No. 09-581

# In the Supreme Court of the United States

JAMAL KIYEMBA, ET AL., PETITIONERS

*v.*

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.

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

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether a district court hearing a habeas corpus action may enjoin the Executive from releasing a detainee from military detention and sending him to a foreign country, where the Executive has submitted sworn declarations establishing that a detainee will neither be sent to any country where he likely will be tortured nor be detained at the behest of the United States.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 561 F.3d 509. The order of the district court (Pet. App. 36a-39a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 7, 2009. A petition for rehearing was denied on July 27, 2009 (Pet. App. 43a-46a). On October 22, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 10, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners are members of the Uighur ethnic group in China. They previously were held in military detention as enemy combatants at the United States Naval Base at Guantanamo Bay, Cuba. After petitioners filed for writs of habeas corpus, the government concluded that it would no longer seek to hold them as enemy combatants.

Petitioners do not want to return to China because they reasonably fear torture there. Consistent with established policy, the United States has committed not to return petitioners to China or to any country that would repatriate them to China or that would be likely to torture them. The government has engaged in sustained diplomatic efforts to locate appropriate alternate countries for resettlement. Of the 22 Uighurs originally at Guantanamo, five have been resettled in Albania, four in Bermuda, and six in Palau, where they live peacefully with no allegations of mistreatment. Two others have agreed to be resettled in Switzerland. The remaining five Uighurs at Guantanamo Bay have each previously received offers of resettlement from two different countries, including Palau.

In addition to filing petitions for writs of habeas corpus, petitioners sought an order from the district court requiring the government to provide 30 days' notice to the court and to them before transferring them from Guantanamo Bay. The district court granted petitioners a preliminary injunction requiring that the government provide such notice. The court of appeals reversed.

1. a. The situation involving the Uighurs arises in the broader context of military detention at Guantanamo Bay. In Executive Order No. 13,492, issued on January 22, 2009, 74 Fed. Reg. 4897 (E.O. 13,492), the President

determined that the "significant concerns" raised by the remaining detentions at Guantanamo Bay justified a focused effort to review the status of each person in military detention there. *Id.* § 2(b). Accordingly, the President directed Executive Branch officials to undertake "a prompt and thorough review" of each detainee in order to determine whether transfer, release, prosecution, or other disposition of the individual was consistent with the national security and foreign policy interests of the United States and the interests of justice. *Id.* preamble, §§ 1(c), 2(d), 3. And for those individuals whom the review determined should be returned home or resettled, the President instructed the Secretary of State to "expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate." *Id.* § 5. On May 15, 2009, the Secretary of State appointed a Special Envoy, Daniel Fried, to intensify diplomatic efforts to repatriate or resettle individuals cleared for transfer.

The President issued another Executive Order on January 22, 2009, that is significant in this case. See Executive Order No. 13,491, 74 Fed. Reg. at 4893. In that Executive Order, the President directed that "individuals detained in any armed conflict * * * shall in all circumstances be treated humanely and shall not be subjected to violence to life and person * * *, nor to outrages upon personal dignity." *Id.* § 3. The President further directed the formation of a "Special Task Force on Interrogation and Transfer Policies * * * to review interrogation and transfer policies." *Id.* § 5(a). As relevant here, the Task Force was instructed "to study and evaluate the practice of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and

policies of the United States and do not result in the transfer of persons to other nations to face torture." *Ibid*.

The Task Force made several recommendations aimed at clarifying and strengthening U.S. procedures for obtaining and evaluating assurances of humane treatment. See *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President* (Aug. 24, 2009) <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>. These included a recommendation that the State Department be involved in evaluating assurances in all cases and a recommendation that the Inspectors General of the Departments of State, Defense, and Homeland Security prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances. See *ibid*. The Task Force also made several recommendations for improving the United States' ability to monitor the treatment of individuals transferred to other countries, including a recommendation that agencies obtaining assurances from foreign countries insist on a monitoring mechanism, or otherwise establish a monitoring mechanism, to ensure consistent private access to the individual who has been transferred, with minimal advance notice to the detaining government. See *ibid*. The government is currently implementing Task Force recommendations.

b. For any transfer, a key concern of the United States is whether the foreign government will treat the detainee humanely and in a manner consistent with its international obligations. Prior to transfer of a detainee, the Executive (typically through the Department of State) assesses issues concerning humane treatment of the detainee in the country of proposed transfer. The

