No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NAZUL GUL, Petitioner,

v.

BARACK OBAMA, President of the United States of America, et al.

ADEL HASSAN HAMAD, Petitioner,

v.

BARACK OBAMA, President of the United States of America, et al.

On Petition for Writ of Certiorari

to the United States Court of Appeals

for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Nazul Gul and Adel Hassan Hamad are former prisoners at the United States Naval Station at Guantánamo Bay, Cuba. Both men have maintained from the time they were seized from their beds that they were innocent of any anti-American or belligerent activity. After filing for habeas corpus relief under *Rasul v. Bush*, 542 U.S. 466 (2004), both petitioners sought summary judgment based on extensive evidence of their innocence gathered by their attorneys through overseas investigation. In 2007, while their habeas corpus petitions were stayed, they were transferred on conditions – not released – to their home countries with explicit written statements by the government that the decision to transfer "does not equate to a determination that [the detainee] is not an enemy combatant . . . nor that he does not pose a threat to the United States or its allies." The district court dismissed the petitioners' habeas cases as moot despite their claims for exoneration, removal of their combatant status, and amelioration of conditions of their transfer. The questions presented are:

I.

Where the petitioners established initial habeas jurisdiction, whether the burden of proof should be on the government, as the party asserting mootness, to establish the absence of direct or collateral consequences from the imprisonment and designation of Mr. Hamad and Mr. Gul as persons who are dangerous and detainable under the Authorization for the Use of Military Force.

II.

Whether, if the petitioners must bear the burden of proving that their cases are not moot, they demonstrated the existence of sufficient remediable consequences, including conditions of transfer, statutory impairments, and non-civilian status, to allow their cases to go forward or, in the alternative, whether their cases should be remanded to the district court so that they may further develop facts specific to their cases.

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The petitioners, Nazul Gul and Adel Hassan Hamad, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 22, 2011, affirming the dismissal of their petitions for writs of habeas corpus.

1. Opinions Below

The District Court for the District of Columbia granted the government's motion to dismiss the petitioners' habeas corpus cases as moot in a consolidated opinion on April 1, 2010. *In re Petitioners Seeking Habeas Corpus Relief In Relation To Prior Detentions At Guantánamo Bay*, 700 F. Supp.2d 119 (D.D.C. 2010). Appendix at 1. The District of Columbia Court of Appeals affirmed the judgment in a published opinion on July 22, 2011. *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011). Appendix at 25. The Circuit denied rehearing and petition for rehearing *en banc* on September 12, 2011. Appendix at 43.

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

3. Constitutional And Statutory Provisions

The constitutional prohibition on suspension of habeas corpus rights states:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. CONST. art. I, § 9, cl. 2. The general federal habeas corpus statute states in relevant part, omitting the amendments struck down in *Boumediene v. Bush*, 553 U.S. 723 (2008):

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> ***
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

28 U.S.C. § 2241. The federal habeas corpus statute provides for speedy scheduling of habeas corpus cases and disposition as "law and justice require":

> A court, justice or judge entertaining an application for a writ of habeas corpus shall 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.
>
> The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
>
> The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.
>
> When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
>
> Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.
>
> The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.
>
> The return and all suggestions made against it may be amended, by leave of court, before or after being filed.
>
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. § 2243.

The Authorization For Use Of Military Force (AUMF), upon which the detention of enemy combatants is based under *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), states in relevant part:

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

AUMF, § 2(a), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C.§ 1541 note).

4. Statement Of The Case

Mr. Hamad, a citizen of Sudan, and Mr. Gul, a citizen of Afghanistan, are among approximately 15 former prisoners at Guantánamo Bay who have appealed the dismissal of their petitions for writs of habeas corpus asserting that their cases are not moot. While the number of men impacted by this aspect of the Guantánamo litigation is small, the impact of the dismissal is great. The circuit court's opinion dilutes habeas rights recognized by this Court, undermining the available remedies for all Guantánamo petitioners.

Neither Mr. Gul nor Mr. Hamad was seized on a battlefield. Both were arrested in their beds months after the first wave of fighting in Afghanistan had ended.[1] Mr. Hamad was seized in his apartment in Pakistan where he had worked as a civilian hospital and charity administrator and had lived with his wife and four daughters for 17 years. Mr. Gul was seized at the home of an acquaintance in Gardez, Afghanistan, where he had gone for medical treatment while working

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[1] A summary of the relevant facts for both Mr. Hamad and Mr. Gul is included as Appendix at 64, an excerpt from the Petitioners' Opening Brief that includes citations to the voluminous record filed with the circuit court.

for the Karzai government. As a toddler, Mr. Gul lost an eye to a Soviet attack, after which his family fled to Pakistan where they lived until after the fall of the Taliban. Then, Mr. Gul returned to Afghanistan for the first time to work for the American allied government.

