No. _____

# In The
# Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,
*Petitioners*,

v.

BARACK OBAMA, *et al.*,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

1. Whether a federal court exercising its habeas jurisdiction under *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008), may require the Executive to provide 30 days' advance notice of a proposed transfer of these Petitioners—all of whom are concededly *not* enemy combatants—from Guantánamo to another location, where the reach of the Great Writ may be unsettled, in order to provide the court with an opportunity to adjudicate any claims Petitioners may have opposing the transfer, including on the grounds that the transfer will result in continued unlawful detention or torture.

2. Whether the D.C. Circuit erred in creating a circuit split when it held that a federal court may issue an All Writs Act injunction to protect its jurisdiction only when the separate standards for an injunction under Federal Rule of Civil Procedure 65 have also been met.

## PARTIES TO THE PROCEEDING

The Petitioners are Jamal Kiyemba, as next friend,[1] Hammad Memet, Abdul Sabour, Khalid Ali and Sabir Osman (collectively "Petitioners").[2]

The Respondents are Barack H. Obama, President of the United States; Robert M. Gates, Secretary of Defense; Rear Admiral David M. Thomas, Jr., Commander, Joint Task Force, Guantánamo Bay, Cuba; and Colonel Bruce E. Vargo, Commander, Joint Detention Operations Group, Joint Task Force, Guantánamo Bay, Cuba.

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[1] Each Petitioner also directly authorized counsel to act in these cases.

[2] Several Petitioners below have since been transferred and are no longer Petitioners in this case: Abdul Nasser, Abdul Semet, Huzaifa Parhat and Jalal Jalaldin were transferred to Bermuda on June 11, 2009 and Edham Mamet was transferred to Palau on October 31, 2009 (Ibrahim Mamet, as next friend to Edham Mamet, is also no longer part of the case). The remaining Petitioners who file this petition for a writ of certiorari are still being held at Guantánamo.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the D.C. Circuit.

## DECISIONS BELOW

The opinion of the D.C. Circuit is reported at *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*"). App. 1a-35a. The district court's orders are unreported. App. 36a-42a.

## JURISDICTION

The Court of Appeals entered judgment on April 7, 2009. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which were denied by majorities of the court on July 27, 2009. App. 43a-46a. On October 23, 2009, Chief Justice Roberts granted Petitioners a 15-day extension to file the instant petition for a writ of certiorari until November 10, 2009. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS OF LAW

Pursuant to Supreme Court Rule 14(1)(f), the relevant provisions of constitutional and statutory law are set forth in the Appendix. App. 47a-49a.

## STATEMENT OF THE CASE

This petition raises the fundamental question whether a federal court exercising its habeas jurisdiction may require the Executive to provide 30

days' advance notice of a proposed transfer of persons detained at Guantánamo to a location arguably beyond the reach of the Great Writ, so that the court may have an opportunity to address any claims opposing the transfer before it occurs, including on the basis that the transfer will result in continued unlawful detention or torture. Petitioners respectfully submit that the D.C. Circuit majority decision erred when it held that the district court lacked the power to require the Executive to provide such notice under the court's habeas jurisdiction, the Constitution and the All Writs Act. The majority principally relied on this Court's decision in *Munaf v. Geren*, 553 U.S. __, 128 S. Ct. 2207 (2008), but in the words of the *Kiyemba II* concurrence and dissent: "the *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"—thus "[t]here was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer." App. 33a-34a. *Munaf* also left open the possibility that a federal court might enjoin a transfer in the "extreme case" in which the transfer would more likely than not result in torture. 128 S. Ct. at 2226. This possibility requires that an individual have notice of a proposed transfer in the first instance.

The D.C. Circuit's holdings regarding federal court habeas jurisdiction and the application of the Constitution to detainees at Guantánamo are not subject to a circuit split because all detainee habeas petitions are being litigated in that circuit. However, these issues are undeniably important as evidenced by the fact that identical notice orders to those reversed in this case are pending in more than 150 other cases.

Further, the Executive's statement that it presently seeks to close the Guantánamo facility and transfer all remaining detainees demonstrates that the question of whether a federal court may require notice of a proposed transfer will continue to be a pressing one. In addition, the D.C. Circuit's application of the All Writs Act—apart from its ruling on the habeas and Constitutional issues—created a clear circuit split on whether an injunction under the Act is only proper when the separate standards for an injunction under Federal Rule of Civil Procedure 65 have also been met.

On October 20, 2009, in a case involving each of the Petitioners here, the Court granted certiorari in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*"). Although this petition involves the same Petitioners and a federal court's application of habeas jurisdiction and the Due Process Clause, the issues presented by this petition are distinct. The petitioners in *Kiyemba I* argue that where the Executive shows that no other release is feasible and concedes that a petitioner is not an enemy combatant, a habeas judge has the power to order that the petitioner be produced in his courtroom so that he might fashion conditions of release. Petitioners here present the separate question whether a federal court has the power to require the Executive to provide advance notice of any proposed transfer from Guantánamo, so that the court may have an opportunity to address any claims opposing the transfer. If petitioners succeed in *Kiyemba I*, the notice orders at issue in this appeal may be rendered moot as to these Petitioners. However, the important issues in this petition have been, and will continue to be, recurring, including in over 150 other habeas cases in which similar notice orders are at stake. The Court

should grant certiorari so that this critical question can be resolved.

