UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION FOUNDATION, as Next Friend, on behalf of Unnamed U.S. Citizen in U.S. Military Detention,

Petitioner,

v.

GEN. JAMES N. MATTIS,
in his official capacity as SECRETARY OF DEFENSE,

Respondent.

No. 17-cv-2069 (TSC)

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS AND REPLY IN SUPPORT OF EMERGENCY MOTION FOR COUNSEL ACCESS

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INTRODUCTION

For nearly two months, the U.S. government has been detaining a U.S. citizen at a secret location without releasing his name and without affording him access to a court, a lawyer, or any meaningful opportunity to challenge his detention. The government effectively seeks sole and unreviewable power over this citizen's liberty and possibly his life, whether by holding him indefinitely without charge, coercing him to confess to crimes, or transferring him to another country, including one where he faces likely torture, an unfair trial, and possible execution. According to U.S. government officials, this American citizen has repeatedly invoked his constitutional right to counsel during multiple interrogations designed to extract evidence of a federal crime under circumstances the Supreme Court has deemed inherently coercive. The government has ignored those requests. Now, further impeding vindication of this citizen's constitutional rights, the government opposes the ACLUF's emergency motion for counsel access, citing obstacles that are entirely of the government's own creation.

The government's response does more than misstate the law on next friend standing and counsel access. It represents a direct assault on a U.S. citizen's right to habeas corpus under federal law and the Constitution. The Supreme Court has consistently recognized the habeas rights of U.S. citizens, even those detained as enemy combatants. Courts have also repeatedly emphasized that habeas rights mean nothing without access to counsel. Now, after having failed in past cases to deny the existence of habeas rights for citizens held as enemy combatants, the government is seeking to prevent this citizen from vindicating his rights by impeding his access to counsel, *even though*, according to U.S. government officials, the citizen has unequivocally demanded it. *See* Dana Priest et al., "Case of suspected American ISIS fighter captured in Syria vexes U.S.," *Wash. Post*, Oct. 29, 2017, http://wapo.st/2zgsIGO (according to U.S. officials

familiar with the case, the detained U.S. citizen "refused to talk to the interrogation team and demanded a lawyer" and then, after FBI agents read him his *Miranda* rights, "he again refused to cooperate and repeated his demand for a lawyer").

The ACLUF filed this emergency motion seeking the narrow relief of counsel access to advise the U.S. citizen detainee of his rights and afford him the opportunity of legal representation—representation that he clearly wants. That is the interest at stake—not, as the government postulates, the ACLUF's "generalized interest[] in constitutional governance." Respondent's Motion to Dismiss and Response to Court's Order of October 19, 2017, at 9, ECF No. 11 ("Resp."). The ACLUF seeks only to provide this specific U.S. citizen, who is seeking counsel and has no other means of timely obtaining it, with the ability to exercise his rights.

For the reasons set forth below, the Court should grant the ACLUF's emergency motion and order Respondent to provide ACLUF attorneys with access, either in person or via videoconferencing, to the unnamed U.S. citizen in military detention in Iraq. If, however, the Court finds that it cannot sufficiently determine, based on the current record, whether jurisdiction exists, it should grant limited jurisdictional discovery to confirm the Court's ability to grant the requested relief.

ARGUMENT

I. The Habeas Petition Was Properly Filed.

The government's argument that the ACLUF's petition was improperly filed pseudonymously without leave is wrong because the rules the government cites were not meant to apply to the extraordinary circumstances presented here. Though neither the federal civil rules nor the local rules of this Court address pseudonymous filings in those terms, courts have held that both sets of rules require that initial pleadings should ordinarily be filed by named parties or

by pseudonymous parties with leave of court. *See John Doe Co. v. CFPB*, __ F.R.D.__, No. 17-cv-49, 2017 WL 2117280, at *2 (D.D.C. Jan. 10, 2017); Fed. R. Civ. P. 10(a), 17(a); LCvR 5.1(c)(1), 11.1. Application of these rules is left to the discretion of the district court. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993). In considering the application of these rules, courts are mindful that they exist to protect the interests of the *public* (in the openness of judicial proceedings) and *defendants* (in the fairness of civil litigation). *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (courts evaluating exceptions to the rules should "take into account the risk of unfairness to the opposing party, as well the customary and constitutionally-embedded presumption of openness in judicial proceedings"); *John Doe Co.*, 2017 WL 2117280, at *2 (the rules are motivated by "[t]he public's interest 'in knowing the names of [] litigants,'" which, "critical[ly], . . . furthers openness of judicial proceedings" (quoting *Doe v. Public Citizen*, 749 F.3d 246, 265 (4th Cir. 2014)); *National Ass'n of Waterfront Emp'rs v. Chao*, 587 F. Supp. 2d 90, 99 (D.D.C. 2008) (courts do not apply the rules to bar pseudonymous filings when the plaintiff's interest in anonymity outweighs "the impact of [that] anonymity on the public interest in open proceedings and on fairness to the defendant"); *see also Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (explaining nearly identical standard that applies in the Second and Ninth Circuits). The rules, accordingly, were not meant to apply here, where it is the conduct of Respondent alone that makes the ACLUF's compliance with the rules impossible, where Respondent is entirely responsible for not identifying the unnamed U.S. citizen party, and where Respondent enjoys the very information advantage that the rules' underlying fairness principle seeks to mitigate.

