**Nos. 07-2926; 08-1094**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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SAMEH SAMI S. KHOUZAM,
Agency No. A75 795 693,

*Petitioner-Appellee,*

v.

MICHAEL CHERTOFF,
Secretary, Department of Homeland Security, et al.,

*Respondents-Appellants*.

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ON APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA GRANTING PETITION FOR WRIT OF HABEAS CORPUS, NO. 3:CV 07-0992

ON PETITION FOR REVIEW OF A DECISION OF THE DEPARTMENT OF HOMELAND SECURITY

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# BRIEF OF AMICI CURIAE SCHOLARS OF INTERNATIONAL HUMAN RIGHTS LAW IN SUPPORT OF PETITIONER

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Baher Azmy (BA8406)
Bassina Farbenblum, Esq.
Jenny-Brooke Condon, Esq.
Joshua P. Arnold, L.A.R. 46.3(a)(3)
Margaret E. Hirce, L.A.R. 46.3(a)(3)
Matthew S. Schoen, L.A.R. 46.3(a)(3)
SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
One Newark Center
Newark, NJ 07102
(973) 642-8700

April 22, 2008

## *AMICI CURIAE* SCHOLARS OF INTERNATIONAL HUMAN RIGHTS LAW[*]


**DEBORAH ANKER**
CLINICAL PROFESSOR OF LAW
DIRECTOR, HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM
HARVARD LAW SCHOOL

**CHERIF M. BASSIOUNI**
DISTINGUISHED RESEARCH PROFESSOR OF LAW
PRESIDENT EMERITUS, INTERNATIONAL HUMAN RIGHTS LAW INSTITUTE
DEPAUL UNIVERSITY COLLEGE OF LAW

**JAMES L. CAVALLARO**
CLINICAL PROFESSOR OF LAW
EXECUTIVE DIRECTOR, HUMAN RIGHTS PROGRAM
HARVARD LAW SCHOOL

**ROGER S. CLARK**
BOARD OF GOVERNORS PROFESSOR
RUTGERS SCHOOL OF LAW – CAMDEN

**MARTIN S. FLAHERTY**
LEITNER FAMILY PROFESSOR OF INTERNATIONAL HUMAN RIGHTS
FORDHAM LAW SCHOOL

**DEENA R. HURWITZ**
ASSISTANT PROFESSOR OF LAW
DIRECTOR, INTERNATIONAL HUMAN RIGHTS LAW CLINIC & HUMAN RIGHTS PROGRAM
UNIVERSITY OF VIRGINIA SCHOOL OF LAW

**JULES LOBELL**
PROFESSOR OF LAW
UNIVERSITY OF PITTSBURGH LAW SCHOOL


[*] The academic affiliations of *amici curiae* are listed for affiliation purposes only.

**JENNY S. MARTINEZ**
ASSOCIATE PROFESSOR OF LAW
JUSTIN M. ROACH, JR. FACULTY SCHOLAR
STANFORD LAW SCHOOL

**KAREN MUSALO**
CLINICAL PROFESSOR OF LAW
DIRECTOR, CENTER FOR GENDER & REFUGEE STUDIES UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

**LORI NESSEL**
PROFESSOR OF LAW
SETON HALL UNIVERSITY SCHOOL OF LAW

**JAYA RAMJI-NOGALES**
ASSISTANT PROFESSOR OF LAW
TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW

**BARBARA J. OLSHANSKY**
LEAH KAPLAN DISTINGUISHED VISITING PROFESSOR OF HUMAN RIGHTS
STANFORD LAW SCHOOL

**SARAH PAOLETTI**
CLINICAL SUPERVISOR AND LECTURER
TRANSNATIONAL LEGAL CLINIC
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

**MICHAEL J. PERRY**
ROBERT W. WOODRUFF PROFESSOR OF LAW
EMORY LAW SCHOOL

**MARGARET SATTERTHWAITE**
ASSISTANT PROFESSOR OF CLINICAL LAW
FACULTY DIRECTOR, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW

**MICHAEL SCHARF**
PROFESSOR OF LAW
DIRECTOR, FREDERICK K. COX INTERNATIONAL LAW CENTER
CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

**BETH VAN SCHAACK**
ASSISTANT PROFESSOR
SANTA CLARA UNIVERSITY SCHOOL OF LAW

**PHILIP G. SCHRAG**
PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

**BETH STEPHENS**
PROFESSOR OF LAW
RUTGERS-CAMDEN LAW SCHOOL

**MICHAEL J. WISHNIE**
CLINICAL LAW PROFESSOR
YALE LAW SCHOOL

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## INTEREST OF AMICI

*Amici curiae* are scholars of Immigration Law and International Human Rights Law who teach at American law schools. With substantial expertise in international treaties and the domestic constitutional and statutory law principles underlying our country's basic human rights commitments, *amici* are well-positioned to assist the Court in addressing several central questions raised by this appeal. Specifically, *amici* believe that the procurement of diplomatic assurances by the executive in the removal context, particularly from countries which routinely engage in torture, is inconsistent with this country's absolute non-refoulement obligation under the Convention Against Torture.

*Amici* write to urge the Court to reject the government's broad claim to unreviewable executive authority to remove aliens based on secret, post-hearing assurances as were obtained in this case, and to demonstrate that the Convention, U.S. law and relevant foreign country practices all mandate that such diplomatic assurances be subject to rigorous judicial review.

