

[ORAL ARGUMENT NOT YET SCHEDULED]

**No. 09-5274**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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UMAR HAMZAYEVICH ABDULAYEV,  
Petitioner-Appellant,

v.

BARACK OBAMA, *et al.*,  
Respondents-Appellees.

On Appeal from the United States District Court for the District of  
Columbia, No. 05-cv-2386, Hon. Reggie B. Walton, *Judge*

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**BRIEF OF APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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**CERTIFICATE AS TO PARTIES, RULINGS  
AND RELATED CASES**

**(A) Parties and Amici.**

The parties before the district court are Appellant Umar Hamzayevich Abdulayev and the governmental Respondents. The above-listed parties are the same parties to this appeal.

**(B) Rulings Under Review.**

The underlying case is in the United States District Court for the District of Columbia, Hon. Reggie B. Walton, Judge. The order of the district court under review is located in the Appendix at A.1, and was entered by the district court on June 12, 2009. The transcript of the hearing at which the district court heard argument and indicated its reasoning, and which resulted in the June 12, 2009 order, is located in the Appendix at A.3.

**(C) Related Cases.**

In addition to being in front of the United States District Court for the District of Columbia, the Appellant's case has been before this Court on interlocutory appeal in *Abdulayev v. Vargo, et al.*, No. 08-5149 (D.C. Cir.), where Mr. Abdulayev was the Appellee, and in *Abdulayev v. Gates*, No. 08-1112 (D.C. Cir.), an action brought pursuant to the

Detainee Treatment Act of 2005. The government also has represented that Mr. Abdulayev is an Appellee in *Al Sanani v. Gates*, No. 08-5516.

(See Opposition to Petitioner's Motion to Govern Future Proceedings, at n.1, *Al Sanani v. Gates*, No. 08-5516 (D.C. Cir. filed Sept. 23, 2009).)

The Appellant denies that he is a party to appeal no. 08-5516. The Appellant is not aware of any other "related cases" involving substantially the same parties and the same or similar issues.

          /s/ Matthew J. O'Hara            
Matthew. J. O'Hara

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## **GLOSSARY OF ABBREVIATIONS AND ACRONYMS**

CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
FARR	Foreign Affairs Reform and Restructuring Act, Pub. L. 105-277, Div. G, Title XXII, § 2242, Oct. 21, 1998, 112 Stat. 2681-822, codified at 8 U.S.C. § 1231 note.
IART	Inter-Agency Review Team (also called the “Guantánamo Review Task Force”) established by Executive Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009)

## JURISDICTIONAL STATEMENT

Umar Hamzayevich Abdulayev is proceeding in the district court pursuant to 28 U.S.C. § 2241, which provides that writs of habeas corpus may be granted by the district courts. *See generally, Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) (holding that detainees at the U.S. Naval Base at Guantánamo Bay, Cuba have the right to seek the writ of habeas corpus to challenge their detention). The district court entered the order under review on June 12, 2009. (Dkt. 1292; A.1.) Mr. Abdulayev filed his Notice of Appeal on August 3, 2009 (Dkt. 1389), within 60 days of the entry of the underlying order. *See* FED. R. APP. P. 4(a)(1)(B).

As is discussed in Part I of the Argument Section of this Brief, below, several independent grounds of appellate jurisdiction exist. The order of the district court under review is effectively final for purposes of 28 U.S.C. § 1291, and the order is immediately reviewable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

**PERTINENT STATUTES/REGULATIONS**

The provisions at relevant to this appeal are reprinted in A. 49-57 of the Appendix to this Brief. Those provisions are: (i) relevant provisions of the federal habeas corpus statute, 28 U.S.C. §§ 2241, 2243; (ii) Executive Order No. 13,492, *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities*, 74 Fed. Reg. 4897 (Jan. 22, 2009); and (iii) Article 3 of the United Nations Convention Against Torture.

**STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

The issue presented for review is whether the district court abused its discretion by indefinitely staying the underlying petition for a writ of habeas corpus brought by a detainee at the U.S. Naval Base in Guantánamo Bay, Cuba, because the IART, a body consisting of Executive Branch officials selected by the President pursuant to an Executive Order, has determined that the Petitioner can be transferred from Guantánamo to Tajikistan, when the approval provides none of the relief that the Petitioner may receive should the district court grant him the writ – including but not limited to the determinations that the Petitioner is being unlawfully detained at Guantánamo and must be released forthwith, and may not be lawfully repatriated to Tajikistan.

## STATEMENT OF FACTS

### **I. Factual Background.**

Umar Hamzayevich Abdulayev is a prisoner in the custody of the United States government at the U.S. Naval Base in Guantánamo Bay, Cuba, held in custody for nearly eight years without charge and without a hearing. Although the government once asserted that he is an “enemy combatant” and now asserts he is properly the subject of military force in the form of military detention power, Mr. Abdulayev was in fact arrested far from any battlefield in the market at a refugee camp near Peshawar, Pakistan, where he lived with his mother, brothers, and sisters. Mr. Abdulayev thoroughly denies the government’s allegations. (Dkt. 1002, 1188, 1235; A. 27-46.)

#### **A. Mr. Abdulayev Was a Child Refugee from Tajikistan, Living in Afghanistan and Then Pakistan.**

Mr. Abdulayev was born in Tajikistan on October 11, 1978 and is the oldest of five children. (See Dkt. 412 at 2.) Mr. Abdulayev’s family fled Tajikistan for Afghanistan in 1992, when civil war erupted after the collapse of the Soviet Union. (*Id.*) At that time, Mr. Abdulayev was thirteen and had only a sixth grade education. (*Id.*) Mr. Abdulayev’s father Hamza was not a member of any political party in Tajikistan and

did not fight in the civil war. (*Id.*) Mr. Abdulayev's family sought refuge from the Tajik civil war with other Tajik refugees near Mazar-e-Sharif. (*Id.*)

In 1994, pleas were broadcast over the radio in Afghanistan from the Tajik government urging Tajik refugees to return home. (*Id.*) Hearing these pleas, Mr. Abdulayev's father Hamza traveled with other Tajik refugees to investigate the situation in Tajikistan. (*Id.*) Hamza Abdulayev never returned, however, and Mr. Abdulayev and his family later learned that his father had been shot and killed while crossing the Tajik-Afghan border. (*Id.* 2-3.) The Abdulayev family remained in Afghanistan after Hamza Abdulayev's death, relying upon aid from the international refugee organizations. (*Id.* at 3.) In early 2001, Mr. Abdulayev and his mother and siblings moved to Pakistan to escape the escalating violence and unrest in Afghanistan. (*Id.*; *see also* A. 28 at ¶ 7.) In Pakistan, they lived in a government-sponsored camp principally for Afghan refugees, Camp Babu, near Peshawar. (Dkt. 412 at 3.)

