Nos. 14-148 and 14-6575

In the Supreme Court of the United States

AMANATULLAH, ET AL., PETITIONERS

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.

REDHA AL-NAJAR, ET AL., PETITIONERS

v.

CHUCK HAGEL, SECRETARY OF DEFENSE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
DOUGLAS N. LETTER
MATTHEW COLLETTE
SHARON SWINGLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether aliens captured abroad and detained by U.S. military forces at Bagram Airfield Military Base, a multi-national military facility in Afghanistan, have a constitutional right to habeas corpus review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-52a[1]) is reported at 738 F.3d 312. The opinion of the district court in No. 14-148 (Pet. App. 54a-79a) is reported at 904 F. Supp. 2d 45. The opinion of the district court in No. 14-6575 (14-6575 Pet. App. A20-A31) is reported at 899 F. Supp. 2d 10. A prior opinion of the court of appeals in No. 14-6575 (14-6575 Pet. App.

[1] All citations of "Pet. App." refer to the petition appendix in No. 14-148 unless otherwise indicated.

A37-A47) is reported at 605 F.3d 84. A prior opinion of the district court in No. 14-6575 (14-6575 Pet. App. A48-A71) is reported at 604 F. Supp. 2d 205.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-3a) was entered on December 24, 2013. Petitions for rehearing were denied on March 13, 2014 (Pet. App. 80a-81a; No. 14-6575 Pet. App. A19). On May 21, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 14-148 to and including August 10, 2014. On May 23, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 14-6575 to and including August 10, 2014. The petitions were filed on August 11, 2014 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Amanatullah (No. 14-148) is a citizen of Pakistan who alleged that he was detained by the United States at Bagram Airfield Military Base (Bagram Airfield), a multi-national military facility in Afghanistan. He filed a petition for a writ of habeas corpus in the district court challenging the lawfulness of his detention. The court denied the petition for lack of jurisdiction. Pet. App. 53a-79a. The court of appeals affirmed. See *id.* at 4a-52a. The Department of Defense has informed this Office that on approximately September 20, 2014, Amanatullah was transferred out of U.S. custody and control.

Petitioner Redha al-Najar (No. 14-6575) is a citizen of Tunisia who also alleged that he was detained by the United States at Bagram Airfield. He filed a petition for a writ of habeas corpus in the district court challenging the lawfulness of his detention. The dis-

trict court denied the government's motion to dismiss, but the court of appeals reversed and ordered the district court to dismiss the petition for lack of jurisdiction. 605 F.3d 84, 99 (*Al Maqaleh II*). On remand, al-Najar amended his petition, but the district court dismissed the amended petition for lack of jurisdiction. 14-6575 Pet. App. A22. The court of appeals affirmed. See Pet. App 4a-52a. The Department of Defense has informed this Office that on approximately December 9, 2014, al-Najar was transferred out of U.S. custody and control.[2]

1. Beginning in 2001, the United States conducted combat operations in Afghanistan against the Taliban, al Qaeda, and associated forces and engaged in related efforts to support the sovereignty of the Afghan government. The combat mission in Afghanistan was conducted by a multi-national coalition led by the U.S. military, acting in concert with Afghan forces. See Joint Decl. of the United States-Afghanistan Strategic Partnership, May 23, 2005, C.A. App. 133-135. The United States operated several non-permanent military facilities, one of which was Bagram Airfield. U.S. and coalition forces used that facility to conduct ongoing military operations.

The use of Bagram Airfield by coalition forces was governed by an "Accommodation and Consignment Agreement" between the Afghan Government and the United States. See *Al Maqaleh II*, 605 F.3d at 87-89. That agreement between Afghanistan as the "host nation" and the United States "as the lessee" provided

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[2] On December 19, 2014, the two other original petitioners in No. 14-6575, Fadi al-Maqaleh and Amin al-Bakri, moved under Rule 46 of the Rules of this Court to dismiss the petition as to them. This Court granted that motion on December 29, 2014.

for the "use" of all facilities and land located at Bagram Airfield "by the United States and coalition forces for military purposes." *Id.* at 87.

The United States operated detention facilities at Bagram Airfield in connection with its military operations. The United States initially housed detainees at the Bagram Theater Internment Facility (BTIF). Pet. App. 9a. In late 2009, the United States constructed a new detention facility at Bagram Airfield, then known as the Detention Facility in Parwan (DFIP). *Ibid.* The United States transferred all detainees held in the BTIF to the DFIP. *Ibid.* The United States built a separate unit within the facility to house non-Afghan detainees.