The exhibits filed in support of Mr. Gul's motion for summary judgment revealed that his seizure was apparently the result of a classic case of mistaken identity – he used a nickname that was also used by someone American forces were seeking. The allegations against Mr. Hamad included nothing about fighting but only that he had worked for charities, whose staffs included people who supported terrorist ideals and causes and had taken anti-American positions.

Mr. Gul was brought to the prison at Guantánamo in 2002; Mr. Hamad in 2003. Both men told United States personnel from the outset, and continuously, that they were innocent of any involvement with Al Qaeda or the Taliban.

Both petitioners were among the first wave of prisoners to file habeas corpus petitions after the decision in *Rasul*. Counsel for both men conducted extensive overseas investigation into their assertions of innocence. The record in both cases includes sworn video-taped evidence from witnesses in Afghanistan and Pakistan confirming the accounts the petitioners had given to United States authorities and attesting to their innocence. Between the decision in *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), and passage of the Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600 (amending 28 U.S.C. § 2241(e)), both Mr. Hamad and Mr. Gul filed motions for summary judgment with the district court that presented overwhelming evidence of their factual innocence.

In March 2007, Mr. Gul was transferred to Afghanistan. In December 2007, Mr. Hamad was transferred to Sudan. Both transfers were effectuated through diplomatic means and with the

enemy combatant designation intact. The government unequivocally communicated the latter position to the petitioners' counsel in identical words: the transfer "does not equate to a determination that [the detainee] is not an enemy combatant . . . nor that he does not pose a threat to the United States or its allies." Appendix at 71, 72.

Early on, the habeas cases for both petitioners were stayed over their objections. Upon filing motions for summary judgment in 2006, the petitioners sought, unsuccessfully, to lift the stays. After the decision in *Boumediene*, both petitioners sought to push their habeas cases to hearing. They then resisted, unsuccessfully, the decision of the district court consolidating the government's motions to dismiss the habeas cases of transferred and released petitioners on mootness grounds.

The district court placed the burden of establishing continuing justiciability on the petitioners. Appendix at 1. While the United States government was not willing to provide information on the terms or conditions of the transfer agreements reached for Mr. Hamad or Mr. Gul, Mr. Hamad was able to obtain information from the government of Sudan. Appendix (Teesdale Declaration) at 44. This information contradicted the position taken by the government regarding the nature of the transfer process, and made clear the significant role of the United States in setting the conditions of transfer. However, relying on generic affidavits from the government describing the transfer process, concerns regarding interference with foreign sovereigns, and its analysis of the law of collateral consequences in habeas, the district court, in a consolidated opinion, dismissed the more than 100 petitions of released prisoners as moot. It placed the burden of establishing collateral consequences on the petitioners, then found that they had not carried their burden.

Approximately 15 of the petitioners appealed from the district court's dismissal order. The circuit court consolidated Mr. Gul and Mr. Hamad's cases and held the others in abeyance pending the disposition in these cases.[2] In deciding the appeal against the petitioners, the circuit assumed, without deciding, that the collateral consequences doctrine applies to these cases. *Gul*, 652 F.3d at 16. It then held that "a former detainee, like an individual challenging his parole," must prove "concrete injuries." *Id.* at 17. The circuit held that any continuing consequences were imposed by the petitioners' home countries and not remediable in the district courts. *Id.* at 18. In addition, the court concluded that some of the claimed consequences were too speculative to sustain the exercise of federal jurisdiction. *Id.* at 19-20.

5. Reasons For Granting The Writ

Certiorari should be granted to address issues related to the availability of a remedy for Guantánamo habeas petitioners. The petition presents significant issues about the reach of the habeas corpus remedy for innocent men who have been removed from the prison by the United States without relief from the designation of being detainable under the AUMF and without any effort to identify and to ameliorate conditions of transfer based on the erroneous designation. The narrow but critical question presented regarding the burden of proof in habeas corpus law would require the Court to determine whether the situation of the former Guantánamo prisoners more closely resembles that of a habeas petitioner who challenges a criminal conviction or findings related to mental condition or sexual offending – where the burden on mootness is on the government and collateral consequences are presumed – or whether their situation more

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[2] One other appeal that has been proceeding under seal was decided at the same time as petitioners' cases.

closely resembles that of parolees who do not challenge their conviction status as criminals, but only the availability of conditional release – where they bear the burden of establishing collateral post-release consequences in order to pursue their claims. Resolution of that question requires analysis of the nature of the AUMF designation, the transfer procedures implemented to remove the men from Guantánamo, and the availability of equitable remedies under the writ of habeas corpus.