To avoid any distraction from the urgent merits of this motion and habeas petition, however, the ACLUF respectfully requests that the Court grant leave to file pseudonymously

nunc pro tunc, as the present circumstances plainly justify granting such leave. *See Weil v. Markowitz*, 898 F.2d 198, 200 (D.C. Cir. 1990) (explaining that "the issue of whether to grant *nunc pro tunc* relief is best left to the discretion of the District Court" and "is available in order to promote fairness to the parties and as justice may require (quotation marks omitted)); *see also, e.g.*, *Parker v. John Moriarty & Assocs.*, 224 F. Supp. 3d 1, 7 (D.D.C. 2016) (granting leave to file amended complaint *nunc pro tunc* despite previous noncompliance with Fed. R. Civ. P. 6(b)(1)(B)).[1]

II. The ACLUF Has Standing to Seek the Requested Relief.

As set forth below, the ACLUF has standing to seek the requested relief because the U.S. citizen detainee is inaccessible, because the citizen has expressed his desire for legal representation to U.S. officials, and because no other putative next friend has come forward to provide that representation to him. The government argues that the ACLUF cannot be a proper next friend because it cannot show that it is truly dedicated to the best interests of the unnamed U.S. citizen and because it lacks a significant relationship with him. Resp. 6–16. Despite the fact that no other next friend has come forward, the government suggests that the citizen could perhaps relay a message through the International Committee of the Red Cross ("ICRC") to unidentified family members and those unidentified family members could, in turn, perhaps seek counsel in a U.S. court on his behalf. *Id.* at 15. The government's argument that the citizen's habeas rights are therefore secure—even though the government is preventing the citizen from filing a petition on his own behalf and even though only the ACLUF is pursuing his stated interests—misstates the law on next friend standing, fundamentally misconstrues the role of the ICRC, and is based on multiple levels of speculation.

[1] If the Court is of the view that the ACLUF should proceed by a formal *nunc pro tunc* motion, the ACLUF will promptly submit such a motion.

As explained in the ACLUF's emergency motion, next friend standing is a long-accepted basis of jurisdiction in habeas actions. *See* Emergency Motion for Counsel Access 3–4, ECF No. 7 ("Mot."). The purpose of next friend standing is to allow an individual or organization to pursue a habeas petition on behalf of a detained person where, as here, that person is unable to seek relief on his own behalf. *See Whitmore v. Arkansas*, 495 U.S. 149, 161–63 (1990); Mot. 3. The Supreme Court has identified two requirements for next friend standing: first, that the detained person cannot prosecute the action on his own behalf, including because he is inaccessible; and second, that the next friend is dedicated to the best interests of the detainee. *Whitmore*, 495 U.S. at 163–64; Mot. 3–4.

The government concedes that the unnamed U.S. citizen is inaccessible under *Whitmore*'s first prong because it is denying him the ability to file a habeas petition on his own behalf. Resp. 6–7 & n.1. The government instead argues that the ACLUF is not a proper next friend under *Whitmore*'s second prong, contending that the ACLUF cannot be dedicated to the best interests of the U.S. citizen detainee since it has never met with him and does not know his identity. *Id.* at 7. The government is wrong.

To be sure, the ACLUF does not have a personal relationship with the U.S. citizen detainee, but that is not what *Whitmore*'s second prong requires. As explained previously, the ACLUF is committed to upholding the constitutional rights of individuals, including the right to counsel of individuals detained by the U.S. military as enemy combatants. Mot. 4–5; Petition for a Writ of Habeas Corpus ¶ 1, ECF No. 4 ("Pet."). The ACLUF has represented other U.S. citizens detained under similar legal authority, including in Iraq. Mot. 4; Pet. ¶ 1. The ACLUF, therefore, is an organization with "an established history of concern for the rights of individuals in the detainee[']s circumstances." *Coalition of Clergy v. Bush*, 310 F.3d 1153, 1167 (9th Cir.

2002) (Berzon, J., concurring). Moreover, the ACLUF did everything within its power to both identify and contact the U.S. citizen detainee before filing this petition, including writing directly to Respondent and the Attorney General to request access to the citizen. Mot. 4; Pet. ¶ 18; *see Coalition of Clergy*, 310 F.3d at 1166–67 (Berzon, J., concurring) (noting the importance of a putative next friend's efforts to communicate with a prisoner prior to filing a habeas petition). The government ignored this request and now seeks to profit by its refusal in opposing standing on the ground that the ACLUF has not identified or spoken to the detainee. Resp. 8. But as the government acknowledges, *id.* at 16–17, "habeas corpus has traditionally been . . . governed by equitable principles." *Fay v. Noia*, 372 U.S. 391, 438 (1963). And the most basic equitable principle is that a party should not be allowed to benefit from its own wrongdoing, as the government seeks to do here. *See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945).