## SUMMARY OF ARGUMENT

The government has never attempted to defend the reliability of the diplomatic assurance it contends gives it authority to remove Mr. Khouzam, in likely part because the auurance could not realistically be defended. Instead, the government reprises a claim of absolute executive prerogative that the Courts have

effectively already rejected. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir.), *cert. granted*, *Geren v. Omar*, 148 S. Ct. 741 (2007). In the end, the government's jurisdictional and substantive arguments vanish at the same ultimate point: that the judiciary has no place in our constitutional scheme as long as the executive asserts that its wartime or foreign affairs power is somehow implicated.

The argument is particularly dangerous where it may be asserted to avoid the non-derogable legal limits on returns to torture set by the Convention Against Torture ("CAT"), and where it seeks to replace statutorily-mandated judicial determinations imposed by CAT's implementing legislation. The court here, as before, should reject the government's position and re-affirm that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536.

First, removals based on diplomatic assurances from countries such as Egypt, which routinely engage in torture, violate the absolute, non-derogable obligation against returns to torture contained in the Convention and its implementing legislation, the Foreign Affairs Reform and Restructuring Act ("FARRA"). Indeed, the U.S. experience with diplomatic assurances in the extraordinary rendition context reveals why assurances from countries that routinely torture could never actually mitigate the risk of torture, and strongly

counsels against a court importing an extraterritorial, extralegal practice into a U.S. court of law.

Second, CAT, FARRA and elementary separation of powers principles plainly require judicial review of a removal decision based on diplomatic assurances. As demonstrated by conclusions of relevant UN bodies and foreign courts, CAT was designed to constrain executive discretion to transfer an alien where there is a risk of torture. The judicial review provisions of FARRA implement this design, and the government has failed to demonstrate by the required clear and convincing evidence that Congress intended to cut off judicial review of the agency action in this case. Equally fundamental, the executive's attempt to effectively reverse the Second Circuit's judgment enjoining Khouzam's transfer to Egypt, if accepted, would render such judgment – and similar judgments made by this Court in the future – impermissibly advisory. *Hamdi* also conclusively established that separation of powers principles foreclose what the government proposes here: exclusive executive authority to deprive individual rights.

Finally, the practices of other state parties to the Convention, relevant to interpreting our country's obligations under CAT, demonstrate that judicial review of diplomatic assurances is necessary, entirely workable, and does not interfere with the executive's foreign affairs power. Foreign country practices as well as

U.S. courts' experience in the CAT and asylum contexts demonstrates that courts are perfectly competent to review assurances without interfering with sensitive diplomatic relationships.

The district court thus correctly held that the executive's attempted removal based on unreviewable diplomatic assurances is unlawful.

## ARGUMENT

### I. BECAUSE IN ENACTING FARRA CONGRESS INTENDED TO CONSTRAIN EXECUTIVE REMOVAL POWERS CONSISTENT WITH THE CONVENTION AGAINST TORTURE, THE EXECUTIVE MAY NOT RELY ON DIPLOMATIC ASSURANCES TO EFFECT AN EXTRAJUDICIAL TRANSFER.

The United States became a party to the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") in November 1994. U.N. Doc. 571 Leg/SER.E/13.IV.9 (1995). In 1998, Congress implemented the United States' non- refoulement obligation under CAT into domestic law, through the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub.L. No. 105-277, div. G., tit. XXII, § 2242, 112 Stat. 2681-822 (codified as note at 8 U.S.C. § 1231). In enacting FARRA, Congress elected to give U.S. obligations under CAT "wholesale effect" under U.S. domestic law. *Medellin v. Texas*, 128 S. Ct. 1346, 1365 (2008). *See also Silva-Rengifo v. Att. Gen. of U.S.*, 473 F.3d 58, 68 (3d Cir. 2007).

### A. Diplomatic Assurances From Countries That Routinely Torture Undermine The Non-Refoulement Obligation Under CAT And FARRA.

Using language that precisely tracks Article 3, Congress unambiguously imported the content of CAT's non-refoulement obligation into U.S. law through section 2242(a) of FARRA:

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture . . . .

Section 2242(f)(2) of FARRA explicitly states that "the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." Thus, congressional intent as to the scope of the non-refoulement constraint under FARRA must be determined by reference to its scope under Article 3 of CAT. *Yusupov v. Attorney General of U.S.*, 518 F.3d 185, 203 n.32 (3d Cir. 2008) ("The adoption of essentially identical language [in the non-refoulement provision of the Refugee Act of 1980] to that contained in Article 33 of the 1967 U.N. Protocol . . . is one of the strongest indicators that Congress intended to incorporate the understanding of the Protocol developed under international law into the U.S. statutory scheme.") (citing *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 180 & n.36 (1993)).

Neither CAT nor FARRA countenance derogation under any circumstances from the absolute prohibition against refoulement to torture. As such, neither contains any reference to diplomatic assurances. International experts and U.N. treaty bodies all conclude that diplomatic assurances, particularly those from countries that habitually violate CAT's prohibition against torture, undermine states' compliance with the fundamental non-refoulement obligation.

