ORAL ARGUMENT HELD SEPTEMBER 25, 2008

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

JAMAL KIYEMBA, et al.,

Petitioners- Appellees,

- v -

BARACK H. OBAMA, et al.,

Respondents- Appellants.

Consolidated Case Nos.
05-5487, 05-5489

PETITIONERS' MOTION TO STAY THE COURT'S MANDATE PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Petitioners move for a stay of the issuance of the Court's mandate pending the disposition of a petition for a writ of certiorari of this Court's decision in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*"). A stay of the issuance of the mandate is warranted under Fed. R. App. P. 41(d)(2) and D.C. Cir. R. 41(a)(2) based on the substantial questions presented, the need to protect Petitioners – who are similarly situated to scores of detainees[1] – from potentially irreparable harm, and the lack of any risk of harm to Respondents.

BACKGROUND

Petitioners are ethnic Uighurs, members of a persecuted Turkic Muslim minority group native to the Xinjiang Uyghur Autonomous Region of far western China. As the courts have concluded and Respondents have conceded, Petitioners are not "enemy combatants," never participated in terrorism or hostilities against the United States, and were never associated with Al Qaeda or the Taliban.[2]

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[1] *See* Supp. Br. for Appellants, dated Aug. 21, 2008, Certificate as to Parties, Rulings and Related Cases (identifying over 150 cases in which "[t]he Government has appealed from similar district court [notice] orders").

[2] *See, e.g.*, *Parhat v. Gates*, 532 F.3d 834, 835-36 (D.C. Cir. 2008) ("It is undisputed that [Petitioner Parhat] is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies."); *Abdul Semet v. Gates*, Nos. 07-1509-12 (D.C. Cir. Sept. 12, 2008) (vacating enemy combatant classification of four other Petitioners); *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 38-39 (D.D.C. 2008) (granting the Writ), *overruled on other grounds*, *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*").

Petitioners nevertheless have been imprisoned by Respondents at Guantánamo Bay, Cuba, for over seven years. That imprisonment is unlawful. *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33 (noting government concession that none of the Uighurs are enemy combatants, finding their imprisonment "unlawful," and ordering their immediate release), *overruled on other grounds sub nom Kiyemba I*, 555 F.3d 1022, petition for certiorari filed, 77 U.S.L.W. 1623 (U.S. Apr. 14, 2009).[3] Although four of the Petitioners in this case were transferred and released to Bermuda on June 11, 2009, five Petitioners continue to be unlawfully imprisoned at Guantánamo.[4]

Respondents recognize that Petitioners "understandably do not wish to [return to China] because they fear inhumane treatment there." *See* Opp'n Br. for Resp'ts at 2, *Kiyemba v. Obama*, No. 08-1234 (U.S. May 29, 2009). Petitioners likewise fear being transferred to any country that might act as a conduit to China. Respondents maintain that although they may lawfully repatriate Petitioners to China – where Respondents too have concluded they will face torture or worse – it is the current *policy* of the United States not to do so. But policy can and does

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[3] In a departure from its usual practice, the Supreme Court did not rule on Petitioners' pending *Kiyemba I* certiorari petition prior to its summer recess.

[4] *Kiyemba* and *Mamet* were formerly consolidated with *Zakirjan v. Bush*, No. 06-5042 and *Aladeen v. Bush*, No. 05-5491, for purposes of this appeal. The *Zakirjan* and *Aladeen* petitioners were transferred to Albania in late 2006 after receiving advance notice of those proposed transfers, to which they did not object.

change, and the political pressure to close Guantánamo is enormous in light of President Obama's January 2010 deadline for closure of the facility.[5] Petitioners reasonably fear that the Executive will do whatever it takes to be rid of them – even if that requires a change in U.S. policy. Petitioners here are understandably unwilling to stake their lives on mere policy.[6] And should Guantánamo be closed before Petitioners are released, there is a real risk that they could be transferred to a location where they will remain unlawfully and indefinitely imprisoned by, in coordination with or at the behest of the United States government, and where, unlike Guantánamo, the reach of the Great Writ may be unsettled.