Critically, the ACLUF does not "simply speculate," Resp. 7, about the wishes of the unnamed U.S. citizen whom the government has imprisoned now for nearly two months. This citizen has made his wishes clear. According to U.S. government officials, he has repeatedly invoked his constitutional right to counsel. *See* Priest, *supra*. The U.S. military, however, has refused the citizen's request for counsel and is seeking to bar the ACLUF, the only person or entity that has come forward to seek this relief on his behalf, from ensuring that request is honored. *See Coalition of Clergy*, 310 F.3d at 1167 ("alignment of interests" supports finding that next friend is dedicated to a prisoner).

The government's argument that the ICRC's two visits with the U.S. citizen defeat the ACLUF's standing, Resp. 2, 7, 15, 20, is incorrect, because those visits suggest nothing concerning the citizen's wishes to meet with counsel or to pursue this petition. The ICRC does

not intervene or participate in judicial proceedings. Declaration of Gabor Rona dated Nov. 1, 2017, and attached hereto ("Rona Decl."), ¶ 13. Instead, the ICRC's principal function is to monitor the conditions of detention, regardless of the reasons for the detention, and to address issues regarding those conditions in direct and confidential communications with the detaining authority. 1 *Customary International Humanitarian Law* 442–44 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), *available at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule124 (discussing ICRC access to people deprived of liberty). "Because the ICRC's primary purpose is to assure that conditions of detention and the treatment of detainees complies with applicable international law, it cannot be assumed in any particular case that the ICRC has advised a detainee about legal representation or judicial remedies, or has offered to facilitate the same." Rona Decl. ¶ 14. Therefore, no assumption can be made that the ICRC and any detainee "have discussed a potential right to challenge detention, let alone a detainee's possible interest in obtaining legal representation." *Id.* Further, "no assumption can be made about any particular detainee's decision to contact family members through the ICRC or not." *Id.* ¶ 11. In fact, while "[s]ome detainees urgently seek family notification and contact," other detainees "may not wish to contact their families for various reasons," including "fear that their families will ostracize them for activities in which they may have engaged, or a fear that their families themselves might face scrutiny, suspicion, or even retaliation." *Id.* Additionally, because of the ICRC's confidential working methods, the U.S. government "cannot be presumed to have any knowledge of the communications between the ICRC and the detainee," including communications about "the availability of judicial remedies and legal assistance." *Id.* ¶ 15.

The government's suggestion that the U.S. citizen detainee could secure representation through ICRC-facilitated family communication therefore rests on multiple layers of speculation

and ignores the various reasons why this mechanism—intended for a different purpose—is inadequate for securing an American citizen's constitutionally guaranteed right to counsel. Critically, the government has made no showing that: (1) the unnamed U.S. citizen has a family; (2) he is willing to contact his family; (3) the ICRC has been able to locate and facilitate contact with the citizen detainee's family; (4) the citizen detainee's family has responded positively to communication from him; (5) the citizen detainee is familiar enough with U.S. habeas law to know that family members might be able to pursue a next friend petition on his behalf; and (6) the citizen detainee's family has the ability, knowledge, and means necessary to access U.S. courts on his behalf. The government has made no effort to establish any of the links in this chain of speculation—all of which are necessary to establish the conclusion the government asks the court to accept.

In short, no assumption can be made about the detained U.S. citizen's decision or ability to contact family members through the ICRC or the family's ability or desire to retain counsel on the citizen's behalf. Instead, what is known is this: a U.S. citizen imprisoned by his own government for nearly two months has repeatedly asserted his constitutional right to counsel; his own government has repeatedly denied him that right; and there is only one next friend petition pending in any U.S. court—the ACLUF's petition in this Court—to vindicate the U.S. citizen's expressed desire for counsel.

The cases on which the government relies fail to support its position. In *Coalition of Clergy*, the coalition denied next friend standing not only had made no "effort to even communicate with the detainees," 310 F.3d at 1162, but also was "an ad-hoc, self-appointed group" of "broad ranging interests and background" that lacked an "established history of concern for the rights of individuals in the detainee['s] circumstances," *id.* at 1167 (Berzon, J.,

concurring). In *Sanchez-Velasco v. Secretary of Department of Corrections*, 287 F.3d 1015 (11th Cir. 2002), the attorney denied next friend standing not only made no attempt to contact the prisoner despite his clear ability to do so, but also bypassed the prisoner's brother and prior counsel, who both *did* have a significant relationship with the prisoner. *Id.* at 1028–29. That attorney, moreover, asserted claims contrary to the stated wishes of the prisoner. *Id.* at 1033 (prisoner has right not to contest his death sentence any further). In *Does v. Bush*, counsel filed an omnibus habeas action on behalf of every non-citizen detainee in U.S. custody at Guantánamo. *Does v. Bush*, No. Civ. A. 05-313 (CKK), 2006 WL 3096685, at *1 (D.D.C. Oct. 31, 2006). In denying counsel next friend standing, the Court emphasized that those Guantánamo detainees who wished to seek habeas relief "have been able to file petitions before the Court in large numbers despite Counsel's claims to the contrary," and "have been appointed counsel." *Id.* at *5. And in *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), the district court denied third party standing to a father who sued to obtain the reasons why his son was placed on a "kill list" because, the court found, the son had indicated he did not desire the protections of the U.S. legal system. *Id.* at 20–21 (finding "no evidence that his son wants to vindicate his U.S. constitutional rights through the U.S. judicial system" and concluding that his "[son] has indicated precisely the opposite—i.e., that he believes it is *not* in his best interests to prosecute this case" (emphasis in original)).

