UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAOLINA MILARDO and ARNALDO GIAMMARCO,	)	
Petitioners,	)	
v.	)	**Misc. No. _____**
R. GIL KERLIKOWSKE, Commissioner, U.S. Customs and Border Protection; JEH JOHNSON, Secretary, U.S. Department of Homeland Security; SARAH SALDAÑA; Director, U.S. Immigration and Customs Enforcement; and LORETTA E. LYNCH, Attorney General,	)	**March 16, 2016**
Respondents.	)	

MEMORANDUM IN SUPPORT OF EMERGENCY PETITION FOR WRITS OF HABEAS CORPUS AD TESTIFICANDUM

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INTRODUCTION

Petitioners Mrs. Paolina Milardo and Mr. Arnaldo Giammarco seek writs of habeas corpus *ad testificandum* to comply with legislative subpoenas from the Judiciary Committee of the Connecticut General Assembly, commanding their in-person testimony at a hearing on April 4, 2016 at the Connecticut Legislative Office Building in Hartford, Connecticut. Mrs. Milardo additionally seeks the *testificandum* writ so that she can testify at her state habeas trial before the Connecticut Superior Court.

In this action, Petitioners do not challenge the lawfulness of the underlying removal orders entered against each of them, nor do they seek federal review of their past deportation proceedings or recent denials by Respondents of administrative applications for permission to return. Compliance with the legislative subpoenas would not disturb those orders or denials. Rather, like any person in the custody of federal authorities whose testimony is subpoenaed in a state proceeding, Petitioners seek the assistance of this Court solely to order Petitioners' custodians to transfer them into Connecticut such that they can appear and give testimony as commanded by duly-issued subpoenas. It is because Respondents restrain Mrs. Milardo and Mr. Giammarco from attending the hearing and trial, and because Respondents thereby obstruct the legislative inquiry of the Connecticut General Assembly, that Petitioners here seek writs of habeas corpus *ad testificandum.*

On February 25, 2016, Representative William Tong and Senator Eric Coleman, Co-Chairs of the Judiciary Committee of the Connecticut General Assembly, issued legislative subpoenas for Mrs. Milardo and Mr. Giammarco, two

former Connecticut residents who lived here lawfully for 50 years each and who were deported in 2011 and 2012. The Judiciary Committee leadership subpoenaed the in-person testimony of Mrs. Milardo and Mr. Giammarco in order to: (1) investigate the immigration consequences that Connecticut residents and families have suffered as a result of Connecticut convictions, especially those who have been deported or who have been threatened with deportation; and (2) assess their remorse and acceptance of responsibility for their conduct—matters of credibility.

Both Mrs. Milardo and Mr. Giammarco are attempting to honor their legislative subpoenas despite U.S. Department of Justice ("DOJ") removal orders that prevent them from lawfully re-entering the United States. Mrs. Milardo and Mr. Giammarco have been denied at their first steps: they each applied to the U.S. Customs and Border Protection's ("CBP") Electronic System for Travel Authorization ("ESTA"), as they are first required to do for travel into the United States, and CBP denied them both. U.S. Immigration and Customs Enforcement ("ICE") has also denied their separate parole applications. Respondents are thus preventing Mrs. Milardo and Mr. Giammarco from honoring the Connecticut legislators' subpoenas that order their in-person testimony at a Connecticut legislative hearing.

FACTS AND PROCEEDINGS

The Legislative Subpoenas and Petitioners' Efforts to Comply with Them

The Co-Chairpersons of the Judiciary Committee of the Connecticut General Assembly have determined that they need the in-person testimony of Mrs. Milardo and Mr. Giammarco on April 4, 2016 to: (1) effectively collect information

about the immigration consequences that Connecticut residents and families have suffered as a result of Connecticut convictions; and (2) assess Mrs. Milardo and Mr. Giammarco's "credibility," as well as "acceptance of responsibility and remorse." Ex. A, Decl. of Michael J. Wishnie ["Wishnie Decl."], Ex. 1; *see also* H.J. 46 (2015) (private bill introduced in Connecticut General Assembly for pardon of Arnold Giammarco); H.J. 47 (2015) (same). Based on that determination, the Co-Chairs of the Judiciary Committee have issued Mrs. Milardo and Mr. Giammarco legislative subpoenas, commanding their presence "on penalty of law." Wishnie Decl., Ex. 1.

Mrs. Milardo and Mr. Giammarco are trying to comply with their subpoenas. On February 29, 2016, Mrs. Milardo and Mr. Giammarco filed applications for humanitarian and public benefit parole with ICE, citing their need to enter the United States to testify before the Connecticut General Assembly's Judiciary Committee and in Connecticut Superior Court. *See* 8 C.F.R. § 212.5(b)(4) (parole is justified where "[a]liens . . . will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States"). Ex. B, Decl. of Paolina Milardo ["Milardo Decl."] ¶ 45; Ex. C, Decl. of Arnaldo Giammarco ["Giammarco Decl."] ¶ 30. ICE denied their petitions on March 8, 2016. Wishnie Decl., Ex. 2.

On March 6, 2016, Mrs. Milardo and Mr. Giammarco applied to ESTA, the first step necessary for their travel back to the United States. *See* 8 C.F.R. § 217.5(a) ("Each nonimmigrant alien intending to travel by air or sea to the United States under the Visa Waiver Program (VWP) must . . . receive a travel

authorization . . . via . . . ESTA."); Milardo Decl. ¶ 48; Giammarco Decl. ¶ 32. ESTA is operated by CBP, a part of the U.S. Department of Homeland Security. *See* 8 C.F.R. § 217.5(a). On March 6, CBP denied Mrs. Milardo and Mr. Giammarco their necessary travel authorization. Milardo Decl. ¶ 48; Giammarco Decl. ¶ 32; Wishnie Decl. Exs. 3, 4.

On March 10 and March 11, 2016, Mrs. Milardo and Mr. Giammarco applied for B-2 visitor visas. Milardo Decl. ¶ 50; Giammarco Decl. ¶ 33; Wishnie Decl. Exs. 5, 7. As of this filing, their visa applications are pending. Mrs. Milardo and Mr. Giammarco also have appointments with the U.S. Consulate General of the United States in Naples, Italy on March 17, 2016 to apply for § 212(d)(3) waivers of inadmissibility. Milardo Decl. ¶ 51; Giammarco Decl. ¶ 34; Wishnie Decl. Exs. 6, 8.

Paolina Milardo

Mrs. Milardo immigrated to the United States lawfully with her family in 1961 when she was 11 years old. Milardo Decl. ¶ 5. She lived in Middletown, Connecticut as a legal permanent resident for nearly 50 years. *Id.* ¶¶ 5, 29. She attended school there. *Id.* ¶ 6. She married Anthony Milardo, a United States citizen and Army veteran who served honorably in the Vietnam War. *Id.* ¶ 7. Together they had three children and six grandchildren, all United States citizens born in Connecticut. *Id.* ¶ 11. Mrs. Milardo was a caretaker for her children and grandchildren, as well as for her husband, especially as he battled stage III colon cancer and continues to suffer from Post-Traumatic Stress Disorder from Vietnam. *See id.* ¶¶ 12, 14.

In 2010, Mrs. Milardo pled guilty to a non-violent crime, first-degree larceny. *Id.* ¶ 21. This was her first and only conviction. *Id.* ¶ 20. The conviction was precipitated by a gambling addiction that she developed while under the stress of her husband's fight with colon cancer. *Id.* ¶¶ 15, 17. Before she was sentenced, the Connecticut Department of Mental Health and Addiction Services ("Addiction Services") determined that Mrs. Milardo met the diagnostic criteria for Pathological Gambling, a psychological disorder under the DSM-IV. Wishnie Decl., Ex. 9. Addiction Services treated Mrs. Milardo and concluded that her prognosis to remain abstinent from gambling was "quite good." *Id.* Mrs. Milardo served her prison sentence and paid restitution to the woman from whom she stole. Milardo Decl. ¶¶ 24-26, 29.

After Mrs. Milardo completed her prison sentence, ICE arrested and detained her. *Id.* ¶ 29. In 2011, at the age of 61, Mrs. Milardo was deported. *Id.*; *see* Wishnie Decl. Ex. 10. Mrs. Milardo's deportation banished her from the only place she has ever considered home. *Id.* ¶¶ 31-35. It separated her from her husband, whom the U.S. Department of Veterans Affairs has rated as 80% disabled, and her three American children and six American grandchildren. *Id.* ¶¶ 31, 33; Wishnie Decl., Ex. 11, at 2.

Mrs. Milardo is currently challenging her criminal conviction in a state habeas proceeding in the Superior Court of Connecticut, which is scheduled for trial April 18 and 20, 2016. Milardo Decl. ¶ 36; Wishnie Decl., Ex. 12. That action is based on a claim under *Padilla v. Kentucky*, 559 U.S. 356 (2010) that her Sixth Amendment right to effective assistance of counsel was violated because her

defense attorney never told her she was pleading guilty to an aggravated felony under federal law—an offense that would lead to her automatic deportation—but instead told her that it was unlikely she would be deported. Ex. B, Milardo Decl. ¶ 37; *see also* 8 U.S.C. § 1227(a)(2)(A)(iii).

During the state habeas trial, factual questions regarding the nature and sufficiency of the advice Mrs. Milardo received must be resolved in order to adjudicate her case. Mrs. Milardo and her defense attorney are both key witnesses, and her defense attorney is expected to testify in person. Thus, Mrs. Milardo's presence and testimony are necessary and material to the trial.