In September 2005, in the wake of news reports that Respondents were contemplating Petitioners' transfer outside of the district court's jurisdiction,

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[5] *See* Exec. Order No. 13,492 § 3, 74 Fed. Reg. 4,897-98 (Jan. 27, 2009).

[6] The government's current disinclination to send them to China is at odds with its prior conduct: Chinese intelligence officials and interrogators were provided with direct access to Petitioners and other Uighurs imprisoned in Guantánamo. *See* U.S. Department of Justice, Office of the Inspector General, A Review of the FBI's Involvement In and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq (May 2008); Amnesty International, *People's Republic of China*: *Uighurs Fleeing Persecution As China Wages Its "War On Terror,"* at 33-34 (2004), http://web.amnesty.org/library/index/engasa170212004 ("Amnesty International has received credible allegations that during [a] visit [to Guantánamo], which reportedly lasted between one and two weeks, Chinese officials took photographs of the Uighurs and interrogated them about their backgrounds."); FBI report, "Detainees Positive Responses," available at http://foia.fbi.gov/guantanamo/detainees.pdf at 211-12 ("US officials [are] considering whether to return the Uighurs to the Chinese, possibly to gain support for the anticipated US action in the Middle East. The Uighur[s]. . . [are] convinced that they would be immediately executed if they were returned to China.").

Petitioners sought and received orders requiring Respondents to provide at least 30 days' notice to the court and Petitioners' counsel before transferring any Petitioner from Guantánamo. The district court granted that relief, noting both the danger presented by rendition to China and the need to protect the integrity of its jurisdiction over the pending cases. *See* App. 46-48, 61-63 (collectively, the "Notice Orders"). Other Guantánamo detainees in over 150 cases obtained similar notice orders from the district court pending the adjudication of their habeas petitions.

Respondents sought interlocutory appeal of the instant Notice Orders in November 2005 and argument was initially heard in September 2006. *See* App. 87, 92. In April 2007, this Court dismissed the appeals after the denial of the petition for certiorari of *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), but recalled its mandate after the Supreme Court granted certiorari on reconsideration in June 2007. In June 2008, the Supreme Court held in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that the constitutional writ of habeas corpus "has full effect at Guantanamo Bay," *id.* at 2262, and that the district court's jurisdiction was consistent with separation of powers principles and the executive's management of foreign affairs and national security, *id.* at 2277. In light of *Boumediene*, this Court ordered supplemental briefing, and heard supplemental argument in September 2008.

On April 7, 2009, the Court issued an opinion reversing the district court's Notice Orders, relying primarily upon the Supreme Court's decision in *Munaf v. Geren*, 128 S. Ct. 2207 (2008). *See Kiyemba*, 561 F.3d at 516 (concluding that *Munaf* "precludes [a] district court from barring the transfer of a Guantánamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country"). In dissent, Judge Griffith wrote that *Munaf* does not "compel[] absolute deference to the government" on matters relating to transfer; rather, "the premise of *Boumediene* requires that the detainees have notice of their transfers and some opportunity to challenge the government's assurances." *Kiyemba*, 561 F.3d at 523.

Petitioners timely filed a Petition For Rehearing And Suggestion For Rehearing En Banc, and the Court *sua sponte* ordered Respondents to file a response. Although three Judges voted in favor of rehearing en banc, a majority of the Court denied Petitioners' motion. The issuance of the mandate is currently stayed pending the disposition of the instant motion. *See* D.C. Cir. R. 41(a)(2).

On June 24, 2009, President Obama signed into law Section 14103(e) of the Supplemental Appropriations Act, 2009, which requires notice to Congress of any transfer or release of a Guantánamo detainee to a foreign country. Under the terms of this legislation, funds will not be provided for any such transfer or release unless the Executive provides Congress with certain classified submissions fifteen days

before any such proposed transfer, including the name of the individual, the country to which he is to be transferred or released, and the "terms of any agreement with another country for acceptance of such individual." Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, 23 Stat. 1859, 1920-21 (2009). Thus, under *Kiyemba II* the Judiciary is the only branch denied any role in the determination of whether a proposed transfer of Petitioners – or any other persons imprisoned in Guantánamo – is lawful.