## I. Factual And Procedural Background

Petitioners are Uighurs, members of a Muslim minority group from the Xinjiang Uyghur Autonomous Region of far-western China. All parties agree that the Chinese government has violently oppressed the Uighurs for many years. App. 68a.[3] Each Petitioner fled from China to Afghanistan to escape that oppression. *Id.* In 2002, for reasons that the Executive now admits were unjustified, Petitioners were taken into United States military custody in Afghanistan and brought to Guantánamo. App. 69a. Petitioners have been detained at Guantánamo ever since, even after the Government conceded that they were not enemy combatants and should never have been considered as such.[4]

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[3] Certain factual citations are made to the October 9, 2008 decision by the district court (Urbina, J.) in *In re Guantánamo Bay Detainee Litigation*, 581 F. Supp. 2d 33 (D.D.C. 2008) (App. 66a-86a), *overruled on other grounds*, *Kiyemba I*, 555 F.3d 1022, *cert. granted*, *Kiyemba v. Obama*, No. 08-1234 (Oct. 20, 2009). Each of the Petitioners here is among the 17 detainees party to that decision, which is the subject of *Kiyemba I*.

[4] *See, e.g.*, *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008) (vacating former Petitioner Parhat's enemy combatant classification); *Abdul Semet, et al., v. Gates*, Nos. 07-1509 through 07-1512 (D.C. Cir. Sept. 12, 2008) (judgments for four other Petitioners); *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d at 38-39 (App. 76a-77a) (each Petitioner's imprisonment is "unlawful").

On July 29, 2005, Petitioners Abdul Sabour, Khalid Ali, Sabir Osman and Hammad Memet filed a petition for a writ of habeas corpus through next friend Jamal Kiyemba in the U.S. District Court for the District of Columbia. SA 250-84.[5] Edham Mamet filed a petition for a writ of habeas corpus through next friend Ibrahim Mamet on August 11, 2005. SA 285-315.[6] Shortly thereafter, Petitioners in both *Kiyemba* and *Mamet* sought orders providing them with 30 days' notice before their transfer out of Guantánamo. SA 34-45, 49-60. In both cases, Petitioners cited their fear of a transfer without notice to China or another country where they would likely be tortured, abused or continue to be unlawfully detained. SA 37, 52. Petitioners demonstrated that they were entitled to an order requiring advance notice of a proposed transfer under the court's habeas jurisdiction, the Constitution and the All Writs Act. SA 34, 42, 49, 57.

Petitioners have a real and ongoing fear of persecution, torture or death if repatriated to China.

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[5] References to "GA" and "SA" are references to the Government's Appendix, submitted with the June 16, 2006 Brief for Appellants (D.C. Cir.), and Supplemental Appendix, submitted with the July 10, 2006 Brief for Appellees/Cross-Appellants (D.C. Cir.), respectively. As noted, five of the nine petitioners present in the decision below were released to Bermuda and Palau on June 11, 2009 and October 31, 2009, respectively.

[6] As noted, Edham Mamet was released to Palau on October 31, 2009, and accordingly is no longer a Petitioner here. Because the district court's ruling in his case is addressed in part by the decision below, it is explained here to provide appropriate context.

SA 39-40, 54-55.[7] Respondents agree that China is more likely than not to persecute, torture or kill Petitioners, and stated in declarations in 2005 that they did not presently intend to transfer them directly back to China. *See, e.g.*, App. 20a n.5. However, Respondents' policy position, as reflected in declarations submitted to the district court in *Mamet* in 2005, GA 99-107, 108-13, is non-binding and subject to unilateral reversal by the Executive without notice. GA 102. In addition, Respondents' declarations expressly leave open the prospect of transfer to a foreign nation that will continue to detain them, including potentially in coordination with or at the behest of the United States or Chinese governments. App. 33a; GA 109.

## II. The Decisions Below

### A. The District Court's Decisions

The district court in *Kiyemba* and *Mamet* granted the notice orders providing the court and Petitioners with 30 days' notice prior to Petitioners' transfer out of Guantánamo ("Notice Orders"). App. 36a-39a, 40a-42a. In *Kiyemba*, the district court (Urbina, J.) noted its "concern that the government may remove the petitioners from GTMO in the near future, thereby divesting (either as a matter of law or *de facto*) the court of jurisdiction." App. 37a. The district court acted expressly to preserve its habeas jurisdiction and to prevent Respondents from "abus[ing] the processes now put in place for the purpose of adjudicating

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[7] *See also* Edward Wong, *China Executes 9 for Their Roles in Ethnic Riots in July*, N.Y. Times, Nov. 10, 2009, at A12.

matters on their merits" and to "'guard against depriving the processes of justice of their suppleness of adaptation to varying conditions.'" App. 37a-38a (citation omitted). The *Kiyemba* Notice Order directed Respondents "not [to] remove the petitioners from GTMO unless this court and counsel for petitioners . . . receive thirty days' advance notice of such removal." App. 38a.

In *Mamet*, the district court (Huvelle, J.) cited Petitioner Mamet's fears of torture or continued detention if returned to China. App. 41a. While the district court denied Petitioner Mamet's request for a preliminary injunction, it conditioned a stay of the district court's proceedings requested by the Government on the provision of 30 days' prior notice of "any transfer of Mamet to a foreign country." App. 42a. The district court granted the stay pending resolution of the appeals in *In re Guantánamo Bay Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), and *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). *See* App. 42a.[8] In granting the Notice Order, the

[8] Those appeals were ultimately consolidated and addressed in *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008). Following *Boumediene*, the *Kiyemba* and *Mamet* actions pending in the district court were consolidated before Judge Hogan. On July 31, 2008, Judge Hogan issued an order "adopt[ing] the reasoning of those Judges who entered orders requiring notice" and requiring that "in cases in which the petitioner requests such notice, the government shall file notice with the Court 30 days prior to any transfer of a petitioner from Guantanamo Bay, Cuba." App. 64a-65a. It is undisputed that the Notice Orders remained in full force and effect even after the disposition of *Boumediene* by this Court. *See* Supplemental Br. for Appellants, *Kiyemba v. Obama,* Nos. 05-5487 and 05-5489 (D.C. Cir. Aug. 21, 2008)

district court in *Mamet* cited to the Notice Orders issued in both *Kiyemba* and *Deghayes v. Bush*, Civ. No. 04-2215 (RMC) (D.D.C. June 15, 2005). App. 50a-62a. The court in *Deghayes* also ordered the Executive to provide notice of any proposed transfer based upon the All Writs Act, 28 U.S.C. § 1651(a), which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *See* App. 42a.