Arnaldo Giammarco

Mr. Giammarco immigrated to the United States lawfully in 1960 when he was a young boy. Giammarco Decl. ¶ 4. As a young man, Mr. Giammarco followed in his grandfather's footsteps by joining the U.S. Army. *Id.* ¶ 6. He continued to serve his country after his honorable discharge from the U.S. Army by serving with the Connecticut Army National Guard. *Id.* ¶ 7; *see* Wishnie Decl. Exs. 13, 14. In 1981, he filed a naturalization application, but it was never adjudicated. *Id.* ¶ 8.

After his first marriage ended in 1993, Mr. Giammarco suffered from depression and began to use illegal drugs. *Id.* ¶ 10. He shoplifted to support his addiction, leading to a series of drug-related convictions. *Id.* ¶ 11. He was convicted of 31 non-violent offenses, including for low-level larcenies, drug possession, and failures to appear. *Id.*

In 2007, after enrolling in a rehabilitation program, Mr. Giammarco pledged to overcome his addiction and turn his life around. *Id.* ¶ 13. He married Sharon

Giammarco, became a dedicated father to their young daughter, worked to support his family, and took pride in his new life. *See id.* He worked at a restaurant in Groton, Connecticut, where he soon became a manager. *See id.* He worked nights and cared for his daughter during the day. *See id.*

Mr. Giammarco's successful efforts to rehabilitate himself and become again a productive member of his community did not spare him from the long shadow of his old convictions, however. *See id.* ¶ 14. In 2011, armed ICE agents arrested Mr. Giammarco, arriving at his house and ordering him to lie down on the ground. *Id.*

While held in immigration detention, Mr. Giammarco remained committed to his rehabilitation and his family. He attended bible study and parenting classes, served as a volunteer unit worker, and was a "model detainee," according to the jail's Chief of Immigration Services. *Id.* ¶¶ 14-15. In 2012, after living in the United States as a legal permanent resident for fifty years, Mr. Giammarco was deported, banishing him from his home and family. *See id.* ¶¶ 4, 17; *see* Wishnie Decl. Ex. 15.

ARGUMENT

I. This Court May Issue Writs of Habeas Corpus *Ad Testificandum* to Facilitate Petitioners' In-Person Testimony Before the Connecticut General Assembly.

A. Federal statute and the common law authorize this Court to issue writs of habeas corpus *ad testificandum*.

Both federal statute and the common law authorize this Court to issue a writ of habeas corpus *ad testificandum*, a "lesser writ" that directs a witness's custodian to permit or bring that witness to appear at a proceeding and give

testimony. 28 U.S.C. §§ 2241(c)(1), (c)(5); *Barber v. Page*, 390 U.S. 719, 724 (1968) (noting that "federal courts [have] the power to issue writs of habeas corpus ad testificandum" in "case of a prospective witness currently in federal custody" where testimony is necessary); *Rivera v. Santirocco*, 814 F.2d 859, 860 (2d Cir. 1987) (recognizing authority of federal courts to issue *testificandum* writ). Issuance of a writ of habeas corpus *ad testificandum* does not challenge or disturb the underlying custodial order, but merely facilitates testimony.

By federal statute, "[d]istrict courts are expressly granted the power to issue the writ of habeas corpus *ad testificandum* today." *Ballard v. Spradley*, 557 F.2d 476, 480 (5th Cir. 1977). Specifically, 28 U.S.C. § 2241(c)(5) confers on district courts the discretion to issue writs of habeas corpus where "[i]t is necessary to bring [the petitioner] into court to testify or for trial." Courts recognize that this provision statutorily authorizes both the issuance of writs of habeas corpus *ad testificandum* and habeas corpus *ad prosequendum*. *See, e.g.*, *Ballard*, 557 F.2d at 480 n.2.

This Court's power to issue the writ is not only based in statute, because the writ of habeas corpus *ad testificandum* is also a "common law writ of ancient origin." *Gilmore v. United States*, 129 F.2d 199, 202 (10th Cir. 1942). This is important: the Supreme Court has indicated that federal courts today must look to the historic usage of habeas corpus writs when defining their authority to issue such writs. *See, e.g.*, *Carbo v. United States*, 364 U.S. 611, 617-620 (1961) (tracing common law and subsequent history of writ of habeas corpus *ad prosequendum*).

Writs of habeas corpus *ad testificandum* are rooted in "early English law" and "'steeped in history.'" *Carmona v. Warden of Ossining Corr. Facility*, 549 F. Supp. 621, 622 (S.D.N.Y. 1982) (quoting *Ballard*, 447 F. 2d at 479); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *129-30 (listing habeas corpus *ad testificandum* as writ issued "by the courts at Westminster"). As a result, federal courts have "recognized [the writ of habeas corpus *ad testificandum*,] at least since *Ex parte Bollman* . . . [in 1807,] as [a writ] within a federal court's power to grant." *In re Grand Jury Proceedings*, 654 F.2d 268, 278 (3d Cir. 1981) (internal citation omitted).

B. The writ may issue to facilitate legislative testimony.

Writs of habeas corpus *ad testificandum* are not limited to judicial proceedings—it is well settled that federal courts may also issue the writs when necessary to secure a witness's presence to testify before legislative bodies. In fact, a 2007 court filing by the Office of Senate Legal Counsel identified over forty instances in the past sixty years in which district courts granted petitions for writs of habeas corpus *ad testificandum* so that persons could be produced for testimony before a congressional committee. Wishnie Decl., Ex. 16. The Office of Senate Legal Counsel explained that "[i]n all of the instances in which congressional committees have filed applications for habeas writs over the past fifty years, we know of no case in which a court ever concluded that it lacked authority to grant the writ, or in which the Department of Justice even intimated such a view." *Id.* at 8. Senator James Abourezk made a similar observation during a congressional debate:

> **The purpose of such a writ [of habeas corpus *ad testificandum*] is to make a person incarcerated in a State or Federal prison available to a committee as a witness. Petitions for such writs are routine for subcommittees like the Permanent Investigations Subcommittee of the Governmental Affairs Committee, which often investigates criminal conduct.**

123 Cong. Rec. 20960 (1977).

Analogously, at common law, English courts repeatedly issued writs of habeas corpus *ad testificandum* to produce prisoners to testify before Parliament. Cases like *In the Matter of Sir Edward Price, a Prisoner* involved "[a] habeas corpus ad testificandum issued to bring up a prisoner to give evidence before an election committee of the House of Commons." 102 E.R. 956 (1804). The practice was also used in New South Wales, which inherited common-law principles. *See* Leslie Zines AO, *The Common Law in Australia: Its Nature and Constitutional Significance*, 32 FED. L. REV. 337, 339 (2004). In another illustrative case, the court recognized that it "can grant a writ of *habeas corpus* [*ad testificandum*], to bring a prisoner before a committee of the Legislative Assembly, for the purpose of giving evidence," where a resolution of the Legislative Assembly had concluded "that the attendance of the witness . . . [was] necessary for the purposes of the inquiry before the select committee." *In re Kelly ex parte the Sheriff* (S. Ct. of New South Wales Feb 24, 1860), *cited in* 2 A SELECTION OF SUPREME COURT CASES FROM NEW SOUTH WALES, FROM 1825 TO 1862 at 1275, 1276 (J. Gordon Legge, ed.,1896).

The practice of issuing habeas corpus *ad testificandum* writs to call prisoners to testify before legislatures was so accepted that several common-law treatises recognized it. *See, e.g.*, 2 ARCHIBALD J. STEPHENS, LAW OF NISI PRIUS, EVIDENCE IN CIVIL ACTIONS, AND ARBITRATION & AWARDS 1712 (1842) ("A *habeas*

corpus will issue to bring up a prisoner before a committee of the House of Commons."); 4 EMPHRAIM A. JACOB, AN ANALYTICAL DIGEST OF THE LAW AND PRACTICE OF THE COURTS OF COMMON LAW, DIVORCE, PROBATE, ADMIRALTY AND BANKRUPTCY, AND OF THE HIGH COURT OF JUSTICE AND THE COURT OF APPEAL OF ENGLAND 5039 (1880) ("A habeas corpus *ad testificandum* issued to bring up a prisoner to give evidence before an election committee of the House of Commons. . . ."); 38 AMERICAN ANNOTATED CASES 1031 (William M. McKinney & H. Noyes Greene eds., 1915) ("[T]he writ may be used to compel the attendance, for the purpose of giving testimony before a legislative committee on elections, of a person detained on a charge of felony or for nonpayment of a fine."); 24 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 173 (Williams & Michie eds., 1894) ("The writ may be granted to bring a prisoner to give evidence before an election committee of a legislative body. . . .").

The clear common-law authority of courts to issue habeas corpus *ad testificandum* writs helps effectuate the sovereign power of American legislatures to conduct investigations and oversee governmental operations. In our tripartite system of governance, "it is commonly accepted that fact-gathering is often a necessary prior condition to the enactment of statutes." William C. Warren, *Congressional Investigations: Some Observations*, 21 FOOD DRUG COSMETIC L. J. 40, 42 (1966). Indeed, the "power of the Congress to conduct investigations is inherent in the legislative process." *Watkins v. United States*, 354 U.S. 178, 187 (1957); *see also McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and

appropriate auxiliary to the legislative function."); *Wilckens v. Willet*, 40 N.Y. (1 Keyes) 521, 525 (1864) (describing Congress's investigatory authority as "a necessary incident to the sovereign power of making laws").