The ACLUF's claim to next friend standing differs from these cases in every critical respect. First, the ACLUF sought to contact the unnamed U.S. citizen through Respondent before filing the instant habeas petition, and was prevented from doing so by the government's own refusal. Mot. 4; Pet. ¶ 18. Second, the ACLUF has an established history of representing individuals in the unnamed U.S. citizen's circumstances to secure their individual rights under

the Constitution of the United States. Mot. 4; Pet. ¶ 1. Third, no other individual or entity has come forward to represent the citizen's interests. Fourth, and critically, the ACLUF is seeking to vindicate the very right—access to counsel—that the U.S. citizen detainee has repeatedly asserted and the government has repeatedly denied him. Priest, *supra*.

Flexibility has always been essential to ensure that the fundamental purpose of habeas corpus is maintained. *See, e.g.*, *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (Habeas has "never been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."); R.J. Sharpe, *The Law of Habeas Corpus* 237 (3d ed. 2011); Paul D. Halliday, *Habeas Corpus: From England to Empire* 176 (2010) (courts historically "issu[ed] the writ by reasoning . . . from the writ's central premise: that it exists to empower the justices to examine detention in all forms"). As one treatise presciently warned: "If third parties were not allowed to initiate proceedings a captor acting unlawfully would only have to hold his prisoner in especially close custody to prevent any possibility of recourse to the courts." Sharpe, *supra*, at 237; *see also Demjanjuk v. Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (Bork, J., sitting as a single Circuit Judge) (construing federal habeas statute to vest jurisdiction in the D.C. Circuit for a detainee being held in an unknown location because "it is essential that [the] petitioner not be denied the right to petition for a writ of habeas corpus"). For hundreds of years, courts have thus recognized that in circumstances that preclude the intervention of a next friend with a preexisting relationship, habeas jurisdiction should not be defeated as a result. *See, e.g.*, *Case of the Hottentot Venus*, 13 East. 195 (K.B. 1810) (providing next friend status to a society seeking to represent the interests of Saartje Baartman, a woman who the society alleged had been abducted and detained under the name "Hottentot Venus").

The government thus wrongly suggests that there must be a preexisting "significant relationship" between the putative next friend and the individual on whose behalf he seeks to act. Resp. 10. The Supreme Court did not adopt any such requirement in *Whitmore*, 495 U.S. at 163–64, nor has the D.C. Circuit adopted it, *see Does*, 2006 WL 3096685, at *6 ("[T]his circuit has not addressed whether there must be 'some significant relationship' between a 'next friend' and the individual on whose behalf the 'next friend' seeks to act."). A significant relationship between the putative next friend and the detainee is thus properly understood not as a stand-alone requirement, but rather "*one means* by which the would-be next friend can show true dedication to the best interests of the person on whose behalf he seeks to litigate." *Sanchez-Velasco*, 287 F.3d at 1026 (emphasis added).

Far from imposing any rigid requirement, courts have flexibly applied the next friend standard, choosing next friends with close personal relationships in cases where such next friends had, in fact, come forward. *See, e.g.*, *Hamdi v. Rumsfeld*, 294 F.3d 598, 606–07 (4th Cir. 2002) (noting that father had come forward to serve as next friend); *Coalition of Clergy*, 310 F.3d at 1160 (noting that some family members had come forward to serve as next friend). And courts have consistently cautioned against imposing an iron-clad rule in the exceptional circumstance, such as that presented here, where a detainee cannot access the courts himself and no individual with a prior relationship has come forward to serve as next friend. *See, e.g.*, *Hamdi*, 294 F.3d at 604 n.3, 606 (reserving, where father had come forward as next friend, case where a detainee lacked such significant relationships). Indeed, "a close familial tie" alone does not necessarily ensure that a putative next friend "actually represents the absent party's best interests." *Al-Aulaqi*, 727 F. Supp. 2d at 22 (citing *Coalition of Clergy,* 310 F.3d at 1162); *accord Bowen v. Rubin*, 213 F. Supp. 2d 220, 227 (E.D.N.Y. 2001) ("The mere fact that an individual has blood

relatives . . . is not [necessarily] sufficient reason to appoint those persons as representatives," absent a showing that the relative is dedicated to the individual's best interests.). Thus, just as the mere existence of a family relationship to a detainee does not necessarily confer next friend status, its absence does not necessarily preclude it. As the district court in *Coalition of Clergy* explained, "[T]he mere failure of a 'next friend' to establish direct communication with the prisoner and obtain explicit authorization from him [cannot be] enough to preclude 'next friend' petitioners. . . . If it were, then there would be an incentive for the government to keep all captives, even United States citizens, incommunicado." *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1044 n.7 (C.D. Cal. 2002).

