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ORAL ARGUMENT SCHEDULED ON APRIL 5, 2018

No. 18-5032

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE,

Petitioner–Appellee,

v.

JAMES MATTIS, in his official capacity as SECRETARY OF DEFENSE,

Respondent–Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies the following:

(A) Parties and Amici

John Doe was petitioner in district court and is appellee in this Court. James N. Mattis, in his official capacity as Secretary of Defense, was respondent in district court and is appellant in this Court. No amici participated in the district court, and none are currently anticipated in this appeal.

(B) Ruling Under Review

The ruling under review is the portion of the district court's opinion and order of January 23, 2018 (Chutkan, J.), granting in part and denying in part Petitioner–Appellee's motion regarding continued interim relief, which was entered as ECF No. 31. The district court's opinion and order were entered as ECF Nos. 51 and 52.

(C) Related Cases

This case has not previously been before this Court or any other court. Counsel for Petitioner–Appellee are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

Dated: March 9, 2018

Respectfully submitted,

/s/ Jonathan Hafetz
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ISIS: Islamic State of Iraq and Syria

INTRODUCTION

The executive has detained Petitioner, an American citizen, without charge for nearly six months. After repeatedly frustrating Petitioner's ability to seek habeas relief by denying him access to a court and to counsel, the government now appeals an order by the district court requiring that the government provide 72-hours' notice of and an opportunity to challenge an involuntary transfer of Petitioner to the custody of another government.

The power the executive claims in this appeal is extraordinary and unprecedented. The executive claims it can involuntarily render Petitioner to any country it unilaterally deems has a "legitimate sovereign interest" in him without positive legal authority and without judicial review. Further, in asserting this unfettered power, the executive relies on its own unilateral conclusion that Petitioner is properly detained as an "enemy combatant"—the very conclusion Petitioner is challenging before the district court. To accept the government's argument would give the executive unreviewable power over a citizen's liberty and eviscerate the centuries-old protections of habeas corpus against unlawful executive detention. This Court should reject the government's request for this blank check and affirm the 72-hour advance notice requirement prudently imposed by the district court.

STATEMENT OF THE CASE

1. The government's military detention of Petitioner and the habeas petition filed on his behalf.

Petitioner is a United States citizen who has been detained by the Department of Defense at a U.S. military facility in Iraq for nearly six months. Joint Appendix ("JA") 28. For more than half of this time, the government denied Petitioner access to a court or an attorney. JA 27–28.

On or about September 12, 2017, Petitioner surrendered to Syrian Democratic Forces at a checkpoint near the Syrian border with Turkey. JA 28. After Petitioner informed them that he was a U.S. citizen and requested to speak with U.S. personnel, JA 192, 245, Syrian Democratic Forces transferred him to the custody of the U.S. military. JA 161. The Defense Department then transferred Petitioner to a military facility in Iraq. JA 68–69. The United States subsequently concluded that Petitioner is an "enemy combatant" based on his alleged membership in the Islamic State of Iraq and Syria, or "ISIS," at the time of his capture. JA 212.

After various media outlets publicly reported Petitioner's detention in mid-September 2017, counsel for the American Civil Liberties Union Foundation ("ACLUF"), as Petitioner's next friend, filed a petition for a writ of habeas corpus

in the district court. ECF No. 4.[1] As relief, the petition asked the district court to "Order Respondent to charge [him] with a federal criminal offense in an Article III court or release him." JA 23. Shortly thereafter, the ACLUF filed an emergency motion seeking counsel access to Petitioner—either by the ACLUF or a court-appointed lawyer—to advise Petitioner of his legal rights as a U.S. citizen and to afford him the opportunity to challenge his unlawful detention. ECF No. 7.

2. The government's repeated efforts to block this habeas challenge and the district court's order permitting counsel access.

On October 30, 2017, the government moved to dismiss the habeas petition, arguing that the ACLUF lacked next-friend standing because it had no prior relationship to Petitioner and could not demonstrate that Petitioner wished to challenge his detention, while also arguing that the district court lacked power to take any steps to ascertain Petitioner's wishes on the matter. ECF No. 11 at 10–13, 16–21; *see* ECF No. 22 at 36 (transcript of hearing) (arguing that the district court lacked "supervisory power over . . . U.S. military operations regarding detainees in foreign countries").

While the counsel-access motion was pending, the *Washington Post* reported that at some point during the government's interrogations of Petitioner, Petitioner

[1] For simplicity, all citations to "ECF No. __" in this brief are to the documents so numbered in the district court's electronic docket. *See Doe v. Mattis*, No. 17-cv-2069 (D.D.C. filed Oct. 5, 2017).

"refused to talk to the interrogation team and demanded a lawyer" and then, after FBI agents read Petitioner his *Miranda* rights, "he again refused to cooperate and repeated his demand for a lawyer." ECF No. 13 at 1–2 (quoting Dana Priest, Devlin Barrett & Matt Zapotsky, *Case of Suspected American ISIS Fighter Captured in Syria Vexes U.S.*, Wash. Post, Oct. 29, 2017, http://wapo.st/2towMmr). The government dismissed that report as "anonymous hearsay" and continued to argue that the district court did not have the authority to inquire whether Petitioner wished to access counsel or challenge his detention through habeas corpus. ECF No. 15 at 5. When the district court ordered the government to confirm whether Petitioner had asked for counsel, the government conceded that Petitioner had, in fact, invoked his constitutional right to an attorney—*two months prior*, on September 25, less than two weeks after the United States took custody of him. ECF No. 18. The government nevertheless continued to argue that there was no evidence that Petitioner might want to "invoke American court relief," ECF No. 22 at 29, and that the district court remained powerless to take any steps to determine whether Petitioner wished to access counsel or seek habeas relief, ECF No. 24 at 4–8.

As the district court considered the counsel-access motion, on December 20, the *New York Times* reported that senior government officials were "embracing a proposal" to transfer Petitioner to Saudi Arabia. *See* Charlie Savage, Eric Schmitt

& Adam Goldman, *Officials Weigh Sending American Detainee to Saudi Arabia*, N.Y. Times, Dec. 20, 2017, https://nyti.ms/2De9Yqh. The ACLUF called the district court's attention to that publication, urging that the reported "proposal underscore[d] the urgency of the relief requested in Petitioner's pending motion for counsel access." ECF No. 27 at 1.

Two days later, the district court denied the government's motion to dismiss the habeas petition and ordered the Defense Department to "provide the ACLUF with temporary, immediate and unmonitored access to the detainee so that it may inquire as to whether he wishe[d] to have the ACLUF or court-appointed counsel continue this action on his behalf." ECF No. 29 at 2. The court further ordered the government, in the interim, "to refrain from transferring the detainee until the ACLUF inform[ed] the court of the detainee's wishes." *Id.*

3. The district court's order requiring 72 hours' notice before transfer of Petitioner.

After meeting with Petitioner by secure videoconference on January 3, 2018, counsel for the ACLUF informed the district court that Petitioner wished to pursue this habeas action and to have the ACLUF represent him in it. *See* ECF No. 31 at 1. On Petitioner's behalf, the ACLUF also requested that the district court order the government to file promptly a habeas return justifying Petitioner's detention, and it sought an extension, during the pendency of the habeas action, of the court-ordered

temporary interim relief restraining the government from involuntarily transferring Petitioner. *See id.* at 2. The government opposed "any judicial restriction" on its power to transfer Petitioner. ECF No. 33 at 8.

On January 23, after receiving briefs and supporting declarations (partially under seal) from both parties and holding two hearings, the district court ordered the government to provide Petitioner's counsel 72 hours' notice prior to transferring Petitioner, at which time Petitioner would be able to file an emergency motion contesting his impending transfer, if necessary. JA 50. In a Memorandum Opinion, the court explained that because the government had not proposed any specific transfer of Petitioner, it was not enjoining one. JA 42; *see* JA 58 (at hearing, government attorney representing that "we are keeping sort of all our options open at this point and have made no final decisions yet").

