354, 361 (1983) (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 574 (1975)); *see also Foucha*, 504 U.S. at 80 ("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." (quoting *Salerno*, 481 U.S. at 750)). "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Foucha*, 504 U.S. at 79 (same). Accordingly, courts must consider whether the purpose of the detention is to punish the detainee(s) and, if not, whether the duration of the detention is excessive in light of the government's purpose. *See Salerno*, 481 U.S. at 747 ("[T]he punitive/regulatory distinction turns on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].") (internal citations and quotation marks omitted) (alternations in original).

Here, the stated purpose of the Executive's detention of Petitioners is to prevent them from returning to the battlefield, or stated in its most elemental form, to prevent them from posing a danger to the community. But whatever limited authorization to detain in direct connection with active hostilities may have pertained fourteen years ago, *see Hamdi*, 542 U.S. 521,[3] this purpose is now insufficient under the Supreme Court's non-criminal confinement jurisprudence to justify such prolonged detention, particularly because Petitioners have not been afforded the strong procedural protections required by the caselaw to justify such detention. Moreover, the duration of Petitioners' detention—ranging from ten to sixteen years—is excessive in light of the Executive's purpose because Petitioners have no prospect for release in the "reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. For the reasons set forth below, Petitioners' preventive detention violates the Due Process Clause.

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[3]Although the plurality in *Hamdi* recognized that the Executive may detain so-called enemy combatants in the narrow circumstances described in that case—that is to prevent a return to active hostilities that were still ongoing in Afghanistan in 2004—it explicitly did not decide whether the Executive may *indefinitely*, *i.e.* perpetually, detain those combatants. 542 U.S. at 521 ("But that is not the situation we face as of this date."). In fact, the Court warned that it would have to reexamine the scope of the Executive's authority if, unlike traditional wars, the conflict in which the United States is engaged is not of "limited duration." *Id.* at 520-21; *Boumediene*, 553 U.S. at 797-98 ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."); *see also* Edward Cantu, *The Separation-of-Powers and the Least Dangerous Branch*, 13 Geo. J.L. & Pub. Pol'y 1, 32 (2015) (explaining this passage from *Boumediene* as "the Court's subtle reminder to the executive that the Court, and not the executive, has the authority to determine the outer boundaries of that power"). Now, so many years after *Hamdi*, and in circumstances so different than the "battlefield" described there, 542 U.S. at 519 (providing for "detention to prevent a combatant's return to the battlefield"), the Executive's justification for the *indefinite* detention of Petitioners should not be permitted to ignore or violate the Supreme Court's clearly established non-criminal detention jurisprudence.

A. Indefinite Detention of Petitioners Violates the Due Process Clause Because the Supreme Court has Held that Dangerousness Alone is Insufficient to Justify Preventive Confinement, Particularly Without Strong Procedural Protections

The Supreme Court has identified preventive, as opposed to punitive, detention regimes as "one of those carefully limited exceptions permitted by the Due Process Clause." *See Foucha*, 504 U.S. at 83. The Court has also made pellucidly clear that indefinite preventive detention cannot be justified based on dangerousness alone. *See, e.g.*, *Zadvydas*, 533 U.S. at 690-91. "In cases in which preventive detention is of potentially indefinite duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger." *Id.* at 691; *see, e.g.*, *Allen v. Illinois*, 478 U.S. 364, 370-71 (1986) (upholding a statute that "require[d] proof of the existence of a mental disorder for more than one year and a propensity to commit sexual assaults, in addition to demonstration of that propensity through sexual assault"); *Heller v. Doe by Doe*, 509 U.S. 312, 317-18 (1993) (upholding a statute that committed "the mentally retarded" if four factors could be established: "(1) The person is a mentally retarded person; (2) The person presents a danger or a threat of danger to self, family, or others; (3) The least restrictive alternative mode of treatment presently available requires placement in [a residential treatment center]; and (4) Treatment that can reasonably benefit the person is available in [a residential treatment center]."). Without any additional factor, indefinite detention based only on perceived dangerousness violates the Due Process Clause.