United States has provided sworn declarations to the courts below setting out the process utilized to make a determination of humane treatment prior to the transfer of a detainee. See Decl. of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues ¶¶ 3-9 (Mar. 8, 2005) (C.A. App. 99-107) (Prosper Decl.); Decl. of Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs ¶¶ 3-8 (June 2, 2005) (C.A. App. 108-112) (Waxman Decl.); Decl. of Sandra L. Hodgkinson, Deputy Assistant Secretary of Defense for Detainee Affairs ¶¶ 3-8 (July 9, 2008) (Hodgkinson Decl.) (Gov't Resp. to Pet. for Reh'g En Banc Exh. 1); Decl. of Clint Williamson, Ambassador-at-Large for War Crimes Issues ¶¶ 3-9 (July 7, 2008) (Gov't Resp. to Pet. for Reh'g En Banc Exh. 2) (Williamson Decl.). Each of those declarations explained that it is the longstanding policy of the United States not to repatriate or transfer a detainee to a country where the United States believes it is more likely than not that the individual will be tortured. Prosper Decl. ¶ 4; Waxman Decl. ¶ 6; Hodgkinson Decl. ¶ 6; Williamson Decl. ¶ 3. The government also has recently filed a declaration of Ambassador Fried in several cases involving transfers to reaffirm that policy and update the courts on the Executive's efforts concerning transfers and humane treatment. See Decl. of Daniel Fried ¶¶ 3-4, 6-8 (Nov. 25, 2009) (Fried Decl.).[1]

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[1] The Fried Declaration of November 25, 2009, was included in a sealed filing in several cases in order to prevent disclosure of the fact that the particular detainees involved in those cases had been approved by the Executive for transfer, when (unlike in this case) that information had not already been made public. A sealed letter filed contemporaneously with this brief in opposition identifies those cases. But the general information in the Fried Declaration about the government's

2. Petitioners are four Chinese nationals who are members of the Uighur ethnic group, a Turkic Muslim minority group in the far-western region of China. Pet. 5; Pet. App. 68a.[2] Prior to September 11, 2001, petitioners traveled to Afghanistan, where Uighur camps had been established in the Tora Bora mountains. *Id.* at 69a. After the onset of hostilities in Afghanistan, petitioners were captured by Pakistan or coalition forces, transferred to U.S. military custody, and brought to the Guantanamo Bay Naval Base for detention under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (50 U.S.C. 1541 note). Pet. App. 68a-69a; see *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2240-2241 (2008). In all, 22 Uighurs were brought there; four of them are petitioners here.

Habeas petitions were filed challenging the lawfulness of petitioners' detention. Pet. App. 69a. In 2008, the government determined that it would no longer seek to hold any of the remaining Uighur detainees at Guantanamo Bay as enemy combatants. *Ibid.*; see *id.* at 4a n.*.

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efforts to secure resettlement of detainees and assure humane treatment is not classified or itself confidential, when it is not associated with a particular detainee for whom the Executive's determination concerning transfer has not been made public. We have furnished petitioners with a copy of the Fried Declaration and will lodge a copy of the declaration with the Court upon request.

[2] Seventeen Uighur detainees originally filed habeas corpus petitions in the district court. Pet. App. 69a. Nine of those individuals were parties to this case before the court of appeals. *Id.* at 2a. Only four of them are petitioners before this Court. Pet. ii. (The other five individuals have been transferred from Guantanamo Bay. Pet. ii n.2.)

Petitioner Jamal Kiyemba, named in the petition as a next friend, is not a Uighur detainee.

3. When a person is released from military detention based on enemy status, the assumption is that he will be returned to his country of citizenship. China has repeatedly asked the United States to return the Uighurs. But petitioners have opposed return to China, because they reasonably fear "persecution, torture or death if repatriated to China." Pet. 5.

The United States assesses humane treatment concerns in determining destinations for detainees at Guantanamo Bay, and follows a policy of not repatriating or transferring a detainee to a country where he more likely than not would be tortured. See pp. 4-5, *supra*; see also *Munaf* v. *Geren*, 128 S. Ct. 2207, 2226 (2008). Accordingly, the United States has agreed not to return petitioners to China and not to transfer them to any other country that would repatriate them to China.

The United States has undertaken significant diplomatic efforts to resettle the Uighurs elsewhere. Those diplomatic efforts have been successful. All of the 22 Uighurs originally at Guantanamo Bay have now either been resettled or received offers of resettlement from other countries. The United States resettled five Uighurs to Albania in May 2006,[3] resettled four additional Uighur detainees in Bermuda in June 2009,[4] and resettled six Uighurs in Palau in October 2009.[5]

Seven Uighurs thus remain at Guantanamo Bay. On February 3, 2010, the government of Switzerland an-

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[3] See Notice of Transfer of Pet'rs at 1, *Mamet* v. *Bush*, No. 05-1886 (EGS) (D.D.C. May 5, 2006).

[4] Letter from Solicitor General to Clerk of this Court at 1 (June 11, 2009), *Kiyemba* v. *Obama*, No. 08-1234.