The district court then analyzed Petitioner's motion for continuing interim relief as a motion for a preliminary injunction. The court found that Petitioner had shown a likelihood of success on the merits of his claim that "there should be some restriction on the government's ability to transfer him during the pendency of this litigation." JA 45. The court explained that the government had failed to identify any "positive legal authority" for any contemplated transfer, and that the government's claim that a 72-hour notice requirement would harm "international relations" was insufficient to render such a requirement unlawful. JA 45. Turning

to irreparable injury, the court noted that the Defense Department did not even "argue that Petitioner will not be irreparably harmed absent some relief." JA 47. Next, the court found that the balance of equities weighed in Petitioner's favor, explaining that it was "not convinced—based on the record here—that [the government's claimed] diplomatic interests override the Petitioner's well-established right 'to contest the factual basis for [his] detention' through a habeas petition." JA 48 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004)). Finally, the court found that the public interest favored the relief it ordered. JA 48–49.

The district court's order requiring 72 hours' notice prior to transfer is the subject of this appeal.

SUMMARY OF ARGUMENT

The district court properly imposed a 72-hour advance notice requirement on the government to ensure that it demonstrates positive legal authority to forcibly transfer Petitioner to another country. The district court correctly concluded Petitioner has a likelihood of success on the merits of his claim that the district court could prohibit his transfer in the absence of positive legal authority. The court also correctly found that Petitioner would be irreparably harmed by an involuntary transfer that deprived him of his right to seek release through habeas, and did not abuse its discretion in weighing this harm against any harm to the government from requiring it to show that a transfer to a particular country is

authorized by law. The court further correctly found that the public interest favors interim relief because it ensures that American citizens are not forcibly transferred to foreign governments by unreviewable executive fiat.

I. Rather than addressing the order actually issued by the district court, the government appears to be seeking review of a question that the district court did not consider: whether the government can transfer Petitioner to [redacted], should it decide to do so. The government's request that this Court decide whether such a hypothetical transfer would be lawful is inappropriate because that is precisely the issue the district court reasonably found it "prudent" not to reach. *See* JA 47. The issue before this Court is not whether the government can transfer Petitioner to [redacted] (or to any other particular country), but whether the government can transfer Petitioner to any country it deems suitable in the absence of positive legal authority and judicial review. The district court did not abuse its discretion in denying the government that unfettered and unreviewable transfer authority.

II.A. The district court properly concluded that Petitioner showed a likelihood of success on his claim that the government cannot forcibly render him without affirmative legal authority and judicial review. In *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), the Supreme Court made clear that the executive may not dispose of the liberty of a citizen by transferring him to another

country without positive legal authority. This fundamental constitutional safeguard is not limited to extradition from the United States, but shields American citizens in U.S. custody abroad and may be enforced through habeas against a U.S. jailor.

The government continues to rely on its assertion that Petitioner is a "wartime detainee" and "enemy combatant" for its claim of unfettered power to transfer him to any country it deems has a "legitimate sovereign interest" in him. *See, e.g.*, Br. 1, 14. But whether Petitioner is in fact lawfully detained is contested and is the focus of Petitioner's underlying and ongoing habeas petition. The government cannot unilaterally conclude that it has authority to detain Petitioner and then use that unreviewed conclusion as the basis to transfer him to another country. Acceptance of the government's position would eviscerate the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and the protections of the Great Writ by giving the executive sole authority to determine the rights and liberty of an American citizen.

The two cases on which the government relies to deny a likelihood of success—*Munaf v. Geren*, 553 U.S. 674 (2008), and *Kiyemba v. Obama* (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009)—do not support its position.

The Supreme Court's decision in *Munaf* was based on the black-letter principle that a sovereign possesses exclusive and absolute jurisdiction over crimes committed by individuals within its territory. Neither *Munaf* nor the principle of

absolute territorial sovereignty justify the government's claimed power to transfer here, and the government's various attempts to draw analogies between that case and this one fail. The petitioners in *Munaf* also lacked any appropriate habeas remedy; here, by contrast, a federal court can afford Petitioner the relief—release from unlawful government custody—that he seeks. Further, the separation-of-powers and foreign policy concerns addressed in *Munaf* related solely to a court's limited ability to review the executive's assessment of a risk of torture in a receiving country once the government had demonstrated affirmative legal authority for the transfer. Additionally, as this Court explained in *Omar v. McHugh*, 646 F.3d 13, 24 (D.C. Cir. 2011), the Supreme Court in *Munaf* did not permit the transfer of a U.S. citizen without first finding legal authority for it.

Likewise, this Court's decision in *Kiyemba II* does not support the government's argument. That decision concerned the executive's wartime authority to transfer non-citizens who did not squarely challenge the government's legal authority to transfer them. And the petitioners there had no remaining rights to enforce in habeas because federal courts could not order their release into the United States. *Kiyemba II* neither eliminates the requirement of positive legal authority to transfer American citizens to another country nor alters the power of a habeas court to grant the remedy of release to an American citizen, if necessary by ordering his release in the United States.

II.B. The district court properly determined that Petitioner would be irreparably harmed without pre-transfer notice and an opportunity to seek relief because a forcible transfer would deprive him of his right to seek a remedy through habeas. JA 47. In so holding, the district court necessarily rejected the government's contention that an involuntary hand-over to a foreign government is equivalent to release. By seeking pre-transfer notice, Petitioner does not seek to remain in U.S. custody indefinitely, as the government asserts; rather, he seeks only the opportunity to prevent an unlawful involuntary transfer that would strip him of his right to regain his liberty.

II.C. The district court did not abuse its discretion in concluding that any potential injury to the government's diplomatic relations from the notice requirement pales in comparison to the absolute, irreparable harm Petitioner would suffer if he were subjected to a forcible and unlawful transfer. As the court noted, the 72-hour notice requirement does not prohibit the government from transferring Petitioner or even "from continuing negotiations or discussions regarding the transfer." JA 48. It merely requires that the government justify his transfer to a given country to ensure there is positive legal authority for it. That federal courts routinely review, and in some instances block, the extradition of citizens—whom, unlike Petitioner, a foreign sovereign has formally charged with a crime—

underscores that the district court did not abuse its discretion in balancing the equities.

II.D. The district court also properly found that the public interest favors ensuring that American citizens have the opportunity "to contest the lawfulness of their detentions and transfers at the hands of the Executive." JA 49. The public interest decidedly does not favor giving the executive unfettered power to render American citizens to foreign governments, thereby depriving them of the centuries-old protections of habeas corpus.

STANDARD OF REVIEW

When the district court grants a preliminary injunction, this Court is "most deferential to the court's balancing of the four injunction factors," and reviews the balancing of the factors only for abuse of discretion. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 319 (D.C. Cir. 1987). The Court reviews findings of fact for clear error, and it reviews questions of law de novo. *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012).

ARGUMENT

I. The government's appeal focuses on the wrong question.

The only question before this Court is whether the district court may require the government to provide 72 hours' notice of and an opportunity to challenge an involuntary transfer of Petitioner to the custody of another government. The

government, however, appears to be seeking review of an order that the district court never issued, addressing in its brief the question whether the government may lawfully transfer, without notice, Petitioner to [redacted], or [redacted], or indeed any other country "that the Executive Branch determines has a legitimate sovereign interest" in Petitioner. Brief for Appellant ("Br.") 21, 31 & n.5. But the government's argument elides that it has not yet, in fact, decided to transfer Petitioner to [redacted]—indeed, the government has not even claimed that it has made a decision to transfer Petitioner *at all*. To the contrary, the government has continued to defend its authority to detain Petitioner indefinitely before the district court, JA 175, and has expressly reserved any final decision concerning Petitioner, JA 58.

In support of its argument concerning a hypothetical transfer of Petitioner to [redacted], the government recites a bevy of allegations concerning the Petitioner and the interests of that country. But none of those facts have been litigated in the trial court, and Petitioner has had no opportunity to contest them. Moreover, on the government's own theory, those facts are irrelevant because the government makes clear that it believes no court has jurisdiction to review such facts at all. Indeed, the government lays its theory bare when it demands that "[a]t a minimum," this Court should order the district court to stand aside while the

government transfers Petitioner to "any country *that the Executive Branch determines* has a legitimate sovereign interest." Br. 31 & n.5 (emphasis added).