In each of *Kansas v. Hendricks*, *Foucha v. Louisiana*, and *Zadvydas v. Davis*, the Supreme Court explicitly stated that dangerousness alone is insufficient to justify indefinite detention. In. *Kansas v. Hendricks*, the state statute at issue provided that commitment proceedings could "be initiated only when a person 'has been convicted of or charged with a

sexually violent offense,' and 'suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.'" 521 U.S. 346, 358 (1997) (quoting Kan. Stat. Ann. § 59–29a02(a) (1994)). Thus, the statute required "more than a mere predisposition to violence; rather, it require[d] evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated." *Id.*

In particular, the Court declared that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment." *Id.* Civil commitment statutes, the Court explained, had been upheld only when they "coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* Stated differently, the Court limited "involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Id.* In light of "[t]he numerous procedural and evidentiary protections afforded" to the accused, the Court determined that Kansas's statute met this stringent requirement because it "requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior." *Id.* (citing Kan. Stat. Ann. § 59–29a02(b) (1994)).

In *Foucha v. Louisiana*, the Court struck down as unconstitutional a detention regime predicated exclusively on dangerousness. 504 U.S. at 83. In that case, the Court examined a Louisiana law that committed defendants found not guilty by reason of insanity unless they proved they were not dangerous. *Id.* at 73. The State argued, and the lower courts agreed, that the Due Process Clause was not violated "by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone." *Id.* at 75. The Supreme Court, however,

held that dangerousness "is not enough to defeat [Defendant's] liberty interest under the Constitution in being freed from indefinite confinement in a mental facility." *Id.* at 82. Further, the Court emphasized that courts cannot "substitut[e] confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Id.* at 83.

Finally, in *Zadvydas v. Davis*, the Court held that a post-removal-period detention statute did not allow the Attorney General to indefinitely detain removable aliens. 533 U.S. at 682. In that case, one of the main justifications for the statute was to protect the community from danger from criminal aliens. *Id.* at 690. The Court rejected this rationale both because "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem," *id.*, and because "[i]n cases in which preventive detention is of potentially indefinite duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger," *id.* at 691. Although the decision noted that it did not address the context of terrorism, "where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security," *id.* at 696, this dicta is, as Justice Kennedy pointed out, incompatible with the long-standing principle that dangerousness is insufficient to justify indefinite detention, *id.* at 714-715 (Kennedy, J., dissenting) (noting that the majority's reliance on risk assessment in the context of terrorism is incompatible with the principle that dangerousness, standing alone, is insufficient). *See also Tuan Thai v. Ashcroft*, 366 F.3d 790, 796 (9th Cir. 2004) (indicating that it is unclear whether the Court would have in fact ruled any differently if confronted with a national security case); *Detroit Free Press v.*

Ashcroft, 303 F.3d 681, 692 (6th Cir. 2002) ("However, nothing in *Zadvydas* indicates that given such a situation [i.e., a case involving terrorism], the Court would defer to the political branches' determination of who belongs in that 'small segment of particularly dangerous individuals' without judicial review of the individual circumstances of each case . . . ."); Norman Abrams, *Addressing the Guantanamo "Legacy Problem": Bringing Law-of-War Prolonged Military Detention and Criminal Prosecution into Closer Alignment*, 7 J. Nat'l Security L. & Pol'y 527, 540 (2014) ("But while that statement suggests the possibility of 'special arguments' for preventive detention for terrorists, it gives no indication as to what the standard should be to justify such detention and provides little support for the notion that a possible lifetime in military detention could be based primarily on findings of continuing dangerousness."). As Justice Kennedy wrote in his concurrence in *Rasul*, "Indefinite detention without trial or other proceeding presents altogether different considerations. . . . Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." 542 U.S. at 488.

Here, the Executive's claims that Petitioners are simply too dangerous to be released are insufficient to justify Petitioners' *indefinite* detention. Unlike in *Hendricks*, *Foucha*, and *Zadvydas*, there is no factor in addition to perceived dangerousness that justifies Petitioners' detention. For this reason alone, the Executive fails to justify Petitioners' indefinite and perpetual detention on the basis of the kind of narrow circumstances that may justify preventive detention.