**B. Mr. Abdulayev Was Arrested in His Refugee Camp in Pakistan Far From the Battlefield and Tortured and Abused by Pakistani Intelligence Agents.**

Mr. Abdulayev was arrested by Pakistani police around November 25, 2001 while he was at a market in Camp Babu. (*Id.*) When Mr. Abdulayev was asked to identify himself, he told the police that he was a refugee, and showed them his refugee identification card. (*Id.*) Nonetheless, the Pakistani police turned him over to persons he believed to be Pakistani intelligence agents. (*Id.*) Notably, this was around the same time that the United States was blanketing Afghanistan and Pakistan with leaflets offering considerable bounties for the capture of persons associated with Al Qaeda. (*Id.*)

While in the custody of the Pakistani intelligence agents, Mr. Abdulayev was tortured and coerced into copying in his own hand notes about weapons and explosives from books that the intelligence officials marked and gave to him. (*Id.*) The Pakistanis beat Mr. Abdulayev, tied him up in a chair, bent his thumbs back and told him they would torture him further if he didn't do as they told him to do. (A. 29 at ¶ 10.)

The Pakistani intelligence service promised Mr. Abdulayev that it would return him to his mother if he did as they directed. (Dkt. 412 at 3.) After spending nearly a month copying all of the materials into the notebooks he was given, the men holding Mr. Abdulayev told him they were going to return him to his family, and they blindfolded him, and drove him away from the location where he had been held. (*Id.* at 3-4.) When he arrived at his destination, Mr. Abdulayev learned he had not been taken back to his family, but instead had been taken to a prison in Kohat, Pakistan. (*Id.* at 4.)

**C. Mr. Abdulayev Was Transferred to U.S. Military Custody and Ultimately Sent to Guantánamo.**

Pakistani officials turned Mr. Abdulayev over to the custody of the United States military in Kohat, Pakistan, and promptly flown to an American military prison in Kandahar, Afghanistan, where he was interrogated and tortured. (A. 30-31 at ¶¶ 15-18.) From there, the United States sent him to Guantánamo, where he has been held ever since without charge or without any hearing consistent with recognized norms of due process. (Dkt. 412 at 4.) Mr. Abdulayev has not seen or heard from his family since he was abducted from the market in Camp Babu in November 2001. (*Id.*)

**D. Mr. Abdulayev Was Interrogated and Threatened by Tajik Government Officials at Guantánamo.**

While at Guantánamo, Mr. Abdulayev has been interrogated on three separate occasions by officials of the Tajik government, who have threatened him with unjustified imprisonment, torture, and even death if he is returned to Tajikistan. The first visit from Tajik officials occurred in or around 2002 or 2003. (A. 32-33 at ¶ 23.) The Tajik officials told Mr. Abdulayev that because he had lived in Afghanistan he could work for them there as a spy. (*Id.*) The Tajik officials further told Mr. Abdulayev that, in exchange for his service, they would take care of him, give him money, get him a house and find his family. (*Id.*) Mr. Abdulayev refused. (*Id.*) The Tajik officials then told Mr. Abdulayev that if he was not with them that he would have problems: they would imprison him, torture him and even “get rid of” him. (*Id.*)

In 2004 or 2005, the Tajik officials visited Mr. Abdulayev a second time and asked if he had time to think about their previous offer to spy for them and whether he wanted to return to Tajikistan. (A. 33 at ¶ 25.) Again, Mr. Abdulayev refused their offer. (*Id.*)

In or around 2005, the Tajik officials paid their third visit to Mr. Abdulayev at Guantánamo. (*Id.*) They again asked if him whether he

wanted to work with them. (*Id.*) Mr. Abdulayev again refused, and the Tajik officials told him that he would see what would happen to him when he returned to Tajikistan. (*Id.*)<sup>1</sup>

In addition to the particular threats made by the Tajik government against him, Mr. Abdulayev has reason to fear torture at the hands of the Tajik government based on its history of human rights abuse. (*Id.*; *see also*, Dkt. 1279 at Ex. B.) The United States Department of State's Country Reports on Human Rights Practices for Tajikistan documents Tajik state conduct consistent with the threats made to Mr. Abdulayev at Guantánamo. (Dkt. 412 at 4- 5.) Specifically, the State Department Reports finds that torture and abuse were carried out by security officials, particularly from the Ministry of Interior, including "systematic beatings, sexual abuse, and electric shock to extort confessions during interrogations." (*Id.* at 5.) Further,

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<sup>1</sup> Mr. Abdulayev understands that the Tajik officials made similar threats to two other Tajik prisoners at Guantánamo: Rukniddin Fayziddinovich Sharipov and Sobit Valikhonovich. (*See id.* ¶ 24.) Both men have since been released from Guantánamo and repatriated to Tajikistan, and Mr. Abdulayev understands that the threats made by the Tajik agents to Mssrs. Sharipov and Valikhonovich appear to have been carried out at least in part, because both were sentenced to 17-year prison terms in Tajikistan in August 2007. (*Id.*; *see also* Dkt. 412 at 4.)

according to the same Report, “prison conditions remained harsh and life threatening.” (*Id.*) In addition, Amnesty International has observed that “[w]idespread and routine torture and other ill-treatment by law enforcement officers continue[s] to be reported.” (*Id.*) Based upon the specific threats made against Mr. Abdulayev by Tajik officials and the well-documented practices of the Tajik government consistent with those threats, Mr. Abdulayev holds a well-founded fear of persecution should he return to Tajikistan. (*Id.*)

## **II. Procedural Background.**

### **A. Mr. Abdulayev’s Petition for a Writ of Habeas Corpus and Injunctions Restricting His Transfer to Tajikistan.**

Mr. Abdulayev filed a petition for a writ of habeas corpus on December 21, 2005, challenging his continued detention by the United States government. (Dkt. 1.) In addition, he brought a claim pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1988 U.S.T. LEXIS 202, alleging that his repatriation to torture would violate his rights under that treaty and the United States’ correspondingly obligation of non-refoulement. (Dkt. 1 at ¶¶ 98-100.) Shortly after Mr. Abdulayev

initiated this action, the district court, believing that it lacked jurisdiction to adjudicate the petition, declined to order the government to file a factual return, denied the petition without prejudice, and administratively closed the case. (Dkt. 6, 324.)