The petition also addresses the portion of the decision of the court below that held that there is no jurisdictional basis to grant relief in the form of an order directing the United States government to take "reasonable and appropriate diplomatic steps" to mitigate the harm caused by its actions, a measure the district courts have approved and that has directly led to meaningful relief for prisoners who have won their habeas cases. A number of petitioners have been resettled in third countries following grants of the writ under such orders. The opinion also undervalued the statutory and practical effects of the continued designation of an innocent person as a combatant who is detainable under the AUMF. The opinion below unduly limits the availability of a remedy for Guantánamo petitioners.

These petitions arise at a time when the promise of this Court's decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*, that our legal system can fairly address the important issues and individual rights at stake in the Guantánamo litigation, has foundered in the circuit court. For nearly a decade, the situation of the prisoners in Guantánamo has been the subject of heated litigation and domestic and international controversy. This Court has addressed the fundamental issues raised by the Guantánamo habeas corpus litigation four times, culminating in the *Boumediene* decision which established a constitutional right for the prisoners to seek a remedy

in habeas corpus and provided an historical context for reaffirmation of the vitality of the Great Writ. On a fifth occasion, this Court granted certiorari to address questions related to the scope of the remedy available to the Guantánamo prisoners. *Kiyemba v. Obama*, 130 S. Ct. 458 (2009) (mem.). After many of the petitioners had been resettled and others had rejected an offer of safe haven, the Court vacated and remanded for determination of "what further proceedings . . . are necessary and appropriate for the full and prompt disposition of the case in light of the new developments." *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (mem.).

As important as are the procedural rights at stake, these cases involve something more – assertions, backed by evidence, that the petitioners are factually innocent. Certiorari should be granted to address the appeals for justice from men who believe deeply that the American system of justice and American values will allow them to seek and to obtain vindication of their innocence through American courts and relieve them – at least partially – from the consequences of their erroneous designation and imprisonment.

A. WHERE THE PETITIONERS ESTABLISHED INITIAL HABEAS CORPUS JURISDICTION, THE GOVERNMENT SHOULD BEAR THE BURDEN OF PROVING MOOTNESS AND OVERCOMING THE PRESUMPTION THAT THE CONSEQUENCES OF DESIGNATION, IMPRISONMENT, AND CONDITIONS OF TRANSFER ARE REMEDIABLE.

The general law on mootness appropriately places upon the moving party a heavy burden to establish that no dispute and no possible remedy persists. Application of this rule is especially appropriate in the context of a habeas corpus challenge by a person who was not seized on a battlefield, was not provided any meaningful process to challenge his seizure and imprisonment, and was then transferred home on conditions with no participation in that process and with the

United States continuing to designate him as a person associated with the mass murders of September 11, 2001. Under this Court's precedents, the burden should remain on the government to establish the absence of remediable consequences.

1. The General Rule Places The Burden To Establish Mootness On The Party Asserting That, After A Plaintiff Establishes Initial Jurisdiction, A Civil Action Has Become Moot.

After initial jurisdiction has been established, a party who asserts that a claim has become moot bears the burden of establishing mootness. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). In the non-habeas context, this rule permits a case to go forward, even when most of the relief a person originally sought has been granted, as long as there is some relief available. *Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992) ("The availability of this possible remedy is sufficient to prevent this case from being moot."); *accord Byrd v. U.S. E.P.A.*, 174 F.3d 239, 244 (D.C. Cir. 1999) (partial remedy sufficient).

These general rules apply in habeas corpus cases challenging criminal convictions. When the core relief sought is release from incarceration and a petitioner has been released, the collateral effects or consequences of the conviction are sufficient to defeat a claim of mootness. *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968). Such consequences are presumed to exist. *Spencer v. Kemna*, 523 U.S. 1, 8 (1998).

In *Spencer*, the Court limited application of the general rule in the context of a challenge to a parole revocation. 523 U.S. at 11-12. Such a challenge does not go to the legality of detention, but is, rather, limited to the length of detention after a lawful conviction has occurred. The reasons for the shift in burden worked by *Spencer* included the Court's view of parole as a procedure arising after and independent of the underlying conviction, as well as the Court's

concern about possible tension between the presumption of consequences and its changing view of standing. *Id.* at 11-13. The Court reaffirmed that, even when collateral consequences are not presumed, a petitioner need only prove a potential for harm. *See Spencer*, 523 U.S. at 9-10 & n.3.

After *Spencer*, this Court reaffirmed the general rule that the party urging mootness bears the burden of establishing it. In *United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011), the Court addressed a supervised release term that included a sex offender registration requirement that ended while the case was on appeal. In finding the case moot, the Court restated the general rule that, in a challenge to an underlying conviction, collateral consequences are presumed, but when the challenge is only to a sentence that has expired, the burden of identifying an ongoing collateral consequence shifts to the defendant. *Juvenile Male*, 131 S. Ct. at 2864. As with Spencer's parole, the juvenile's expired registration requirement did not involve a challenge to the underlying status as a convicted criminal (or adjudicated delinquent). *Id.* at 2865. In contrast, the core of this case is the petitioners' innocence of being an enemy belligerent linked to the mass murders of 9/11.

