No. 10-____ ~~UNDER SEAL~~

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2010

FARHI SAEED BIN MOHAMMED, ET AL.,

Petitioners,

v.

BARACK OBAMA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether, in a habeas corpus action brought by an individual held in United States territory, including Guantánamo,

(a) *Munaf v. Geren*, 553 U.S. 674 (2008), requires, and

(b) *Boumediene v. Bush*, 553 U.S. 723 (2008), the Suspension Clause, and the Due Process Clause permit,

the district court to give conclusive effect to the government's assertion that the individual is unlikely to be tortured if transferred to a particular country, disabling the individual from challenging his transfer on the ground that he will likely be tortured, and the court from fashioning an equitable remedy.

PARTIES TO THE PROCEEDING

Petitioners in this Court and in the court below:

Farhi Saeed Bin Mohammed and Moazzam Begg, as next friend of Farhi Saeed bin Mohammed.

Respondents in this Court and the court below:

Barack Obama, President of the United States; Robert M. Gates, Secretary of Defense; Tom Copeman, Commander, Joint Task Force, GTMO; Donnie Thomas, Commander, Joint Detention Operations Group, JTF-GTMO.

TABLE OF CONTENTS

Page

DECISIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS OF LAW 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 11

1. The D.C. Circuit's misreading of Munaf 12

2. A due process right to challenge transfer to feared torture 16

3. Inconsistency with Boumediene and Suspension Clause 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Abdah v. Obama,
D.D.C. No. 04-1254 3

Abdah v. Obama, D.C. Cir. No. 05-5224 ..... 12, 15, 19

Afriyie v. Holder,
613 F.3d 924 (9th Cir. 2010) 15

Boumediene v. Bush,
553 U.S. 723 (2008) 3, 12, 17,18

Khouzam v. Attorney General,
549 F.3d 235 (3d Cir. 2008) 16

Kiyemba v. Obama,
555 F.3d 1022 (D.C. Cir. 2009)
("*Kiyemba I*") 3, 5, 18

Kiyemba v. Obama,
561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*") ..... passim

Kiyemba v. Obama,
605 F.3d 1046 (D.C. Cir. 2010)
("*Kiyemba III*") 3

Landon v Plasencia,
459 U.S. 21 (1982) 16

Munaf v. Geren,
553 U.S. 674 (2008) ..... passim

STATUTES

8 U.S.C. § 1252(a) 15

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241(c)(1) and (3) 1

OTHER AUTHORITIES

8 C.F.R. § 208.16(a)(1) 15

Court, Rule 10(c) 12

U.S. Const., Amdt. V 1

U.S. Const., Art. I, § 9, cl. 2: 1

DECISIONS BELOW

The court of appeals' decision (Pet. 1a), issued on July 8, 2010, and its order denying petitioner's motion to stay the mandate, issued on July 10, 2010, are unreported. The district court's decision (Pet. 8a), issued on June 29, 2010, is also unreported. On July 16, 2010, this Court denied Mr. Mohammed's application for a stay pending the filing of a petition for certiorari. (No. 10A52.) On September 19, 2010, the Chief Justice extended the time for filing the petition to November 5, 2010.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The jurisdiction of the district court rested on 28 U.S.C. § 2241(c)(1) and (3), the Suspension Clause, and the Fifth Amendment.

RELEVANT PROVISIONS OF LAW

Suspension Clause, U.S. Const., Art. I, § 9, cl. 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Due Process Clause, U.S. Const., Amdt. V,

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

1. Petitioner, Farhi Saeed Bin Mohammed, is an Algerian held at the Guantánamo Bay detention facility. He left Algeria about twenty years ago, after a threatening encounter with terrorists. After living in Europe for about ten years, he left in 2001. He was

seized in Pakistan later that year, and was brought to Guantánamo in early 2002.

The Government intends to repatriate Mr. Mohammed to Algeria, but the district court found that "[t]here is no question" that Mr. Mohammed would likely suffer irreparable injury if he is repatriated. (Pet. 21a.) The district court stated:

> The record shows that the Government is moving forward in its efforts to transfer Mohammed to Algeria and that there is certainly a likelihood of his suffering irreparable injury from such a transfer, as has already been discussed. Petitioner has demonstrated that "irreparable injury is *likely* in the absence of an injunction."

(Pet. 21a) (citation omitted) (emphasis in original).) The district court specifically found "reasonable, and well founded" Mr. Mohammed's stated fear that he will be in 'great danger' from Islamic militants if he is returned to Algeria." (Pet. 18a.)