On March 7, 2008, Mr. Abdulayev moved for a preliminary injunction barring his repatriation to Tajikistan and to compel the government to provide his counsel with at least thirty days' advance notice of any intended removal of him from Guantánamo to any other country. (Dkt. 412.) Following this Court's decision in *Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008), and following a hearing on March 19, 2008, the district court granted in part Mr. Abdulayev's motion for an injunction in open court, entering a preliminary injunction requiring the government to give him thirty days' advance notice of its intent to remove Mr. Abdulayev from Guantánamo, and ordering that Mr. Abdulayev's request for an order permanently barring the government from repatriating him be held in abeyance. (Dkt. 416, 421; A. 47-48.)

On June 12, 2008, the Supreme Court issued its opinion in *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008), holding that persons

imprisoned at Guantánamo are entitled to prompt habeas corpus hearings. Following *Boumediene*, on July 1, 2008, the Executive Committee of the district court transferred all cases filed by detainees at Guantánamo to District Judge Thomas F. Hogan for coordination and management, while the individual judges of the court (the “merits judges”) retained the cases for all other purposes. (Dkt. 463, 467.)

On October 14, 2008, Mr. Abdulayev filed under seal an emergency motion for preliminary and permanent injunctive relief to prevent his repatriation to Tajikistan. (Dkt. 626.) Judge Hogan granted Mr. Abdulayev’s motion on October 20, 2008. (Dkt. 656-59.)<sup>2</sup> Respondents filed a classified factual return in his case on November 25, 2008. (Dkt. 716.) On February 17, 2009, Mr. Abdulayev filed his classified Traverse disputing the government’s asserted grounds for detention. (Dkt. 1002.) He later filed a supplement to his traverse (Dkt. 1188) and sought leave to file a second supplement (which the district did not rule on because it stayed Mr. Abdulayev’s case). (Dkt.

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<sup>2</sup> Judge Hogan entered four consecutive orders under seal in Misc. No. 08-442 (D.D.C.) on October 20, 2008. Because the orders do not contain ECF-stamped document numbers printed in their headers, it is unclear from the order and the docket report which of these docket entries specifically reflects the district court’s October 20, 2008 Order with respect to Mr. Abdulayev.

1235.) On January 16, 2009, Mr. Abdulayev filed a motion for expedited judgment on the record. (Dkt. 904.) Even though this motion was fully briefed (*see* Dkt. 1188, 1244) and argued on June 10, 2009, the district court denied this motion without prejudice when it issued the order under review staying Mr. Abdulayev's habeas corpus proceeding. (Dkt. 1292.)

**B. The Guantánamo Review Task Force Approves Mr. Abdulayev for Transfer to Tajikistan, and the District Court Stays the Underlying Habeas Corpus Proceedings.**

On June 2, 2009, the government's counsel informed Mr. Abdulayev's counsel that the Guantánamo Review Task Force had approved Mr. Abdulayev for transfer from Guantánamo to Tajikistan:

The Guantánamo Review Task Force has completed its review of Petitioner's case. As a result of that review, Petitioner has been approved for transfer from Guantánamo Bay to Tajikistan. In light of this development, the United States will take appropriate diplomatic steps, consistent with the national security and foreign policy interests of the United States, to facilitate Petitioner's transfer from Guantánamo Bay.

(A. 26.) The following day the government moved the district court to stay Mr. Abdulayev's habeas corpus proceedings, which Mr. Abdulayev

opposed. (Dkt. 1266, 1279.)<sup>3</sup> After a hearing, on June 12, 2009, the District Court stayed Mr. Abdulayev's habeas corpus proceedings and denied his motion for expedited judgment on the record without prejudice to renewal. (Dkt. 1292.)

Today, after nearly eight years in captivity, and approaching seventeen months after the Supreme Court's command in *Boumediene* that "the costs of delay can no longer be borne by those who are held in custody," 128 S. Ct. at 2275, Mr. Abdulayev remains in prison without having had a hearing on his petition for a writ of habeas corpus or on his claim under the CAT. No such hearing is scheduled or even contemplated under the district court's stay order.

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<sup>3</sup> The government initially designated the Task Force's decision and its motion to stay as "protected information" pursuant to the Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantánamo Bay, Cuba, as amended (the "Protective Order"). (See Dkt. 409, *In re Guantánamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C. Sept. 11, 2008).) Mr. Abdulayev objected to the designation of the information and the motion as protected, and, as it is required, the government requested that the district court confirm the designations under the Protective Order and allow it to file the motion to stay under seal. On June 4, 2009, the district court denied the government's requests and directed the clerk of the court to unseal the government's motion and file it on the public docket. (Dkt. 1271.)

## **SUMMARY OF THE ARGUMENT**

The district court abused its discretion by granting the government's motion to indefinitely stay Mr. Abdulayev's habeas corpus petition, on the basis that the decision of the Guantánamo Review Task Force to approve Mr. Abdulayev for transfer to Tajikistan leaves nothing further for the court to do. In reaching that conclusion, the district court eviscerated the clear directives of the Supreme Court of the United States and the plain language of the habeas corpus statute that detainees at Guantánamo have a right to challenge their detention by petitioning the district court for a writ of habeas corpus, that the detainees are entitled to a prompt hearing and that "the costs of delay can no longer be borne by those who are held in custody"—delay that is now rapidly approaching its eighth year.

