No. 11-421

In the Supreme Court of the United States

MAHMOAD ABDAH, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a district court considering a habeas corpus petition may require the Executive to provide advance notice before releasing a detainee from military detention and sending him to a foreign country, where the Executive has submitted sworn declarations establishing that a detainee will neither be sent to any country where he is more likely than not to be tortured nor be detained at the behest of the United States.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the petition for a writ of certiorari, the habeas petitions in these cases asserted that the following individuals were next friends of detainees, and those individuals were accordingly listed as appellees in the dockets of the court of appeals: Ghazi Awadh Bin Aqil Al-Nahdi, Taher Desghayes, and Omar Deghayes.

The correct title for respondent Colonel Donnie Thomas is Commander, Joint Detention Group, JTF-GTMO.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. An order denying a petition for initial en banc hearing (Pet. App. 3a-17a) is reported at 630 F.3d 1047. The opinion of the district court (Pet. App. 18a-31a) is not published in the Federal Supplement but is available at 2005 WL 711814. The orders and opinions of the district court in 20 other cases that were consolidated with this case in the court of appeals are not published in the Federal Supplement, but two of them are available at 2005 WL 774843 and 2005 WL 839542.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2011. On July 15, 2011, the Chief Justice ex-

tended the time within which to file a petition for a writ of certiorari to and including September 22, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are aliens detained by the Department of Defense at Guantanamo Bay, Cuba, under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224. In Executive Order No. 13,492, 3 C.F.R. 203 (2009 Comp.), the President directed a panel of Executive Branch officials led by the Attorney General to undertake "a prompt and thorough review" of each Guantanamo detainee in order to determine whether transfer, release, prosecution, or some other disposition of the individual was consistent with the national-security and foreign-policy interests of the United States and the interests of justice. *Id.* §§ 1(c), 2(d), 4. For individuals the panel determined could be repatriated or resettled, the President instructed the Secretary of State to "expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate." *Id.* § 5. On May 15, 2009, the Secretary of State appointed a Special Envoy, Daniel Fried, to intensify diplomatic efforts to repatriate or resettle individuals cleared for transfer.

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

United States has provided sworn declarations to the courts below setting forth the process used to determine, before a detainee is transferred, that the transfer would be consistent with the government's post-transfer humane-treatment policy. Gov't C.A. Resp. to Pet. for Initial Hr'g En Banc, Exs. G-K (Decl. of Pierre-Richard Prosper, then-Ambassador-at-Large for War Crimes Issues, Department of State (Mar. 8, 2005) (Prosper Decl.); Decl. of Matthew C. Waxman, then-Deputy Assistant Secretary of Defense for Detainee Affairs (Mar. 8, 2005) (Waxman Decl.); Decl. of Clint Williamson, then-Ambassador-at-Large for War Crimes Issues, Department of State (July 7, 2008) (Williamson Decl.); Decl. of Sandra L. Hodgkinson, then-Deputy Assistant Secretary of Defense for Detainee Affairs (July 9, 2008) (Hodgkinson Decl.); Decl. of Daniel Fried, Special Envoy for the Closure of the Guantanamo Bay Detention Facility, Department of State (Nov. 25, 2009) (Fried Decl.)).

Each of the declarations explains that the United States will not repatriate or transfer any detainee to a country where the United States believes it is more likely than not that he will be tortured. Prosper Decl. ¶ 4; Waxman Decl. ¶ 6; Williamson Decl. ¶ 4; Hodgkinson Decl. ¶ 6; Fried Decl. ¶¶ 3-4. The declarations also explain that once detainees are transferred to third countries, they are "no longer subject to the control of the United States." Waxman Decl. ¶ 5; see Hodgkinson Decl. ¶ 5. Any further detention after transfer would be "by the foreign government pursuant to its own laws and not on behalf of the United States." *Ibid.*

2. Petitioners challenged the lawfulness of their detention by filing petitions for writs of habeas corpus. In each of the 21 consolidated cases, the district court en-

tered an order barring the government from transferring petitioners from Guantanamo Bay without 30 days' notice to the court and to petitioners. See, *e.g.*, Pet. App. 32a.[1]

3. The government appealed the orders, and the court of appeals consolidated the appeals and held them in abeyance pending the resolution of *Boumediene* v. *Bush*, 553 U.S. 723 (2008), and then pending the court of appeals' decision in *Kiyemba* v. *Obama*, 561 F.3d 509 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010) (*Kiyemba II*).

