No. 05-892

IN THE

Supreme Court of the United States

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,
Petitioners,

v.

GEORGE W. BUSH, *et al*.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE UYGHUR AMERICAN ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

The question presented is whether the District Court, which had jurisdiction over Petitioners' petitions for habeas corpus and determined that Petitioners' continued military detention was unlawful, had the power to craft a remedy to protect Petitioners' liberty interests from further unlawful deprivation.

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INTRODUCTION

The Uyghur American Association ("UAA") respectfully submit this brief as *amicus curiae* pursuant to Sup. Ct. R. 37.3 in support of Petitioners' application for a writ of certiorari before judgment.[1]

STATEMENT OF INTEREST

East Turkistan has been under the dominion of the People's Republic of China ("PRC" or "China") and referred to by that government as the Xinjiang Uyghur Autonomous Region since 1949. Uyghurs, a largely Muslim people, have long struggled for cultural recognition and self-determination. UAA represents the Uyghur community located in the United States - - a community of people who left their homeland to seek freedom and opportunities unavailable to them in China. UAA works to preserve the rich, humanistic, and diverse Uyghur culture, and to support the Uyghur people's right to use peaceful and democratic means to determine their own political future.

UAA understands that the Petitioners in this case, Guantanamo Bay detainees from East Turkistan, fled China in an effort to reach a relative haven where they could find work and rebuild their lives - - only to be seized and sold to U.S. military authorities. After years of incommunicado detention, the military has determined that Petitioners are not enemy combatants; yet they remain incarcerated thousands of miles from friends and family and without any foreseeable prospect of release. The District Court found that Petitioners' detention was unlawful, but deemed itself incapable of fashioning a remedy. With respect, UAA believes that the District Court erred. A remedy is not only possible, but obligatory.

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[1] The parties consented in writing to UAA's participation in this case, and their consents have been filed with the Clerk of the Court. No party to this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission. Sup. Ct. R. 37.6.

UAA is uniquely situated to offer assistance to the Court and the Executive to fashion a remedy. In the District Court, the Uyghur community and UAA members offered to provide housing, food, clothing, English language training, and gainful employment to Petitioners if they are paroled into the continental United States. UAA submits this brief in part to reaffirm that offer.

ARGUMENT SUMMARY

This case is about the liberty of two illegally detained men and the efficacy of the Great Writ. The District Court recognized that the continuing detention of Petitioners is both indefinite and unlawful. *Qassim v. Bush*, 407 F. Supp. 2d 198, 201 (D.D.C. 2005). Nevertheless, it found that, due to constitutional "obstacles" that "involve the separation of powers," it could not offer Petitioners any relief. *Id.* at 202. This conclusion fails to vindicate Petitioners' indisputable liberty interests and, if upheld, will eviscerate the habeas remedy they and the other Guantanamo detainees won less than two years ago in the Supreme Court. *Rasul v. Bush*, 542 U.S. 466, 483 (2004).

Uyghurs have endured decades of mistreatment at the hands of the PRC. Their status as a religious and ethnic minority has exposed them to countless indignities, including the targeted dilution of their culture and the denial of their most basic civil, religious, and political rights. Many Uyghurs have fled China, seeking opportunities to rebuild their lives and communities elsewhere. This case concerns two such Uyghurs - - Abu Bakker Qassim and Adel Abdu' al-Hakim - - men who left their homes and families in search of work and freedom. As the District Court noted, "the government has not stated that [Petitioners] were ever suspected of having engaged in armed conflict against the United States." *Qassim*, 407 F. Supp. 2d at 200. Nevertheless, they were seized and detained as "enemy combatants," and were subsequently transported to Guantanamo Bay, Cuba.

Although the Executive now has determined that it was wrong to label these men "enemy combatants," it refuses to release them. Its principal justification for continued detention is the power to "wind up" Petitioners' captivity in a manner satisfactory to the Executive. The District Court rightly rejected this frightening attempt to justify indefinite, unlawful detention. This Court reached the same result 60 years ago when the government made a similar claim to hold an admittedly loyal U.S. citizen of Japanese descent in an internment camp. *See Ex parte Endo*, 323 U.S. 283, 302-04 (1944).