The Government filed notices of appeal from the portion of the *Kiyemba* order "that prohibits respondents from removing petitioner from Guantanamo unless the Court and any counsel for petitioner receive thirty days' advance notice of such removal," GA 87, and the portion of the *Mamet* order "that requires respondents to provide the Court thirty days' advance notice of any transfer of petitioner Mamet to a foreign country and sets the terms of that notice." GA 92. The *Kiyemba* and *Mamet* appeals were consolidated, along with two other appeals of 30 days' Notice Orders then pending before the D.C. Circuit in *Zakirjan v. Bush*, No. 06-5042 (D.C. Cir.) and *Aladeen v. Bush*, No. 05-5491 (D.C. Cir.).

It bears emphasizing that the Notice Orders were narrowly tailored to require only notice. The Executive was *not* enjoined from effecting a specific transfer, but required only to provide Petitioners and the district court with 30 days' notice, at which point Petitioners would have the opportunity to raise any

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(attempting to distinguish *Boumediene* and arguing that Notice Orders should be vacated).

objections. When the Executive sought to transfer the petitioners in *Zakirjan* and *Aladeen* to Albania in November 2006, both petitioners were provided notice under Notice Orders like those at issue here, and neither objected to the transfer. The Orders imposed no practical impediment to their transfer.[9]

Underscoring the importance of this petition, the district court entered identical or similar Notice Orders in approximately 150 habeas cases brought by Guantánamo detainees that were similarly appealed by the Executive and are currently pending before the D.C. Circuit. *See* Supplemental Br. for Appellants, *Kiyemba v. Obama,* Nos. 05-5487 and 05-5489 (D.C. Cir. Aug. 21, 2008).

**B. The D.C. Circuit's Decision**

Oral argument in the consolidated appeals was first held on September 11, 2006. Prior to issuing a decision, the court dismissed the appeals in light of the D.C. Circuit's decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), which, prior to its reversal by this Court, held that the Military Commissions Act had stripped habeas jurisdiction over claims brought by Guantánamo detainees. When this Court granted certiorari, *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008), the D.C. Circuit recalled the mandate in the Notice Orders appeals and stayed the proceedings pending this Court's resolution of *Boumediene*. On

[9] Likewise, recent events underscore the lack of any burden that the Notice Orders place on the Executive. Most of the original *Kiyemba II* Petitioners have been successfully transferred either when they waived the notice periods or after the proposed transfers were already made public.

June 12, 2008, this Court issued its decision in *Boumediene* reversing the D.C. Circuit and holding that Congress did not strip Petitioners' right to assert habeas claims. *Id.* at 2247-59. After that decision, the D.C. Circuit ordered supplemental briefing in the Notice Orders appeals and held additional argument.

On April 7, 2009, the D.C. Circuit issued its decision as reported in *Kiyemba II*. *Kiyemba II* unanimously held that under *Boumediene* the district court had habeas jurisdiction over claims relating to the proposed transfer of detainees from Guantánamo. App. 5a-6a. Notwithstanding such jurisdiction, the panel majority interpreted *Munaf*, 128 S. Ct. 2207—which this Court issued the same day as *Boumediene*—to preclude a district court from giving notice to Petitioners of their proposed transfer so that they would have an opportunity to assert any such claims. App. 13a-14a. *Kiyemba II* rejected Petitioners' arguments that common law habeas jurisdiction has long included a court's power to provide an opportunity for a petitioner to challenge an unlawful transfer to a location potentially outside the jurisdiction of the court. *Kiyemba II* also did not accept that Petitioners were entitled under due process to notice and an opportunity to be heard before their life and liberty interests were impaired. The *Kiyemba II* majority further concluded that the All Writs Act, 28 U.S.C. § 1651, had no independent force to support the Notice Orders if Rule 65's requirement of "likelihood of success on the merits," among other things, was not met. In so holding, the D.C. Circuit directly split with the Eleventh Circuit's decision in *Klay v. United Healthgroup, Inc.*, that "[t]he requirements for a traditional [Rule 65] injunction *do not apply* to injunctions under the All Writs Act because the

historical scope of a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns." 376 F.3d 1092, 1100 (11th Cir. 2004) (emphasis added).

The *Kiyemba II* concurrence and dissent (Griffith, J.) concurred as to jurisdiction, but otherwise dissented from the panel majority because it found *Munaf* inapposite: "the *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"—thus "[t]here was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer." App. 33a-34a. The dissent further observed that "I do not believe *Munaf* compels absolute deference to the government on this matter" and that the "premise of *Boumediene* requires that the detainees have notice of their transfers and some opportunity to challenge the government's assurances." App. 27a. Moreover, the dissent identified at least three elements critical to the holding in *Munaf* that are not present here: 1) "the need to protect Iraq's right as a foreign sovereign to prosecute the petitioners"; 2) "Iraq's status as an ally and the fact that the petitioners had voluntarily traveled to Iraq to commit crimes during ongoing hostilities"; and 3) the "unique type of relief" sought by the *Munaf* petitioners, namely shelter from a sovereign government that sought to prosecute those petitioners for alleged crimes committed within its borders. App. 34a.

