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[ORAL ARGUMENT SCHEDULED FOR OCTOBER 8, 2009]

No. 09-5236

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

DJAMEL AMEZIANE,

Petitioner-Appellee,

v.

BARACK H. OBAMA, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for the following, the Opening Brief for Appellants lists all parties, intervenors and *amici* appearing before the District Court and in this Court, identifies the rulings under review, and indicates whether the case on review was previously before this Court and the names and numbers of other related cases currently pending in this Court or the District Court:

Although Petitioner is aware that approximately 200 habeas actions were commenced pursuant to 28 U.S.C. §§ 2241 and 1331 in the District Court by, or on behalf of, prisoners at Guantánamo Bay, this case raises unique factual and legal issues. This case is also pending in this Court in three matters captioned *Ameziane v. Obama*, Nos. 05-5243, 08-5248, and 08-5511.

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J. Wells Dixon

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Executive Order

Other Authorities

*Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

Add. ..... Appellants' Addendum

App. ..... Appellants' Appendix

FOIA ..... Freedom of Information Act

Fried Declaration..... Declaration of Ambassador Daniel Fried

Gvt. Br..... Opening Brief for Appellants

IACHR ..... Inter-American Commission on Human Rights

Red Cross ..... International Committee of the Red Cross

Task Force..... Guantánamo Review Task Force

COUNTER STATEMENT REGARDING JURISDICTION

The District Court has subject-matter jurisdiction over the habeas petition filed by Petitioner Djamel Ameziane pursuant to 28 U.S.C. §§ 2241 and 1331. This Court lacks jurisdiction over this appeal, as discussed in Parts I and II below.

STATEMENT OF THE ISSUES

1. Whether this Court should dismiss this appeal as moot because the single unclassified fact that Ameziane seeks to disclose publicly – *i.e.*, that he has been approved for transfer from Guantánamo Bay by the Guantánamo Review Task Force – is already in the public domain.

2. Whether this Court has jurisdiction to review a non-final order granting Ameziane's request to disclose publicly his approval for transfer from Guantánamo Bay by the Guantánamo Review Task Force, where that information is already in the public domain, the appeal does not raise a serious issue deserving interlocutory review, and the government would have adequate opportunity to present the issue for review once the case becomes final.

3. Whether the District Court abused its discretion in ruling that Ameziane may publicly disclose his approval for transfer from Guantánamo Bay by the Guantánamo Review Task Force, after conducting a fact-based inquiry and rejecting the factual predicates for Ambassador Daniel Fried's generic declaration,

which does not mention Ameziane or address the circumstances of his case, and which was filed on a blanket basis in numerous detainee cases.

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner Djamel Ameziane, a 42-year-old citizen of Algeria, is a prisoner at Guantánamo Bay. He has been imprisoned at Guantánamo Bay, without charge or trial, since February 2002. He fears torture and persecution in Algeria, which he fled nearly twenty years ago to avoid the civil war in that country. Ameziane has applied for resettlement in Canada, where he has family who are Canadian citizens, and where he has other substantial ties. He is sponsored for resettlement in Canada by the Anglican Diocese of Montreal and the Canadian Council for Refugees, a non-profit organization authorized by the Canadian government to administer the sponsorship of refugees program.

In May 2009, Ameziane was approved for transfer from Guantánamo Bay by the Guantánamo Review Task Force ("Task Force"). The government attempted unilaterally to designate his clearance as protected information pursuant to a protective order crafted and entered in the District Court in an exercise of discretion granted by the All Writs Act, 28 U.S.C. § 1651. Ameziane objected to the purported designation, and moved to unseal his clearance so that he could use the information to facilitate his efforts to obtain resettlement in Canada. The

government later cross-moved to confirm the protected designation. After conducting a fact-based inquiry, the District Court granted Ameziane's motion and denied the government's motion. The government appealed, and obtained from this Court a stay of the District Court order pending appeal.

In the interim, the International Committee of the Red Cross ("Red Cross"), a non-profit organization which has access to the detainees at Guantánamo Bay through official, government-controlled channels, *see* Gvt. Br. at 47 n.5, learned of Ameziane's approval for transfer and informed his family in Canada. The information is now public.

B. Course of Proceedings

Ameziane filed a habeas petition in the District Court on February 24, 2005, challenging the factual and legal basis for his detention. App. 1.

On April 12, 2005, the District Court entered a protective order governing access to detainees at Guantánamo Bay, and stayed this case pending resolution of various appeals in other detainee cases. *See* Order, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. Apr. 12, 2005) (dkt. no. 12).

On June 12, 2008, the U.S. Supreme Court held in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that the Guantánamo detainees have a constitutionally-protected right to petition for habeas relief. The Supreme Court "consider[ed] it uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a

meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Id.* at 2266 (quotation marks omitted). Above all else, therefore, the detainees have the right to a meaningful process by which they may show that they are not "enemy combatants." *Id.* Though "more may be required," the fundamental right to show that they simply do not fall within the category of people who may be lawfully held is one of the "easily identified attributes of any constitutionally adequate habeas corpus proceeding." *Id*. at 2267.

On July 2, 2008, the District Court (Judge Huvelle) transferred this case to Senior U.S. District Judge Thomas F. Hogan for coordination and management, while retaining it for all other purposes. *See* Order, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. July 2, 2008) (dkt. no. 47). The case was coordinated with numerous other detainee habeas cases under the caption *In re Guantánamo Bay Detainee Litigation*, No. 08-MC-442 (TFH) (D.D.C.).

On September 11, 2008, Judge Hogan entered a revised protective order. App. 7-34. Paragraph 34 of that order provides that the District Court, not the government, may designate unclassified information as protected, either *sua sponte* or upon motion of the party requesting the designation. App. 14-15.

On October 9, 2008, the government notified Ameziane of his imminent transfer to Algeria. Fearing torture and persecution in his home country, Ameziane

filed an emergency motion to enjoin his transfer. Judge Hogan granted the motion, in part, "to protect [the District Court's] jurisdiction over Petitioner's petition for a writ of habeas corpus, pursuant to its remedial authority under the All Writs Act, 28 U.S.C. § 1651." App. 35-36 (citing *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008)). The government appealed that order in November 2008. The injunction remains in effect.

Also in November 2008, Judge Huvelle began to move this case swiftly toward a hearing on the merits of Ameziane's habeas petition. In response, on December 17, 2008, the government moved to stay the case on the ground that Ameziane had been cleared by the Defense Department for "transfer or release" from Guantánamo Bay. App. 37.

In a pleading designated as protected, the government argued that a stay was appropriate because "the military rationales for enemy combatant detention no longer warrant [Ameziane's] custody and steps are [being] taken to arrange for the end of such custody." App. 42. Ameziane objected to the stay motion, which was denied by Judge Hogan on January 2, 2009.

Thus, unable to transfer Ameziane to Algeria and unable to prevent his case from being heard, and when finally forced to defend the merits of the case before the District Court, the government promptly rescinded Ameziane's clearance and stated in a public status report that he was not approved for transfer. *See* Resp'ts'

Notice of Filing of Detainee Information Pursuant to the Court's January 14, 2009 Order, *In re Guantánamo Bay Detainee Litig.*, No. 08-MC-442 (TFH) (D.D.C. Jan. 21, 2009) (dkt. no. 1535-2). The government did so because Ameziane's cleared status no longer served the exigencies of its litigation position, *i.e.*, it wanted the freedom to argue on the merits of his habeas case (and has since argued) that there are military rationales for his continued detention. In sum, the government manipulated Ameziane's cleared status as a litigation tactic, and did so outside the public view because the information had been deemed protected.

Thereafter, in February 2009, Ameziane filed a preliminary traverse and moved for expedited judgment on the evidence contained in the government's factual return. Judge Huvelle permitted the government to supplement its factual return over Ameziane's objections, and held a series of hearings on his motion for expedited judgment.

On April 29, 2009, Judge Huvelle denied Ameziane's motion for expedited judgment and set a schedule for discovery and further proceedings, including production of any exculpatory evidence gathered by the Task Force during its review of Ameziane's case. *See* Order, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. Apr. 30, 2009) (dkt. no. 198).

C. Disposition Below

On May 21, 2009, the government notified the District Court and counsel that Ameziane had once again been approved for transfer from Guantánamo Bay, this time by the Task Force, and requested that the District Court vacate its discovery and scheduling orders. The District Court promptly stayed and administratively closed this case, over Ameziane's objections, based on his approval for transfer by the Task Force. App. 3.

The government also once again purported unilaterally to designate Ameziane's clearance for transfer as protected. Ameziane objected.