According to the Executive, even if Petitioners are wrongfully detained, the courts cannot order them released. The Executive will not release them to China because, as Uyghurs, they face the prospect of further detention and torture in China. It will not parole them into the continental United States, because, at bottom, it does not want them in the continental United States, and asserts plenary authority to keep them out. The Executive's solution is to let Petitioners sit at Guantanamo Bay indefinitely until another nation consents to take them.

The District Court's failure to order Petitioners' release guts the habeas relief granted in *Rasul* and diverges from centuries of habeas jurisprudence. The Great Writ is a Judicial check on Executive authority to imprison. The remedy it provides is release. Having determined that Petitioners were and are wrongfully detained, the Writ demands that the courts order their release.

Fortunately, this Court need not craft and implement a remedy on its own. UAA is here to help the court fashion an appropriate solution. UAA and its constituents stand willing to take Petitioners in and to help them meet any conditions of release that may be imposed.

ARGUMENT

I. PETITIONERS ARE NOT ENEMY COMBATANTS.

A. The Uyghur People Have Endured Decades of Discrimination and Brutal Oppression.

Uyghurs have suffered greatly at the hands of the communist government since it came to power in 1949. The State Department annually documents human rights practices in reports that prominently feature the plight of the Uyghur people in China. *See generally Country Reports on Human Rights Practices-2004: China*, Bureau of Democracy, Human Rights, and Labor, U.S. Department of State (Feb. 28, 2005) ("*China Report*").[2] The China Report states that the Uyghur people are subject to increasing, state-sponsored oppression. *Id.* The PRC's conduct reflects an apparent effort to extinguish the Uyghur ethnic, cultural, and religious identity.

The PRC has promoted the steady migration of Han Chinese to East Turkistan on a scale sufficient to dilute the Uyghur majority in the region. The Han population in East Turkistan rose from roughly 300,000 in 1949 to over 8.25 million in 2003, rivaling that of the Uyghur population. In recent decades the Han migration has targeted East Turkistan's capital, Urumqi, where the Han-Uyghur ratio shifted from 20:80 to 80:20. *See id.* at 35.

The steady and calculated Han migration has accompanied a systematic denial of civil, political, and religious freedoms to the native Uyghur population. Economic opportunity is disproportionately distributed along ethnic lines, even to the extent of shipping Han workers to East Turkistan to work on large development projects at the expense of local Uyghur

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[2] These country reports for various countries and years are available on the U.S. State Department worldwide web page at the following address: http://www.state.gov/g/drl/rls/hrrpt/2004/index.htm. Page citations are to the HTML printed version of the report.

labor. *Id.* The China Report notes that "[t]he majority Han Chinese have benefited disproportionately from government programs and economic growth, even in minority areas. Many development programs have disrupted traditional living patterns of minority groups, and have included, in some cases, the forced evacuation of persons." *Id.*

Uyghur participation in the political process is largely illusory and any expression of dissent is potentially dangerous. Ethnic minorities are excluded from positions of real political and economic power; Han officials hold the most powerful Party positions in minority autonomous regions, such as East Turkistan. *Id.* Uyghur political, religious, and economic leaders are targeted for intimidation, incarceration, and execution, based on charges as preposterous as passing "newspaper articles and a list of names of persons whose cases had been handled by the courts." *Id.* at 36. In one of the more recent campaigns to stifle Uyghur dissent, the State Department reported that justice was handed out in the presence of "mass sentencing rallies attended by more than 300,000." *Id.* The PRC is not beyond the forced repatriation and execution of dissenting Uyghurs who have been granted refugee status by the United Nations High Commissioner for Refugees. *Id.*

The Uyghur people are largely Muslim - - a trait that singles them out for further persecution. "Officially sanctioned" mosques are free to operate, *id.* at 21, but "[r]egulations restricting Muslims' religious activity, teaching, and places of worship continued to be implemented forcefully in Xinjiang," *id.* at 23. Religious personnel have been subject to "monthly political study sessions." *Id.* In East Turkistan, mosque building and religious training are restricted, as is the teaching of Islam to children under the age of 18. *Id.* Teachers, professors, and university students are not allowed to practice religion openly. *Id.* at 24. Uyghurs are imprisoned for engaging in non-descript "illegal religious activities," *id.* at 23,

a loose term for any religious activity beyond those sanctioned by the authorities.