In any event, whether a significant relationship is a separate requirement or merely one means to establish dedication to the U.S. citizen's best interests is of no import here. The "contours" of any requisite relationship for next friend purposes "must necessarily adapt to the circumstances facing each individual detainee." *Coalition of Clergy*, 310 F.3d at 1162 (cautioning against an overly rigid interpretation of "significant relationship" and adopting a flexible approach). "Not all detainees may have a relative, friend, or even a diplomatic delegation able or willing to act on their behalf." *Id.* In such cases, an entity with a relationship that is "significant" in comparison with others, may properly serve as a next friend. *Id.* "[E]xtreme circumstances," in short, may necessitate relaxation of the ordinary next friend standards, particularly in a case where no individual or entity with a preexisting relationship is available to press a detainee's interests. *Id.*; *accord Hamdi*, 294 F.3d at 604 n.3, 606.

This case presents exactly such extreme circumstances. The unnamed detained U.S. citizen has repeatedly invoked his right of counsel access. The government has repeatedly refused him that right. It has prevented him from seeking the Court's assistance directly and has

failed to provide him an adequate alternative means of doing so. No other person or entity has stepped forward to vindicate his rights. Only the ACLUF has filed a habeas petition on the U.S. citizen's behalf and only the ACLUF has sought to provide him with what he desires, what the government has denied him, and what the Constitution and laws of the United States guarantee him: access to counsel in the face of grave threats to his liberty and potentially his life. The ACLUF accordingly has standing to seek the requested relief of advising the U.S. citizen detainee of his rights and affording him the opportunity of legal representation.

III. The Unnamed U.S. Citizen Has the Right to Counsel Access Under the Federal Habeas Statute and the Constitution.

The government cannot dispute that this Court has jurisdiction over a habeas petition filed by U.S. citizens, including a citizen detained as an enemy combatant, whether in the United States or overseas. *See, e.g.*, Mot. 6–8; *Munaf v. Geren*, 553 U.S. 674, 686 (2008) (U.S. citizens detained by U.S. military in Iraq); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (U.S. citizen detained by U.S. military in the United States). The government also cannot dispute that the Court's exercise of its habeas jurisdiction requires that the citizen be provided an opportunity to challenge his detention, including the factual and legal basis for it. *See, e.g.*, Mot. 6–7; *Hamdi*, 542 U.S. at 536 ("[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining [the separation of powers], serving as an important judicial check on the Executive's discretion in the realm of detentions."); *see also Boumediene v. Bush*, 553 U.S. 723, 783 (2008) ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."). And the government cannot dispute that for the Court's exercise of a detainee's habeas rights to be meaningful, he must have access to counsel. *See, e.g.*, Mot. 7–8; *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 15 (D.D.C. 2012) (detainees must

have access to counsel for access to the courts to be "adequate, effective, and meaningful" (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)); *Omar v. Harvey*, 514 F. Supp. 2d 74, 77 (D.D.C. 2007) ("access to the Court would mean [ ] nothing without access to counsel") (quoting *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005)).

The government instead offers two main reasons why it should be permitted to continue to deny a lawyer to a U.S. citizen it has detained for nearly two months already and will continue to detain for the foreseeable future. First, the government argues that the citizen might not want legal assistance. Resp. 20. Second, the government argues that counsel access is "premature." *Id.* Specifically, the government argues that the citizen has spent only a "short time" in detention and the government "is still in the process of determining what its final disposition regarding this [citizen] will be." *Id.* at 20–21. Relatedly the government asserts that allowing access to the detainee, even by teleconference, "would be no easy matter" since government has "restricted civilian access" due to operational concerns and "lacks any unclassified video-teleconference capability." *Id.* at 21. These arguments should be rejected. They not only lack merit, but also reflect a dangerous attempt by the Executive Branch to negate the statutory and constitutional rights of a detained U.S. citizen by erecting artificial bureaucratic barriers to their enforcement.

First, as stated above, U.S. officials have now acknowledged that the U.S. citizen in its custody has repeatedly requested counsel. Priest, *supra*. Thus, it is not credible for the government to argue, with no evidence, that there exists genuine uncertainty regarding the citizen's desire for counsel.

Second, the time for the government to afford counsel access to the U.S. citizen is now, not at some uncertain future date. Courts have consistently rejected substantially the same arguments the government makes here to deny counsel access to detained enemy combatants.