In July 2005, Mr. Mohammed filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. (D.D.C. No. 05-1347.) While Mr. Mohammed's habeas case was pending, review bodies established by the Bush and Obama administrations cleared him for transfer. (Pet. 11a.) In November 2009, the district court granted Mr. Mohammed the writ and ordered the Government to "take all necessary and appropriate diplomatic steps to facilitate Petitioner's release forthwith." (Pet. 20a.) The Government appealed; in June 2010, on the Government's motion, the D.C. Circuit held the appeal in abeyance.

2. Beginning in March 2005, the various district court judges handling Guantánamo habeas cases issued orders in many of the cases requiring the Government to provide detainee counsel with 30-days' advance notice of any intended transfer of a detainee from Guantánamo, to permit counsel to contest the transfer. *See, e.g.*, *Abdah v. Bush*, D.D.C. No. 04-1254 (March 29, 2005) (Docs. 146 & 147). The Government appealed all of these orders.

After this Court decided *Boumediene v. Bush*, 553 U.S. 723 (2008), Judge Thomas F. Hogan, acting coordinating judge, issued 30-day notice orders in all of the habeas cases. (Pet. 27a.) The Government appealed each such order. The D.C. Circuit held the appeals in abeyance pending its decision in *Kiyemba II*. That case was to be the first in which the D.C. Circuit would decide the validity of the 30-day notice orders.[1]

Judge Hogan also preliminarily enjoined the Government from repatriating Mr. Mohammed to Algeria pending *Kiyemba II*. (Pet. 29a.) [redacted] The Government appealed [redacted] The D.C. Circuit also held

[1] "*Kiyemba II*" refers to the second in a triad of appeals taken by the Government in Uighur cases. At issue in *Kiyemba I* and *Kiyemba III* is the court's power to *order* the transfer of Guantánamo detainees. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*"), and *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) ("*Kiyemba III*"). The D.C. Circuit held in those two cases that the court has no power to order release. The petitioners in those cases expect to file a petition for certiorari seeking review of the two decisions. Their petition is due in early December.

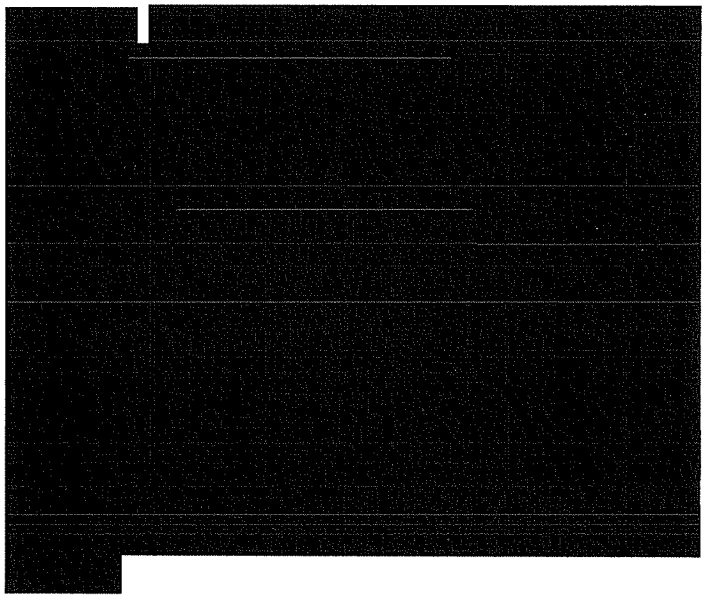
those appeals in abeyance pending *Kiyemba II*, because although the immediate issue in *Kiyemba II* was the validity of the 30-day notice orders, the ultimate issue was the court's power to enjoin the transfer of Guantánamo detainees—the issue also presented in this case.

On April 7, 2009, the D.C. Circuit issued its decision in *Kiyemba II*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (Pet. 31a.). The court held that, because the Government's *policy* is not to transfer Guantánamo detainees to countries where they are more likely than not to be tortured, a court may not consider evidence that a *particular* detainee, if transferred to a *particular* country, in fact is likely to be tortured. 561 F.3d at 514-15 (Pet. 58a-64a.) The D.C. Circuit rested its holding on *Munaf v. Geren*, 553 U.S. 674 (2008), which the court read to preclude a court "from second-guessing the Executive's assessment of the likelihood a detainee will be tortured by a foreign sovereign." *Id.* at 515. (Pet. 43a.) The court stated:

> The Supreme Court's ruling in *Munaf* precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured * * * in the recipient country. The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood.