The government's request that this Court decide whether a hypothetical transfer would be lawful is inappropriate because that is precisely the issue the district court reasonably found it "prudent" not to reach. JA 47 (declining to enjoin the transfer of Petitioner for the duration of the habeas proceedings because "[p]roviding the relief Petitioner seeks would require the court to prohibit an action that the Defense Department has not yet decided to take."); *see* JA 42 (explaining that the government has represented only that it "may seek" to transfer Petitioner and "is unable to provide a timeline for when this transfer might take place"); Br. 4 ("The question presented is whether the district court erred in prohibiting the Government from transferring petitioner to *any* foreign sovereign, without first giving seventy-two hours' advance notice, so that petitioner may file an emergency motion contesting (and the court may review) such transfer." (emphasis added)).

To prevail on the question actually presented in this appeal, the government therefore must show not that a hypothetical transfer to a particular country would be lawful if the facts alleged by the government about Petitioner and about that country are accepted as true, but that any transfer of Petitioner to any country that the executive determines has a "legitimate sovereign interest" would be lawful and that any review by the district court would necessarily be futile. In other words, if

there is *any possibility* that the district court could enjoin the transfer of Petitioner to *any* such country, this Court should affirm the district court's order.

As described below, the government cannot establish that the district court lacks all power to restrict Petitioner's transfer. The executive does not possess a blank check to determine the fate of American citizens who are seeking release from unlawful detention by rendering them to the custody of foreign nations without legal authority and without review of that authority. In this context, the judicial role is not to issue advisory opinions pre-clearing specific countries to which the government may one day wish to transfer Petitioner, but to evaluate the legality of the government's concrete transfer plans if and when a determination to transfer has been made. That is all the district court's modest and narrow order ensures, and that order is all that is at issue on appeal.

II. The district court did not abuse its discretion in requiring the government to provide 72 hours' notice before transferring Petitioner.

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). A court considering a request for preliminary relief must examine four factors: (1) whether the plaintiff "is likely to succeed on the merits," (2) whether "he is likely to suffer irreparable harm in the

absence of preliminary relief," (3) whether "the balance of equities tips in his favor," and (4) whether "an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The district court properly found that Petitioner demonstrated a likelihood of success on the merits of his claim that a district court may prohibit his transfer in the absence of positive legal authority, and it did not abuse its discretion in weighing the *Winter* factors.

A. Petitioner has shown a likelihood of success on his claim that a district court may prohibit his transfer in the absence of positive legal authority.

The government can prevail on this appeal only if a federal court has no power to review the transfer of Petitioner—a U.S. citizen—to another country and to prohibit that transfer for lack of legal authority. The government's argument that it possesses unfettered authority to transfer Petitioner to any country it unilaterally deems has a "legitimate sovereign interest" in him fails for the following reasons.

First, the executive does not have the prerogative to dispose of the liberty of an American citizen who is outside the borders of the United States based on its unilateral determination that another country has a "legitimate interest" in him, Br. 38. In *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), the Supreme Court upheld the core constitutional principle that the executive cannot forcibly transfer a citizen to another country without affirmative legal authority. That

principle does not stop at the shores of the United States but necessarily extends to American citizens in U.S. custody abroad, and it therefore may be enforced through habeas.

Second, the executive likewise cannot rely on its unilateral determination that Petitioner is an "enemy combatant" to transfer Petitioner because that reliance assumes the answer to the very question at issue in Petitioner's habeas action. To allow the executive to transfer Petitioner on this basis would subvert the core protections of the Great Writ by depriving Petitioner of the opportunity to obtain his release by establishing the illegality of his detention.

Third, the two cases on which the government principally relies—*Munaf v. Geren*, 553 U.S. 674 (2008), and *Kiyemba v. Obama* (*Kiyemba II*), 561 F.3d 509 (D.C. Cir. 2009)—do not support its claim of unreviewable executive prerogative to transfer Petitioner without demonstrating that it has positive legal authority to do so. *Munaf* rested on the black-letter principle that a sovereign possesses exclusive and absolute jurisdiction over crimes committed by individuals who voluntarily travel to its territory, commit crimes there, and are detained on its soil—a principle inapplicable here. Further, in *Munaf*, the Supreme Court reviewed the lawfulness of the petitioners' transfer and approved the transfer only after finding legal authority for it. *Kiyemba II* is equally inapposite here, as it rested on the executive's wartime authority to transfer *non-citizens* who had no remaining rights

to enforce in habeas because federal courts could not order their release into the United States or anywhere else. *Kiyemba II* neither eliminates the requirement of legal authority to transfer American citizens to another country nor alters the power of a habeas court to grant the remedy of release to an American citizen, if necessary by ordering his release into the United States.

1. The executive does not have the prerogative to transfer U.S. citizens to foreign jurisdictions without positive legal authority and without judicial review.

In this appeal, the government makes the remarkable claims that it has unfettered power to render Petitioner—a U.S. citizen—to a foreign government, and that the judiciary cannot review whether any particular exercise of that power is lawful. Specifically, the executive claims it has the "prerogative" to transfer Petitioner to any country it determines has a "legitimate sovereign interest" in him, even in the absence of positive legal authority for the transfer. Br. 18.

But as the district court concluded, if the government decides to transfer Petitioner, it will have to "present 'positive legal authority' for [that] transfer," and the habeas court will have the opportunity to review the transfer's legality. JA 45 (quoting *Omar v. McHugh*, 646 F.3d 13, 24 (D.C. Cir. 2011)). The government has not articulated any affirmative legal authority, such as a statute or treaty, as a basis for forcibly transferring Petitioner to another country, including [redacted]—the specific country it identifies under seal as a potential receiving country. The

government does not allege that Petitioner has been charged with a crime in any jurisdiction, nor does it identify any legal instrument pursuant to which Petitioner could be handed over to another jurisdiction. In these circumstances, foreclosing all judicial review of a transfer would offend the Constitution.

The requirement of legal authority to transfer is rooted in the Constitution's separation of powers and guarantee of due process. As the Supreme Court made clear in *Valentine*:

> [T]he Constitution creates no executive prerogative to dispose of the liberty of the individual. . . . There is no executive discretion to surrender [a citizen] to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

299 U.S. at 9; *see Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) ("[T]he legal right to demand [a person's] extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty."); *In re Kaine*, 55 U.S. (14 How.) 103, 113 (1852) ("[A]n extradition without an unbiased hearing before an independent judiciary [is] highly dangerous to liberty, and ought never to be allowed in this country."); M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 9 (6th ed. 2014) (extradition requires a treaty). Consistent with this requirement, Congress has expressly denied the executive the power to extradite citizens in the absence of a treaty. *See* 18 U.S.C. § 3181(b). Moreover,

even where the executive does possess positive legal authority to extradite, its decision to extradite a particular individual remains subject to judicial review. *See, e.g.*, *Matter of Extradition of Santos*, 228 F. Supp. 3d 1034 (C.D. Cal. 2017); *Gouveia v. Vokes*, 800 F. Supp. 241 (E.D. Pa. 1992); *Republic of France v. Moghadam*, 617 F. Supp. 777 (N.D. Cal. 1992).

The United States does not [redacted],[2] and, as the district court found, the government has not identified any other positive legal authority to transfer Petitioner there, JA 45. As a result, the government's argument would perversely mean that while transfers pursuant to extradition treaties (with their attendant diplomatic, legislative, and judicial

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[2] Ample reasons exist for the [redacted] that would expose U.S. citizens to forcible transfer to that country, including fundamental fairness differences between the two legal systems and widespread human rights violations there. *See, e.g.*, [redacted] 98th Cong. (1983) (statement of [redacted] (" "); U.S. Dep't of State, *Country Reports on Human Rights Practices for 2016:* [redacted] § [redacted] (2016) (abuse and torture of prisoners and failure of prisons and detention centers to meet international standards); *id.* § [redacted] (denial of due process); *id.* § [redacted] (denial of fair trials).