Notably, Judge Mukasey ordered immediate access for habeas counsel to a U.S. citizen detained as an enemy combatant even when President Bush himself claimed that the citizen possessed "information that would be helpful in preventing al Qaeda attacks" and posed "a continuing, present and grave danger to the United States." *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 572 (S.D.N.Y. 2002), *opinion adhered to on reconsideration sub nom. Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003). In that case, the government had argued that affording Padilla counsel access would "jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America." *Id.* at 603 (arguing that "access to counsel would interfere with questioning" and that "al Qaeda operatives are trained to use third parties as intermediaries to pass messages to fellow terrorists"). Judge Mukasey nevertheless ordered counsel access over the government's vigorous objection. *Id.* at 605. He explained that a U.S. citizen's "right to present facts is rooted firmly in the statutes that provide the basis for his [habeas] petition." *Id.* at 599 (citing 28 U.S.C. §§ 2241, 2243, 2246). "Quite plainly," he concluded, "Congress intended that a § 2241 petitioner would be able to place facts, and issues of fact, before the reviewing court, and it would frustrate the purpose of the [habeas] remedy to prevent him from doing so." *Id.* at 600. Although Judge Mukasey noted that the provisions of the habeas statute "do not explicitly provide a right to counsel," *id.*, he found that a detainee's "need to consult with a lawyer" to "present and contest facts," as the habeas statute explicitly affords him the opportunity to do, "is obvious," *id.* at 601–02. Judge Mukasey accordingly exercised his authority under the habeas statute, along with his authority under the All Writs Act, 28 U.S.C. § 1651(a), and the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B) (authorizing appointment of counsel in section 2241 actions), to order counsel access for the detained U.S.

citizen. *Padilla*, 233 F. Supp. 2d at 605. Judge Mukasey stressed, moreover, that "[e]ven giving substantial weight" to the President's determination about the grave and continuing threat Padilla posed, a U.S. citizen's "statutorily granted right to present facts to the court in connection with [his] petition will be destroyed utterly if he is not allowed to consult with counsel." *Id.* at 604.

Judge Mukasey adhered to this holding in denying the government's motion for reconsideration in which the government maintained, based on a sworn declaration from the Director of the Defense Intelligence Agency, that "[p]ermitting Padilla *any* access to counsel may substantially harm our national security interests," *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42, 50 (S.D.N.Y. 2003) (emphasis added), by disrupting "intelligence-gathering," *id.* at 49, and rupturing the forced sense of "hopelessness" the military sought to create, *id.* at 52. Judge Mukasey said those asserted national security interests could not override a citizen's need for counsel access "since there is no practical way for [him] to vindicate [his] right [to habeas corpus] other than through a lawyer." *Id.* at 54.

In *Omar v. Harvey*, Judge Urbina similarly recognized that a U.S. citizen detained by the U.S. military in Iraq must have access to counsel to vindicate his habeas rights. 514 F. Supp. 2d at 77 ("petitioner's access to the courts would mean . . . nothing without access to counsel" (quotation marks omitted)). The government's suggestion that the district judge tolerated a lengthy delay in counsel access based on where the citizen detainee had been captured, Resp. 17, is misleading at best. It was only the government's effort to challenge jurisdiction, which undeniably exists here, *see Munaf*, 553 U.S. at 686; Mot. 7, that caused delay. Once the D.C. Circuit resolved that it had jurisdiction over the habeas petition, Judge Urbina turned promptly to counsel access. *Omar*, 514 F. Supp. 2d at 76. Although the court denied without prejudice the petitioner's motion to transfer him to the United States to facilitate access to his lawyers, *id.* at

77–78, it ordered the government to show cause why it should not enable petitioner's lawyers to travel to Iraq to ensure their access to him. Order, *Omar v. Harvey*, Civ. No. 05-2374 (RMU) (D.D.C. Sept. 28, 2007), ECF No. 42. Following the issuance of this directive, the government agreed to permit the U.S. citizen detainee access to his counsel. Respondents' Resp. to Order to Show Cause at 1, *Omar v. Geren*, Civ. No. 05-2374 (RMU) (D.D.C. Oct. 8, 2007), ECF No. 44.

Courts in this district have consistently held that even non-citizens must be afforded counsel access to pursue their habeas petitions. Mot. 8 (citing cases). Despite the government's suggestion to the contrary, Resp. 19, courts afforded Guantánamo detainees access to counsel as soon as the Supreme Court determined that they had jurisdiction over their petitions. After the Supreme Court ruled in *Rasul v. Bush*, 542 U.S. 466 (2004), that non-citizens detained at Guantánamo had a right to habeas corpus under section 2241, Judge Kollar-Kotelly not only held that the detainees were entitled to counsel access, but also rejected the government's attempt to impose procedures that would abrogate the attorney-client relationship and the concomitant attorney-client privilege covering communications between them. *Al Odah v. United States*, 346 F. Supp. 2d 1, 5 (D.D.C. 2004) (relying on the federal habeas statute, the All Writs Act, and the Criminal Justice Act); *see also id.* at 7 (petitioners have a "clear" right under the habeas statute "to present facts surrounding their confinement to the Court" and it is "equally clear" that the Court has authority "to craft the procedures necessary to make this possible" by ensuring counsel access). As Judge Kollar-Kotelly explained, "The Supreme Court has found that Petitioners have the right to bring their claims before this Court, and this Court finds that Petitioners cannot be expected to exercise this right without the assistance of counsel." *Id.* at 8. For the past thirteen-plus years, judges in this district have repeatedly held that "access to the Court means nothing without access to counsel." *E.g.*, *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C.