*First*, the district court granted the motion despite that the government neither articulated a correct legal standard for granting a stay under these circumstances nor met its burden of supplying an appropriate justification for staying the case. And *second*, the district court wrongly concluded that the decision of the Task Force to approve Mr. Abdulayev for transfer to Tajikistan left the court with no

meaningful relief to grant. To the contrary, not only is the Task Force's decision manifestly not the equivalent of the Great Writ (a position that the government has advocated in this Court in other cases), but there are both direct and collateral consequences that would flow from the granting of the writ.

Mr. Abdulayev is entitled to a prompt hearing on his habeas corpus petition. The district court's order if allowed to stand ensures that Mr. Abdulayev, who has no prospect for release consistent with this Nation's laws, may never have that prompt hearing and will continue to bear all the costs of the government's delay. For these reasons the district court's order must be reversed so that Mr. Abdulayev can, as the Supreme Court directed, proceed to a prompt hearing on his habeas corpus petition challenging his nearly eight-year detention at the prison in Guantánamo Bay, Cuba and his threatened repatriation to Tajikistan.

## ARGUMENT

Umar Hamzayevich Abdulayev has been in the custody of the United States government at the high-security prison at the U.S. Naval Base at Guantánamo Bay, Cuba since April 2002. The Executive Branch has, for the second time in two years, approved Mr. Abdulayev for transfer to his home country of Tajikistan, but federal law prohibits the government from transferring him there because it is more likely than not that Mr. Abdulayev will be tortured by the Tajik state.

Citing what effectively amounts to nothing more than the government's desire to transfer him to Tajikistan at some point in time, the district court stayed Mr. Abdulayev's habeas corpus petition indefinitely. Effectively, the district court's stay has had the result that eight years after being snatched out of a market and sold like a chattel to the United States, that after being tortured and abused in American custody, and that after so long in a maximum-security prison with no contact with his family and with no release in sight other than to a country whose officials has threatened his life, that he has no prospect of a hearing. The district court found that his legal challenge to the Executive's decision to detain him and to ultimately repatriate him to

Tajikistan would be a meaningless gesture that would waste the court's time. Mr. Abdulayev is now, as he has been since April 2002, bearing fully all of the costs of his detention. His bearing of those costs is, as the Supreme Court ruled in *Boumediene*, impermissible. For the reasons discussed below, Mr. Abdulayev respectfully urges the Court to vacate the order of the district court staying Mr. Abdulayev's habeas corpus petition and direct that this case proceed to a prompt hearing.

**I. The District Court's Order is Reviewable by this Court as a Final Order or as a Collateral Order.**

There are several independent bases for appellate jurisdiction in this appeal: (A) the district court's order indefinitely staying Mr. Abdulayev's habeas corpus petition is immediately appealable as a final order under 28 U.S.C. § 1291; and (B) the district court's order is immediately reviewable under the collateral order doctrine exception.

**A. The Underlying Order is Final.**

Numerous cases, including appeals in habeas corpus proceedings under § 2241, recognize that orders staying litigation that are indefinite or expected to be lengthy, and thus effectively place a party out of court, are immediately appealable under 28 U.S.C. § 1291. *See, e.g., Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962) (per

curiam); *see also Dellinger v. Mitchell*, 442 F.2d 782, 789 (D.C. Cir. 1971) (stay order placing the appellate effectively out of court has elements of finality); *Yong v. INS*, 208 F.3d 1116 (9th Cir. 2000) (reviewing an indefinite stay of litigation in a habeas corpus proceeding under § 2241); *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 723-24 (9th Cir. 2007) (citing cases).

In this case, the district court stated that it issued the stay “predicated on the *Kiyemba* decision.” (A. 19.) The *Kiyemba* decision referenced by the court, *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (“*Kiyemba II*”), holds, among other things, that the district courts lack the authority to order the government to bring Guantánamo detainees who have been granted writs of habeas corpus into the United States to be released from detention. As the district judge stated during the hearing on the government’s motion to stay this case, proceeding on Mr. Abdulayev’s habeas corpus petition would be “asking me to make a decision that really may be totally meaningless because I have— assuming I ruled in his favor on his habeas petition I don’t have the authority to tell the government not to send him to Tajikistan.” (A. 7.) The government represented to the district court that the Task Force’s

decision to approve Mr. Abdulayev for transfer to Tajikistan is final (*see id.* at A. 6) and that it does not believe it is legally prohibited under the CAT or other laws to transfer Mr. Abdulayev to Tajikistan (*see id.* at A. 8-10).

Although the district court ordered status updates every 30 days to, presumably, monitor the government's efforts to repatriate Mr. Abdulayev, directing status reports does not lessen the fact that the stay entered in this case is indeterminate or of exceedingly long duration. *See Idlewild*, 370 U.S. at 715 (stay order appealable even though it was possible that appellant would be able to return to the district court to litigate after a state court addressed state-law questions). In fact, though the parties have as of the date of this Brief filed five monthly Joint Status Reports (*see* Dkt. 1337, 1394, 1433, 1466 1492), which reflect no material change in Mr. Abdulayev's status since the date his habeas corpus petition was stayed. Unsurprisingly, his case has in fact remained stayed.

What is more, the obvious length of the delay caused by the stay in this case must be balanced against the rights at issue in the underlying litigation. Mr. Abdulayev has been held in prison for nearly

eight years without charge and without an opportunity to challenge the government's basis for detaining him. The federal habeas corpus statute recognizes and the Supreme Court in *Boumediene* acknowledged and placed great importance on the principle that habeas corpus is intended to be a speedy remedy. See 28 U.S.C. § 2243 (manifesting a policy that petitions should be heard and disposed of promptly); *Boumediene*, 128 S. Ct. at 2275 (“the costs of delay can no longer be borne by those who are held in custody”); *Fay v. Noia*, 372 U.S. 391, 400 (1963) (the writ of habeas corpus is intended to afford a “swift and imperative remedy in all cases of illegal restraint or confinement”); see also *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (“the writ of habeas corpus . . . is reduced to a sham if the trial courts do not act in a reasonable time”).

