IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE, and the AMERICAN CIVIL LIBERTIES UNION FOUNDATION, as Next Friend, Petitioners, v. GEN. JAMES N. MATTIS, in his official capacity as SECRETARY OF DEFENSE, Respondent.	)	Civil Action No. 1:17-cv-2069 (TSC)

RESPONDENT'S RESPONSE TO PETITIONER'S PROPOSED RELIEF

Respondent respectfully submits this response to Petitioner's November 30, 2017 filing, in which it argues that the information provided by Respondent warrants an Order from this Court either granting Petitioner "immediate unmonitored access" to the detainee in U.S. military custody in Iraq "to provide him legal advice and afford him the opportunity of legal representation" or ordering Respondent to "present to the detainee" certain questions that the detainee would answer.

This Court lacks jurisdiction to order either form of relief. Neither proposal by Respondent qualifies as "jurisdictional discovery" because both involve making inquiries not of Respondent but of the detainee. The information provided in Respondent's November 30, 2017 filing does not support Petitioner's next friend standing. The information neither establishes a relationship between Petitioner and the detainee, nor does it show that Petitioner knows the detainee's wishes in regard to the pursuit of habeas relief. To the contrary, the information provided confirms that the detainee's prior request for counsel was only in connection with his

being questioned by the FBI for law enforcement purposes. *See* Resp. Reply [ECF 15], at 5, 10. Thus, the second and third requirements for next friend standing—that a would-be next friend clearly establish that it is truly dedicated to the real party's best interests, and that it have a significant relationship with the real party—continue to be unsatisfied. *See Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 20 (D.D.C. 2010) (Judge Bates recognizing it would be inappropriate to assume a detainee wishes to seek habeas relief in a U.S. court, when the would-be next friend has not conferred with the detainee); *Does 1-570 v. Bush*, No. Civ A 05-313, 2006 WL 3096685, at *5 (D.D.C. Oct. 31, 2006) (Judge Kollar-Kotelly, same). No jurisdictional discovery could change the conclusion here that Petitioner lacks next friend standing.

Absent subject matter jurisdiction, this Court has no authority to order Respondent to make the detainee available to ACLUF lawyers, to act as ACLUF's agent in seeking information from the detainee, or otherwise to exercise supervision over the U.S. military's custody of this individual in an area of armed conflict in a foreign country. At the hearing, Petitioner cited the All Writs Act, 28 U.S.C. § 1651. However, a federal court's power under the Act is confined to process "in aid of" the court's existing jurisdiction. *See* 28 U.S.C. § 1651(a) (courts can issue writs "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). The Act does not provide a substitute basis for authority where jurisdiction is otherwise lacking, nor does it enlarge the court's jurisdiction. *See Clinton v. Goldsmith*, 526 U.S. 529, 534-36 (1999); *see also al Odah v. United States*, 62 F. Supp. 3d 101, 110–11 (D.D.C. 2014) (denying relief under All Writs Act because, "In the absence of some other basis for jurisdiction, Petitioner is not entitled to the relief sought under the All Writs

Act"); *Ross v. United States*, 460 F. Supp. 2d 139, 151 (D.D.C.2006) (holding that "the Act itself is not a grant of jurisdiction ... [the] statutory language makes clear that the authority to issue writs is confined to the issuance of process 'in aid of' jurisdiction that is created by some other source and not otherwise enlarged by the All Writs Act."). The Act allows a court to issue extraordinary writs, when no other remedy is available to prevent improper threats or impediments to subject matter jurisdiction then being exercised by the court. *See ITT Comm. Develop. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978). The Act does not give a court *carte blanche* to oversee all matters relating to the subject area of issues before it. *Goldsmith*, 526 U.S. at 536-37.

Petitioner's proposal invites the Court to intervene in the U.S. military's detention of an individual currently held as an enemy combatant in Iraq when neither the detainee nor any proper next friend has sought habeas relief on his behalf. While the Court at the hearing expressed concern at the prospect that the detainee's current circumstance might continue indefinitely, Respondent has indicated that that is not the Government's intention, and it is diligently working to make a determination regarding this detainee's future status. The Supreme Court has recognized that such determinations can take a reasonable period of time, and that courts should not entertain, during this period, even a properly filed habeas petition for a detainee held in a detention facility that is not in an active theater of war and that is not (in any practical sense, as the Court held) in a foreign country. *Boumediene v. Bush*, 553 U.S. 723, 795 (2008). Moreover, next friend standing must be established as of October 5, 2017, when Petitioner filed its petition. *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009) ("standing is assessed as of the time a suit commences"). Accordingly, this case

does not present an extraordinary circumstance that justifies the unprecedented holding that Petitioner has next friend standing, given the absence of any relationship at all with the detainee, and Petitioner's repeated admission that it does not know the detainee's wishes. The Court therefore should reject Petitioner's proposal and instead dismiss the petition for lack of standing.

December 1, 2017

Respectfully submitted,

CHAD A. READLER
Principal Deputy Assistant Attorney General
JESSIE K. LIU
United States Attorney
TERRY M. HENRY
Assistant Director, Federal Programs Branch

/s/ Kathryn L. Wyer
KATHRYN L. WYER
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue, N.W.
Washington, DC 20530
Tel. (202) 616-8475 / Fax (202) 616-8470
kathryn.wyer@usdoj.gov
Attorneys for Respondent