[5] *United States Transfers Six Uighur Detainees from Guantanamo Bay to Palau* (Oct. 31, 2009) <http://www.justice.gov/opa/pr/2009/October/09-ag-1179.html>.

nounced that it would accept two additional Uighurs for resettlement.[6] The remaining five Uighurs—four of whom are petitioners here—previously received an offer of resettlement in Palau, but did not accept it. All five also recently received an offer of resettlement from another country, but they did not accept that offer either, and it was withdrawn after several months. The United States continues its efforts to identify an additional appropriate country in which to resettle these five Uighurs.

4. Petitioners sought an order from the district court barring the government from transferring them from Guantanamo Bay without 30 days' prior notice to the court and to their counsel. Pet. App. 2a. The district court granted petitioners a preliminary injunction. *Id.* at 36a-39a; see *id.* at 40a-42a. It stated that a restriction on petitioners' transfer was necessary because "the government may remove the petitioners from [Guantanamo Bay] in the near future, thereby divesting * * * the court of jurisdiction" over petitioners' habeas petitions. *Id.* at 37a.

5. The government appealed, and the court of appeals initially directed that the case be dismissed for lack of subject-matter jurisdiction on the basis of Section 7(a) of the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2636 (28 U.S.C. 2241(e)(2)). That Section provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been

[6] See *Switzerland Admits Two Uyghurs for Humanitarian Reasons* (Feb. 3, 2010) <http://www.news.admin.ch/message/?lang=en&msg-id=31467>.

properly detained as an enemy combatant or is awaiting such determination." See Pet. App. 3a.

This Court subsequently held in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), that Section 7(a) of the MCA effected an unconstitutional suspension of the writ of habeas corpus as applied to detainees at Guantanamo Bay. *Id*. at 2274. The court of appeals therefore vacated its judgment of dismissal and reinstated the government's appeal of the district court's order. Pet. App. 3a-4a.

6. After reinstatement of the appeal, the court of appeals vacated the preliminary injunction. Pet. App. 1a-35a.

a. The court of appeals first held that the district court had jurisdiction to consider petitioners' request for injunctive relief. Pet. App. 4a-7a. The court rejected the argument that *Boumediene* involved only "core" habeas relief and left the MCA's preclusion of "ancillary" habeas jurisdiction intact. *Id*. at 4a-6a. The court also held that the second sentence of Section 7(a) of the MCA, which eliminates jurisdiction over "any other action against the United States or its agents relating to any aspect of the * * * transfer" of a detainee, was inapplicable here because "other action" referred to actions other than a petition for a writ of habeas corpus. *Id*. at 6a-7a (quoting 28 U.S.C. 2241(e)(2)).

On the merits, the court of appeals held that the district court had improperly issued a preliminary injunction. Pet. App. 14a. In reaching that conclusion, the court relied on this Court's recent decision in *Munaf*. In *Munaf*, the Court vacated an injunction barring the transfer to the Iraqi government for criminal prosecution of an American citizen who was detained in Iraq by the United States military. 128 S. Ct. at 2220. The peti-

tioners in *Munaf* sought an injunction prohibiting transfer because they alleged a fear of torture by the receiving government. *Id.* at 2214-2215, 2225. The Court rejected that claim, explaining that while torture "allegations are * * * a matter of serious concern, * * * in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 2225. The Court noted the United States' statements that it would not transfer the petitioners it if believed that they would likely be tortured and that the State Department had determined that the Iraqi Justice Ministry (which would have authority over the petitioners) and its prison and detention facilities have generally met internationally accepted standards for basic prisoner needs. *Id.* at 2226. The Court held that judicial review of the Executive's determination respecting the likelihood of torture would be improper, observing that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Ibid.*

In this case, the court. of appeals concluded that "*Munaf* precludes a court from issuing a writ of habeas corpus to prevent a transfer on the grounds asserted by the petitioners here." Pet. App. 8a-9a. The court noted that "the record documents the policy of the United States not to transfer a detainee to a country where he is likely to be tortured," and shows that "the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee." *Id.* at 9a. For that reason, the court observed, petitioners "are not liable to be cast abroad willy-nilly

without regard to their likely treatment in any country that will take them." *Ibid.*

The court of appeals further held that "*Munaf* * * * bars a court from issuing a writ of habeas corpus to shield a detainee from prosecution and detention by another sovereign according to its laws." Pet. App. 11a-12a; see *id.* at 13a-14a. That rule, the court explained, is rooted in "norms of international comity" as well as "separation of powers principles." *Id.* at 12a. The court noted that the requirement that the government provide pre-transfer notice "interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Ibid.* Any prosecution or detention that the petitioners would face after their transfer, the court explained, would be by the transferee government and not on behalf of the United States. See *id.* at 11a. The court observed that this case "does not involve" the transfer of detainees to a country where they would be subject to continued detention on behalf of the United States, because the Executive is no longer holding petitioners as enemy combatants and the Executive is diligently seeking their resettlement. *Id.* at 12a-13a n.*.