In March 2012, the United States agreed to transfer "U.S. detention facilities in Afghan territory to Afghan control" and to transfer "Afghan nationals detained by U.S. forces at the [DFIP] to Afghanistan." C.A. App. 680. The United States completed the transfer of the DFIP facility and all of its Afghan detainees to Afghan control on March 25, 2013, while continuing to hold a small number of non-Afghan detainees at the facility.

The Department of Defense has informed this Office that on approximately December 10, 2014, the United States transferred out of U.S. custody and control the last remaining detainee who was held at Bagram Airfield and that the United States no longer operates any detention facilities in Afghanistan.

2. a. Petitioner al-Najar (No. 14-6575) is a citizen of Tunisia who alleged that he had been detained at Bagram Airfield since approximately 2003. In 2008, he filed a petition for a writ of habeas corpus in the United States District Court for the District of Co-

lumbia challenging the lawfulness of his detention. See 604 F. Supp. 2d 205, 209 (2009) (*Al Maqaleh I*), reversed, 605 F.3d 84 (D.C. Cir. 2010).

The government moved to dismiss the petitions filed by al-Najar and other Bagram Airfield detainees, arguing that the district court lacked jurisdiction under 28 U.S.C. 2241(e), which was enacted as Section 7(a) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2635. Section 2241(e)(1) provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

The district court denied the government's motion. It held that under the Suspension Clause of the Constitution (Art. I, § 9, Cl. 2), Section 2241(e)(1) could not constitutionally be applied to deprive the court of jurisdiction over the petitions. *Al Maqaleh I*, 604 F. Supp. 2d at 232. The court relied on this Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), which held that Section 2241(e)(1)'s application to military detainees held at the U.S. military facility at Guantánamo Bay, Cuba, violates the Suspension Clause. *Id.* at 792. The district court then certified an interlocutory appeal under 28 U.S.C. 1292(b). See *Al Maqaleh II*, 605 F.3d at 87.

b. The court of appeals reversed and ordered the petitions dismissed. *Al Maqaleh II*, 605 F.3d at 99. The court began by explaining that "Afghanistan remains a theater of active military combat." *Id.* at 88. The court then examined each of the three factors that

this Court found relevant to the territorial reach of the Suspension Clause in *Boumediene*: (i) "the citizenship and status of the detainee and the adequacy of the process through which that status determination was made," (ii) "the nature of the sites where apprehension and then detention took place," and (iii) "the practical obstacles inherent in resolving the prisoner's entitlement to the writ." 553 U.S. at 766; see *Al Maqaleh II*, 605 F.3d at 94-98.

The court of appeals determined that the first factor supported the petitioners' argument for extending the availability of the writ to Bagram Airfield. 605 F.3d at 96. Like the petitioners in *Boumediene*, the court observed, the petitioners were being held as enemy aliens, and their status had originally been determined by a tribunal that used procedures that the court believed afforded fewer procedural protections than the tribunals that had determined the status of the aliens held at Guantánamo. *Ibid.* The court declined the government's request that it consider "new procedures that [the government had] put into place at Bagram in the [previous] months for evaluating the continued detention of individuals." *Id.* at 96 n.4.

The court of appeals concluded, however, that *Boumediene*'s second and third factors strongly favored declining to extend the reach of the Suspension Clause to Bagram Airfield. See 605 F.3d at 96-98. The petitioners, the court explained, had been captured abroad and were being held at a location where the United States exercised neither *de jure* nor *de facto* sovereignty. *Id.* at 97. Unlike with Guantánamo, where the "United States has maintained its total control * * * for over a century, even in the face of a hostile government maintaining *de jure* sovereignty

over the property," the court saw no indication that the United States intended to permanently occupy Bagram Airfield and perceived no "hostility on the part of the 'host' country." *Ibid.*

The court of appeals likewise determined that "the practical obstacles inherent in resolving the prisoner's entitlement to the writ" weighed "overwhelmingly in favor of the position of the United States." 605 F.3d at 97. The court reiterated that Bagram Airfield was located in an active theater of war. That rendered the facility less amenable to the jurisdiction of U.S. courts not only than Guantánamo, but also than the detention facility at issue in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), which held that the Suspension Clause did not apply to World War II military detainees held at an Allied Forces prison in Germany even though "active hostilities in the European theater had come to an end." 605 F.3d at 97 (internal quotation marks omitted); see *Johnson*, 339 U.S. at 777-781. And the court emphasized that Bagram Airfield "is within the sovereign territory of another nation, which itself creates practical difficulties." 605 F.3d at 99.