Thus, the United States would have no legal authority to involuntarily transfer Petitioner by extradition to [redacted] even if Petitioner had been charged with a crime there. That Petitioner has not been charged with a crime in that country (or anywhere else) makes the government's claim for unreviewable executive prerogative to transfer that much weaker.

safeguards) *are* subject to judicial review, transfers that lack positive legal authority are not.

The government seeks to evade the need to identify any positive legal authority for, or to submit to any judicial review over, a transfer of Petitioner by claiming that the constitutional guarantees articulated in *Valentine* apply exclusively to American citizens facing extradition from inside the United States. Br. 14, 29–30. But *Valentine*'s essential requirements—legal authority and judicial review—are not confined to that context. In *Valentine*, the Supreme Court articulated foundational constraints on the executive's freedom "to dispose of the liberty" of a citizen. 299 U.S. at 9. Nothing in the Court's reasoning suggests that these constraints were limited by the happenstance of a citizen's location. Rather, *Valentine*'s requirement that the executive demonstrate affirmative legal authority before rendering a citizen to another government is rooted in bedrock constitutional guarantees that apply even when the government "acts against citizens abroad." *Reid v. Covert*, 354 U.S. 1, 5 (1954); *see id.* at 5–6 ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."); *see also Valentine*, 299 U.S. at 9 (explaining that the Court's holding rested on "the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual"). Indeed, even

during wartime, and even when the prisoner is held overseas, the United States may not transfer American citizens "at will, without any review of the positive legal authority" for transfer. *Omar*, 646 F.3d at 24; *id.* at 26 (Griffith, J., concurring) (court may review on habeas whether executive has "positive legal authority" to transfer a citizen, even when he is held abroad).

The *Valentine* requirement—that the executive must have affirmative legal authority to transfer a citizen to another jurisdiction—thus necessarily applies wherever the United States exercises control over a citizen's liberty. And that requirement may necessarily be enforced by a court through its habeas jurisdiction by virtue of its control over the jailor. *See* 28 U.S.C. § 2241(c)(1) (writ of habeas corpus extends to prisoner "in custody under or by color of authority of the United States"); *Rasul v. Bush*, 542 U.S. 466, 481–82 (2004) (explaining that "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control" (footnotes omitted)); *cf. Boumediene v. Bush*, 553 U.S. 723, 739 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.").

2. The government cannot rely on its unilateral and untested assertion that Petitioner is an "enemy combatant" as a basis for Petitioner's involuntary transfer.

The government rests its claimed unreviewable transfer authority on its assertion that Petitioner is a "wartime detainee" and an "enemy combatant." *See, e.g.*, Br. 1, 2, 6, 14, 16, 18, 22, 30, 34, 37, 38; ECF No. 33 at 7. In particular, the government claims a free hand to render Petitioner to [redacted]—or to any other country the executive deems suitable—based on its unilateral assessment that the country has a "legitimate sovereign interest" in him because of his alleged connection to ISIS and the country's involvement in the multinational conflict against that group. *See* Br. 21–25, 31 & n. 5. But the government cannot prevail on this appeal by assuming the answer to the very question presented in this habeas action: whether the government can lawfully detain Petitioner as an enemy combatant in the first place. To conclude otherwise would contradict the Supreme Court's decision in *Hamdi* and eviscerate the hallowed protections of the Great Writ.[3]

[3] In this appeal, the government makes various allegations concerning Petitioner's background and conduct. *See* Br. 4–6. Because those allegations are completely untested and unproven, they are irrelevant to this appeal. In proceedings before the district court, the parties have agreed to assume the truth of those allegations for the limited purpose of first litigating the government's legal authority to detain Petitioner, reserving Petitioner's right to contest the factual allegations at a later stage of the habeas action. *See* ECF No. 54. Nevertheless, the government asks this Court to swallow its untested factual allegations hook, line, and sinker.

In *Hamdi*, the Supreme Court held that U.S. citizens have a right to challenge the lawfulness of their military detention and to obtain the remedy of release through habeas. *See* 542 U.S. at 536. And the Court further made clear that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id*. Eight of nine Justices therefore rejected the government's claim of unilateral executive control over the liberty of a U.S. citizen, and the Court required that such detention be subject to meaningful judicial review. *Id.* at 533 (plurality op.); *id.* at 540 (Souter, J., concurring in part and dissenting in part); *id.* at 574–75 (Scalia, J., dissenting). In part, the Court viewed the statutory and constitutional requirement of habeas review as depending on the need to ensure that "the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant." *Id.* at 534 (plurality op.).

Petitioner notes, as he did before the district court, that the government's allegations are riddled with inaccuracies, are fundamentally misleading, and are replete with irrelevant information. *See* ECF No. 59. Contrary to the thrust of the government's contentions that Petitioner is an ISIS fighter, and as Petitioner told the government, he sought to understand firsthand and report about the conflict in Syria; was kidnapped and imprisoned by ISIS; and tried numerous times to escape. Not even the government alleges that he ever took up arms against the United States or anyone else. *See* ECF No. 59 at 1–2.

Accepting the government's position here would effectively render this core element of *Hamdi* a dead letter, for it would mean that the government could do by transfer exactly what the Supreme Court held it could not do through detention: restrict the liberty of a U.S. citizen on its own say-so. *Id.* at 536–37 ("[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by the Government, simply because the Executive opposes making available such challenge."). Indeed, the government has explicitly acknowledged to this Court that it sought to expedite this appeal to ensure that it maintained free rein to transfer Petitioner—without notice to or review by any court—before the district court could decide if Petitioner was being properly detained in the first instance. *See* Unopposed Motion to Expedite Appeal at 4 (Feb. 5, 2018) ("[I]n the absence of expedition, the district court may resolve the merits of petitioner's habeas case. That could render the Government's appeal here moot, depriving it of the opportunity to vindicate its authority to transfer the detainee prior to an ultimate determination of the merits.").

The government's position is chilling. If the executive need not bother to justify to a court either the legality of its detention abroad of a U.S. citizen *or* the legality of a forcible transfer to a foreign country of the government's choosing, nothing would prevent the government from detaining and transferring the "errant

tourist, embedded journalist, or local aid worker" about whom the Supreme Court expressed concern in *Hamdi*, 542 U.S. at 534. In other words, the government's position requires accepting that government agents may forcibly apprehend a U.S. citizen anywhere abroad, detain him, unilaterally declare him an "enemy combatant," and then transfer him to the custody of any country that the executive decides has a "sovereign interest" in him, without any possibility of judicial review. This Court should reject this sweeping claim of unreviewable executive prerogative.[4]

[4] The government argues that Petitioner was "captured abroad on an active battlefield and held in military custody adjacent to that battlefield." Br. 14. But those facts (assuming they are true) do not provide effective constraints on the executive's asserted power, because absent judicial review, the executive could conclude to its own satisfaction that any U.S. citizen captured at or near a "battlefield"—however the government may construe that term—is lawfully detainable and unilaterally transferable, even when the government is mistaken.

Moreover, if the district court ultimately concludes that petitioner is, in fact, properly detained as an "enemy combatant," the government would still need affirmative authority for his transfer to another country. *Cf. In re Territo*, 156 F.2d 142, 144 (9th Cir. 1946) (explaining the district court's finding that an American citizen, properly detained as a prisoner of war for serving in the Italian army during World War II, could be repatriated to Italy because the Geneva Convention affirmatively authorized such transfer).

3. Neither Supreme Court nor D.C. Circuit precedent supports the government's position.

a. The Supreme Court's decision in *Munaf* is far narrower than the government suggests and does not preclude the relief the district court provided.

The district court properly rejected the government's argument that it possesses the same legal authority here that the Supreme Court found to justify the petitioners' transfers in *Munaf*. JA 46. The government's reliance on *Munaf* is misplaced for the following four reasons.

