Nos. 06-1195, 06-1196

IN THE SUPREME COURT OF THE UNITED STATES

LAKHDAR BOUMEDIENE, *ET AL.*,

Petitioners,

v.

GEORGE W. BUSH, *ET AL.*,

Respondents.

KHALED A. F. AL ODAH, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

APPLICATIONS TO SUSPEND ORDER DENYING CERTIORARI

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

Petitioners, foreign nationals held in the custody of the United States at Guantanamo Bay Naval Station, Cuba, apply under Supreme Court Rule 16.3 to suspend the Court's order entered April 2, 2007, denying certiorari in these cases.[1] Petitioners simultaneously have applied for an extension of time within which to petition for rehearing of the denial of certiorari based on the inadequacy of their remedy under the Detainee Treatment Act of 2005, §1005(e)(2), Pub. L. No. 109-148, 119 Stat. 2680 ("DTA").[2] The reason for this application is that, unless the order denying certiorari is suspended, petitioners will suffer irreparable harm from the district court's grant of a motion filed by the government on April 19, 2007, to dismiss all pending Guantanamo habeas cases. In that motion the government asks the district court to dissolve the protective order authorizing counsel to visit and communicate with petitioners and other important procedural orders affecting petitioners' ability to seek and obtain judicial relief. A suspension of the order denying certiorari will preserve the *status quo ante* and will not adversely affect the government, given that proceedings in the pending habeas cases will remain stayed by order of the district court. Suspension also is warranted because there is a substantial likelihood that, on rehearing, the Court will reverse its decision and grant certiorari. *See Richmond v. Arizona*, 434 U.S. 1323, 1325 (1977) (Rehnquist, J., Circuit Justice).

1. On April 19, 2007, the government moved in the district court to dismiss all pending Guantanamo habeas cases and dissolve the current protective order authorizing counsel to visit

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[1] Petitioners in the *Al Odah* case previously lodged with the Clerk of the Court an emergency application addressed to the Chief Justice to stay the issuance by the court of appeals of its mandate in that case. That application has not been forwarded to the Chief Justice because the court of appeals has not yet issued its mandate.

[2] Petitioners have annexed to this application a copy of their application for an extension of time.

their detainee-clients at Guantanamo and all other procedural orders entered in those cases. The current protective order was entered by the district court after extensive negotiations, briefing, and oral argument, and includes provisions imposed by the court where the parties disagreed but not the restrictions now sought by the government from the court of appeals. The other procedural orders govern such matters as (i) communications between detainees and their counsel; (ii) counsel access to and handling of classified information, including information vital to counsel's representation of the detainees; (iii) contemplated transfers of detainees from Guantanamo; and (iv) preservation of counsel papers and government records.

Absent suspension of the order denying certiorari, the district court will be free to grant the government's motion, inflicting irreparably harm upon petitioners. First, the government – which maintains that the Guantanamo detainees have *no* legal rights whatsoever – will completely control the terms and conditions of communications between petitioners and their counsel, unless and until the court of appeals establishes procedures to govern DTA cases.[3] Second, the government no longer will be constrained by the current procedural orders from transferring petitioners from Guantanamo to countries or facilities where they may be tortured or abused, and by transferring petitioners from Guantanamo, effectively defeat the jurisdiction of the federal courts. Third, document preservation orders entered by the district court will lapse, and counsel will be required to destroy their files within 60 days after the cases are dismissed.

In contrast, suspension of the order denying certiorari will preserve the *status quo ante* without harming the government at all. Neither petitioners nor any other Guantanamo detainees

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[3] The government has moved in the court of appeals for entry of a new, far more restrictive protective order for DTA cases, and for DTA procedures that would strictly confine DTA review to the record compiled by the military for consideration by the Combat Status Review Tribunals.

will be able to prosecute their pending habeas cases because those cases are stayed by order of the district court pending final disposition of these cases.