The court of appeals therefore held that the petitioners were not constitutionally entitled to seek writs of habeas corpus in U.S. courts. 605 F.3d at 99. The court rejected the petitioners' arguments that the reach of the writ should be expanded to an active war zone because the government "might be able to evade judicial review of Executive detention decisions by transferring detainees into active conflict zones." *Id.* at 98 (internal quotation marks omitted). The court allowed that "such manipulation by the Executive might constitute an additional factor in some case in which it is in fact present." *Id.* at 99. With respect to

the petitioners before it, however, the court noted that "that is not what happened here." *Id.* at 98. The court thus concluded that determining how such manipulation might affect habeas jurisdiction "can await a case in which the claim is a reality rather than a speculation." *Ibid.*

c. The petitioners in *Al Maqaleh* sought rehearing in the court of appeals, arguing that factual developments after the case was submitted to the panel showed that the U.S. military intended to detain them for the foreseeable future. See Pet. for Reh'g 5, 09-5265 Docket entry (July 6, 2010). In particular, the petitioners cited the government's decision to transfer Afghan detainees previously held at the BTIF to the DFIP and to transfer both those detainees and the DFIP facility itself to Afghan control, while not transferring non-Afghan detainees to Afghan control. See *id.* at 4-5. The court of appeals denied rehearing, noting that the rehearing petition cited evidence not in the record and that the denial of rehearing "is without prejudice to appellees' ability to present this evidence to the district court in the first instance." Order 1, 09-5265 Docket entry (July 23, 2010).

d. The *Al Maqaleh* petitioners filed amended habeas petitions in the district court. Pet. App. 14a. They contended, *inter alia*, that new evidence showed that the United States intended to remain indefinitely at Bagram Airfield, that practical barriers to habeas review were less severe than what the first panel had believed, and that the United States was attempting to evade habeas review by detaining the petitioners there. *Ibid.* The district court denied the petitions after concluding that "petitioners' new evidence" did

not "undermine[] the rationale of the court of appeals' decision." 14-6575 Pet. App. A22; see *id.* at A24-A31.

3. Petitioner Amanatullah (No. 14-148) is a citizen of Pakistan who alleged that he was taken into custody in 2004 in Iraq by British forces and then transferred to the custody of U.S. forces and subsequently detained at Bagram Airfield. Pet. 3; Pet. App. 88a-91a. While the initial appeal in *Al Maqaleh* was pending, Amanatullah filed a habeas petition in the United States District Court for the District of Columbia challenging the lawfulness of his detention. After the court of appeals issued its decision in *Al Maqaleh*, the district court permitted Amanatullah to amend his petition. *Id.* at 54a-55a. The district court then granted the government's motion to dismiss the petition, holding that Amanatullah had failed to adduce "new evidence, not part of the record before the Court of Appeals in [*Al Maqaleh II*], that would mandate a departure from the Circuit's application of the *Boumediene* factors and produce a different outcome." *Id.* at 73a-79a.

4. The court of appeals affirmed the dismissal of the amended petitions in three consolidated appeals involving five detainees, including Amanatullah and al-Najar. Pet. App. 52a. The court concluded that none of the alleged changes or factual developments since its earlier decision undermined that decision's holding. *Id.* at 47a-50a.[3]

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[3] With respect to one detainee who is not a petitioner here, the court of appeals held that his case may be moot because he had been transferred to the custody of the government of Pakistan. See Pet. App. 16a-19a. Because that detainee had argued that the United States still retained some form of constructive custody over him, the court of appeals remanded the case to the district court

The court of appeals began by explaining that the application of the first *Boumediene* factor—the citizenship and status of the detainees—had not changed since the first decision. See Pet. App. 20a-26a. The petitioners remained "aliens detained as enemy combatants." *Id.* at 20a. The court also found that petitioners had conceded in the district court that the new procedures that determined their status (which the first panel had declined to consider) were "more akin to traditional habeas proceedings than were the * * * procedures" at issue in the first appeal. *Id.* at 28a. The court explained that under those procedures, the petitioners were "entitled to a personal representative and may call witnesses, proffer evidence and investigate potentially exculpatory information." *Ibid.*