After then waiting nearly three weeks for the government to file a motion to designate his clearance as protected, as required by the protective order entered on September 11, 2008, Ameziane moved to unseal his cleared status on June 11, 2009. He also moved in the alternative for a hearing to address whether to lift the stay of his case. The government then filed a conclusory motion to designate his status as protected on June 15, 2009, citing a generic declaration by Ambassador Daniel Fried, which does not mention Ameziane or the circumstances of his case, and which was filed on a blanket basis in numerous detainee cases. App. 44-48.

On June 30, 2009, the District Court held a hearing and, after conducting an extensive fact-based inquiry, granted Ameziane's motion to unseal his cleared status and denied the government's motion for a protected designation. The

District Court stayed the order for one week. App. 86-87. The government appealed the District Court order, and again moved in the District Court for an emergency stay pending appeal. Ameziane opposed that motion, and, at a hearing held later the same day, the District Court denied the government's motion. App. 112-16. The District Court subsequently issued a written memorandum opinion and order denying the government's emergency motion for a stay pending appeal. App. 120-28.

This Court issued an administrative stay, and later granted the government's motion for a stay pending appeal before this Court.

STATEMENT OF FACTS[1]

Ameziane is a college-educated citizen of Algeria. His story is the classic immigrant's story. An ethnic Berber, Ameziane fled his home country more than 15 years ago in order to escape escalating violence and insecurity, and in search of a better life. He traveled first to Austria, where he worked as a high-paid chef in an Italian restaurant, and then to Canada, where he sought political asylum and lived for five years but was ultimately denied refuge. Fearful of being deported to Algeria, and faced with few options, Ameziane went to Afghanistan. He traveled

[1] These facts are set forth in the unclassified Statement of Djamel Ameziane, dated June 10, 2008, attached to his Emergency Motion for Temporary Restraining Order and Preliminary Injunction Barring Transfer to Algeria, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. Oct. 24, 2008) (under seal).

to Afghanistan because it was the only country he could think of where, as a Muslim man, he might live peacefully and without constant fear of being returned to Algeria. He fled that country soon after the fighting began in October 2001, but was captured by a local Pakistani tribe. The tribe turned him over to Pakistani authorities, who, in turn, apparently sold him to the U.S. military for a bounty.

After his capture, Ameziane was transferred to the prison at the U.S. Airbase at Kandahar, Afghanistan, and later to Guantánamo Bay in February 2002.

In 2004, a Combatant Status Review Tribunal determined that Ameziane was properly detained as an "enemy combatant" because he was "part of or supporting Taliban or Al Qaida forces," a claim that he categorically rejects.[2] Ameziane's last Administrative Review Board, conducted in 2006, also found him ineligible for release. However, as indicated above, the government has since approved him for transfer or release, and determined that he should be repatriated to Algeria, where he would be at risk of persecution.

In addition to challenging the legality of his detention in the District Court through habeas corpus, on August 6, 2008, Ameziane filed a petition and request for precautionary measures with the Inter-American Commission on Human Rights ("IACHR"). Recognizing the substantial risk of harm that he would face if

[2] Unclassified Summary of Basis for Tribunal Decision at 8, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. July 11, 2005) (dkt. no. 16-2).

transferred to Algeria, the IACHR issued precautionary measures on August 20, 2008. These measures require, among other things, that the United States: (1) "Take all measures necessary to ensure that, prior to any potential transfer or release, Mr. Djamel Ameziane is provided an adequate, individualized examination of his circumstances through a fair and transparent process before a competent, independent and impartial decision maker"; and (2) "Take all measures necessary to ensure that Mr. Djamel Ameziane is not transferred or removed to a country where there are substantial grounds for believing he would be in danger of being subjected to torture or other mistreatment, and that diplomatic assurances are not used to circumvent the United States' non-refoulement obligations."[3]

Ameziane also applied in 2008 for sponsored refugee protection in Canada, the country in which he legally resided for five years and would not have left had he not been denied asylum in 2000. The Anglican Diocese of Montreal, working with the Canadian Council for Refugees, has agreed to sponsor him for resettlement in Canada, and his application is pending before the Canadian government. *See* Emergency Motion for Temporary Restraining Order and Preliminary Injunction Barring Transfer to Algeria, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. Oct. 24, 2008) (under seal) (and exhibits attached

[3] *See* Emergency Motion for Temporary Restraining Order and Preliminary Injunction Barring Transfer to Algeria, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. Oct. 24, 2008) (under seal).

thereto).[4] If his application is approved, Canadian law would require that he be resettled there regardless of whether the United States would prefer to resettle other Guantánamo detainees in that country.

To date, however, more than seven years after his capture and transfer to Guantánamo Bay, Ameziane remains imprisoned without charge or trial, and without a decision on the merits of his habeas corpus petition.

PROVISIONS AT ISSUE

All applicable provisions of the protective order at issue in this appeal are contained in the Opening Brief for Appellants.

STANDARD OF REVIEW

This Court reviews a district court order to seal or not to seal a judicial record for abuse of discretion, "a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 599 (1978); *EEOC v. Nat'l Children's Center, Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996). In deciding whether to designate unclassified information concerning Guantánamo detainees as protected, this Court has twice held that "[i]t is the court, not the Government, that has discretion to seal a judicial record, which

[4] *See* Michelle Shephard, *Montreal Supporters Offer Haven to Prisoner Held at Guantánamo Bay*, Toronto Star, Oct. 22, 2008, *available at:* http://thestar.com/comment.columnists/article/52116; Michelle Shephard, *Camp 6 Detainee Pins Hopes on Canada*, Toronto Star, June 9, 2008, *available at:* http://thestar.com/printArticle/439676.

the public ordinarily has the right to inspect and copy." *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007) (citation omitted); *Parhat v. Gates*, 532 F.3d 834, 853 (D.C. Cir. 2008) (government must give the court a basis for withholding that is "specific to the information that it has designated in this case"). At a minimum, and of particular relevance here, the specificity required by this Court to seal unclassified information precludes the government from seeking to designate as protected information that is already in the public domain. 532 F.3d at 853.

SUMMARY OF ARGUMENT

The government attempts for the third time in three years to obtain relief which this Court has consistently denied it – *i.e.*, the right unilaterally to designate unclassified information as protected on a blanket basis. The government asks this Court to reverse a discretionary order of the District Court ruling that Ameziane may publicly disclose his approval for transfer by the Task Force. The government contends that the District Court erred by not deferring to the declaration of Ambassador Daniel Fried, filed in numerous detainee cases, which states that public disclosure of Task Force clearance determinations would harm the foreign policy interests of the United States by interfering with diplomatic negotiations concerning the closure of Guantánamo Bay. Indeed, the government suggests that the District Courts lack any authority, regardless of the facts and circumstances of

a particular detainee case, to conclude that the Fried Declaration is inadequate or unpersuasive to support the protected designation of a detainee's cleared status.

In contrast to the sweeping nature of the government's position, the issues actually presented for review in this particular case are narrow and fact-specific. First, this Court should dismiss this appeal for lack of jurisdiction because the question of whether the District Court abused its discretion in ruling that Ameziane may publicly disclose his approval for transfer is moot. Second, this Court lacks jurisdiction under the collateral order doctrine, and mandamus review is not appropriate. Third, even if jurisdiction were deemed proper, the District Court did not abuse its discretion in ruling that Ameziane may publicly disclose his approval for transfer by the Task Force.

A. Mootness

The government concedes in this appeal, as it did before the District Court, that once the Task Force's decision to approve Ameziane for transfer is disclosed publicly, the harm will be done and the disclosure will moot the issues on appeal. As the District Court found in the exercise of its discretion, and as the government does not seriously dispute, such disclosure has already occurred. The Court should therefore dismiss this appeal as moot on the ground that Ameziane's approval for transfer by the Task Force is already in the public domain.

B. Collateral Order Doctrine and Mandamus Review

The District Court order from which the government purports to appeal is not appealable as a collateral order for three reasons. First, because Ameziane's clearance for transfer is already in the public domain and disclosure is not equivalent to the deprivation of a substantial statutory or constitutional right, the District Court order does not raise an important issue deserving interlocutory review. Second, the Task Force's approval of Ameziane for transfer and the disclosure of that determination are inextricably intertwined with the merits of his habeas petition. Third, because public disclosure of Ameziane's clearance for transfer has already caused the purported harm which the government has sought to avoid by designating that information as protected, the government will have adequate opportunity to present this issue for review once the case becomes final. For the same reasons, mandamus review is not appropriate.

C. The District Court's Discretion

The District Court did not abuse its discretion in ruling that Ameziane may publicly disclose his approval for transfer by the Task Force. The District Court neither applied the wrong legal standard nor relied on clearly erroneous facts. *Linder v. Dep't of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998).