Petitioners sought rehearing of *Kiyemba II* and a stay of the mandate from the D.C. Circuit, which were denied by majority votes.

## III. The Court's Grant Of Certiorari In *Kiyemba I*

On October 20, 2009, this Court granted certiorari in *Kiyemba I*, No. 08-1234, a separate petition arising from the habeas proceedings of these and additional Uighur petitioners. That petition arose specifically from a district court order, following the Government's concession that the petitioners are not "enemy combatants," directing that petitioners be brought to the courtroom for the fashioning of release conditions. *See In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 43 (D.D.C. 2008) (App. 86a). The D.C. Circuit reversed, *Kiyemba I*, 555 F.3d 1022, and this Court granted certiorari to review the decision.

Here, as noted, Petitioners who are also present in the *Kiyemba I* case seek this Court's review of the separate question of whether a federal court exercising its habeas jurisdiction has the power to require 30 days' advance notice of a proposed transfer of a detainee by the Executive out of Guantánamo, in order to provide the district court with the opportunity to determine whether the transfer will result in continued unlawful detention or torture in a location arguably beyond the reach of the Great Writ.

## REASONS FOR GRANTING THE PETITION

### I. The D.C. Circuit's "Blank Check" To The Executive In Transferring Individuals Out Of Guantánamo Raises Important And Recurring Habeas And Constitutional Issues

#### A. The Great Writ Has Historically Provided Courts With The Authority To Prevent Unlawful Transfers

This Court has repeatedly determined that lower court decisions granting the Executive unchecked authority with respect to the treatment of detainees raise fundamental issues of the separation of powers and thus merit the Court's review.[10]

Here, the D.C. Circuit granted the Executive unreviewable power in transferring detainees without notice out of Guantánamo, a location to which this Court has confirmed the reach of the Great Writ. *See, e.g., Boumediene*, 128 S. Ct. at 2266, 2274. Without such notice, Petitioners may be suddenly transferred

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[10] *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."); *id.* at 525 (habeas corpus is a "critical check" on the Executive); *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'"); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) ("[F]ederal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.").

to an unidentified location where the reach of the Great Writ may be uncertain, and have no opportunity to challenge the transfer on the grounds that it will result in continued unlawful detention or torture. Thus, a crucial principle is at stake here: whether the judiciary in exercising habeas jurisdiction has any role in checking Executive action concerning individuals who have been detained at Guantánamo since 2002. Given the Executive's public statements that it is closing Guantánamo, the specific questions concerning notice of proposed transfers have been, and will continue to be, recurring.

The Court has long recognized that notice and judicial inquiry into the legality of a prisoner's transfer is a fundamental component of habeas review of Executive action. *See In re Bonner*, 151 U.S. 242, 254-62 (1894) (prisoner who is transferred to unauthorized prison is entitled to habeas corpus relief); *Carbo v. United States*, 364 U.S. 611, 621 (1961) (a federal court's habeas decision "'may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court' after the suit is begun") (quoting *Ex parte Endo*, 323 U.S. 283, 307 (1944)); *see also Miller v. Overholser*, 206 F.2d 415, 419-20 (D.C. Cir. 1953) ("We think it has been settled since the decision of the Supreme Court in *In re Bonner* that the writ is available to test the validity not only of the fact of confinement but also of the place of confinement.").[11]

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[11] *See also* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 36.3 (5th ed. 2005) ("[T]he federal courts have inherent authority to preserve or modify a prisoner's custody status during all phases of a habeas corpus proceeding. That authority extends, at the least, to issuance by the district

These decisions are grounded in the origins of federal habeas power. The Habeas Corpus Act of 1679, which codified the English common law writ, specifically prevented "[t]he possibility of evading judicial review through [] spiriting-away" of the King's prisoners. *Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting). Justice Scalia dissented in *Boumediene* on the issue of whether the writ reached Guantánamo, but agreed that the writ as embodied by the 1679 Act embraced a claim, like the one here, against transfer outside of the jurisdiction. *Id*. Indeed, the full name of this foundational statute under Charles II was "An Act for the better securing the Liberty of the Subject and *for the Prevention of Imprisonment beyond the Seas*." (emphasis added). Thus, Article XII of the Act forbade "the shipment of prisoners to places where the writ did not run or where its execution would be difficult." *Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting); *see also* App. 27a ("Since at least the seventeenth century, the Great Writ has prohibited the transfer of prisoners to places beyond its reach where they would be subject to continued detention on behalf of the government.") (Griffith, J., dissenting).[12]

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court—at any time after it concludes that it has personal and subject matter jurisdiction—of an order forbidding transfer to another facility if (1) transfer would threaten the court's jurisdiction or venue or adversely affect the efficiency, fairness, or remedial capacity of the proceedings, and (2) there is no 'need therefor.'") (citations omitted).

[12] The *Boumediene* majority also recognized that the 1679 Act was "the model upon which the habeas statutes of the 13 American colonies were based." 128 S. Ct. at 2246. Passage of the 1679 act was motivated in large part by the practice of the Earl of Clarendon, who was impeached in 1667 for sending persons "to be imprisoned against the law in remote islands, garrisons, and other

Petitioners' claims here, that the Executive may not unilaterally effect a transfer that might divest the district court's habeas jurisdiction without notice and an opportunity to be heard, are substantially the same claims recognized by the English common law writ in 1679.