4. a. In April 2009, the court of appeals issued its decision in *Kiyemba II*, holding that, in light of the government's post-transfer humane-treatment policy, a court may not "bar[] the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country." 561 F.3d at 516. In reaching that conclusion, the court relied on *Munaf* v. *Geren*, 553 U.S. 674 (2008), in which this Court held that a district court could not enjoin the transfer to Iraqi authorities of American citizens detained in Iraq by an international coalition force that included the United States military. *Id*. at 681-684, 700. Petitioners in that case alleged that they feared torture by the Iraqi government, but the

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[1] In three of the district court cases, the order requiring 30 days' notice was limited to particular circumstances. See Order of June 14, 2005, at 10, *Deghayes* v. *Bush*, No. 04-cv-2215 (D.D.C.) (limiting the notice requirement to any transfer to Libya); Order of Dec. 20, 2005, at 2, *Al-Mithali* v. *Bush*, No. 05-cv-2186 (D.D.C.) (limiting the notice requirement to circumstances where the government "do[es] not have an understanding with the receiving country that a transfer from Guantanamo Bay, Cuba is for purposes of release only"); Order of Apr. 12, 2005, at 5-6, *Ameziane* v. *Bush*, No. 05-cv-392 (D.D.C.) (same).

Court explained that while torture "allegations are * * * a matter of serious concern, * * * in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 700. The Court noted the government's statement that it would not transfer the petitioners if it believed that torture was more likely than not to result, and it held that judicial review of the Executive's determination respecting the likelihood of torture would be improper because "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 702.

The court of appeals in *Kiyemba II* noted that "the record documents the policy of the United States not to transfer a detainee to a country where he is likely to be tortured" and shows that "the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee." 561 F.3d at 514. The court concluded that courts "may not question the Government's determination that a potential recipient country is not likely to torture a detainee." *Ibid.* A contrary result was not required by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, or implementing legislation, the court held, because "Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal." *Kiyemba II*, 561 F.3d at 514. The court of appeals also held that an order requiring 30 days' pre-transfer notice was improper. Such an order, the court explained, "interferes with the Execu-

tive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Id.* at 515.

b. After unsuccessfully seeking rehearing en banc, the *Kiyemba II* petitioners filed a petition for a writ of certiorari, which this Court denied. 130 S. Ct. 1880 (2010).

5. After this Court denied certiorari in *Kiyemba II*, the court of appeals issued an order directing petitioners to show cause why the orders at issue here should not be vacated in light of *Kiyemba II*. Petitioners subsequently filed a petition for initial en banc hearing, which the court of appeals denied. Pet. App. 3a-17a. In an unpublished order, the court of appeals then vacated the district court's notice orders. *Id.* at 1a-2a.

ARGUMENT

In *Kiyemba* v. *Obama*, 561 F.3d 509 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010), the court of appeals correctly applied this Court's decision in *Munaf* v. *Geren*, 553 U.S. 674 (2008), in concluding that a court may not bar the transfer of a Guantanamo detainee to a foreign country based on a detainee's challenge to the government's determination that he is not more likely than not to be tortured, nor may it require the government to provide notice before a detainee is transferred in order to facilitate such a challenge. The court of appeals has repeatedly reaffirmed *Kiyemba II*, and this Court has repeatedly declined to review it. See *Khadr* v. *Obama*, 131 S. Ct. 2900 (2011); *Kiyemba* v. *Obama*, 130 S. Ct. 1880 (2010); see also *Mohammed* v. *Obama*, 131 S. Ct. 32 (2010) (denial of application for stay); *Naji* v. *Obama*, 131 S. Ct. 32 (2010) (same). In the unpublished order in this case, the court of appeals applied

Kiyemba II to vacate the district court's orders requiring notice before transfer. The order of the court of appeals does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. The court of appeals' unpublished order applying *Kiyemba II* to this case does not warrant further review. *Kiyemba II* was correctly decided, and this Court has correctly denied review of that decision.