This Court's prior decisions in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), and *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) – cases all but ignored

by the government in its opening brief – hold that sparse, generic claims of harm to national security or other important interests are insufficient to protect unclassified information concerning Guantánamo detainees. The government must provide a basis for withholding that is specific to the information it seeks to designate in a particular case. It may not rest on a blanket motion filed in numerous cases, which is exactly what it has attempted to do in this case.

The District Court properly determined that the declaration of Ambassador Daniel Fried, on which the government relies exclusively, fails to provide the required specificity to seal Ameziane's approval for transfer. The Fried Declaration states that disclosure of Task Force determinations would interfere with diplomatic efforts to resettle detainees and close Guantánamo Bay; if those determinations were to become public, numerous detainees could approach foreign governments in order to attempt to obtain resettlement which could create confusion. Yet the District Court concluded that regardless of whether Task Force determinations are disclosed, the government is powerless to prevent detainees like Ameziane from approaching foreign governments and seeking resettlement in those countries. The District Court also concluded that prior (and continuing) disclosures of Task Force determinations by other District Judges and by the government itself further undermine Ambassador Fried's claim that disclosure of such determinations would interfere with the government's diplomatic efforts. In

addition, the District Court found there is no rational distinction between public disclosure of a detainee's approval for transfer by the District Court as the result of a habeas hearing and approval for transfer by the Task Force, particularly where, as here, the government consistently invokes the approval of detainees for transfer by the Task Force as a basis to stay their habeas cases, thus depriving the detainees of their constitutionally-protected right to petition for habeas relief.

Moreover, the District Court order in this case does not infringe on a "core foreign relations function" or require "special deference" to the Executive. Notwithstanding the cases relied on by the government, this case does not involve the disclosure of classified information, foreign affairs preemption, or any other narrow category of cases requiring deference to the Executive. Nor does it involve the question of whether there is a constitutional or common law right of access to judicial records, an issue raised by the government for the first time on appeal.

ARGUMENT

I. THIS COURT SHOULD DISMISS THIS APPEAL AS MOOT BECAUSE THE INFORMATION THAT AMEZIANE SEEKS TO DISCLOSE PUBLICLY IS ALREADY IN THE PUBLIC DOMAIN

The law is well-settled that "[f]ederal courts lack jurisdiction to decide moot cases because their [Article III] constitutional authority extends only to actual cases or controversies." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1135 (D.C. Cir. 2009) (quoting *Larsen v. U.S. Navy,* 525 F.3d 1, 4 (D.C. Cir.

2008)). "A case is moot when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated in circumstances where it becomes impossible for the court to grant any effectual relief whatever to the prevailing party." *Id.* (internal quotation marks omitted). In cases involving challenges to the disclosure of information, once the information is disclosed the issue is moot. *See Exxon Corp. v. FTC*, 589 F.2d 582, 587 (D.C. Cir. 1978) ("Some of the information that the appellants sought to protect has already been disclosed, and this appeal is moot as to this material.").

Ameziane seeks to disclose the single unclassified fact that he has been approved for transfer from Guantánamo Bay by the Task Force. To be clear, he does not seek to disclose the District Court pleadings or transcripts regarding this issue, or the parties' appellate briefs, or any information regarding the government's attempts to repatriate him to Algeria. All that the District Court addressed in its June 30, 2009 order, and all that is at issue in this appeal, is whether Ameziane "may publicly disclose that he has been approved for transfer from Guantanamo by the Guantánamo Review Task Force." App. 87.

As the government concedes in its opening brief, and as it conceded before the District Court, "public disclosure of information directed by the [District Court's June 30, 2009] order would moot any appeal." Gvt. Br. at 20; Resp'ts' Emergency Mot. to Stay the Court's June 30, 2009 Order at 8, *Ameziane v. Obama*,

No. 05-CV-392 (ESH) (D.D.C. July 7, 2009) (under seal) ("[D]isclosure by Petitioner's counsel may moot the issue"). The government's concession is fatal to its appeal.

In reaching its decision to allow disclosure, the District Court concluded, in part, that the issue is moot. The District Court concluded that, "[m]ost importantly, the record demonstrates that protecting petitioner's clearance status would serve little purpose because that information has already been made public. As counsel indicated, both the Red Cross and petitioner's brother in Canada are already aware that petitioner has been cleared for transfer." App. 126, 127; *see also* App. 83 ("We know his brother already knows about it."); App. 100 ("The issue is this information is already known to people. You can't do anything about that. . . . the brother knows; the Red Cross knows."); App. 103 ("The facts include the fact that the Red Cross knows he's been cleared, and his brother knows he's been cleared.").

The District Court's factual finding that this information has already been disclosed was not clearly erroneous. The government neither disputed the fact of disclosure to the Red Cross or Ameziane's brother in Canada before the District Court nor offered any persuasive explanation as to how or why such disclosure was not "public," particularly given that Ameziane's brother is a foreign national, living in a foreign country, and is not subject to the terms of the District Court

protective order entered in this case. There was nothing more that the District Court could do to prevent the fact of Ameziane's approval for transfer from entering the public domain. Nor is there anything that this Court may do now to prevent the disclosure. *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) ("Secrecy is a one-way street: Once information is published, it cannot be made secret again.").

Indeed, what the government seeks is not an order prohibiting the public disclosure of Ameziane's approval for transfer, but an order simply making it more difficult for him to use the information already in the public domain to facilitate his efforts to obtain resettlement in Canada. Specifically, the government seeks to prohibit his counsel from repeating the information to the government of Canada, which has inquired whether he is approved for transfer, in order to delay for as long as possible the time it will take for that information to reach the Canadian government via Ameziane's family and thus make his resettlement efforts in Canada less likely to succeed before Guantánamo Bay is scheduled to be closed in January 2010. App. 109.

Yet such obfuscation was not intended and is not authorized by the protective order entered in this case. As paragraph 31 of the protective order provides, once protected information enters the public domain, "counsel is not precluded from making private or public statements about the information already

in the public domain, but only to the extent that the information is in fact in the public domain. . . . [T]o help ensure clarity on this matter, the [District] Court emphasizes that counsel shall not be the source of any classified information or protected information entering the public domain." App. 14.

The government's claim in response that "there is a substantial difference between a disclosure of information made by a private party or an individual and a formal acknowledgement by the U.S. Government" is misplaced for two reasons. Gvt. Br. at 45-46.

First, the "official acknowledgement" doctrine cited by the government is not applicable in the context of this case. The doctrine authorizes the disclosure of classified information in cases brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Executive has statutory authority under FOIA, and under the National Security Act of 1947, 50 U.S.C. § 401 *et seq.*, or other "withholding" statutes, to control the flow of properly classified national security information, and to prevent its public disclosure unless the information sought to be disclosed is specific and matches information already made public through an official and documented disclosure. Gvt. Br. at 45-46 (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). It is that specific statutory authority to withhold classified information to which federal courts routinely defer in FOIA cases.

By contrast, this case is neither a FOIA case nor does it involve the disclosure of classified information. Ameziane does not seek to compel the disclosure of documents or information beyond a single unclassified fact that is already in the public domain. There is also no statutory or other legal authority for the government to control the flow of unclassified information, or to withhold such information from public view in its discretion, to which authority or discretion a federal court must defer. Rather, as this Court held in *Bismullah* and *Parhat*, it is for the courts to exercise discretion whether to seal unclassified judicial records pursuant to applicable protective order procedures established by the courts in the exercise of their discretion, not the government. 501 F.3d at 188; 532 F.3d at 853.

Second, there is no rational distinction between Ameziane's public disclosure of his approval for transfer, whether directly or through his counsel, and his brother's public disclosure of that same information. The District Court order permitting Ameziane and his counsel to disclose his approval for transfer does not authorize or compel a formal acknowledgement by the government any more than his brother's disclosure of that information constitutes an official disclosure. Ameziane, his attorneys and his family are all private citizens without power to "acknowledge" information on behalf of the United States. Although we surely seek to disclose his approval for transfer to the government of Canada, none of us speaks on behalf of the United States or acts in any manner that would carry the

imprimatur of official government action.[5] To the contrary, Ameziane has repeatedly offered to stipulate that his resettlement efforts are not undertaken on behalf of, or sanctioned by, the United States in order to avoid any purported confusion. *See* Reply Mem. in Further Supp. of Mot. to Unseal at 3, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. June 18, 2009) (under seal). In addition, of course, absent an official acknowledgment of the information, the government remains free not to confirm or deny whatever is said publicly about Ameziane's cleared status.