Accordingly, even to the extent that the stay entered in this case is definite because it can conceivably be revisited, Mr. Abdulayev faces a risk of irreparable harm during the time that his habeas corpus petition is stayed. See *Am. Mfrs. Mut. Ins. Co. v. Edward R. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1524 (11th Cir. 1984) (citing *Hines v. D'Artois*, 531 F.2d 726, 730 (5th Cir. 1976)) (concluding that an order staying litigation

was effectively final and recognizing that even if litigation may eventually resume, the delay imposed by the stay order creates a danger of denying justice by delay); *Blue Cross & Blue Shield of Ala.*, 490 F.3d at 724 (same). That risk is either continued unlawful imprisonment or repatriation to torture in violation of his rights under the CAT. Therefore, the underlying order is final for purposes of 28 U.S.C. § 1291.

**B. The District Court's Order is Also Immediately Reviewable as a Collateral Order.**

The order is also immediately reviewable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Under that doctrine, a non-final order is immediately reviewable if it (1) conclusively determines the disputed issue, (2) resolves an important issue completely separate from the merits of the action and (3) is effectively unreviewable on appeal from a final judgment. *Id.* at 546; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467-68 (1978). Many cases recognize that orders granting stays of litigation are immediately reviewable under the doctrine. *See, e.g., Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1103 (9th Cir. 2005); *Discon, Inc. v. Nynex*

*Corp.*, 4 F.3d 130, 133 (2d Cir. 1993); *Burns v. Watler*, 931 F.2d 140, 144-45 (1st Cir. 1991).

With respect to the first element, the issue in dispute in this appeal is whether the Task Force's decision approving Mr. Abdulayev for transfer to Tajikistan entitles the government to relief from litigating his habeas corpus proceedings or, as the district court stated it, effectively renders Mr. Abdulayev's habeas corpus proceedings "meaningless." (*See* A. 7.) But the issue presented by Mr. Abdulayev's petition is whether the government is lawfully detaining him. *See Gherebi v. Obama*, 609 F. Supp. 2d 43, 70-71 (D.D.C. 2009) (Walton, J.) (discussing the standard under which the district court will determine the lawfulness of detention).

Further, the district court's order is conclusive of the issue because the court did not impose a time limit on the stay or describe circumstances under which its order would be modified showing. *See Lockyer*, 398 F.3d at 1103 (holding that underlying decision was conclusive because it was indeterminate and because the district court did not state under what circumstances it would modify its decision); *see also Burns*, 931 F.2d at 44 ("While it is true that the district court

requested periodic reports on the progress of the case at the state level and even commented that appellant could seek reconsideration of its order, there is no indication in the record that it intended to take any further action with regard to the case until the state court had given full consideration to the same. . . .”).

Next, the district court’s order resolved important issues separate from the merits of the case. The Supreme Court has held that an order amounting to a refusal to adjudicate the merits “plainly presents an issue separate from the merits.” *Moses H. Cohen Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983). The merits of the underlying case involve whether the government has a legal justification for imprisoning Mr. Abdulayev for nearly eight years in military facilities and whether the government may lawfully repatriate him to a country where it is more likely than not that he will be tortured. As the Supreme Court unequivocally held in *Boumediene*, Mr. Abdulayev has a right to seek a determination concerning unlawful imprisonment in the district court.

But the order of the district court indefinitely stays that proceeding so that the merits will never be heard. More to the point,

the district court's order is based on a determination that the court should *not* decide whether Mr. Abdulayev's detention is legally justified—which *Boumediene* says it must—because to do so would upset the balance of power between the Judicial and Executive Branches, or because Mr. Abdulayev's habeas corpus petition is effectively moot because the Task Force has granted him all the relief to which he would be entitled under § 2241—notwithstanding the fact that Mr. Abdulayev remains imprisoned.

Finally, there is no doubt that the district court's order is effectively unreviewable on appeal from a final judgment. A final judgment in the underlying case will consist of either the granting or denial of Mr. Abdulayev's petition for a writ of habeas corpus following a hearing on the merits and a determination of his CAT claim. The order at issue in this appeal operates to prevent any such hearing from occurring. Indeed, the district court granted the stay, at least in part, because it believed that the Task Force's decision approving Mr. Abdulayev for release granted him all of the relief he could possibly obtain if the great writ were granted. In other words, the extraordinary relief granted to the government in the underlying order will never be

reviewed by way of a final judgment. Accordingly, the underlying order is immediately reviewable under the collateral order doctrine.

## **II. Standard of Review.**

This Court reviews on order of the district court staying proceedings for an abuse of discretion. *See Clinton v. Jones*, 520 U.S. 681, 707 (1997); *Dellinger*, 442 F.2d at 788-89; *Yong*, 208 F.3d at 1119. But the abuse of discretion standard in this context is somewhat less deferential to the district court; the Court must balance the length of the stay against the strength of justification for giving it, and if a stay is especially long or indefinite, the Court requires a greater showing to justify it. *See Yong*, 208 F.3d at 1119 (citing cases). Further, this Court reviews *de novo* legal issues involved in the district court's exercise of its discretion. *See United States v. Mejia*, 448 F.3d 436, 456 (D.C. Cir. 2006). In this appeal, the questions whether the Task Force's decision to approve Mr. Abdulayev for release is, as the district court believed, rendered meaningless any relief that he could possibly obtain in his petition for a writ of habeas corpus and whether the government has met its burden of demonstrating its entitlement to a stay are legal issues concerning which this Court should not defer to the district court.

### **III. The District Court Abused its Discretion in Staying Mr. Abdulayev's Petition for a Writ of Habeas Corpus.**

#### **A. The District Court Applied an Incorrect Legal Framework for Determining Whether the Government was Entitled to a Stay of the Litigation.**

Initially, in moving for a stay of proceedings based on the Task Force's decision approving Mr. Abdulayev for transfer to Tajikistan, the government failed to identify a legally sufficient—or any—basis for its entitlement to a stay, and the district court likewise failed to apply the correct legal standard for evaluating whether the government was so entitled. It was the government's burden to show that a stay was justified. *Clinton*, 520 U.S. at 708. Under the well-settled standard for obtaining a stay of litigation, as recently reaffirmed by the Supreme Court, the district court abused its discretion in granting the government's motion.