The Committee Against Torture[1] has specifically instructed the United States that "[w]hen determining the applicability of its non-refoulement obligations under Article 3 of the Convention, the [United States] should only rely on 'diplomatic assurances' in regard to States which do not systematically violate the Convention's provisions." U.N. Comm. Against Torture, *Conclusions and Recommendations to U.S.*, ¶21, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006). The U.N. Special Rapporteur on Torture has similarly condemned the use of diplomatic assurances on the basis that they are unreliable. *See, e.g.*, The Secretary General, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶51, A/60/316 (Aug. 30, 2005); Decl. Theo van Boven, former Special Rapporteur, J.A. 466 ("[R]emoval of Petitioner to Egypt – a country which has consistently engaged in torture – would

[1] The Committee's jurisprudence is an authoritative interpretation of the non-refoulement obligation under CAT. *Kamara v. Attorney General of U.S.*, 420 F.3d 202, 215 (3d Cir. 2005).

be in violation of the United States treaty obligations, notwithstanding the procurement of diplomatic assurances."). Other international human rights experts such as the U.N. Human Rights Commissioner, the U.N. High Commissioner for Refugees, and the Council of Europe Human Rights Commissioner have held similarly. *See* Br. Am. Cur. Human Rights Watch ("HRW") *et al.*

### B. The Court Should Categorically Reject The Use Of Diplomatic Assurances From Countries Such As Egypt Because U.S. Experience Reveals Such Assurances Are Futile And Subject To Exploitation.

As other *amici* in this case amply demonstrate, diplomatic assurances from countries such as Egypt, which engage in routine and widespread acts of torture, are inherently unreliable and unverifiable. *See id.* Moreover, because the U.S. government's own experience demonstrates that the U.S. knows full well that such assurances are valueless, and that the executive may even exploit their use in the rendition context, the court should categorically refuse to accept such assurances in the removal context.

#### 1. The U.S. experience with Egypt through its program of extraordinary rendition demonstrates the cynical futility of such assurances.

The United States' experience with diplomatic assurances has developed in the context of extraordinary renditions – the extrajudicial transfer of terrorism suspects to foreign countries for interrogation, detention, and, as critics allege,

torture.[2] The President has stated that renditions of persons only occur "with the promise that they won't be tortured,"[3] and that when "we seek assurances . . . [w]e believe [we are] adhering to our laws and our treaty obligations."[4] Egypt and other countries with poor human rights records are by far the most frequent destinations for rendered terrorism suspects.[5] According to the primary architect of the rendition program, diplomatic assurances from such countries do not include verifiable guarantees to comply with international norms but rather, rely on a "legal nicety" that the foreign country "pledge it would treat him according to the rules of its own legal system."[6]

Thus, it is not surprising that, despite a diplomatic assurance to the contrary, many of the rendered suspects were in fact tortured upon transfer.[7] Indeed, U.S. officials have admitted what is implicit in the program – that the U.S. government

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[2] *See* Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L. Rev. 1333 (2007).

[3] President George W. Bush, Press Conference (Mar. 16, 2005), http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html.

[4] White House Press Secretary Scott McClellan, Press Briefing (Mar. 17, 2005), http://www.whitehouse.gov/news/releases/2005/03/20050317-4.html.

[5] Shaun Waterman, *Terror Detainees Sent to Egypt*, Wash. Times, May 16, 2005, at A4 (reporting 2005 statement of Egyptian Prime Minister that the U.S. has rendered "60 or 70" detainees to Egyptian custody after September 11th).

[6] Human Rights Watch, *Double Jeopardy: CIA Renditions to Jordan*, 8-9 (2008) (quoting Michael Scheuer, former head of CIA "Bin Laden Unit").

[7] Katherine R. Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition*," 20 Geo. Immigr. L.J. 213, 234-60 (2006) (detailing numerous accounts of tortured suffered by prisoners in rendition program, including Maher Arar, a Canadian citizen tortured in Syria despite U.S. procurement of diplomatic assurance).

knows full well, and even expects – foreign countries to torture suspects upon their transfer. *See* Stephen Grey, *America's Gulag*, New Statesman, May 17, 2004 (quoting former CIA official as stating: "If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear -- never to see them again -- you send them to Egypt."); Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, Wash. Post, Dec. 26, 2002, at A1 (quoting U.S. official directly involved in renditions, as stating: "[w]e don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them").

The Secretary of State, confronted with legal and moral concerns about the program, has responded, "[r]enditions take terrorists out of action, and save lives."[8] It is, of course, the State Department which obtains diplomatic assurances before each transfer, including Khouzam's. At a minimum, therefore, the request for a diplomatic assurance in Mr. Khouzam's case is wholly unreliable because it sends a mixed message to Egypt, which may well be inclined to treat this assurance as lightly as those the U.S. executive obtains in the rendition context, i.e. as an empty formality.

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[8] *See* Condoleezza Rice, U.S. Sec'y of State, U.S. Dep't of State, Remarks upon Her Departure for Europe (Dec. 5, 2005), http://www.state.gov/secretary/rm/2005/57602.htm.

More troubling, however, is the reasonable inference raised by knowledgeable critics of the rendition program, that the executive cynically employs diplomatic assurances to cloak practices otherwise illegal under CAT and FARRA with a veneer of legality.[9] Because the court has an obligation to "promote confidence in the administration of justice [and] to preserve the judicial process from contamination," it should resist the executive's attempt to import practices from the extralegal, extraterritorial rendition context – which the U.S. government has every reason to believe will not work – into a U.S. court of law. *Olmstead v. United States*, 277 U.S. 438, 484 (Brandeis, J., dissenting). *See also Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring) (courts obligated to reject government practices or evidence inconsistent with supervisory authority over administration of justice).

Moreover, to accept the government's position in this case would sanction the executive's impermissible disclosure of Khouzam's fear of torture to the very torturers from whom he seeks protection. As the State Department's own regulations recognize, the executive has a duty of confidentiality regarding an alien's fear of torture from his home country, in light of the obvious threat of retribution upon removal if the alien's fear is disclosed. 8 C.F.R. § 208.6(a) & (b).