The principle that the Executive may not unilaterally transfer a prisoner out of the jurisdiction is not new. Magna Carta provides that "[n]o freeman shall be taken, or imprisoned, or disseised, or outlawed, *or exiled*, or in any way harmed—save by the lawful judgment of his peers or by the law of the land." Magna Carta § 39 (emphasis added). Petitioners' claims for notice and opportunity for judicial review of a proposed transfer from Guantánamo fall squarely within this promise of Magna Carta, which is fulfilled by the Great Writ. *See Boumediene*, 128 S. Ct. at 2244 ("the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled"). The Writ has also long required review of Executive decisions concerning

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places." Br. of Legal Historians as Amicus Curiae in Supp. of Pet'rs, at 10, *Boumediene v. Bush*, Nos. 06-1195 and 06-1196 (U.S. Aug. 2007); *see also* Br. of the Commonwealth Lawyers Ass'n as Amicus Curiae in Supp. of Petr's, at 6, *Boumediene v. Bush*, Nos. 06-1195 and 06-1196 (U.S. Aug. 24, 2007) (The Habeas Corpus Act was designed to counter executive practices of moving prisoners "from gaol to gaol so that it was impossible to serve the proper gaoler with the writ . . . [as well as the problem of] prisoners [] removed overseas so giving rise to practical difficulties in terms of communication (between the detained person and those acting on his behalf), service (on the relevant gaoler), and enforcement of the writ (by production of the detained person) if the writ was issued.").

transfer that could result in a detainee's torture or other inhumane treatment.[13]

The Notice Orders simply provide Petitioners with notice and an opportunity to raise these well-established common law habeas claims—which predate even our Constitution—if Petitioners chose to do so upon notice of a proposed transfer.[14] Under the D.C. Circuit's holding here, there will be *no* notice or judicial review of the ongoing process of transferring detainees out of Guantánamo in these cases or any other action where the Executive might attempt to defeat jurisdiction by sending a habeas petitioner to a location potentially beyond the reach of the court. This extraordinary delegation of power to the Executive

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[13] In *Sommersett's Case*, 20 How. St. Tr. 1, 80-82 (1772) (discussed in *Boumediene*, 128 S. Ct. at 2248), slavery abolitionists obtained a writ of habeas corpus with respect to the holding of James Sommersett, an African born slave "by the laws of Virginia," who was soon to be transferred to Jamaica to continue a life of slavery. Lord Mansfield granted the writ, and on hearing arguments on the return, ordered Sommersett be released immediately. *See also Robert Murray's Case* (1679) (petitioner bailed from custody expressly to bar transfer to Scotland, which continued to use torture until 1707 and where he appeared to be more likely than not to face torture); *see generally* John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Regime* (1977).

[14] Indeed, over one hundred years before the adoption of the Constitution, the jailer's obligation to keep the prisoner within the jurisdiction pending judicial review was so well-recognized as part of a meaningful remedy in habeas corpus that a breach of that obligation rendered the jailer liable to criminal penalties. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 896 n.23 (2d Cir. 1996).

branch by the lower court calls out for this Court's review.

### B. The Court Should Review Whether The D.C. Circuit's Decision Violates Petitioners' Due Process Rights

In giving the Executive unreviewable discretion to effect a transfer of these Petitioners out of Guantánamo, the D.C. Circuit held that Petitioners were not entitled to the due process requisites of notice and an opportunity to be heard when one's life and liberty are at stake. The correctness of this decision is an issue of obvious importance that affects the hundreds of Guantánamo detainees that have Notice Orders in place and whom the Executive now wishes to expeditiously transfer.

While the federal courts' common law habeas powers discussed above provide a sufficient basis for notice and judicial review of transfers that might result in torture or continued unlawful detention, Petitioners also possess due process protections against transfer to torture or continued unlawful detention that can be raised under Section 2241(c)(3) and thus require the Notice Orders. *See* 28 U.S.C. § 2241(c)(3) (providing the writ of habeas corpus when a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States"). The Due Process Clause provides that "certain substantive rights—life, liberty and property—cannot be deprived except pursuant to constitutionally adequate procedures. . . . The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett*

*v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring)).

The D.C. Circuit "assume[d] arguendo these alien detainees have . . . constitutional rights with respect to their proposed transfer." App. 9a n.*.[15] However, the Court of Appeals held that Petitioners could be sent by the Executive to a location, such as China, where they might be tortured, subjected to further unlawful detention or other acts that impair their life and liberty interests—with *no* notice of the proposed governmental action or any opportunity to challenge it. This holding is in obvious conflict with the "essential principle of due process . . . that a deprivation of life, liberty, or property '*be preceded by notice and opportunity for hearing appropriate to the nature of the case*.'" *Cleveland Bd. of Educ.*, 470 U.S. at 542 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) (emphasis added).

The Notice Orders were narrowly tailored to provide Petitioners with these basic procedures of notice and an opportunity to be heard. There was no

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[15] *Rasul* held that statutory habeas extends to Guantánamo detainees. 542 U.S. at 481. *Boumediene* provides that Petitioners' statutory habeas rights survived the Military Commissions Act of 2006, which the Court found to constitute an unconstitutional suspension of the writ. 128 S. Ct. at 2266 (stating that section 2241 "would govern in MCA § 7's absence"). It necessarily follows from the Court's holding and analysis in *Rasul* and *Boumediene* that the Due Process Clause reaches Guantánamo. However, in *Kiyemba I*, the D.C. Circuit held that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." 555 F.3d at 1026-27 & n.9. That decision is now before this Court in the certiorari petition granted on October 20, 2009.

injunction against any specific transfer and, in fact, the record amply demonstrates that these and other Petitioners would approve any reasonable relocation proposal, just as they have done in the past. However, without the Notice Orders, nothing would prevent the Executive from making a transfer literally in the middle of a habeas hearing, potentially divesting the district court's jurisdiction to adjudicate Petitioners' claims and leaving them subject to bodily harm and/or further unlawful detention.