The same is true of the Connecticut General Assembly. *See, e.g.*, *Greenfield v. Russel*, 292 Ill. 392, 400 (1920) ("It must also be conceded that a state Legislature has power to obtain information upon any subject upon which it has power to legislate, with a view to its enlightenment and guidance. This is essential to the performance of its legislative functions, and it has long been exercised without question."); *Ex Parte Parker*, 55 S.E. 122, 124 (S.C. 1906) ("The power of the General Assembly to obtain information on any subject upon which it has power to legislate, with a view to its enlightenment and guidance, is so obviously essential to the performance of legislative functions that it has always been exercised without question."); *Burnham v. Morrissey*, 80 Mass. 226, 239 (1859) ("We therefore think it clear that [the legislature] has the constitutional right to take evidence, to summon witnesses, and to compel them to attend and to testify."). The U.S. Supreme Court has not ruled directly on this issue but it has observed that state legislatures' investigative powers are only "slightly different" than Congress's power. *Sweezy v. New Hampshire*, 354 U.S. 234, 235 (1957). By ensuring the testimony of witnesses before legislative bodies that would otherwise be obstructed by federal or state custodians, federal courts play a key role in protecting the important information-gathering functions of legislative bodies tasked with making law in our legal system.

C. This Court has jurisdiction to grant the writ because Respondents hold "custody" of Mrs. Milardo and Mr. Giammarco.

Respondents hold "custody" of Mrs. Milardo and Mr. Giammarco for habeas corpus *ad testificandum* purposes because they are restraining Mrs. Milardo and Mr. Giammarco from testifying before the Connecticut General Assembly. Habeas corpus *ad testificandum* seeks to aid government efficiency where custodians obstruct government functions, like a duly-issued legislative subpoena. Indeed, the Supreme Court has indicated that lesser habeas writs—"tool[s] for jurisdictional potency as well as administrative efficiency"—are subject to less stringent jurisdictional requirements than the Great Writ used to challenge government restraints. *See Carbo*, 364 U.S. at 618 (finding that the Great Writ's territorial limitations did not apply to habeas corpus *ad prosequendum*). Petitioners seek such a writ here.

Still, even in the context of the Great Writ, "[h]istory, usage, and precedent can leave no doubt that, besides physical imprisonment, *there are other restraints on a man's liberty, restraints not shared by the public generally*, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (emphasis added). Courts have accordingly found that parole, probation, court-mandated Alcoholics Anonymous classes, and court-mandated community service can each establish habeas custody. *Id.* (habeas custody for parole); *U. S. ex rel. B. v. Shelly*, 430 F.2d 215, 216 n.3 (2d Cir. 1970) (habeas custody for probation); *Dow v. Circuit Court of First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (habeas custody for court-mandated AA classes); *Barry v. Bergen Cnty. Prob.*

Dep't, 128 F.3d 152, 161-62 (3d Cir. 1997) (habeas custody for court-mandated community service).

Supreme Court precedent illustrates that the proper "public generally" against which to compare a petitioner is the class of people that the petitioner would belong to if not for the contested restraint. In *Justices of Boston Municipal Court v. Lydon*, for instance, the Court found habeas custody by comparing a petitioner who contested restraints imposed by a future jury trial to people not waiting for a future trial. 466 U.S. 294, 301 (1984). In *Hensley v. Municipal Court*, the Court compared a petitioner who contested restraints imposed by his bail to people not on bail. 411 U.S. 345, 351 (1973). In *Lehman v. Lycoming County Children's Services Agency*, the Court compared a juvenile petitioner seeking to leave the foster care system to juveniles outside of the foster care system. 458 U.S. 502 (1982). Indeed, in *Jones* itself, the Court compared a petitioner who contested the conditions of his parole to "free men" who were not on parole. 371 U.S. at 243.

The Second Circuit has followed the Supreme Court's decisions in defining the "public generally" against which to compare habeas petitioners. In *Poodry v. Tonawanda Band of Seneca Indians*, the Second Circuit compared habeas petitioners—banished members of the Tonawanda Band of Seneca Indians—to non-banished members of the Tonawanda Band of Seneca Indians. 85 F.3d 874 (2d Cir. 1996). Judge Cabranes, writing for the panel, rejected Judge Jacobs's dissenting argument that the court's baseline population should be the population that petitioners joined as a result of their contested restraint—i.e., the

American public at large—and instead applied the rule followed by *Lehman*, *Lydon*, *Henley*, and *Jones. Id.* at 897.

1. Relevant considerations confirm Respondents hold custody of Petitioners for habeas corpus *ad testificandum* purposes.

Respondents hold custody of Petitioners for the purposes of habeas corpus *ad testificandum* jurisdiction. To make this determination, this Court should look to Supreme Court, Second Circuit, and common law precedent, which identifies a number of considerations that weigh in favor of finding custody. These considerations include whether the respondent: (1) restrains a petitioner's physical movements;[1] (2) hangs a reasonable probability of re-incarceration without a hearing over the petitioner's head;[2] (3) actually denies a petitioner entrance into the United States;[3] (4) imposes severe restraints on a petitioner's liberty;[4] and (5) imposes restraints that implicate federalism principles.[5] Because all of these considerations are present here, this Court should find that Respondents hold custody of Mrs. Milardo and Mr. Giammarco for habeas corpus *ad testificandum* purposes, and exercise jurisdiction.

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[1] *See, e.g.*, *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294 (1984); *Jones v. Cunningham*, 371 U.S. 236 (1963); *In re Waldron*, 13 Johns. 418 (N.Y. 1816); *De Manneville v. De Manneville*, 32 E.R. 762 (1804); *State v. Sheve*, 1 N.J.L. (1 Coxe) 230, 230 (N.J. 1794); *Respublica v. Keppele*, 2 U.S. 197, 198-99 (Mem.) (Pa. 1793); *R. v. Anne Brooke and Thomas Fladgate*, (1766) 98 Eng. Rep. 38 (K.B.); *Rex v. Clarkson*, (1722) 93 Eng. Rep. 625 (K.B.).

[2] *See, e.g.*, *Lydon*, 466 U.S. 294 (1984); *Jones*, 371 U.S. 236 (1963); *Simmonds v. INS*, 326 F.3d 351 (2d Cir. 2003).

[3] *See, e.g.*, *Jones*, 371 U.S. at 239; *Ekiu v. United States*, 142 U.S. 651 (1892); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Subias v. Meese*, 835 F.2d 1288, 1289 (9th Cir. 1987).

[4] *See, e.g.*, *Hensley v. Mun. Court*, 411 U.S. 345, (1973); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996).

[5] *See, e.g.*, *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982).

a. Respondents restrain Petitioners' physical movements.

***First*, restraints on Mrs. Milardo and Mr. Giammarco's movements demonstrate Respondents' custody. Indeed, for over three hundred years, courts have exercised jurisdiction over habeas petitions submitted by people whose movements were restrained. In 1804, Lord Eldon assumed, for instance, that a mother could file a habeas petition to prevent the father of her child from taking her child out of England, which would have constrained the child's movements. *De Manneville v. De Manneville*, 32 E.R. 762 (1804). The court there observed that, "if the child was grown up, and the father had taken it away, the Crown might by the Great or Privy Seal, call upon it to return." *Id.* In 1722, the King's Bench found that a woman's guardians had placed her in custody, for purposes of a habeas petition, when they prevented her from visiting her purported husband. The court granted her petition and declared that she was now "at her liberty to go where she pleases." *Rex v. Clarkson*, (1722) 93 Eng. Rep. 625 (K.B.). More than forty years later, the King's Bench reaffirmed this principle and freed another woman from her guardians by declaring that "she was at liberty to go where she thought proper." *R. v. Anne Brooke and Thomas Fladgate*, (1766) 98 Eng. Rep. 38 (K.B.); *see also In re Waldron*, 13 Johns. 418 (N.Y. 1816). Habeas cases also found or assumed custodial jurisdiction where petitioners were bound to indentured service, and were thus subject to restraints on their movements. *See, e.g., Respublica v. Keppele*, 2 U.S. 197, 198-99 (Mem.) (Pa. 1793) (on habeas petition, construing Pennsylvania servant statute, concluding infant could not be bound, and discharging fourteen-year-old who had fled service).**

In modern cases, the U.S. Supreme Court has similarly found restrictions on movement relevant to habeas custody. For instance, in *Jones*, the Court concluded that the Virginia Parole Board had placed the petitioner in "custody" by expelling him from Virginia and prohibiting him from entering any county but a specific community in Georgia. 371 U.S. at 242. In *Lydon*, the Court ruled that Massachusetts had placed a habeas petitioner in custody when it prohibited the petitioner from entering another state without leave. 466 U.S. at 301 (finding habeas custody where petitioner awaiting trial "[must] appear for trial in the jury session on the scheduled day and . . . not depart without leave") (internal quotation marks omitted); *see also Hensley*, 411 U.S. at 351 (finding habeas custody where a petitioner on bail "[could] not come and go as he please[d]" and "[h]is freedom of movement rest[ed] in the hands of state judicial officers, who may demand his presence at any time without a moment's notice").