Finally, as a matter of common sense it is unreasonable to suggest that foreign government officials could not discern that detainees and their private counsel are separate and apart from the U.S. government and do not speak on its behalf. Foreign governments have already clearly distinguished formal or "official" requests for resettlement made by the United States from the ongoing advocacy of individual detainees and their private representatives. *See*, *e.g.*, *Austria Rejects Guantanamo Detainees*, Austrian Times, Jan. 23, 2009, *available at:* http://www.austriantimes.at/index.php?id=10762 (Austrian government noting

[5] As addressed in Part III.C below, this is not a case which impacts the nation's ability to "speak with one voice." Gvt. Br. at 7, 13, 27. It involves the ability of a private individual to disclose information on his own behalf, not a dispute between conflicting state and federal laws that touch on foreign affairs or the doctrine of foreign affairs preemption from which the "once voice" concept originates. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (addressing conflict between state and federal law impacting foreign affairs).

no "official requests" from the U.S. government to resettle detainees); U.S. Dep't State, *Issues that Affect Germany, the United States and the International Community*, Feb. 3, 2009, *available at:* http://www.state.gov/secretary/rm/2009a/02/115906.htm (indicating U.S. government had not formally requested that Germany resettle detainees).

II. THE DISTRICT COURT'S ORDER IS NOT APPEALABLE

The government contends that this Court has jurisdiction over this appeal under 28 U.S.C. § 1291, because the District Court's disclosure order falls within the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Alternatively, the government contends that mandamus review is appropriate. Gvt. Br. at 15-22. The government's arguments lack merit.

A. The District Court Order Does Not Satisfy the Collateral Order Doctrine

Applying the *Cohen* factors, this Court may consider an interlocutory appeal only from decisions that: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment. *Will v. Hallock*, 546 U.S. 345, 349 (2006). "The conditions are 'stringent,' and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further." *Id.* at 349-50 (citations omitted). The

collateral order doctrine is of "modest scope," and "narrow and selective in its membership." *Id.* at 350.

Ameziane concedes that the first *Cohen* factor is satisfied. The District Court's June 30, 2009 order is conclusive. However, the order does not satisfy the other *Cohen* requirements for three reasons.

First, the District Court order does not raise an important issue deserving interlocutory review. The order does not merit interlocutory review because, as explained above, the single unclassified fact that Ameziane seeks to disclose is already in the public domain and the issue of disclosure is moot. *Banks v. Office of the Senate Sergeant-at-Arms & Doorkeeper of the U.S. Senate*, 471 F.3d 1341, 1344 (D.C. Cir. 2006) (dismissing appeal for lack of jurisdiction and concluding "[t]he final judgment rule . . . relieves appellate courts from the immediate consideration of questions that might later be rendered moot"). Even if the issue were not moot, an exercise of this Court's jurisdiction at this time would invite a flood of interlocutory appeals in each and every instance in which a District Judge grants or denies a request to seal unclassified information pursuant to the protective order entered in approximately 200 pending detainee cases, substantially undermining the purpose and function of the final judgment rule. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 876-77 (1994) (dismissing appeal for lack of jurisdiction and reciting the Supreme Court's frequent

admonition that the availability of collateral order review is determined at a higher level of generality); *Doe v. Exxon*, 473 F.3d 345, 349 (D.C. Cir. 2007) (dismissing appeal for lack of jurisdiction and noting "[c]larity is an important consideration in collateral order cases: the issue of appealability . . . is to be determined for the entire category to which a claim belongs," without regard to whether a particular injustice would be averted by interlocutory appellate review).

The District Court order in this case is also undeserving of collateral review because it does not rise to a level of importance equivalent to matters involving the loss of substantial statutory or constitutional rights. *Digital Equipment Corp.*, 511 U.S. at 878-80; *Will*, 546 U.S. at 351-53. The collateral order doctrine is limited to those cases involving some "particular value of a higher order" or a "weighty pubic objective" that is "deeply rooted in public policy," such as cases involving the power of contempt, absolute or qualified immunities, or double jeopardy. *Digital Equipment Corp.*, 511 U.S. at 883-84; *Will*, 546 U.S. at 353-55; *see also*, *e.g.*, *Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009) (classified information protected from disclosure by statute); *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892 (D.C. Cir. 2006) (confidential trade secrets); *In re Sealed Case*, 381 F.3d 1205 (D.C. Cir. 2004) (privileged information); *In re Rafferty*, 864 F.2d 151 (D.C. Cir. 1988) (prior restraint on speech).

By contrast, and contrary to the government's arguments throughout this case, the mere invocation of foreign policy concerns does not provide a basis for interlocutory review, even where the State Department alleges a possible adverse impact on U.S. interests absent interlocutory review. *Doe*, 473 F.3d at 351-52 (dismissing for lack of jurisdiction despite State Department letter alleging possible, ambiguous harm to U.S. interests); *see also United States v. Cisneros*, 169 F.3d 763, 764-66 (D.C. Cir. 1991) (dismissing for lack of jurisdiction despite allegations of impermissible intrusion on prerogatives of the Executive).

Nor is the government's claim that this appeal involves important questions concerning this Court's supervisory role over the District Courts persuasive. Gvt. Br. at 18-19. As an initial matter, the District Court in this case did nothing to warrant immediate intervention and supervision by this Court. The District Court merely exercised its routine discretion to apply a provision in a protective order that itself was crafted and entered by the District Judges in an exercise of the discretion granted to them by the All Writs Act, 28 U.S.C. § 1651, in aid of their jurisdiction and to assist them in developing the factual records necessary to decide the merits of the detainees' habeas petitions. *Al Odah v. United States*, 346 F. Supp. 2d 1, 6 (D.D.C. 2004) (the "decision to grant an order under the All Writs Act is 'within the sound discretion of the court'"); *Adem v. Bush*, 425 F. Supp. 2d 7 (D.D.C. 2006) (discussing court's inherent authority to craft protective order).

The government's contention that this Court must promptly resolve conflicting decisions among District Judges regarding the public disclosure of Task Force determinations also wrongly assumes that all such decisions must be the same regardless of the facts and circumstances of particular cases. As indicated above, the government's argument is essentially that no reasonable District Judge could conclude in the exercise of discretion that the purported harms identified in the Fried Declaration are inadequate or unpersuasive to warrant the protected designation of a detainee's cleared status. In other words, the government appears to claim that the issue of disclosure in this particular case is "important" for purposes of collateral review because it should be the government, not the District Court, which has the power unilaterally to determine whether information should be protected. As discussed in Part III.A below, however, that claim is squarely foreclosed by *Bismullah* and *Parhat*. 501 F.3d at 188; 532 F.3d at 853.

Second, neither Ameziane's approval for transfer by the Task Force nor disclosure of that determination is completely separate from the merits of this case.

There is no serious dispute that Ameziane's approval for transfer is inextricably intertwined with the merits of his habeas petition. This habeas case has been stayed and administratively closed at the request of the government, over Ameziane's objections, based on his approval for transfer by the Task Force. As the District Court found in the exercise of its discretion, that places him in a

potentially worse position than if he were to proceed to a hearing on the merits of his petition. App. 125-26. Although habeas review tests the legality of detention while the Task Force review considers other discretionary factors, *see* Exec. Order 13,492, § 2(d), 74 Fed. Reg. 4897 (Jan. 22, 2009), the Task Force determination that Ameziane should be transferred someday has nonetheless operated to deprive him of his constitutionally-protected right to petition for habeas review.

Indeed, it is the government's policy in every case in which a Guantánamo detainee has been approved for transfer by the Task Force to seek a stay of his habeas petition pending the government's efforts to repatriate or resettle him eventually. *See*, *e.g.*, Add. 9-19 (orders granting government stay motions in *Naji*, *Yoyej*, and *Mattan*, over the detainees' objections). In other words, the government is asking the District Judges to stay indefinitely dozens of detainee lawsuits challenging the legality of its discretionary detention authority so that the government may exercise *more* discretion concerning the ongoing detention of the detainees, even though the very purpose of habeas is to dispense with executive discretion and swiftly determine whether there is a factual and legal basis for detention in the first instance. Yet it bears emphasis that habeas corpus does not authorize the Executive to detain an individual for nearly eight years and only then begin the process of deciding on its own whether, when or under what circumstances to release that individual in the future. Contrary to the

government's position regarding the effect of the Task Force determinations, and notwithstanding the stay orders entered in the instant case and other detainee cases over the prisoners' objections, habeas corpus is no more subordinate to Executive Order 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), than it was subordinate to the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (Dec. 30, 2005), or the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), which likewise attempted unsuccessfully to deprive the detainees of the right to obtain relief on the merits of their habeas petitions. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

In addition, notwithstanding its argument in this appeal that the stays it seeks are "temporary" in order to allow the District Judges to prioritize their case loads, *see* Gvt. Br. at 39, the government has taken a very different position in the lower court. There, the government has argued that once a detainee is approved by the Task Force for transfer, his habeas cases should not be heard at all because there is no relief that a District Judge may order apart from the requirement that the government undertake diplomatic efforts to repatriate or resettle the detainee, which will follow at some point from a Task Force transfer decision. App. 69; Resp'ts' Reply in Supp. of Mot. to Confirm Designation at 8, *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C. June 24, 2009) (under seal) ("Conducting merits proceedings where the United States is seeking to end its custody of Petitioner is

not appropriate, where, at the end of the day, even if Petitioner prevails, the parties will be in a similar position as they are in now, with Respondents seeking to transfer Petitioner out of U.S. custody to Algeria.").

