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

JAMAL KIYEMBA, et. al., Petitioners-Appellees, v. BARACK OBAMA, et al., Respondents-Appellants.	)	Nos. 05-5487, 05-5489

OPPOSITION TO PETITIONERS' MOTION TO STAY THE MANDATE PENDING DISPOSITION OF A PETITION FOR CERTIORARI

Petitioners seek to stay the mandate in the above-captioned appeals pending the filing and disposition of a petition for certiorari to review this Court's decision of April 7, 2009, which reversed and vacated district court orders barring petitioners' transfer from Guantanamo Bay without advance notice. *See Kiyemba* v. *Obama*, 561 F.3d 509 (D.C. Cir. 2009). Respondents-appellants oppose petitioners' motion.

To obtain a stay of the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court, a party "must show that the certiorari petition would present a substantial question *and* that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A) (emphasis added). To satisfy that standard, "the party seeking the stay must demonstrate both a reasonable probability of succeeding on the merits and irreparable injury absent a stay." *Al-Marbu* v. *Mukasey*, 525 F.3d 497, 499 (7th Cir.

2008) (internal quotation marks omitted).[1] "In order to demonstrate a reasonable probability of succeeding on the merits of the proposed certiorari petition, the applicant must show a reasonable probability that four Justices will vote to grant certiorari and a 'fair prospect' that five Justices will vote to reverse the judgment of this court." *Id.*; *accord Nara* v. *Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007). Even if the applicant makes the required showing, whether to grant the stay is a matter of discretion. *Khulumani* v. *Barclay National Bank Ltd.*, 509 F.3d 148, 152 (2d Cir. 2007). If the Court grants such a stay and a petition for certiorari is filed with the Supreme Court, the stay continues until the Supreme Court disposes of the petition. *See* Fed. R. App. P. 41(d)(2)(B).

Petitioners' motion fails to satisfy this standard. As explained below, the four issues that petitioners intend to raise in their petition for certiorari are controlled by the Supreme Court's unanimous decision in *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008). Thus, there is no likelihood that four Justices would vote to grant certiorari to review issues that that Court has just recently decided. Moreover, if this Court's mandate is

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[1] Petitioners' statement (Mot. at 7) that they need establish only one of the two prongs for a stay of the mandate is incorrect and refuted by precedent. *See*, *e.g.*, *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); *California* v. *American Stores Co.*, 492 U.S. 1301, 1304-06 (1989) (O'Connor, J., in chambers); *Nara* v. *Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007); *Al-Marbu*, 525 F.3d at 499.

stayed, the reversal of numerous district court injunctions barring transfer of detainees at Guantanamo Bay may be delayed. These injunctions interfere with the President's ability to implement the closure of the Guantanamo detention facility. The injunctions issued in this case, and those issued in numerous other Guantanamo habeas cases, are contrary to this Court's ruling and should no longer be permitted to interfere with the Executive's ability to transfer detainees from Guantanamo.

I. THERE IS NO LIKELIHOOD THAT THE SUPREME COURT WILL GRANT CERTIORARI TO REVIEW ISSUES THAT IT ALREADY DECIDED IN *MUNAF*.

Petitioners present four questions which they contend the Supreme Court is likely to grant certiorari to review: (1) whether a district court is precluded from exercising habeas jurisdiction to prevent a transfer when there is an alleged fear of torture: (2) whether a district court, under the All Writs Act, may issue a preliminary injunction even if a party has failed to satisfy the four traditional factors for issuing an injunction; (3) whether petitioners are barred from bringing claims under the Convention Against Torture ("CAT") in a habeas action; and (4) whether the Guantanamo detainees have rights requiring notice and an opportunity to challenge a proposed specific transfer. Each of these questions, however, is controlled by the Supreme Court's decision in *Munaf*. Accordingly, none presents an issue for which that Court is likely to grant review.