The line between a challenge to a criminal conviction and a challenge to a designation and imprisonment under the AUMF is direct. Mr. Gul and Mr. Hamad both suffered formal designation as persons who were found to be sufficiently dangerous and hostile to be imprisoned under the AUMF. Their challenge is to that finding and imprisonment, not the duration of detention. They suffer under conditions of transfer required by their former jailers, from the stigma of their designation, and from statutory limitations on their freedom. Their need for meaningful review of the basis for the harms they continue to suffer is even greater than that of

persons convicted of crimes because there has never been a reliable determination, or any judicial determination at all, that they ever committed any belligerent acts or posed any danger.

2. The Court Below Ignored Application Of The Presumption Of Collateral Consequences In Other Habeas Contexts.

The circuit court viewed the decision in *Spencer* too broadly. There, this Court carved a limited exception to the general rule on the burden of proof. In several other situations not involving criminal convictions, the courts have imposed the burden of proof on the party asserting mootness. *See Justin v. Jacobs*, 449 F.2d 1017, 1020 (D.C. Cir. 1971) (sexual psychopath designation); *In re Ballay*, 482 F.2d 648, 651-52 (D.C. Cir. 1973) (mental health civil commitment). While both Justin and Ballay faced some potential legal consequences from the findings that had been made against them, the decisions in both cases also expressed concern about the stigma of the labels that remained attached to the petitioners. *Justin*, 449 F.2d at 1020 n.18; *Ballay*, 482 F.2d at 650.

A third analogous situation involved allegations that an individual had been a notorious Nazi prison guard. *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). Ivan Demjanjuk was ordered extradited from Ohio to Israel to stand trial as a war criminal. *Id.* at 339. The district court ordered, and then, in a habeas corpus action, the Sixth Circuit upheld, his extradition, finding sufficient evidence that he was "Ivan the Terrible." *Id.* at 355. When it was later revealed that the government had withheld critical information, Demjanjuk sought to reopen his habeas case. *Id.* at 340. Notwithstanding the fact that he had been tried in Israel and acquitted, the Sixth Circuit reopened the habeas case and vacated the judgment in the extradition proceeding. *Id.* at 356. The rationale was to relieve him of the stigma of being labeled a Nazi in

the extradition proceeding *Id.* The stigma of being labeled as complicit in the crimes of 9/11 is similarly severe.

3. The Challenge To Designation And Imprisonment Under The AUMF Does Not Implicate The Special Burden Rule Under *Spencer* Regarding Parole.

The circuit court treated the underlying issue in these cases as involving a habeas challenge to a finding by the United States that the petitioners are "enemy combatants." *Gul*, 652 F.3d at 14, 20. This finding was then downplayed by the court which stated that "the Government no longer attaches any legal significance to the term . . . ." *Id.* at 20. The underlying dispute, however, involves something that goes far beyond that term: the finding required by the AUMF, which is specifically linked to the attacks against this country on September 11, 2001. As stated in *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010):

> The AUMF authorizes the President to "use all necessary and appropriate force against those . . . persons he determines planned . . . or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."

The finding of involvement in planning or aiding the terrorist attacks of September 11 or harboring those who did could support any number of charges under the United States Criminal Code. *See* 18 U.S.C. 2331 *et seq*. This finding, labeling, and concomitant imprisonment are much more serious than a conviction for shoplifting, identity theft, or drug possession, some of the crimes for which a habeas petitioner is presumed to suffer sufficient consequences that allow his case to go forward after release.

Whether or not the government continues to call Mr. Hamad or Mr. Gul "enemy combatants," because the statutory authority for their detention is linked to the mass murders of September 11, they remain stigmatized by association with those horrific acts.

Throughout their imprisonment, and beyond, they have been held up to the world as such by the top leaders of this country:

- "[The prisoners are] among the most dangerous, best trained vicious killers on the face of the earth."[3]
- "[T]hese are people that would gnaw through hydraulic lines in the back of a C-17 to bring it down . . . . [t]hese are very, very dangerous people, and that's how they're being treated." [4]
- "They are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others."[5]
- "They're all terrorists; they're all enemy combatants. . . . I don't think there is such a thing as a medium-security terrorist."[6]
- Guantánamo prisoners are "the worst of the worst" and the only alternative to prison was "to kill them."[7]

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[3] Department of Defense News Briefing - Secretary Rumsfeld Media Availability en route to Guantánamo Bay, Cuba (Jan. 27, 2002), available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2320.

[4] Department of Defense News Briefing - Secretary Rumsfeld and Gen. Myers (Jan. 11, 2002), available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031.