Even if the stays were only temporary, they would still operate to deprive the detainees of their constitutionally-protected right to petition for habeas relief. That is so because the harm caused by the stay of a habeas case is substantive, not procedural. Each day that Ameziane or another detainee remains imprisoned at Guantánamo Bay without judicial review he suffers the very harm which he filed his habeas petition in order to remedy – *i.e.*, indefinite detention without charge or trial. *See Boumediene*, 128 S. Ct. at 2275 ("While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody."); *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 490 (1973) (noting interests of prisoner and society in "preserv[ing] the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement") (internal quotation marks omitted); *Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969) ("This is a habeas corpus proceeding, and thus particularly inappropriate for any delay."); *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000) (district courts have less discretion to stay habeas proceeding); *see also* 28 U.S.C. § 2243 (requiring prompt disposition of habeas cases).

The issue of public disclosure of Ameziane's clearance for transfer is equally related to the merits of his habeas case. As the District Court concluded after conducting a fact-based inquiry, Ameziane's counsel is currently engaged in resettlement discussions with Canada, which has expressed an interest in whether he has been approved for transfer. Notice of the Task Force's determination would advance those discussions and secure his release more expeditiously. Safe resettlement in another country like Canada, in turn, would effectively resolve the merits of his habeas case. App. 125-26. However, again, as the District Court concluded, with Ameziane's case stayed and administratively closed over his objections, his inability to disclose his clearance publicly would cause him unfair prejudice by placing him in a worse position to advocate for his resettlement than if he had proceeded to a hearing on the merits of his habeas case and were ordered released by the District Court. *Id.*[6]

Third, because public disclosure of Ameziane's clearance for transfer has already caused the purported harm which the government has sought to avoid by designating that information as protected, there is no urgency requiring interlocutory review. The government will have adequate opportunity to present

[6] *See generally Cunningham v. Hamilton County*, 527 U.S. 198, 206 (1999) (collateral order review not appropriate where "an inquiry would differ only marginally from an inquiry into the merits"); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (collateral review not appropriate where review involves questions of law or fact common to the merits).

this issue for review once the case becomes final. Simply stated, the status quo is such that "the cat is out of the bag." *Cf. Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009). Interlocutory review of the District Court's order thus would not differ in any practical or meaningful respect from appellate review after a final judgment on the merits, even if further public dissemination of Ameziane's approval for transfer to the Canadian government caused some marginal burden to the U.S. government. *Digital Equipment Corp.*, 511 U.S. at 872 (mere identification of some interest that may be imperfectly reparable by appellate review after final judgment has "never sufficed to meet the third *Cohen* requirement").

B. Mandamus Review Is Not Appropriate

As an alternative to the collateral order doctrine, the government requests that this Court exercise its mandamus authority to review the District Court's disclosure order. Although the government concedes that mandamus review is "drastic" and "not generally granted," it contends that such review is appropriate in this case to defend the "important policy interests" protected by the protective order entered in this case, and given the conflicting rulings of the District Judges regarding the Fried Declaration. Gvt. Br. at 20-22. The government is wrong.

As with the collateral order doctrine, the mere invocation of foreign policy concerns does not provide a basis for mandamus review. *Doe*, 473 F.3d at 353-54.

Nor does the government have a clear and indisputable right to relief in this case based on a split of decisions among the District Judges, particularly given that the disclosure issue in this specific case is already moot, or, at a minimum, may be adequately reviewed after a final judgment on the merits of Ameziane's habeas case. *Id.*; *Banks*, 471 F.3d at 1350 (mandamus review not appropriate for same reasons collateral order review not appropriate). In addition, by adhering to the procedures in the protective order for obtaining a protected designation (including the requirement that the information be treated as protected until the District Court ruled that it should not be designated), the District Court sufficiently defended the policy interests that it first crafted and entered the protective order in its discretion to account for and preserve.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT AMEZIANE MAY PUBLICLY DISCLOSE HIS APPROVAL FOR TRANSFER

The government's position on the merits of this appeal may be summarized as follows: (1) the government has a significant interest in closing Guantánamo Bay and promptly resettling or repatriating the detainees; (2) the Fried Declaration warns that publicly disclosing Task Force clearance determinations could damage those interests; (3) because disclosure could damage those interests, in no case and under no circumstances may a District Judge refuse to defer entirely to the Fried Declaration and decline to designate a Task Force determination as protected, and

(4) the District Court's disclosure order in this case must be reversed accordingly. The government also argues that there is no constitutional or common law right of public access to Task Force clearance determinations.

Although Ameziane does not dispute that the government has a significant interest in closing Guantánamo Bay and promptly repatriating or resettling the detainees, the government ignores this Court's controlling decisions in *Bismullah* and *Parhat*, which set forth the requirements to obtain a protected designation of unclassified information. 501 F.3d at 188; 532 F.3d at 853. The government also fails to show that the District Court order permitting Ameziane to disclose his approval for transfer interferes with the national interest or was otherwise clearly erroneous. Nor must the District Court defer entirely to allegations of harm by the Executive concerning the disclosure of unclassified information. Finally, the government's arguments concerning the public right of access to these proceedings should be rejected because the legal theories asserted by the government are raised for the first time on appeal and are otherwise meritless.

A. The Government Has Failed to Satisfy *Bismullah* and *Parhat*

The law in this Circuit is clear: the question of whether to designate unclassified information as protected is a matter committed to the sound discretion of the courts.

In *Bismullah v. Gates*, the government "propose[d] unilaterally to determine whether [unclassified] information is 'protected,' meaning that petitioners' counsel must keep it confidential and file under seal any document containing such information." 501 F.3d at 188. "For example, the Government would designate as 'protected' information 'reasonably expected to increase the threat of injury or harm to any person' and information already designated by the Government to be 'For Official Use Only' or 'Law Enforcement Sensitive.'" *Id.* Rejecting that proposal, this Court held that "[i]t is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy. Therefore, insofar as a party seeks to file with the court nonclassified information the Government believes should be 'protected,' the Government must give the court a basis for withholding it from public view." *Id.* (citations omitted).

Similarly, in *Parhat v. Gates*, the government moved to protect from public disclosure in numerous detainee cases "all nonclassified record information that it has labeled 'law enforcement sensitive,' as well as the names and 'identifying information' of all U.S. government personnel mentioned in the record." 532 F.3d at 836. In support of its motion, the government again alleged that public disclosure of the information would risk the safety of U.S. personnel, especially

personnel deployed overseas, and could harm the national interest in fighting the "global war against al Qaeda and its supporters." *Id.* at 852.

Acknowledging there could be information in those categories that might warrant protection, this Court again rejected the government's proposal for a blanket designation. *Id.* In a comment equally pertinent to the instant case, the Court concluded:

> [T]he motion relies solely on spare, generic assertions of the need to protect information in the two categories it identifies. The government does not "give the court a basis for withholding" that is specific to the information that it has designated in this case. Nor does it offer any basis on which [the Court] may determine whether the information it has designated properly falls within the categories it has described.

Id. at 852-53 (quoting *Bismullah*, 501 F.3d at 188).

At a minimum, the Court concluded that the specificity required to designate unclassified information as protected precludes the government from designating information that is already in the public domain. *Id.* at 853.

The Court further concluded:

> By resting its motion on generic claims applicable to all of the more than one hundred other detainee cases in which the motion was filed, the government has effectively duplicated its request "unilaterally to determine whether information is 'protected.'" *Bismullah*, 501 F.3d at 188. Without an explanation tailored to the specific information at issue, [the Court is] left with no way to determine whether it warrants protection – other than to accept the government's own designation. This we cannot do because, as we held in *Bismullah*, "[i]t is the court,

> not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy."

