

A.____

(No. 07-____)

IN THE SUPREME COURT OF THE UNITED STATES

AHMED BELBACHA, ET AL., PETITIONERS

v.

GEORGE W. BUSH, ET AL., RESPONDENTS

EMERGENCY APPLICATION FOR STAY

To the Honorable John G. Roberts, Chief Justice of the United States and Circuit Justice of the United States Court of Appeals for the District of Columbia Circuit:

Ahmed Belbacha, by and through his next friend Salah Belbacha, respectfully applies to this Court for an order under the All Writs Act, 28 U.S.C. § 1651(a), and pursuant to its inherent power under the U.S. Constitution, Article III, Section 2, staying proceedings in his case and restraining the Government of the United States from transferring Mr. Belbacha from Guantánamo Bay to Algeria, predicated on four separate considerations:

1. Pending a decision by the United States Court of Appeals for the District of Columbia in his appeal;

2. Pending this Court's decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007), Ex. 1;

3. Pending the expeditious filing of a petition for writ of certiorari before this Court; and

4. Pending the expeditious filing of an original petition for writ of habeas corpus before this Court.¹

STATEMENT OF THE CASE

This is a request for limited, temporary relief to preserve the Court's jurisdiction. Applicant Ahmed Belbacha is an Algerian national imprisoned in Guantánamo Bay. He seeks to enjoin the United States from delivering him to Algeria, where he will likely be abused and tortured, by the Algerian Government and Islamic militants. Once the government sends Mr. Belbacha to his fate in Algeria, the *status quo* will have been irrevocably altered and irreparable harm suffered. Jurisdiction will disappear (along with Mr. Belbacha). *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) ("If an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed").

¹ Mr. Belbacha proposes to file his petition for writ of certiorari and original petition for writ of habeas corpus by Friday, August 10, 2007. He proposes that Respondents file their opposition by Friday, August 17, 2007. Mr. Belbacha's brief would be due on Tuesday, August 21, 2007.

* * * *

Mr. Belbacha's story illuminates his fears. After finishing mandatory national service in Algeria, Mr. Belbacha worked as an accountant at the country's major oil company, Sonatrach, which the government owns. While working at Sonatrach, the Algerian army recalled Mr. Belbacha for a second term of service. The *Groupe Islamique Armée* (GIA), which supports the use of violence to establish an Islamic state in Algeria, found out about the recall notice.² The GIA threatened to kill Mr. Belbacha if he rejoined the army. The GIA also ordered Mr. Belbacha to quit his job with Sonatrach, as it was government-owned. The GIA was notorious for killing people due to their military service, and had killed a number of Sonatrach employees.³

Mr. Belbacha never reported for his recall. Instead, he left home and attempted to hide from the GIA within Algeria, but the group pursued him. They came to his house looking for him on at least two occasions, threatening not just Mr. Belbacha, but also his family. Worrying that a loved one would get

² The GIA is infamous for having carried out attacks in Algeria – against both civilians and those associated with the ruling regime – for many years. See “Group Profile: Armed Islamic Group,” <http://www.tkb.org/Group.jsp?groupID=27>. The GIA later spawned the splinter group, the GSPC (Salafist Group for Preaching and Combat); that group is now called Al Qaeda in the Islamic Maghreb. It continues to carry out violent attacks in Algeria. See Craig Whitlock, “Al Qaeda Branch Claims Algerian Blasts,” *Washington Post*, April 12, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/11/AR2007041100371.html>.

³ See *Issue Paper: Algeria*, Immigration and Refugee Board of Canada, http://www.irb-cisr.gc.ca/en/research/publications/index_e.htm?docid=115&cid=0 &sec=CH05 (detailing threats and attacks against Sonatrach employees beginning in 1996).

hurt, Mr. Belbacha decided he had to leave Algeria altogether. He obtained a visa for France and left the country. After spending a few days in France, Mr. Belbacha traveled to England.⁴ There, he headed to the town of Bournemouth, where he had childhood friends. In July 2000, he applied for asylum.