Furthermore, Petitioners' detention based on their perceived dangerousness has been imposed using relaxed procedural standards, as Petitioners outline in their Motion for Order

Granting Writ of Habeas Corpus. Pet'rs' Mot. at 8-9 (noting that appeals court are allowed to displace trial court's judgments concerning credibility of witnesses and evidence, that the government's evidence is given a presumption of accuracy, and that detentions have been upheld based on hearsay evidence and other highly attenuated evidentiary showings); *see also Latif v. Obama*, 666 F.3d 746, 771, 779 (D.C. Cir. 2011) (Tatel, J., dissenting) (explaining that post-*Boumediene* decisions have "mov[ed] the goal posts," denied detainees a "'meaningful opportunity' to contest the lawfulness of [their] detention,'" and "call[ed] the game in the government's favor." (quoting *Boumediene*, 553 U.S. at 779)). And the limited "discretionary, administrative interagency process" afforded by the Periodic Review Board does not even purport to "address the legality of any individual's detention under the authority of the Authorization for Use of Military Force." U.S. Dep't of Def., The Periodic Review Board, http://www.prs.mil/About-the-PRB/ (noting that "Detainees have the constitutional privilege of the writ of habeas corpus to challenge the legality of their detention, and nothing in EO 13567 or its implementing guidelines is intended to affect the jurisdiction of federal courts to determine the legality of their detention"); *see* Monica Eppinger, *Reality Check: Detention in the War on Terror*, 62 Cath. U. L. Rev. 325, 350 (2013) (contrasting the process afforded in the Periodic Review Board proceedings with the process afforded in criminal proceedings); Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011) (noting that the Board may, in exceptional circumstances, withhold evidence from the detainee and his representatives); Directive-Type Memorandum, Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567 (May 9, 2012, updated Oct. 31, 2012), at 13, https://www.hsdl.org/?view&did=724713 (same); *see also* Spencer Ackerman, *US*

lifts veil on Obama's Guantánamo detainee review process, The Guardian, Jan. 28, 2014, https://www.theguardian.com/world/2014/jan/28/public-look-guantanamo-detainee-review-board-obama (highlighting the Board's secretive decision-making process, the superficial scope of its review, and the delayed pace at which detainees are provided hearings).

These handicapped habeas and severely limited Periodic Review Board proceedings contrasts starkly with the "strictest procedural standards" the Court has demanded when upholding non-criminal detention statutes. *See, e.g.*, *Hendricks*, 521 U.S. at 364 ("The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards."). Indeed, in *Salerno,* "[i]n addition to first demonstrating probable cause, the Government was required, in a 'full-blown adversary hearing,' to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, *i.e.*, that the 'arrestee presents an identified and articulable threat to an individual or the community.'" *Foucha*, 504 U.S. at 81 (quoting and citing *Salerno*, 481 U.S. at 747-51); *Foucha*, 504 U.S. at 81-82 (striking down the statute because the defendant "is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community."); *Salerno*, 481 U.S. at 750 (upholding the statute because "[t]he Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."); *Schall*, 467 U.S. at 270 (outlining the expedited procedural protections detainees are afforded);

Addington, 441 U.S. at 427 ("We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."). Accordingly, the glaring lack of procedural protections here violates the Due Process Clause. *See Zadvydas*, 533 U.S. at 692 ("The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious."). The feeble procedural protections made available to Petitioners fall well short of what the law requires to justify such prolonged detention.

The Supreme Court has repeated held that indefinite preventive detention does not satisfy the Due Process Clause unless any dangerousness rationale is accompanied by some other special circumstance *and* the individual is afforded strong procedural protections. Here, the Executive's detention of Petitioners fails on both counts. The only rationale for Petitioners' detention is perceived danger to the community, and Petitioners are afforded anemic procedural protections that pale in comparison to the robust process requirements outlined in *Hendricks*, *Salerno*, *Foucha*, *Schall*, and *Addington*. For the foregoing reasons, the Executive cannot justify Petitioners' detention under the narrow confines of the Supreme Court's preventive detention jurisprudence.

B. Indefinite Detention of Petitioners Violates the Due Process Clause Because the Supreme Court has Held that There Must Be Durational Limits on Non-Criminal Confinements

