UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAJID S. KHAN, *Petitioner*, v. JOSEPH R. BIDEN, JR., *et al.*, *Respondents*.	:	Civil Action No. 22-1650

MOTION FOR SUMMARY ORDER GRANTING
WRIT OF HABEAS CORPUS AND OTHER RELIEF

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PRELIMINARY STATEMENT

Petitioner, by and through his undersigned counsel, respectfully moves for an order summarily granting the writ of habeas corpus and ordering his prompt release from Guantanamo. Alternatively, the Court should order Respondents to show cause within one week why the writ should not be granted, and hold an expedited hearing to address the merits of the Petition, pursuant to 28 U.S.C. § 2243. The Court should also grant interim relief "as law and justice require" to provide an immediate remedy for his unlawful imprisonment, pursuant to § 2243. In particular, if Petitioner is not released from Guantanamo within 30 days, the Court should order a hearing to address his conditional release from the prison into the care of migration officials at Naval Station Guantanamo Bay, or, as necessary, his parole into the custody of his U.S.-citizen family members in United States, under the direct supervision of this Court, pending U.S. State Department efforts to resettle him in another country. The motion should be granted for the following reasons, and for the reasons set forth in the Petition. *See* ECF No. 1.[1]

BACKGROUND

The following facts alleged in the Petition are not disputed. Petitioner is a citizen of Pakistan with legal status in the United States, where he grew up, worked, owned property, and lived with his family who are U.S. citizens. He is 42 years old, and has been in U.S. custody for almost half his life. He was captured in Pakistan nearly 20 years ago. After being held and tortured by the CIA for more than three years, he was transferred to Guantanamo nearly 16 years ago. He pled guilty before a military commission at Guantanamo and agreed to cooperate with U.S. authorities more than 10 years ago. He completed his criminal sentence five months ago, on March 1, 2022, and filed this habeas case to challenge his continuing imprisonment beyond

[1] The parties have met and conferred, and Respondents object to the requested relief, despite their failure to appear in this case. *See* Ex. A (email correspondence).

the end of his sentence nearly two months ago.[2] Yet, despite accepting service of the Petition and an amicus brief filed by September 11th Families for Peaceful Tomorrows, *see* ECF No. 14, and despite assurances that Petitioner's transfer is a "priority" for the government, *see* Ex. A, Respondents have not appeared in this case or otherwise responded to the Petition. Accordingly, because Petitioner remains imprisoned beyond the end of his sentence, unlawfully and without foreseeable end, and under conditions of confinement that are no better—and in some respects, worse—than when he was serving his sentence, the Court should grant summary relief.

ARGUMENT

Respondents do not appear to dispute that Petitioner, who cooperated with U.S. authorities for a decade, must be released to a country other than Pakistan, where he would face persecution and torture, now that he has completed his criminal sentence. But they have not taken sufficient steps to resettle him anywhere; indeed, they do not appear to have taken any steps to resettle him until recently, despite knowing for at least a year that his criminal sentence would end on March 1, 2022.[3] Respondents have also had more than enough time to respond to his habeas petition. For example, they could concede the writ given the unique facts and circumstances of this case to facilitate Petitioner's transfer rather than acting (or failing to act) in a way that prolongs the imprisonment of an important U.S. government cooperator, who the government claims it has prioritized for transfer, in a prison the President has said should be closed.[4] Instead, by failing to appear or state their position in this case, apart from objecting to

[2] Petitioner does not collaterally attack his prior conviction or sentence.

[3] Since early 2021, Respondents have known that Petitioner's maximum criminal sentence was 10 years from the date of his guilty plea on February 29, 2012. *See* Pet. ¶¶ 16-17 & n.6.

[4] As explained in the amicus brief filed by September 11th Families for Peaceful Tomorrows, ensuring Petitioner's prompt transfer from Guantanamo would also serve the important purpose of facilitating plea negotiations in other military commission cases, including the 9/11 case that

the relief requested by this motion, Respondents appear intent on avoiding the Court's consideration of the merits of the case until they transfer Petitioner whenever, wherever, and under whatever circumstances they unilaterally deem appropriate notwithstanding that each day he remains imprisoned at Guantanamo beyond the conclusion of his sentence is unlawful. The Court should reject the government's transparent efforts to delay and thereby undermine the Court's habeas authority.