Mr. Belbacha has a well-founded fear that should he be returned to Algeria, Al Qaeda in the Islamic Maghreb, the modern offshoot of the GIA, will target him as they did before. Furthermore, because of his unjust imprisonment in Guantánamo Bay, it is more likely than not that Algerian authorities will brand him an outlaw and an international terrorist and torture him. Trapped by the dual threat of armed domestic groups and a government that often brutalizes suspected Islamists, Mr. Belbacha cannot safely return to Algeria.⁵

Mr. Belbacha's fear of what might happen to him in Algeria is so great that he would prefer to endure the oppressive conditions in Guantánamo Bay until an asylum state can be found. At Guantánamo, Mr. Belbacha is held in near-total isolation in an all-steel cell with all-steel furniture and fixtures. He has no natural light in his cell; only neon lights, which are kept on 24 hours a day. He is allowed to exercise two hours a day in a 6.5'-16.5' area; his only "equipment" is a deflated football. His family may not visit him, and he may

⁴ Mr. Belbacha chose England because of its reputation for respecting human rights and because France, the more immediate destination, had a significant presence of the GIA.

⁵ On July 11, 2007, counsel for Mr. Belbacha submitted an asylum application to relevant United States government authorities. That application is still pending. Respondents were provided a copy of the application through their counsel.

not call them. Family mail takes months to get through, and when it does, it is often heavily censored. This is the world that Mr. Belbacha chooses over returning to Algeria to face torture and other forms of abuse.

In addition, Respondents have designated Mr. Belbacha as an “enemy combatant” based on his asserted link to Al Qaeda. Respondents have concluded that Mr. Belbacha “will not pose a continuing threat to the United States and its allies.” Opp. to Emergency Mot., Ex. 7 (Benkert Decl. ¶ 5); *see also id.*, Ex. 6 (Williamson Decl. ¶¶ 2-3) (same). That conclusion, however, is unlikely to temper the Algerian government’s view that Mr. Belbacha poses a continuing threat to Algeria – particularly because Respondents linked Mr. Belbacha to Al Qaeda. In short, Mr. Belbacha faces persecution by Islamic militants because of his association with the Algerian government, and persecution by the Algerian government because of his asserted connection with Al Qaeda. He loses no matter which way he turns.

On December 8, 2005, Mr. Belbacha filed a petition for a writ of habeas corpus in the District Court. On July 26, 2007, he filed in the District Court an emergency motion to prevent his transfer from Guantánamo Bay to likely abuse and torture in Algeria. On July 27, 2007, the District Court heard arguments and denied the motion. *See* Ex. 2. The Court stated that, under *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007), it did not have jurisdiction to grant Mr. Belbacha’s motion, despite the dangers he faces and fact that transfer would necessarily deprive the Court of jurisdiction of

his still-pending habeas petition. Counsel noticed an appeal on July 27, 2007. The District Court, citing its lack of jurisdiction, denied orally Mr. Belbacha's motion for a stay of transfer pending appeal.⁶

On July 28, 2007, Mr. Belbacha asked the Court of Appeals to enjoin his transfer to Algeria pending his appeal. Mr. Belbacha stressed the risk of his abuse and torture at the hands of the Algerian Government and Islamic militants, whom no diplomatic assurances could ever reach. Without a stay, in all likelihood there would be no chance for meaningful review, as Mr. Belbacha would be in Algeria long before the Court reached its decision on the merits.

Despite this, on August 2, 2007, the Court of Appeals denied Mr. Belbacha's request for standstill relief, and ordered the clerk to set a standard briefing schedule. *See Belbacha v. Bush*, Case No. 07-5258 (Order of August 2, 2007), Ex. 3. In denying the motion, the Court relied on *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3078 (2007), holding that it was "bound to follow circuit precedent until it is overruled by an en banc court or the Supreme Court." *Id.*, citing *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005).

Mr. Belbacha therefore respectfully applies to this Court for an order restraining the U.S. Government from transferring him from Guantánamo Bay to Algeria.

⁶ Counsel has requested from the Court Reporter an expedited hearing transcript and expects it imminently.

ARGUMENT

Mr. Belbacha seeks modest, equitable relief in this Court: an order temporarily enjoining the United States and its officials from delivering him to abuse and torture at the hands of the Algerian Government and/or Islamic militants, until the lawfulness of his proposed transfer is conclusively ruled upon. As was noted in the District Court by Judge Rosemary Collyer, should the courts have jurisdiction over these matters, this is a case where the Court would most likely grant the injunction sought and bar transfer to Algeria. But the District Court and Circuit Court have found their hands were tied, by *Boumediene*. Only the Supreme Court can unbind them.