1. Petitioners argue that *Munaf* did not preclude the district court from issuing orders barring transfer here because the decision in *Munaf* involved a "fact-sensitive inquiry" that was limited to whether "transfer to *a specified country* is unlikely to result in torture," whereas in this case the Government has "made no determination at all about any third country to which Petitioners might be transferred." *See* Mot. at 9 ; *id.* at 10 (noting that three Justices "emphasiz[ed] the unique facts of the case"). As this Court has recognized, however, *Munaf* unambiguously "held the judiciary cannot look behind the determination made by the political branches that the transfer would not result in mistreatment of the detainee at the hands of the foreign government." *Kiyemba*, 561 F.3d at 515.

Petitioners in *Munaf*, like petitioners here, were military detainees. They, like petitioners here, contended that an injunction prohibiting transfer was necessary because they alleged a fear of torture by the receiving government. The unanimous *Munaf* court explicitly held that judicial review of the Executive's determination respecting the likelihood of torture in this context would be improper. The Court explained that "[t]he Judiciary is not suited to second-guess such determinations – determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." 128 S. Ct. at 2226. The Court stressed that, "[i]n contrast, the political

branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Id.*; *accord id.* at 2225 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.").

Munaf invoked the same separation-of-powers principles that the Government raised here, *see* Prosper Decl. ¶ 6, App. 102-03; Waxman Decl. ¶¶ 6-7, App. 110-11, and determined that those principles prohibited the district court from enjoining transfer. Indeed, for petitioners to obtain ultimate relief with respect to transfer, the district court would have to conclude that they would likely be tortured in the receiving country. Under *Munaf*, however, the district court has no authority to pass upon the Executive's determination to the contrary. Accordingly, this Court properly held here that, "[t]o the extent the detainees seek to enjoin their transfer based upon the expectation that a recipient country will detain or prosecute them, *Munaf* again bars relief." *Kiyemba*, 561 F.3d at 515.

Nor is this case distinguishable from *Munaf* because the Government has not submitted a determination regarding the risk of torture as to *one specific country*. The Government has submitted sworn declarations explaining that it would not send any

of the Guantanamo detainees to a country where the Government determines that it is more likely than not that they would be tortured. *See* Waxman Decl. ¶ 6, App. 110; *accord* Prosper Decl. ¶ 4, App. 101-02. As Judge Kavanaugh explained, "there is no meaningful distinction" between such determinations because the broader Government determination "encompasses" any country-specific determination. *See Kiyemba*, 561 F.3d at 518 n.2 (Kavanaugh, J., concurring).

Accordingly, the Supreme Court's decision in *Munaf* is directly applicable here. Thus, there is no reason that the Supreme Court would choose to revisit its recent decision that district courts are precluded from issuing injunctions to prevent transfer on the basis of alleged fears of torture.

2. Petitioners further argue that the Supreme Court is likely to grant certiorari in this case to review whether the district court may, under the All Writs Act, issue an injunction barring transfer to preserve its habeas jurisdiction. The Supreme Court, however, addressed and rejected that argument in *Munaf*.

The *Munaf* detainees brought habeas actions demanding release from United States custody and invoked the All Writs Act, 28 U.S.C. § 1651, in seeking injunctive relief barring their transfer to the custody of Iraq. The district court granted a preliminary injunction barring such transfer in order to preserve its jurisdiction over the habeas claims, *see Omar* v. *Harvey*, 416 F. Supp. 2d 19, 24-25 (D.D.C. 2006), and

this Court affirmed, *Omar* v. *Harvey*, 479 F.3d 1, 15 (D.C. Cir. 2007).

The Supreme Court, however, reversed the injunction. It first held that the district court had jurisdiction over the habeas claims. *Munaf*, 128 S. Ct. at 2218. The Court then held that, despite this jurisdiction, entry of the injunction based on jurisdictional concerns was an abuse of discretion that required reversal. *Id.* at 2219. The Court went on to hold that the district court could *not* enjoin the detainees' transfer to the custody of Iraq (preliminarily or otherwise) as part of their habeas relief. The Court explained that the Constitution does not give detainees the right to challenge a transfer to the custody of another country, even when that transfer is alleged to be "likely to result in torture." *Id.* at 2222, 2225. Indeed, the Court specifically rejected the suggestion that detainees could use habeas as a vehicle for seeking "release in a form that would avoid transfer" to the custody of another country. *Id.* at 2223.