In light of *Munaf* and the government's "declared * * * policy not to transfer a detainee to a country that likely will torture him," the court of appeals concluded that petitioners' "claims do not state grounds for which habeas relief is available," and it therefore rejected their request for preliminary injunctive relief. Pet. App. 14a.

b. Judge Kavanaugh concurred. Pet. App. 14a-26a. He emphasized that "the Government has represented that no detainee in this case will be transferred to a country where the Government believes it likely the detainee would be tortured," just as the government had

represented with respect to the detainees in *Munaf*. *Id*. at 16a n.2. And he explained that here, as in *Munaf*, "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally." *Id*. at 22a (quoting *Munaf*, 128 S. Ct. at 2226).

c. Judge Griffith concurred in part and dissented in part. Pet. App. 27a-35a. He acknowledged that the proposed injunction could "limit[] the government's flexibility in a sensitive matter of foreign policy." *Id*. at 27a. But he expressed concern that detainees could be detained on behalf of the United States after they were transferred. *Id*. at 29a. Judge Griffith acknowledged that "the government has submitted sworn declarations assuring the court that any transfer will result in release from U.S. authority." *Id*. at 31a. And he stated that "[i]f the government's representations are accurate," then "each transfer will be lawful." *Ibid*. But rather than defer to those sworn statements, *id*. at 32a, Judge Griffith would have upheld an injunction for the limited purpose of allowing petitioners "an opportunity to challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States," *id*. at 35a.

6. Petitioners sought rehearing and rehearing en banc, which were denied. Pet. App. 43a-46a.

## ARGUMENT

Petitioners contend (Pet. 13-14) that this Court should grant review to decide whether a habeas corpus court may require that the government provide 30 days' notice to the court and to counsel before transferring them from Guantanamo Bay. As an initial matter, any suggestion that the United States is contemplating send-

ing petitioners to a country where they likely would be tortured is refuted both by uncontradicted sworn declarations and by the government's extensive diplomatic efforts to resettle petitioners and the other Uighur detainees. Moreover, the court of appeals' decision is correct, does not conflict with any decision of this Court—but to the contrary follows from this Court's decision in *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008)—and does not conflict with any decision of another court of appeals. This Court's review therefore is not warranted.

1. As an initial matter, there is no basis for believing that petitioners likely would be tortured by any country that will receive them. That factual predicate for the injunction petitioners seek therefore is absent. As the President underscored in Executive Order No. 13,491, it is the policy of the United States not to transfer a detainee to a country where it is more likely than not that he will face torture, and the Executive works diligently to effectuate that policy with respect to each detainee. That is especially evident with respect to petitioners and the other Uighur detainees: the United States has committed not to return them to China, and it has made significant and successful diplomatic efforts to secure offers of resettlement for them in countries where it has determined—and petitioners do not dispute—that it is not likely that they would be tortured.

a. The United States has submitted a number of sworn declarations from Executive Branch officials describing the resettlement process. Each of the declarants has stated, in no uncertain terms, that it is the policy of the United States not to transfer a detainee to a country where the United States determines he more likely than not would be tortured.

Before the district court, the United States submitted declarations of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, and Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs. Ambassador Prosper's declaration provided an overview of the process utilized by the Executive Branch (primarily the Department of State) to arrange for transfers and to ensure that international obligations and United States policies are properly implemented during transfers. Prosper Decl. ¶¶ 1-9. Ambassador Prosper noted the "longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured," *id.* ¶ 4, and described the steps taken to ensure humane treatment by the receiving country for each transfer, *id.* ¶¶ 4-8. Ambassador Prosper also noted the sensitive diplomatic nature of that process, explaining that "[l]ater [court] review * * * of the Department[] [of State's] dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture that come to our attention and to reach acceptable accommodations with other governments to address those important concerns." *Id.* ¶ 10. Mr. Waxman's declaration, which focused on transferring a detainee from United States control to the control of a foreign government, Waxman Decl. ¶ 1, confirmed that, with respect to such transfers, "it is the policy of the United States * * * not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured," *id.* ¶ 6.

Before the court of appeals, the United States provided updated declarations to confirm that the Execu-

tive Branch has procedures in place to effectuate the policy that the government will not transfer a detainee to a country where he more likely than not would be tortured. The declaration of Clint Williamson, Ambassador-at-Large for War Crimes Issues, again recounted the process utilized by the government to obtain assurances of humane treatment, Williamson Decl. ¶¶ 3-9, and the declaration of Sandra L. Hodgkinson, Deputy Secretary of Defense for Detainee Affairs, addressed the particular context of transfer to the custody of another sovereign, Hodgkinson Decl. ¶¶ 5-8. Both declarants again confirmed the "longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured." Williamson Decl. ¶ 4; see Hodgkinson Decl. ¶ 6.