Petitioners have due process life and liberty interests at stake because they seek an opportunity to assert a claim that they will be unlawfully detained or tortured upon transfer out of Guantánamo. *See Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) ("While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.") (footnote omitted). Torture and unlawful detention are self-evidently "bodily restraint and punishment." But the D.C. Circuit's unprecedented decision held that Petitioners here have *no* procedural rights to notice or an opportunity to challenge a proposed transfer, including to present a claim against moving Petitioners to a location arguably beyond the reach of the Great Writ where they will suffer continued unlawful detention or torture.

Petitioners' due process rights are not adequately protected by the Executive's four-year old policy declaration that it did not presently intend (as of 2005) to transfer detainees to locations where they are more likely than not to be tortured. Without notice, there

will be no opportunity for Petitioners or the court to determine whether the Executive's stated policy has changed or, even if it has not, whether the proposed transfer is in fact consistent with that stated policy. Moreover, the Executive has provided no assurance—generic or otherwise—that Petitioners will not be transferred for further unlawful detention, which would impair the Petitioners' life and liberty interests and independently necessitate notice and an opportunity to be heard. App. 33a ("The declaration expressly left open the possibility that a foreign nation will continue detention of the petitioners.") (Griffith, J., dissenting).

*Rochin* recognized that individuals have a substantive due process right against government conduct that "shocks the conscience," and torture or indefinite unlawful imprisonment of non-enemy combatants at the behest of the Government shocks the conscience. *See Rochin v. California*, 342 U.S. 165, 172 (1952); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (Torture is inconsistent with "'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions.'") (citation omitted); *see also Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (reiterating that evidence obtained through conduct that "shock[s] the conscience" may not be used to support a criminal conviction). In addition, this Court held that "'arbitrary action of government'" shocks the conscience where "the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (citations omitted). Transfer for further unlawful detention of these Petitioners—who the

Government has conceded are not enemy combatants—would qualify as such an arbitrary act "without any reasonable justification in the service of a legitimate governmental objective." The lack of any procedural protections for Petitioners further underscores that "the fault lies in a denial of fundamental procedural fairness." Petitioners are at least entitled under procedural due process to notice and an opportunity to be heard on a claim that their substantive due process rights would be violated by the Executive's proposed transfer out of Guantánamo.

In sum, the Court should grant certiorari to review whether Petitioners' due process rights to notice and to be heard when their life and liberty interests are at stake has been impermissibly eliminated by the D.C. Circuit's holding that they have no right to notice or opportunity to challenge a transfer out of Guantánamo that might result in further unlawful detention or torture. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (O'Connor, J.) ("'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' . . . These essential constitutional promises may not be eroded.") (citations omitted).

### C. This Court's Decision In *Munaf* Left Open Important Habeas And Due Process Issues That Should Be Decided Here

The D.C. Circuit's decision below held that Petitioners' common law habeas and due process rights set forth above were overridden by this Court's decision in *Munaf*, 128 S. Ct. 2207. However, as the concurring and dissenting opinion pointed out: "the *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"—thus "[t]here was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer." App. 33a-34a. Unlike the injunction in *Munaf*, the Notice Orders here merely provided notice, and did not enjoin any specific transfer contemplated by the Executive. Moreover, *Munaf* does not preclude Petitioners' claims against a transfer as a matter of law and indeed specifically left open important questions directly implicated here.

*First*, the *Munaf* majority left open whether a petitioner could block a transfer in an "extreme case" where it was more likely than not that he would be tortured. 128 S. Ct. at 2226; *see also id.* at 2228 (Souter, J., joined by Ginsburg, Breyer, JJ., concurring) (noting same caveat would extend "to a case in which the probability of torture is well documented, *even if the Executive fails to acknowledge it*") (emphasis added).[16]

*Second*, as the three-member concurrence in *Munaf* emphasized, the decision left open whether a petitioner could be entitled to an injunction against transfer in circumstances *other than* those present in *Munaf*: "(1) [petitioners] 'voluntarily traveled to Iraq.'

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[16] While the D.C. Circuit noted that *Munaf* recognizes the possibility that a court could bar transfers proposed by the Executive in "extreme cases," App. 10a n.*, *Kiyemba II* nevertheless prevented the district court from testing Executive proclamations to determine whether it has in fact been presented with such a case.

They are being held (2) in the 'territory' of (3) an 'all[y]' of the United States, (4) by our troops, (5) 'during ongoing hostilities' that (6) 'involv[e] our troops.' (7) The government of a foreign sovereign, Iraq, has decided to prosecute them 'for crimes committed on its soil.' And (8) 'the State Department has determined that . . . the department that would have authority over [petitioners] . . . as well as its prison and detention facilities have generally met internationally accepted standards for basic prisoner needs.'" *Id.* at 2228 (Souter, J., concurring) (second and third alterations in original) (citations omitted).[17] Of the eight circumstances "essential to the Court's holding" that an Executive transfer would not be blocked in *Munaf*, only one is present here: Petitioners are being held by the U.S. military.