Respondents' enforcement of its removal orders, denial of Petitioners' applications for parole, and denial of Petitioners' ESTA submissions, despite the issuance of legislative subpoenas compelling their testimony, place an even greater restraint on Petitioners' movements than the restraints discussed in *Jones* and *Lydon*. In *Lydon*, Massachusetts allowed the petitioner to move about in one U.S. state. In *Jones*, the Virginia Parole Board allowed the petitioner to move about in one U.S. community. In this case, however, Respondents have prohibited Petitioners from moving about in any U.S. county or state—a serious restriction on movement compared to the class of people, legal permanent residents, that Petitioners would belong to if not for Respondents' restraints.

Completely prohibiting someone from moving into the United States at all when subject to a subpoena to testify constrains a person's liberty far more than allowing a person to move in just one specific county or state.

It is true that Mrs. Milardo and Mr. Giammarco can go anywhere *else* in the world, free of Respondents' restraints. However, this cannot defeat jurisdiction. First, on a petition for a writ of habeas corpus *ad testificandum,* where in-person testimony is commanded for a particular hearing, it is irrelevant that Petitioners might travel to other places where the hearing is *not* to be held. Second, the history of habeas law demonstrates that this is not reason to find that Respondents do not hold "custody" of Mrs. Milardo and Mr. Giammarco. In *Rex v. Clarkson*, and *R. v. Anne Brooke and Thomas Fladgate*, for instance, the petitioners could move anywhere in the world except to their purported husband's house. In those cases, the King's Bench found that this restraint *still* placed the petitioner in custody. In any event, what is relevant here is whether Petitioners are obliged to appear at the Legislative Office Building in Hartford, Connecticut on April 4, 2016 as commanded "on penalty of law." Wishnie Decl., Ex. 1. Respondents are preventing Petitioners from appearing, and that is highly relevant, if not itself sufficient, to conclude that the "custody" requirement for this petition is satisfied.

b. Respondents' restraints allow them the legal right to re-incarcerate Petitioners without a hearing.

***Second,* that Respondents have a legal right to re-incarcerate Petitioners without a hearing, despite the Petitioners' obligation to appear in Hartford to testify, further demonstrates that Petitioners are "in custody" for the purpose of**

this petition. The Supreme Court has found that the government places a person in custody when it reserves the right to incarcerate that person without a hearing for breaking the conditions of her restraint. In *Lydon*, the Court found that Massachusetts placed a petitioner in custody partly because if the petitioner "fails to appear in the jury session, he may be required, without a further trial, to serve the 2-year sentence originally imposed." 466 U.S. at 301. In *Jones*, the Court noted that the petitioner "can be rearrested at any time the Board or parole officer believes he has violated a term or condition of his parole, and he might be thrown back in jail . . . with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime." 371 U.S. at 242 (footnote omitted).

Echoing these cases, the Second Circuit has held that there is habeas custody where there is a "reasonable basis" to conclude that a federal agency will seek custody of a petitioner in the future. *Simmonds v. INS*, 326 F.3d 351, 355-56 (2d Cir. 2003). The Second Circuit's standard in *Simmonds* is broader than the one illustrated by *Jones* and *Lydon*. *Simmonds* requires merely a reasonable threat of re-incarceration, whereas *Jones* and *Lydon* found it important that re-incarceration could happen without a hearing. In *Simmonds*, written by Judge Calabresi and joined by then-Judge Sotomayor, the Second Circuit found habeas custody where a petitioner's potential future custody would "include physical confinement, in addition to the execution of an administrative order of 'banishment,' which we euphemistically call 'removal.'" *Id.* at 356. This holding

echoed the Supreme Court's finding in *Jones* and *Lydon* that the possibility of future incarceration without a hearing triggers habeas custody.

The Respondents' restraints—their enforcement of removal orders that banished Petitioners and terminated their LPR status—allow federal agents the legal right to re-incarcerate Petitioners without a hearing if they violate those restraints. By comparison, when "the public generally" is not under a removal order, its members cannot be re-incarcerated without a hearing based upon their compliance with a separate subpoena. If an immigration officer discovers, for instance, that Mrs. Milardo has violated the terms of Respondents' restraints, the Attorney General "shall take [her] into custody"—place her in federal immigration detention—without any procedural protections, even without a hearing. 8 U.S.C. § 1226(c); *see also* 8 U.S.C. § 1231(a)(5); *see also Jones*, 371 U.S. at 242 (finding habeas "custody" where the petitioner could be taken into custody "at any time the Board or parole officer believes he has violated a term or condition of his parole, and he might be thrown back in jail . . . with few, if any, . . . procedural safeguards").

Petitioners are thus subject to imprisonment if they disobey the legislative subpoenas, and Petitioners are subject to re-incarceration without a hearing if they obey the subpoenas absent an order from this Court. Respondents' authority to re-incarcerate Mrs. Milardo and Mr. Giammarco without a hearing confirms they are in "custody."

c. Respondents have actually denied Petitioners admission to the United States.

***Third*, by refusing Petitioners' ESTA and humanitarian parole applications, despite Petitioners' status as subject to subpoenas to testify, and thereby actually denying Mrs. Milardo and Mr. Giammarco entry into the United States, Respondents again impose a restraint that demonstrates custody for purposes of this petition. "[T]he requirement of custody is broadly construed to include restriction from entry into the United States, since denial of entry amounts to a restraint on liberty." *Subias v. Meese*, 835 F.2d 1288, 1289 (9th Cir. 1987); *Jones*, 371 U.S. at 239 (custody includes an alien *seeking entry* into the United States).**

The Supreme Court has recognized that federal courts possess jurisdiction over habeas petitions submitted by people actively denied entry by the United States. *See, e.g. Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("An alien immigrant, *prevented from landing* by any such [immigration] officer claiming authority to do so under an act of congress, *and thereby* restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the *restraint* is lawful.") (emphases added).[6] In other words, the Court made clear that the relevant *restraint* was the *denial* from entering legally into the country. Petitioners do not challenge their underlying removal orders here, as stated previously, but the enforcement of those orders demonstrates they are restrained from testifying, and thus in custody for habeas corpus *ad testificandum* purposes.

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[6] As the Court noted, "landing" meant legally entering the country—removing Mrs. Ekiu to a Methodist Chinese mission did not constitute "landing." *Ekiu* 142 U.S. at 662 (placement in mission was pursuant to Chinese Exclusion Act power "to inspect and examine them, and may for this purpose remove and detain them on shore, without such removal being considered a landing").

Similarly, in *Shaughnessy v. United States ex rel. Mezei*, a habeas petitioner had been denied entry into the United States while at Ellis Island. 345 U.S. 206 (1953). The government argued that the Court lacked jurisdiction because the petitioner could go anywhere but into the United States. The Court disagreed, concluding that "his movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion." *Id.* at 213.

In some cases, courts have refused to apply this principle to people residing in foreign countries. For instance, in *Patel v. U.S. Attorney General*, the Eleventh Circuit denied a deported person's habeas petition because he was "currently physically located in India," so "the custody determination in this case [was] distinguishable from the case of an alien detained by United States authorities while wishing to enter the United States." 334 F.3d 1259, 1263 n.4 (11th Cir. 2003). Similarly, in *El-Hadad v. United States*, a district court denied an Egyptian person's habeas petition to attend a trial as a plaintiff because "[t]his court's review of the cases cited in *Jones* suggests that the Supreme Court only intended to extend habeas jurisdiction to aliens held at a point of entry into the United States." 377 F. Supp. 2d 42, 47 (D.D.C. 2005).

However, these cases do not concern Mrs. Milardo and Mr. Giammarco, whom CBP has actively denied entry to the United States. Today's travel authorizations are the same events once captured at last century's American water ports. Just as immigration officials used to inspect ships in American ports and prevent individuals from "landing"—a constructive term that meant legally

entering the country—immigration officials today inspect mandatory ESTA preclearance applications to prevent individuals from "landing." *See* 8 C.F.R. § 217.5(a) ("Each nonimmigrant alien intending to travel by air or sea to the United States under the Visa Waiver Program (VWP) *must* . . . receive a travel authorization . . . via . . . ESTA." (emphasis added)). Modern application of *Ekiu* and *Mezei* thus confirms that an ESTA denial to a subpoenaed legislative witness, no less than a denial to an immigrant to "land" in San Francisco Bay a century ago, establishes custody for the purpose of this petition.

d. Respondents' restraints on liberty are severe.

***Fourth*, the severity of Mrs. Milardo and Mr. Giammarco's restraints—enforcement of their removal orders, their parole and ESTA denials—confirm that Respondents are in custody of Petitioners. "The custody requirement of the habeas corpus statute is designed . . . for severe restraints on individual liberty." *Hensley*, 411 U.S. at 351. "[T]he inquiry into whether a petitioner has satisfied the jurisdictional prerequisites for habeas review requires a court to judge the 'severity' of an actual or potential restraint on liberty." *Poodry*, 85 F.3d at 894. In *Poodry*, the Second Circuit applied this test to find that a tribal banishment order placed the recipients of that order in custody for the purposes of the Indian Civil Rights Act's habeas corpus provision.[7] The orders placed the petitioners in custody because the orders subjected them to a wide range of harassment, and banishment represented the tribe's severest form of punishment. *Id.* at 895-96.**

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[7] The Second Circuit analyzed this action under 25 U.S.C. § 1303 as analogous to 28 U.S.C. § 2241(c)(3). *Poodry*, 85 F. 3d at 890-893.