The declaration of Ambassador Daniel Fried (see p. 5 & note 1, *supra*), who was appointed as Special Envoy in May 2009 to intensify repatriation and resettlement efforts, updates the declarations provided to the courts below and reaffirms that it is the policy of the United States not to repatriate or transfer a detainee to a country where he more likely than not would be tortured. Fried Decl. ¶ 3. As Ambassador Fried explains, a key concern in any proposed transfer from the Guantanamo Bay detention facility is whether the receiving government will treat the detainee humanely and in a manner consistent with its international obligations. *Id.* ¶¶ 3-4. If transfer of a particular detainee is found to be appropriate, a process is undertaken, typically led by the Department of State, in which appropriate assurances concerning security and other matters are sought from the country to which the transfer of the detainee is proposed. *Id.* ¶ 6. In every transfer case in which deten-

tion or other security measures by the transferee government are foreseen, such assurances include assurances of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer. *Ibid.* Among other things, the Department of State considers whether the nation in question is a party to relevant treaties such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, and it ensures that assurances are tailored accordingly if the nation concerned is not a party or if other circumstances warrant. Fried Decl. ¶ 6.

Recommendations by the Department of State concerning proposed transfers "are decided at senior levels through a process involving Department officials most familiar with international legal standards and obligations and the conditions in the countries concerned." Fried Decl. ¶ 7. Thus, in determining whether it is more likely than not that an individual will be tortured in the proposed transfer country, the Department consults internally with its Bureau of Democracy, Human Rights, and Labor (which drafts the Department of State's annual Country Reports on Human Rights Practices) and the relevant Department of State regional bureau, country desk, or U.S. Embassy. *Ibid.* It also considers expressed commitments of officials of the foreign government. In evaluating assurances, Department of State officials consider the identity, position, or other information concerning the official relaying the assurances; political and legal developments in the relevant foreign country that provide context for the assurances; and the foreign government's incentives and capacity to fulfill its

assurances to the United States. *Id.* ¶ 8. In an appropriate case, the Department of State may consider various monitoring mechanisms for verifying that assurances are honored after transfer. *Ibid.*

If a case arises in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States will not transfer a detainee to the control of that government unless the concerns are satisfactorily resolved. Fried Decl. ¶ 8. Indeed, circumstances have arisen in the past in which the United States decided not to transfer detainees to their country of origin or to another country because of mistreatment concerns. *Ibid.*; see *id.* at ¶ 3.

b. Notably, petitioners do not contend that the United States plans to repatriate them to China or to transfer them to any nation where they likely would be tortured or would be detained on behalf of the United States. Indeed, they acknowledge that the Executive has stated since 2005 that it would not return them to China. Pet. 6 (citing Pet. App. 20a n.5); see Pet. 20. The numerous sworn declarations described above make plain the commitment of the United States not to transfer petitioners to any country where they more likely than not would be tortured. See Prosper Decl. ¶ 4; Waxman Decl. ¶ 6; Hodgkinson Decl. ¶ 6; Williamson Decl. ¶ 4; Fried Decl. ¶¶ 3-4.

The court of appeals recognized that commitment, explaining that sworn declarations "document[] the policy of the United States not to transfer a detainee to a country where he is likely to be tortured." Pet. App. 9a (citing *Munaf*, 128 S. Ct. at 2226). Indeed, the court explained, they establish that "the Government does everything in its power to determine whether a particu-

lar country is likely to torture a particular detainee." *Ibid.* And the court observed that the government's sworn declarations setting forth the firm policy against transfer to a country in which torture is likely provide the same assurance that this Court pointed to with respect to the petitioners in *Munaf*. *Ibid.*; see *id.* at 16a n.2 (Kavanaugh, J., concurring) (finding "no meaningful distinction" between the declarations here and in *Munaf*).

The court of appeals specifically noted petitioners' "failure to present anything that contradicts" the government's sworn declarations. Pet. App. 13a n.*. Petitioners do not provide such evidence or even assertions now. Instead, they note that the declarants have left their posts since the time the declarations were filed. Pet. 25 n.18. But that provides no basis to question the United States' longstanding policy. The policy statement articulated in the original declarations (by Ambassador Prosper and Mr. Waxman) was reaffirmed in subsequent declarations (by Ambassador Williamson and Ms. Hodgkinson) that were filed in all of the detainee cases—including these cases—and were appended to the government's response to petitioners' petition for rehearing before the court of appeals. And Ambassador Fried's declaration reiterates the Executive's firm commitment not to transfer detainees where the U.S. Government has determined that the transferee is more likely than not to be tortured.

The government's uncontradicted sworn statements are confirmed by its actions with respect to these very petitioners. The government has long committed not to return them to China and has pursued extensive diplomatic efforts to secure resettlement offers from other countries where Uighurs who have already been trans-

ferred now live peacefully and where there has been no claim that torture would occur.

