

[ORAL ARGUMENT NOT SCHEDULED]

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

_____)	
AHMED BELBACHA,)	
)	
<i>Petitioner/Appellee,</i>)	Case. No. 08-5350
)	
v.)	
)	ORAL ARGUMENT
BARACK OBAMA, <i>et al.</i> ,)	REQUESTED
)	
<i>Respondents/Appellants.</i>)	
_____)	

MOTION TO GOVERN FURTHER PROCEEDINGS

Petitioner Ahmed Belbacha respectfully submits this motion to govern further proceedings pursuant to this Court’s order of October 28, 2008.¹ He respectfully requests that the Court continue to hold this case in abeyance pending the Supreme Court’s disposition of a petition for certiorari that the petitioners in *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir.) (“*Kiyemba II*”) intend to file. He also respectfully requests oral argument on this motion.

¹ The Court’s order reads as follows:

ORDERED that the motion be granted and this case be held in abeyance pending further order of the court. The parties are directed to file motions to govern further proceedings within thirty days of this court’s disposition of *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir.), argued September 25, 2008.

Mr. Belbacha is an Algerian who has been held at Guantánamo since 2002. If returned to Algeria, he is likely to be tortured by the Algerian government, or by a terrorist organization that has threatened him in the past. *See Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008) (noting “the seriousness of the harm [Mr. Belbacha] claims to face, namely, torture at the hands of a foreign state and of a terrorist organization”).² For this compelling reason, Mr. Belbacha is fighting to avoid being transferred to Algeria.³ His efforts to avoid transfer to Algeria have drawn international attention,⁴ and human rights organizations have taken up his

² *See also* Status Report, *Belbacha v. Bush*, No. 05-2349 (RMC) (D.D.C. July 18, 2008) (Doc. 52) (detailing Mr. Belbacha’s fears of torture); Pet. Cert. before J., *Belbacha v. Bush*, No. 07-173, at 3-5 (S. Ct.) (same).

³ Mr. Belbacha has filed under seal three exhibits in support of this motion. Exhibit A is a statement by Mr. Belbacha, dictated to counsel at Guantánamo on August 18, 2009. Exhibit B is a Declaration of David H. Remes, and Exhibit C is a document cited in the Remes declaration.

⁴ *E.g.*, “Disse Guantánamo-fangene vil til Norge,” *Dagbladet.co*, July 19, 2009 (Norway); “Wer will mich?” *SZ-Magazin.de*, July 16, 2009 (Germany); “La herida que no cierra,” *Página/12*, May 3, 2009 (Argentina); “‘Lebendig begraben’-Guantánamo-Häftlinge hoffen bisher vergeblich auf Hilfe der EU,” *Islam.de*, Feb. 27, 2009 (Germany); “Se le permite dejar Guantánamo,” *Diario De Noticias De Álava*, Feb. 28, 2009 (Spain); “Guantanamoofange foretrekker cella framfor friheten,” NRK, Jan. 26, 2009 (Norway); “Des détenus innocents ont si peur qu’ils préfèrent rester à Guantanamo,” *Le Courrier*, June 9, 2008 (Switzerland); “US Appeals Court Sends Guantanamo Detainee’s Case Back To Federal Court for Further Review,” *Asharq Al-Awsat*, Mar. 14, 2008 (English edition); “Häftling will in Guantánamo bleiben,” *20 Minuten Online*, Nov. 8, 2007 (Germany); “Guantanamo inmate fights to stay put,” *Taipei Times*, Aug. 8, 2007 (Taipei); “Gevangene blijft liever in zijn cel in Guantánamo,” *de Volkskrant*, Aug. 2, 2007 (Netherlands); “Câu chuyện về một tù nhân Guantanamo sợ tự do,” *Dân Trí*, July 31, 2007 (Vietnam); “Nechte mě na Guantánamu, prosí vězeň,” *novinky.cz* (Czech); Sean O’Neill, “Guantánamo Cell Is Better Than Freedom, Says Inmate Fighting Against Release,” *Times Online*, July 31, 2007 (UK); “Prisoner ‘fears

cause.⁵ He believes that his strenuous and widely-publicized efforts to avoid transfer to Algeria place him in the government's crosshairs. (See App. A.)⁶

To avoid the irreparable injury likely to result from his transfer to Algeria, Mr. Belbacha respectfully requests that the Court continue to hold this case in abeyance pending the Supreme Court's disposition of a petition for certiorari that the petitioners in *Kiyemba II* intend to file. As noted, their petition is due by October 26, 2009, and counsel for the *Kiyemba* petitioners have assured undersigned counsel that they intend to meet that deadline. Such relief is

leaving' Guantánamo," *Aljazeera.net*, July 28, 2007; "Algérie : 7 algériens libérés de Guantanamo à la fin juillet," *El-annabi* (Algeria); "Profile: 'Forgotten' Cuba detainees," *BBC News*, Oct. 5, 2006 (UK); "Lost and Found at Guantánamo," Mohammed Al Shafey, *Asharq Al-Awsat*, June 16, 2006 (English ed.).

⁵ *E.g.*, Jennifer Daskal and Stacy Sullivan (Human Rights Watch), "The Insanity Inside Guantánamo," *Salon.com*, June 10, 2009; Amnesty International, "Ahmed Belbacha," (<http://www.amnesty.org.au/hrs/comments/3174/>); "Toma acción para Ahmed Belbacha, ciudadano argelino de 38 años bajo custodia estadounidense en Guantánamo," Amnesty Int'l (<http://www.amnestyusa.org/individuos-en-riesgo/toma-accion-para-ahmed-belbacha-ciudadano-argelino-bajo-custodia-estadounidense-en-guantanamo/page.do?id=1041154>). *See also* Human Rights Watch, "US: Rice Should Press Algeria on Fate of Returned Guantanamo Detainees," Sept. 4, 2008 (<http://www.hrw.org/en/news/2008/09/04/us-rice-should-press-algeria-fate-returned-guantanamo-detainees>).