Poodry **builds on centuries of observations that banishment is a gravely serious restriction. "Although not penal in character, deportation . . . may inflict the equivalent of banishment or exile."** ***Barber v. Gonzales*****, 347 U.S. 637, 642 (1954). Deportation "obviously deprives [a man or woman] of liberty," and "also in loss of both property and life, or of all that make life worth living."** ***Ng Fung Ho v. White*****, 259 U.S. 276, 284 (1922). "[D]eportation is a sanction which in severity surpasses all but the most Draconian [restrictions]."** ***Lok v. INS*****, 548 F.2d 37, 39 (2d Cir. 1977). James Madison himself observed that "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."** ***United States v. Ju Toy*****, 198 U.S. 253, 270 (1905) (Brewer, J., dissenting).**

Although Mrs. Milardo and Mr. Giammarco were not U.S. citizens, they were decades-long legal permanent residents, and their enforced banishment, despite being subject to a subpoena to testify, is a severe restraint on their liberty. Both Mrs. Milardo and Mr. Giammarco lived in the United States for approximately 50 years. Milardo Decl. ¶¶ 5, 29; Giammarco Decl. ¶¶ 4, 17. They grew up in the United States. Milardo Decl. ¶ 6; Giammarco Decl. ¶ 5. They went to school in the United States. Milardo Decl. ¶ 6; Giammarco Decl. ¶ 5. Their spouses, children, and grandchildren are in the United States. Milardo Decl. ¶ 14; Giammarco Decl. ¶ 17. In sum, their lives are in the United States. Their "administrative orders of 'banishment,' which we euphemistically call 'removal,'" ***Simmonds*****, 326 F.3d at 356, impose some of the severest restraints on their liberty possible. The extraordinary severity of Respondents' restraints—banishment from their homes,**

families, and communities—further evidences that Petitioners are in Respondents' custody for the purposes of this petition.

e. Respondents' restraints threaten federalism principles.

***Fifth*, federalism concerns support a finding of custody—and thus of jurisdiction—where, as here, a state legislative subpoena has lawfully issued demanding petitioners' presence "on penalty of law." Indeed, federalism principles go to the heart of a federal court's habeas role. Thus, in *Lehman*, the Court considered "federalism" interests in denying habeas jurisdiction, emphasizing that federalism principles would be violated if federal habeas jurisdiction were found to exist over claims stemming from child custody matters. 458 U.S. at 512-13.**

But just as federalism can counsel a federal court to refuse jurisdiction, it should also counsel a federal court to exercise jurisdiction. This Court should facilitate the production of witnesses that a State demands over a federal agency's interference. After all, the Supreme Court has recognized the importance of "increased cooperation between . . . the States and the Federal Government," such that witnesses are not deprived by one body of government from another. *See Barber*, 390 U.S. at 723. "For example, in the case of a prospective witness currently in federal custody, 28 U.S.C. § 2241(c)(5) gives federal courts the power to issue writs of habeas corpus ad testificandum at the request of state authorities." *Id.* at 724. And one federal agency, the U.S. Bureau of Prisons, has a "policy" of "permit[ting] federal prisoners to testify in state court criminal proceedings pursuant to writs of habeas corpus ad testificandum

issued out of state courts." *Id.* This is true even though state courts cannot enforce *ad testificandum* writs against federal respondents. *See United States v. Schultz*, 37 F.2d 619, 619 (D. Mont. 1930) ("[O]f the two sovereignties, the United States dominates."). These practices and principles show the importance of federal courts in issuing writs *ad testificandum* to vindicate federalism concerns.

Accordingly, the strong federalism interests in this case support a finding of jurisdiction here. As a fundamental decision of its legislative process, the Connecticut General Assembly's Judiciary Committee has subpoenaed Mrs. Milardo and Mr. Giammarco to testify in-person. Specifically, it has exercised its "power of inquiry," which is "an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174-75; *see infra* Part I.B. Refusing to exercise jurisdiction in this case would undermine Connecticut's legislative autonomy and functionality and the U.S. Constitution's inherent commitment to federalism.

2. This petition is not controlled by cases involving "Great Writ" petitions challenging removal orders.

Petitioners are aware of no U.S. Court of Appeals that has examined whether a habeas corpus *ad testificandum* writ can issue regarding a person who has been deported but is not held in literal detention. Some courts, however, in considering deported petitioners' habeas corpus *ad subjiciendum* cases—i.e., "Great Writ" cases—have held that removal orders, without more, do not

themselves create federal "custody" of a person.[8] Those cases are inapposite for two reasons.

First, those cases frequently involve attempts to challenge underlying removal orders or administrative denials of permission to return, which Petitioners expressly do not seek to do here. In other words, those were cases involving habeas corpus *ad subjiciendum*—the "Great Writ . . . designed to relieve an individual from oppressive confinement." *See Carbo*, 364 U.S. at 618.

Importantly, jurisdictional requirements for the Great Writ are treated far differently in habeas law than jurisdictional requirements for the lesser writs, which, as the Supreme Court observed about the twin *prosequendum* writ, are not relief "from oppressive confinement," but "tool[s] for jurisdictional potency [and] administrative efficiency." *Id.* Indeed, the interests protected by jurisdictionally limiting the Great Writ—convenience, necessity, and avoidance of inordinate expense—are "remarkably unpersuasive when viewed in light of the role of the [lesser writs]." *Id.* For while the Great Writ seeks to *challenge*

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[8] *See Kumarasamy v. Atty. Gen. of U.S.*, 453 F.3d 169, 173 (3d Cir. 2006), *as amended* (Aug. 4, 2006) (holding that a deported person was not in custody because he was "subject to no greater restraint than any other non-citizen living outside American borders"); *Merlan v. Holder*, 667 F.3d 538, 539 (5th Cir. 2011) (holding that a deported person was not in custody because he failed to show that he was "subject to any restraints in Mexico not experienced by other non-citizens who lack the documentation to enter the United States"); *Samirah v. O'Connell*, 335 F.3d 545, 549-50 (7th Cir. 2003) (concluding that a deported person, who had presented himself at an Irish airport but returned to his home country was not in custody because his "restraint, such as it is, only puts him on par with the billions of other non-U.S. citizens around the globe who may not come to the United States without the proper documentation"); *Miranda v. Reno*, 238 F.3d 1156, 1159 (9th Cir. 2001) (concluding that a deported person was not in custody because he was "subject to no greater restraint than any other non-citizen living outside American borders"); *Patel v. U.S. Att'y Gen.*, 334 F.3d 1259, 1263 (11th Cir. 2003) (following *Miranda* and finding that a deported person was not in custody).

government restraints, the lesser writs merely *recognize* restraints and accordingly order custodians to modify those restraints for logistical efficiency. In fact, even when a lesser habeas writ is issued, the custodian still *maintains custody* of its prisoner. *See United States v. Kelly*, 661 F.3d 682, 686 (1st Cir. 2011) (explaining that the twin *prosequendum* writ's nature is such that "'the sending state retains full jurisdiction over the prisoner since the prisoner is only 'on loan' to the [other] jurisdiction.'" (quoting *Flick v. Blevins*, 887 F.2d 778, 781 (7th Cir. 1989)); *Crawford v. Jackson*, 589 F.2d 693, 695-96 (D.C. Cir. 1978) ("[T]he sending [custodian's] jurisdiction over the [prisoner] continues uninterruptedly."). It follows that the limitations from Great Writ cases involving deported petitioners challenging government restraints do not define limitations on lesser writ cases involving deported petitioners merely subject to such restraints.

Second, *not one* of the Court of Appeals *subjiciendum* cases involving deported petitioners involved a writ whose grant was necessary to respect the fundamental functions of a state legislature. Here, in contrast, the issuance of the writ requested furthers a "comity . . . necessary between sovereignties." *Carbo*, 364 U.S. at 621. "[T]hrough the use of the writ," this petition seeks an "accommodation . . . important between federal and state authorities." *Id.* at 620-21.

Even if the Court of Appeals cases did apply here, they should not be followed for two reasons. First, the cases fail to recognize that a removal order subjects a person to precisely the kinds of restraints that the Supreme Court has found sufficient to establish habeas jurisdiction: restraints on movement that the

Court found sufficient to constitute custody in *Jones*, *Hensley*, and *Lydon*; the right to re-incarcerate without a hearing, similar to *Lydon* and *Jones*; the reasonable probability of future incarceration, similar *Simmonds*; and the banishment of people from their homes and communities, a sufficiently severe restriction on liberty under *Poodry*.

Second, these cases compare their petitioners to the wrong "public generally" when determining whether their restraints and greater than those shared by the public generally. *See Jones*, 371 U.S. at 240 ("[B]esides physical imprisonment, there are other restraints on a man's liberty, *restraints not shared by the public generally*, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." (emphasis added)).

Specifically, they mistakenly compare their petitioners to the class that the petitioners *currently* belong to *because* of their contested restraints (i.e., people living abroad without entry documents). Instead, decisions of the Supreme Court and the Second Circuit counsel lower courts to compare petitioners to the class of people that petitioners would belong to in the *absence* of their restraints (i.e., legal permanent residents living in the United States).