Even if preventing a return to the battlefield—a proxy for dangerousness—may have justified an initial preventative wartime detention of the kind contemplated by *Hamdi*, the Supreme Court's jurisprudence nevertheless imposes meaningful durational limitations on continuing preventive detention. Thus, in *Salerno*, the Court upheld the Bail Reform Act of 1984, which "requires courts to detain prior to trial arrestees charged with certain serious

felonies," 481 U.S. at 739, but did so only because "the arrestee is entitled to a prompt detention hearing and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act," *id.* at 747 (citations omitted). In *Foucha*, the Court reiterated that the Bail Reform Act survived scrutiny under the Due Process Clause, in part, because "the duration of confinement under the [Act] was strictly limited." 504 U.S. at 81; *id.* at 82 ("It was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration."). Unlike the Bail Reform Act at issue in *Salerno*, where a detainee would quickly proceed to a criminal trial and, if convicted, "would be confined as a criminal proved guilty; if he were acquitted, he would go free," *id.* at 81, the Louisiana law in *Foucha* authorized indefinite detention. *Id.* at 82-83. For that reason, and others, the Court determined that Louisiana law did not qualify as "one of those carefully limited exceptions permitted by the Due Process Clause." *Id.* at 83.

Similarly, in *Schall v. Martin*, the Court upheld a New York pretrial detention statute because of its strict durational limitations. 467 U.S. 253, 257 (1984). There the Court examined a statute that authorized pretrial detention of accused juvenile delinquents based on a finding of a "serious risk" that the child would commit a crime. *Id.* at 256. In concluding that the statute did not violate the Due Process Clause, the Court stressed that "the maximum possible detention under [the statute] of a youth accused of a serious crime, assuming a 3–day extension of the factfinding hearing for good cause shown, is 17 days. The maximum detention for less serious crimes, again assuming a 3–day extension for good cause shown, is six days." *Id.* at 270. The Court believed that these strict durational limitations, in conjunction with a series of procedural protections designed to provide the juvenile with expedited and sufficient process, satisfied the requirements under the Due Process Clause. *Id.*

Even in *Zadvydas*, where the Court rejected a preventive detention scheme predicated exclusively on dangerousness, the Court felt compelled to explain what constituted a "presumptively reasonable period of detention." 533 U.S. at 701 ("We have adopted similar presumptions in other contexts to guide lower court determinations.") (citing *Cheff v. Schnackenberg*, 384 U.S. 373, 379-380 (1966) (plurality opinion); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-58, (1991)). When dealing with dangerous, removable aliens, the Court recognized six months as a presumptively reasonable period of detention; any longer period required the government to either rebut a showing by the detainee that he would not be removed in the "reasonably foreseeable future" or release the detainee. *Zadvydas*, 533 U.S. at 701; *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (applying "the 6–month presumptive detention period" that the Supreme Court "prescribed in *Zadvydas*"); *see also Demore v. Kim*, 538 U.S. 510, 528 (2003) (emphasizing that for detention under the statute to be reasonable, it must be brief in duration); *Rodriguez v. Robbins*, 804 F.3d 1060, 1090 (9th Cir. 2015) (*cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016)); ("[W]e hold that [Immigration Judge]s must consider the length of detention and provide bond hearings every six months."); *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015) ("[W]e hold that, in order to avoid significant constitutional concerns surrounding the application of [the statute], it must be read to contain an implicit temporal limitation."); *Diop v. ICE/Homeland Sec.,* 656 F.3d 221, 231 (3d Cir. 2011) (invoking the canon of constitutional avoidance to "conclude that the statute implicitly authorizes detention for a reasonable amount of time"); *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008) (concluding that the court was bound by *Zadvydas* and *Clark* to hold that the statute cannot authorize petitioner's indefinite detention); *Ly v. Hansen,* 351 F.3d 263, 267-68, 271 (6th Cir. 2003) (explaining that *Demore* "is undergirded by reasoning relying on the fact that [the

alien in the case], and persons like him, will normally have their proceedings completed within a short period of time" and the case must be understood as authorizing detention for only brief periods of time).

Petitioners' detention—between ten and sixteen years—far exceeds the limits imposed by the courts. Pet'rs' Mot. for Order Granting Writ of Habeas Corpus, at 9. Nor is there any end in sight, given that, in the absence of the intervention of the Courts, Petitioners will certainly be detained for the "reasonably foreseeable future," based upon the President's unequivocal declarations that he will not release anyone from Guantánamo. *See, e.g.*, Pamela Engel, *Trump says there should be 'no further releases' from Guantanamo Bay*, Business Insider, Jan. 3, 2017, http://www.businessinsider.com/trump-guantanamo-bay-releases-2017-1 (quoting President Trump as tweeting: "There should be no further releases from Gitmo" and "These are extremely dangerous people and should not be allowed back onto the battlefield."); *see also* William Finnegan, President Trump's Guantánamo Delusion, The New Yorker, March 9, 2017, https://www.newyorker.com/news/daily-comment/president-trumps-guantanamo-delusion (highlighting that Trump tweeted that read: "122 vicious prisoners, released by the Obama Administration from Gitmo, have returned to the battlefield. Just another terrible decision!"); Molly O'Toole, Guards and Detainees Alike Left in Limbo at Trump's Guantánamo, Foreign Policy, Feb. 20, 2017, http://foreignpolicy.com/2017/02/20/guards-and-detainees-alike-left-in-limbo-at-trumps-guantanamo/ ("Trump officials are finalizing an executive order to stop transfers out of the prison and allow for any new captured terrorist suspects — including from the Islamic State — to be sent there.").