REASONS FOR STAYING THE ISSUANCE OF THE MANDATE

A motion to stay the mandate pending a petition to the Supreme Court for a writ of certiorari should be granted when the petition (1) presents a "substantial question" and (2) there is "good cause" for a stay. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2).

For the first prong, this Court considers whether the petition "tender[s] [issues that] are substantial." *Deering Milliken, Inc. v. Fed. Trade Comm'n*, 647 F.2d 1124, 1128 (D.C. Cir. 1978). Courts may also look to "'whether four Justices will vote to grant certiorari'" and give "'*some* consideration as to predicting the final outcome of the case in [the Supreme] Court.'" *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in

chambers) (citation omitted) (emphasis added).[7] The probability of a grant of ceriorari "must [be] consider[ed] . . . in the context of the case history [and] the Supreme Court's treatment of other cases presenting similar issues." *Books*, 239 F.3d at 828.

For the second prong of "good cause," courts focus on the balance of equities and in particular the likelihood of irreparable harm to a party if a stay is granted or denied. *Rostker*, 448 U.S. at 1308; *Nara*, 494 F. 3d at 1133; *Books*, 239 F. 3d at 828. Here, not only would denying a stay potentially cause irreparable harm to the instant Petitioners, it would also adversely affect dozens of other Guantánamo detainees who have an equal interest in receiving notice prior to a transfer outside of the district court's jurisdiction before the adjudication of their habeas claims. Though only one prong need be established, *see Books*, 239 F.3d at 829 (granting stay for good cause in light of the equities, despite a "weak case" that the petition would be granted), both prongs are easily satisfied here.

A. PETITIONERS' CASE PRESENTS NUMEROUS SUBSTANTIAL QUESTIONS

The Court's opinion, which spanned thirty-three pages including a separate concurrence and dissent, is proof positive of the significance of the issues at stake.

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[7] *See also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980); *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007); *Books v. City of Elhart*, 239 F.3d 826, 827-28 (7th Cir. 2001).

Petitioners anticipate presenting the following four questions in their petition for writ of certiorari:

1) Whether *Munaf* requires transfer-based habeas claims to be effectively carved out from the scope of the constitutional habeas rights articulated by the Supreme Court in *Boumediene*;

2) Whether a district court may protect against divestiture of its jurisdiction pursuant to the All Writs Act independent from whether a party has established the four criteria used for determining whether the party is entitled to a Rule 65 preliminary injunction;

3) Whether the REAL ID Act can be interpreted to strip the district courts of jurisdiction to hear a habeas petitioner's CAT claims even where such an interpretation would leave the petitioner with no alternative means to raise those claims; and

4) Whether, pursuant to *Boumediene*, the Guantánamo detainees possess due process rights requiring notice and a hearing to determine whether a specific transfer would result in torture or continued detention.

The Supreme Court is likely to grant certiorari on each of these questions for the reasons set forth below, and as demonstrated by its frequent review of habeas decisions issued by this Court and others involving Guantánamo detainees.[8]

1. This Court's Interpretation Of *Munaf* Limits The Scope Of Constitutional Habeas Articulated In *Boumediene*.

The majority's conclusions about the scope and effect of *Munaf* have significant and wide implications. *Kiyemba* "precludes a court from issuing a writ of habeas corpus to prevent a transfer" on the basis of feared torture or other

[8] *See Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene*, 128 S. Ct. 2229.

persecution. 561 F.3d at 514- 15. Petitioners respectfully disagree with the majority's decision, and will ask the Supreme Court to review whether this Court misconstrued *Munaf* in vacating the Notice Orders. In *Munaf*, the government had determined that transfer to the government of Iraq would not subject petitioners to a risk of torture. Here, just the opposite, the government has concluded that repatriation to China would put Petitioners at risk of torture or worse – and have made no determination at all about any third country to which Petitioners might be transferred.