The government asserted that it was entitled to a stay because “it is highly unlikely that a ruling by this Court will affect the timing or substance of any transfer” and “staying this proceeding will promote judicial economy and the appropriate use of the Court's and the parties' resources in the unique circumstances of this litigation.” The government further asserted that it “should not be forced to litigation

the merits of this case . . . when such cases may present sensitive legal issues, and will detract from litigating other cases involving petitioners who are not approved for transfer, when the Government is seeking to relinquish Petitioner from custody.” (A. 77.) The government further asserted that a stay would cause Mr. Abdulayev no prejudice. (*Id.* at A. 78.) Finally, the government’s motion suggested that, in its view, in light of the Task Force’s decision Mr. Abdulayev was only left to litigate “his objection to being transferred to Tajikistan,” (*id.*), which the government claims be cannot challenged under *Munaf v. Geren*, 128 S. Ct. 2207 (2008), and *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

The district court’s authority to grant a stay is traditionally justified by the perceived need to prevent irreparable injury to the parties or to the public. *Nken v. Holder*, 129 S. Ct. 1749, 1760 (2009). To that end, the Supreme Court recently reaffirmed the four factors that historically must guide the district court in determining whether to exercise its discretion to grant a stay:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Id.* at 1761.

Although the district court retains the discretion to grant or deny a stay when irreparable injury is shown, *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926), the fact remains that the movant must demonstrate irreparable injury—in addition to carrying its burden with respect to the remaining three factors.

The government made no attempt in its motion to meet its burden, and the district court abused its discretion both by not applying the correct standard for granting a stay and by granting the government's motion on the basis of the record created by the government.<sup>4</sup> What is more, however, even if the district court had applied the appropriate factors, the district court would have likewise have abused its discretion in granting it. Being forced to attempt to justify, in litigation, its decision to detain Mr. Abdulayev nearly eight years ago is not irreparable harm to the government, especially given the Supreme Court's directive that Mr. Abdulayev has a right to seek

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<sup>4</sup> To the extent the government was attempting to articulate an argument that this is a case in which the district court could stay this case in order to conserve judicial resources pursuant to its inherent power to control its docket—and the government cited no such authority—the circumstances of this case does not fit within the ambit of that power.

habeas corpus relief. *See Commc'n Workers of Am., AFL-CIO v. Am. Tel. & Tel. Co.*, 932 F.2d 199, 210 (3d Cir. 1991); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936) (party seeking the stay must make out a clear case of hardship or inequity).

Further, the balance of equities required under the traditional stay analysis weighs strongly in Mr. Abdulayev's favor. Despite the government's unsupported statement that a stay will not prejudice Mr. Abdulayev, precisely the opposite is true. The Task Force approved Mr. Abdulayev for transfer to Tajikistan. Agents of the Tajik state have on three occasions been allowed to interrogate Mr. Abdulayev at Guantánamo and have specifically threatened him with harm and *death* should he return there. (A. 32.) Moreover, the United States Department of State has recognized that the government of Tajikistan represses individuals who its suspects of being Islamic extremists. (A. 9)

The stigma cast upon Mr. Abdulayev by the allegations made by the United States government to defend his indefinite detention at Guantánamo paint him as precisely the type of individual who would be at serious risk within Tajikistan. (*See* Dkt. 716.) Mr. Abdulayev has

filed a classified Traverse disputing each of the government's allegations concerning his purported support for the Taliban or Al Qaeda and has also moved for expedited judgment on the record (Dkt. 1002)—a motion that was denied without prejudice based on the entry of the stay in this case. By indefinitely staying this case, Mr. Abdulayev will be unable to establish that there was never a justification for detaining him. A determination that he has been detained unlawfully would speak highly to the fact that he was not someone who was substantially supporting the Islamic extremists with whom the United States is at war.<sup>5</sup> Thus, the government did not carry its burden of showing that the district court could exercise its discretion in granting a

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<sup>5</sup> The district court stated that granting a writ of habeas corpus would not serve to prove that Mr. Abdulayev is not what the government claims he is; in other words, the granting of the writ would establish only that the government failed to meet its burden of proof. With all due respect for the district court, that statement misses the mark. It has been shown repeatedly in the 31 cases thus far (of 38 that have had hearings) in which Guantánamo detainees have won their habeas corpus petitions that the evidence is beyond insubstantial. As just one example, in *Al Rabia v. United States*, No. 02-cv-828, 2009 U.S. Dist. LEXIS 88936, at \*5-6 (D.D.C. Sept. 17, 2009), the district court observed that virtually all of the government's evidence consisted of purported confessions that were uncorroborated or procured by questionable means, and neither credible nor reliable.

stay, and the district court accordingly abused its discretion in granting the government that relief.

**B. The District Court Abused its Discretion in Granting the Stay.**

Central to the district court's reasoning in staying Mr. Abdulayev's habeas corpus petition is its belief, shared by the government, that there is nothing meaningful left for it to do. According to the government and the district court, because the Guantánamo Task Force has now approved Mr. Abdulayev for transfer to Tajikistan and the government represented that it is working to effectuate that transfer, a writ of habeas corpus would, at best, accomplish nothing or, at worst, interfere with the government's efforts to repatriate him.

**1. The Task Force's Determination is Not a Substitute for Habeas Corpus.**

By the express terms of the Executive Order establishing the Guantánamo Task Force, the determination of the Task Force, standing alone, accomplishes nothing. Under the Executive Order, the Task Force is directed to decide only whether each detainee can be transferred or released, prosecuted for criminal conduct or subject to

another lawful disposition consistent with the national security and foreign policy interests of the United States and the interests of justice. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), at §§ 2(d), 4. The determination made by the Task Force, to decide “*whether*” and “*can*,” is clearly not an order releasing him from Executive detention, the core remedy of the writ of habeas corpus. *See Rasul v. Bush*, 542 U.S. 466, 474 (2004). This is all the government has presently decided to do.

Mr. Abdulayev retains meaningful rights that would be vindicated should he succeed in obtaining a writ of habeas corpus.