First, *Munaf* does not support any claim of legal authority for Petitioner's transfer based on the government's novel and nebulous claim of "legitimate sovereign interest" because *Munaf* hinged on the long-established—and distinct—principle that a sovereign has an absolute and exclusive right to punish crimes committed by individuals within its borders. Second, the traditional habeas remedy of release, which was not available to the petitioners in *Munaf*, remains available to Petitioner. Third, the passages from *Munaf* addressing sensitive separation-of-powers and foreign-policy concerns relate solely to a court's limited ability to second-guess the government's determination about a risk of torture in the receiving country *after* the government had established affirmative legal authority for the transfer. And fourth, the Supreme Court in *Munaf* did not permit the

transfer of a U.S. citizen without first finding affirmative legal authority for that transfer, even when that transfer was within the same country.

* * *

First, contrary to the government's claim that this case is "analogous" to *Munaf* on the merits, Br. 18, the district court correctly concluded that the Supreme Court's decision does not support any claim of legal authority for Petitioner's transfer in this case. JA 46. The government radically recasts *Munaf* into an endorsement of a free-wheeling executive prerogative to transfer citizens based on another country's purported "legitimate sovereign interest" in them. *See* Br. 25–26. But nothing in *Munaf* supports the government's assertion of such a sweeping power.

None of the circumstances critical to the Supreme Court's holding in *Munaf* is present here. *Munaf* was explicit about the question it addressed: "whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals [1] detained within another sovereign's territory [2] to *that sovereign's* government [3] for criminal prosecution." 553 U.S. at 689 (emphasis added). And despite the government's attempts to paint *Munaf*'s holding with a broad brush, the Court repeatedly emphasized that its conclusion hinged on Iraq's territorial jurisdiction over the petitioners and its "sovereign right to prosecute [the petitioners] for crimes

committed on its soil," to which they had voluntarily traveled. *Id.* at 694; *see also, e.g.*, *id.* at 692, 701.

Additionally, the Court noted that the petitioners were being held by the U.S. military "at the behest of the Iraqi Government pending their prosecution in Iraqi courts," functioning "in essence, as its jailor." *Id.* at 698. Notably, unlike the transfer the government seeks to effect here, the transfers in *Munaf* were not transfers across jurisdictions; they were effectively transfers from one jail to another within a single nation to ensure detention pending resolution of criminal prosecutions—and that nation had the "exclusive and absolute" right to punish the alleged crimes because they occurred within its territory. *Id.* at 694 (quotation marks omitted).

The government's attempts to draw parallels with, or explain away the differences between, the facts in *Munaf* and a hypothetical transfer to [redacted] fail.

As an initial matter, the government's belabored efforts to argue that its determination of [redacted] "legitimate sovereign interest" brings this case within *Munaf* is, on the government's own theory, entirely beside the point. The government's argument is not limited by the supposed connections it draws with any particular country—because, after all, it claims the unreviewable power to transfer Petitioner to *any* country that the executive deems has a "legitimate

sovereign interest" in him. *See* Br. 31 (arguing that "[a]t a minimum, the [district court's] order should be narrowed to exempt any country that the Executive Branch determines has a legitimate sovereign interest" in Petitioner).[5]

Moreover, the government's proposed parallels are unpersuasive. For example, the government argues that [redacted] has a "legitimate sovereign interest" in Petitioner because it is an ally of the United States in the "armed conflict against ISIL." Br. 26. But *Munaf* did not rest on Iraq's participation in a multinational coalition with the United States; it rested on Iraq's absolute and exclusive sovereignty over crimes committed within its territory.[6] In yet another effort to shoehorn Petitioner into *Munaf*'s holding, the government argues that "[i]n *Munaf*, . . . at least one petitioner's connection to Iraq was far less significant" than Petitioner's connection to [redacted] because of Petitioner's [redacted]

[5] The government has not even attempted to justify its argument, made in passing, that a potential transfer of Petitioner to the custody of [redacted] "would be consistent with *Munaf*," Br. 31 n.5, under its "legitimate sovereign interest" theory. Of course, on the government's view, it need not ever justify that argument to any court.

[6] To the extent that [redacted] participation in the coalition against ISIS informs the basis of its "legitimate interest" in Petitioner, the same would be true of the 73 other countries that participate in that coalition with the United States. *See* U.S. Dep't of State, The Global Coalition to Defeat ISIS: Partners, https://www.state.gov/s/seci/c72810.htm.

[redacted]. Br. 27. But the fact that one of the petitioners in *Munaf* [redacted] did not even enter into the Supreme Court's analysis.[7]

The government also argues that a country's "'sovereign right' over Petitioner carries the same weight—and is implicated equally"—as that in *Munaf* "whether or not" that country "initiates a criminal investigation of petitioner before receiving him." Br. 25. But critical to the Supreme Court's decision in *Munaf* was the fact that Iraq was actively prosecuting the petitioners. *See* 553 U.S. at 698–99 ("To allow United States courts to intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy seems at least as great an intrusion as the plainly barred collateral review of foreign convictions.").

In another effort to liken the "legitimate sovereign interest" that the government identifies here for [redacted] to the basis for the Supreme Court's holding in *Munaf*, the government asserts a spurious international-law justification. The government argues that the "territorial control" in *Munaf* is just one of "multiple bases for a country to exercise jurisdiction" under international law and that "nationality and certain conduct outside a sovereign's borders provide others." Br. 25. The government argues that "customary international law generally recognizes a state's right to exercise prescriptive jurisdiction over an individual

[7] Of course, [redacted] does nothing to reduce or impinge upon the rights inherent in [redacted]. *See, e.g.*, [redacted].

with a 'genuine connection' to the state, even when the individual is located outside the state's territory." Br. 23 (citing Restatement (Fourth) of Foreign Relations Law of the United States—Jurisdiction § 211 (Am. Law Inst. Draft No. 1, 2016) ("Restatement (Fourth)")).

To be sure, both "conduct occurring on the state's territory" (as in *Munaf*) and [redacted] (as here) may indeed permit the exercise of prescriptive jurisdiction. Restatement (Fourth) § 211. But the Supreme Court did not base its conclusion in *Munaf* on prescriptive jurisdiction—or, at least, not prescriptive jurisdiction alone. Rather, the Court's holding explicitly rested on a state's "exclusive jurisdiction to punish offenses against its laws committed within its borders," 553 U.S. at 697–98 (citation omitted)—a sovereign right that encompasses not merely prescriptive, but also adjudicative and enforcement jurisdiction, both of which are necessarily present and absolute for crimes committed within a sovereign's territory. *See* Restatement (Fourth) § 211 cmt. a ("[J]urisdiction to adjudicate . . . concerns the authority of a state to subject particular persons or things to its judicial process."); *id.* ("[J]urisdiction to enforce . . . concerns the authority of a state to exercise its power to compel compliance with law.").

In short, the circumstances here are wholly different from those in *Munaf*. The government's argument grossly distorts and radically expands the Supreme

Court's ruling, which was based on Iraq's exclusive and absolute sovereign right to prosecute the petitioners, who voluntarily traveled to, committed crimes in, were apprehended in, and were detained in Iraq.

Second, *Munaf*'s reasoning is inapplicable because "the nature of the relief sought" in that case demonstrated that the traditional habeas remedy of release was "not appropriate," 553 U.S. at 693. Specifically, in *Munaf*, "what petitioners [were] really after [was] a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders." *Id.* at 694. The Supreme Court, accordingly, could not grant the petitioners relief because, in those specific circumstances, any habeas remedy necessarily "would interfere with Iraq's sovereign right to 'punish offenses against its laws committed within its borders.'" 553 U.S. at 692 (quoting *Wilson v. Girard*, 354 U.S. 524, 529 (1957)); *see also id.* at 695; *Kiyemba II*, 561 F.3d at 526 (Griffith, J., concurring in part and dissenting in part) ("Critical to *Munaf*'s holding was the need to protect Iraq's right as a foreign sovereign to prosecute the petitioners . . . . for crimes committed on its soil." (quotation marks and citation omitted)).