Petitioners' failure to allege a fear of mistreatment abroad, combined with the government's specific efforts to find safe homes for these petitioners, and its long-standing policy not to transfer a detainee to a country where he more likely than not would be tortured makes plain that this Court's review is not warranted.

2. In addition, the court of appeals correctly held that this case "is controlled by the Supreme Court's recent decision in *Munaf*." Pet. App. 8a.

As an initial matter, *Munaf* held that "a party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.'" 128 S. Ct. at 2219 (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006)). For that reason, it was "an abuse of discretion" for the district court in *Munaf* to grant a preliminary injunction "without even considering the merits of the underlying habeas petition." *Ibid*. The same is true here: the district court order granting petitioners preliminary injunctive relief included no consideration of petitioners' likelihood of success on the merits. See Pet. App. 36a-39a. To the contrary, the district court entered the injunction based solely on the possibility that a transfer could divest the court of jurisdiction, *id*. at 37a-38a—the same basis that this Court held insufficient in *Munaf*, see 128 S. Ct. at 2219. That fact alone warranted reversal of the district court's decision.

Moreover, the court of appeals correctly recognized that this Court's decision in *Munaf* "precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipi-

ent country" where, as here, "[t]he Government has declared its policy" not to do so. Pet. App. 14a. In *Munaf*, this Court vacated an injunction barring the transfer of an American citizen detained in Iraq by the United States military to the Iraqi government for criminal prosecution. The petitioners in *Munaf*, like petitioners here, were in military detention. 128 S. Ct. 2214-2215. They, like petitioners, contended that an injunction prohibiting transfer was necessary because of the prospect of torture by the receiving government. *Id.* at 2225. In *Munaf*, as here, the government had declared its commitment not to transfer the petitioners in circumstances where torture was likely to result. *Id.* at 2226. This Court held that judicial review of that determination by the Executive respecting the likelihood of torture by the receiving country would be improper. The Court explained that while torture "allegations are * * * a matter of serious concern, * * * in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 2225. The Court observed that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 2226.

That judgment is appropriate, and never more so than with respect to petitioners and the other Uighurs. As Ambassador Fried has explained, the Department's "ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with foreign governments with discretion." Fried Decl. ¶ 9. The task of resettling detainees requires a "delicate diplomatic exchange" that "cannot occur effectively except in a confidential setting."

*Id.* ¶ 10. That has proven especially so with regard to the Uighurs because of their relationship with China and the potential difficulties that poses for other countries. It therefore is important for the Executive to have the latitude to manage resettlement efforts free of judicial second-guessing, because as Ambassador Fried explains, "[j]udicial review of the diplomatic dialogue between the U.S. Government and other governments concerning the terms of transfer, or of the ultimate decision to effect a transfer to a given country, risks undermining the ability of the U.S. Government to speak with one voice on Guantanamo transfer issues." *Id.* ¶ 12.[7]

3. Petitioners attempt to distinguish *Munaf* on several grounds, none of which has merit.

a. Petitioners suggest (Pet. 22-23) that the result here should be different from the result in *Munaf* because the petitioners in *Munaf* challenged their proposed transfer to a specific country (Iraq), while petitioners here do not know to which country they may be transferred. That factual distinction does not support a different result. The *Munaf* petitioners claimed that they would be tortured and possibly killed if transferred to the custody of the Iraqi government. Petitioners here seek a 30-day notice requirement in order to raise the same type of challenge. In *Munaf*, as here, the govern-

[7] Petitioners' due process claim (Pet. 18-22) adds nothing to their argument. As the court of appeals recognized (Pet. App. 9a n.*), this Court held that courts may not second-guess a determination by the Executive that a detainee is not likely to be tortured in the proposed country of transfer. *Munaf*, 128 S. Ct. at 2225-2226. The hearing petitioners seek therefore could not provide them any relief. See *Estes* v. *Texas*, 381 U.S. 532, 542 (1965) (noting that "in most cases involving claims of due process deprivations we require a showing of identifiable prejudice").

ment had documented its commitment not to transfer the petitioners to a country where torture is likely to result. While noting that allegations of torture were "a matter of serious concern," the *Munaf* Court concluded that "in the present context that concern is to be addressed by the political branches and not the judiciary." 128 S. Ct. at 2255. The Court reasoned that the Executive is "well situated" to determine "whether there is a serious prospect of torture" upon transfer "and what to do about it if there is," and that "the Judiciary is not suited to second-guess such determinations." *Id.* at 2225, 2226. That conclusion applies regardless of the proposed country of transfer.