I. The Court Should Grant Summary Relief to Remedy Petitioner's Unlawful Imprisonment at Guantanamo.

The Supreme Court long ago held that "the costs of delay can no longer be borne by those who are held in custody" at Guantanamo, and "[t]he detainees in these cases are entitled to a prompt habeas corpus hearing." *Boumediene v. Bush*, 553 U.S. 723, 795 (2008). The Court also held that the "duration of the detention and the reasons for it bear upon the precise scope of the inquiry," and "the writ must be effective." *Id.* at 783; *Rasul v. Bush*, 542 U.S. 466, 473-75 (2004); *INS v. St. Cyr*, 533 U.S. 289, 301 (2001), *superseded by statute as stated in Nasrallah v. Barr*, 140 S. Ct. 1683 (2020). The Court has further held that the prompt disposition of habeas cases is essential to preserve the writ as an effective remedy for unlawful detention. *See Wingo v. Wedding*, 418 U.S. 461, 468 (1974) ("[T]he 'great constitutional privilege' of *habeas corpus* has historically provided 'a prompt and efficacious remedy for whatever society deems to be intolerable restraints'" (citation omitted)); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (characterizing habeas as an "effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person."); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Relief

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has languished in pretrial proceedings at Guantanamo for more than a decade. *See* ECF No. 14; *see also*, *e.g.*, Ben Fox, *U.S. Accused of Stalling on Deal to Free Guantanamo Prisoner*, AP News (June 8, 2022), https://apnews.com/article/cuba-maryland-government-and-politics-war-crimes-41a1ab97957b6a0b3d78e32f06114e42 (counsel for 9/11 defendant Ammar al Baluchi: "We are watching the administration's handling of the Khan case carefully.").

in this type of case must be speedy if it is to be effective."); *Storti v. Massachusetts*, 183 U.S. 138, 143 (1901) ("[S]ubstantial justice, promptly administered, is ever the rule in habeas corpus"); *see also Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 490 (1973) (noting interests of prisoner and society in "preserv[ing] the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement" (internal quotation marks omitted)); *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) ("[H]abeas corpus cuts through all forms and goes to the very tissue of the structure.").

As another member of this Court concluded a decade ago, "[t]he Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts." *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 28 (D.D.C. 2012) (Lamberth, C.J.).

A. The Court Should Grant Summary Relief Because Delay in Habeas Cases Causes Irreparable Harm.

Habeas cases are particularly inappropriate for delay—even temporary delay like that caused by Respondents' failure to appear or respond to the Petition in this case—because delay causes substantive harm. Each day that Petitioner remains imprisoned at Guantanamo without meaningful judicial review of the factual and legal basis for his imprisonment compounds the very harm that he filed this case to remedy, *i.e.*, continuing imprisonment beyond the conclusion of his criminal sentence. "[A]ny amount of [additional] jail time" has constitutional significance. *See Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (in the context of prejudice from ineffective counsel (quoting *Glover v. United States*, 531 U.S. 198, 203-04 (2001) (alteration in original))).

The government bears a higher burden to justify delay than it would in an ordinary civil case because basic liberty is at issue. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (freedom from bodily restraint is core liberty interest). Respondents' commitment to transfer and resettle

Petitioner at some point in the future is plainly not sufficient to justify their failure to appear or respond to the Petition for nearly two months. *See Boumediene*, 553 U.S. at 794-95 ("While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody."); *Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969) ("This is a habeas corpus proceeding, and thus particularly inappropriate for any delay."). If delay in deciding habeas petitions were routinely permissible, absent good reason, "the function of the Great Writ would be eviscerated." *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990); *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000) (district courts have less discretion to stay habeas proceeding); *Ruby v. United States*, 341 F.2d 585, 587 (9th Cir. 1965) ("The application for the writ usurps the attention and displaces the calendar of the judge or justice who entertains it and receives prompt action from him within the four corners of the application. . . . One who seeks to invoke the extraordinary, summary and emergency remedy of habeas corpus must be content to have his petition or application treated as just that and not something else."); *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737-38 (9th Cir. 1954) ("[The Writ] is a speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination."); *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) ("The writ of habeas corpus, challenging illegality of detention, is reduced to a sham if the trial courts do not act within a reasonable time.").