Under the All Writs Act, 28 U.S.C. § 1651(a), this Court can issue a stay of the District Court order pending appeal, to preserve jurisdiction. *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966) (recognizing power to issue order enforcing status quo pending review). This is so even when jurisdiction has not yet been established. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 42 (1943) (authority of appellate court “is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected”); *Adams v. United States*, 317 U.S. 269, 273 (1942) (court may grant writ under All Writs Act whenever it determines such action necessary “to achieve the ends of justice entrusted to it”); *I.T.T. Community Dev. Corp. v. Barton*, 569 F.2d 1351,

1359 n. 19 (5th Cir. 1978) (under All Writs Act, court may issue an order preserving the *status quo* when the “potential for jurisdiction exists . . . to ensure that once its jurisdiction is shown to exist, the court will be in a position to exercise it”). It must be remembered that habeas corpus is “at its core, an equitable remedy.” *Schiup v. Delo*, 513 U.S. 298, 319 (1995). *See also Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936) (courts must “guard against depriving the processes of justice of their suppleness of adaptation to varying conditions”); *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007) (statement of Stevens and Kennedy, JJ.) (“Were the Government to take additional steps to prejudice the position of petitioners in seeking review in this court, ‘courts of competent jurisdiction,’ including this Court, ‘should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised.’”).

In acting as Circuit Justice upon an application for a stay of a District Court’s order pending appeal to a Circuit Court, an individual Justice may exercise that All Writs Act power, but to do so must (1) try to predict whether four Justices of the Supreme Court would vote to grant certiorari should the Court of Appeals affirm the District Court’s order without modification; (2) try to predict whether the Supreme Court would then set the order aside; and (3) balance the “stay equities.” *San Diegans for the Mt. Soledad Nat’l War Mem’l v. Paulson*, 126 S. Ct. 2856, 2857 (U.S. 2006); *INS v. Legalization Assistance Project of the L.A. County Fed’n of Labor*, 510 U.S. 1301 (U.S. 1993).

A. Four or More Justices Would Vote to Grant *Certiorari*

Four Justices would almost certainly grant certiorari in this case. The District Court and Circuit have denied a stay of transfer to Algeria because the Military Commissions Act, as interpreted by *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007), supposedly denied the courts jurisdiction. However, the Supreme Court granted certiorari in *Boumediene* to determine “whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay.”⁷ Therefore, the matter at issue here is squarely before the Supreme Court in *Boumediene*. Given the pendency of that case, at least four Justices would grant certiorari here, too.

In *Pasadena City Board of Education v. Spangler*, 423 U.S. 1335, 1336 (1975), this Court was faced with exactly this situation. Certiorari had already been granted in a related case. Chief Justice Rehnquist found that

should this Court reverse or significantly modify the conclusion of the Court of Appeals for the Ninth Circuit with respect to the ... “question presented” in [the related case] there would be serious doubt as to the correctness of the order of the District Court which applicants now seek to stay. Because under my analysis the

⁷ The Court will also consider “Whether Petitioners’ habeas corpus petitions, which establish that the United States government has imprisoned Petitioners for over five years, demonstrate unlawful confinement requiring the grant of habeas relief or, at least, a hearing on the merits.” *Boumediene v. Bush*, Supreme Court Case No. 06-1195 (Order of June 29, 2007).

critical event will not be the decision of the Court of Appeals on applicants' presently pending appeal, but rather the disposition by this Court of [the related case for which certiorari had already been granted], It Is Ordered that the order of the District Court in this case ... is stayed pending disposition of [the related case] by this Court.

Id.

Similarly in *Atiyeh v. Capps*, 449 U.S. 1312 (1981), Justice Rehnquist stayed a District Court injunction when the Supreme Court had granted certiorari that term in a case exploring the same questions, "a case relied upon by the District Court in its findings and conclusions when it was simply a decision of the Court of Appeals." *Id.* at 1316. Justice Rehnquist found "it best, in the exercise of my function as Circuit Justice, that the District Court have the benefit of this Court's opinion in that case." *Id.* Therefore, "because in the normal course of events by the close of this Court's ... Term a decision should be handed down in [the case in which cert had been granted] I think that the District Court's ultimate resolution of the case before it will be facilitated, not retarded, by the issuance of a stay" *Id.* at 1318 (staying District Court injunction pending decision of the Circuit Court in appeal or decision of Supreme Court in case in which Court had already granted cert, whichever came first). *See also Mikutaitis v. United States*, 478 U.S. 1306, 1308-1309 (1986) (Stevens, J.) (granting stay based in part on fact that petition for certiorari in case with similar questions presented was *pending* at time).