b. Petitioners also suggest that the injunction here "merely provided notice, and did not enjoin any specific transfer contemplated by the Executive," Pet. 23, and therefore is less onerous than the injunctions in *Munaf*, which barred transfer of the detainees to Iraq. But the reason petitioners seek notice is so that they can litigate the Executive's determination that they would not be likely to face torture in the receiving country and, ultimately, to obtain an injunction barring transfer. Pet. 2, 13-14, 18-20, 22, 26. *Munaf* made clear that "[t]he Judiciary is not suited to second-guess" Executive Branch determinations about "whether there is a serious prospect of torture" upon transfer "and what to do about it if there is." 128 S. Ct. at 2226. And the United States has established, through numerous uncontested sworn statements, that a court-ordered notice requirement would in fact interfere with the Executive's resettlement efforts. Pet. App. 12a ("the requirement that the Government provide pre-transfer notice interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for de-

tainees") (citing Prosper Decl. ¶ 10); see also Fried Decl. ¶¶ 9-12. Indeed, the injunction was more than a notice requirement; it forbade transfer before or within 30 days after notice. See Pet. App. 38a.

c. Petitioners also incorrectly suggest that the present case implicates two questions left open by *Munaf*. First, they note (Pet. 23) that the Court left open the question whether judicial inquiry would be proper in "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." *Munaf*, 128 S. Ct. at 2226. The court of appeals correctly recognized (Pet. App. 10a n.*) that that question is not implicated here. The Executive has not decided to transfer petitioners to a country where they more likely than not would be tortured; it has long determined to the contrary. *E.g.*, *id.* at 9a.

Second, petitioners suggest (Pet. 23-24) that the holding in *Munaf* is limited to its precise facts. As the court of appeals recognized, however, the rationale of *Munaf* is not so limited. Pet. App. 11a-12a. The petitioners in *Munaf*, like petitioners here, were detained by the military and sought to enjoin transfer because of a fear of torture, and this Court determined that "it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." 128 S. Ct. at 2225. That holding is directly applicable here.

4. Contrary to petitioners' repeated suggestion (Pet. 13-22), this case does not raise any issue about whether a habeas corpus remedy is available to enjoin a detainee's transfer to another country when the receiving country would continue to detain the individual on behalf of the United States. As a factual matter, the government has represented that such transfers will not be

made, and petitioners have put forward no basis to dispute that representation. See Pet. App. 9a, 12a-13a n.*; see also Waxman Delc. ¶ 5 ("In all such cases of transfer for detention * * * the detainee is transferred entirely to the custody and control of the other government, and once transferred, is no longer in the custody and control of the United States; the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States."). And in this case, petitioners are well aware that the United States intends to resettle them abroad—not to transfer them to the control of a foreign sovereign for detention—just as it already has resettled 15 of the 22 original Uighur detainees and obtained offers of such resettlement for the other seven.

As a legal matter, moreover, petitioners failed to preserve an argument regarding transfer that would result in continued detention. As Judge Kavanaugh explained, petitioners "did not advance that position in their 104 pages of briefing in [the court of appeals] (except perhaps an ambiguous reference at the tail end of one sentence in a supplemental brief)" and did not raise the argument at all "during two lengthy oral arguments in [that] [c]ourt." Pet. App. 23a (Kavanaugh, J., concurring). And because petitioners did not present the argument, the court of appeals did not pass on it. In any event, the injunction at issue here is far too broad to be justified on that ground, because it forbids any transfer without 30 days' notice, rather than only transfers in which the United States would effectively maintain custody of the detainee. *Id.* at 38a.[8]

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[8] Petitioners also suggest more generally (Pet. 16) that the district court injunction must be reinstated because "the Executive may not

5. Petitioners contend (Pet. 27-31) that review is warranted to address whether a party must demonstrate a likelihood of success on the merits to obtain relief under the All Writs Act, 28 U.S.C. 1651. They are mistaken.

The court of appeals correctly determined that, because petitioners sought a preliminary injunction to enjoin transfer, they must satisfy the four-part standard for that relief, including showing a likelihood of success on the merits. Pet. App. 7a-8a & n.*. The court addressed petitioners' All Writs Act argument in a footnote. *Id.* at 8a n.*. The court noted that it had previously held that, when a Guantanamo Bay detainee seeks a preliminary injunction to bar transfer, a district court should "balance the four factors in order to decide whether a preliminary injunction is 'necessary or appropriate'" within the meaning of 28 U.S.C. 1651. *Belbacha* v. *Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008). Here, the court determined that petitioners were not "reliev[ed]

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unilaterally transfer a prisoner out of the jurisdiction." That suggestion presumes that the Executive would continue to detain petitioners subsequent to transfer. The Uighurs who have already been transferred have not been detained, and there is no suggestion in this case that the petitioners who remain at Guantanamo Bay would be detained in a country of transfer. Moreover, as the government has explained, any post-transfer detention of persons at Guantanamo Bay "would be effected 'by the foreign government pursuant to its laws and not on behalf of the United States.'" Pet. App. 11a (quoting Waxman Decl. ¶ 5). In any event, petitioners' suggestion is inconsistent with *Munaf*, in which this Court held that there was habeas corpus jurisdiction, but ruled that the district court could not review the Executive's determination regarding a detainee's post-transfer treatment, and in which the Court vacated the injunction that purported to maintain the status quo pending such a judicial inquiry. The decisions upon which petitioners rely (Pet. 14) significantly pre-date *Munaf*, and none of them stands for the sweeping propositions suggested by petitioners.