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[9] Satterthwaite, *supra* note 2, at 1379; Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, New Yorker, Feb. 14 & 21, 2005, at 107 (arguing that executive justifies its rendition of persons to known human rights abusers by relying "on a very fine reading" of CAT).

For this reason, removing an individual after obtaining a diplomatic assurance may itself constitute a substantive due process violation because of the serious risk that the executive's communication with the alleged torturer may render the individual more "vulnerable to danger than had [it] not intervened". *Kneipp v. Tedder*, 95 F.3d 1199, 1209 (3d Cir. 1996); *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996) (enjoining removal of alien because actions of U.S. officials increased risk of abuse by home country upon return).

**2. Because the government's position in this case is inconsistent with years of State Department conclusions regarding Egypt, it should be rejected by the Court.**

This Court has explained that, where an agency follows a general policy or a settled course of action, and then pursues "an irrational departure from that policy (as opposed to an avowed alteration of it)," courts need not defer to that agency – particularly where the justification for that change in policy is not explained. *Smriko v. Ashcroft*, 387 F.3d 279, 291 (3d Cir. 2004).

For over a decade, the U.S. State Department – the very agency now vouching for the reliability of Egypt's assurance in this case – has concluded that Egypt is unwilling to control torture in prisons and fails to hold torturers accountable.[10] The State Department has also reported that Egypt persists in

[10] *See, e.g.*, Br. Am. Cur. HRW.

denying what is objectively, empirically true regarding its practice of torture.[11] In fact, Egypt characterizes accusations that it tortures as "mythology."[12] In light of the State Department's consistent conclusions regarding the intractability of torture in Egypt, and the untrustworthiness of Egyptian denials of torture, the Executive's position in this case should be viewed as arbitrary and irrational, and rejected by the Court.

## II. CAT, FARRA AND ELEMENTARY SEPARATION OF POWERS PRINCIPLES REQUIRE JUDICIAL REVIEW OF ANY EXECUTIVE ATTEMPT TO REMOVE A PERSON PURSUANT TO DIPLOMATIC ASSURANCES.

As described, the use of diplomatic assurances from countries such as Egypt is deeply inconsistent with the absolute non-refoulement prohibition embodied in CAT and FARRA, and should not be permitted to undermine CAT protection. If, however, a particular diplomatic assurance could, in rare circumstances, be probative of a petitioner's risk of torture upon removal, both CAT and FARRA require that such a conclusion be made by a judicial body, and not via a unilateral determination by the executive office seeking the CAT petitioner's removal.

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[11] U.S. Dep't of State, Country Reports on Human Rights Practices: Egypt – 2007 (Mar. 11, 2008) (noting that Egyptian officials claim "any torture occurs only in isolated instances").

[12] Dana Priest and Dan Eggen, *Terror Suspect Alleges Torture, Detainee Says U.S. Sent Him to Egypt Before Guantanamo*, Wash. Post, Jan. 6, 2005; *see also* Amany Radwan, *Egypt's Torture Video Sparks Outrage*, Time (Jan. 23, 2007) (Egyptian official responded to video of police torture by blaming the "independent media for exaggerating torture issues").

Indeed, the government's assertion that it may ignore or preempt a court's prior CAT determination and deport a petitioner based on secret, unreviewable evidence would undermine that statutory scheme, opening an exception to non-refoulement protocols that would swallow the rule and violate the most elementary principles of separation of powers.

### A. FARRA Mandates Judicial Review Of A CAT-Petitioner's Risk Of Torture, Including The Validity Of Diplomatic Assurances.

In passing FARRA, Congress clearly intended to import the requirement that Article 3 determinations be subjected to judicial review. *See infra* Section III. (demonstrating that foreign countries uniformly subject Article 3 determinations to judicial review). Indeed, the Senate deliberately *declined* to include the executive's proposed understanding that "competent authorities" refers to administrative authorities whose determinations are not judicially reviewable. S. Exec. Rep. 101-30, at 17-18, 37; U.S. Reservations, Declarations, and Understandings to CAT, 136 Cong. Rec. 36,198 (1990). *Cf.* Gov't Br. at 23. Moreover, in its only reservation to Article 3, the Senate explained that a "substantial risk" of torture would be satisfied – and the executive judicially enjoined from transferring – if a petitioner met a "more likely than not" standard. 136 Cong. Rec. 36, 198 (1990). This standard is, of course, tantamount to "preponderance of the evidence," *Fadiga v. Attorney General*, 488 F.3d 142, 160

n.27 (3rd Cir. 2007), which the Senate well knew is common to adjudicative, not executive, decision-making. *See* 8 U.S.C. §§ 1252(e)(2)(C), 1324(g)(2)(A).

Because diplomatic assurances from a country like Egypt have virtually no probative value as evidence, *see* Br. Am. Cur. HRW, they should be no more persuasive to a court applying the "more likely than not" calculus than a reflexive denial from a home country about its torture practices or a promise to follow its own laws. *See supra* Section I(B)(2). Yet this merely underscores that it must be a *court*, not the executive, which makes the determination regarding the ultimate likelihood of torture.

**1. Section 2242(d) plainly provides for judicial review of agency action.**

Consistent with the foregoing framework, Congress specifically provided for judicial review of all claims related to the non-refoulement proscription in Article 3 of CAT and §2242(a) of FARRA. *See* § 2242(d).