The court of appeals also rejected petitioners' argument that the court should reach a different conclusion from the first panel on the second *Boumediene* factor—the nature of the sites of apprehension and detention—on the ground that new evidence established that "the United States now intends to permanently occupy Bagram." Pet. App. 29a-33a. The court explained that the first panel had credited the government's representation that it had "no intention of remaining in Afghanistan permanently or of establishing a permanent base or prison at Bagram," and it determined that "[s]ubsequent events have confirmed, not undermined, the Government's declared intention." *Id.* at 31a. In particular, the court pointed to a memorandum of understanding expressing the United States' intention to transfer all Afghan detainees and

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"for the limited purpose of determining whether he is in the sole custody of the government of Pakistan." *Id.* at 19a.

detention facilities to Afghanistan; the United States' subsequent transfer of all Afghan detainees and certain detention facilities to Afghan control; and its transfer of one of the petitioners in the appeal to his home country. *Ibid.* The court determined that those developments "support * * * the conclusion we reached in *Al Maqaleh II* that American control over Bagram and its detention facilities lacks the permanence of U.S. control over Guantanamo." *Id.* at 32a.

The court of appeals further concluded that practical obstacles to habeas review persisted. See Pet. App. 33a-46a. The court noted that the armed conflict in Afghanistan was ongoing and that it would be greatly disruptive to military efforts to allow U.S. courts to order the release of prisoners in Afghanistan or to require U.S. commanders to appear in civilian courts. *Id.* at 36a-37a. "The United States," it explained, "is not involved merely in administering occupied territory and containing scattered guerilla fighters but rather in quelling a large-scale insurgency against the government of a regional ally." *Ibid.* The court also rejected the argument that the U.S. government's participation in Afghan criminal proceedings demonstrated that habeas review in U.S. courts was practicable. See *id.* at 38a-43a. "The question," the court said, "is whether [U.S. forces'] participation [in habeas proceedings] would 'divert [their] efforts and attention *from the military offensive abroad to the legal defensive at home*,'" and, it concluded, the United States' mission in helping Afghanistan build its judicial system "is a part of the 'military offensive abroad.'" *Id.* at 38a-39a (quoting *Eisentrager*, 339 U.S. at 779) (emphasis added by court of appeals).

The court of appeals also emphasized another practical obstacle that it had previously identified: "the disruption of the relationship between the U.S. and Afghan governments potentially created by extension of the Suspension Clause to Bagram." Pet. App. 40a-41a. The court declined to give weight to a letter sent from the then-Afghan President's Chief of Staff to petitioners' counsel, which petitioners argued showed that the Afghan government wanted U.S. courts to exercise habeas jurisdiction over non-Afghan detainees. *Id.* at 41a-43a. The court noted that other Afghan Government officials had made conflicting statements, and that the court lacked competence to resolve which view represented the official position of the Afghan government: "Because we lack the competence and, more importantly, the power to negotiate the subtleties of international politics, we run the very high risk of misstating Afghanistan's formal policy and 'embarrass[ing] the executive arm of the government in conducting foreign relations.'" *Id.* at 42a-43a (quoting *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943)).

Finally, the court of appeals for a second time rejected petitioners' argument that the government's choice to detain them at Bagram Airfield reflected impermissible "manipulation" of U.S. courts' habeas jurisdiction that justified extension of the writ. Pet. App. 47a. The court emphasized that the petitioners "do not allege, nor do they have evidence suggesting, that any official ever considered the reach of the writ in deciding where to detain *them*." *Id.* at 50a. Rather, the petitioners' argument appeared to be that they were entitled to habeas review because "the President *might* have considered at *some* point in time the reach

of the writ as *one factor* among others in his decision to detain abroad (not necessarily at Bagram) certain *unidentified* detainees" captured abroad. *Id.* at 49a-50a. "Reduced to its core," the court concluded, that argument would support "universal extraterritorial application of the Suspension Clause." *Id.* at 50a. The court "again reject[ed] any argument tending toward this result." *Ibid.* The court noted, however, that "[w]ere a detainee to allege capture by the United States within our constitutional habeas jurisdiction followed by transfer to U.S. custody in territory beyond it, his entreaty for the protection of the Suspension Clause would be much more compelling than [the petitioners']." *Id.* at 52a.