The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: ‘The Privilege of the Writ of Habeas Corpus shall not be suspended.’ 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. 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, 290-291 (1969) (internal citations omitted). The measure of relief available to Mr. Abdulayev by way of a

writ of habeas corpus is not limited to whatever relief the Executive Branch opts to provide. *See Boumediene*, 128 S. Ct. at 2259 (the scope of the Writ “must not be subject to manipulation by those whose power it is designed to restrain”); *see also* U.S. CONST. art. 1, § 9 cl. 2 (providing that Congress—not the Executive—shall not suspend the privilege of the writ of habeas corpus except in extraordinary circumstances). Moreover, release is not the only remedy potentially available to Mr. Abdulayev. *Boumediene*, 128 S. Ct. at 2266 (“release need not be the exclusive remedy in every case in which the writ is granted”); *see also Rasul*, 542 U.S. at 474 (§ 2241 has expanded habeas corpus beyond the limits obtained during the 17th and 18th centuries) (internal quotations omitted).

The stay granted by the district court will unquestionably prejudice Mr. Abdulayev’s ability to seek exoneration and be cleared of the stigma of “terrorist” that the government has cast upon him while it simultaneously threatens to repatriate him to a country where he legitimately fears for his life.<sup>6</sup> A judicial determination in his favor

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<sup>6</sup> As well as accusations that he substantially supported the Taliban or Al Qaeda, which is the base threshold the government must prove for

would have very real and tangible ramifications, including assisting him in finding a safe third country where he can be resettled and resume his life—or, in the worst case scenario for him, reduce the risk of torture and unjust imprisonment in Tajikistan.

If Mr. Abdulayev is not allowed to proceed on his habeas corpus petition and he is repatriated, the stigma of having been imprisoned in Guantánamo is likely to encourage the suspicion in Tajikistan, however inaccurate, that he is an Islamic militant. The United States Department of State recognizes that Tajikistan historically views “extremist” Islamic groups as national security threats and monitors them closely. *See Country Report on Human Rights Practices—2008 for Tajikistan* (A. 66). Even if he had not been the target of specific threats made by Tajik officials three times since his incarceration at Guantánamo (A. 32), Mr. Abdulayev would still have reason to fear for his safety if repatriated. The likelihood that he will suffer at the hands of the Tajik authorities will be lessened if he is granted a writ of habeas corpus. And if he is granted the writ his efforts to obtain asylum in a safe third country would undoubtedly be greatly improved. These are

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the court to deny the writ, based upon the district court’s analysis of the military’s detention power. *See Gherebi*, 609 F. Supp. 2d at 70-71.

tangible consequences to Mr. Abdulayev being able to prosecute his petition. The district court's determination to the contrary is inaccurate.

**2. A Writ of Habeas Corpus May Vindicate Mr. Abdulayev's Right to Avoid Repatriation to Torture.**

Although the government asserted that Mr. Abdulayev's interest in pursuing his habeas corpus proceeding is "based solely on his objection to being transferred to Tajikistan," (A. 78) that is not the case. As noted above, Mr. Abdulayev has multiple reasons for pursuing his rights in this proceeding, including, but not limited to, his desires to clear his name after nearly eight years of unlawful Executive imprisonment, to improve his chances for asylum in a country other than Tajikistan and to lessen the likelihood that he may be imprisoned or tortured if he is, in fact, forcibly transferred to Tajikistan. These considerations properly serve as a basis for the continuation of his habeas proceeding. *See Carafas v. LaVallee*, 391 U.S. 234, 237-238 (1968) (declaring that petitioner's habeas corpus proceeding was not moot despite petitioner's release). Furthermore, these concerns are separate and independent from any attempt by Mr. Abdulayev to

“interfer[e] with the Government’s transfer decision.” Rather, he seeks to vindicate his right not to be repatriated to Tajikistan when he is more likely than not to face persecution or torture there.

If the district court’s order stands, it would be impossible for the district court to entertain Mr. Abdulayev’s claims for relief guaranteed by the Constitution. *See Belbacha*, 520 F.3d at 458-459 (remanding to district court to consider whether injunction pursuant to All Writs Act to preserve jurisdiction over habeas corpus petition while petition for writ of certiorari was pending). As a result, litigating Mr. Abdulayev’s habeas corpus case is imperative because a finding that he is not lawfully detained may prohibit the government from sending him to Tajikistan. *See id.* at 455-56 (“If a case presents a ‘substantial’ jurisdictional question, then under the All Writs Act, 28 U.S.C. § 1651, a district court may act to preserve its jurisdiction while it determines whether it has jurisdiction.”).

In its motion, the government suggested that “[a] stay will not unduly prejudice [Mr. Abdulayev], as the government is already seeking his transfer.” (A. 78) This statement, however, is unfounded given the government’s acknowledgement that Mr. Abdulayev fears for his safety

in the event he is repatriated to Tajikistan. For him, transfer to that country poses the ultimate prejudice. The government's stated intent to send Mr. Abdulayev to Tajikistan despite his uncontested statements that he has been threatened at Guantánamo and fears for his safety violates the government's legal obligation not to "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, signed April 18, 1988, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (A. 57). "Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). The ban on torture is *jus cogens*, in other words, "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted." *Siderman de Black v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (citation omitted). This core and basic norm of international law "may well restrain our government in the same way the Constitution

restrains it.” *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988).

While this Court has recently held that the district court cannot bar the transfer of a detainee on the basis that he is likely to be tortured or subject to further detention in the receiving country, *Kiyemba II*, 561 F.3d at 514, the petitioners in that case are in the process of seeking a writ of certiorari from the Supreme Court. Accordingly, this decision may yet be vacated or reversed. Moreover, the basis for the government’s argument in the district court that Mr. Abdulayev cannot safeguard his non-derogable rights under the CAT, and which also underlies *Kiyemba II*, is *Munaf v. Geren*, 128 S. Ct. 2207 (2008), a case with no applicability to Mr. Abdulayev’s case.