Uyghur culture and history are also openly under attack. Cultural promotion and research are plainly frowned upon by the communist authorities, with cultural leaders, researchers, and activists detained and subjected to long prison terms. *Id.* at 36. Uyghur heritage is being erased through such acts as the destruction of books on Uyghur history and culture. *Id.* at 17.

The "war on terror" has emboldened the PRC's assimilation campaign. "Because the Government authorities in Xinjiang regularly grouped together those involved in 'ethnic separatism, illegal religious activities, and violent terrorism,' it was often unclear whether particular raids, detentions, or judicial punishments targeted those peacefully seeking to express their political or religious views or those engaged in violence." *Id.* at 36. "The [Chinese] Government used the international war on terror as a pretext for cracking down harshly on suspected U[y]ghur separatists expressing peaceful political dissent and on independent Muslim religious leaders." *Id.* at 2.

B. Petitioners' Flight from China Earned Them Imprisonment Outside of China at the Hands of United States Authorities.

Petitioners fled oppression in China in search of greater economic opportunity and personal freedom. Their paths crossed in Kyrgyzstan, and together they planned to make their way to Turkey in search of work. July 16, 2005 Sabin Willett Decl. ("July 16, 2005 Willett Decl.") ¶ 6 (Doc. No. 24, Attach. 2).[3] Their journey ended short of its goal in Pakistan, where in late 2001 they were seized and sold to U.S.

[3] The first citation to papers, pleadings and minutes from the record below are accompanied by a reference to the relevant document number in the District Court docket for *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005).

authorities, apparently for $5,000 each. *Id.* ¶ 7. They spent approximately the next six months in U.S. military custody in Kandahar, Afghanistan. *Id.* ¶ 10.

During their detention in Kandahar, Petitioners learned that they had been inadvertently detained in the confusion associated with U.S. military operations against the Taliban. Mr. Hakim was advised by a U.S. interrogator that "the Americans knew that Mr. Hakim had been seized by mistake." *Id.* Similarly, an interrogator informed Mr. Qassim that "the U.S. was 'there to capture Arabs,' and that Qassim 'was in the wrong place at the wrong time,' and swept up in the 'wrong net.'" Sept. 8, 2005 Sabin Willett Decl. ("Sept. 8, 2005 Willett Decl") ¶ 22 (Doc. No. 35). Half-way around the globe and nearly three years later, the U.S. Combat Status Review Tribunal ("CSRT") process would officially confirm those observations, finding that Mr. Qassim and Mr. Hakim, now long incarcerated in Guantanamo Bay, Cuba, were not enemy combatants. The final step in the CSRT process was completed on March 26, 2005,[4] *see* Aug. 1, 2005 Mot. Hr'g Tr. ("Aug. 1, 2005 Tr.") at 5, but the Executive did not tell Petitioners they were exonerated until two months later. Petitioners' counsel and the District Court did not learn of the CSRT outcome until four months later. July 16, 2005 Willett Decl. ¶¶ 12-14.

Petitioners have endured more than four years of now concededly wrongful captivity in virtual isolation at the hands of the military. Petitioners have almost no contact with their families. UAA understands that Mr. Qassim has had no contact with his wife and three children, including twins he has never seen. *Id.* ¶ 4; Sept. 8, 2005 Willett Decl. ¶ 18. Mr.

[4] According to public sources, Petitioners may have in fact been initially identified as non-enemy combatants over one year earlier. *See* Mem. in Supp. of Pet'rs Emergency Mot. to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners ("July 20, 2005 Pet'rs Mem.") at 2 (July 20, 2005) (Doc. No. 24, Attach. 1); *see also* Aug. 1, 2005 Tr. at 7.