Id. at 516. (Pet. 46a.) The court denied rehearing and rehearing en banc on July 27, 2009 (Pet. 71a), and this Court denied certiorari on March 22, 2010.

3. After the appeals court denied rehearing in *Kiyemba II*, the Government moved to dissolve the preliminary [redacted] that Judge Hogan issued in Mr. Mohammed's case [redacted] On February 4, 2010, Judge Hogan granted the Government's motions on the basis of the D.C. Circuit's decision in *Kiyemba II*:



(Pet. 76a.)

On April 19, 2010, Judge Hogan denied [redacted] for reconsideration by Mr. Mohammed [redacted]. (Pet. 78a.) In response to the [redacted] argument that "new evidence" supported reinstatement of the preliminary [redacted], Judge Hogan directed [redacted] (Pet. 87a.)

On May 24, 2010, Mr. Mohammed filed an emergency motion with Judge Gladys Kessler, the Merits Judge in his case, for a preliminary injunction enjoining the Government from transferring him to Algeria. Among other things, he expressed fear that he would be targeted by terrorist groups in Algeria, and that the Algerian government might arrest and torture him simply because the United States had called him an enemy combatant. He argued that any contrary diplomatic assurances from Algeria—a country with a dismal human rights record and a documented history of using torture—were worthless.

On June 3, 2010, Judge Kessler entered an administrative stay to prevent Mr. Mohammed's transfer pending her decision on his preliminary injunction motion. (Pet. 90a.) On June 17, 2010, the Government filed a notice of appeal, seeking expedited summary reversal of Judge Kessler's administrative stay. On June 25, 2010, the D.C. Circuit issued an order directing the district court to "resolve all outstanding motions in [the] case by Tuesday, June 29, at 4:00 p.m., in a manner consistent with *Munaf v. Geren*, 553 U.S. 674 (2008), and *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (*Kiyemba II*)." (Pet. 91a.)

On June 28, 2010, Mr. Mohammed submitted to the district court a collection of 33 exhibits, including witness declarations, substantiating his fear of mistreatment by private parties in Algeria as well as potential torture and ill-treatment by the Algerian government. The district court held a hearing that day to consider Mr. Mohammed's motion for an injunction. On June 29, 2010, the District Court

granted a preliminary injunction against the transfer of Mr. Mohammed to Algeria. (Pet. 8a.)

As an initial matter, the district court concluded that *Munaf* and *Kiyemba II* did not preclude the injunctive relief sought by Mr. Mohammed. (Pet. 15a-19a.) The court distinguished *Munaf* on the ground that it involved alleged criminal conduct committed in the territory of a foreign sovereign, not the potential transfer of an unlawfully detained individual "who now has a legal right to his freedom, to another country where he fears harm," and on the ground that *Munaf* did not involve the fear of harm by "non-governmental Islamic terrorists." (Pet. 16a-17a.) The district court also found that "*Kiyemba II* cannot control this case" for substantially the same reasons. (Pet. 18a.)

The district court then applied the traditional four-part test for a preliminary injunction and determined that Mr. Mohammed satisfied the test. Under the likelihood of success prong, the court concluded that Mr. Mohammed was likely to establish that, as a prevailing habeas petitioner, he has a right not to be transferred to a country where he reasonably fears that he will be tortured or physically harmed by the receiving government or non-governmental actors. The court found this right implicit in a prevailing habeas petitioner's "legal right to * * * freedom" and enforceable by a court. (Pet. 16a.) The court concluded that Mr. Mohammed also had established "certainly a likelihood" that he would suffer such torture or harm if he is transferred to Algeria. (Pet. 21a.)

Turning to the balance of harms, the district court found that "[t]here is no question" that there is

a likelihood that Mr. Mohammed would suffer torture or mistreatment by the Algerian government or non-governmental actors if he is transferred to Algeria:

> The record shows that the Government is moving forward in its efforts to transfer Mohammed to Algeria and that there is certainly a likelihood of his suffering irreparable injury from such a transfer, as has already been discussed. Petitioner has demonstrated that "irreparable injury is *likely* in the absence of an injunction."