In *Kiyemba II*, the court of appeals held that where the government has provided sworn declarations explaining that it will not transfer a detainee to any country where it is more likely than not that he will face torture, "a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country." 561 F.3d at 514. Because a court may not enjoin a transfer on those grounds, there is no basis for an order requiring advance notice before a transfer takes place. Moreover, a "requirement that the Government provide pre-transfer notice" would be improper for the additional reason that it would "interfere[] with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Id.* at 515. As the court in *Kiyemba II* explained, "[l]ater review in a public forum of the [State] Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture . . . and to reach acceptable accommodations with other governments to address those important concerns." *Ibid.* (quoting Prosper Decl. ¶ 10); see Williamson Decl. ¶ 10; Fried Decl. ¶ 10. The declarations in this case further explain that the State Department's "ability to seek and

obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with the foreign government with discretion." Prosper Decl. ¶ 9; Williamson Decl. ¶ 9; Fried Decl. ¶ 9. The task of resettling detainees requires a "delicate diplomatic exchange" that "cannot occur effectively except in a confidential setting." Prosper Decl. ¶ 10; Williamson Decl. ¶ 10; Fried Decl. ¶ 10.

The holding of *Kiyemba II* is fully consistent with this Court's decision in *Munaf*. As the court of appeals explained in *Kiyemba II*, the reasoning of *Munaf* "precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country" where, as here, the Government has declared and implemented a policy not to transfer a detainee if torture would more likely than not result. 561 F.3d at 516. In *Munaf*, United States citizens detained in Iraq by coalition forces that included the United States military sought to block their transfer to the custody of the Iraqi government, claiming that they would be tortured if transferred. While recognizing that the allegations were "a matter of serious concern," the Court did not assess their strength or validity. 553 U.S. at 700. Instead, the Court made clear that such determinations are properly addressed to the political Branches, which are "well situated" to determine "whether there is a serious prospect of torture" upon transfer "and what to do about it if there is." *Id.* at 702. By contrast, the Court observed that "[t]he Judiciary is not suited to second-guess such determinations" and that judicial interference would "undermine the Government's ability to speak with one voice" in the foreign policy arena. *Ibid*.

2. Petitioners suggest (Pet. 12-14) various grounds on which *Munaf* might be distinguished, but they ignore the ruling's central rationale. For example, the petitioners in *Munaf* sought to avoid transfer to a sovereign government for criminal proceedings, see 553 U.S. at 689, while petitioners here potentially seek to avoid transfer even where no criminal proceedings are contemplated. But the potential for criminal proceedings did not inform the Court's analysis of petitioners' claims that they would be tortured if transferred to the Iraqi government. See *id.* at 700-703. Nor would there be any basis for holding that courts are "suited to second-guess * * * determinations," *id.* at 702, concerning the likelihood of torture upon transfer when no criminal prosecution is contemplated but not otherwise. In both circumstances, judicial review "would require federal courts to pass judgment" on foreign governments and would "undermine the Government's ability to speak with one voice in this area." *Ibid.*

In addition, petitioners suggest (Pet. 13-14) that habeas relief would be available to review proposed transfers in the "extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway," *Munaf*, 553 U.S. at 702, as well as proposed transfers to locations beyond the reach of the writ of habeas corpus for the purpose of further detention on behalf of the United States. The former circumstance is not present here, however, because, as in *Munaf*, the government has provided sworn declarations explaining that it does not transfer detainees to other countries if it determines that torture is more likely than not to occur. Prosper Decl. ¶ 4; Waxman Decl. ¶ 6; Williamson Decl. ¶ 4; Hodgkinson Decl. ¶ 6; Fried Decl. ¶¶ 3-4. See *Munaf*, 553 U.S. at 702. Nor

is the latter circumstance present, given that the United States does not engage in such detention arrangements. Indeed, the government's sworn declarations state that, once a detainee is transferred to another country, he is "no longer subject to the control of the United States." Waxman Decl. ¶ 5; see Hodgkinson Decl. ¶ 5 (explaining that if an individual is detained after transfer, that detention would be "by the foreign government pursuant to its own laws and not on behalf of the United States").