Hakim also is married with three children, the youngest of whom he too has never met. July 16, 2005 Willett Decl. ¶ 5. After years of incommunicado detention, Mr. Hakim was finally allowed a telephone call with his sister on August 23, 2005. Sept. 27, 2005 Susan Baker Manning Decl. ("Sept. 27, 2005 Manning Decl.") ¶ 4 (Doc. No. 38). At a meeting with counsel, Mr. Hakim was allowed to view photographs of his family, but the photographs could not be left with him and it is unclear whether they were ever released to him. Sept. 8, 2005 Willett Decl. ¶ 12. To UAA's knowledge, Petitioners remain without access to radio, newspapers, magazines or television, except for videos of cartoons and Arabic movies, none of which are in the Uyghur language. *Id.* ¶ 7.

The circumstances under which Petitioners are allowed to discuss their legal status is, at best, intimidating. They have been told by military lawyers as late as October 2005 that the involvement of outside counsel would only make their release more difficult. Dec. 9, 2005 Neil McGaraghan Decl. ("Dec. 9, 2005 McGaraghan Decl.") ¶ 11 (Doc. No. 53). Correspondence between Petitioners and their attorneys has been seized and not delivered. Sept. 8, 2005 Willett Decl. ¶ 7. Face-to-face discussions with their attorneys occur in separate facilities where they are kept in complete isolation. Consultations with counsel - - even by telephone - - are conducted with Petitioners shackled to the floor. Sept. 27, 2005 Manning Decl. ¶ 8.

Petitioners are bombarded with conflicting messages. Suggestions that they will be freed "soon," Sept. 8, 2005 Willett Decl. ¶ 23, and findings of the CSRT that they are not enemy combatants collide with other statements by U.S. military representatives "that they have no more rights that any of the enemy combatants imprisoned at Guantanamo." Dec. 9, 2005 McGaraghan Decl. ¶ 9. Mr. Qassim has expressed concerns about whether the United States is in fact telling potential host countries that he and Mr. Hakim are terrorists. *Id.* ¶ 5.

The military compounded the psychological burdens Petitioners suffer when it permitted PRC interrogators access to Guantanamo, where they threatened both Mr. Qassim and Mr. Hakim. According to Mr. Hakim, the interrogators made comments to the effect that he was "lucky" the Pakistanis turned him over to U.S. authorities and that Guantanamo Bay was far better than the prison that awaited him in China. July 16, 2005 Willett Decl. ¶ 9.

Despite the extreme stress of their seizure and prolonged military detention at Guantanamo Bay, Petitioners remarkably harbor no ill will toward their captors or the United States in general. They never did. Indeed, each expresses support for America. Sept. 8, 2005 Willett Decl. ¶ 17; July 20, 2005 Pet'rs Mem. at 5.

C. Petitioners Remain Prisoners of the United States, Not for the Danger They Pose to the United States, but for the Danger China Poses to Them.

Petitioners cannot go home. We know this from the PRC interrogators who came to Guantanamo Bay, and the Executive acknowledges that torture likely awaits Petitioners if they are released to the government in China. *See, e.g.*, Sept. 8, 2005 Willett Decl., Exs. B & C. The Executive's counsel has made this fact very clear. Aug. 1, 2005 Tr. at 14 ("it's more likely than not that they [Petitioners] will be tortured"). When the District Court obliquely states that "China is keenly interested in [Petitioners'] return," *Qassim*, 407 F. Supp. 2d at 203, the implication is quite dire.

II. PETITIONERS' LIBERTY INTEREST IN FREEDOM FROM UNLAWFUL AND INDEFINITE MILITARY DETENTION IS INDISPUTABLE AND DEMANDS RELEASE.

In *Rasul*, this Court announced that Guantanamo detainees possess the right to challenge their detention through the writ of habeas corpus. *Rasul*, 542 U.S. at 483. Because the Great

Writ exists principally to safeguard individual liberty, it necessarily follows that Guantanamo detainees have individual liberty interests that demand protection. Petitioners invoked the Great Writ to vindicate those interests, and the District Court correctly determined that the government's sole justification for continued detention - - a so-called "wind-up" power - - was both meritless and dangerous.