[5] Linda Kozaryn, U.S. Gains Custody Of More Detainees, American Forces Press Service, Department of Defense, Jan. 28, 2002, available at http:www.defense.gov/news/newsarticle.aspx?id=43813 (quoting Rear Admiral John D. Shuttlebeem).

[6] Tim Golden, *Military Taking A Tougher Line With Detainees*, N.Y. Times, December 16, 2006 (quoting Rear Admiral Harris, commander of the Guantánamo task force), available at http://www.nytimes.com/2006/12/16/washington/16gitmo.html.

[7] ASSOCIATED PRESS, Cheney: Gitmo holds "worst of worst," June 9, 2009 (quoting former Vice President Richard Cheney), available at http://www.msnbc.msn.com/id/3/052241 /ns/world-news-terrorism/+/Cheney-gitmo-holds-worst-worst/.

- "Many of those held at Gitmo are the worst of the worst – hard core haters who cannot be rehabilitated."[8]

- "I believe Guantánamo Bay serves its purpose. I remain firmly opposed to bringing dangerous terrorists to our soil, and I believe this bill will help prevent that from ever happening."[9]

When the underlying dispute is recognized as involving the finding required by the AUMF, the importance of maintaining the burden of proof on the government to establish mootness is clear.

4. The Non-Judicial Process That Led To The Petitioners' Imprisonment For Years Was Fatally Flawed, Supporting Placement Of The Burden On The Government To Establish Mootness.

Outside of parole and other conditions of sentencing, the habeas petitioners in cases discussing mootness were incarcerated following a rigorous judicial process.[10] Here, there was none. Indeed, there is no evidence of any process at all for more than two years other than the bedside decisions to seize the petitioners made by United States, or Pakistani, military or other personnel. The process ultimately used to justify the petitioners' continued imprisonment, the Combatant Status Review Tribunal Process in Guantánamo, was found to be woefully inadequate by this Court. *Boumediene*, 553 U.S. at 784-86.

The absence of any meaningful process to justify the petitioners' incarceration in Guantánamo strongly supports continuation of the habeas proceedings given the fact that "habeas corpus is, at its core, an equitable remedy." *Id.* at 780 (quoting *Schlup v. Delo*, 513 U.S. 298,

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[8] Press Release, Congresswoman Jane Harman, May 8, 2007, available at http://www.house.gov/list/press/ca36_harman/May_8.shtml.

[9] Press Release, Congressman Bobby Shilling, Jan. 28, 2011, available at http;//schilling.house.gov/News/DocumentSingle-aspx?Document ID=250954.

[10] While the proceeding in *Spencer* was a non-judicial parole hearing, the predicate for the case was a judicial finding of guilt and imposition of a term of imprisonment. 523 U.S. at 3.

299 (1995)); *see* 28 U.S.C. § 2243 (a case is to be resolved as "law and justice" require). When a person is, or may be, harmed or stigmatized by our government without any meaningful process, the need for a remedy in habeas is greater than a situation in which the person was afforded a meaningful process. Maintaining the burden of proof on the government when it seeks to avoid consideration of the lawfulness of its actions is consistent with the equitable aspects of habeas. Most basically, the government is in the best position to present the facts required for a neutral and fair determination of the continuing effects of the AUMF designation under the conditions of transfer it sought and obtained.

The importance of the availability of some meaningful process to review the legality of the seizure and imprisonment of the petitioners and their continuing effects is underscored by the fact that a mootness inquiry involves two questions: Has the underlying dispute been resolved? Is any remedy available? *See Carafas*, 391 U.S. at 236-39. The underlying dispute unquestionably remains unresolved given the government's explicit statement regarding the continuing designations and findings of dangerousness. The habeas proceeding is the first opportunity for a fair review. The courts should not permit the government to stay habeas proceedings, then invoke the mootness doctrine and complain that the petitioner provided insufficient information about consequences to allow a forum for determining the validity of the AUMF designation, especially when it set and bargained for conditions of transfer it refuses to disclose. *Cf. Carafas*, 391 U.S. at 239 (discussing the unfairness of denying the petitioner his "day in court" when delay through no fault of his own resulted in his release before final adjudication of his claims).

B. EVEN IF THE PETITIONERS MUST SHOULDER THE BURDEN OF ESTABLISHING THAT THEIR CASES ARE NOT MOOT, THE COURT SHOULD REVERSE BECAUSE THEY DEMONSTRATED THE EXISTENCE OF SUFFICIENT REMEDIABLE CONSEQUENCES.