Justice Rehnquist's lead should be followed here. A stay should be granted in this case at least until *Boumediene* is resolved or the Court of Appeals decides the merits of Mr. Belbacha's appeal. See *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346 (U.S. 1977) (Rehnquist, J.) ("given the substantial chance that the petition for certiorari will be granted, the preservation of that status quo is an important factor favoring a stay").

B. Mr. Belbacha Would Prevail On *Certiorari* Review

There is a significant probability that a majority of the Court will find the District Court's jurisdictional holding erroneous. *United States v. United Mine Workers*, 330 U.S. 258, 290 (1947) ("the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction"). The grant of certiorari in *Boumediene* was an extraordinary move, and indicates a strong likelihood that the Court will reverse *Boumediene*'s finding that the Military Commissions Act is an adequate substitute for habeas. Cases like Mr. Belbacha's strengthen that probability, as they are further evidence of the inadequacies of the Military Commissions Act; injunctions like the one sought here could clearly issue in the habeas context, and they are truly necessary to protect people from abuse and torture. As the District Court stated, if jurisdiction lies, this is the type of situation in which injunctive relief is likely warranted. Cf. Fed. R. App. P. 23(a) ("Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United

States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule”).

Furthermore, Mr. Belbacha clearly meets the standard for injunctive relief: (1) he would suffer irreparable injury if the injunction were not granted; (2) granting an injunction would further the public interest; (3) he has a substantial likelihood of success on the merits; and (4) granting the injunction would not injure other parties. *See Al-Fayed v. CIA*, U.S. App. D.C. 223 (D.C. Cir. 2001). These factors interrelate on a sliding scale and must be balanced against each other. *See Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998). “If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.” *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). In this case, the balance of factors tips decidedly towards Mr. Belbacha.

1. Mr. Belbacha Faces Irreparable Injury

Respondents stated before the District Court on July 27, 2007, that a transfer may take place after “several days.” Several days have now passed. Unless this Court acts swiftly, Mr. Belbacha will very likely be transferred to a country he fled years ago and where he faces torture and other forms of abuse. Without a stay, Mr. Belbacha could be handed over to Algeria before the Circuit Court and this Court have had the opportunity to hear and decide the merits of his case.

In opposing Mr. Belbacha's emergency motion in the Circuit Court, Respondents did not dispute that Mr. Belbacha would face torture and other abuse at the hands of Islamic terrorists. In fact, they did not even mention it. Instead, Respondents sought to allay concerns that Mr. Belbacha would face mistreatment by a government to which Respondents might transfer him. Respondents relied entirely on soothing generalities about U.S. transfer policy and Respondents' decision-making process. *E.g.*, Opp. to Emergency Mot. at 3, 5. In substance, Respondents are saying to the Court: "trust us." But the stakes are too high.

Any assurances that Respondents might obtain from the government of Algeria would not be credible or unenforceable. The U.S. government itself has stated that Algerian government officials tortured and imposed cruel, inhuman or degrading punishment on prisoners.⁸ The State Department report claims that security forces operated with impunity and frequently used torture to obtain confessions.⁹ These practices apparently fell hardest on suspected Islamist terrorists: torture "continued to occur in military prisons, more often against those arrested on 'security grounds.'"¹⁰

⁸ See United States Department of State, Algeria Country Report on Human Rights Practices 2006, released March 6, 2007, <http://www.state.gov/p/nea/ci/81993.htm>.