5. On December 28, 2014, the United States ended its combat mission in Afghanistan. See Office of the Press Secretary, The White House, *Statement by the President on the End of the Combat Mission in Afghanistan* (Dec. 28, 2014).[4] The President has stated that "the United States—along with our allies and partners—will maintain a limited military presence in Afghanistan to train, advise and assist Afghan forces and to conduct counterterrorism operations against the remnants of al Qaeda." *Ibid.*

The Department of Defense has informed this Office that no detainees remain in U.S. custody in Afghanistan. As relevant here, after the petitions for writs of certiorari were filed in these cases, petitioners Amanatullah and al-Najar were each transferred out of U.S. custody and control.

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[4] http://www.whitehouse.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan.

ARGUMENT

Petitioners argue (14-148 Pet. 8-25, 14-6575 Pet. 12-32) that the court of appeals erred in holding that it lacked jurisdiction over habeas petitions filed by detainees at Bagram Airfield. These cases, however, are not suitable vehicles to consider that question. The Department of Defense has informed this Office that the United States no longer has custody or control over petitioners, so the cases are now moot. And even aside from that threshold barrier to review, the Department of Defense has further informed this Office that no detainees remain in U.S. custody or control in Afghanistan, so the question whether constitutional habeas jurisdiction extends to enemy aliens held at Bagram Airfield lacks prospective importance.

In any event, petitioners' argument lacks merit. The court of appeals carefully applied the multi-factored framework that this Court set out in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), and correctly concluded that the Suspension Clause did not authorize petitioners to challenge their detention at Bagram Airfield, a multi-national military base in an active war zone on foreign soil. Accordingly, further review is not warranted.

1. a. These cases are not appropriate vehicles to consider the extraterritorial reach of the Suspension Clause because they are now moot. The Department of Defense has informed this Office that both Amanatullah and al-Najar have been transferred out of U.S. custody and control. See p. 13, *supra*.

To satisfy Article III's case-or-controversy requirement, a litigant must "continue to have a personal stake in the outcome of the lawsuit," *i.e.*, he "must have suffered, or be threatened with, an actual injury

traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990)). In the context of habeas litigation challenging a criminal conviction, a prisoner who has been released from government custody must establish that he is likely to suffer continuing collateral consequences from the allegedly wrongful prior detention that can be remedied by the reviewing court. See *id.* at 8.

Even assuming that the same principle applies here, Amanatullah and al-Najar, who have been transferred out of the custody and control of the U.S. military, face no concrete and continuing injury from the United States that could be remedied through this litigation. As the D.C. Circuit previously concluded with respect to released Guantánamo detainees (after assuming *arguendo* that they could establish a continuing case or controversy by identifying redressable collateral consequences), any harms that those detainees might assert to flow from their prior detention are either too speculative or not subject to redress by a U.S. court. See *Gul* v. *Obama*, 652 F.3d 12, 16-21 (2011), cert. denied, 132 S. Ct. 1906 (2012); see also Pet. App. 16a-19a (holding that one detainee's case would be moot if he is now "in the sole custody of the government of Pakistan").

The petitioners in *Gul* argued that a number of collateral consequences would flow from their prior detention, but the court of appeals correctly concluded that those purported consequences did not suffice to establish a continuing case or controversy. The *Gul* petitioners argued, for example, that because they had been designated and detained as "enemy combatants,"

their home governments had restricted their ability to travel. 652 F.3d at 18. But the court of appeals explained that a U.S. court lacks any authority to redress that harm or to control the acts of a foreign government. *Ibid.* Similarly, the *Gul* petitioners argued that they would not be allowed to enter the United States on account of their designation, but the court of appeals recognized that various statutes would bar their admission in any event. *Id.* at 19-20. And the court of appeals further held that any "stigma" that the petitioners suffered as a result of past detention imposed "neither a 'concrete effect' nor a 'civil disability' susceptible to judicial correction." *Id.* at 20-21.

For the same reasons, these cases, too, are moot. They are thus particularly unsuitable vehicles to consider the question presented, because this Court would likely be required to dismiss them as moot rather than resolve the Suspension Clause issue that petitioners raise.

b. Even aside from the fact that these cases are moot, the question whether U.S. courts' habeas jurisdiction extends to Bagram Airfield has limited, if any, continuing significance as a practical matter. As discussed, see p. 13, *supra*, the U.S. military has concluded its combat mission in Afghanistan. The Department of Defense has informed this Office that on approximately December 10, 2014, the United States transferred out of U.S. custody and control the last remaining detainee who was held at Bagram Airfield and that the United States no longer operates any detention facilities in Afghanistan.