That is not the case here, because Petitioner *can* obtain the traditional remedy of relief pursuant to his habeas action. So far as the government has alleged, no charges are pending against him in [redacted], where he is being held (solely

because the United States brought him there, JA 68–69). Petitioner's release from U.S. custody therefore would not, unlike in *Munaf*, *see* 553 U.S. at 693, subject him to immediate apprehension by any authorities for criminal prosecution. And even if, as the government speculates, it would be impracticable to simply release Petitioner in [redacted], *see* Br. 29, Petitioner's release could be effectuated by a district court order to bring him to the United States. As a U.S. citizen, Petitioner has an affirmative right to return and to remain. *See, e.g.*, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 67 (2001) (citizens have "the absolute right to enter" the United States); *Worthy v. United States*, 328 F.2d 386, 394 (5th Cir. 1964) ("It is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil. It is not to be wondered that the occasions for declaring this principle have been few.").

Third, the government quotes passages from *Munaf* to argue that "the separation-of-powers principles underlying *Munaf* are broader than the district court acknowledged" because "[t]he Supreme Court reaffirmed in *Munaf* that the courts are 'not suited to second-guess' political determinations on 'sensitive foreign policy issues,' and that '[o]ur constitutional framework' likewise requires that the courts be 'scrupulous not to interfere with legitimate [military] matters.'" Br. 28 (quoting *Munaf*, 553 U.S. at 700, 702). But although the government invokes these passages to argue that the courts should not review the executive's

decision to transfer a U.S. citizen to a foreign country, the passages do *not* relate to the authority of courts to enjoin a forcible transfer generally. Instead, in one of the quoted passages, the Court was merely reaffirming the principle that "[t]hose who commit crimes within a sovereign's territory may be transferred to that sovereign's government for prosecution," with "hardly an exception to that rule . . . ." *Munaf*, 553 U.S. at 700.

And in the other passage, having already decided that a specific transfer of American citizens was authorized, the Supreme Court considered whether the judiciary could "second-guess" the Executive's determination concerning "whether there is a serious prospect of *torture* at the hands of an ally, and what to do about it if there is." *Id.* at 702 (emphasis added). There, the Court was merely showing deference to the executive's factual determination regarding the likelihood of torture in the receiving country, not to the government's legal conclusion that it had authority to transfer the petitioners in the first place. Moreover, the Court held that even this deference was not absolute, "reserv[ing] judgment on an 'extreme case in which the Executive has determined that a detainee . . . is likely to be tortured but decides to transfer him anyway.'" *Id.* (Souter, J., concurring) (describing the Court's holding and citing official country-specific government assurances about receiving country's detention facility and treatment of petitioners); *see also id.* at 706 (explaining the concurrence's view that the ability

to bar transfer should extend to situation where "probability of torture is well documented, even if the Executive fails to acknowledge it"); *Kiyemba II*, 561 F.3d at 514 n.5 (reserving decision on the rights a detainee might possess to restrict a transfer in the "extreme case" described in *Munaf*). The Court, therefore, did not even categorically bar judicial review of receiving-country conditions in all circumstances—let alone judicial review entirely.[8]

Fourth, and finally, the Supreme Court in *Munaf* did not permit the transfer of a U.S. citizen without first finding legal authority for that transfer. In *Munaf*, the Supreme Court exercised habeas review over the lawfulness of the proposed transfer of two American citizens from U.S. custody to Iraqi custody within Iraq. 553 U.S. at 689. And in exercising that review, as the government concedes, the Court approved the transfer *only after* finding affirmative legal authority for the transfer. Br. 30 ("This Court recognized that *Munaf* 'determined that the Executive Branch had the affirmative authority to transfer' the detainees at issue." (quoting *Omar*, 646 F.3d at 24 (citing *Munaf*, 553 U.S. at 704))). Thus, *Munaf* underscores

[8] Although the government complains that Petitioner's motion did not raise any claims about his treatment in a receiving country, Br. 15, Petitioner did not specifically raise arguments about treatment in another country in his motion because the government had not at that time identified to Petitioner any country to which he would be sent—again underscoring why the government's distortion of the issues before the Court in this appeal is improper. *See supra* Part I. Petitioner's motion sought only to preserve the status quo to give Petitioner the opportunity to challenge the legality of a future transfer, and the district court's minimal advance notice order merely gives Petitioner an opportunity to make such a challenge.

that even in the case of an American citizen's transfer from U.S. to foreign custody *within the same* foreign jurisdiction, the government must provide affirmative authority for the transfer *and* a habeas court is empowered to review that transfer to ensure its legality.[9]

b. The district court's order is consistent with this Court's decision in *Kiyemba II*.

The government also relies on this Court's decision in *Kiyemba II* to argue that the district court cannot require the government to provide Petitioner and the district court with notice before transfer. But *Kiyemba II* stands for the limited proposition that where a court cannot enjoin a petitioner's transfer on any ground, that petitioner is not entitled to pre-transfer notice. The district court's injunction does not conflict with *Kiyemba II* for two main reasons. First, Petitioner is challenging the government's legal authority to transfer him, not (as in *Kiyemba II*) the executive's assessment of a risk of torture in the receiving country. Whereas the former is a basis for granting Petitioner injunctive relief here, the latter provided no such basis there. Second, the traditional habeas remedy of release

[9] Notably, the *Munaf* petitioners had advance notice of the transfer and the opportunity to challenge its legality—indeed, that was the genesis of the entire case. *See* 553 U.S. at 682, 684; *see also Kiyemba II*, 561 F.3d at 526 (Griffith, J., concurring in part and dissenting in part). The district court's 72-hour advance notice requirement merely preserves the same opportunity here.

from custody is still available to Petitioner, as a U.S. citizen, but was not available to the detainees in *Kiyemba II*.

Kiyemba II concerned non-citizen wartime detainees being held at Guantánamo Bay. Although the government had cleared each of the petitioners for release, they had no right to enter the United States and could not return to their home country because of the likelihood of torture there. 561 F.3d at 519 & n.5. The petitioners requested 30 days' notice before transfer to a third country based on their fears that they would be "transferred to a country where they might be tortured or further detained." *Id.* at 511; *see id.* at 520 (Kavanaugh, J., concurring) (the "fundamental issue" in *Kiyemba II* was "whether the Constitution's Due Process Clause (or the Foreign Affairs Reform and Restructuring Act) requires judicial reassessment of the Executive's determination that a detainee is not likely to be tortured by a foreign nation—and whether, in order to ensure such a judicial inquiry, the Government must notify the district court before transfer"). This Court held that to the extent the detainees' habeas claims were based on the concern that the executive would wrongly assess expected conditions in the receiving country following transfer—including the likelihood of torture, or the expectation of prosecution or detention—the detainees were not entitled to relief. *See id.* at 514–15 (majority op.); *id.* at 514 (explaining that, like in *Munaf*, the "record show[ed that] . . . the Government does everything in its power to determine whether a

particular country is likely to torture a particular detainee," and "the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee").

Here, however, as explained above, Petitioner's motion does not challenge a transfer based on conditions in a receiving country. Instead, Petitioner maintains that he should have the opportunity to challenge before a court whether the government has legal authority to transfer him once a government transfer decision is made. But the *Kiyemba II* petitioners did not squarely present a challenge based on the absence of legal authority. Because that question *is* subject to judicial review, *see supra* Part II.A.1, and Petitioner *would* be entitled to relief if the district court finds the government does not have positive legal authority to transfer him, the district court's notice requirement is necessary to ensure the opportunity for judicial review.