The circuit court's analysis of remedies included four basic errors, each of which potentially skews and dilutes this Court's Guantánamo jurisprudence. First, the court ignored the critical distinction between a person "released," based on recognition of the fact that the individual is not detainable under the AUMF, and a person "transferred," with the AUMF designation intact and conditions of transfer negotiated based on the AUMF designation. Second, the court denigrated the efficacy of the same type of order – the government must take "all necessary and reasonable diplomatic steps" to ameliorate conditions of transfer – that district courts since the first post-*Boumediene* habeas grants have routinely ordered. Third, the court undervalued the actual terms of transfer evidenced in Mr. Hamad's case as well as the concrete consequences – including no-fly designation – that accompanies Guantánamo detention. Fourth, the court's analysis of "prudential considerations" misstated and ignored relevant facts.

1. The Conclusion Of The Court Below That No Remediable Consequences Had Been Shown, Assuming The United States Government Plays No Role In The Treatment Of Transferred Prisoners, Ignores The Distinction Between Transfer And Release.

Under the policies and regulations of the Department of Defense, men could be removed from Guantánamo in two distinct ways – by "transfer" or by "release." One involved outright release; the other, removal from the prison on conditions. *See Kiyemba v. Obama* (*Kiyemba II*), 561 F.3d 509, 515 n.7 (D.C. Cir. 2009) (noting distinction). Regulations promulgated by the

Department of Defense incorporated this distinction.[11] Both Mr. Hamad and Mr. Gul were transferred on conditions – not released – and with the explicit statement that their transfer did not mean that the United States no longer considered them enemy combatants.[12]

The distinction between the government's decision to "transfer," rather than "release," the petitioners from Guantánamo demonstrates the existence of meaningful consequences from the lack of exoneration and, concomitantly, the viability of a remedy. If the government did not believe that a significant difference existed, it would simply have released these men, as it did others.

Notwithstanding the strong showing made by the petitioners of the legal significance between "transfer" and "release" (Op. Br. 46-47; Reply Br. 14-15), the court below failed to discuss this issue. The distinction between transfer and release is highly significant on the question of the existence of consequences from the imprisonment and transfer. The United States government controlled the form of removal and accompanying statement of condemnation of the men as continuing to be detainable under the AUMF and dangerous. The government declaration explicitly stated that it removes men from the prison for release with no conditions when it determines that they are no longer enemy combatants or dangerous. Declaration of

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[11] *See* Enclosure 3 to the Memorandum issued by then-Deputy Secretary of Defense Gordon England on September 14, 2004 re: "Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba." Appendix at 50.

[12] The distinction between transfer and release is seen in *Qassim v. Bush*, 466 F.3d 1073, 1075 (D.C. Cir. 2006), where the government acknowledged that the petitioners, ethnic Uighers, were innocent of the AUMF grounds for detention. *See also Kiyemba II*, 561 F.3d at 200 (involving more of the Uighers who had been declared to be innocent). The issues in that case involved only the mechanics of the release.

Ambassador-at-Large for War Crimes Clint Williamson. Appendix at 57. Its declaration and actions in the petitioners' cases should be seen as admissions that it sought to ensure continuing effects from the designation and imprisonment, which supports the petitioners' claims of the existence of collateral consequences.

2. The Court Misapplied The Remedial Provisions Of Habeas Law By Crediting Generic Declarations That Did Not Negate Onerous Conditions Of Transfer And By Failing To Implement The Same Type Of Affirmative Relief Granted In The Guantánamo Habeas Cases Since *Boumediene*.

a. The relief sought is directed solely at the United States and its role in the transfer process.

In concluding that the harms articulated by the petitioners were not remediable, the circuit court relied on government declarations that asserted that when a "detainee is transferred out of Guantánamo, he is 'transferred entirely to the custody and control of the [receiving] government,'" stating, "we credit that declaration." *Gul*, 652 F.3d at 18 (quoting *Kiyemba*, 561 F.3d at 515 n.7). The court then stated that the manner in which the petitioners frame the remedy they seek does not cure the jurisdictional problem. *Id.* In so holding, the court ignored the facts recited in the government declarations on which it relied, the reality of the transfers, the Teesdale declaration, and the nature of the remedy granted by the district courts in post-*Boumediene* litigation.

Even if it is true that custody of transferred prisoners lies entirely with the receiving government, the government's own declarations establish that the United States is a partner in the transfer and negotiates for the conditions of transfer. The government declarations state that

when removal from the prison is for something other than release, the Department of State negotiates to ensure that the receiving country will accept certain responsibilities.

> The primary purpose of these discussions is to learn what measures the receiving government is likely to take to ensure that the detainee will not pose a continuing threat to the United States or its allies **and to obtain appropriate transfer assurances**. My office **seeks assurances** that the United States Government considers necessary and appropriate for the country in question.