Unfortunately, the District Court allowed the government to persuade it that other "obstacles" to Petitioners' release left the courts without the power to order a remedy. The District Court erred. The writ is an ancient and flexible mechanism for checking unlawful exertions of government authority, and its equitable nature empowers the courts to do justice in particular cases. Release into the United States, through some form of parole, is the only way for this Court to vindicate Petitioners' liberty interests and to protect the integrity of the habeas remedy. The "obstacles" over which the District Court stumbled are not sufficient to divest the courts of the power to order a remedy.

A. The Great Writ Protects the Right to Be Free from Unlawful Detention.

The writ of habeas corpus provides individuals held in unlawful detention with a procedure to seek their release. 28 U.S.C. § 2241. This has been its core historical function, particularly in times of crisis:

> Habeas corpus has time and again played a central role in national crises, wherein the claims of order and liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty . . . . Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the

> fundamental requirements of the law, the individual is entitled to his immediate release.

Fay v. Noia, 372 U.S. 391, 401 (1963); *see also Rasul*, 542 U.S. at 474.

The right to invoke the writ imparts a corresponding right to be free from unlawful detention. *Fay*, 372 U.S. at 430-31; *INS v. St. Cyr*, 533 U.S. 289, 301-03 (2001). Unlawful detention is detention that is inconsistent with the Constitution, laws and treaties of the United States. *See Rasul*, 542 U.S. at 483 n.15; *see also, e.g., Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (placing limits on detentions in immigration context); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (placing limits on detaining the mentally ill). Because this Court held that Qassim and Al-Hakim have a right to bring a writ of habeas corpus, *see Rasul*, 542 U.S. at 484, they also must possess the right to be free from unlawful detention.[5]

B. The Executive Does Not Have the Power to "Wind Up" Detentions.

As the District Court noted, "[t]he status of 'enemy combatant' has been, until now, the only handhold for the government's claim of executive authority to hold detainees at Guantanamo," under the authority recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Qassim*, 407 F. Supp. 2d at 199. In *Hamdi*, this Court ruled that the Authorization for Use of Military Force ("AUMF"),[6] gives the Executive the

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[5] The right to be free from unlawful detention has been recognized as a core interest in our constitutional framework, *see Foucha*, 504 U.S. at 80, and in international law, *see* International Covenant on Civil and Political Rights art. 9, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

[6] The AUMF provides in relevant part: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, 115 Stat. 224 (2001).

power to detain the "limited category" of individuals who it alleges are part of or supporting forces hostile to the United States in Afghanistan and who engaged in armed conflict against the United States as "enemy combatants." *Hamdi*, 542 U.S. at 518-19. As the District Court also recognized, because Petitioners are not enemy combatants, the Executive needs "a new reason" to continue their detention. *Qassim*, 407 F. Supp. 2d at 199.

The government seeks to stretch the authority granted in *Hamdi*, arguing that even if Petitioners are not enemy combatants, they can be held on Guantanamo for as long as it takes the Executive to "wind up" their detention by finding a place to send them that suits the Executive's purposes. In the government's words: "The Executive's power to detain a suspected enemy combatant necessarily includes the authority to wind up that detention in an orderly fashion after a detainee has been determined to no longer be an enemy combatant or after hostilities have ended." Resp't Supplemental Mem. Pursuant to the Court's Invitation at the Aug. 1, 2005 Hr'g ("Aug. 8, 2005 Resp't Mem.") at 13 (Doc. No. 27); *see also Qassim*, 407 F. Supp. 2d at 200. Because the Executive's actions in bringing Petitioners to Guantanamo, wrongly labeling them as enemy combatants and exposing them to the PRC have effectively rendered Petitioners stateless, this amounts to an argument that they can be held indefinitely, as the District Court correctly concluded. *Qassim*, 407 F. Supp. 2d at 201. Of course, neither *Hamdi* nor the AUMF contains such an authorization. On the contrary, the *Hamdi* court reiterated that its opinion authorizing the detention of enemy combatants was strictly limited to its narrow definition of an enemy combatant. 542 U.S. at 509, 516.