Although the majority in *Kiyemba II* simply assumed that the government had the authority to transfer the petitioners, the concurrence did address the issue. *See id.* at 519 (Kavanaugh, J., concurring). But critical to Judge Kavanaugh's conclusion that the government possessed transfer authority was the fact that the petitioners were non-citizen detainees in the shoes of "inadmissible aliens at the border of a U.S. port of entry [who] have no constitutional right to enter the United States." *Id.* In both cases, Judge Kavanaugh said, "the United States has a very

strong interest in returning the aliens to their home countries or safe third countries so that they will not be detained indefinitely in facilities run by the United States." *Id.* Judge Kavanaugh further emphasized that "transfer[s] of wartime alien detainees . . . are a traditional and lawful aspect of U.S. war efforts." *Id.* "[W]hen the United States determines during an ongoing war that an alien no longer needs to be detained or has been mistakenly detained—for example, if he is a non-combatant and not otherwise subject to confinement—the United States attempts to promptly transfer or release that detainee to his home country or a safe third country." *Id.*[10]

These arguments do not apply to Petitioner for the simple reason that he is a U.S. citizen with a constitutional right to enter the United States and therefore to the essential habeas remedy of release. Unlike in the case of non-citizen detainees held at Guantánamo, then, neither analogies to the immigration context nor the United States' "history or modern practice" concerning "alien wartime detainees" can justify his transfer, *id.* The government nonetheless claims that the district

[10] To be sure, the majority did "assume arguendo these alien detainees have the same constitutional rights with respect to their proposed transfer as did the U.S. citizens facing transfer in *Munaf*." *Kiyemba II*, 561 F.3d at 514 n.4. But that assumption went to the question of whether the detainees could ask a court to second-guess executive-branch conclusions as to the risk of torture. The Court was clear that, because the prisoners were non-citizens with no right to enter the United States, there was no question of whether outright release (under the traditional habeas remedy) was possible. Similarly, *Munaf* is also a case in which release was not a viable habeas remedy. *See* 553 U.S. 693–94; *see also supra* Part II.A.3.a.

court erred by distinguishing *Kiyemba II* on the ground that Petitioner is a U.S. citizen with a right to enter the country, instead claiming that "the same concern exists here" because "[a]s a practical matter, the United States cannot simply open the doors and allow petitioner to walk free within the sovereign territory of Iraq without conferring with the government of Iraq about releasing him from U.S. custody." Br. 29; *see* JA 46. But, as explained above, Petitioner's detention is entirely unlike that of the petitioners in *Omar* and *Munaf*: there is no pending criminal proceeding that would bar his release in Iraq or, if necessary, in the United States.

* * *

In sum, neither *Munaf* nor *Kiyemba II* supports the government's argument that Petitioner may be denied notice and an opportunity to challenge his transfer. Accordingly, this Court should conclude that the district court's 72-hour notice requirement was a reasonable means of protecting Petitioner's right to insist that the government show positive legal authority before forcibly transferring him to the custody of another country.

B. The district court correctly determined that without pre-transfer notice, Petitioner will be irreparably harmed.

A movant seeking a preliminary injunction must "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22

(citing *Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983)). The district court properly determined that Petitioner would likely be irreparably harmed without pre-transfer notice because a forcible transfer would deprive him of his right to seek his freedom through habeas. JA 47. In so holding, the district court also properly and necessarily rejected the government's argument that forcible transfer to another country amounted to the habeas relief Petitioner seeks because it constitutes a "release from custody." *See* ECF No. 33 at 1–2. For the reasons explained below, the district court's conclusion was right.

Petitioner's habeas petition is clear about his requested relief: that the government either "charge [Petitioner] with a federal criminal offense in an Article III court or release him." JA 23. The government has thus far declined to charge Petitioner, and instead claims that by forcibly transferring him without notice to another country, it is merely providing the relief Petitioner seeks by "releasing" him. Br. 32–33 (contending that a forcible transfer "would provide [Petitioner] with all the relief to which he would be entitled under habeas"). Thus, the government contends, Petitioner cannot be irreparably injured by such a transfer. Br. 33.

This position would be laughable were it not such a serious distortion of the Constitution. Rather than granting Petitioner the relief he seeks, it would deprive him of the very opportunity to ever obtain the *actual* relief that the writ of habeas

corpus exists to provide: liberty. *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody."); *Dhiab v. Trump*, 852 F.3d 1087, 1092 n.8 (D.C. Cir. 2017) ("[T]he writ of habeas corpus is a 'civil remedy for the enforcement of the right to personal liberty' . . . ." (citation omitted)); *Council v. Clemmer*, 165 F.2d 249, 250 (D.C. Cir. 1947) ("[T]he function of the writ of habeas corpus, which is of ancient origin in the common law and is given high sanction by our Constitution, is to afford a petitioner therefor a speedy and effective method of securing release when illegally restrained of his liberty."). As a U.S. citizen, Petitioner has a right "to challenge his classification as an enemy combatant" to obtain release. *Hamdi*, 542 U.S. at 533. Forcibly transferring Petitioner to the hands of another sovereign would in no way vindicate his habeas right to have his personal liberty restored through release. Instead, it would irreparably harm Petitioner by subjecting him to the force of the U.S. government against his will and rendering him into the custody of another government for an unknown future disposition. Br. 25.

The government has provided no authority that supports its extreme position. The government cites *Qassim v. Bush*, 466 F.3d 1073 (D.C. Cir. 2006) (per curiam)—but *Qassim* in fact undermines its argument. There, the "release" was effectuated through the *voluntary* transfer of the Guantánamo detainees. *See id.* at 1076. Petitioner does not dispute that a voluntary transfer would be equivalent to

the habeas remedy of release, but that is not the basis of the authority the government claims here. For similar reasons, the government's arguments that Petitioner's habeas action seeks to "prolong" his unlawful detention and amount to a bid to stay in U.S. custody also fail. *See* Br. 31–34. By seeking a pre-transfer notice, Petitioner does not, of course, seek to remain in custody indefinitely. Rather, he seeks only to prevent an unlawful and involuntary transfer that would strip him of his right to regain his liberty. The government's arguments therefore have no merit, and the district court correctly found that Petitioner would be irreparably harmed if the government were permitted to transfer him with no notice and no opportunity to challenge the lawfulness of that transfer.

C. The district court properly found that the balance of equities weighs in favor of Petitioner.

The district court also correctly balanced the equities. JA 48; *see Winter*, 555 U.S. at 24 (requiring courts to "*balance* the competing claims of injury [to] consider the effect on each party of the granting or withholding of the requested relief" (emphasis added)). Contrary to the government's assertions, Petitioner need not show "that an injunction would not substantially injure [the government]." Br. 17. Rather, *Winter* requires that courts *weigh* the potential harms at stake and consider whether the "balance of equities tips in [Petitioner's] favor." *In re Navy Chaplaincy*, 697 F.3d at 1178 (quoting *Winter*, 555 U.S. at 20). As the district

court found, any potential injury to diplomatic relations that could occur if the notice requirement were kept in place pales in comparison to the absolute, irreparable harm Petitioner would suffer if he were subject to a forcible transfer. That finding, which this Court reviews for abuse of discretion, should be upheld. *See id.*; *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (applying the abuse of discretion standard when reviewing the district court's balancing of the equities).

The government lists a number of supposed harms in its brief, some of which must be discounted in their entirety. For example, the government complains of harm that would result to foreign relations if the district court considers a proposed transfer, finds it unlawful, and accordingly enjoins it. *See, e.g.*, Br. 35 ("An injunction seriously compromises that sensitive process by creating uncertainty about 'whether or not it will be possible to implement the transfer arrangements once they are concluded . . . .'"). The government, however, cannot have a legitimate interest in *unlawfully* transferring an American citizen to another country in violation of his due process and habeas rights. *Cf. Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (A party cannot be "harmed by issuance of a preliminary injunction which prevents [it] from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." (citations omitted)); *Newsom ex rel. Newsom v. Albemarle*

Cty. School Bd., 354 F.3d 249, 261 (4th Cir. 2003) (A party is "in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation . . . [which] is likely to be found unconstitutional.").

The government also encourages this Court to find in its favor based on an argument that is clearly unfounded: that the district court's order would cause harm because it "contemplates that if petitioner successfully challenges his transfer, the Government must continue to detain him until the district court disposes of his habeas case." Br. 36. But this is not so: the order contemplates that the government can still charge Petitioner with a crime, release him at any time, or transfer him voluntarily or pursuant to legal authority. The order thus does not require the government to detain petitioner until the district court "disposes of his habeas case," but rather imposes the most modest of restrictions to prevent the government from circumventing the core protections of habeas by lawlessly "dispos[ing] of the liberty" of Petitioner, *see Valentine*, 299 U.S. at 9, in the dead of night and without any opportunity for court review.