Because Petitioners have been held for at least a decade with no prospect for release in the "reasonably foreseeable future," their detention violates the Due Process Clause. *See*

Zadvydas, 533 U.S. at 699-700 (stating that if the alien cannot be removed, "the court should hold continued detention unreasonable and no longer authorized by statute"). Accordingly, Petitioners' detention cannot be justified under the narrow confines of the Supreme Court's pretrial detention jurisprudence.

* * *

The Supreme Court has never sanctioned the type of indefinite detention to which Petitioners are subjected. *See also* Paola Bettelli, *The Contours of Habeas Corpus After Boumediene v. Bush in the Context of International Law*, 28 N.Y. Int'l L. Rev. 1, 19 (2015) ("Indefinite detention, without due process, also violates international human rights principles."). Nor should this Court. As an American Bar Association Report emphasized:

> We are a great nation not just because we are the most powerful, but because we are the most democratic. But indefinite detention, denial of counsel, and overly secret proceedings could tear at the Bill of Rights, the very fabric of our great democracy. We must ensure that we do not erode our cherished Constitutional safeguards and that we strengthen the rule of law.

American Bar Association, Task Force on Treatment of Enemy Combatants, Criminal Justice Section, Section of Individual Rights and Responsibilities, Report to the House of Delegates (Feb. 2003), http://news.findlaw.com/hdocs/docs/aba/abatskforce103rpt.pdf (footnote omitted) . Because Petitioners' detention, which is predicated exclusively on their perceived risk of returning to the battlefield (*i.e.*, dangerousness) and is well beyond the durational limits imposed by courts, violates the Due Process Cause and, the Executive must either charge or release Petitioners.

III. The AUMF Does Not Contain the Requisite Clear Statement Necessary to Authorize Indefinite Detention and Must be Construed to Include Durational Limits on the Executive's Detention Power to Avoid Serious Constitutional Problems

Petitioners are detained under the Authorization for Use of Military Force ("AUMF").

The AUMF provides that:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107–40, § 2a. The AUMF further provides that this section "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." *Id.* § 2(b); *see* 50 U.S.C. § 1541 *et seq.*; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 593-94 (2006). While the Court in *Hamdi* determined that the statute's "necessary and appropriate force" language authorizes the power to detain, it also noted "that indefinite detention for the purpose of interrogation is not authorized." 542 U.S. at 521; *see also Hussain*, 134 S. Ct. at 1622 (statement of Justice Breyer respecting denial of certiorari) (explaining that the Court has not considered whether "either the AUMF or the Constitution limits the duration of detention"); Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. Rev. 77, 118 (2005) ("What is clear, I think, is that the Court either believed that Congress had not authorized indefinite detention, or did not explicitly address the question at all."). Here the question is whether Congress, in the AUMF, contemplated indefinite detention of Petitioners, without charge or trial, as part of a war that may last forever. *See, e.g.*, Steve Coll, Name Calling, March 4, 2013, *available at* https://www.newyorker.com/magazine/2013/03/04/name-calling-2 ("The conflict presents a problem of definition: as long as there are bands of violent Islamic radicals anywhere in the world who find it attractive to call themselves Al Qaeda, a formal state of war may exist between Al Qaeda and America. The Hundred Years War could seem a brief skirmish in comparison.").