The Executive's position recalls one of the darker chapters of our history. Sixty years ago, the government argued that an Executive Order that set up procedures for the internment of "disloyal" U.S. citizens of Japanese ancestry gave it the authority to continue to hold a citizen who concededly was

"loyal" and not otherwise subject to detention in order to resolve "situations created by the exercise of [the original power to detain.]" *Ex parte Endo*, 323 U.S. at 297. The Court disagreed. It refused to read the Executive Order to imply powers beyond those necessary to effect the purpose of the provision, which was to protect against espionage and sabotage: "When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Id.* at 302. Similarly, here, when the government's power to detain is based on its power to prevent combatants from returning to the battlefield as an exercise of "necessary and appropriate force" in connection with waging war, *Hamdi*, 542 U.S. at 519, detention that has no relationship to that objective is unauthorized, and must be remedied.

C. A Judicial Remedy is Both Available and Required.

The Executive argues that even if the detention is unlawful, the federal courts are powerless to order a remedy. The Executive posits that no court could order Petitioners' release because (1) they may not be "benign," *see* July 29, 2005 Resp't Mem. in Opp'n to Pet'rs Mot. to Vacate Stay Order and Issue Writ Directing Immediate Release of Pet'rs at 9 (Doc. No. 25); (2) release would interfere with ongoing diplomatic efforts to affect a remedy and relocate Petitioners, *see id.* at 5; and (3) release into the continental United States would improperly violate the Executive's plenary control over entry into the United States, *see* Aug. 8, 2005 Resp't Mem. at 3-4, 16-19. None of these justifications is sufficient to prevent a judicial remedy.

The District Court properly rejected the Executive's first justification, calling it "Kafkaesque." *Qassim*, 407 F. Supp. 2d at 200. The Executive cannot spin the CSRT outcome to support its rhetorical notion that, while no longer enemy combatants, Petitioners may once have been such. Petitioners

have *never* been deemed enemy combatants by any appropriate tribunal, much less a court.

The District Court was more troubled by the Executive's second and third arguments, ultimately concluding that they presented constitutional obstacles "and involve the separation of powers doctrine" in a way that precludes a judicial remedy. *Id.* at 202.

The District Court's decision does not uphold separation of powers; it undermines the Judiciary's historic role as protector of individual liberty. Indeed, the District Court's decision would not maintain appropriate separation between coordinate branches of government, but would "*condense* power into a single branch of government." *Hamdi*, 542 U.S. at 536. Just as the Supreme Court in *Hamdi* rejected the government's contention that separation of powers prevents the courts from passing on the facts alleged to support detention of a particular individual as an enemy combatant, this Court should reject the contention that separation of powers prevents the courts from ordering a remedy once the facts show that detention is unlawful. *Id.* at 535-36. As the *Hamdi* court admonished: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 536.

The District Court's decision not only misperceives separation of powers, it also undermines the Judiciary's ancient and fundamental power for remedying illegal deprivations of liberty. Petitioners indisputably have the right to challenge their detention by invoking the Great Writ. *Rasul*, 542 U.S. at 483-84. Petitioners invoked that right to seek habeas review, and the District Court ruled that their military detention is unlawful. *Qassim*, 407 F. Supp. 2d at 201. That finding, standing alone, mandates a remedy. The District Court's conclusion to the contrary negated the habeas right

affirmed in *Rasul*, and eliminated the court's ability to check Executive overreaching. This outcome is exactly what this Court warned against in *Hamdi*. *Rasul*, 542 U.S. at 536. The doctrine of separation of powers does not prevent a remedy; on the contrary, it demands that the courts exercise their power to issue a writ for Petitioners' release.

D. Petitioners Should be Paroled into the United States.

The language of the habeas corpus statute reveals the breadth of the power it vests in the federal courts: "The court shall summarily hear and determine the facts, and dispose of the matter *as law and justice require*." 28 U.S.C. § 2243 (emphasis added). The writ "is, at its core an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). Historically, the equitable nature of the writ has allowed courts the flexibility to fashion relief appropriate to the unique facts and circumstances presented by a particular case. *See, e.g., Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief."); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) ("[The writ of habeas corpus] is not now and never has 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."); *Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("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 the courts and lawmakers.").