2. As petitioners have shown in their application for an extension of time within which to petition for rehearing from the denial of certiorari, it is substantially likely the Court will reverse its previous decision and grant certiorari if, on rehearing, petitioners establish that their remedy under the DTA is inadequate and that it would be futile to require them to exhaust it. The three Justices who dissented from the denial of certiorari were of the view that the jurisdictional and constitutional questions raised by the petitioners "deserve this Court's immediate attention." *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting). Justices Stevens and Kennedy stated that despite "the obvious importance of the issues raised in these cases," review was not appropriate "at this time" because the petitioners had yet to exhaust their DTA remedies. *See id.* at 1478 (Statement of Stevens and Kennedy, JJ., respecting the denial of certiorari). Therefore, petitioners have satisfied the test articulated by Justice Rehnquist for the suspension of an order denying certiorari. *Richmond v. Arizona*, 434 U.S. at 1325.

Moreover, there is a significant possibility that, if certiorari is granted, the judgment of the court of appeals will be reversed. Justice Breyer, dissenting from the denial of certiorari, expressed the view on behalf of three Justices that "petitioners plausibly argue that the lower court's reasoning is contrary to this Court's precedent" in *Rasul v. Bush*, 542 U.S. 466 (2004). *Boumediene*, 127 S. Ct. at 1479. Justice Stevens and Justice Kennedy, noting that the "denial of certiorari does not constitute an expression of any opinion on the merits," pointedly cited the pages of their respective majority and concurring opinions in *Rasul* where they explained the

inapplicability to petitioners at Guantanamo of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the case upon which the court of appeals primarily relied for its decision below. *Id.* at 1478.

For these reasons, petitioners respectfully request that the Chief Justice grant this application to suspend the Court's order denying certiorari.

Respectfully submitted,

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APRIL 23, 2007

ANNEX

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APPLICATIONS FOR EXTENSION OF TIME WITHIN WHICH TO PETITION FOR REHEARING

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

Petitioners, foreign nationals held in the custody of the United States at Guantanamo Bay Naval Station, Cuba, apply under Rule 30.3 for an extension of time of 120 days, to and including August 27, 2007,[1] within which to petition for rehearing of the Court's denial of certiorari in these cases.[2] The Court denied certiorari on April 2, 2007. Absent the requested extension, the petitions for rehearing would be due on April 27, 2007. Petitioners believe the Court is likely to grant rehearing because events subsequent to the denial of certiorari already demonstrate – and future events are likely to confirm – that petitioners cannot obtain meaningful relief under the Detainee Treatment Act of 2005, § 1005(e)(2), Pub. L. No. 109-148, 119 Stat. 2680 ("DTA"), and that requiring petitioners to exhaust that remedy, which was enacted only after petitioners filed habeas corpus cases and is itself the subject of the present petitions, will compromise "'the office and purposes of the writ of habeas corpus.'" *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (Statement of Justices Stevens and Kennedy respecting denial of certiorari).

1. Petitioners sought certiorari to review the decision of the court of appeals that (i) the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA") stripped the courts of jurisdiction over petitioners' pending habeas corpus cases, and that (ii) petitioners could not invoke the Suspension Clause to invalidate the MCA because, as foreign nationals located outside the sovereign territory of the United States, they had no enforceable rights under the Constitution. The court of appeals held that petitioners' only remedy was judicial review under the DTA of determinations by the Combat Status Review Tribunals ("CSRTs") that petitioners

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[1] The 120th day, August 25, 2007, is a Saturday.

[2] Petitioners simultaneously have applied for a suspension of the Court's order denying certiorari.

were properly detained as "enemy combatants." This Court denied certiorari. Three Justices dissented, stating that the jurisdictional and constitutional questions raised by petitioners "deserve this Court's immediate attention." *Boumediene*, 127 S. Ct. at 1479 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).

Justices Stevens and Kennedy issued a statement explaining that, "[d]espite the obvious importance of the issues raised in these cases," they were persuaded to deny certiorari "at this time" by the "traditional rules governing our decision of constitutional questions ... and our practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." *Boumediene*, 127 S. Ct. at 1478. However, they added that "'the policy underlying the exhaustion-of-remedies doctrine does not require the exhaustion of inadequate remedies,'" and suggested that, if petitioners later show that the DTA remedy has been rendered inadequate by government action or otherwise, "'courts of competent jurisdiction,' including this Court, 'should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised.'" *Id.* (internal citations omitted).