In considering judicial review, Congress attempted to restrict the *timing* of petitioner's opportunity to present Article 3 and 2242(a) claims in connection with reviews of "final order[s] of removal" (while at the same time it preserved habeas corpus jurisdiction over such claims as well, *see Ogbudimpka v. Ashcroft*, 342 F.3d 207, 220 (3d Cir. 2003)). But, as part of that review process, Congress specifically ensured that a petitioner would be free to challenge all "claims raised under the Convention" or "*any other determination* made with respect to application of the

policy" set forth in §2242(a). § 2242(d) (emphasis added). Because the government's proffer of a diplomatic assurance undoubtedly implicates a petitioner's claim under the Convention and constitutes a "determination" related to the non-refoulement prohibition in section (a) of FARRA, it is subject to judicial review. And, Congress could not have intended to cut off review of executive conduct that may violate this country's treaty obligations.

The government argues that regulations permit it to terminate a CAT claim pursuant to a diplomatic assurance *subsequent* to the adjudication of a final order of removal and thereby insulate its actions from judicial review. Gov't Br. at 23-26. However, to the extent that those regulations, promulgated after FARRA, insulate removal decisions from judicial review, they are clearly contrary to congressional intent and void. *See INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). Moreover, the government certainly cannot be permitted to void judicial review contemplated by Congress, by attempting, as it does here, a removal after CAT proceedings. The executive is not entitled to hold the keys to the courthouse. *See Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995) ("[I]t is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust … federal district courts of subject matter jurisdiction"); *Braniff Airways, Inc. v. Civ. Aeronautics Bd.*, 581 F.2d 846, 850-51 (D.C. Cir. 1978) (holding that it would violate separation of powers to allow the executive the power to control

which executive orders are reviewable by the courts); *accord Nasuti v. Scannell*, 906 F.2d 802, 813 (1st Cir. 1990).

**2. Any ambiguity in the jurisdictional statute must be read to require judicial review.**

An additional, fatal obstacle in the path of the government's position is the hornbook administrative law principle that presumptively requires judicial review of agency action. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated"). This presumption can be overcome only by a showing of "clear and convincing evidence of a legislative intent to restrict access to judicial review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). The availability of judicial review ensures executive compliance with congressional will and, accordingly, ensures that the executive branch is limited to enforcing, rather than making, the law. *INS v. Chadha*, 462 U.S. at 953, n.16; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Judicial review likewise "perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Touby v. United States*, 500 U.S. 160, 170 (1991) (Marshall, J., concurring); B. Schwartz, *Administrative Law* 436 (2d ed. 1984) ("[w]ithout judicial review, statutory limits would be naught but empty words").

A diplomatic assurance procured after the final removal order is far from the "clear and convincing" evidence of congressional intent required to foreclose judicial review of agency action. As the court explained in response to a similar agency argument, "there is not even the slightest intimation that Congress gave thought to the matter of the preclusion of judicial review. The only reasonable inference is that the possibility did not occur to the Congress." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

### B. The Government's Position Undermines Elementary Separation Of Powers Principles.

Each of the government's remarkable positions in this case – (1) that the executive can unilaterally preempt a prior court judgment and (2) that a court must accept as conclusive the executive's factual determination regarding the likelihood of torture – does lasting violence to the role of the courts in our constitutional system.

#### 1. Permitting the government to preempt a binding court judgment would eviscerate the Article III obligations of the judicial branch.

In rejecting the government's arguments and awarding Khouzam deferral of removal under CAT, the Second Circuit effectively enjoined the government from removing Khouzam to Egypt unless, in the context of a termination hearing, the government could satisfy an immigration judge that new circumstances reduce the risk of torture below the relevant statutory threshold. 8 C.F.R. § 208.17(d). Thus,

the Second Circuit's grant of deferral functions like a preliminary injunction. Accordingly, just as the government could not void a court-imposed desegregation order or other form of injuction based on an untestable assertion that it has met all the conditions imposed by the court or that the circumstances justifying the injunction had changed, *cf. Walker v. City of Birmingham*, 388 U.S. 307, 320-21 (1967), here, the government cannot remove Mr. Khouzam simply because it has satisfied *itself alone* that the Second Circuit's prohibitions should no longer apply.

Indeed, if accepted, the government's position would fundamentally undermine centuries of Supreme Court precedent limiting this Court's role under Article III to issuing judgments binding upon litigants before it. *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) ("It has . . . been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."). If the executive branch were free to revise or preempt a court judgment granting CAT relief (either pursuant to its own judgment or pursuant to a regulation promulgating such authority), then the court's judgment would not be binding. The Supreme Court has confirmed that, since *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), "Congress cannot vest review of the decision of Article III courts in officials of the Executive Branch." *Plaut v.*

*Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). If Congress cannot vest such review, clearly an administrative agency cannot either.

The government's proposed action would thus unconstitutionally transform the Second Circuit's judgment into an advisory opinion. Indeed, should this Court accept the government's position in this case, it would render *all future Third Circuit decisions* granting or affirming deferral of removal relief under CAT merely advisory – that is, subject to the revision or preemption of the executive. In order to avoid this unconstitutional result, the court should reject the government's position in this case.

**2. Under separation of powers principles, a court cannot be required to accept as conclusive the executive's findings regarding the likelihood of torture.**

The Supreme Court has already rejected the government's assertion that a court must accept as conclusive the executive's factual determination regarding the likelihood of torture. Specifically, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the government argued, as it does here, that "respect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making" eliminates any individualized process for a person challenging his "enemy combatant" designation and that the court must "*assume the accuracy* of the government's articulated basis for Hamdi's detention." *Id*. at 527-28 (emphasis added).