"In construing a statute, the court begins with the plain language of the statute." *United*

States v. Braxtonbrown-Smith, 278 F.3d 1348, 1352 (D.C. Cir. 2002). "Where the language is clear, that is the end of judicial inquiry 'in all but the most extraordinary circumstances.'" *Id.* (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474 (1992)). But where the language is subject to multiple interpretations, courts may look to the statute's legislative history or Congress's general purpose in enacting it. *Id.* Courts are also guided by the principle that they "do not ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999). Indeed, "[i]t is a cardinal principle" of statutory interpretation . . . that when an Act of Congress raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas*, 533 U.S. at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *Almendarez–Torres v. United States*, 523 U.S. 224, 237-38, (1998) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.") (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("[A] decision to declare an Act of Congress unconstitutional 'is the gravest and most delicate duty that this Court is called on to perform.'") (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)).

In particular, the Supreme Court has required a "clear indication of congressional intent" in order to uphold indefinite detention schemes. *Zadvydas*, 533 U.S. at 696-97; *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (explaining that the clear statement, or plain statement, rule requires that Congress make its intention "unmistakably clear in the language of

the statute.") (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)); *see also Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) ("Application of the plain statement rule thus may avoid a potential constitutional problem."); *In re al-Nashiri*, 791 F.3d 71, 77 (D.C. Cir. 2015) ("The clear-statement rule is a species of the constitutional avoidance doctrine . . . ."). In the context of non-criminal detention, the Supreme Court has consistently construed statutes to preclude indefinite detention authority. *See also Foucha*, 504 U.S. at 81 (noting that non-criminal commitment statutes must be "sharply focused" and "carefully limited"). The Court has concluded, for example, that a statute authorizing the Attorney General to detain removable aliens should be construed to avoid the "serious constitutional problem" that would be posed by a statute that permitted indefinite detention. *Zadvydas*, 533 U.S. at 690 (applying the canon of constitutional avoidance to a statute that provided that a removable alien "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . .") (quoting 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V)). And even if a "statute can be construed 'literally' to authorize indefinite detention," *Clark*, 543 U.S. at 378, courts should not permit it unless Congress speaks clearly. *Zadvydas*, 533 U.S. at 690.

As the Supreme Court concluded in *Zadvydas*, "if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms." *Id.*; *see also Clark*, 543 U.S. at 377-78 ("In light of that perceived ambiguity and the serious constitutional threat the Court believed to be posed by indefinite detention of aliens who had been admitted to the country, the Court interpreted the statute to permit only detention that is related to the statute's basic purpose of effectuating an alien's removal" (internal citations and quotation marks omitted)). Here, the plain language of the AUMF does not include a clear statement providing for indefinite detention without charge or trial. Unlike other statutes under

which the government has claimed authority to indefinitely detain, *cf. Zadvydas*, 533 U.S. at 682 (providing that the removable alien "may be detained beyond the removal period") (quoting 8 U.S.C. § 1231(a)(6)); *Hendricks*, 521 U.S. at 351-52 (explicitly providing for "a civil commitment procedure for the long-term care and treatment of the sexually violent predator") (quoting Kan. Stat. Ann. § 59–29a01), the AUMF does not even mention the word "detention," "civil commitment," or "confinement," let alone the unprecedented power to confine Petitioners until their death. *See Ali v. Obama*, 736 F.3d 542, 553 (D.C. Cir. 2013) ("It seems bizarre, to say the least, that someone like [the detainee], who has never been charged with or found guilty of a criminal act and who has never 'planned, authorized, committed, or aided [any] terrorist attacks,' is now marked for a life sentence.") (second alteration in original). Thus, the only plausible argument that the AUMF authorizes indefinite detention must come from the "necessary and appropriate" language, the meaning of which is not self-evident and should not be construed in a way that raises the serious constitutional problems discussed above.

In particular, the "necessary and appropriate force" language cannot be interpreted to authorize indefinite detention because the Court in *Hamdi* contemplated durational limits on the Executive's war-time detention power and because the language falls well short of the clear statement required to authorize an expansive indefinite detention regime. First, although the "necessary and appropriate force" language encompasses powers "incident to war" like detention, the Court in *Hamdi* highlighted that war-time detentions are "temporary." 542 U.S. at 518 ("It is now recognized that Captivity is neither a punishment nor an act of vengeance, but merely a *temporary* detention which is devoid of all penal character. . . . A prisoner of war is no convict; his imprisonment is a simple war measure.") (quoting W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) (emphasis added) (internal quotation marks omitted)).

Particularly given that "our Nation's past military conflicts have been of limited duration," *Boumediene*, 553 U.S. at 797-98, Congress could not have intended to authorize indefinite detention in the AUMF.