The requirement of speedy disposition of habeas cases is codified in 28 U.S.C. § 2243. Indeed, § 2243 provides for the summary relief requested by this motion. The statute requires the Court to "forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." *Id.* The expedition requirement is so strict that the

statute provides for a return in three days, which cannot be expanded beyond 20 days even for good cause, and a hearing within five days of the return unless additional time is allowed for good cause. In addition, the statute provides that a habeas court "shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Id.*

Here, summary relief pursuant to § 2243—in the form of an order granting the writ and ordering Petitioner's release from Guantanamo, or, alternatively, requiring Respondents to show cause within one week why the writ should not be granted and scheduling an expedited merits hearing—is particularly appropriate for several reasons. First, as explained above, Respondents have failed to appear or state any opposition to the merits of the Petition. Indeed, based on their knowing failure to submit a response for two months, the Court should conclude that Respondents have waived opposition to the Petition. Nor in any event should Respondents be granted any more than a week to respond to the Petition given their longstanding knowledge that Petitioner's sentence would end in March 2022, their failure until recently to undertake any efforts to transfer him, and the two months that have elapsed since he filed this case.

Second, Petitioner submits that he is likely to succeed on the merits of his claims given the unique circumstances of his case and, in particular, the fact that his habeas claims are based on continued his imprisonment beyond the completion of his sentence.

Third, even if Petitioner's entitlement to relief were not obvious on the face of the Petition, or were otherwise contested, the Petition presents only questions of law capable of resolution in a summary proceeding. This is not like other Guantanamo detainee habeas cases, which, for example, may involve more protracted discovery or other pretrial litigation, much of which involves classified information.[5]

[5] Compare, for example, Duran v. Biden, No. 16-cv-2358 (RBW) (D.D.C. filed Nov. 30, 2016), which involves a Somali detainee approved for transfer via the Periodic Review Board process,

Fourth, the parties agree that Petitioner must be transferred to a country other than Pakistan, and a habeas order would indisputably facilitate that process. Petitioner's prompt transfer also has important programmatic implications, including for the integrity of the U.S. Justice Department's cooperator program, the purpose and integrity of a Guantanamo military commission trial and sentence, and current efforts to negotiate plea agreements in the remaining military commission cases, including the 9/11 case—a necessary, substantial step toward closing the detention facility at Guantanamo more than two decades after it opened and a year after the end of the war in Afghanistan that gave rise to the prison. *See supra* note 4; Pet. ¶ 56 & n.16.

B. The Court Should Not Countenance Further Delay and Compound the Irreparable Harm Already Suffered by Petitioner.

There is no basis to delay consideration of the merits of this case. Respondents may believe that the case should be delayed indefinitely while they undertake resettlement efforts, *see* Ex. A, but they have not appeared or moved for that relief, and delay would not be appropriate in any event for the reasons set forth above.

Simply put, the Court is not obligated to, and should not, defer to Executive inaction. Rather, "[t]he long history of the Great Writ . . . firmly establishes that it is the high duty of the Court, not the Executive, to 'call the jailer to account' in habeas proceedings, and to ensure that access to the courts is 'adequate, effective, and meaningful.'" *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d at 15 (citation omitted). The law is well-settled that the government has no unilateral authority to dictate, regulate, or otherwise impair or infringe a habeas petitioner's access to counsel or the courts, including by delaying consideration of the merits. *See Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("The Court has steadfastly insisted that 'there is no higher duty than to maintain [the Great Writ] unimpaired.' Since the

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and classified, cross-motions related to discovery that have been pending for nearly three years.

basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed" (citation omitted)); *Ex parte Hull*, 312 U.S. 546, 549 (1941) (holding prison authorities may not "abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus"). "The Court is simply not obliged to give the Executive the opportunity to create its own [habeas] procedures. To do so would be to allow the Government to transgress on the Court's duty to safeguard individual liberty by 'calling the jailer to account.'" *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d at 16 (quoting *Boumediene*, 553 U.S. at 745-46).

To delay a merits decision would violate the separation of powers from which this Court's habeas authority derives by essentially allowing the government—Petitioner's jailers—to dictate whether and to what extent he can challenge their continuing imprisonment of him after the completion of his sentence, and in doing so to prolong indefinitely that imprisonment from which he seeks relief. That would not be calling the jailer to account for Petitioner's unlawful detention; to the contrary, it would thwart meaningful and effective habeas review. *See id.* at 15 ("The Framers considered the Great Writ an 'essential mechanism in the separation-of-powers scheme' because it serves as check against 'undivided, uncontrolled power' that is endemic in the 'pendular swings to and away from individual liberty.' 'It is from [the separation-of-powers] principles that the judicial authority to consider petitions for habeas corpus relief derives.'" (quoting *Boumediene*, 553 U.S. at 742-43, 797) (alterations in original)). "If the separation-of-powers means anything, it is that this country is not one ruled by Executive fiat." *Id.* at 19.