The District Court considered several potential avenues for granting relief to Petitioners, but ultimately concluded that none were available. The District Court erred. The federal judiciary has inherent power to devise an interim remedy in a

case such as this. It can and should order the conditional release of Petitioners into the United States pending the ultimate resolution of the government's ongoing diplomatic efforts to gain Petitioners entry into a country other than China.

The federal courts have long recognized the availability of interim relief in habeas cases. *See Baker v. Sard*, 420 F.2d 1342 (D.C. Cir. 1969) (holding that pending its determination on the merits of petitioner's habeas claim, it possessed the inherent power to grant relief *pendente lite*, including conditional release); *see also Mapp v. Reno*, 241 F.3d 221, 227 (2d Cir. 2001) ("Absent a clear direction from Congress, federal judicial power is unaltered, and the authority of the federal courts to admit to bail parties properly within their jurisdiction remains unqualified."); *Ostrer v. United States*, 584 F.2d 594, 597 n.1 (2d Cir. 1978) ("The district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody."); *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955) ("One of the inherent powers of the judiciary with regard to proceedings before it has been the admission of a prisoner to bail where, in the exercise of his discretion, the judge deems it advisable.").

The relief Petitioners seek is nothing more than the relief that the Federal Rules of Appellate Procedure and the Rules of the Supreme Court recognize as being presumptively due a successful habeas petitioner pending appeal of the habeas decision. Fed. R. App. P. 23; Sup. Ct. R. 36. In cases where the state or federal detention of a petitioner has been found unlawful by a lower court, these rules recognize a strong presumption that the petitioner will "be released on personal recognizance, with or without surety" pending appeal. Fed. R. App. P. 23(b)(3). In many cases, those entitled to the presumption are individuals who were previously accused and convicted of violent crimes and may not be considered

"entirely benign" by the government or the court. Nevertheless, the rules recognize that once the legal basis for the detention has been removed, the interest of the habeas petitioner in release is substantial. *Hilton*, 481 U.S. at 777-78.

Even in the immigration context, prolonged or indefinite detention of aliens pending the outcome of the administrative, political, or diplomatic efforts that will determine their fate is the exception, not the rule. *Cf. Ma v. Barber*, 357 U.S. 185, 190 (1958) ("The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted."); *United States ex rel. Picicci v. District Dir. of Immigration & Naturalization at Port of N.Y.*, 181 F.2d 304, 305 (2d Cir. 1950) (granting release where deportation was held in abeyance during the pendency of a private bill in the Senate granting Petitioners the right of admission for permanent residence); *Diaz v. Haig*, 594 F. Supp. 1, 5-9 (D. Wyo. 1981) (noting that the government's ongoing development of a plan for release was "commendable," but holding that alien detainees were entitled to immediate release pending government's determination of their fate). Where legitimate governmental concerns may exist, even the assertion of "plenary" Executive authority cannot justify indefinite detention. *Cf. Zadvydas*, 533 U.S. at 696; *Clark v. Martinez*, 543 U.S. 371, 386 (2005). Rather, the authority to detain has always been and remains subject to a rule of reasonableness, *cf. Zadvydas*, 533 U.S. at 699-700, enforceable through the Great Writ, *Rasul*, 542 U.S. at 484.

Petitioners' detention of more than four years exceeds any notion of reasonableness. *Cf. Zadvydas*, 533 U.S. at 699-700. It would be all the more unreasonable to allow the Executive to escape accountability by invoking its "plenary" powers over diplomacy and immigration given that it is the Executive's overreaching that created Petitioners' predicament. *Cf. United States ex rel. Paktorovics v. Murff*, 260 F.2d 610, 614 (2d Cir. 1958) (executive's conduct conferred on alien rights

that alien would not otherwise have possessed); *Corniel-Rodriguez v. INS*, 532 F.2d 301, 302 (2d Cir. 1976) (ordering entry where alien was made deportable only through executive conduct); *Diaz*, 594 F. Supp. at 6-7 (estopping the government from asserting exclusive authority over aliens and ordering release of aliens to community members).