2005). Indeed, judges regard counsel access as so vital that they have rejected government attempts to compromise it even for non-citizen detainees whose habeas cases have been dismissed and who have no pending or impending habeas case. *See In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d at 19; *id*. at 16 (finding government's opposition to counsel access "untenable").

The government's reliance on *Hamdi* and *Boumediene*, *see* Resp. 17–18, is similarly misplaced. In *Hamdi*, the Supreme Court did not rule on counsel access only because Hamdi had already been appointed counsel following the grant of certiorari. 542 U.S. at 539. Further, as the Supreme Court stated, Hamdi "unquestionably has the right to access to counsel" in habeas proceedings to challenge the basis for his detention. *Id.* In *Boumediene*, the Court addressed the rights of *non-citizens* at Guantánamo under the Constitution's Suspension Clause. 553 U.S. at 795. The Court never contemplated, let alone suggested, that it would tolerate any attempt by the government to delay a citizen's ability to access counsel to prosecute his habeas petition under the federal habeas statute or under the Suspension Clause.

The government's assertion that the unnamed U.S. citizen should be denied counsel access while it continues to deliberate over his fate contradicts settled understandings of the origins and purpose of habeas. For centuries, habeas has served as "the great and efficacious writ, in all manner of illegal confinement" precisely because it authorizes a court to determine if a person is unlawfully detained and, if so, to order his release. William Blackstone, 3 *Commentaries on the Laws of England* 131 (William Draper Lewis ed., 1902); *see also, e.g.*, *Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."). The Great Writ does not permit the government to hold a U.S. citizen for weeks,

let alone months, without access to a court or a lawyer, and thus without the ability to challenge his detention, while it ponders its options.

Further, the U.S. citizen has a right to counsel with respect to all of the possible "disposition[s]" the government is supposedly entertaining. Resp. 21. If charged, the citizen has a right to counsel under the Sixth Amendment. U.S. Const., amend VI; *Kirby v. Illinois*, 406 U.S. 682, 688–89 (1972). If held as an enemy combatant, as he is now, he has a right to counsel access to challenge the factual and legal basis for his detention. *See supra*, at 13–18. And if threatened with transfer to another country, he has the right to counsel access to prevent a transfer to torture and an unfair trial in that country. *See Omar*, 514 F. Supp. 2d at 76 (right to counsel in case challenging threatened transfer to torture in Iraq); *see also* Declaration of Belkis Wille dated Nov. 1, 2017, and attached hereto, ¶¶ 7–14 (describing significant risk that the unnamed U.S. citizen detainee will be tortured, denied basic due process, and sentenced to death if transferred to Iraqi custody).[2] Thus, nothing about the government's "process," Resp. 21, alters the citizen's bedrock right to counsel. There is no basis to continue denying him that right when his liberty and potentially his life are at stake.

The government's argument, moreover, would lead to absurd results. Under the government's view, it can deny a citizen in its custody access to counsel for a prolonged and indeterminate period while it continues to investigate and interrogate him as long as it does not bring charges against him. By contrast, once charges are filed, a citizen's right to counsel would necessarily attach under the Sixth Amendment, *Kirby*, 406 U.S. at 688–89, as would his right to prompt presentment, Fed. R. Crim. P. 5(a)(1)(B) ("[p]erson making an arrest outside the United

[2] For this reason, the ACLUF has requested that the Court order Respondent "to provide notice to the Court and to counsel for the [ACLUF] prior to any transfer of [the] Unnamed U.S. Citizen," including "transfer to the custody of another nation." Pet., Prayer for Relief ¶ D.

States must take the defendant without unnecessary delay before a magistrate judge"); *United States v. Abu Khatallah*, Case No. 14-cr-00141 (CRC), 2017 WL 3534989, at *14–16 (D.D.C. Aug. 16, 2017). The unnamed U.S. citizen has now been held for nearly two months under conditions that the Supreme Court has deemed inherently coercive. Mot. 9 (citing cases). Yet, under the government's view, the only way for this citizen to obtain access to a lawyer is to confess to a crime, including one he may not have committed. The federal habeas statute should be construed to avoid that perverse result by requiring access to counsel. *Nixon v. Missouri Mun. League*, 541 U.S. 125, 138 (2004) ("Courts will not construe a statute in a manner that leads to absurd . . . results." (citing *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940))).