Petitioners, like Judge Griffith, assert that *Munaf*, at most, stands for the proposition that courts are not suited to "second-guess" government determinations that transfer to *a specified country* is unlikely to result in torture where those determinations "would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice." *Munaf*, 128 S. Ct. at 2226. As Judge Griffith noted, in *Munaf* "petitioners knew in advance that the government intended to transfer them to Iraqi authorities and had the opportunity to demonstrate that such a transfer would be unlawful." *Kiyemba*, 561 F.3d at 526. Thus, *Munaf* conducted exactly the sort of fact-sensitive inquiry, including considering the particular location and other circumstances of the actual

proposed transfer, that this Court's decision precludes for Petitioners here.[9] The Notice Orders are also supported by the long history and constitutional status of habeas claims to prevent the transfer of a petitioner outside of the court's jurisdiction. *Id.* at 523-24 (Griffith, J., dissenting) ("The bar against transfer beyond the reach of habeas protections is a venerable element of the Great Writ and undoubtedly part of constitutional habeas.").[10]

Three justices in *Munaf* joined a concurring opinion emphasizing the unique facts of the case as "essential to the Court's holding," and to "reserve[] judgment" about other cases that might present facts warranting judicial relief. *Munaf*, 128 S. Ct. at 2228; *see also Khouzam v. Chertoff*, 549 F.3d 235, 254 (3d Cir. 2008) (noting *Munaf* was based on a "highly unusual factual scenario"). The likelihood that these justices will vote to grant certiorari in this case is high, as is the likelihood that at least one additional Justice will provide the necessary fourth vote to review the issues of substantial importance.[11]

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[9] The very information over which the government has claimed the Executive has exclusive control must now be shared in classified form with the Legislature, *see* Supplemental Appropriations Act, 2009. Submission under seal of that information to the Judiciary would be no more intrusive.

[10] *See also Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting) (the English common law writ specifically forbade "the shipment of prisoners to places where the writ did not run or where its execution would be difficult").

[11] *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426, 455 (2004) (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.) (asserting that where a habeas petition

2. This Court's Holding That An All Writs Act Injunction Must Meet The Traditional Rule 65 Injunction Factors Presents A Circuit Split.

The majority's holding that a district court may act to protect its jurisdiction under the All Writs Act only "'if a party satisfies the [four] criteria for issuing a preliminary injunction,'" *Kiyemba*, 561 F.3d at 513 n.3 (citation omitted), effectively limits injunctive relief under the All Writs Act to those circumstances where a party would already be entitled to the same relief under Rule 65. Petitioners respectfully maintain that All Writs Act injunctions, which were intended by Congress to preserve a court's jurisdiction in order to provide a party with *the opportunity* to litigate the merits, are critically different from preliminary injunctions issued under Rule 65, which preserve the status quo once a party has had that opportunity and established that he or she is likely to succeed on the merits. This distinction has been applied by other circuits. *See, e.g.*, *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100-02 (11th Cir. 2004) ("The requirements for a traditional injunction do not apply to injunctions under the All Writs Act because a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns.").[12]

"raises questions of profound importance," the Court should address the merits of the petition).

[12] *Accord In re Johns-Manville Corp.*, 27 F.3d 48, 49 (2d Cir. 1994) ("We also reject the appellants' procedural objection that the Trial Courts have failed to make

The Court in *Munaf* had no occasion to address the All Writs Act because it concluded that the factual record surrounding transfer was fully developed. *See Munaf*, 128 S. Ct. at 2219-20 (deciding merits resolution was ripe). Because the petitioners' claims there were ripe for review on substantive grounds, the Supreme Court could and did proceed directly to the merits determination under Rule 65, and there was no need to preserve jurisdiction pending the outcome. *See id.* at 2220. Here, however, no specific transfer is contemplated, and it is thus impossible at this stage to proceed to the merits of Petitioners' claims – *if* they in fact object to transfer.[13] This case thus squarely presents the important All Writs Act issue, which the Supreme Court did not have occasion to address in *Munaf*, whether the district court may preserve its jurisdiction under the statute to consider the claims until the relevant facts are before it.[14]

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the findings required by Rule 65 of the Federal Rules of Civil Procedure . . . . '[I]njunctions issued under the authority of the All-Writs Act stem from very different concerns than those motivating preliminary injunctions governed by Fed. R. Civ. P. 65.") (citation omitted). Moreover, other prior cases in this Circuit are consistent, in result, with this distinction. *Potomac Electric Power Co. v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983) (issuing All Writs Act injunction without reference to the Rule 65 factors); *Belbacha*, 520 F.3d at 459 (Guantánamo detainee entitled to All Writs Act injunction even though "the probability of [petitioner's] prevailing on the merits of his habeas petition is far from clear.").