Accordingly, these cases present poor vehicles to resolve questions about the extraterritorial reach of

the Suspension Clause. Given that, under *Boumediene*, the Suspension Clause can require a fact-specific analysis of the particular detention facility where a detainee is held and the circumstances surrounding the United States' presence in the foreign nation (see pp. 18-19, *infra*), a decision holding that the Suspension Clause either does or does not apply to aliens detained at Bagram Airfield during a period of active hostilities would be unlikely to have substantial continuing significance.

2. In any event, the court of appeals correctly held that petitioners—aliens who were captured abroad and who at the time of the court's decision were detained at a multi-national military base in an "active theater of war"—do not have a constitutional right to seek a writ of habeas corpus in U.S. courts. Pet. App. 35a (citation omitted).

a. In *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), this Court held that German nationals captured in China after Germany's surrender, convicted by a military commission of violations of the laws of war, and detained at an Allied Forces facility under the control of U.S. forces in postwar Germany had no constitutional right to seek a writ of habeas corpus. See *id.* at 765-767, 777-781. The Court explained that to hold that such military detainees may obtain habeas review would logically suggest that habeas relief "would be equally available to enemies during active hostilities," and that "[s]uch trials would hamper the war effort and bring aid and comfort to the enemy." *Id.* at 779. "It would be difficult to devise more effective fettering of a field commander," the Court continued, "than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil

courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.*

In *Boumediene*, this Court concluded that "aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba" were differently situated from the detainees in *Eisentrager* for Suspension Clause purposes. 553 U.S. at 732; see *id.* at 739-771. After reviewing the history of the writ and its decisions in *Eisentrager* and other cases, see *id.* at 739-764, the Court held that the applicability of the Suspension Clause to a given prisoner does not depend exclusively on whether the United States exercises formal sovereignty over the place of detention. *Id.* at 764. Rather, it turns primarily on "objective factors and practical concerns." *Ibid.* In particular, the Court "conclude[d] that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 766. Applying those three factors, the Court held that, especially in light of the unique circumstances of the U.S. military's presence at Guantánamo, the detainees had a constitutional right to seek habeas relief. See *id.* at 766-771.

First, although the detainees were aliens who the Executive Branch had "designated as enemy combatants," 553 U.S. at 732, the procedures used to determine that status fell "well short of the procedures and adversarial mechanisms that would eliminate the need

for habeas corpus review." *Id.* at 767-768. Second, although "the sites of their apprehension and detention [we]re technically outside the sovereign territory of the United States," which "weigh[ed] against finding they have rights under the Suspension Clause," *id.* at 768, the Court held that the long-term, "indefinite" U.S. presence at Guantánamo meant that "[i]n every practical sense Guantanamo is * * * within the constant jurisdiction of the United States." *Id.* at 769. That distinguished the Guantánamo detainees from the detainees in *Eisentrager*, who were held at an Allied Forces prison under U.S. control during the temporary occupation of postwar Germany. *Id.* at 768. Finally, with respect to practical obstacles to habeas jurisdiction, the Court believed that the government had "present[ed] no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims." *Id.* at 769. That was also in contrast to *Eisentrager*, where "the United States [was] responsible for an occupation zone encompassing over 57,000 square miles with a population of 18 million" and "faced potential security threats from a defeated enemy." *Ibid.*

b. In the decision below, the court of appeals correctly applied the multi-factored framework set forth in *Boumediene* to hold that petitioners, who at the time were detained at Bagram Airfield, were not entitled to seek habeas relief in U.S. courts. In particular, the location of Bagram Airfield in a foreign nation over which the United States does not exercise even *de facto* sovereignty and the immense practical difficulties that would arise from permitting foreign prisoners to seek habeas relief in U.S. courts weighed de-

cisively against extension of the Suspension Clause to petitioners.

i. The second and third factors identified in *Boumediene*—the location of the detention facility and the practical obstacles to habeas review—strongly disfavored extending the availability of the writ to petitioners when they were detained at Bagram Airfield.