Finally, this Court should reject the government's effort to deny counsel access merely because the government claims permitting access would not be "easy." Resp. 21. The Supreme Court has made clear that a jailor "may not abridge or impair [a] petitioner's right to apply to a federal court for a writ of habeas corpus." *Ex parte Hull*, 312 U.S. 546, 549 (1941); *see also Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."). In line with this bedrock principle, courts have previously rejected the government's asserted obstacles as a basis for denying counsel access even to alleged enemy combatants in military custody. *See, e.g.*, *In re Guantanamo Detainee Continued Access to Counsel*, 892 F. Supp. 2d at 27–28 (government's argument that the court would be interfering with Executive's prerogative to control classified information "does not pass the smell test"); *Padilla*, 233 F. Supp. 2d at 604 (rejecting government's contention that alleged al Qaeda operative would use counsel access to

transmit information to others). This Court should similarly reject the government's arguments here. The government does not contend that it could not facilitate counsel access, whether in person or via videoconferencing. And it has allowed counsel access to citizens in military custody before, including in Iraq. Mot. 7–8. Additionally, the ACLUF has attorneys with security clearances should the government insist that such clearance is necessary, and its attorneys have visited detainees held as enemy combatants at secure facilities in the past in order to represent them.

The government labels the relief sought by the ACLUF as "extraordinary and unprecedented." Resp. 2. But the only thing extraordinary and unprecedented is the government's brazen attempt to imprison a U.S. citizen without charge and without access to a court or lawyer for nearly two months. The government cannot eviscerate the guarantees of the federal habeas statute and the Constitution by effectively disappearing a U.S. citizen and then using the citizen's inaccessibility to deny him legal representation. The Court should order counsel access immediately to ensure the right of this American citizen to challenge his unlawful detention under the federal habeas statute and the Constitution.

IV. In the Alternative, the Court Should Order Jurisdictional Discovery.

For the reasons set forth above, the record at this stage is more than sufficient to establish the Court's jurisdiction: the government admits that it is holding the U.S. citizen in custody without charge or access to a lawyer, and it has submitted no evidence either disputing the citizen's expressed wish for counsel or identifying any person or entity better-suited to effectuate the citizen's stated interest than the ACLUF. If, however, the Court finds that it cannot sufficiently determine, based on the current record, whether jurisdiction exists, it should grant limited jurisdictional discovery to confirm the Court's ability to grant the requested relief.

Judge Bates's decision in *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004), provides an instructive precedent. There, Judge Bates sought to vindicate the overriding imperative that "the federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts for the protection of their rights in those tribunals" in the face of an inconclusive record and an inaccessible U.S. citizen held abroad. *Id.* at 54 (quoting *Alabama Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906)). In *Abu Ali*, the government disputed that the citizen was in U.S. custody and argued that the court therefore lacked jurisdiction over his habeas petition. As here, the citizen was himself unavailable due to the government's own actions. *Id.* at 67. And, as here, Judge Bates observed that a "consideration that further supports habeas jurisdiction in this case is the allegation that respondents are deliberately shielding [a U.S. citizen] from constitutional scrutiny by keeping him outside the United States." *Id.* at 54. Finally, as here, "with a single narrow exception, the United States ha[d] not offered evidence to rebut any of the information supplied and inferences reasonably raised by petitioners, even though such evidence is in many instances directly in its control." *Id.* at 69.

Faced with a record that he believed did not conclusively establish whether or not the court had habeas jurisdiction, Judge Bates held that the path forward was best served by "expeditious but cautious" jurisdictional discovery. *Id.* Such discovery, he determined, would provide petitioners "an opportunity to establish the jurisdiction of th[e] Court over their habeas petition and, if jurisdiction lies, to challenge the legality of Abu Ali's continuing detention through their petition for a writ of habeas corpus." *Id.* Allowing jurisdictional discovery did not require proof "that petitioners will be able to prove a constitutional violation; or even that they will be able to demonstrate following jurisdictional discovery that they are in the actual or

constructive custody of the United States." *Id.* at 50. But providing such an opportunity, rather than dismissing the case before any jurisdictional discovery could be taken, upheld the requirement that "courts must avoid 'legalistic' and 'formalistic' distinctions and honor the 'breadth and flexibility of the Great Writ.'" *Id.* at 46 (quoting *United States v. Morgan*, 346 U.S. 502, 506 n.3 (1954); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 807 (D.C. Cir. 1988)).

Here, and only if the Court deems it necessary to establish jurisdiction, "expeditious but cautious" discovery could confirm that: (1) the U.S. citizen indeed has expressed his desire to have counsel, as confirmed by U.S. officials to the *Washington Post*; and (2) the U.S. citizen lacks a next friend better-situated than the ACLUF to press a habeas claim seeking to vindicate his wishes, as already indicated by the fact that no other putative next friend has come forward to help secure representation for him. Such discovery is authorized by the All Writs Act, 28 U.S.C. § 1651. *See, e.g.*, *Harris v. Nelson*, 394 U.S. 286 (1969) (confirming that a district court may use the All Writs Act to compel a jailor to answer interrogatories posed by a habeas corpus petitioner).

CONCLUSION

For the foregoing reasons, and those stated in the Petition and the Emergency Motion for Counsel Access, this Court should order Respondent to provide ACLUF attorneys prompt access to the unnamed U.S. citizen to inform the citizen of his rights and to provide him the opportunity of legal representation. Alternatively, the Court should order limited and expeditious jurisdictional discovery to confirm its authority to grant the requested relief.

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Respectfully submitted,

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