Appendix at 59 (emphasis added). The circuit overlooked these admissions. When they are considered, it is clear that the United States can take steps to seek amendment or removal of the conditions for which it negotiated. The remedy sought by the petitioners is directed to that end and parallels that used by the courts in other Guantánamo habeas cases where, upon granting the writ, the courts ordered the government to take "all necessary and appropriate diplomatic steps to facilitate the release of the petitioner [ ] forthwith." *Al Ginco v. Obama*, 626 F. Supp. 2d. 123,130 (D.D.C. 2009); *Basardh v. Bush*, 612 F. Supp. 2d 30, 35 (D.D.C. 2009).

Here, the courts could issue an order to the government to take all necessary and appropriate diplomatic and other steps to ameliorate the conditions of transfer and the enemy combatant designation. Such an order would be addressed directly to the role the United States plays in the process. It is not, as the Panel stated, a "reframing" of the remedy. *Gul*, 652 F.3d at 18. Rather, the remedy as framed focuses on the nature and the availability of at least limited redress, with due consideration for executive prerogatives ("appropriate" diplomatic steps left to the Executive Branch).

While restrictions the petitioners suffer may be "traceable to the act of a foreign sovereign," *Gul*, 652 F.3d at 18, the acts of the foreign power are traceable to actions of the

United States. If the petitioners obtain a ruling that their imprisonment was unlawful, the district court can order the government to take steps to ameliorate the harms it has perpetuated by the terms of the agreements it sought. This type of relief has had, and can have, positive real-world results. Since *Boumediene*, the Department of State has diligently followed such orders and successfully negotiated placement of detainees who could not go home.

b. The United States plays a larger role in the imposition of the conditions at issue than found by the court below and its role renders the consequences remediable in the federal courts.

The potential effectiveness of the relief sought by petitioners is especially strong because of the role played by the United States in the setting of conditions of transfer. The circuit court stated that neither Mr. Hamad nor Mr. Gul raised an "individual issue sufficient to establish their cases are not moot." *Gul*, 652 F.3d at 21. That statement ignores Mr. Hamad's presentation of evidence of the United States' role in setting the conditions of his transfer that he obtained from the government in Sudan. The declaration submitted by Mr. Teesdale makes clear not only that the United States dictated some of the terms, but also that it maintains a role in their enforcement:

a. The Sudanese government agreed to retain all of the detainees' travel documentation;

b. The Sudanese government agreed with the United States to supervise Mr. Hamad and Mr. Adem at all times;

c. The Sudanese government agreed that the detainees would not be allowed to join any organization or institution that had any possible animosity toward the United States or its allies;

d. The United States government requested that the Sudanese not allow the detainees to travel outside of Sudan; and

e. The United States government reserved the right to re-arrest the detainees if they joined any organization with animosity toward the United States or its allies. Similarly, the United States reserved the right to continue investigation of the detainees at any time.

Appendix (Teesdale Declaration) at 46. The facts obtained from the Sudanese are consistent with the distinction between release and transfer set out in the Department of Defense regulations and with the Declaration of Ambassador Williamson, which acknowledged seeking "assurances" as a predicate to transfers generally. Appendix (Williamson declaration) at 59-61.

In light of the foregoing, the government's declarations should not have been "credited" and relied upon in holding that no remedy is available. *Gul*, 652 F.3d at 18. Indeed, the government's failure to produce evidence in its control to rebut the Teesdale declaration should give rise to an inference that it is unfavorable to its position. *See Int'l. Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him"). At the least, the cases should be remanded for factual development.

3. The Court Should Recognize A Remediable Injury Because The Petitioners Are Suffering Direct And Collateral Consequences As The Result Of The Actions Of The United States In Imprisoning Them In Guantánamo, Designating Them Under The AUMF, And Transferring Them On Conditions With The Enemy Combatant Designation Intact.

The petitioners are suffering direct and collateral consequences as a result of the seizure, designation, imprisonment, and conditions of transfer set by the United States. As noted *supra* at 12-15, these include stigma far worse than that suffered by most convicted felons. The

consequences include the real limitations on their movement and actions as described in the Teesdale declaration. And the consequences include the specific statutory prohibition found in the "no fly" statute.

The petitioners asserted inclusion on the "no fly list" under 49 U.S.C. § 44903(j)(2)(C)(v) as one of the concrete legal consequences that could be remedied through habeas. The court below rejected this argument, stating that, because the statute requires inclusion for all people who have been imprisoned there, a favorable ruling in habeas would be of no consequence. *Gul*, 652 F.3d at 19.[13] Construction of the statute to require inclusion of persons who were unlawfully imprisoned would, however, raise a host of constitutional concerns. Under the doctrine of constitutional avoidance, the statute should be construed to require inclusion only of men who were **lawfully** detained. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (requiring construction of statute to avoid serious constitutional problems); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (same). If there is a "serious doubt" as to a statute's constitutionality, the Court must "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