The government proffers a few alleged harms that the district court did find credible. It argues that the notice requirement—by allowing for the possibility of judicial review—creates uncertainty in its negotiations with another country because "[a]n advance-notice requirement makes the results of diplomatic dialogue between the Executive Branch and a foreign government inherently contingent

upon the approval of the Judiciary." Br. 35–36. This, according to the government, "[i]mpairs the Executive's ability to speak with one voice . . . in discussing release or transfers," Br. 35, causing harm to the United States' credibility and "mak[ing] it more difficult to engage in diplomatic negotiations in other areas." Br. 36. The district court considered these arguments, examined the record, and acknowledged "the government's significant interest in maintaining fruitful, diplomatic relations." JA 48.

The district court nonetheless concluded that in this case it was "not convinced" that the government's asserted interests in "maintaining fruitful, diplomatic relations" trumped the Petitioner's "well-established right" to challenge the legality of his detention on habeas and thereby obtain habeas relief. JA 48. As noted above, *see supra* Part II.B, the court found that Petitioner would suffer irreparable harm from a forcible transfer without notice because he would "likely be unable to pursue his habeas petition" and thereby secure his release. JA 47. Given the magnitude of this harm to Petitioner, the district court properly concluded that Petitioner's "right to habeas relief does not yield to the government's desire to maintain good diplomatic relations." JA 48.

Critical to the district court's analysis was the limited nature of its injunction. As the court noted, the 72-hour notice requirement does not prohibit the government from transferring Petitioner. Nor does it prevent the government "from

continuing negotiations or discussions regarding the transfer, or from obtaining further information that might support a transfer." JA 48. The government will merely be required to justify its transfer to a particular country by demonstrating that it has positive legal authority for it, and will be restricted only from engaging in an extralegal transfer.

The district court's ruling on the balance of the equities is not at odds with *Kiyemba II*. Consistent with this Court in *Kiyemba II*, the district court recognized that the government had a "significant interest" in maintaining its diplomatic relations. JA 48; *see Kiyemba II*, 561 F.3d at 515 ("[T]he 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."). But while the possible harms the government faces here are similar to the possible harms it faced in *Kiyemba II*, the harms Petitioner faces are significantly weightier. In *Kiyemba II*, the Court ruled on the petitioners' claims challenging transfer before finding that they were not entitled to notice; here, as described above, the absence of notice would allow the government to transfer Petitioner without ever establishing that it had authority to make that transfer. Moreover, Petitioner, as a U.S. citizen, is entitled to be released into the United States if he succeeds on his habeas claim; the petitioners in *Kiyemba II*, as non-

citizens, were found to have no such right, leaving transfer to another sovereign as effectively the only option. *See supra* Part II.A.3.b.

That the district court did not abuse its discretion in weighing these factors is evident from a comparison to the safeguards provided in the extradition context. Surely any of the government's stated harms in this context arise equally in the extradition context because "[e]xtradition is quintessentially a matter of foreign policy; it occurs only pursuant to an international agreement and is invoked by a foreign government." *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1088–89 (9th Cir. 2004), *vacated on reh'g as moot*, 389 F.3d 1307 (9th Cir. 2004). Notably, judicial officers have the authority to determine whether the alleged fugitive falls within and satisfies the terms of the extradition treaty—that is, they determine whether there is legal authority for the transfer. *See* 18 U.S.C. § 3184 (explaining that a court may order the arrest of an individual sought by extradition only where it "deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention"); *Matter of Extradition of Liuksila*, 74 F. Supp. 3d 4, 8 (D.D.C. 2014) ("An extradition certification is in order . . . where: 1) the judicial officer is authorized to conduct the extradition proceeding; 2) the court has jurisdiction over the fugitive; 3) the applicable treaty is in full force and effect; 4) the crimes for which surrender is requested are covered by the applicable treaty; and 5) there is sufficient evidence to support a finding of probable cause as to each

charge for which extradition is sought." (citation omitted)). If the individual falls outside the terms of the treaty, courts decline to certify the request. *See id.* Further, if an alleged fugitive is determined to be extraditable, he or she may seek relief through a writ of habeas corpus. *See United States v. Doherty*, 786 F.2d 491, 495–96 (2d Cir. 1986).

These safeguards reflect a balancing of the government's interests in foreign affairs against the accused individual's liberty—and, by definition, contemplate that courts, which routinely review formal extradition requests from foreign governments, may block a citizen's transfer that lacks positive legal authority notwithstanding the impact on those government interests.[11] Here, the government argues that Petitioner—who has *not* been charged with a crime and who is *not* subject to any extradition treaty—merits not only fewer safeguards than fugitives from justice, but in fact no safeguards from illegal transfer at all. This cannot be.

[11] *See, e.g.*, *Gouveia*, 800 F. Supp. 259–60 (holding that a U.S citizen could not be transferred to Portugal because the statute granting the executive the power to transfer U.S. citizens was not passed until after the date the Portuguese court sentenced him *in absentia*); *Moghadam*, 617 F. Supp. at 788 (blocking an extradition request because the government had not shown probable cause and the principle of "dual criminality"—required under the U.S. extradition treaty with France—was not met); *Matter of Extradition of Santos*, 228 F. Supp. 3d at 1055–56 (blocking extradition of a U.S. legal permanent resident because the government failed to show probable cause that petitioner had actually participated in the crimes he was accused of).

For these reasons, the district court did not abuse its discretion in concluding that the balance of equities weighs in favor of Petitioner.

D. The public interest favors Petitioner because the district court's decision ensures that American citizens are not forcibly transferred to foreign governments by executive fiat.

As the district court found, the public interest favors ensuring that American citizens have the opportunity "to contest the lawfulness of their detentions and transfers at the hands of the Executive." JA 49. Habeas remains "the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939). The right to habeas corpus prevents the executive from exercising the unfettered and unreviewable power it claims here—the power to dispose of a citizen's liberty by its own *ipse dixit*. Contrary to the government's extreme position, Br. 37, habeas remains a vital check on executive detention, even in time of war. *Hamdi*, 542 U.S. at 536 ("[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.").

Maintaining this hallowed protection here serves the public interest. As Justice Kennedy stated in *Boumediene*: "Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the

separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives." 553 U.S. at 797.

The executive has imprisoned Petitioner without charge for nearly six months. It would make a mockery of the Great Writ if the executive could now strip this American citizen of his right to seek his freedom by rendering him to the custody of another country without established legal authority and without judicial review. In short, it violates the public interest to give the executive *carte blanche* over the liberty of American citizens based on the fiction that a forcible transfer to the custody of another government is equivalent to release from unlawful custody.

CONCLUSION

For the foregoing reasons, the district court's order directing the government to provide the court and Petitioner's counsel 72 hours' notice prior to transferring Petitioner should be affirmed.

Dated: March 9, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,689 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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Dated: March 9, 2018

CERTIFICATE OF SERVICE

On March 9, 2018, I filed the foregoing PUBLIC BRIEF FOR PETITIONER–APPELLEE with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit via the Court's electronic docketing system.

Dated: March 9, 2018

Respectfully submitted,

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ADDENDUM

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18 U.S.C. § 3181—Scope and Limitation of Chapter

(a) The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

(b) The provisions of this chapter shall be construed to permit, in the exercise of comity, the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government if the Attorney General certifies, in writing, that—

(1) evidence has been presented by the foreign government that indicates that had the offenses been committed in the United States, they would constitute crimes of violence as defined under section 16 of this title; and

(2) the offenses charged are not of a political nature.

(c) As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

18 U.S.C. § 3184—Fugitives from Foreign Country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

28 U.S.C. § 2241—Power to Grant Writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the

district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No 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 properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.