⁶ Mr. Belbacha's case also highlights Algeria's dismal human rights record. *E.g.*, "Algeria: Researched and Compiled by the Refugee Documentation Centre of Ireland on 1 July 2009" (<http://www.unhcr.org/refworld/pdfid/4a56ecfb.pdf>); "Algeria: Torture Remains A Common Practice," Report Submitted to the Committee Against Torture in the Context of the Review of the Periodic Report for Algeria," *Al Karama for Human Rights*, Apr. 2008 (http://www2.ohchr.org/english/bodies/cat/docs/ngos/ReportAlkarama_CAT4apr08.pdf); Amnesty Int'l, "Unrestrained Powers: Torture by Algeria's Military Security, July 2006 (<http://www.amnestyusa.org/document.php?lang=e&id=ENGMDE280042006>).

warranted because *Kiyemba II* presents the same question as that presented in this case: Whether *Munaf v. Geren*, 128 S. Ct. 2207 (2008), “precludes the 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 of detention in the recipient country.” *Kiyemba II*, slip op. 13. Mr. Belbacha simply asks this Court to continue to defer a decision in this case. Should this Court decide this case in favor of the Government, Mr. Belbacha will seek a stay of mandate pending his filing of a petition for certiorari.

The modest relief that Mr. Belbacha requests would keep in place, for the time being, the preliminary injunction issued by the District Court on June 13, 2008, enjoining the Government from transferring him to Algeria pending further proceedings in that court. *Belbacha v. Bush*, No. 05-2349 (RMC) (Doc. 44). Such relief would cause the Government no harm: Mr. Belbacha’s transfer has already been enjoined for more than two years, since July 30, 2007, when this Court administratively stayed his transfer pending his appeal in *Belbacha v. Bush*, 520 F. 3d 452 (D.C. Cir. 2008). Such relief would also preserve the Court’s habeas corpus jurisdiction.

The Court should also continue to hold this case in abeyance because it is possible that *Kiyemba II* will become moot, resulting in vacatur of that decision. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The Government has

already transferred four of the nine original *Kiyemba II* petitioners to Bermuda. It seeks to transfer other *Kiyemba II* petitioners to the Republic of Palau, if not elsewhere. *See* Peter Finn, “Administration Makes Progress on Resettling Detainees,” Wash. Post, Aug. 20, 2009. The Court should not decide these cases while it is possible that *Kiyemba II* may be vacated. *See also Al-Marri v. Spagone*, 128 S. Ct. 1545 (2009) (vacating lower court’s decision and remanding case where detainee was released from military custody after certiorari was granted).

Mr. Belbacha is mindful that this Court recently denied the *Kiyemba II* petitioners a stay of mandate pending their filing of a certiorari petition. That case, however, is distinguishable. First, the Government has made clear that it will not transfer those petitioners to China. Those petitioners therefore did not face irreparable injury if denied a stay pending their filing of a certiorari petition. In contrast, the Government has offered no assurance that it will not transfer Mr. Belbacha to Algeria. He therefore faces irreparable injury, unless the preliminary injunction is preserved. Second, unlike the *Kiyemba II* petitioners, Mr. Belbacha does not seek a stay of mandate. He simply asks the Court to defer a decision in these cases.

This Court’s decision in an earlier phase of this case, *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008), supports the relief requested here. In that case, Mr. Belbacha moved to enjoin the Government from transferring him to Algeria. The

District Court denied the motion on the ground that, under this Court's decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), it lacked jurisdiction to enjoin the transfer. On appeal, this Court held otherwise. The Court held that, though *Boumediene* was the law of the circuit,

when the Supreme Court grants certiorari to review this court's determination that the district court lacks jurisdiction, a court can, pursuant to the All Writs Act, 28 U.S.C. § 1651, and during the pendency of the Supreme Court's review, act to preserve the status quo in other cases raising the same jurisdictional issue if a party satisfies the criteria for issuing a preliminary injunction.

Belbacha, 520 F.3d at 457. So, here, the Court may preserve the status quo pending the Supreme Court's disposition of the *Kiyemba II* petition, which will present a question the answer to which may likewise be dispositive here.

That the *Kiyemba II* petitioners have not yet filed their petition for certiorari does not alter the conclusion, because the principle is the same: Should the Supreme Court grant their petition and hold that a court may enjoin a Guantánamo detainee's transfer in circumstances such as those here, Mr. Belbacha may be entitled to an order enjoining his transfer to Algeria. *Cf. Belbacha*, 520 F.3d at 456 (“Should the Supreme Court hold in *Boumediene* that a detainee at Guantánamo Bay may petition for a writ of habeas corpus to challenge his detention, and should the district court conclude that Belbacha's detention is unlawful, then the Executive might be without authority to transfer him to Algeria.”). That petition

for certiorari will be filed within weeks. This Court should provide the Supreme Court the opportunity to determine the law that will control this case.

CONCLUSION

The Court should continue to hold this case in abeyance pending the Supreme Court's disposition of the petition for certiorari that the *Kiyemba II* petitioners intend to file. The Court should direct the parties to file new motions to govern within thirty days after the Supreme Court's disposition of the petition.

The Court should also set the motion for oral argument.

Respectfully submitted,

/s/

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