Unlike the *Munaf* petitioners, Mr. Abdulayev did not voluntarily travel to the country to which the United States wishes to surrender him; he is not alleged to have committed serious crimes there; and he does not concede that were he not in United States custody Tajikistan would be free to arrest and prosecute him under Tajik law. *See Munaf*, 128 S. Ct. at 2221; *see also id.* at 2228 (Souter, J., conc.) (petitioners were held in the territory of Iraq by U.S. troops during hostilities

involving those troops, and the State Department had determined that the Iraqi prison and detention facilities meet international standards). Also unlike the *Munaf* petitioners, who did not raise a claim under the implementing legislation for CAT, the FARR Act, *see Munaf*, 128 S. Ct. at 2226, Mr. Abdulayev raises precisely such a claim here in his habeas corpus proceeding. (See Dkt. 1 ¶¶ 98-100.) The *Munaf* Court “express[ed] no opinion on whether Munaf and Omar may be permitted to amend their respective pleadings to raise such a claim on remand.” *Id.* at 2226 n.6.

If the government is allowed to ship Mr. Abdulayev off to the unmonitored corners of Tajikistan’s prisons before he has even an opportunity to resolve his habeas corpus petition, he will be deprived of a judicially-cognizable right to have his repatriation subject to judicial scrutiny. The Court should allow the litigation to proceed on its merits, because at the end of the case, the result may be something other than the hands-off policy enunciated in the Court’s decision in *Kiyemba II*.

**C. The District Court Should Be Compelled to Vacate the Stay to Preserve Its Jurisdiction Over Mr. Abdulayev’s Petition for a Writ of Habeas Corpus.**

Mr. Abdulayev enjoys the privilege of habeas corpus, and the district court is vested with the power and the duty to allow him to vindicate that privilege. *See Boumediene*, 128 S. Ct. at 2262, 2277. The statute confirms that Mr. Abdulayev’s request for relief here—barring the Executive from unilaterally and unlawfully transferring him, thereby divesting the district court of its habeas jurisdiction—was encompassed by the English common law writ in 1679. The Habeas Corpus Act of 1679, which codified the English common law writ, specifically addressed preventing “[t]he possibility of evading judicial review through . . . spiriting-away” of the King’s prisoners. *See Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting). The full name of this foundational statute under King Charles II was “An Act for the Better Securing the Liberty of the Subject, and for the Prevention of Imprisonments Beyond the Seas.” *See, e.g., Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 896 n.23 (2d Cir. 1996). Thus, Article XII of the Act forbade “the shipment of prisoners to places where the writ did not run or where its execution would be difficult.” *Boumediene*,

128 S. Ct. at 2304. Accordingly, this Court recently held that “a potential transfer out of the jurisdiction of the court is a proper subject of statutory habeas relief.” *Kiyemba II*, 561 F.3d at 513.

In exercising its jurisdiction over Mr. Abdulayev’s habeas petition, under the All Writs Act, 28 U.S.C. § 1651(a), the district court has the authority and the duty to protect its jurisdiction by preventing the Government from transferring Mr. Abdulayev to the custody of the Tajik government before his habeas corpus petition is heard. Such an injunction can “preserve the status quo between the parties pending a final determination of the merits of the action.” 13 MOORE’S FEDERAL PRACTICE 3D § 65.20 (2004).

Here, issuing an injunctive order to protect this Court’s habeas jurisdiction is of particular importance because if Mr. Abdulayev’s detention is unlawful, the Government may well lack the authority to transfer him to the custody of the Tajik government. *See Belbacha*, 520 F.3d at 456 (observing that the Government may lack authority to transfer a detainee to Algeria if its detention of the detainee was unlawful). If *Kiyemba II* is yet undone in the Supreme Court, a stay of litigation in favor of the government’s efforts to send Mr. Abdulayev to

Tajikistan will simply have, at the very least, delayed the adjudication of his case on the merits. Moreover, the Supreme Court has granted certiorari to review this Court's decision in *Kiyemba v. Obama*, 555 F.3d 1022, 1029 (D.C. Cir. 2009) ("*Kiyemba I*"), that the courts may not order the release on parole of unlawfully detained men who may not be lawfully repatriated to their home countries.

Should that decision be vacated, Mr. Abdulayev will be entitled to his freedom here if the government does not arrange for a safe country of asylum. Should a merits decision be delayed while these matters are decided in the Supreme Court in favor of the men imprisoned at Guantánamo, Mr. Abdulayev will have suffered yet even further impermissible delay. *See Boumediene*, 128 S. Ct. at 2275 ("the costs of delay can no longer be borne by those who are held in custody"). At the worst, a stay for the reason that the Task Force has decided to approve Mr. Abdulayev for transfer to Tajikistan will assist the government in sending him to his native country with the label of "terrorist" still firmly on his back—at a time when the law is unsettled by virtue of the Supreme Court's grant of certiorari in the *Kiyemba* case.

## **CONCLUSION & PRECISE RELIEF SOUGHT**

By failing to apply the well-settled legal standard for granting stays of litigation, by failing to hold the government to its burden of persuasion and by failing to recognize that the decision of the President's Guantánamo Task Force that he can be transferred to Tajikistan is not a substitute for the privilege of the writ of habeas corpus, the district court abused its discretion in staying Mr. Abdulayev's petition for a writ of habeas corpus. After nearly eight years of Executive imprisonment without charge or trial, the district court's order places Mr. Abdulayev at risk of his worst possible fate: repatriation to torture.

For all these reasons, Umar Hamzayevich Abdulayev respectfully requests that the Court of Appeals vacate the order of the district court staying his petition for a writ of habeas corpus so that he may proceed to the prompt hearing to which he is entitled.

DATED: November 10, 2009

Respectfully submitted:

UMAR HAMZAYEVICH  
ABDULAYEV

By:     /s/ Matthew J. O'Hara      
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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This Brief complies with the type-volume limitation of Rule 32(a)(7) of the Federal Rules of Appellate Procedure because this Brief contains 8,936 words, excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

/s/ Matthew J. O'Hara  
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**CERTIFICATE OF SERVICE**

I, Matthew J. O'Hara, one of the attorneys for the Appellant, hereby certify that on November 10, 2009, I caused a true and correct copy of the foregoing Brief of Appellant to be served by electronic mail via this Court's CM/ECF system on counsel of record on the service list for No. 09-5274.

/s/ Matthew J. O'Hara  
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