By leaving open these questions for future consideration, *Munaf* made clear that it did not

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[17] In denying the injunction, the *Munaf* majority opinion emphasized that the relief petitioners sought "would interfere with Iraq's sovereign right to 'punish offenses against its laws committed within its borders,'" and would essentially use habeas as "a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them." 128 S. Ct. at 2220, 2223 (citation omitted). That, indisputably, is not this case, where Petitioners were involuntarily brought to Guantánamo and there is no claim that they have committed crimes in another country to which they will be transferred for lawful prosecution. *Cf. In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. at 42 (App. 84a-85a) ("[T]he court's authority to safeguard an individual's liberty from unbridled executive fiat reaches its zenith when the Executive brings an individual involuntarily within the court's jurisdiction, detains that individual and then subverts diplomatic efforts to secure alternative channels for release.").

preclude a district court from requiring the Executive to provide advance notice of a proposed transfer of a habeas petitioner or any review of a claim opposing the transfer that any habeas petitioner might make. Indeed, the Court's recognition in *Munaf* of other circumstances where a proposed transfer of a habeas petitioner could be enjoined necessarily requires notice and an opportunity to be heard so that the district court can determine whether such circumstances are present. Critically, the *Munaf* petitioners themselves were notified of the transfer and were able to challenge the Government's evidence with respect to the specific proposed transfer to Iraq. In *Munaf*, the Executive submitted a declaration regarding the specific country of transfer and even the specific ministry that would have authority over their detention, which petitioners had an opportunity to challenge. 128 S. Ct. at 2226. The D.C. Circuit's decision in this case, however, precludes a district court from ever requiring advance notice of a proposed transfer, thus denying other detainees, including Petitioners here, an entitlement to the same opportunity to be heard that was afforded to the petitioners in *Munaf* "to call the jailer to account." *Boumediene*, 128 S. Ct. at 2247.[18]

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[18] The declarations on which the D.C. Circuit relied are critically different from the government assurances provided in *Munaf*. Generic statements (made by two officials of the former administration who have long since left their posts) asserting no more than the fact that the government intended to follow its own policies cannot be likened to the country-specific determinations that this Court relied upon in *Munaf*. Indeed, as the dissent below noted, the declarations provided here "expressly left open the possibility that a foreign nation will continue detention of the petitioners." App. 33a (Griffith, J., dissenting) (citing Decl. of Matthew C. Waxman, Deputy Assistant Sec'y of Def. for Detainee Affairs, at 2 (June 2, 2005) (describing Executive's policy of

Petitioners submit that they are entitled to notice and an opportunity to obtain judicial review of claims relating to their proposed transfer, if necessary, once the circumstances of the proposed transfer are known. This Court's review is required to correct the D.C. Circuit's erroneous application of *Munaf* as categorically precluding that basic process and to address the open questions that *Munaf* identified, which are directly at stake here.

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transfer "to the control of other governments for continued detention")). Under common law practice, the habeas court's power was not limited to accepting generic or otherwise insufficient declarations by the Executive, either in the form of a return or a supporting affidavit. *See, e.g.*, *Strudwick's Case*, 94 Eng. Rep. 271 (K.B. 1744) (responding to a return that a prisoner was too sick to be produced in court by ordering and considering affidavits from both sides on the question of the prisoner's health); *Emerton's Case*, 84 Eng. Rep. 829 (K.B. 1675) (finding return insufficient on basis of three affidavits attesting that petitioner's wife was still under respondent's custody, despite respondent's denial); *United States v. Irvine*, National Archives Microfilm, M-1184, roll 1 (C.C. D. Ga. May 18, 1815) (discharging petitioner because detaining officer's affidavit failed to provide specific proof supporting general statements that enlistment had been obtained with parental consent); *Leonard Watson's Case*, 112 Eng. Rep. 1389, 1415 (K.B. 1839) (requiring jailer to explain the alleged untruths in the original return after petitioner was allowed to challenge return's veracity); *United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 682, 685 (E.D. Pa. 1855) (finding after hearing that return of writ was "evasive, if not false").

## II. The D.C. Circuit's Holding That An All Writs Act Injunction Must Meet The Traditional Preliminary Injunction Factors Presents A Circuit Split

In granting the Notice Orders, the district court relied upon the All Writs Act. *See* App. 54a (citing 28 U.S.C. § 1651(a) ("all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law").[19] The two predicates for issuing an order under the All Writs Act are (1) "'jurisdiction already existing,'" *Adams v. McCann*, 317 U.S. 269, 273 (1942) (citation omitted), and (2) that "the integrity of [that jurisdiction] is being threatened by some action or behavior." *Klay*, 376 F.3d at 1100. Because both conditions are indisputably present here—(1) the district court has jurisdiction to review a proposed transfer under the habeas authority recognized in *Boumediene*, *see* App. 5a-6a, and (2) the Government's stated intent to unilaterally transfer petitioners out of Guantánamo threatens that jurisdiction—the district court properly entered the Notice Orders pursuant to the All Writs Act statute.

The D.C. Circuit's majority opinion, however, broke with these standards and held that an All Writs Act injunction may only issue "'if a party satisfies the [four] criteria for issuing a preliminary injunction'"

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[19] The All Writs Act was originally codified in the Judiciary Act of 1789, which Justice O'Connor described as "the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself." Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. Cin. L. Rev. 1, 3 (1990).

under Federal Rule of Civil Procedure 65. App. 8a n.* (alteration in original) (citation omitted). In so holding, the D.C. Circuit directly split with the Eleventh Circuit's decision in *Klay*, which squarely held that "[t]he requirements for a traditional [Rule 65] injunction *do not apply* to injunctions under the All Writs Act because the historical scope of a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns." 376 F.3d at 1100 (emphasis added) (citing, *inter alia*, *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977) (affirming grant of injunction under the All Writs Act without regard to traditional four factors)). The D.C. Circuit's decision also conflicts with the Second Circuit's holding in *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 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). This dispute among the Courts of Appeals goes to the heart of federal judicial power, and the Supreme Court should grant certiorari to resolve the recurring issue. *See, e.g.*, Eugene Gressman *et al.*, *Supreme Court Practice* 242 (9th ed. 2007) ("One of the primary purposes of certiorari jurisdiction is to bring about uniformity of decisions on these matters [of federal and general law] among the federal courts of appeals.") (collecting cases).[20]