⁹ *Id.*

¹⁰ *Id.* See also Amnesty International Urgent Action 173/06 *Incommunicado detention/fear of torture or other ill-treatment*, June 20, 2006, http://web.amnesty.org/library/Index/_ENGMDE280112006?open&of=ENG-DZA; Amnesty International *Annual Report 2007: Algeria*, available at

Mr. Belbacha's last permanent home, the United Kingdom, agrees. A report produced by the U.K.'s Country Information and Policy Unit and used in assessing asylum claims in the U.K., provides a gruesome list of torture methods employed in Algeria:

beatings with fists, batons, belts, iron bars, plastic pipes or rifle butts; whipping; cutting with sharp objects; hitting the soles of the feet; soldering irons or cigarette butts applied to bare skin; burning cigarette ash thrown into the eyes; electrical shocks to the body, often to sensitive organs such as the genitals, to increase the pain the victim's body may be soaked first in water; attempted strangulation, almost to the point of suffocation; sexual assault or the threat of rape; forced to look on while others are being tortured; hanging by the neck until loss of consciousness; placing lighted newspapers on the body; the 'chiffon', in which the victim is tied down and a rag is forced into the mouth and dirty water, containing detergent and other impurities, such as urine or household chemicals, poured through it which the victim is forced to swallow to induce choking.¹¹

This is the general climate of governmental abuse into which Respondents would deliver Mr. Belbacha. But, Mr. Belbacha faces torture and abuse not only by the Algerian Government but also by Islamic radicals. The Algerian Government exercises no control over these outlaws and can offer no assurances that they will treat Mr. Belbacha humanely. Once Respondents have transferred Mr. Belbacha to Algeria, the bell cannot be unring.

<http://thereport.amnesty.org/eng/Regions/Middle-East-and-North-Africa/Algeria> (finding Algerian security services hold terrorism suspects in secret locations for up to several months, deny them contact with the outside world and often subject them to serious abuse).

¹¹ Human Rights Watch, *UK: Empty Promises can't protect people from torture (Joint Letter to Tony Blair from Human Rights Watch and Liberty)*, June 23, 2005, http://hrw.org/english/docs/2005/06/23/uk11219_txt.htm.

2. The Public Interest Weighs Heavily in Favor of a Stay

Preliminary relief is essential to avoid an incomprehensible scenario: Mr. Belbacha is rendered to Algeria where he is abused or tortured; and, thereafter, this Court issues a decision recognizing his due process, statutory or treaty-based rights to be safeguarded from rendition to such abuse or torture. The public interest is always served by giving the law time to take its course.

It is more likely than not that Mr. Belbacha will be abused and tortured upon his arrival in Algeria. Therefore, Respondents' return of Mr. Belbacha would violate the Fifth and Eighth Amendments, the Convention Against Torture,¹² the 1951 United Nations Refugee Convention,¹³ and the International

¹² *U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature Dec. 10, 1984, S. Treaty Doc. 31 No. 100-20 (1988), 1465 U.N.T.S. 85 (CAT). The United States became a party to CAT in 1994 and promulgated its first regulations implementing Article 3 in 1999. *See Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (1999). The standard under CAT is that a person must not be returned if he has "substantial grounds for believing" he faces torture if returned. When the U.S. Senate ratified CAT, it did so with the understanding that its "more likely than not" standard would be used. *See* 136 Cong. Rec. 36, 1984 (1990). Mr. Belbacha's transfer to Algeria would violate CAT under either standard.

¹³ *1951 Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, entered into force April 22, 1954, article 33; Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967 (requiring that no state "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened"). Mr. Belbacha qualifies for refugee status due to his well-founded fear of persecution on the basis of his political opinions and/or membership in a certain social group: individuals thought to be connected to international terrorism whom the Algerian government targets for its most severe treatment.

Covenant on Civil and Political Rights.¹⁴ Common Article 3 of the Geneva Conventions, found by the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), to apply to Guantánamo Bay prisoners, protects detained civilians in internal conflict and prohibits cruel treatment, torture, and “outrages against personal dignity, in particular humiliating or degrading treatment ... in all circumstances ... [and] at any time and in any place whatsoever.” *Id.*

The law is clear: Respondents must do all they can to prevent the delivery of Mr. Belbacha to torture. The public interest lies “in meticulous compliance with the law by public officials.” *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993); *see also Fund for Animals, Inc. v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998); U.S. Const., art. II (obliging the Executive to “take care that the Laws be faithfully executed”). Ensuring such compliance would help restore the public’s faith that the United States stands for the “rule of law,” a faith that is rapidly being depleted by imprisonment without due process of law at Guantánamo Bay, and allegations of torture, extraordinary rendition and other abuses in Guantánamo Bay and in secret detention facilities throughout the world. Respondents’ policies and actions have created the impression that the United States is creating “judicial blackholes” to avoid compliance with its own laws and international laws. The public good demands that Respondents not be

¹⁴ *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 7, *entered into force* Mar. 23, 1976 (providing that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

permitted to deliver Mr. Belbacha into the hands of those who might abuse him or continue to imprison him indefinitely without due process of law.