The United States' presence at Bagram Airfield differs fundamentally from the "*de facto* sovereignty" that this Court determined the United States exercises at Guantánamo. *Boumediene*, 553 U.S. at 755. The U.S. military occupies territory at Bagram Airfield under a lease agreement with Afghanistan. *Al Maqaleh II*, 605 F.3d at 97. Petitioners adduced no evidence below "of any intent to occupy the base with permanence, nor is there hostility on the part of the 'host' country." *Ibid.* Indeed, the President announced an end to the United States' combat mission in Afghanistan in December 2014 (and the United States has now relinquished custody of all detainees previously held there). See p. 13, *supra*. That situation bears no resemblance to United States' "indefinite" presence at Guantánamo, *Boumediene*, 553 U.S. at 768, "a territory that, while technically not part of the United States, is under the complete and total control of our Government," *id.* at 771.

In addition, serious practical barriers to resolving a detainee's entitlement to the writ "weigh[] overwhelmingly" against extending habeas corpus jurisdiction to a facility, like Bagram Airfield, located in the middle of a war zone on foreign soil. *Al Maqaleh II*, 605 F.3d at 97; see Pet. App. 35a-37a. As the court of appeals explained, if U.S. courts could order the release of prisoners held by the military as enemy bel-

ligerents in foreign war zones, our allies might have "reason to doubt the authority of, and promises made by," U.S. military commanders. *Id.* at 37a. "'[W]avering neutrals'" might "throw their lot in with our enemies if they believe that our commanders lack the authority to, for example, provide the promised level of protection against those enemies." *Ibid.*

Petitioner al-Najar challenges (14-6575 Pet. 15-16) the court of appeals' conclusion that habeas proceedings would have been impracticable, arguing that they could have been held in a federal court in Washington, D.C., and would not have required live testimony. That argument rests on an unduly narrow understanding of the sorts of practical obstacles that counsel against extending habeas jurisdiction. Requiring U.S. military officials to facilitate habeas proceedings involving detainees held in foreign conflict areas could require substantial diversion of military resources. For example, if U.S. courts were to order discovery akin to the discovery ordered in Guantánamo habeas cases, military officials in the field could be required to review documents, respond to burdensome production requests, and provide factual declarations on a broad array of matters. In addition, military officials could be required to facilitate counsel access by constructing adequate and safe facilities for detainees to meet with their attorneys. That could disrupt the cooperative working relationship between the U.S. military and allied forces responsible for detention and criminal prosecution of insurgents.

al-Najar also contends (14-6575 Pet. 16-17) that extending habeas jurisdiction to detainees who were held at Bagram Airfield would not have interfered with military operations because the United States

has provided assistance and mentoring to the Afghan government in conducting criminal trials. But as the court of appeals explained, the military's efforts to develop the institutional capacity of the Afghan government to detain, prosecute, and incarcerate insurgents are a critical component of the mission in Afghanistan. Pet. App. 38a-39a. That facet of the Nation's strategy does not support extending the habeas jurisdiction of U.S. courts to the Afghan battlefield.

ii. With respect to the first *Boumediene* factor—the citizenship and status of the detainees—petitioners at most stand in an equivalent position to the detainees in *Boumediene*: They are aliens captured abroad "designated as enemy combatants." 553 U.S. at 732; see Pet. App. 23a. Petitioners advance a series of arguments for why *Boumediene*'s first factor particularly favors extension of the writ to them, but none has merit.

First, al-Najar argues (14-6575 Pet. 28-29) that the fact that detainees are "citizens of nations not at war with the United States" supports habeas jurisdiction. But in *Boumediene* itself, no petitioner was a "citizen of a nation now at war with the United States," yet the Court did not suggest that that fact had any relevance to the Suspension Clause analysis. See 553 U.S. at 734, 766-767. Like petitioners, the detainees in *Boumediene* were being held under the Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, enacted in response to the September 11, 2001, attacks on the homeland. See 553 U.S. at 733. Given that the AUMF authorizes the use of military force against not only nations, but also organizations and individuals who planned, authorized, committed, or aided those attacks, see *ibid.*, no

sound reason exists to conclude that citizenship—rather than membership in an organization covered by the AUMF or individual participation in the September 11 attacks—should be the sole criterion for Suspension Clause purposes.