2. Following the denial of certiorari, the government sought new orders from the court of appeals and the district court that would bear directly on DTA review. In particular, on April 9, 2007, the government filed a 72-page "Brief for Respondent Addressing Pending Preliminary Motions" in *Bismullah v. Gates*, No. 06-1197 (D.C. Circuit) and *Parhat v. Gates*, No. 06-1397 (D.C. Circuit), two DTA cases. In that brief the government contends that the court of appeals should enter an order (i) denying the detainees access to government documents outside the CSRT record that may contradict the evidence in that record; (ii) prohibiting the detainees from supplementing the CSRT record with affirmative evidence of innocence, evidence that statements against them were obtained through torture, or other evidence rebutting the

government's accusations; and (iii) precluding the court of appeals from independent factfinding. The government further contends that the court of appeals should issue a new protective order (i) limiting counsel to three visits to the detainees, regardless of the duration of their detention, the needs of their case, or the importance of sustaining their attorney-client relationship, (ii) permitting the government unilaterally to prohibit *all* counsel visits to Guantanamo, and (iii) allowing the government to withhold from counsel (who have security clearances) any classified information in the CSRT records that the government decides counsel do not have a "need-to-know." The court of appeals is scheduled to hear argument on these matters on May 15, 2007, and it has indicated that its ruling will be binding in all DTA cases.

On April 19, 2007, the government moved in the district court to dismiss all pending Guantanamo habeas cases and dissolve the current protective order authorizing counsel to visit their detainee-clients at Guantanamo and all other procedural orders entered in those cases. The current protective order was entered by the district court after extensive negotiations, briefing, and oral argument, and includes provisions imposed by the court where the parties disagreed but not the restrictions now sought by the government from the court of appeals. The other procedural orders govern such matters as (i) communications between detainees and their counsel; (ii) counsel access to and handling of classified information, including information vital to counsel's representation of the detainees; (iii) contemplated transfers of detainees from Guantanamo; and (iv) preservation of counsel papers and government records.

3. Petitioners believe that, if the lower courts grant the government's requests, petitioners will be able to demonstrate to this Court in petitions for rehearing that DTA review has been rendered essentially meaningless and that it would be futile to require petitioners to exhaust that remedy. *See Boumediene*, 127 S. Ct. at 1478 (Statement of Stevens and Kennedy, JJ.); *Shalala*

v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 13 (2000). Certainly, if the court of appeals orders that DTA review shall be strictly confined to the CSRT record, which contains only the evidence selected by the military for consideration by the CSRT, petitioners will be able to establish that such review is not an adequate substitute for habeas to "test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (internal quotation marks omitted). Similarly, if the court of appeals enters a new protective order limiting counsel access both to petitioners and to the classified CSRT record and the district court dissolves the orders authorizing petitioner meetings and communications with counsel, petitioners will be able to demonstrate that their ability to develop and file DTA petitions will be severely impaired. In those events, petitioners submit it is likely the Court will grant both rehearing and certiorari "'to ensure that the office and purposes of the writ of habeas corpus are not compromised.'" *Boumediene*, 127 S. Ct. at 1478 (Statement of Stevens & Kennedy, JJ.).

4. Regardless of the government's requests and the lower courts' disposition of them, the process of DTA review may prove to be inadequate for other reasons, including a continuation of the delaying tactics previously employed by the government in this litigation. Granting petitioners an extension of time within which to seek rehearing for such reasons would avoid the further delay of requiring petitioners to seek certiorari anew, facilitating the Court's swift intervention before petitioners have exhausted their DTA remedies if the remedies are unreasonably protracted.

5. The government will suffer no harm if this application is granted. Should petitioners ultimately file a petition for rehearing, the Court, absent extraordinary circumstances, will not grant the petition without giving the government an opportunity to respond. *See* Supreme Court Rule 44.3. In contrast, if this application is denied, petitioners may lose forever the opportunity

to obtain review of the important constitutional issues raised in this case. At a minimum, review would be substantially delayed if petitioners, instead of being allowed to petition for rehearing, are required to petition for certiorari anew.

For these reasons, petitioners respectfully request that the Chief Justice grant this application for an extension of time of 120 days, to and including August 27, 2007, within which to petition for rehearing of the Court's denial of their petition for a writ of certiorari.

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