In order to pass constitutional muster, the no-fly statute must be construed to prohibit flying only by people who were lawfully detained in Guantánamo. Permitting inclusion of men

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[13] The court below ignored other facts pertinent to the travel issue. It stated that there is no evidence in the record that the petitioners actually want to travel to the United States. *Gul*, 652 F.3d at 19. This conclusion is unwarranted for several reasons. First, the records show that both petitioners have engaged in international travel. Second, both men are among the very few former prisoners who are pressing their habeas claims, evidence of their interest in relief from all of the disabilities they currently suffer. Third, Mr. Hamad has affirmatively sued the United States in a separate civil action (*Hamad v. Gates, et al.*, No. 10-cv-591- MJP (W.D. Wa. filed Apr. 7, 2010)), further evidencing his desire to have appropriate legal contacts with this country.

based on unlawful government action would offend due process (*Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977)), create an unconstitutional irrebuttable presumption that innocent detained persons are dangerous (*Cleveland Bd. of Ed. v. La Fleur*, 414 U.S. 632, 644-46 (1974)), and amount to an unconstitutional bill of attainder (*United States v. Lovett*, 328 U.S. 303, 315 (1946)). When the no fly statute is construed to include only those people lawfully imprisoned in Guantánamo, the availability of relief in habeas is clear.

4. The Petitioners' Cases Present A Sound Vehicle For This Court To Rule On Habeas Relief And Remedies.

Under black letter mootness law, the individual facts of each case should be determinative. The equitable principles underlying habeas corpus jurisprudence, similarly, require individualized consideration. The facts of the petitioners' cases highlight the importance of individualized consideration and the availability of relief.

Through the presentation of evidence of innocence of any actions for which they could be detainable under the AUMF, the petitioners have demonstrated the existence of a genuine controversy that goes far beyond the general rule that facts in a complaint are to be accepted as true and must state a plausible claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009).[14] With respect to the question of remedy, it defies common sense to suggest that exoneration through habeas will not have an ameliorative impact on the lives of men currently associated with the attacks of September 11, 2001, through the enemy combatant designation under the AUMF. The approach taken by the courts below ignored not only this reality, but also

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[14] Even in the absence of the evidence Mr. Hamad gathered, one of the officers who sat on his Combatant Status Review Tribunal in 2004 was sufficiently disturbed that he used the word "unconscionable" in describing his detention, dissenting from the CSRT's designation under the AUMF.

the reality of the statutory harm arising from the "no fly" law, and the concrete evidence presented by Mr. Hamad of the United States role in the imposition of the conditions of his transfer. These cases present the appropriate vehicle to demonstrate that United States courts are not powerless to direct the executive to take reasonable and appropriate steps to ameliorate the harms caused by the United States government.

The conclusion of the circuit court that the "prudential considerations" discussed by this Court in *Spencer* militated against a presumption of collateral consequences was based, in part, on its belief that Mr. Gul and Mr. Hamad were "seized on a battlefield" and were "in the custody of a foreign sovereign." *Gul*, 652 F.3d at 17. Those statements are, however, factually incorrect. Both men were seized from their beds. Mr. Hamad was seized in a separate country. Neither is in the custody of a foreign sovereign, but both are subject to conditions that the government admits are routinely negotiated. These mistakes seriously undermine the circuit's analysis of the "prudential considerations" under *Spencer*. Judicial review is far less intrusive on the executive than the circuit believed.

6. Conclusion

This case involves the most basic of human rights issues: whether the government can deny a forum for innocent men to vindicate their claims that the United States wrongfully designated them as enemies under the AUMF, held them in a notorious prison for years, then transferred them under conditions negotiated based on their continuing designation as combatants. The general rules on mootness would place the burden on the party asserting mootness, thereby requiring the government to prove why a forum for relief could not be provided in the individual case. Instead, the government seeks to avoid review of its actions,

perpetuating wrongful designations with real world results, after delaying requests for hearings, ignoring evidence of innocence, and explicitly conveying that the petitioners remain dangerous. In this Court's supervision over the Guantánamo litigation, all arising from a single circuit, the Court should grant certiorari to consider the important issues raised as questions of first impression that are necessary to fair adjudication of the claims of wrongfully detained persons.

The general rule on mootness is applicable here. The circuit court's analogy to parole is inapt. Even under the standard articulated by the court below, both Mr. Hamad and Mr. Gul have established that their cases are not moot. Both petitioners premise their habeas challenges on the factual assertion that they were wrongly seized, wrongly held, and wrongly designated. Both premise their challenges on evidence of innocence they have gathered independent of the government. They suffer consequences that are remediable without inappropriate intrusion into foreign affairs. Certiorari should be granted to address the availability of a remedy in habeas for these innocent men.

DATED this 6th day of December, 2011.

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