* * * of the need to satisfy the standard for a preliminary injunction" simply because they invoked the All Writs Act when the relief they sought was a preliminary injunction. Pet. App. 8a.

That is the same conclusion this Court reached in *Munaf*. The *Munaf* petitioners invoked the All Writs Act, Habeas Pets. Br. at 45-46, *Munaf*, *supra* (Nos. 07-394 & 06-1666), and this Court nonetheless held that the district courts erred in enjoining transfer "without even considering the merits of the underlying habeas petition," 128 S. Ct. at 2219. To the extent petitioners suggest that they were entitled to an injunction merely upon showing that the district court had jurisdiction, Pet. 27, that suggestion is squarely at odds with *Munaf*, where the district court had jurisdiction, the proposed transfers would have terminated district court jurisdiction, and yet this Court held that injunctions against those transfers were improper. *Munaf*, 128 S. Ct. at 2219. And here, as in *Munaf*, the serious separation-of-powers concerns raised by judicial second-guessing of Executive Branch determinations regarding the likelihood of torture makes a preliminary injunction inappropriate under the All Writs Act.

Petitioners erroneously contend that the decision below conflicts with *Klay* v. *United Healthgroup, Inc.*, 376 F.3d 1092 (11th Cir. 2004). In *Klay*, the court of appeals remarked (in the context of an injunction to stop arbitration of doctors' claims against a health maintenance organization) that "[t]he requirements for a traditional injunction do not apply to injunctions under the All Writs Act." *Id.* at 1100. As the Eleventh Circuit later explained, that statement is dictum, because "the *Klay* Court struck down the challenged injunctions on the ground that they were not needed to protect the dis-

trict court's jurisdiction," and the decision "in no way turned on the applicability of the traditional preliminary injunction requirements to injunctions issued pursuant to the All Writs Act." *Alabama* v. *United States Army Corps of Eng'rs*, 424 F.3d 1117, 1131-1132 n.20 (2005), cert. denied, 547 U.S. 1192 (2006). In addition, the court observed in *Alabama* that even if the statement in *Klay* "were a holding rather than dictum, there would be some doubts as to [its] validity," because, as the *Klay* court itself recognized, the Eleventh Circuit's cases are "deeply inconsistent on this issue." *Id.* at 1132 n.20 (citing *Klay*, 376 F.3d at 1100 n.12).

In any event, the court below did not purport to hold that likelihood of success on the merits is always required under the All Writs Act; instead, it limited its brief analysis to the situation of a Guantanamo Bay detainee's request for an injunction to enjoin transfer. Pet. App. 8a n.*. And even if the Eleventh Circuit has different standards for some relief under the All Writs Act, that difference would not be implicated here because the Eleventh Circuit would not apply the All Writs Act standard to this case. See *Schiavo* v. *Schiavo*, 403 F.3d 1223, 1229 (11th Cir. 2005) ("[W]here the relief sought is in essence a preliminary injunction, the All Writs Act is not available.").

The decision below likewise does not conflict with *In re Johns-Manville Corp.*, 27 F.3d 48 (2d Cir. 1994), a three-paragraph opinion addressing a series of stays entered by a district court to stop payments from a trust while litigation to restructure the trust was ongoing, *id.* at 49. In that case, unlike this one, a party was seeking to "maintain the status quo" through a stay, *ibid.*, not to obtain preliminary injunctive relief. The Second Circuit did not hold that a showing of likelihood of suc-

cess on the merits may never be required for relief under the All Writs Act; it simply held that no such showing was required to support the stays entered in that case. *Ibid*. There is therefore no disagreement in the circuits warranting this Court's review.

6. Petitioners suggest (Pet. 31-32) that this petition should be held pending the outcome of *Kiyemba* v. *Obama*, cert. granted, No. 08-1234 (Oct. 20, 2009) *(Kiyemba I)*. But, as petitioners readily admit, *Kiyemba I* poses an entirely "separate question" from the notice issue here. Pet. 3; see, *e.g.*, *ibid*. ("[T]he issues presented by this petition are distinct."); Pet. 31 ("the two petitions" are "fundamentally different"). *Kiyemba I* presents the question whether the federal courts, exercising habeas corpus jurisdiction, may properly order the United States government to bring petitioners into the United States for release, in contravention of the federal immigration laws and specific statutory bars. The answer to that question would have no effect on the question here, which concerns the district court's authority to prevent the government from resettling petitioners in a foreign country. Accordingly, the petition should not be held pending the outcome of *Kiyemba I*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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