Id. The Court therefore denied the government's motion "[b]ecause we are unable to determine, on the pleadings before us, whether the information that the government has designated should be deemed 'protected.'" *Id.*

Here, as in *Bismullah* and *Parhat*, the government has failed to establish that the single unclassified fact that Ameziane has been approved for transfer by the Task Force should be designated as protected. The government filed a conclusory six-page motion to seal in more than twenty cases – some involving detainees who do not even have resettlement concerns, *e.g.*, *Taher v. Obama*, No. 06-CV-1684 (GK) (D.D.C.) – that neither mentions Ameziane nor addresses the facts and circumstances of his particular case. The motion is supported by the declaration of Ambassador Fried, which likewise fails to mention Ameziane or his efforts to obtain resettlement in Canada, and instead offers only generalized allegations of harm that might or might not result from public disclosure of Task Force determinations concerning unspecified detainees. It is also particularly difficult to see how the disclosure of Ameziane's clearance for transfer could bring about any of the purported harms identified by the Fried Declaration, especially when his clearance has entered the public domain, and the government concedes it is powerless to prevent his counsel from attempting to facilitate his safe resettlement

in another country, which is the crux of the harm identified in the Fried Declaration. As the District Court concluded in its discretion, the purported harm identified by the Fried Declaration is entirely speculative, and is otherwise riddled with contradictions in the context of this particular case.

B. The District Court Properly Determined that the Fried Declaration Fails to Provide the Required Specificity to Seal Ameziane's Approval for Transfer

The government has wholly failed to establish that the District Court abused its discretion in rejecting the sufficiency of the Fried Declaration as a basis for designating Ameziane's approval for transfer as protected. As described at length above, his approval for transfer by the Task Force has already been publicly disclosed, and what the government seeks is not to prohibit the disclose of that information but rather to prevent Ameziane and his counsel from using that information to facilitate his resettlement efforts in Canada. The District Court's decision is also firmly rooted in the facts and circumstances of this particular case. The fact that other District Judges have reached different conclusions in other cases does not mean that the District Court abused its discretion in this case. In addition, the fact that other District Judges have reached different conclusions undermines the government's concern that the disclosure order in this case might cause a flood of similar decisions in other cases.

Although the government attempts to cast the issue in this appeal as presenting a serious legal question to be resolved by this Court, *see* Gvt. Br. at 15, this case again involves nothing more than the District Court's routine exercise of judicial discretion to apply a provision in a protective order, crafted and entered in the District Court pursuant to its discretionary authority under the All Writs Act, 28 U.S.C. § 1651, based on the particular facts and circumstances of this case. As the record in this case reflects at length, the District Court rejected the government's request for a protected designation after conducting "a fact-based inquiry to determine whether the information sought to be protected is supported by specific and valid reasons." App. 125; *see also* App. 81 (deciding disclosure issue "in this particular instance as to this particular petitioner"); App. 100 ("I don't think you can tell me why Mr. Mattan from Palestine is comparable to Mr. Ameziane."); App. 103 ("My ruling is specific to this gentleman."); App. 113 ("[The government] may have an interest in making sure that [it] negotiate[s] on behalf of as many petitioners as humanly possible, but [the Court has] no specifics about this gentleman, and [the government is] hard pressed to come up with specifics . . . . this is a situation where it is not a legal issue.").

As indicated above, in support of its attempt to conceal Ameziane's clearance from greater public view, the government relies solely on the declaration of Ambassador Daniel Fried. The government cites that declaration throughout its

opening brief for the proposition that detainees who undertake their own efforts to seek resettlement typically in "certain European countries" may interfere with the State Department's efforts to close Guantánamo Bay by causing confusion or sending mixed messages to potential resettlement countries. Gvt. Br. at 6-7, 12, 26-27. The government also claims that foreign countries' abilities to resettle detainees may be limited, and that detainees who arrange on their own for resettlement in those countries may occupy a limited number of slots that should be left open for other detainees who the State Department would prefer to resettle there. *Id.* at 12, 27, 30.

As the District Court concluded in the exercise of its discretion, however, the Fried Declaration "provides no specificity as to why Ameziane's cleared status must be protected or why his counsel should be prohibited from using the information to advocate for his resettlement to other countries." App. 125. The Fried Declaration "fails to address any of the specific factors related to petitioner's individual circumstances." *Id.* Rather, the District Court found, the government's arguments are "speculative and conclusory." *Id.* at 126.

The District Court specifically found that the Fried Declaration was filed on a blanket basis in numerous detainee habeas cases. The declaration does not provide any specific information tailored to Ameziane, diplomatic efforts regarding his home country of Algeria, or the countries where he has sought

resettlement. App. 86 ("The government has failed to explain with sufficient specificity why Ameziane's cleared status must be protected, or why his counsel should be prohibited from using the information to advocate for his resettlement to other countries."). The Fried Declaration notably does not mention Canada, where Ameziane previously lived for five years and has family who are citizens, and where he has applied for resettlement under the sponsorship of the Anglican Church. Nor does it address the numerous other issues unique to his case such as the Task Force's clearance of Ameziane for transfer just before his merits hearing, which operated to deprive him of his constitutionally-protected right to petition for habeas relief. App. 81-82, 94-95, 98, 100, 103-04, 114, 125.[7]

The District Court also found the government's proffered harms to be merely speculative based on the government's concessions at oral argument that it has not engaged in any meaningful discussions with Algeria regarding Ameziane's repatriation and does not know whether public disclosure of his clearance would have any impact on future diplomatic efforts regarding the closure of Guantánamo Bay. App. 121. Indeed, the government conceded before the District Court that it is not particularly concerned about whether Algeria might be disturbed by

[7] The District Court also rejected the sufficiency of the declarations of former Deputy Assistant Secretary of Defense Sandra L. Hodgkinson and Ambassador Clint Williamson, *see* App. 129, 134, on the ground that they are out-of-date and do not speak to Ameziane's unique facts. App. 81, 94.

Ameziane's clearance and desire to resettle elsewhere. App. 78. As the District Court observed, the government appears to be less concerned with whether Ameziane's clearance for transfer is publicly known than it is with the perceived meddling of the District Court and Ameziane's counsel in the government's efforts to repatriate or resettle the detainees and close Guantánamo Bay. App. 109.

There is also no basis for this Court to upset the District Court's reasoned conclusions now. Certainly, the District Court did not apply the wrong legal standard and its findings and conclusions were not clearly erroneous. There is no serious dispute that Ameziane's clearance has already become public. In addition, there is no dispute that the government lacks power to prevent the speculative, generic harms that it seeks to avoid by designating Ameziane's Task Force clearance as protected. As the government itself repeatedly concedes, regardless of whether the Task Force decision is designated as protected, the government has no power to prevent Ameziane's counsel from continuing to communicate with foreign governments on his behalf in order to find him a country for resettlement because he cannot safely return to Algeria, where he would likely be detained on behalf of the United States and persecuted. App. 126 ("[P]rotecting petitioner's clearance status will do little to prevent petitioner's counsel from soliciting other countries to accept him because, as the government admits, petitioner's counsel is free to communicate directly with foreign governments to advocate for his

resettlement irrespective of this Court's June 30, 2009 Order."); *see also* App. 150-62 (documenting risk of harm). Nor is there anything the government can do to stop Ameziane's counsel from discussing with the Algerian government his desire to be resettled elsewhere in order to obtain Algeria's cooperation in those resettlement efforts.

Further, as the District Court found in the exercise of its discretion, there is simply no discernable, rational distinction between the public disclosure of notice that Ameziane has been cleared by the Task Force and the routine public disclosure of orders entered by District Judges granting habeas petitions filed by detainees who still remain at Guantánamo Bay pending diplomatic negotiations regarding their transfers. App. 124-25. The government has also publicly disclosed at least one detainee's clearance by the Task Force absent a court order granting his petition, and continues to permit counsel in other detainee cases to disclose publicly their clients' clearances for transfer. App. 124; Add. 5-8, 24 n.2. At least one other District Judge also twice rejected the government's attempt to conceal the clearance of two detainees by the Task Force, including another Algerian (ISN 744), each of whom has repatriation concerns similar to Ameziane's concerns,

without incident or apparent harm to U.S. interests. Add. 9-12.[8] Notably, and in apparent contradiction to the Fried Declaration's suggestion that any disclosure of Task Force determinations would harm the government, the government did not appeal those rulings. In sum, as the District Court found in its discretion, "[t]he government's rationale for protecting petitioner's clearance status is riddled with contradictions." App. 124. "There is no practical reason to keep clearance approval secret from the public simply because it has been granted by the government instead of the Court." App. 124-25.[9]

Far from offering any persuasive response to the District Court's specific findings and conclusions in this case, the government argues that the District Court erred because other District Judges have reached different conclusions regarding the sufficiency of the Fried Declaration. Gvt. Br. at 24-25, 27. That argument is not persuasive. As the District Court explained, "the different decisions arose not from 'serious legal questions,' as the government asserts, but from unique factual

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[8] Nor has harm resulted from the recent transfers of other Algerian prisoners to Bosnia and France. *See*, *e.g.*, *US Sets Free Test Case Detainee*, BBC News, 15 May 2009, *available at:* http://news.bbc.co.uk/2/hi/americas/8052728.stm.