C. Respondents' Recent Efforts to Resettle Petitioner Do Not Diminish the Need for a Court Order Granting Habeas Relief.

The fact that Respondents have prioritized Petitioner's transfer, and that the State Department has recently begun efforts to resettle him in another country—which Petitioner appreciates—does not moot the merits of his Petition or otherwise justify the Court's deferral of this case. As counsel for Respondents argued in September 2021 before the D.C. Circuit *en banc* in the case *Al-Hela v. Biden*, an order granting the writ makes a difference because, "in the actual world, which is that where the writ has been granted, people [are] transferred." Tr. of Oral Argument at 61, *Al-Hela v. Biden*, No. 19-5079 (D.C. Cir. Sept. 30, 2021) ("Al-Hela Tr."). That point was proven correct most recently in the case of detainee Asadullah Haroon Gul, who won his habeas case in October 2021, and was repatriated eight months later to Afghanistan—a country with which the United States does not even have direct diplomatic relations—under threat of a judicial contempt order by Judge Mehta. *See Gul v. Biden*, No. 16-cv-1462, __ F. Supp. 3d __, 2021 WL 5217352 (D.D.C. Oct. 18, 2021) (granting habeas petition); Press Release, U.S. Dep't of Defense, *Guantanamo Bay Detainee Transfer Announced* (June 24, 2022), https://www.defense.gov/News/Releases/Release/Article/3073210/guantanamo-bay-detainee-transfer-announced/ (announcing Gul's transfer "in accordance with the U.S. District of Columbia's order granting his Writ of Habeas Corpus, ruling the United States no longer has a legal basis to justify the continued detention of Mr. Gul"). Unfortunately, the same cannot be said for the 20 other detainees, including Mr. Al-Hela, who have been approved for transfer by the Guantanamo Review Task Force in 2010, or by subsequent Periodic Review Boards, and who the government has said it intends to transfer, but who remain in detention at Guantanamo without foreseeable end—in some instances for more than 12 years after their approval for

transfer. *See also*, *e.g.*, Al-Hela Tr. at 63 (Millett, J., addressing distinction between having the writ granted and otherwise being transferred in exercise of Executive's discretion).

Whatever steps Respondents are now taking to resettle Petitioner do not ameliorate the actual, current conditions of imprisonment that Petitioner continues to endure after completing his criminal sentence. As explained in Count VIII of the Petition, Petitioner's transfer upon the completion of his criminal sentence is required by law and not simply as a matter of Executive discretion or grace. Nor is he subject to the Periodic Review Board process or other administrative transfer requirements. *See* Pet. ¶¶ 75-76. But that simply underscores the need for speed and summary disposition of this case. It is well past time for Petitioner, who long ago accepted responsibility for his actions, cooperated with U.S. authorities for a decade, and has served his sentence, to be released from Guantanamo. But it is equally clear that this is unlikely to happen in the foreseeable future without a court order. As the Supreme Court held in *Boumediene*, habeas review is "more than an empty shell," 553 U.S. at 785 (quoting *Frank*, 237 U.S. at 346 (Holmes, J., dissenting)), and "the writ must be effective." *Id.* at 783. A court order granting the writ would make a material difference in terms of Petitioner's release.

II. The Court Should Order Interim Habeas Relief to Provide an Immediate Remedy for Petitioner's Unlawful Detention Pending Resettlement Efforts.

In addition to granting the writ and ordering Petitioner's prompt release from Guantanamo, the Court should grant interim habeas relief to provide an immediate remedy for his unlawful imprisonment pending the State Department's efforts, begun recently, to resettle him in another country. In particular, if Petitioner is not released from Guantanamo within 30 days, the Court should order a hearing to address his conditional release from the prison into the care of migration officials at Naval Station Guantanamo Bay, or, as necessary, his parole into the

custody of his U.S.-citizen family members in United States, under the Court's supervision, pending his resettlement in another country.

A. The Court Has Authority to Order Interim Relief in the Form of Petitioner's Conditional Release into the Naval Station.