The justice systems and penal authorities of countries with horrendous human rights records such as Algeria's cannot be trusted to ensure Mr. Belbacha's humane treatment. Nor has the U.S. Government presented evidence of any attempt to protect Mr. Belbacha from Islamic radicals. To restore its global reputation and the faith of its citizens, the United States must not transfer Mr. Belbacha to Algeria to be abused and tortured. Accordingly, a stay pending appeal would be appropriately granted here to further the public interest.

3. Mr. Belbacha Has Substantial Likelihood of Success on Merits

Under the All Writs Act, a Petitioner must show only "a substantial possibility, though less than a likelihood, of success on appeal." *Michael v. INS*, 48 F.3d 657, 664 (2d Cir. 1995). Moreover, under the All Writs Act, a court may issue an order preserving the *status quo* when the "potential for jurisdiction exists . . . to ensure that once its jurisdiction is shown to exist, the court will be in a position to exercise it." *I.T.T. Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 n. 19 (5th Cir. 1978). When the balance of the factors weigh in favor of the issuance of injunctive relief, the moving party need not demonstrate that he is more likely than not to win, but only that he has presented questions that are "so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative

investigation.” *Washington Metro. Area Transit. Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (internal quotation omitted). Mr. Belbacha certainly does that here. As Judge Collyer stated during oral argument, if she determined the Court had jurisdiction, the Court would likely grant this stay.

Failure to grant the relief requested would entirely foreclose Mr. Belbacha’s ability to: 1) seek judicial relief to prevent his transfer to torture at the hands of Algerian officials or Islamic militants; and, 2) fully adjudicate his legal rights. In light of the grant of certiorari in *Boumediene*, and the balance of equities, this Court should grant the narrow relief requested and issue a stay of transfer.

4. No One Else Will Be Harmed Should the Court Grant a Stay

Preserving the *status quo* would do no harm to the United States. The U.S. Government can continue to imprison Mr. Belbacha until he completes his legal challenges to transfer, or Respondents identify a safe third country for resettlement. Approximately 360 men are still imprisoned at Guantánamo and by all accounts, the facility will continue to remain open for at least the next several months, if not much longer, during which Respondents have time to identify a safe third country for resettlement. In the past, Respondents have continued to imprison other men to avoid a transfer-to-torture while simultaneously making efforts to identify a safe third country for resettlement. Mr. Belbacha’s circumstances are similar and his ongoing imprisonment at

Guantánamo, while extremely difficult for him to endure, places no significant additional burdens upon Respondents. Rather, it will bolster them.

Enjoining Mr. Belbacha's repatriation to torture would further United States public policy, as clearly stated in the Foreign Affairs Reform and Restructuring Act of 1998: "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 18 U.S.C. § 123. *See also* Decl. of Clint Williamson, United States Ambassador-at-Large for War Crimes Issues, Opp. to Petitioner's Emergency Mot. for Order Prohibiting Transfer, Attach. A, *Khalifah v. Gates*, No. 07-1215 (D.C. Cir. 2007) (citing "longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured"). Transferring individuals to states where they are at risk of torture and prohibited ill-treatment, based on unreliable diplomatic assurances, flies in the face of this principle. Yet, Mr. Belbacha faces just that threat. This Court should ensure Respondents implement their policy in this case.

C. The Balance of Equities Favors a Stay So Mr. Belbacha Will Not Be Abused or Tortured Before His Rights Are Adjudicated

The irreparable harm to Mr. Belbacha – his abuse and torture – substantially outweighs any *de minimis* harm to the United States from the brief

delay needed to permit appellate review of the important questions presented when U.S. officials seek to transfer someone to a country where it is more likely than not that he will face abuse and torture. *See Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (stays and “other summary remedies” are available under All Writs Act, 28 U.S.C. § 1651(a), on “a showing that a grant of certiorari and eventual reversal are probable”); *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (enjoining election on bond issue upon a finding of irreparable harm, that a writ of certiorari would “likely” issue, and that there was “a fair prospect” the District Court opinion would be reversed); *American Trucking Ass’ns. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (order requiring tax revenues to be held in escrow temporarily when there was “‘significant possibility’ that the Court would note probable jurisdiction of an appeal of the underlying suit and reverse”).