[13] *See supra* at p. 2 n.4.

[14] *See Klay*, 376 F.3d at 1102 ("[A] court may enjoin almost any conduct 'which, left unchecked, would have . . . the practical effect of diminishing the court's power to bring the litigation to a natural conclusion.'") (citation omitted);

The Supreme Court is likely to grant certiorari on this question as it affects all instances in which a court may seek to protect its jurisdiction, and to resolve the circuit split following this Court's holding.

3. This Court's Holding That The REAL ID Act Bars CAT claims Raises Substantial Suspension Clause Questions.

In vacating the Notice Orders, the majority held that Petitioners' claims under the Convention Against Torture ("CAT") were barred by a section of the REAL ID Act, 8 U.S.C. § 1252(a)(4). However, REAL ID is an act amending the immigration laws, the legislative history of which states that it was "not [intended to] preclude habeas review over challenges . . . that are independent of challenges to removal orders." House Conference Report, H.R. Rep. No. 109-72, at 175 (2005) ("Conf. Rep.").[15]

This Court's reading of § 1252(a)(4) in a case where no alternative means exist to raise Petitioners' CAT claims, raises serious Suspension Clause concerns. *See Khouzam*, 549 F.3d at 246 ("Without question, serious constitutional questions would be raised if [a petitioner] were afforded no alternative to the habeas review denied by 8 U.S.C. § 1252(a)(4)."); *see also Nnadika v. Attorney General*, 484

Lindstrom v. Graber, 203 F.3d 470, 474-76 (7th Cir. 2000) (All Writs Act permits court to stay extradition pending appeal of habeas petition); *Michael v. INS*, 48 F.3d 657, 663-64 (2d Cir. 1995) (All Writs Act permits federal Court of Appeals to stay a deportation order pending review of its legality).

[15] *See also Khouzam*, 549 F.3d at 246 ("the Act 'does not eliminate judicial review'") (quoting Conf. Rep. at 174).

F.3d 626 (3d Cir. 2007) (finding that parallel habeas-stripping provision of REAL ID, codified at 8 U.S.C. § 1252(a)(5), cannot apply to claims that could not have been brought in a petition for review of a final order of removal); *Madu v. Attorney General*, 470 F.3d 1362 (11th Cir. 2006) (same); *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007) (same).[16]

As Petitioners previously argued, the Court should have avoided these constitutional concerns because Section 1252(a)(4) may be fairly read as not foreclosing habeas review of CAT claims outside of the removal context or where habeas is the only process available to make such a challenge. The rule of constitutional avoidance and established Supreme Court precedent require that "fairly possible" readings should be adopted over constitutionally problematic alternatives. *INS v. St. Cyr*, 533 U.S. 289 (2001).

The Supreme Court expressly reserved decision on this issue in *Munaf* where the petitioners had not raised a CAT claim in their habeas petitions. *See Munaf*, 128 S. Ct. at 2226 n.6. Here, Petitioners have asserted such claims in their

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[16] Other courts have found § 1252(a)(4) to bar CAT claims only in contexts where *some* alternative measure of review was available. *See Francois v. Gonzales*, 448 F.3d 645, 648 (3d Cir. 2006); *Toussaint v. Attorney General*, 455 F.3d 409, 412 (3d Cir. 2006); *Hamid v. Gonzales*, 417 F.3d 642, 645 (7th Cir. 2005); *see also Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 217 (3d Cir. 2003); *Cadet v. Bulger*, 377 F.3d 1173, 1182 (11th Cir. 2004); *Saint Fort v. Ashcroft*, 329 F.3d 191, 200-02 (1st Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 140-43 (2d Cir. 2003); *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003). *But see Mironescu v. Costner*, 480 F.3d 664, 673-77 (4th Cir. 2007).

petitions and the Supreme Court is likely to review the issue.