(Pet. 21a. (citation omitted; emphasis in original).) The court specifically concluded that Mr. Mohammed had expressed "reasonable, and well founded fears that he will be in 'great danger' from Islamic militants if he is returned to Algeria." (Pet. 18a.) The court added that the Government's evidence was "inadequate to support the government's contention * * * that Petitioner will not be subject to any inhumane treatment if transferred to Algeria." (Pet. 19a.)

The Government claimed that granting the injunction would cause it substantial harm [redacted] Pet. 22a.) [redacted] the district court noted that "Petitioners have not contested this point, and probably are not in a position to do so because of their lack of knowledge about the classified diplomatic processes in which the Government is engaged. Consequently, the Court will assume that the Government will in fact suffer substantial harm if injunctive relief is granted." (*Id.*)

Finally, the district court found that the public interest warranted preliminary relief:

> There is no question that an enormous public interest exists in determining the fate of the many detainees left at Guantanamo Bay. The Court is well aware of the public efforts the Government has made to accomplish this end and the importance of accomplishing it as quickly as possible. On the other hand, the public interest is also served by ensuring that individuals who the Government has unlawfully detained, as in this case, are not transferred to countries where there is a substantial likelihood of their facing harm, including torture and possibly execution, from either private terrorist groups or from the country's Government. As a country, we pride ourselves on our Constitutional guarantees that individual rights will be protected. For that reason, the Court concludes that the public interest is better served by ensuring that no errors are made in the transfer of an unlawfully detained person that could result in irreparable harm even though there may well be some delays in reaching the very important goal of transferring detainees to appropriate countries.

(Pet. 22a-23a.) After considering this fourth factor, the Court concluded that Mr. Mohammed had established under the four-part test that he was entitled to a preliminary injunction, and granted his motion. (Pet. 23a.)

4. The Government moved for expedited summary reversal, which the D.C. Circuit granted. (Pet. 1a.)

The D.C. Circuit held that the district court erred as a matter of law in enjoining Mr. Mohammed's repatriation, because, in the circumstances of the case, *Kiyemba II* foreclosed such relief:

> [T]he district court may not prevent the transfer of a Guantanamo detainee when the government has determined that it is more likely than not that the detainee will not be tortured in the recipient country. 561 F.3d 509, 516 (D.C. Cir. 2009); *see Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008). The government's representations in this case satisfy that standard.

(Pet. 2a.) On July 12, 2010, the D.C. Circuit denied Mr. Mohammed's motion to stay the mandate pending the filing of a petition for a writ of certiorari. (Pet. 93a.) Judge Tatel, in partial dissent, noted that *Kiyemba II* involved only an allegation of likely torture at the hands of the recipient Government, and not an allegation of likely torture at the hands of non-governmental actors. He then stated:

> In an allegation that the district court credited, however, Mohammed also claims that he will be targeted by non-governmental actors—armed Islamic militants unaffiliated with the Algerian government—if the United States sends him to Algeria. Even if the logic of *Kiyemba II* requires deference to the government's evaluation of threats from non-governmental entities, that decision still requires evidence of a governmental policy not to transfer a detainee where such harm is likely. Notwithstanding several rounds of briefing by Mohammed raising the issue, however, the government has never said in its declarations

> whether, as a matter of policy, it even considers threats from non-governmental entities—or whether it receives assurances from the recipient government regarding its ability to protect the detainee from such threats—when making transfer decisions.
>
> * * *
>
> Thus, while I agree with my colleagues that *Kiyemba II* compels us to reverse the district court with respect to Mohammed's allegations of torture by the Algerian government, * * *, I would remand to allow the government an opportunity to submit supplemental declarations as to whether, in deciding it was safe to send Mohammed to Algeria, it considered potential threats posed by non-governmental entities.

(Pet. 6a-7a.)

On July 13, 2010, Mr. Mohammed applied to this Court for stay pending the filing of a petition for certiorari. (No. 10A52.) On July 16, 2010, the Court denied Mr. Mohammed's application. Justice Ginsberg, joined by Justices Breyer and Sotomayor, dissented from the denial of the stay:

> I would grant the stay to afford the Court time to consider, in the ordinary course, important questions raised in this case and not resolved in *Munaf v. Geren*, 553 U. S. 674 (2008).

REASONS FOR GRANTING THE WRIT

Because the D.C. Circuit in its summary reversal order relied on *Kiyemba II* as law of the circuit, that

decision, effectively, is the decision that Mr. Mohammed presents to this Court for review.[2] Review should be granted because, in *Kiyemba II*, the D.C. Circuit decided important issues of federal law that have not been, but should be, settled by the Court, Rule 10(c), and because the decision raises Due Process Clause and Suspension Clause issues, and is at odds with *Boumediene*, *cf.* Rule 10(c).