Second, the AUMF's "necessary and appropriate" language does not qualify as the type of clear statement that the Court in *Zadvydas* required to authorize indefinite detention. Far from making its intent "unmistakably clear," Congress gave no indication that the AUMF intended to authorize an indefinite detention regime.[4] *See also Zadvydas*, 533 U.S. at 697 ("We cannot find here, however, any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed."). If Congress wanted to establish an indefinite detention regime that would potentially hold people for the rest of their lives, it would have clearly said so.[5] But "Congress did not write the statute that way," *United*

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[4]Indeed, there is evidence of Congressional intent to the contrary. *See* 147 Rec. H5645 (daily ed. Sept. 14, 2001) (statement of Rep. Dennis Kucinich):

> We are a Nation of civil and moral values, and we must show the world that.
>
> These terrorist attacks were clearly a crime against humanity. What does a democracy do to punish criminals? We put them on trial. If found guilty, we imprison them. The U.S. military action should be centered on arresting the responsible parties and the Government placing the suspects on trial.
>
> That is how we win this. This is how we should show the world that we are a humane and democratic Nation. That is what gives us the moral high ground. That is what we need to do to help prevent future attacks . . .
>
> Violence is reciprocal in nature. Peace is also reciprocal. The direction we take will speak volumes about our democracy. We must and will defend our country, and we must and will pursue and arrest these criminals. We must do so in a manner that upholds democratic principles.

[5]In fact, the legislative history of the AUMF indicates that, as a general matter, Congress sought to limit the Executive's expansive request for authority. *See* Richard F. Grimmett, Cong. Research Serv. Report ("CRS Report") for Congress Order Code RS22357, Authorization For Use Of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History, 2-3 (Jan. 16, 2007) (highlighting that Congress rejected an earlier draft of the AUMF because it "seemingly authorized the President, without durational limitation, and at his sole discretion, to take military action against any nation, terrorist group or individuals in the world without having

States v. Naftalin, 441 U.S. 768, 773 (1979), and courts "are not free to rewrite the statute that Congress has enacted," *Dodd v. United States*, 545 U.S. 353, 359 (2005). Moreover, the canon of constitutional avoidance requires this Court to construe the AUMF to include durational limits on the Executive's detention power so that it complies with the dictates of the Due Process Clause. *See, e.g.*, *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 68 (D.D.C. 2009) ("Consistent with this cardinal rule of statutory construction, courts are obligated to construe legislative enactments in a manner that avoids constitutional questions whenever there is a saving construction that is 'not plainly contrary to the intent of Congress.'") (quoting *Miller v. French*, 530 U.S. 327, 328 (2000)); *Markadonatos v. Vill. of Woodridge*, 760 F.3d 545, 550 (7th Cir. 2014) (en banc) (per curiam) ("A saving construction is available to our court; we should embrace it."); *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1349 & n.18 (Fed. Cir. 2009) (providing examples of cases where the Court construed a statute narrowly in order to avoid serious constitutional issues). Indeed, the case for constitutional avoidance is even stronger here than in *Zadvydas*, where the Court did not find the detention language clear enough even though the statute at issue there "literally says" that the Attorney General has the power to indefinitely detain. 533 U.S. at 689. *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). By contrast, the AUMF's "necessary and appropriate force" language does not plainly authorize indefinite detention and is therefore, much more readily construed than the statute in *Zadvydas* in accordance with the well-established limits on the Executive's

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to seek further authority from the Congress").

detention power described above.

For the reasons set forth above, the Court should hold that the AUMF does not authorize indefinite detention and, therefore, Petitioners must be charged or released.

CONCLUSION

For the foregoing reasons, this Court should conclude that Petitioners' indefinite detention violates the Due Process Clause, or, in the alternative, is not authorized by the AUMF.

Dated: January 22, 2018

By: /s/ Michael R. Griffinger

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APPENDIX A

List of *Amici Curiae* Due Process Scholars[6]

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Bernard E. Harcourt
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Kermit Roosevelt
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[6] *Amici* submit this brief in their personal capacities as scholars, not on behalf of their respective universities.

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2018, I caused the Brief of Proposed *Amici Curiae* Due Process Scholars in Support of Petitioners to be filed with the Court and served on all counsel via the Court's CM/ECF system.

By: /s/ Michael R. Griffinger

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