[9] Prior clearance notices by the Defense Department's Administrative Review Boards – which, like the Task Force, determined whether detainees found to be "enemy combatants" should nonetheless be transferred or released from Guantánamo Bay – were also publicly disclosed. No harm resulted from the disclosures; rather, the information was posted on the Internet by the Defense Department at http://www.dod.mil/pubs/foi/detainees/.

circumstances that distinguish the instant case." App. 127. The government's argument concerning the need for uniformity is also undercut by Ambassador Fried's concession that it may be helpful for the government to allow public disclosure of Task Force determinations on a case-by-case basis. App. 47.

The government's argument for requiring uniformity among the District Judges further ignores this Court's rulings in *Bismullah* and *Parhat*, rejecting the government's previous attempts to designate entire categories of information as protected based on a blanket assertion of generic harms to national security or the national interest. As described above, this Court held in *Parhat* that

> [b]y resting its motion on generic claims applicable to all of the more than one hundred cases in which the [designation was requested], the government has effectively duplicated its request "unilaterally to determine whether information is 'protected.'" Without an explanation tailored to the specific information at issue, we are left with no way to determine whether it warrants protection – other than to accept the government's own designation. This we cannot do . . .

532 F.3d at 853 (quoting *Bismullah*, 501 F.3d at 188) (citation omitted).

Indeed, the government concedes in its opening brief that it cannot properly rest a motion to protect information on a generic claim applicable to all detainee cases. It nevertheless suggests that some types of information may warrant protection as a categorical matter. Gvt. Br. at 30-31.

In support of that claim, the government cites a single case, *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991), which is wholly irrelevant.

SafeCard was a FOIA case that involved the question of whether to withhold the names and addresses of private individuals located in law enforcement files pursuant to an express statutory privacy exemption. And far from authorizing courts to withhold unclassified information on a generic, categorical basis, the case simply recites the uncontroversial proposition that in deciding FOIA cases courts may "generalize from their experience, that is, in order to minimize unnecessary inquiries into factual minutiae" of numerous documents which may be responsive to a particular FOIA request, and where a statutory claim for withholding tips decidedly in one direction. *Id.*

By contrast, the instant case is neither a FOIA case nor involves the need to inquire into factual minutiae on a broad basis. Rather, here, the District Court has already conducted a fact-specific inquiry concerning a particular detainee and determined that a single unclassified fact may be publicly disclosed pursuant to a protective order. In doing so, again, as explained above, the District Court found specifically that the unique factual circumstances of the case distinguished it from other cases in which District Judges have reached different conclusions. App. 127.

The District Court's reliance on the unique nature of this case further undermines the government's fear that the decision might precipitate a "tragedy of the commons" and open the door for other District Judges automatically to issue similar rulings. Gvt. Br. at 31. In short, the District Judges have issued and will

likely continue to issue different decisions regarding the disclosure of Task Force determinations based on the particular facts and circumstances of specific detainee cases. That is the proper function of the District Courts, and should not be upset in this context as an abuse of discretion.

C. The District Court's Order Does Not Infringe on a "Core Foreign Relations Function" or Require "Special Deference" to the Executive

The government's argument on the merits of this appeal ultimately rests on the notion that the District Courts lack any authority to reject the Fried Declaration as providing a sufficient justification to designate a Task Force determination as protected. According to the government, no District Judge may refuse to defer entirely to the Fried Declaration and decline to designate a Task Force clearance determination as protected. In support of this sweeping claim, the government contends that the District Court's decision to allow disclosure of a Task Force determination infringes on a "core foreign relations function" and ignores the "special deference" that must be afforded to determinations of the Executive. Gvt. Br. at 13, 23-25. The government's argument lacks merit.

As an initial matter, the government does not explain the basis for its assertion that disclosure of Ameziane's Task Force determination might infringe on a "core foreign relations function" entirely outside the reach of the District Court, or how the disclose of a Task Force determination would have any greater

impact on foreign relations than any other decisions by the District Court concerning the transfer or release of Guantánamo detainees, including public orders granting habeas relief. The government has also failed to explain what "special deference" might require if not complete deference to the Executive. Nor has the government identified any constitutional or statutory basis for the absolute deference to which the government claims entitlement. The government instead asks this Court to sanction an unprecedented view of Executive power requiring the District Court to accept the government's proffered harms at face value as well as its unilateral designation of Task Force determinations as protected without the required assessment of individualized facts, which this Court has twice held is improper under *Bismullah* and *Parhat*. 501 F.3d at 188; 532 F.3d at 853.

To the extent that the government may contend that the requirement of "special deference" is rooted in the separation of powers, *see* Gvt. Br. at 12-13, the government errs by "presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated function." *Clinton v. Jones*, 520 U.S. 681, 702 (1997). In the realm of foreign affairs, specifically, not every dispute "touching our foreign relations falls outside the province of the judiciary." *Holmes v. Laird*, 459 F.2d 1211, 1215 (D.C. Cir. 1972); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[I]t is

error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

That is so even where, as here, judicial review allegedly touches on sensitive negotiations concerning the repatriation of foreign citizens detained by the United States. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) ("The sole foreign policy consideration the Government mentions here is the concern lest courts interfere with 'sensitive' repatriation negotiations. But neither the Government nor the dissents explain how a habeas court's efforts to determine the likelihood of repatriation, if handled with appropriate sensitivity, could make a significant difference in this respect.") (citation omitted).

Even during an alleged time of war, judicial review of Executive action touching on foreign affairs and the treatment of detainees is entirely appropriate and lawful. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) ("Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006) ("In view of the public importance of the questions raised by [the

cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) ("[I]t does not infringe on the core role of the military for courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here."); *id.* at 535-36 ("We have long since made clear that a state of war is not a blank check for the President"); *cf. Al Odah v. United States*, 559 F.3d 539, 545 (D.C. Cir. 2009) (rejecting government's "naked" assertion that classified information was not material to detainee's habeas claim and should be not be shared with detainee's counsel).

The cases cited by the government do not support a contrary conclusion. Gvt. Br. at 15, 32-35. *Titanium Metals Corp. v. N.L.R.B.*, 392 F.3d 439 (D.C. Cir. 2004), for example, is wholly irrelevant. There, this Court exercised its limited jurisdiction to review directly an administrative agency's failure to adhere to its own deferral policy. The case did not involve detainees, foreign affairs or even review of a District Court's exercise of its discretion. *Id.*

This case is also unlike *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990), *United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006), and *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), where the Court reviewed the application of

specific statutory provisions governing the disclosure of classified information pursuant to FOIA (*Fitzgibbon*) and the Classified Information Procedures Act, 18 U.S.C. App. § 4 (*Mejia* and *Yunis*). As explained at length above, this case does not involve classified information or any claim of statutory or other legal authority for the government to withhold unclassified information.[10]

In addition, this case is unlike the various cases cited by the government requiring deference to the Executive in the unique and limited contexts of: (1) judicial review of the acts of sovereign nations triggering principles of international comity, *see Belize Telecom, Ltd. v. Government of Belize*, 528 F.3d 1298 (11th Cir. 2008); (2) the interpretation or application of treaty law, *see Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972); (3) a non-justiciable political question, *see Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005); or (4) federal affairs preemption arising from a conflict between state and federal law which affects the ability of the nation to "speak with one voice" in matters of foreign affairs, *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Nor does the District Court's disclosure order in this case contravene the general principle of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), and *Haig v.*

[10] *Cf. Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (courts should not nullify executive action regarding air commerce where such action is based on information "properly held secret").

Agee, 453 U.S. 280 (1981), that the Executive has primary responsibility for the conduct of foreign affairs.