In *Merlan v. Holder*, for instance, the Fifth Circuit compared petitioner to "non-citizens who lack the documentation to enter the United States" and live in Mexico. 667 F.3d 538, 539 (5th Cir. 2011).. In *Kumarasamy v. Attorney General*, the Third Circuit compared the petitioner to "any other non-citizen living outside American borders." 453 F.3d 169, 173 (3d Cir. 2006).. In *Samirah v. O'Connell*, the Seventh Circuit compared petitioner to "billions of other non-U.S. citizens around

the globe who may not come to the United States without the proper documentation." 335 F.3d 545, 549-50 (7th Cir. 2003). In *Patel v. U.S. Attorney General*, the Eleventh Circuit compared the petitioner to "any other non-citizen living outside American borders." 334 F.3d at 1263. And in *Miranda v. Reno*, the Ninth Circuit also compared the petitioner to non-citizens living outside American borders. 238 F.3d at 1159. These circuits ignore the Supreme Court's implicit rule that the "public generally" refers to the class that the petitioners would belong to if not for their restraint.

Lastly, other cases that refuse to find deportation orders place a person "in custody" for habeas purposes based on a collateral-consequence theory are also inapposite. *See, e.g.*, *Maleng v. Cook*, 490 U.S. 488, 492 (1989). Here, petitioners are in custody for habeas purposes because the ESTA refusals, parole denials, and the removal orders *themselves* significantly restrict their liberty, and specifically Petitioners' ability to comply with legislative subpoenas, using restraints not shared by the public generally. Petitioners do not claim that Respondents hold them in custody merely because deportation is a "collateral consequence" to a conviction. Moreover, Mrs. Milardo and Mr. Giammarco are not asserting they are in custody for the purpose of challenging their underlying convictions, removal orders, or administrative denials; instead, they assert they are in custody because Respondents current restraints are actively preventing from entering the United States to honor their Connecticut legislative subpoenas.

D. Respondents are within the jurisdiction of this Court.

Respondents, custodians of Mrs. Milardo and Mr. Giammarco, are within the habeas corpus *ad testificandum* jurisdiction of this Court. It is well-established that the reach of the writ of habeas corpus *ad testificandum* is not affected by geographical constraints—specifically, it is not affected by the geographic location of a respondent custodian.[9] As the Fourth Circuit explained in *United States v. Moussaoui*, "[i]t is . . . clear that a district court may reach beyond the boundaries of its own district in order to issue a testimonial writ." 382 F.3d 453, 466 (4th Cir. 2004). Indeed, even "if it were necessary for the writ to be served upon [a] witnesses' . . . custodian . . . in a foreign country, the district court would have the power to serve the writ." *Id.* at 465 This Court therefore has jurisdiction to reach all of the Respondents here.

The Supreme Court has ruled that the "the territorial limitation refers *solely* to issuance of the Great Writ." *Carbo*, 364 U.S. at 619 (emphasis added) (finding no geographical limit for habeas corpus *ad prosequendum*). "A consensus among the courts [thus] indicates support for the extraterritorial issuance of writs *of habeas corpus ad testificandum.*" *Williams v. Beauregard Par.*, No. 2:08-CV-355, 2014 WL 1030042, at *3 (W.D. La. Mar. 17, 2014); *see also Moussaoui*, 382 F.3d 453

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[9] While it is true that "the process power of the district court does not extend to foreign nationals abroad," that principle is inapplicable in cases such as this one where the witnesses are held by a federal custodian. *United States v. Moussaoui*, 382 F.3d 453, 463-464 (4th Cir. 2004); *see Ex Parte Endo*, 323 U.S. 283, 306 (1944) ("The important fact to be observed in regard to the made of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter."); 28 U.S.C. § 2243 (providing that a writ of habeas corpus "shall be directed to the person having custody of the person detained").

(4th Cir. 2004); *ITEL Capital Corp. v. Dennis Mining Supply and Equip., Inc.,* 651 F.2d 405, 406–07 (5th Cir. 1981); *Stone v. Morris,* 546 F.2d 730, 737 (7th Cir. 1976); *Roe v. Operation Rescue*, 920 F.2d 213, 218 n. 4 (3d Cir.1990); *Atkins v. City of New York*, 856 F. Supp. 755, 758-59 (E.D.N.Y. 1994); *Greene v. Prunty*, 938 F. Supp. 637, 638-39 (S.D. Cal. 1996). Respondents are thus within the habeas corpus *ad testificandum* jurisdiction of this Court.

II. The Writs Should Be Granted.

Issuing writs of habeas corpus *ad testificandum* is within the sound discretion of the Court. *See Twitty v. Ashcroft*, 712 F. Supp. 2d 30, 31-32 (D. Conn. 2009); *Atkins*, 856 F. Supp. at 757. "Simple, rigid rules" do not govern habeas jurisprudence; instead, "equitable principles and broad adjudicative and interpretive powers" may override "procedural obstacles to an apparently just outcome." RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2 (7th ed. 2015).

When courts consider writs of habeas corpus *ad testificandum*, they use their broad discretion to balance "the interest of the plaintiff in presenting his testimony in person" with "the interest of the state in maintaining the confinement of the plaintiff-prisoner." *Twitty*, 712 F. Supp. 2d at 30 (quoting *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005)). To assess these interests, courts examine: 1) whether the person's presence will substantially further the resolution of the case; 2) whether there are reasonable alternatives to the person's presence; 3) whether the person's presence may pose a security risk; 4) the expense of transportation and safekeeping; and 5) whether the case can be

stayed. *Id.* at 32. Additionally, under the federalism canon, it is especially important that the federal *ad testificandum* writ issue where it would effectuate a state legislature's fundamental legislative function. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *McGrain*, 273 U.S. at 174-75.

In this case, each factor weighs towards granting Mrs. Milardo and Mr. Giammarco's petition. Indeed, the interest of the state is not in maintaining the exclusion of Mrs. Milardo or Mr. Giammarco. Rather, the Co-Chairs of the Judiciary Committee of the Connecticut General Assembly have issued and served a subpoena commanding Petitioners' presence at a legislative hearing scheduled for April 4, 2016 in Hartford.

A. The testimony will substantially further objectives of the Judiciary Committee.

The first factor this Court must consider is whether Mrs. Milardo and Mr. Giammarco's testimony will "substantially further" the resolution of the proceeding at issue. *See Twitty*, 712 F. Supp. 2d. at 32. In making this determination, courts in the Second Circuit considering writs of habeas corpus *ad testificandum* decide whether a person's testimony is necessary to the proceedings. *See, e.g.*, *Atkins*, 856 F. Supp. at 758 (granting writ when the witness' testimony was "pivotal to the defense"). Here, Mrs. Milardo and Mr. Giammarco's testimony is necessary to the legislative hearing.

The Co-Chairs of the Judiciary Committee have already determined that Mrs. Milardo and Mr. Giammarco's in-person testimony is "necessary for committee members to evaluate [their] credibility, as well as [their] acceptance of responsibility and remorse" in testifying to their experiences with immigration

consequences of Connecticut criminal convictions. Wishnie Decl., Ex. 1. The credibility determinations made possible by in-person testimony will not only enable wise and effective legislating, but it will also promote the private resolution of their cases through potential legislative pardons. In fact, two private bills that would pardon Mr. Giammarco's convictions were referred to the Committee on Veterans' Affairs in 2015. H.J. 46 (2015) (private bill introduced in Connecticut General Assembly for pardon of Arnold Giammarco, though kept in committee); H.J. 47 (2015) (same). In-person testimony will be central to the legislature's consideration of any such resolutions that may arise in the future.

Regardless, this Court should defer to the state legislative branch's determination that Mrs. Milardo and Mr. Giammarco's testimony is necessary and material to its own proceedings. *See, e.g.*, *Bhd. of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 138-39 (1968) (recognizing that district courts should not "resolve conflicts in the evidence against the legislature's conclusion or . . . reject the legislative judgment on the basis that . . . the legislative viewpoint constitutes nothing more than . . . 'pure speculation.'"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 212 (1997) (a court is "not at liberty to substitute [its] judgment for the reasonable conclusion of a legislative body"); *People Helpers Found., Inc. v. City of Richmond*, 12 F.3d 1321, 1330 (4th Cir. 1993) ("A legislative function, such as that performed by the City, should be afforded judicial deference unless it is evident that impermissible criteria were considered.").

This Court should accordingly conclude that Mrs. Milardo and Mr. Giammarco's testimony will "substantially further" the resolution of the Connecticut legislative proceeding.

B. Mrs. Milardo's judicial testimony will also "substantially further" the resolution of her state habeas trial.

Mrs. Milardo's testimony is also necessary and material to her state habeas trial, a proceeding at which a petitioner's presence is critical. At least in the federal system, "[p]roduction of the [petitioner] at evidentiary or other factually oriented proceedings is '[a] basic consideration in *habeas corpus* practice'" and "'*inherent* in the very term *habeas corpus*.'" HERTZ & LIEBMAN, *supra*, § 21.3 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950)) (emphasis added). "The [petitioner's] presence also may be useful in reminding the judge that the case does not involve the application of technical rules to disembodied facts, but instead will determine whether a human being will continue to be incarcerated." *Id.*; *see also Thornton*, 428 F.3d at 697 ("The immediacy of a living person is lost with video technology."). In fact, in-person presence at a habeas proceeding is so important that "[c]ounsel should insist that the client [not only be present, but also] sit at counsel table through the proceeding." HERTZ & LIEBMAN, *supra*, § 21.3.