1. The D.C. Circuit's misreading of *Munaf*.

In *Kiyemba II*, the D.C. Circuit treated *Munaf* as settling issues that *Munaf*, in fact, did not settle, and which this Court should settle.

In *Munaf*, the Court framed the merits question as "whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution." 553 U.S. at 689. The Court first explained why, as a matter of the general principles applicable in the case, the petitioners were not entitled to the relief they sought—avoiding transfer to Iraqi authorities for prosecution

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[2] Pending in the D.C. Circuit, in a 30-day notice case involving most of the Guantánamo detainees, is a motion for initial en banc hearing to overrule *Kiyemba II*. *Abdah v. Obama*, No. 05-5224. Because the D.C. Circuit's disposition of that petition could materially if not decisively affect Mr. Mohammed's petition, the Court should consider holding his petition pending the D.C. Circuit's disposition of the *Abdah* petition. Also pending in the D.C. Circuit is a fully briefed appeal from an order barring the Government from repatriating a Tajik detainee to Tajikistan, *Abdulayev v. Obama*, D.C. Cir. 08-5515.

of crimes they allegedly committed on Iraqi soil. *Id.* at 692-700. The Court then addressed what it described as the petitioners' contention "that these general principles are trumped in their cases because their transfer to Iraqi custody is likely to result in torture." *Id.* at 700. The Court viewed the petitioners' torture claim as merely a facet of a general assault on the Iraqi justice system, all in aid of their quest to avoid transfer for prosecution in Iraq. *See id.* at 702. ("The Judiciary is not suited to second-guessing such determinations [regarding the likelihood of torture]—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area."). The Court also viewed as highly material the fact that MNF-1, in holding the petitioners, was acting as custodian for the Iraq government. *See id.* at 697, 705.[3]

The Court stressed that its decision was limited to "the present context," *id.* at 700, and to "circumstances such as those presented here," *id.* at 680. And the eight "circumstances" that Justice Souter identified as "essential to the Court's holding," *id.* at

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[3] The Court noted:

> MNF-1 forces * * * detain individuals who pose a threat to the security of Iraq. The Government of Iraq retains ultimate responsibility for the arrest and imprisonment of individuals who violate its laws, but because many of Iraq's prison facilities have been destroyed, the MNF-1 forces agreed to maintain physical custody of many such individuals during Iraqi criminal proceedings.

514 U.S. at 680.

706 (concurring opinion), all pivot on the petitioners' quest to avoid transfer for prosecution. The Court's preeminent concern was "Iraq's sovereign right to 'punish offenses against its laws committed within its borders.'" *Id.* at 692 (citations omitted). That is to say, it is not just that these cases are factually distinguishable; it is that the facts that are not present here were indispensable to the *Munaf* holding.

The D.C. Circuit mechanically applied the "no inquiry" rule of *Munaf* to the circumstances of cases such as *Kiyemba II*, and this case, without pausing to examine whether the "circumstances" and "context" of *Kiyemba II* were the same as those of *Munaf*. Instead, the court flatly stated:

> Under *Munaf*, * * * the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee. * * * In light of the Government's policy, a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country.

(Pet 40a-41a.)

In fact, the "circumstances" and "context" of *Kiyemba II* and *Munaf* are entirely different, and the considerations that the Court regarded as militating against judicial review of the petitioners' torture claims in *Munaf* do not apply here.[4] It is no answer

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[4] The Court reserved decision on whether the FAAR act could support a claim for relief in the circumstances of the case. 553 U.S. at 703 & n.6. The Farr act question is presented in the (...continued)

to say that the *rationale* for *Munaf*'s rule of non-inquiry, see 553 U.S. at 702, is not limited by "circumstances" and "context," because in other cases—specifically, appeals from final orders of deportation, 8 U.S.C. 1252(a)—individuals are allowed to challenge the Government's representation that torture is unlikely.

Moreover, unlike Mr. Mohammed's case, neither *Munaf* nor *Kiyemba II* involved a petitioner's claim that he faced likely torture at the hands of private parties.[5] Nevertheless, the D.C. Circuit in *this* case concluded that *Kiyemba II* controlled on the facts here.