4. The Court's Determination That Petitioners Are Not Entitled To Due Process For A Transfer Potentially Resulting In Torture Or Continued Detention Cannot Be Reconciled With *Boumediene.*

Petitioners' transfer from Guantánamo Bay without notice and the opportunity to prevent transfer to torture or unlawful detention would violate Petitioners' substantive and procedural due process rights.

As an initial matter, Petitioners' right to challenge an unlawful transfer that would result in continued detention by the United States or on its behalf is not dependent upon a finding that Petitioners possess Fifth Amendment due process rights. Instead, the ability to challenge such a transfer is fundamental to Petitioners' *habeas* rights, which concern at a minimum Petitioners' right to require the government to justify their detention; without such procedural protection of Petitioners' habeas rights, *Boumediene's* guarantee would be rendered hollow. *See Kiyemba*, 561 F.3d at 526 (Griffith J., dissenting) ("The constitutional habeas protections extended to these petitioners by *Boumediene* will be greatly diminished, if not eliminated, without an opportunity to challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States.").

This Court's conclusion that Petitioners do not possess any rights under the Due Process Clause, *Kiyemba*, 555 F.3d at 1026, cannot, respectfully, be

reconciled with the fundamental principle upon which *Boumediene* was based. While the Supreme Court withheld judgment on "the content of the law that governs petitioners' detention," the extension of Due Process Clause rights to Petitioners is consistent with the Supreme Court's conclusion that Guantánamo detainees "may invoke the fundamental procedural protections of habeas corpus." *Boumediene*, 128 S. Ct. at 2277.

In determining whether a Constitutional provision extends to Guantánamo detainees, the Supreme Court in *Boumediene* adopted the "impracticable and anomalous" test flowing from the *Insular Cases*, and from *Reid v. Covert*, 354 U.S. 1 (1957), in particular. *Boumediene*, 128 S. Ct. at 2255 (quoting *Reid*, 354 U.S. at 74). That evaluation turns on "objective factors and practical concerns, not formalism." *Id.* at 2258. Extending Due Process Clause protections to Petitioners, thereby protecting them from transfers that would result in torture or unlawful detention would not be "impracticable or anomalous." *See Downes v. Bidwell*, 182 U.S. 244, 277, 283 (1901) (even in "territory over which Congress has jurisdiction which is not a part of the 'United States'" aliens "are entitled under the principles of the Constitution to be protected in life, liberty and property").[17] The Supreme Court has affirmed that "[i]n every practical sense Guantanamo is not abroad; it is

[17] *See also Khouzam*, 549 F.3d at 255-59 (appellant, who had made no legal entry into the United States, had due process rights to contest his removal to Egypt).

within the constant jurisdiction of the United States." *Boumediene*, 128 S. Ct. at 2261; *see also Rasul*, 542 U.S. at 480.

Given the United States' control over Guantánamo Bay and the fact that Guantánamo cases are now regularly heard in U.S. courts, extension of Due Process Clause protections to Petitioners to guard against governmental action likely to result in torture or continued unlawful detention, is neither impracticable or anomalous.[18] The Due Process Clause requires notice and a hearing before rights are affected, which the Notice Orders were narrowly tailored to ensure.[19] Petitioners will urge the Supreme Court 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.

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[18] Petitioners' substantive due process protections flowing from the Due Process Clause prohibit government conduct that shocks the conscience, a standard that transfer to torture easily satisfies. *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952); *see also* Amnesty International, USA, *Justice Years Overdue: Federal court hearing for Uighur detainees in Guantánamo*, at 3 (Oct. 2008), http://www.amnesty.org/en/library/info/AMR51/110/2008/en (finding "the indefinite and isolating nature of the detentions at Guantánamo" to amount to "cruel, inhumane and degrading" treatment).

[19] *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 205 (D.C. Cir. 2001) ("[T]he fundamental norm of due process clause jurisprudence requires that before the government can constitutionally deprive a person of the protected liberty or property interest, it must afford him *notice and a hearing*.") (emphasis added) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

B. THE EQUITIES FAVOR A STAY

Good cause for a stay of the mandate exists because Petitioners' face a significant possibility of severe and irreparable harm, while Respondents can make no such showing. *Books*, 239 F.3d at 829; *U.S. Postal Serv.*, 481 U.S. at 1302-03.