The Court strongly rejected the government's assertion that the courts have "a heavily circumscribed role" where military considerations are implicated and recognized that the Constitution "most assuredly envisions a role for all three branches where individual liberties are at stake." *Id*. at 536. Indeed, as the Court explained, in analysis equally responsive to the government's position in this case:

> [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 simply because the Executive opposes making available such a challenge.

*Id.* at 536-37.

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For the purposes of separation of powers, the court's role in evaluating the executive's attempt to circumvent Khouzam's statutory right to protection from return to torture is no different than its role in evaluating the executive's similar attempt to short-circuit *Hamdi*'s right to procedural due process. *See also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2791-93 (2006) (rejecting demand of conclusive deference to executive's decision that alien's rights under Uniform Code of Military Justice and Geneva Conventions were satisfied by executive order creating military commissions); *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (the Constitution likely precludes granting "an administrative body the unreviewable authority to make determinations implicating fundamental rights.").

## III. FOREIGN STATES' PRACTICE DEMONSTRATES THAT JUDICIAL REVIEW OF DIPLOMATIC ASSURANCES IS NECESSARY AND WORKABLE.

The consistent practices of other state parties to CAT contradict the government's further assertion that judicial review of diplomatic assurances would undermine the executive's foreign affairs power by interfering with sensitive diplomatic relationships. Gov't Br. at 31-32.

In order to interpret the scope of U.S. obligations under an international treaty, U.S. courts frequently rely on the post-ratification understanding of the treaty developed by courts of other state parties, as a widely-recognized source for interpreting international law. *See e.g.*, *Medellin v. Texas*, 128 S.Ct. 1346, 1363 (2008) (relatively consistent practice of other state parties to treaty "strongly suggests" that treaty should be "so viewed in our courts"); *accord Yusupov v. Attorney General of U.S.*, 518 F.3d 185 (3d Cir. 2008). The practices of similarly-situated foreign courts are especially instructive in relation to diplomatic assurances.

Recognizing the potential for governments to use diplomatic assurances to attempt an "end run" around the non-refoulement obligation, the U.K., Europe and Canada all require judicial review. As discussed in the examples below, those courts have developed judicially-manageable standards by which they rigorously assess the reliability of diplomatic assurances – by asking if there is a "sound

objective basis" for concluding the assurances sufficiently mitigate the risk of torture. Confirming the judiciary's critical role, foreign courts have routinely regarded proposed assurances with deep skepticism, and found that assurances (invariably from countries that practice torture) could not, consistent with Article 3, adequately mitigate the risk of torture upon the individual's return.

**The United Kingdom**

In the United Kingdom, diplomatic assurances are subjected to rigorous judicial review. *See e.g., MT, RB, & U v. Sec'y of State for the Home Dep't*, ¶11, [2007] EWCA Civ. 808. The U.K. Special Immigration Appeals Commission ("SIAC")[13] requires that diplomatic assurances be presented in open court and available to the subject for challenge. *See Y v. Sec'y of State for the Home Dep't*, [2006] SC/36/2005 (SIAC). In *MT, RB, & U*, the Court of Appeals approved four pre-conditions established in a SIAC decision for removal based on diplomatic assurances: (i) if fulfilled, assurances will protect against treatment violative of Article 3; (ii) assurances must be given in good faith; (iii) there must be a "sound objective basis" for believing assurances will be fulfilled;[14] and (iv) fulfillment of assurances must be capable of verification by monitoring and/or other means. *MT*,

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[13] SIAC adjudicates national security removal cases, the context in which diplomatic assurances have arisen in the U.K..

[14] The court noted that determination might be based on the degree to which the destination country adheres to the rule of law, the extent to which it possesses the political will and national interest in fulfilling assurances, and whether it has adequate control over agencies including security forces. *Id.*

*RB, & , U* ¶94 (*affirming BB v Sec'y of State for the Home Dep't*, [2006] SC/39/2005 (SIAC), ¶¶5,6).

In *DD & Anor v Sec'y of State for the Home Dep't*, [2008] EWCA Civ 289 (April 9, 2008) ("DD (Appeals)"), the leading U.K. case concerning diplomatic assurances, the government urged the court to defer to the view of the former British ambassador to Libya that removal of two men pursuant to Libyan diplomatic assurances would not violate the non-refoulement obligation because, it claimed, a breach of the assurances was "well nigh unthinkable." *DD* (Appeals), ¶320. The Court of Appeals refused, holding that, "the question whether deporting someone would infringe his human rights under Article 3 of the Convention … at no point lies within the exclusive province of the executive." *Id.* ¶49. Despite fully crediting the former ambassador's diplomatic expertise, familiarity with the negotiations, and sincere motivations, it concluded that SIAC correctly declined to adopt the government's assessment of the reliability of the assurances.

Far from questioning "the hearts and minds of [Colonel Qadafhi's] regime," which the court conceded might be "not justiciable," *id.* ¶32**,** the court rested its decision on various criteria indicating there was not a "sound objective basis" for believing assurances would be fulfilled, all of which were within the competence of any court. *DD* (Appeals), ¶41. Those factors included: (1) the history of human rights abuses by Libyan security forces and their enjoyment of impunity; (2) the

competition between Libyan intelligence and security organizations; (3) the risk that the assurances may not be respected if the foreign country developed a grievance against the U.K. or if circumstances otherwise changed; and (4) the reality that the U.K. could not apply diplomatic pressure if monitoring failed to reveal abuse. *DD & AS v SSHD* [2007] SC/42 & 50/2005(SIAC), ¶¶354, 362, 368. The court agreed that "there is too much scope for something to go wrong, and too little in place to deter ill-treatment or to bring breaches of the [assurance] to the U.K.'s attention." *DD* (Appeals), ¶80, citing *DD* (SIAC), ¶368.