Petitioner, who all parties agree cannot be repatriated to Pakistan because he would face persecution and torture, and who awaits resettlement in another country, should be readily turned over to the care of migration officials at the Naval Station, who routinely process Cubans and other refugees who arrive at the base. The migration office provides support for them while the State Department undertakes efforts to resettle them in other countries. As set forth in the State Department Fact Sheet attached as Exhibit B,[6] the current structure in place at the Naval Station—separate from the detention facility—is operated by the State Department's Bureau of Population, Refugees, and Migration, and the U.S. Citizenship and Immigration Services (USCIS) of the U.S. Department of Homeland Security (DHS). This system is run in coordination with the United Nations' International Organization for Migration, which provides a social service program to help refugees at the base while they, like Petitioner, await resettlement in other countries.

For example, the program provides them with dormitory-style housing, food and health care while helping them integrate into the social fabric of the Naval Station, including by helping them find jobs at the Naval Station. These individuals may also establish bank accounts; use public transportation; attend religious services of their choice; and communicate directly with their relatives—which are attributes of freedom from imprisonment that Petitioner is presently denied. *See* Pet. ¶¶ 30-32. In addition, the refugees are subject to some restrictions of movement

[6] The Fact Sheet is publicly available online at https://assets.documentcloud.org/documents/2772373/Guantanamo-MOC-Fact-Sheet-as-of-Sept-2015.pdf.

implemented due to security concerns at the Naval Station. They are escorted around the base by unarmed, DHS contractors employed by USCIS, who could likewise supervise Petitioner to the extent that may be necessary or appropriate as determined at a hearing before the Court.

The law is well-settled that the Court has broad, equitable habeas authority to fashion appropriate interim relief pending final resolution based on the unique facts and circumstances of this case. *See Hensley v. Municipal Court*, 411 U.S. 345, 352 (1973) (habeas authority includes the power to "order [a] petitioner's release pending consideration of his habeas corpus claim" (citing *In re Shuttlesworth*, 369 U.S. 35 (1962))); *Marino v. Vasquez*, 812 F.2d 499, 507 (9th Cir. 1987) (the authority of the court to conditionally release a prisoner pending habeas proceedings derives from the power to issue the writ itself). In particular, if Petitioner is not immediately released from Guantanamo, the Court has habeas authority to order his conditional release pending his resettlement to ensure the effectiveness of the Great Writ. *See* 28 U.S.C. § 2243 (habeas court shall "dispose of the matter as law and justice require"); *Boumediene*, 553 U.S. at 779 ("[T]he habeas court must have the power to order the conditional release of an individual unlawfully detained . . ."); *Aamer v. Obama*, 742 F.3d 1023, 1035 (D.C. Cir. 2014) ("[A] court may simply order the prisoner released unless the unlawful conditions are rectified, leaving it up to the government whether to respond by transferring the petitioner to a place where the unlawful conditions are absent or by eliminating the unlawful conditions in the petitioner's current place of confinement." (citing *In re Bonner*, 151 U.S. 242, 262 (1894)); *see also Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief." (citing 28 U.S.C. § 2243)).

The law is equally clear that courts have habeas authority to enter any form of order, where, as here, the requested interim relief directly compels or indirectly "affects" or hastens the petitioner's release from custody. *See Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) (noting that habeas courts have the "power to fashion appropriate relief other than immediate release."); *Carafas*, 391 U.S. at 239 (emphasizing that habeas statute "does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted."); *see also*, *e.g.*, *Edwards v. Balisok*, 520 U.S. 641 (1997) (after determining that true nature of relief sought is speedier release from imprisonment, Court assumes that habeas court had authority to adjudicate claim).

Here, the Court should exercise its habeas authority to grant interim relief in the form of Petitioner's conditional release because there is no serious dispute that Petitioner will otherwise remain unlawfully imprisoned at Guantanamo for the foreseeable future, beyond the conclusion of his criminal sentence, and subject to the same—if not worse—conditions of confinement than when he was serving his 10-year sentence. Put differently, the only equitable way to cure these violations and ensure the effectiveness of the writ is for the Court to order Petitioner out of the prison, on conditions, and, at minimum, into the Naval Base so that he is no longer treated as a criminal and can begin the process of preparing for his resettlement and life after Guantanamo. *See Schlup v. Delo*, 513 U.S. 298, 319 (1995) ("[H]abeas corpus is, at its core, an equitable remedy."); *Sanders v. United States*, 373 U.S. 1, 17 (1963) ("[H]abeas corpus has traditionally been regarded as governed by equitable principles"); 28 U.S.C. § 2243 (authorizing relief "as law and justice require"). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *In re Guantanamo Bay*

Detainee Continued Access to Counsel, 892 F. Supp. 2d at 20 ("Invoking the Court's equitable power in Guantanamo cases is particularly appropriate because this class of cases is *sui generis*.").