Petitioners also suggest (14-148 Pet. 10-18; 14-6575 Pet. 21-25) that judicial evaluation of their "status" requires a review of the lawfulness of their detention, including a review of the factual basis for the government's decision to detain them and the government's legal authority to do so. But that is the *merits* question in evaluating a habeas petition. See Pet. App. 24a ("We reject Appellant Amanatullah's argument not only because it is irrelevant under *Boumediene* but also because it commits the fallacy of *petitio principii.*"). As the court of appeals recognized, if the illegality of a detention were a sufficient basis for a U.S. court to exercise habeas jurisdiction over a person held by the United States in a foreign nation, then the jurisdiction of U.S. courts would effectively extend everywhere in the world. See *id.* at 25a. That is not what this Court sanctioned in its careful, contextual analysis of Guantánamo in *Boumediene*. Rather, in describing the first factor, the Court used the term "status" to refer to the legal basis that the *government* has relied on for detaining the individual, *i.e.*, that the individual is an "enemy alien" or "enemy combatant." 553 U.S. at 766-767.[5]

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[5] Petitioners also argue that the fact the government had approved them for discretionary release affects their "status" under *Boumediene.* In *Boumediene,* however, this Court used "status" to refer to an individual's identity as an "enemy alien" or "enemy combatant." 553 U.S. at 766-767. It is on that basis that an individual is subject to detention pending the conclusion of active hos-

al-Najar further argues (14-6575 Pet. 25) that this Court should give special weight to the "status" factor in light of the asserted inadequacy of the procedures by which his status was determined. Yet under the procedures used since 2009 to determine the status of Bagram detainees, each detainee was appointed a personal representative to act in his "best interests"; that personal representative had access to all reasonably available information, including classified information. C.A. App. 472-473; see Pet. App. 28a. The detainee also had the right to call reasonably available witnesses, to proffer evidence, and to have a reasonable investigation of potential exculpatory information. C.A. App. 472; see Pet. App. 28a. Those procedures, even if not sufficient alone to tilt the first factor against the extension of habeas jurisdiction, are entitled to some weight in the government's favor in the overall analysis.[6]

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tilities under the AUMF and the laws of war. See *id.* at 733; *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518 (2004) (opinion of O'Connor, J.); *id.* at 587-588 (Thomas, J., dissenting). There is no separate requirement that an individual must also have been personally determined to pose an ongoing threat. Cf. *id.* at 516-524 (opinion of O'Connor, J.); *id.* at 589 (Thomas, J., dissenting). Petitioners do not explain why the Executive Branch's discretionary determination that a lawfully detained enemy fighter can be transferred to the control of another government willing to accept responsibility for ensuring that he will not continue to pose a threat, C.A. App. 465, would give rise to more expansive habeas corpus jurisdiction.

[6] al-Najar also argues (14-6575 Pet. 27) that certain procedural protections to which detainees were entitled were denied in practice. The district court correctly concluded that the detainees were not denied protections to which they were entitled, see 14-6575 Pet. App. A30-A31, and the court of appeals held that there was "no error, much less clear error, in [the district court's] resolution" of that issue. Pet. App. 29a n.10.

iii. Finally, al-Najar argues (14-6575 Pet. 18-20) that the Executive Branch sought to evade judicial review by holding him at Bagram Airfield rather than within the habeas jurisdiction of U.S. courts and that the alleged evasion supports extending habeas jurisdiction to that facility. But as the court of appeals recognized, both in the first appeal and after al-Najar had an opportunity to submit additional evidence on remand, the allegation that the United States deliberately manipulated the site of his detention in order to deny him the right to seek habeas relief has no support in the evidence presented below. *Al Maqaleh II*, 605 F.3d at 98-99. al-Najar also appears to make the broader contention (14-6575 Pet. 20) that the mere possibility that the Executive Branch might take into consideration courts' habeas jurisdiction in deciding where to detain enemies captured abroad favors the extension of the writ to any detainee, no matter where in the world he is captured and detained. That would effectively lead, however, to "universal extraterritorial application of the Suspension Clause," Pet. App. 50a—a result squarely at odds with *Boumediene*'s teaching that "questions of extraterritoriality turn on objective factors and practical concerns," and its affirmation of the Court's holding and analysis in *Eisentrager*. See 553 U.S. at 764, 766-771.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
Acting Assistant Attorney General
DOUGLAS N. LETTER
MATTHEW COLLETTE
SHARON SWINGLE
Attorneys

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