Similarly, *Youssef v. The Home Office* [2004] EWHC 1884 (QB) demonstrates the importance of the court's role in regulating the executive's temptation to transfer a person for reasons of political expedience. The British Prime Minister, despite repeated warnings by the Home Office that Cairo's assurances would never diminish the risk of torture, took the position that it "should use whatever assurances the Egyptians are willing to offer… [g]iven that torture is banned under Egyptian law." *Youssef*, ¶¶8, 38. In rebU.K.ing the Prime Minister's opportunistic prediction, the court cited objective factors proving the contrary, including: the "strong evidence that the Egyptian Security Forces systematically tortured political detainees," even though Egypt is a signatory to CAT and the clear evidence "that elements in the Egyptian Security Forces were a

law unto themselves" and therefore could not be controlled by good faith government efforts.

**Canada**

Canada requires judicial scrutiny of any proposed assurances, including an opportunity for the subject to refute the government's written reasons for their validity. *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 SCR 3, ¶¶123, 126. Canadian courts view assurances from countries with a record of torture with extreme skepticism, and no court has allowed transfer to Egypt pursuant to assurances. *See* Decl. of Audrey Maklin, J.A. 456. In *Suresh*, the court proposed objective factors for assessing the validity of assurances similar to those employed by the U.K., including "the human rights record of the government giving the assurances," that government's "record in complying with its assurances," and the "capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces." *Suresh*, ¶125. *See also Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503 (remanding removal decision because decision-maker failed to take into account Egyptian government's human rights record and "the overwhelming bulk of evidence which document[ed] Egypt's poor record of compliance [with assurances]"); *Lai Cheong Sing v. Canada* (Minister of Citizenship and Immigration), 2007 FC 361 (government's

reliance on Chinese assurances was "patently unreasonable" given widespread use of torture inflicted in secret).

**Europe**

Diplomatic assurances have been similarly rejected by other European courts and the European Court of Human Rights ("ECHR"), whose decisions bind the courts of all 47 member states in the Council of Europe and which are particularly persuasive to U.S. Courts. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). The ECHR has consistently held that in light of the absolute non-refoulement prohibition, courts have an obligation to examine whether diplomatic assurances "provide[], in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention." *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, ¶148; *see also Chahal v. United Kingdom*, 23 Eur. Ct. H. R. Rep. 413, ¶¶93, 105 (1996) (concluding that review of assurances is required; assurances will not sufficiently mitigate the risk of torture from a country where human rights abuses are a "recalcitrant and enduring" problem, and an assurance from a government "unable to control [its] security forces" is of "little value").

## IV. UNITED STATES COURTS ARE CAPABLE OF ASSESSING THE LIKELIHOOD OF TORTURE UPON REMOVAL PURSUANT TO ASSURANCES IN A WAY THAT DOES NOT IMPLICATE THE FOREIGN AFFAIRS POWER.

The United States does not confront unique foreign relations concerns that would justify departure from the globally-accepted requirement of subjecting diplomatic assurances to judicial review. Such review is required by CAT as implemented through FARRA, and U.S. courts have the relevant expertise to accomplish it without interfering with the executive's foreign affairs power.

### A. The Government Widely Miscasts The Nature Of The Court's Inquiry

In contending that judicial review of diplomatic assurances is beyond the competence of the court or otherwise interferes with the executive's foreign relations power, the government attacks a distant straw man. Contrary to the government's assertion, neither Khouzam nor *amici* ask the Court to "assess the *nature of the relationship* between Egypt and the United States *to determine* whether this country can trust Egypt's diplomatic commitment." Gov't Br. at 29 (emphasis added); *see also id.* at 31-32 (arguing that "courts lack the institutional competence and resources to assess diplomatic commitments between nations" and citing cases). As described, whether a diplomatic assurance can ameliorate the risk of torture in almost all cases will have nothing to do with the nature, quality or history of the relationship between the sovereign governments.

### B. United States Courts Are Competent To Determine Whether Diplomatic Assurances Sufficiently Mitigate The Risk Of Torture

The Supreme Court has consistently explained that, not "every case or controversy which touches foreign relations lies beyond judicial competence." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Courts are constitutionally equipped to decide what is within, and what is outside their authority. *See Abu Eain v. Wilkes*, 641 F.2d 504, 516 (7th Cir. 1981) (distinguishing inquiry into foreign country motives for extradition, deemed not justiciable, from those objective facts in extradition request giving rise to "political offense" defense, which clearly are justiciable). The inquiry into the likelihood of torture, in spite of the procurement of a diplomatic assurance, turns on considerations that courts routinely make in the deportation context. *See Mironescu v. Costner*, 480 F.3d 664, 672 (4th Cir. 2007) (finding no foreign relations bar to adjudication of FARRA claims because courts are well-equipped to answer "straightforward question[s] of whether a fugitive would likely face torture [since] . . . American courts routinely answer similar questions, including in asylum proceedings.").

At a minimum, in reviewing a proposed removal based on diplomatic assurance, the court must not accept the assurance or the reasons underlying it as conclusive evidence regarding the likelihood of torture. *See supra* Section III; *Hamdi*, 542 U.S. at 536-37. In support of its position that the diplomatic assurance mitigates the risk of torture, the government, however, may present expert

testimony as to the reliability of the assurance or regarding the expertise and good faith of the negotiations, much in the same way that it presents arguments challenging a claim for CAT relief. Even if the court grants deference to such expert testimony, *see DD* (Appeals) (or if, as urged here, it does not, *see supra* Section I(B)), the judge is nevertheless able to evaluate that testimony against *objective* criteria indicating whether assurances will be fulfilled.