Respondents attempt to counter Mr. Belbacha’s concrete showing that he would likely face torture and abuse in Algeria with claims of injury to the government’s ability to conduct foreign affairs, potential interference with the war on terrorism, and “undue intrusion” by the judiciary into the Executive Branch’s constitutional sphere of authority. *Opp. to Emergency Mot.* 18. Courts, however, may intervene when a prisoner contests transfer to likely abuse and torture in violation of Federal law and international treaties.¹⁵

¹⁵ *See DKT Memorial Fund, Inc. v. AID*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) (“claims alleging non-compliance with the law are justiciable, even

No court would accept Respondents' claims of unreviewable Executive Branch authority if Respondents asserted them to justify sending a U.S. citizen to a foreign country notorious for its record of human-rights violations. These claims rest on the controversial and controverted premise that individuals held at Guantánamo have no forum in which to assert any rights. That is the very issue to be decided by the Supreme Court in *Boumediene*.

In denying a stay, the Court of Appeals has not merely given the Executive permission to hand over a prisoner to a dictatorship with a well-documented practice of torture, and an increasingly active and violent Islamic militant movement. It has also threatened to deprive this Court of its ultimate jurisdiction over this case by refusing to enter an order preserving the *status quo* pending this Court's consideration in *Boumediene* of Mr. Belbacha's right not to be transferred to abuse and torture. This Court should set that right and preserve jurisdiction. *See FTC v. Dean Foods Co.*, 384 U.S. 597 (1966) (stating exercise of power under All Writs Act "extends to the potential jurisdiction of

though the limited review that the court undertakes may have an effect on foreign affairs"); *Flynn v. Shultz*, 748 F.2d 1186, 1191 (7th Cir. 1984) (stating an "area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action;" "it is clear that respect for the political branches affects but does not preclude, decision on the merits") (citation omitted); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016-1017 (9th Cir. 2000) (holding claim against transfer to likely abuse and torture "brought in a petition for habeas corpus, becomes ripe as soon as the Secretary of State determines that the fugitive is to be surrendered to the requesting government;" "rule [of non-inquiry] does not bar review of the Secretary [of State's] actions . . . since Congress' legislation implementing the Torture Convention . . . clearly supersedes the doctrine, which developed as a matter of federal common law.").

the appellate court where an appeal is not then pending but may be later perfected”); *McClellan v. Carland*, 217 U.S. 268, 280 (1910) (“where a case is within the appellate jurisdiction of the higher court a writ ... may issue in aid of the appellate jurisdiction which might otherwise be defeated”); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943) (stating authority of the appellate court “is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.”); *Chandler v. Judicial Counsel of Tenth Circuit*, 398 U.S. 74, 112 (1970) (Harlan, J., concurring) (recognizing the power of Court under the All Writs Act to “issue the writ when the lower court’s action might defeat or frustrate this Court’s *eventual* jurisdiction”).

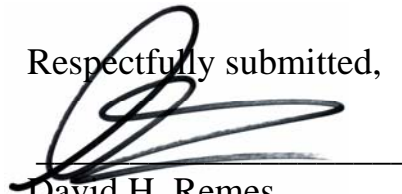
Plainly, this Court has the authority to maintain the *status quo* until such time as the lower Court and this Court in *Boumediene* have had an opportunity to issue a decision concerning the very legal issues that would prevent Mr. Belbacha’s transfer to torture and determine his fate. *See Pasadena City Board of Education v. Spangler*, 423 U.S. 1335, 1336 (1975); *Atiyeh v. Capps*, 449 U.S. 1312 (1981); *Adams v. United Healthgroup Inc.*, 317 U.S. 269, 273 (1942) (court should grant injunctive relief under the All Writs Act “to achieve the ends of justice entrusted to it”).

CONCLUSION

For the foregoing reasons, the Court should issue an order enjoining Mr. Belbacha's transfer to Algeria pending resolution petition of his appeal before the Circuit Court; this Court's decision in *Boumediene*; the expeditious filing of a petition for writ of certiorari before this Court; and the expeditious filing of an original petition for writ of habeas before this Court.

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Respectfully submitted,



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