Finally, the Supreme Court explained that the injunction implicated the constitutional separation of powers because the detainees' alleged concerns regarding torture were "for the political branches, not the judiciary," *Munaf*, 128 S. Ct. at 2225. As the Court held, the political branches are "well situated" to assess such allegations; the courts are "not suited" to do so; and judicial second-guessing in this area would undermine the ability of the federal government to speak with one voice

with respect to foreign relations. *Id.* at 2226.

As this Court properly recognized, *Munaf* required reversal of the district court orders in this case. *Munaf* held that the ground on which the injunctions were issued here – preserving habeas jurisdiction – is *not* a proper basis for enjoining transfer to another sovereign country. And, even if petitioners had valid claims that their detention was unlawful, an injunction barring transfer is not an available remedy for the reasons identified by the Supreme Court: there is no constitutional right to avoid release or transfer to another country, and the Constitution forbids courts, absent any explicit congressional authority, from second-guessing the Executive's determination that a detainee is unlikely to be tortured in the receiving state.

Thus, whether this Court could issue an injunction under the All Writs Act to preserve the district court's habeas jurisdiction is precisely the same issue that *Munaf* addressed and answered in the negative. *Munaf* first held that the district court unequivocally had jurisdiction, *see* 128 S. Ct. at 2218, and then held that the district court had erred in entering the injunction in aid of preserving its jurisdiction, *see id.* at 2228. Under *Munaf*, therefore, it is clear that a court cannot enter injunctive relief without assessing the legal merits of the petitioner's position. There is no likelihood, therefore, that the Supreme Court would revisit this exact same issue in the context of this case.

3. Petitioners further contend that the Supreme Court is likely to grant certiorari to review this Court's holding that the REAL ID Act, 8 U.S.C. 1252(a)(4), bars petitioners' CAT claims, because that holding raises a problem under the Suspension Clause. Petitioners argue that "[t]he Supreme Court expressly reserved decision on this issue in *Munaf* where the petitioners had not raised a CAT claim in their habeas petitions." Mot. at 14.

But as the Supreme Court recognized in *Munaf*, Congress, in the implementing legislation for CAT, *see* Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note), has expressly limited jurisdiction over CAT claims to the immigration context, and only on review of a final removal order. *See Munaf*, 128 S. Ct. at 2226 & n.6; *see also* 8 U.S.C. § 2242 ("nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * except as part of the review of a final order of removal").[2] Because no such removal order was at issue in this case, this Court properly concluded that the reasoning of *Munaf* controls, and that petitioners here could not bring CAT claims in their habeas petitions. *See Kiyemba*, 561 F.3d at 514-

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[2] *See also Mironescu* v. *Costner*, 480 F.3d 664, 672 (4th Cir. 2007), *cert. dismissed*, 128 S. Ct. 976 (2008); *Al-Anazi* v. *Bush*, 370 F. Supp. 2d 188, 194 (D.D.C. 2005); 8 U.S.C. § 1252(a)(4) (CAT claims are not cognizable in a habeas petition).

15 ("Here the detainees are not challenging a final order of removal. As a consequence, they cannot succeed on their claims under the FARR Act, and *Munaf* controls.").

Judicial review of petitioners' CAT claims, therefore, which is what the district court injunctions here were designed to allow, would improperly intrude not only on the authority of the Executive Branch, but also on that of the Legislative Branch. *Munaf*, 128 S. Ct. at 2226 ("sensitive foreign policy issues" are left to the consideration of the "political branches," not the courts); *see also Kiyemba*, 561 F.3d at 517 (Kavanaugh, J., concurring) (noting that in this context Congress has not sought "to restrict the Executive's transfer authority or to involve the Judiciary in reviewing war-related transfers").