Petitioners also argue (Pet. 14) that they have a due process right to challenge a transfer to another country. That argument, too, is foreclosed by *Munaf*, which rejected a due process challenge by United States citizen detainees to their transfer. See 553 U.S. at 700-701 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."). It follows that the alien petitioners here have no due process right to challenge a determination by the Executive that a detainee is not more likely than not to be tortured in the proposed country of transfer. Nor can petitioners claim a right to advance notice of transfer where the notice could not provide them any relief. See *Kiyemba II*, 561 F.3d at 517-520 (Kavanaugh, J., concurring).

3. Petitioners contend (Pet. 14-17) that they have a right to judicial review of their transfer under Article 3 of the CAT. But Article 3 of the CAT is not self-executing, and, as the court of appeals explained in *Kiyemba II*, the legislation implementing the CAT does not provide a basis for judicial review of Executive Branch CAT determinations outside of immigration proceedings. 561

F.3d at 514-515. In giving its advice and consent to ratification of the CAT, the Senate declared that "the provisions of Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. 36,198 (1990). Thus, the provisions are not, by themselves, individually enforceable in United States courts. See *Medellin* v. *Texas*, 552 U.S. 491, 505 & n.2 (2008); *Mironescu* v. *Costner*, 480 F.3d 664, 666, 677 n.15 (4th Cir. 2007), cert. denied, 552 U.S. 1135 (2008).

Congress enacted the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (8 U.S.C. 1231 note), to implement Article 3 of the CAT, but that legislation does not provide for judicial review of the government's post-transfer humane-treatment determinations in the Guantanamo context. Specifically, the FARRA provides that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section * * * except as part of the review of a final order of removal pursuant to [8 U.S.C. 1252]." § 2242(d), 112 Stat. 2681-822. Petitioners are not subject to—and do not seek judicial review of—a final order of removal entered under the removal provisions of the Immigration and Nationality Act, which apply to aliens who are physically present in the United States. See *Sale* v. *Haitian Ctrs. Council*, 509 U.S. 155, 173 (1993). Nor is there any affirmative indication in the FARRA that Congress otherwise intended to create any individual right to enforce Article 3 of the CAT, which is not self-executing, in proceedings such as these brought by aliens outside the United States. See *id*. at 188 ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.").

Congress reaffirmed the limitation in Section 2242(d) of the FARRA in 2005, when it enacted a statute providing that, "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, * * * a petition for review * * * shall be the sole and exclusive means for judicial review of any cause or claim" under the Convention, with one exception not relevant here. 8 U.S.C. 1252(a)(4).[2]

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[2] Petitioners argue (Pet. 16) that the limitation in Section 1252(a)(4) applies only in cases in which CAT claims may be asserted as part of a petition for review of an order of removal, contending that such a result follows from the title of 8 U.S.C. 1252—"Judicial review of orders of removal." But, as already explained, Section 1252(a)(4) merely confirmed the limitation on jurisdiction already established in the FARRA, which is written in broad terms and does not bear a similar title. In any event, the "title of a statute . . . cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R. Co.*, 331 U.S. 519, 528-529 (1947)).