In-person testimony is especially important where credibility determinations are at stake. In *Atkins*, "the interests of justice" favored production of an eyewitness because without his presence, "the factual resolution . . . would hinge almost entirely" upon the credibility of the in-person witnesses, without regard to the credibility of the eyewitness. 856 F. Supp. at 759;

see generally infra Part II.C (discussing problems determining credibility over videoconferencing).

Although Connecticut state habeas trials sometimes allow for testimony by videoconference, in this case, if Mrs. Milardo is not permitted to testify in person at her own habeas trial, the resolution of factual questions would be unfairly prejudiced in favor of her former defense attorney, who will testify in person. Factual questions regarding the lack of competent advice provided to Mrs. Milardo will be at the heart of the habeas trial. Thus, "the interests of justice" weigh in favor of allowing Mrs. Milardo to testify in person so that the judge can make credibility determinations about witnesses and factual assertions on both sides of the claim.

C. No reasonable alternative exists to Petitioners' live testimony.

The Co-Chairs of the Judiciary Committee have subpoenaed Mrs. Milardo and Mr. Giammarco's live, in-person testimony. This Court should defer to the state legislature's conclusion that there are no reasonable alternatives to Petitioners' live testimony.

Furthermore, case law supports the Judiciary Committee's determination that there is no reasonable alternative to Mrs. Milardo and Mr. Giammarco's physical presence at the hearing. _See, e.g._, _Twitty_, 712 F. Supp. 2d at 33 ("the importance of presenting live testimony in court weighs in favor" of granting a writ of habeas corpus _ad testificandum_); _Atkins_, 856 F. Supp. at 758 (granting the writ because "the power of in-court testimony . . . would exceed substantially the presentation of such evidence through the reading of a deposition transcript").

Indeed, the American legal system places enormous value on live testimony and disfavors video or written testimony, especially for assessing credibility. *See, e.g.*, FED. R. CIV. P. 43(a) advisory committee's note to 1996 amendment ("The importance of presenting live testimony in court cannot be forgotten . . . . The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."); *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[O]nly the [factfinder] can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."); *United States v. Thoms*, 684 F.3d 893, 903 (9th Cir. 2012) ("[L]ive testimony is the bedrock of the search for truth in our judicial system."); *State v. Rogerson*, 855 N.W. 2d 495, 496, 507 (Iowa 2014) (videoconference testimony must be justified by "an important public interest" that surpasses mere "convenience"); *People v. Buie*, 775 N.W.2d 817, 825 (Mich. Ct. of App. 2009) ("The virtual 'confrontations' offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect.").

Videoconferencing, an alternative the Federal Rules of Civil Procedure disfavors and allows only in "compelling circumstances," FED. R. CIV. P. 43(a), would not present an adequate alternative. Research establishes that credibility determinations are especially difficult over video feeds, and videoconferencing is associated with artificially "low credibility."[10] This is largely because

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[10] Eric T. Bellone, *Private Attorney-Client Communications and the Effect of Videoconferencing on the Courtroom*, 8 J. INT'L COM. L. & TECH. 24, 35 (2013).

videoconferencing often "strip[s]" nonverbal cues or "overemphasize[s] them,"[11] and non-verbal communication is a "vital part of the communication process"—it may account for 65% to 93% of social meaning conveyed during interpersonal communication.[12] Thus, distortions of nonverbal cues have "profound impacts of the cognitive and emotional response of the listener with the perception of the speaker's credibility."[13]

Videoconferencing distorts nonverbal communication, and thus credibility, in several ways. First, poor connectivity and video quality lowers trust levels: "A poor quality video can create artificial cues associated with lying."[14] For instance, a slow signal, fast movements that cause an image to "blur" or "freeze," and "[s]mall time lags" all make it appear that a speaker is hesitating, and hesitation in answering subtly suggests to listeners that a speaker is lying.[15] Second, because speakers naturally look at a screen rather than a camera, videoconferencing obscures eye contact, creating an artificial sign of deception and leading to subtle feelings of mistrust.[16] Third, videoconferencing is "notorious for introducing spatial distortions"[17]—and where spatial distortions are exacerbated, research concludes that videoconferencing negatively affects

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[11] ***Developments in the Law: Access to Courts and Videoconferencing in Immigration Court Proceedings***, **122 HARV. L. REV. 1181, 1185 (2009).**
[12] **PETER A. ANDERSON, NONVERBAL COMMUNICATION: FORMS AND FUNCTIONS 1-2 (1999).**
[13] **Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 61 (2006).**
[14] **Bellone, *supra*, at 32.**
[15] ***Id.* at 31-32.**
[16] ***See* Ernst Bekkering & J.P. Shim, *i2i Trust in Videoconferencing*, 29:7 COMMC'NS ACM 103, 105-06 (2006).**
[17] **Bellone, *supra*, at 30.**

trust patterns.[18] Although body language is "extremely important" in establishing trust, the ability to convey and read those non-verbal gestures and cues is spatially limited by videoconferencing.[19] Together, these problems make it more difficult for listeners to trust speakers, and especially hard for listeners to identify with speakers.[20]

These are precisely the problems that have arisen when videoconferencing has been tested in court proceedings. Just as research predicted, immigration attorneys working with videoconferenced hearings have reported that "split-second delays in the video transmission made the image 'choppier' in a subtle way and made the immigrant appear less truthful."[21] They also reported that "emotions were less clearly communicated" and factfinders "were likely to feel more emotionally distant from and apathetic to an immigrant on a television screen."[22]

Videoconferencing thus translates into real harm. A study examining outcome disparities in immigration proceedings found significant differences in the rates of asylum grants based on form: in 2005, the grant rate for represented immigrants with in-person hearings was nearly 15% higher than those with

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[18] David Nguyen & John Canny, *MultiView: Improving Trust in Group Video Conferencing Through Spatial Faithfulness*, CHI 2007 PROCEEDINGS-TRUST & ENGAGEMENT 1465 (2007).
[19] Bellone, *supra*, at 30; *see also* Cameron Teoh et al., *Body Language and Gender in Videoconferencing*, INFO SCI. POSTGRADUATE DAY 9, 10 (2010) (identifying the importance of body language and eye and gaze contact for trustworthy communication).
[20] Bellone, *supra*, at 32.
[21] LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHI. APPLESEED FUND FOR JUSTICE, VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE IMMIGRATION CHICAGO COURT 45 (2005).
[22] *Id.* at 45-46.

videoconferenced hearings.[23] In 2006, it was over 17% higher.[24] Mock trials have shown similar effects: conviction rates in one study's mock trials for child sex abuse were 60.8% for videotaped testimony and 76.7% for live testimony.[25] And the same effects have been recorded at criminal arraignments: a review of bail hearings in Cook County, after the introduction of videoconferenced bail proceedings, showed that defendants were "significantly disadvantaged by the videoconferenced bail proceedings," with the average bond amount increasing by an average of 51%.[26] These differences arise from a basic difference: "participants in a face to face interaction are in a shared space in which they directly perceive themselves, each other, additional participants in the . . . proceeding, and the [proceeding] itself."[27]

Still, those differences can be worsened, and Internet access in Melilli and Campo Di Fano—the current residences of Mrs. Milardo and Mr. Giammarco—is especially unreliable. Mrs. Milardo has gone hours, days, and sometimes even weeks without an Internet connection. Milardo Decl. ¶ 41. Although Mrs. Milardo has set up an Internet hotspot with her phone, her Internet coverage remains

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[23] Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 272 (2008).
[24] *Id.*
[25] David F. Ross, et al., *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 LAW & HUM. BEHAV. 553, 563 (1994).
[26] Shari Seidman Diamond, et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 897-98 (2010). In contrast, the average bond levels for non-videoconferenced hearings increased by only 13%. *Id.* at 897.
[27] Jane Bailey et al., *Access to Justice for* All: *Towards an "Expansive Vision" of Justice and Technology*, 31(2) WINDSOR YEARBOOK OF ACCESS TO JUSTICE 181, 203 (2013).

poor, and received a grade of "D" from an Internet reliability test that stated her connection was: "Concerning. Most online applications will not perform well but should function in some capacity." *Id.* ¶ 42; Wishnie Decl., Ex. 17 (screenshot of PingTest.net (Mar. 8, 2016)). This has made it difficult for Mrs. Milardo to communicate with her family, her attorneys, and others. Milardo Decl. ¶ 43. For instance, when Mrs. Milardo tried to speak with a reporter, her Internet connection did not work and she had to use an Internet hotspot, which took an hour to establish a connection. *Id.* ¶ 44. Similarly, Mr. Giammarco's Internet causes frequent dropped video calls, and even when video calls work, the picture is "granular and it often freezes." Giammarco Decl. ¶¶ 26-29. The difficulties of losing an Internet connection unexpectedly—along with the diminished audio and video available through Skype or other media—illustrate precisely why the Connecticut legislature has determined that in-person testimony is necessary, why American courts value in-person testimony, and why research indicates that videoconferencing negatively impacts credibility determinations.

Mrs. Milardo and Mr. Giammarco's experiences accord with Internet-connectivity data. Internet speed in Italy trails behind other European countries. In 2015, Italy was ranked 24 out of 25 countries in average peak connection speed and average connection speed among countries surveyed in the EMEA region (encompassing Europe, the Middle East, and Africa). Wishnie Decl., Ex. 18. Only South Africa trails it. *Id.*

Connecticut state legislators at the legislative hearing should be afforded the opportunity to hear in-person testimony from Mrs. Milardo and Mr.