In any event, petitioners fail to raise a substantial question in arguing that their inability to raise CAT claims in a habeas petition would violate the Suspension Clause. Neither the CAT, nor the FARRA, afford petitioners any enforceable rights. In giving its advice and consent to ratification, the Senate declared that the CAT would not, itself, be privately enforceable. *See* 136 Cong. Rec. S36,198 (Oct. 27, 1990). And the FARRA limited the judiciary's jurisdiction over CAT claims solely to the immigration context. Accordingly, the Convention by itself creates no judicially enforceable rights, and the FARRA creates no jurisdiction to enforce the

Convention outside of the immigration context. Petitioners' inability to press such claims in a habeas proceeding, therefore, cannot possibly violate the Suspension Clause.

4. Finally, petitioners argue that the Supreme Court is likely to grant certiorari "to decide whether this Court properly read *Munaf* to override the protections of the Due Process Clause and the procedural protections of habeas corpus upon which *Boumediene* is necessarily based." Mot. at 17. But the Supreme Court itself in *Munaf* determined that, whatever constitutional protections may apply to wartime detainees by virtue of its decision in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), which was decided the same day as *Munaf*, such protections did *not* include a right to an injunction to prevent transfer to a foreign country based on alleged fears of persecution. *Munaf*, 128 S. Ct. at 2222 (rejecting argument that Due Process Clause protects against an unlawful transfer); *see also Kiyemba*, 561 F.3d at 518 ("*Munaf* and the extradition cases have already struck the due process balance between the competing interests of the individual and the Government") (Kavanaugh, J., concurring); *id.* at 519 n.4 ("Even assuming that Guantanamo detainees, like the U.S. citizens in *Munaf*, possess constitutionally based due process rights with respect to transfers * * *, *Munaf* and other precedents preclude judicial second-guessing of the Executive's considered judgment that a transfer is unlikely to result in torture")

(Kavanaugh, J., concurring).

As this Court recognized, *Munaf*, rather than *Boumediene*, is the case that directly controls here. *See Kiyemba*, 561 F.3d at 514 (holding that this matter "is controlled by the Supreme Court's recent decision in [*Munaf*]"); *see also Rodriguez de Quijas* v. *Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls").

Indeed, petitioners' attempt to distinguish *Munaf* is especially unavailing considering that they, unlike the petitioners in *Munaf*, are *aliens*, who were captured abroad and held outside the United States. If the U.S. citizen petitioners in *Munaf* could not challenge their transfer to the custody of another country, despite their claim that they would be tortured or killed there (notwithstanding the determination of the United States to the contrary), then, *a fortiori*, the alien petitioners here cannot do so. *See Kiyemba*, 561 F.3d at 517-18 (Kavanaugh, J., concurring) ("The *Munaf* decision applies here *a fortiori*: That case involved transfer of American citizens, whereas this case involves transfer of alien detainees with no constitutional or statutory right to enter the United States.").

In sum, petitioners have failed to identify any substantial issue that would be reasonably likely to prompt the Supreme Court to grant certiorari. In *Munaf*, that Court already decided the legal issues that petitioners raise here. The fact that petitioners disagree with that decision, and this Court's straightforward application of it to this case, does not demonstrate any likelihood that the Supreme Court would decide to grant review, much less a reasonable probability of succeeding on the merits.

II. THE BALANCE OF EQUITIES WEIGHS AGAINST A STAY.

Petitioners likewise fail to demonstrate irreparable injury absent a stay. Petitioners' alleged injury is premised on the notion that they may be transferred to a foreign country where they might face torture. The Government, however, has submitted sworn affidavits in this case, which attest that the Government would not send any of the Guantanamo detainees to a country where they would likely be subject to torture. *See* Waxman Decl. ¶ 6, App. 110; *accord* Prosper Decl. ¶ 4, App. 101-02. Indeed, this Court recognized that, "as the present record shows, the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee." *Kiyemba*, 561 F.3d at 514. As the Court further noted, petitioners have offered no evidence even remotely suggesting that the United States would fail to honor that policy in their cases. *Kiyemba*, 561 F.3d at 515

(relying on "the Government's sworn declarations, and * * * the detainees' failure to present anything that contradicts them").