As part of that inquiry, the court can consider such objective factors including: (i) the human rights record of the country and the extent to which torture is routine; (ii) the degree of government control over agencies, including police and security forces, and the degree to which the rule of law is embedded; (iii) whether assurances are capable of future verification, including whether proposed monitoring mechanisms are effective; and (iv) whether torture is likely to be inflicted in secret despite assurances. *See supra* Section III.

In addition, in cases such as this, a petitioner should be able to raise considerations that almost uniformly counsel against accepting an assurance. They include: (i) whether a country has breached assurances in the past or whether the U.S. has "rendered" individuals to the country in the past, *see supra* Section I(B); (ii) whether the country's government denies it tortures, in the face of human rights reports to the contrary*; id; see also U.S. v. Karake*, 443 F. Supp. 2d 8, 71 (D.D.C. 2006) (rejecting Rwandan official's denial that he coerced confession, in part

based on consistent State Department reporting that torture was rampant in Rwandan detention facility during period of confinement); and (iii) whether the particular individual has been tortured by agents of the country in the past, *see* J.A. 101-02.

In a case such as this, analysis of such factors will lead to the inevitable conclusion that no diplomatic assurance is capable of sufficiently reducing the risk that the individual will be tortured, even if made with the best intentions of both governments.

**C. The Rule of Non-Inquiry Has No Relevance**

Contrary to the government's additional assertion, the rule of non-inquiry has no relevance to the adjudication of diplomatic assurances as part of a CAT-FARRA claim. The rule emerges as part of the formal extradition process, and the principles underlying it mandate that the rule be limited to that context. *See generally*, M. Cherif Bassiouni, *The Law of International Extradition: United States Law and Practice* 604-42 (5th ed. 2007). Specifically, the rule derives directly from a statutory division of responsibility, 18 U.S.C. § 3184, by which the judiciary first ensures extraditability of the relator and only then may defer to the Secretary of State's discretion regarding foreign relations considerations. S*ee e.g.*, *United States v. Kin-Hong*, 110 F.3d 103, 111 n.12 (1st Cir. 1997). There is no comparable statutory implication in the deportation context. The regulations relied

upon by the government in this case may attempt to give the government discretion, but because CAT and FARRA mandate final judicial inquiry into the risk of torture, such regulatory discretion is void. *Mironescu*, 480 F.3d at 671–72 (federal law embodied in FARRA displaces rule of non-inquiry and now unambiguously makes potential treatment on transfer justiciable).

Finally, whatever deference the rule of non-inquiry was designed to give the political branches pursuant to a statutory delegation of authority, it could never be said to shelter from judicial review conduct that is alleged to be in violation international law obligations. Thus, courts applying the rule of non-inquiry themselves recognize an express exception for transfer based on a plausible fear of torture. *See Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960) (recognizing that courts may block extradition in situations in which "relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency"); *accord Hoxha v. Levi*, 465 F.3d 554, 564 n.14 (3d Cir. 2006).

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
One Newark Center
Newark, New Jersey 07102
(973) 642-8700

By: /s/ Baher Azmy
Baher Azmy (BA8406)

Bassina Farbenblum, Esq.
Jenny-Brooke Condon, Esq.
Joshua Arnold, L.A.R. 46.3(a)(3)
Margaret Hirce, L.A.R. 46.3(a)(3)
Matthew Schoen, L.A.R. 46.3(a)(3)
Counsel for *Amici Curiae*

Dated: April 22, 2008

## CERTIFICATE OF COMPLIANCE

I, Baher Azmy, hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this Brief contains 6,994 words of text.

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 this Brief has been prepared in a proportionately spaced typeface using MS Word, font size 14 Times New Roman.

3. The hard copy and the electronic copy of this Brief are identical.

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Dated: April 22, 2008

___/s/ Baher Azmy_____

Baher Azmy

**CERTIFICATE OF BAR MEMBERSHIP**

I, Baher Azmy, hereby certify that I have been admitted to the Bar of the Third Circuit Court of Appeals and remain a member in good standing.

_____/s/Baher Azmy___
Baher Azmy

## CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2008, after obtaining consent via telephone from counsel for both parties to use an electronic method of service, I caused a copy of the foregoing *Amici Curiae* Brief of International Human Rights Scholars in Support of Petitioner to be emailed to each of the following parties. A hard-copy will also be sent via first class mail to each party:

Mr. Douglass E. Ginsburg
Office of Immigration Litigation
U.S. Department of Justice
1331 Pennsylvania Avenue, NW Suite 700
Washington, DC 20004
Email: Douglas.Ginsburg@usdoj.gov
*Counsel for Respondent-Appellant*

Ms. Amrit Singh
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Email: asingh@aclu.org
*Counsel for Petitioner-Appellee*

Mr. Witold. J. Walczak
American Civil Liberties Union Foundation
313 Atwood St.
Pittsburgh, PA 15213
Email: vwalczak@aclupgh.org
*Counsel for Petitioner-Appellee*

Mr. Morton Sklar
World Organization for Human Rights USA
1725 K St. NW, Suite 160
Washington, DC 20006
Email: msklar@humanrightsusa.org
*Counsel for Petitioner-Appellee*

/s/ Bassina Farbenblum

Dated: April 22, 2008 Bassina Farbenblum, Esq.