In short, *Munaf* does not as such embody categorical and far-reaching principles, as the D.C. Circuit in *Kiyemba II* mistakenly supposed, precluding judicial review of claims such as those of Mr. Mohammed in the circumstances here. Those principles applied on the facts of *Munaf*. This Court should decide whether those principles apply here.

Abdah and *Abdulayev* cases pending in the D.C. Circuit. *See* note 2, *supra*.

[5] It is well-established by both regulation and decisional law that torture by non-state actors can be the basis for relief in removal cases as much as where the putative abuser is the government itself. *See, e.g.*, 8 C.F.R. §§ 208.16(a)(1); 1208.16(a)(1); *see also Afriyie v. Holder*, 613 F.3d 924, 937 (9th Cir. 2010) (remanding case to BIA to consider whether prior acquiescence in non-state torture by Ghanian government made it "more likely than not" that petitioner would be tortured if returned to Ghana). Because there was no allegation in *Munaf* that either of the Petitioners feared mistreatment by non-state actors within Iraq—rather than by the sovereign government of Iraq—the Court had no reason to address the issue.

2. A due process right to challenge transfer to feared torture

Review is also warranted to establish definitively that Guantánamo detainees have a due process right to challenge their transfers to another country on the ground that they are likely to be tortured there. That Mr. Mohammed is a non-citizen makes no difference; in the deportation context, for example, non-citizens have been held to have a due process right to challenge a government determination that they are unlikely to face torture if deported to a particular country, *see Khouzam* v. *Attorney General*, 549 F.3d 235 (3d Cir. 2008), and, more generally, a due right to a fair hearing to challenge their removal, *see, e.g.*, *Landon v Plasencia*, 459 U.S. 21 (1982). Due process likewise does not permit the Government to transfer a Guantánamo detainee to feared torture without affording him a meaningful opportunity to challenge his transfer on that ground.[6]

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[6] As Justice Souter suggested in his *Munaf* concurrence, transfer to a country in which the government knows *or should know* that the detainee credibly fears torture may also constitute a violation of substantive due process. *Munaf*, 553 U.S. at 706 (Souter, J., concurring) ("Although the Court rightly points out that any likelihood of extreme mistreatment at the receiving government's hands is a proper matter for the political branches to consider, if the political branches did favor transfer it would be in order [for this Court] to ask whether substantive due process bars the Government from consigning its own people to torture." (citation omitted)).

3. Inconsistency with *Boumediene* and Suspension Clause

The D.C. Circuit's decision as to judicial review of torture claims also is in substantial tension with this Court's decision in *Boumediene* and the Suspension Clause. "Habeas 'is, at its core, an equitable remedy,'" *Boumediene*, 553 U.S. at 723 (citations omitted); *see also id.* ("'common-law habeas was, after all, an adaptable remedy'"(citation omitted).) True to that principle, the district court in this case fashioned an "equitable" remedy. Flouting that principle, the D.C. Circuit gave *Munaf* a reading that disables habeas courts from fashioning "equitable" relief.

As Judge Griffith emphasized in his partial dissent in *Kiyemba II*, the Suspension Clause should be read as protecting the power of the federal courts to consider *ex ante* challenges to transfer, invoking in support the bar on transfers to places where habeas did not run in the Habeas Corpus Act of 1679. (*See* Pet. 61a (Griffith, J., concurring in the judgment in part and dissenting in part).) Judge Griffith made the point as to a petitioner's claim that the Government is unlawfully transferring him to a particular country for "proxy detention" on behalf of the United States, but the rationale also applies in the context of a petitioner's claim of transfer to feared torture. As Judge Griffith concluded, as to transfer to "proxy detention," "[t]he 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[.]" (Pet. 70a.)

This Court in *Boumediene* concluded that Combatant Status Review Tribunals (CSRTs) were an inadequate substitute for habeas corpus at least in part because they lacked the power to effectuate the detainee's release. *See Boumediene*, 553 U.S. at 787–88; *see also id.* at 787 ("[W]hen the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."). And yet, the D.C. Circuit's decisions in the Uighur cases and in this case effectively divest the district court of the same authority in the exercise of their habeas jurisdiction, barring them from considering whether the detainees have a right *not* to be transferred to particular countries. The net effect of these decisions is to surrender to the Executive authority that this Court emphasized in *Boumediene* is part of the judicial power that the Suspension Clause was intended to preserve.

CONCLUSION

The Court should grant the petition. Alternatively, the Court should hold the petition pending the D.C. Circuit's disposition of the petition for initial en banc hearing in *Abdah*.

Respectfully submitted,

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