Notably, the Supreme Court in *Munaf* relied upon the Solicitor General's statement in the Government brief that "it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result." 128 S. Ct. at 2226. The record on appeal here reflects that very same policy. The sworn declarations of the State Department and the Department of Defense establish that the Executive will not "repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured." *See* Waxman Decl. ¶ 6, App. 110; *accord* Prosper Decl. ¶ 4, App. 101-02.

Petitioners suggest that these statements of policy are irrelevant because "policy can and does change." Mot. at 2-3. That argument is baseless, both as a matter of fact and law. Petitioners' counsel are well aware that the policies articulated in the declarations have been repeatedly affirmed by the Executive Branch. In any event, the Supreme Court in *Munaf* recognized that deference to Executive policy in these circumstances was appropriate because "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Munaf*, 128 S. Ct. at 2226; *id.* at 2225 ("it is for the political branches,

not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments"); *id.* at 2226 ("[t]he Judiciary is not suited to second-guess such determinations").

Thus, all petitioners can do is speculate that, absent a stay, they might be harmed because, despite its stated policy, the Government might transfer them to a country in which they could be tortured. *See Kiyemba*, 561 F.3d at 514 ("detainees are not liable to be cast abroad willy-nilly without regard to their likely treatment in any country that will take them"). In reality, four of the petitioners have been released to Bermuda, *see* "Bermuda Takes in 4 Uighurs," Wash. Post at A7 (Jun. 15, 2009), and there is no suggestion that the United States is considering sending the remaining petitioners to any country where they would face a risk of torture. *See, e.g.*, "Palau Deal Close for Uighur Guantanamo Detainees," N.Y. Times (Aug. 5, 2009).

Thus, there is no risk of harm to petitioners that would warrant delay in the issuance of the mandate. In contrast, the harm to the Government and the public interest is manifest. As the Government has explained, and this Court has recognized, the district court injunctions prohibiting transfer without advance notice "interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Kiyemba*, 561 F.3d at 515 (citing Prosper

Declaration). Not only are there notice orders in a large majority of the habeas cases, there are also numerous orders simply barring transfer. These related orders have all been appealed to this Court, and the Government has filed motions seeking summary disposition in light of the Court's ruling in this case. That relief from those related orders is long overdue and should be granted forthwith once the mandate issues in the present case.

If this Court's mandate is stayed, however, and summary disposition in the other cases is denied as a result, numerous district court injunctions barring transfer of detainees at Guantanamo Bay could remain intact. Those injunctions interfere with the Government's ability to implement the President's executive order to secure the "prompt and appropriate disposition of the individuals" detained and "closure of" Guantanamo, goals that "further the national security and foreign policy interests of the United States." Exec. Order, § 2(b). The inability to move detainees also causes the habeas cases (and related appeals) to continue unnecessarily. *See, e.g.*, U.S. Opening Br. 10, *In re Sealed Case*, No. 09-5236 (D.C. Cir.).

Thus, there is a clear harm to the Executive and the public interest. The injunctions issued in this case, and those issued in numerous other Guantanamo habeas cases, are contrary to this Court's ruling and Supreme Court precedent and

should no longer be permitted to interfere with the Executive's ability to transfer detainees from Guantanamo.

CONCLUSION

For the foregoing reasons, petitioners have failed to satisfy the requisite standards for a stay of the mandate. We respectfully request that the Court deny their motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2009, I filed and served the foregoing Opposition to Petitioners' Motion to Stay the Mandate Pending Disposition of a Petition for Certiorari by causing an original and four copies to be delivered to the Court via hand delivery, and by causing one paper copy to be delivered to lead counsel of record via hand delivery or Federal Express (as specified below):

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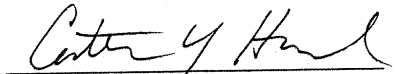

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