B. The Court Has Authority to Order Interim Relief in the Form of Petitioner's Conditional Release Outside of Guantanamo.

In addition to ordering Petitioner's immediate release from Guantanamo, and if the Court determines is necessary at a hearing, the Court should order Petitioner paroled into the custody of his U.S.-citizen family members in the United States, under the Court's direct supervision, while the State Department continues its recently begun efforts to resettlement him in another country.

This Court has inherent power as a habeas court to order parole—*i.e.*, release on conditions—pending Petitioner's resettlement. *See Baker v. Sard*, 420 F.2d 1342 (D.C. Cir. 1969). In *Baker*, the D.C. Circuit stated that "[w]hen an action pending in a United States court seeks release from what is claimed to be illegal detention, the court's jurisdiction to order release as a final disposition of the action includes an inherent power to grant relief *pendente lite*, to grant bail or release, pending determination of the merits." *Id.* at 1343. The power to provide interim relief is incident to—and a subset of—the Court's broad, equitable habeas authority. *See Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955) (court has power to order bail in habeas even in absence of bail statute). This authority constitutes an essential element of the flexible, equitable power inherent in the habeas statute. *See Harris*, 394 U.S. at 292 ("The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary." (quotation marks omitted)); *id.* at 291 ("The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers."). "Indeed, common-law habeas corpus was, above all, an

adaptable remedy. Its precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779; *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas corpus "always could and still can reach behind prison walls and iron bars").

The Court's authority to grant conditional release is fully applicable in cases involving non-citizens. Even an adjudicated criminal alien who has never made an entry into the United States, and who has no legal right to be here, must be released on conditions into the United States when faced with the prospect of indefinite detention because no foreign government has agreed to accept him. *See Clark v. Martinez*, 543 U.S. 371, 386 (2005); *see also Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001) (adjudicated criminal aliens entitled to release); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 347-48 (2005) (recognizing rule that detained deportable non-citizens "must presumptively be released into American society after six months").

In addition, the current legislative restriction on "the transfer or release to or within the United States" of a Guantanamo "detainee" in Section 1033 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1033, 132 Stat. 1636, 1953 (2018), does not preclude Petitioner's parole into this country. As addressed in the Petition, he is not classified as a detainee but rather as a criminal defendant who has completed his sentence. Nor does the statute address parole into the United States, which is qualitatively different from what the statute prohibits, *i.e.*, the resettlement of detainees such as the Uighurs in the United States. The legislative provision is also not sufficiently clear to displace the Court's traditional habeas authority, including the power to order parole as an interim remedy for unlawful detention. *See St. Cyr*, 533 U.S. at 299-300 (applying habeas statute and stating that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and

where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems" (citation omitted)); *Holland v. Florida*, 560 U.S. 631, 646 (2010) ("[W]e will not construe a statute to displace courts' traditional equitable authority absent the clearest command." (internal quotation marks omitted)).

Nor does the D.C. Circuit's decision in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131 (2010), *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010), preclude Petitioner's parole into the United States based on the unique facts and circumstances of this case. *Kiyemba* held that Uighur detainees at Guantanamo could not be resettled in the United States because they lacked presence or property in this country. But unlike the Uighurs, Petitioner has legal status and other substantial, voluntary ties to the United States. The Supreme Court, which ultimately declined to review the Circuit's reinstated decision in 2010 after the Uighurs were offered resettlement options, has also not yet addressed the issue of parole into the United States on the merits.

Any and all other issues related to Petitioner's conditional release can and should be addressed at a hearing before the Court if he is not released from Guantanamo within 30 days.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Petition, the motion should be granted in its entirety.

Dated: July 25, 2022

Respectfully submitted,

/s/ Katya Jestin

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2022, I caused the foregoing motion for summary order granting writ of habeas corpus and other relief, with a proposed order, to be filed with the Court and served on counsel for Amicus Curiae via the Court's CM/ECF system, and served on counsel for Respondents listed below by email.

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