The majority's holding effectively strips Petitioners of their only means to ensure the district court's continuing jurisdiction to hear their claims, and to seek protection in the event of a unilateral transfer decision that could endanger their lives, persons and liberty. As previously explained, Petitioners contend that the likelihood of success on these claims cannot be prejudged without knowing the identity of the transferee country and other critical information, notwithstanding the government's current stated policy position, which is non-binding and subject to reversal without notice absent judicial oversight.

The harm Petitioners face is twofold: 1) being denied the ability to obtain judicial review of their habeas claims, including claims against unlawful transfer; and 2) the possible physical harm and/or continued unlawful detention resulting from any such transfer. The political pressure on the new administration to solve the problem of Petitioners' location in the coming months is intense. Before the Supreme Court has a final say in *Kiyemba I* and *Kiyemba II*, the government should not be permitted to unilaterally defeat the court's jurisdiction over Petitioners' claims – jurisdiction unanimously affirmed by all members of the

panel – by transferring Petitioners to another sovereign's territory arguably outside of the habeas court's jurisdiction. The possible consequential harm – torture or other inhumane treatment and/or continued unlawful detention – would be irreparable. *Belbacha*, 520 F.3d at 459 (potential harm of torture justified injunction though petitioner's success on the merits was "far from clear").

By contrast, Respondents cannot show the possibility of any substantial harm from a stay. At most, Respondents may argue that the Notice Orders "are tying the Executive's hands in the conduct of diplomatic relations" as they seek to resettle Petitioners. Resp. Supp. Br. at 17. This assertion is belied by the fact that Petitioners have repeatedly made clear that they are willing to discuss possible resettlement options in confidence with Respondents, and would consent to waive the 30-day requirement for reasonable options. *See, e.g.*, Oral Arg. Tr. 38:5-7 (Sept. 25, 2008) ("[Petitioners' counsel]: If we were to receive notice . . . of a transfer to a country that would be safe, there would be no further litigation."). Indeed this is precisely what happened with four Petitioners, all subject to notice protection, recently resettled to Bermuda, and with two former Petitioners, subject to notice protection, resettled to Albania in November 2006. Oral Arg. Tr. 45:9-23 (Sept. 25, 2008).[20]

[20] In contrast, five Uighur men who did not have notice orders in place were sent to Albania in May 2006 – one day before this court was to hear oral argument in their case, *see Qassim v. Bush*, 466 F.3d 1073, 1074 (D.C. Cir. 2006), and months

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court stay the issuance of its mandate pending Petitioners' petition for a writ of certiorari.

Dated: August 3, 2009 Respectfully submitted,

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before the former *Zakirjan* and *Aladeen* petitioners were transferred to Albania with their consent. Because the five men did not have notice orders in place, neither the court, nor they, nor their counsel had any advance warning of the transfer. Instead the five were flown half way around the world strapped to the floor of a military transport plane while wearing blackout goggles, noise-deadening headphones, surgical masks, and diapers. Until those five men were unshackled in Albania, they believed they were being sent back to China and to their deaths. *See generally* Frontline, Albania: Getting Out of Gitmo *available at* http://www.pbs.org/frontlineworld/stories/albania801/.

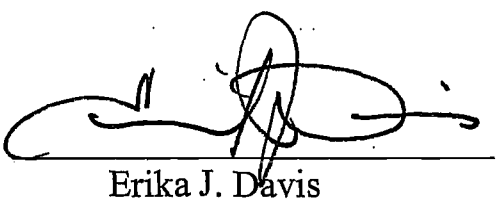
CERTIFICATE OF SERVICE

I, Erika J. Davis, assistant managing attorney, hereby certify that:

On August 3, 2009, two copies of the foregoing Petitioners' Motion to Stay the Court's Mandate Pending Disposition of Petition for Writ of Certiorari have been delivered by U.S. first-class mail, postage pre-paid to the party listed below:

Robert M. Loeb
Attorney, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dated: August 3, 2009



Erika J. Davis