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[20] Moreover, *Kiyemba II* is in conflict with the D.C. Circuit's own prior precedents. *See Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983) (issuing All Writs Act injunction

The D.C. Circuit'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,'" App. 8a n.*, 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. However, as the Eleventh and Second Circuits have recognized, All Writs Act injunctions were intended by Congress to preserve a court's jurisdiction in order to provide a party with *the opportunity* to litigate the merits. *See Klay*, 376 F.3d at 1100 ("Whereas traditional injunctions are predicated upon some cause of action, an All Writs Act injunction is predicated upon some other matter upon which a district court has jurisdiction. Thus, while a party must 'state a claim' to obtain a 'traditional' injunction, there is no such requirement to obtain an All Writs Act injunction—it must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by some action or behavior."); *contra* App. 8a n.*.[21] All Writs Act injunctions are thus critically

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without reference to the Rule 65 factors); *Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008) (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."). Where, as here, an intra-circuit conflict relates to a recurring and important issue it favors the grant of certiorari. *See Inyo County, Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003) (certiorari granted to address question on which the Ninth Circuit "expressed divergent views"); *Comm'r v. Estate of Bosch*, 387 U.S. 456, 457 (1967).

[21] *See also* Dimitri D. Portnoi, *Note: Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. Rev. 293, 306 (2008) ("a

different from preliminary injunctions issued under Rule 65, which preserve the status quo once a party has established that he or she is likely to succeed on the merits. The D.C. Circuit thus committed fundamental error when it diverged from the law of other circuits and conflated Rule 65 injunctions with All Writs Act injunctions, and this Court should grant certiorari in order to harmonize the law.[22]

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traditional injunction under Rule 65 requires consideration of four factors: (1) substantial likelihood of success on the merits; (2) irreparable injury; (3) injury to the opposing party; and (4) furthering the public interest. *In contrast, an AWA injunction may be granted whenever it is 'calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it*.'") (alteration in original) (emphasis added) (citations omitted); *cf. Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1002-03 (5th Cir. 1969) (district court that dismissed action for lack of jurisdiction erred in denying "motion for injunction pending appeal").

[22] Not surprisingly, *Munaf* does not even mention the All Writs Act, let alone discuss its application, because there the Court concluded that the factual record surrounding transfer was fully developed. *See Munaf*, 128 S. Ct. at 2219-20 (deciding merits resolution was ripe); *cf. Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record . . . are not to be considered as having been so decided as to constitute precedents."). Because the petitioners' claims there were ripe for review on substantive grounds, the 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 Munaf*, 128 S. Ct. at 2220. Here, however, no specific transfer has been identified yet, and it is thus impossible at this stage to determine Petitioners' likelihood of success on the merits of their claims—*if* they were in fact to object to any such transfer. This case thus squarely presents the important All Writs Act issue, which the 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.

The Court should grant certiorari to address the clear circuit split on the standard for injunctions under the All Writs Act, which affects all instances in which a federal court may seek to protect its jurisdiction under the statute.

## III. In The Alternative, The Court May Hold The Petition Until The Disposition Of *Kiyemba I*

Petitioners respectfully submit that the Court should grant certiorari here without delay. Although all Petitioners here are also petitioners in *Kiyemba I*, the two petitions involve fundamentally different forms of relief. *Kiyemba I* concerns whether a federal court has the habeas power to direct that petitioners who are not enemy combatants be brought to the courtroom so that it might fashion conditions of release. The instant petition concerns the separate, but equally important, question whether a federal court has the authority to require the Executive to provide notice of a proposed transfer so that the court has an opportunity to adjudicate any claims relating to that transfer. For the reasons explained, the questions here are undoubtedly recurring and worthy of immediate review.

However, if the Court believes that it would benefit from a decision in *Kiyemba I* prior to considering the instant petition, it may defer consideration of the merits of this petition until disposition of *Kiyemba I*. *See Keney v. New York*, 388 U.S. 440 (1967).[23] Should

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[23] *Kiyemba I* broadly relates to judicial authority under habeas jurisdiction and the Due Process Clause. Accordingly, it is

the Court do so, and should petitioners prevail in *Kiyemba I*, *Kiyemba II* could be mooted, in which case the petitioners respectfully submit that the Court should grant this petition and remand to the D.C. Circuit to vacate its judgment and dismiss the appeal as moot in order to "'clea[r] the path for future relitigation of the issues between the parties and [to] eliminat[e] a judgment, review of which was prevented through happenstance.'" *Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007) (per curiam) (granting, vacating and remanding with instructions to dismiss as moot when case mooted after petition for certiorari filed but before decision on petition) (quoting *Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam), and quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950))) (alterations in original).[24]

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari or, alternatively, defer consideration of the merits of this petition until the disposition of *Kiyemba I*.

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possible that this Court's resolution of *Kiyemba I* may have some bearing on the instant petition. While *Kiyemba I* is pending before the Court, Respondents may not transfer the Petitioners—each of whom is a party to both *Kiyemba I* and *II*—without notice and approval by the Court or Petitioners. *See* Sup. Ct. R. 36 ("Pending review in this Court of a decision in a habeas corpus proceeding . . . the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.").

[24] *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-73 (1997) (vacatur appropriate where employee resignation rendered case moot prior to intervener's petition for certiorari).

Respectfully submitted,

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