Giammarco and assess their credibility and remorse. This will not only enable the creation of wise and effective legislation, but also may promote the private resolution of their cases through legislative pardon. The judge presiding over Mrs. Milardo's state habeas trial should similarly be afforded the opportunity to hear in-person testimony as her credibility determinations will likely shape the outcome of the case.

D. Mrs. Milardo and Mr. Giammarco pose no security risk whatsoever.

Neither Mrs. Milardo nor Mr. Giammarco pose a security risk. In assessing whether they would be a flight risk or pose a danger to the community, "measures must be taken to assess the risk of flight and danger to the community on a current basis . . . to presume dangerousness to the community and risk of flight based solely on his past record does not satisfy due process." ***Chi Thon Ngo v. INS,*** **192 F.3d 390, 398-99 (3d Cir. 1999).**

Mrs. Milardo poses no security risk. She is a 66-year-old grandmother who lived in Connecticut for nearly 50 years before being deported. Milardo Decl. ¶¶ 2, 5, 14, 29. Her single criminal conviction was a nonviolent offense that occurred during a difficult period when she was struggling with family health problems, financial troubles, and gambling addiction. ***Id.*** **¶¶ 15-20. She has since rehabilitated herself with the help of counseling and her church.** ***Id.*** **¶¶ 22-23. Moreover, that Connecticut released Mrs. Milardo from prison well before her deportation proceedings indicates that Connecticut has concluded that Mrs. Milardo is not a security risk.**

Mr. Giammarco also poses no security risk. He is a 60-year-old U.S. Army veteran and father who lived in Connecticut for 50 years before he was deported. Giammarco Decl. ¶¶ 4, 17. All his criminal convictions were for non-violent offenses, *id.* ¶ 11, and even the Connecticut State's Attorneys who prosecuted Mr. Giammarco do not regard him as a risk—they have unanimously stated they do not oppose a pardon for him. Wishnie Decl., Ex. 19.

Courts regularly grant writs of habeas corpus *ad testificandum* for people who have been convicted only of non-violent crimes, like Mrs. Milardo and Mr. Giammarco. *See, e.g., United States v. Gottfried,* 165 F.2d 360, 366 (2d Cir. 1948) (referencing the district court's decision to issue the writ for an individual convicted of illegally selling gas coupons); *United States v. McIntryre,* 271 F. Supp. 991, 994 (S.D.N.Y. 1967) *aff'd,* 396 F.2d 859 (2d Cir. 1968) (granting habeas corpus *ad testificandum* for person convicted of narcotics-related crimes).

If this court issues the writs, Mrs. Milardo and Mr. Giammarco consent to electronic monitoring and any other conditions of supervision that Respondents deem necessary. Milardo Decl. ¶ 52; Giammarco Decl. ¶ 35. They would not be a flight or safety risk.

E. Granting the writs here would cost the government virtually nothing.

The government would bear virtually no cost if the writs requested here are granted. Mrs. Milardo and Mr. Giammarco's families are prepared to pay all expenses related to their travel between Italy and the United States. If granted release, Mrs. Milardo would stay with her husband in Middletown, Connecticut and her family would cover all living expenses. Mr. Giammarco would stay with

his wife, Sharon Giammarco, in Niantic, Connecticut. As a full-time mental health worker for Connecticut's Department of Mental Health and Addiction Services, Mrs. Giammarco would cover any and all living expenses for Mr. Giammarco.

The only costs associated with Mrs. Milardo and Mr. Giammarco's presence concern their monitoring by Respondents while in the United States. However, because they both pose no security risk, Respondents could employ inexpensive conditions. Electronic monitoring, for example, would cost only eight dollars per day. Gregory Chen, *Memorandum on the Use of Electronic Monitoring and Other Alternatives to Institutional Detention on Individuals Classified under INA § 236(c)*, American Immigration Lawyers Association (Aug. 6, 2010).

Indeed, the Second Circuit has granted writs of habeas corpus *ad testificandum* despite the existence of much more substantial costs. *See, e.g.*, *United States v. Taylor*, 562 F.2d 1345, 1361 (2d Cir. 1977) (describing proceedings where the cost of flying a witness in federal custody from Virginia to New York on the request of a criminal defendant was not found to make writ of habeas corpus *ad testificandum* unreasonable). The government would incur no such costs if this Court issues the writs requested by Mrs. Milardo and Mr. Giammarco.

F. The legislative proceeding and state habeas trial cannot be stayed until Petitioners are allowed back into the country.

Neither the Judiciary Committee's hearing nor Mrs. Milardo's habeas trial can be stayed. When prisoners in custody wish to appear at trials or hearings unrelated to their incarceration (for example, a civil case for damages), courts may consider whether the suit can be stayed until the prisoner is released,

without causing prejudice. *See Atkins*, 856 F. Supp. at 757; *Haywood v. Hudson*, CV-90-3287 (CPS), at *1 (E.D.N.Y. Apr. 23, 1993); *Ballard*, 557 F.2d at 480.

Such a stay is not an option for either Mrs. Milardo or Mr. Giammarco. Both Petitioners are subject to statutory bars on reentry to the United States and can only seek admission again after twenty years—in 2031 for Mrs. Milardo and in 2032 for Mr. Giammarco, when they are 81 years old and 76 years old. *See* 8 U.S.C. § 1182(a)(9)(A)(ii); 8 C.F.R. § 212.2(a). Mrs. Milardo and Mr. Giammarco cannot afford to wait so long. The Connecticut General Assembly also cannot wait so long, either, because under the state Constitution, it must adjourn the regular session by June 8, 2016. CONN. CONST. art. III, § 2.

G. Tenth Amendment and federalism principles favor issuance of the writ to facilitate a witness' presence demanded by a state legislature.

The writs here should also issue in order to respect the fundamental, legislative decisions of Connecticut as a sovereign State. A separation of powers between the federal government and each of the several States is a bedrock feature of our federalist system. "States are not mere political subdivisions of the United States." *New York v. United States*, 505 U.S. 144, 188 (1992). They are sovereigns, and dividing "power among sovereigns" is critical to the protection of American liberty. *See Printz v. United States*, 521 U.S. 898, 933 (1996). "By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, . . . we strive to maintain the balance of power embodied in our Constitution." *Federal Martime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 769 (2002).

The Supreme Court has accordingly held that the federal government must respect State decisions "of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. A state legislature's authority to investigate and hear testimony is fundamental to its authority to legislate and "to make . . . fundamental . . . decisions[,] . . . the quintessential attribute of sovereignty." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). "[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174-75. "Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC*, 456 U.S. at 761. In order for a federal statute to regulate a state's "fundamental" decisions, Congress must have "ma[de] its intention to do so unmistakably clear in the language of the statute." *Id.* There is no such language in 28 U.S.C. § 2241(c)(5), the statute codifying the testificandum writ. Therefore, in respecting our federalist system, that statute must be interpreted to respect demands made by state legislative proceedings.

The Co-Chairs of the Judiciary Committee have subpoenaed Mrs. Milardo and Mr. Giammarco in exercise of the General Assembly's "power of inquiry" and its "legislative function" affecting its constituency. "The United States shall guarantee to every State in this Union a Republican Form of Government." *See* U.S. CONST. art. 4, § 4, cl. 1. While that clause is not often cited, a state whose legislature—the voice of its people, the creator of its law—can no longer hear testimony it desires from individuals who resided within its borders for 50 years may no longer have a guaranteed "republican form of government."

III. This Court Should Issue an Order to Show Cause and Set a Prompt Return Date.

Unless the petition is frivolous or obviously meritless, the Court must issue an order to show cause. 28 U.S.C. § 2243; *see also Wright v. Dickson*, 336 F.2d 878, 881 (9th Cir. 1964) ("Unless a petition for habeas corpus reveals on its face that as a matter of law the petitioner is not entitled to the writ, the writ or an order to show cause must issue . . . . The usual practice is for the petitioned court to issue an order to show cause").

In this case, Mrs. Milardo and Mr. Giammarco have petitioned for a writ of habeas corpus *ad testificandum*, in accordance with 28 U.S.C. § 2241(c)(5), to obey a subpoena to testify at a hearing before the Judiciary Committee and for Mrs. Milardo to testify at her state habeas trial, both of which the Respondents are currently restraining them from attending. The petition is not frivolous and an order to show cause is appropriate.

Moreover, the Court should issue the order to show cause with an expeditious return date. Mrs. Milardo and Mr. Giammarco must make arrangements to travel to and attend the April 4, 2016 hearing at the Connecticut Legislative Office Building in a matter of weeks. 28 U.S.C. § 2243, which establishes the procedure for issuing an Order to Show Cause, prescribes a return within three days of the order's issuance. The heightened urgency created by upcoming April 4 legislative hearing justifies the expeditious issuance of an Order to Show Cause and strict adherence to the statutory three-day return period set out in 28 U.S.C. § 2243.

CONCLUSION

For the foregoing reasons, Petitioners Paolina Milardo and Arnaldo Giammarco respectfully request that the Court grant their Emergency Petition for Writs of Habeas Corpus *Ad Testificandum* and expeditiously order Respondents to show cause why the writ should not issue.

DATED: March 16, 2016
New Haven, Connecticut

Respectfully submitted,

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***This memorandum does not purport to present the views of Yale Law School, if any.**