UAA stands ready and willing to provide whatever assistance the court may require in fashioning and implementing parole. During proceedings before the District Court, members of the Uyghur American community repeatedly offered to provide housing and employment to Petitioners, if they were granted conditional release. *See* Dec. 12, 2005 Status Conference Tr. at 17 ("WILLETT: I can bring into this courtroom resident alien U[y]ghur expatriates who have offered us bedrooms for these men, who have offered us jobs, who have called us on the phone to say how can we help . . . . We can show you a community of people who can make this work at a practical level . . . ."); Aug. 25, 2005 Status Conference Tr. at 24 ("WILLETT: Mr. Parhat Yassin (ph), who is in the courtroom today and is a resident asylee U[y]ghur escaped from China himself, and who has called me up to offer his home as a refuge for these people . . . .").[7] UAA and the Uyghur American community it represents hereby reiterate their offer of assistance and support. UAA understands the plight of Petitioners and is in a unique position to help them meet any conditions of release this Court may choose to impose.

Notably, there is precedent for the use of community resources to remedy unlawful government detention. *Diaz*, 594 F. Supp. at 8-9 (releasing aliens to custody of community members pending government's implementation of a long-

[7] Mr. Parhat Yassin has a personal connection to Petitioner Al-Hakim. Several members of the Uyghur American community, including Mr. Yassin, were students of Petitioner Al-Hakim's father, a well-respected high school teacher in East Turkistan.

term plan for their future). The availability of such resources in this case is clear, and the need for their use is compelling.

III. THIS COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT

This Court should grant certiorari before judgment because this case is "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. This case implicates at least two interests that taken together merit the Court's immediate attention: the indefinite deprivation of the liberty of admittedly wrongfully held individuals, and the concurrent subversion of the habeas remedy this Court recognized in *Rasul*. *Compare Ex parte Quirin*, 317 U.S. 1 (1942) (granting petitions for certiorari filed by accused saboteurs before court of appeals rendered judgment); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 269 (1947) (granting certiorari prior to judgment where prompt resolution of dispute was in the public interest); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) (granting certiorari before court of appeals reached merits of dispute to achieve prompt resolution of wartime controversy); *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) (granting certiorari to review directly district court decision dismissing challenge to segregation in public schools "because of the importance of the constitutional questions presented"); *United States v. Nixon*, 418 U.S. 683, 689-90 (1974) (granting cross-petitions for certiorari before judgment in case that implicated core executive powers and the role of the federal courts); *Dames & Moore v. Regan*, 453 U.S. 654, 659-62, 667-68 (1981) (granting certiorari before judgment in court of appeals to address exercise of Executive authority and Judiciary's role in defining limits on that authority); *Mistretta v. United States*, 488 U.S. 361, 371 n.6 (1989) (granting certiorari before judgment because challenge to federal sentencing guidelines was of great importance and because of conflict in lower courts regarding the constitutionality of the system).

As in all of the foregoing cases, this case involves critical issues related to the limits of Executive and Judicial powers in matters of extreme public importance and prominence. It is no exaggeration to say that the world is watching how the United States Judiciary handles the Guantanamo detainees generally, and this case in particular. The Executive has no legitimate basis for continuing to hold Petitioners, and likely never did. After four years of wrongful detention, the efficacy of Petitioners' habeas rights turns as much on the speed with which the courts are able to provide a remedy as on the remedy itself. For this reason, the decision of the Court of Appeals for the District of Columbia Circuit to grant expedited review does not minimize the need for this Court's immediate consideration. Further delay in this case, even the delay associated with allowing the Court of Appeals to hear and pass on this matter, will extend a grave and now quite public injustice that has already gone on too long. This Court should intervene now to ensure that Petitioners' wrongful confinement ends, to uphold the habeas remedy recognized in *Rasul*, and to clarify the roles of the Executive and Judiciary branches in matters of this kind.

CONCLUSION

UAA urges the Court to grant Petitioners' petition for a writ of certiorari before judgment and to issue a writ of habeas corpus releasing Petitioners from their unlawful military captivity.

Respectfully submitted,

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