Petitioners' reading of Section 1252(a)(4) also fails because it would make that subsection entirely redundant with the subsection that follows it, 8 U.S.C. 1252(a)(5). See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995). Section 1252(a)(5)—which was enacted at the same time as Section 1252(a)(4), see REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(B), 119 Stat. 310-311—provides that "[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, United States Code or any other habeas corpus provision, * * * a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act." If, as petitioners believe, Section 1252(a)(4) bars habeas review of CAT claims only when those claims could be asserted in a petition for review of a final order of removal, then Section 1252(a)(4) is entirely unnecessary because Section 1252(a)(5) already bars habeas review of *all* claims that could be asserted in a petition for review. Petitioners' legislative history argument

Accordingly, Article 3 of the CAT by itself creates no individually enforceable rights in United States courts, and the FARRA and 8 U.S.C. 1252(a)(4) do not provide for individual enforcement of Article 3 here, where petitioners attempt to assert rights under Article 3 extraterritorially and in a non-immigration context. See *Munaf*, 553 U.S. at 703 n.6 (observing that FARRA "may be limited to certain immigration proceedings"); *Khouzam* v. *Attorney Gen.*, 549 F.3d 235, 245 (3d Cir. 2008) (holding that Section 1252(a)(4) precludes the assertion of jurisdiction over a habeas petition raising CAT claims); *Mironescu*, 480 F.3d at 674 (holding that "although courts may consider or review CAT or FARR[A] claims as part of their review of a final removal order, they are otherwise precluded from considering or reviewing such claims"); but see *Trinidad y Garcia* v. *Benov*, 395 Fed. Appx. 329, 331-332 (9th Cir. 2010) (holding that circuit precedent dictated a holding that CAT claims are judicially reviewable in the extradition context but noting that "[i]f we were writing on a clean a slate, we would hold that the Government has the better of the argument"), reh'g en banc granted, 636 F.3d 1174 (9th Cir. 2011).[3]

(Pet. 16-17) fails for the related reason that it pertains not to 8 U.S.C. 1252(a)(4) but to Section 1252(a)(5) and other related provisions enacted at the same time as Section 1252(a)(4).

[3] The Ninth Circuit's unpublished decision in *Trinidad y Garcia* arose in the distinct context of extradition from the United States, and for that reason alone would not suggest that review would be warranted in this case involving aliens detained at Guantanamo Bay. In any event, on February 28, 2011, the Ninth Circuit granted rehearing en banc in *Trinidad y Garcia*, and the en banc court heard argument on June 23, 2011. Because the Ninth Circuit will reconsider the issue, review by this Court is all the more unwarranted.

Petitioners suggest (Pet. 17), in the alternative, that 8 U.S.C. 1252(a)(4) amounts to an unconstitutional suspension of the writ of habeas corpus if it does not permit them to assert CAT Article 3 claims here. But the FARRA and Section 1252(a)(4) did not "suspend" a pre-existing authority to adjudicate such claims in habeas corpus actions. Because Article 3 of the CAT is not self-executing, the question is whether the statutes conferred on courts the authority to adjudicate CAT Article 3 claims beyond the immigration context in habeas corpus actions, and *Kiyemba II* properly held that they did not.

Moreover, the FARRA and Section 1252(a)(4) do not bar habeas jurisdiction altogether; they bar habeas jurisdiction only over claims arising under the CAT, which itself creates no judicially enforceable rights. The Suspension Clause does not require Congress to provide detainees with the right to enforce non-self-executing provisions of treaties in habeas. Consistent with this understanding, courts have rejected the argument that the habeas statute allows for enforcement of treaties that do not themselves create judicially enforceable rights. See *Poindexter* v. *Nash*, 333 F.3d 372, 379 (2d Cir. 2003), cert. denied, 540 U.S. 1210 (2004); *Bannerman* v. *Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wesson* v. *U.S. Penitentiary Beaumont*, 305 F.3d 343, 348 (5th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1241 (2003); *Hain* v. *Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), cert. denied, 537 U.S. 1173 (2003); *United States ex rel. Perez* v. *Warden*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, 537 U.S. 869 (2002). See also *Noriega* v. *Pastrana*, 564 F.3d 1290, 1295-1296 (11th Cir. 2009) (stating that "it is within Congress' power to change

domestic law, even if the law originally arose from a self-executing treaty"), cert. denied, 130 S. Ct. 1002 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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