In sum, while the government contends that the foreign relations concerns identified in the Fried Declaration are entitled to "special" – *i.e.*, total – deference, the government cites no actual legal authority to support such an expansive and unprecedented claim of Executive power. Moreover, to the extent that any deference was owed to the Executive concerning the protected designation of Ameziane's approval for transfer, the District Court properly afforded such deference by applying the procedures set forth in the protective order to obtain a protected designation (including the requirement that the information be treated as protected until the District Court ruled that it should not be designated) and by accounting for the appropriate separation of powers. App. 14; App. 123 ("[T]he Court is mindful that the judiciary may not involve itself in matters left solely within the province of the executive. . . . It is, however, the judiciary's duty to decide whether unclassified information should be protected based on a careful consideration of the specific circumstances and unique facts presented by each case.") (citations omitted).

D. The Government's Remaining Claims Regarding Public Access to Task Force Determinations Are Meritless

The government further claims that there is no constitutional or common law right of public access to the Task Force determination in this case. Gvt. Br. at 36-39. Although the government concedes that public access plays a significant role in the functioning of the detainee habeas cases, it contends that Task Force determinations are not the sort of information where public disclosure would serve an important function of monitoring government misconduct. In particular, the government contends that the Task Force's approval of Ameziane for transfer does not fall within the First Amendment or common law right of access to judicial proceedings because that determination is not relevant to the merits of his habeas proceeding, and public release of the information would contribute nothing to the public's evaluation of the habeas process. *Id.* at 13-14, 38-39. The government's claims should be rejected for two reasons.

First, although the District Court surely addressed the public interest in whether its June 30, 2009 order authorizing the disclosure of Ameziane's approval for transfer should be stayed pending appeal, *see* App. 123-24, the government failed to raise any argument or objection in the lower court concerning whether there is a First Amendment or common law right of access to the Task Force's determination. Neither the First Amendment nor the common law right of access

to civil proceedings was so much as mentioned in passing below. The government's claim that there is no such right regarding Task Force determinations is raised for the first time on appeal, and should be rejected accordingly. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal. . . . Decisions in this Circuit have consistently followed a practice of dismissing appeals brought on grounds not asserted in the trial court."); *cf. United States v. Fredriksson*, 893 F.2d 1404 (D.C. Cir. 1990) ("While the appellants did raise a First Amendment issue below, it was premised on a different ground. It is well settled that appellants may not raise a new legal theory on appeal for the first time.").

Second, even if the Court considers the government's novel argument concerning the public right of access to the Task Force's approval of Ameziane for transfer, that argument should be rejected. As Judge Hogan concluded in the *In re Guantánamo Bay Detainee Litigation* cases in rejecting the government's attempt unilaterally to designate unclassified factual returns as protected, "public access plays a significant positive role in the functioning of these habeas proceedings." Mem. Op. at 14, *In re Guantanamo Bay Detainee Litig.*, No. 08-MC-442 (TFH) (D.D.C. June 1, 2009) (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1,

8 (1986)) (internal quotation marks omitted).[11] "In general, opening the judicial process ensures actual fairness as well as the appearance of fairness." *Id.* (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). Moreover, the operation of the Task Force is central to the judicial process. *Id.* at 14-15 ("[T]he President created a Guantanamo Review Task Force . . . to determine the proper disposition of each detainee. While the detainees await the findings of the Task Force, filing a petition for a writ of habeas corpus remains the only official vehicle for a detainee to challenge the government's decision to detain him. These proceedings thus remain of critical importance and relevance.") (citations omitted).

In the context of this particular case, public disclosure of Ameziane's clearance for transfer would "enlighten the citizenry and improve the perceptions" of the habeas proceedings and the operations of the Task Force created by Executive Order 13,492, affording those processes the legitimacy that accompanies transparency. Mem. Op. at 15, *In re Guantanamo Bay Detainee Litig.*, No. 08-MC-442 (TFH) (D.D.C. June 1, 2009) (citing *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (observing that in the areas of national defense and international relations "the only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry")).

[11] Judge Hogan's opinion also appears as Docket Entry No. 212 in *Ameziane v. Obama*, No. 05-CV-392 (ESH) (D.D.C.).

Transparency is particularly important here because, as described above, the Task Force's approval of Ameziane for transfer has operated to deprive him of his constitutionally-protected right to petition for habeas relief.

It is important to recognize that Ameziane has been imprisoned at Guantánamo Bay for more than seven years. Although he has been approved for transfer, the government has concealed this critically important fact by attempting to designate his status as protected, thus prohibiting him from using this information to facilitate his resettlement in a country other than Algeria. At the same time, as explained above, the government has relied on his clearance as a basis to obtain a stay of the merits of his habeas case. Indeed, the government's claim that Ameziane will suffer no prejudice from the continuing concealment of his clearance cannot be reconciled with the fact that his habeas case has been stayed, without his consent, based on his clearance by the Task Force. Again, as the District Court properly found in the exercise of its discretion, "it would be unfair if he were in a worse position to advocate for his resettlement to foreign countries than if his habeas case had proceeded and he was ordered released by [the district court]." App. 125-26.

Each day that Ameziane remains secretly approved for transfer, combined with the very public stay of his case, is an affront to the Supreme Court's decision in *Boumediene*, 128 S. Ct. at 2275, holding "the costs of delay can no longer be

borne by those who are held in custody." And while the government contends that Ameziane suffers no harm because his detention is no longer at issue, Gvt. Br. at 14, 41, it overlooks entirely the basic fact that *he is still in prison at Guantánamo*, and, as far as the public may believe absent further dissemination of information about his clearance, he is still subject to military detention based on secret evidence. At best, he is in the same position he has been in for the past seven years – *i.e.*, living behind razor wire, on a remote military base, thousands of miles from his family, with no meaningful access to the outside world. At worst, the stay combined with the concealment of his clearance wrongly implies he is too dangerous to release.

Moreover, public notice of the Task Force's determination regarding Ameziane is necessary to ensure that the government does not later rescind his status as "approved for transfer" if the government is unable to transfer him to Algeria and is forced to litigate the merits of his habeas case. Importantly, that is not a speculative concern based on the government's prior conduct in this case.

As described above, the government attempted to repatriate Ameziane to Algeria in October 2008. After Ameziane obtained an injunction barring his transfer – which remains in force – the government moved to stay his case on the ground that the Defense Department had approved him for "transfer or release." App. 37. That determination was not in any way qualified or limited to

Ameziane's approval for transfer to Algeria. Rather, the government argued that the case should be stayed because there were no longer any "military rationales" for his detention and steps were being taken to transfer him. App. 42. Moreover, as indicated above, the government filed its stay motion *after* Ameziane had already obtained an injunction barring his transfer to Algeria, and such transfer was not possible, further underscoring the general nature of his clearance for transfer.

Yet after the stay motion was denied, the government rescinded Ameziane's clearance and stated in a public status report that he was not approved for transfer. The government manipulated his clearance designation as a litigation tactic – in the process concealing his prior status and hindering his efforts to find a safe country for resettlement by stating publicly he was not cleared for transfer or release. *See supra* pp.5-6.

The government's current position is essentially no different. Ameziane has been cleared for transfer and the government attempted to designate his status as protected, thereby preventing his attorneys from informing the Canadians directly that he is approved for transfer from Guantánamo Bay. The government has also taken the position, once again, that this case should be stayed, and the District Court entered such a stay over Ameziane's objections. Absent public scrutiny, however, there is nothing to ensure that the government will not again seek to change his status should the need arise in connection with future litigation.

Ameziane remains in no better position than he was in many months ago, and by any measure he continues to bear the costs of delay in contravention of *Boumediene*. 128 S. Ct. at 2275.

In sum, as the District Court properly found in the exercise of its discretion, the public has a substantial interest in the transparency that accompanies the disclosure of Ameziane's Task Force decision. App. 123-24. Transparency is essential to ensure truth, accuracy and the public interest in the proper administration of justice, especially in the context of the Guantánamo cases which have so dominated the legal landscape in this country and affected the international reputation of the United States for more than seven years. The Task Force, in particular, was created by the President in order to close Guantánamo Bay by January 2010. In the meantime, although large numbers of detainees have been approved for transfer or release eventually, few have actually been released and the Task Force has operated to deprive the detainees who remain imprisoned of their constitutional right to petition for habeas relief. These issues are indisputably of critical importance and relevance to the public as this country seeks to end nearly a decade of litigation and overcome the bitter legacy of Guantánamo Bay.

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal for lack of jurisdiction. Alternatively, the Court should affirm the order of the District Court.

Date: New York, New York
August 27, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, in accordance with Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the Opening Brief for Appellee is proportionately spaced, has a typeface of 14 point font, and contains 13,982 words, which does not exceed the applicable 14,000 word limit.

_____
J. Wells Dixon

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2009, I caused the foregoing Opening Brief for Appellee to be hand-delivered to the Court for filing under seal, and to be served on counsel of record via email and overnight mail at the following address:

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