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ORAL ARGUMENT SCHEDULED ON APRIL 5, 2018

No. 18-5032

**IN THE 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 APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

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.

B. Rulings Under Review

The ruling under review is the district court's order and opinion (Tanya S. Chutkan, J.) of January 23, 2018, which requires respondent to provide the court and counsel seventy-two hours' notice prior to transferring petitioner to another country. App. 42. The district court's opinion and order are not published.

C. Related Cases

This case has not previously been before this Court and there are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

s/ Sonia M. Carson

Sonia M. Carson

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GLOSSARY

ISIL

Islamic State of Iraq and the Levant

INTRODUCTION

This Court has held that a district court may not require the Government to provide advance notice before transferring a wartime detainee captured and held abroad if the court would lack authority to enjoin the Government from completing the underlying transfer. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (*Kiyemba II*). The Supreme Court has explained in analogous circumstances that the Executive Branch is entitled without judicial interference to transfer a detainee like petitioner to a nation with a strong sovereign interest in him, like [REDACTED] here. *Munaf v. Geren*, 553 U.S. 674 (2008). The district court nonetheless required the Government to provide notice seventy-two hours before transferring petitioner to *any* country, for the express purpose of permitting the court to review the validity of *any* transfer. Because *Munaf* and *Kiyemba II* foreclose that result in this case, the district court's order should be vacated and its judgment reversed.

Petitioner is a citizen of the United States and Saudi Arabia. He has spent most of his adult life in Saudi Arabia and developed extensive ties to that country. He is in military custody because he voluntarily traveled to Syria, decided to join the Islamic State of Iraq and the Levant ("ISIL"), and was ultimately captured on an active battlefield in ISIL-held territory by Syrian Democratic Forces, who transferred petitioner to U.S. forces after he announced that he is a U.S. citizen. ISIL has committed countless atrocities across the globe, including murdering scores of [REDACTED]. [REDACTED]. The United States is at war with

ISIL and [REDACTED] is a military ally in that conflict. Based on petitioner's own admissions and other evidence that the United States independently acquired, the U.S. Department of Defense has determined that petitioner is an enemy combatant.

The Government is actively engaged in high-level diplomatic negotiations with [REDACTED] petitioner to that country, consistent with the [REDACTED]
[REDACTED]
[REDACTED] State Dep't Decl. ¶ 4 (App. 153; Supp. App. 166). Here, as in *Kiyemba II*, the district court's order requiring pre-transfer notice "interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." 561 F.3d at 516. It injects uncertainty into these sensitive diplomatic negotiations, precludes immediate implementation of any arrangement, and risks long-term harm to the State Department's ability to engage credibly with an ally whose support "has been a significant benefit to the United States in combatting terrorism." Decl. ¶ 4 (App. 153; Supp. App. 166).

The district court acted on the belief that the Executive Branch lacked "positive legal authority" to transfer petitioner to any other sovereign. But as we explain below, that ruling rests on extradition principles that the Supreme Court and this Court have declared inapposite in this context, and it flouts the principles reaffirmed in *Munaf* and *Kiyemba II*. Petitioner is not a domestic prisoner; he was not captured in U.S. territory, nor is he being extradited from U.S. territory. He is a wartime detainee captured on foreign battlefield who is being held in military custody

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in Iraq. The Executive Branch has concluded that [REDACTED] has a legitimate sovereign interest in [REDACTED] petitioner: [REDACTED] is entitled to prevent [REDACTED] like petitioner from continuing to support ISIL, as well as to exercise its sovereign prerogative to assess whether prosecution, detention, rehabilitation, or other steps under its laws are appropriate. The Executive Branch has also decided that relinquishing petitioner to [REDACTED] custody would advance U.S. military and foreign policy, consistent with our “ongoing bilateral cooperation with [REDACTED],” Decl. ¶ 4 (App. 153; Supp. App. 166), and our partnership with [REDACTED] in the global effort to defeat ISIL. Consistent with *Munaf* and *Kiyemba II*, the Executive Branch is entitled to vindicate these determinations without judicial interference.

STATEMENT OF JURISDICTION

Petitioner is a dual citizen of the United States and Saudi Arabia who is currently being detained by the U.S. military in Iraq. Petitioner challenged his detention in district court, invoking its jurisdiction under 28 U.S.C. §§ 1331, 1651, 2201-2202, and 2241. App. 13. In the context of that habeas action, petitioner sought a preliminary injunction barring the Government from transferring him to the custody of any foreign sovereign while his habeas petition is pending. On January 23, 2018, the district court entered an order precluding the Government from transferring petitioner to any other country absent seventy-two hours’ advance notice. App. 42. The Government timely appealed from that order on February 2, 2018. App. 86; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

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STATEMENT OF THE ISSUE

Petitioner is a dual citizen of Saudi Arabia and the United States. The United States has detained him based on evidence, including petitioner's admissions, that petitioner was part of or substantially supported ISIL. Petitioner filed a habeas action in district court, and the Government informed the district court (initially *ex parte*) that it sought to relinquish custody of petitioner and transfer him to [REDACTED].

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.

STATEMENT OF THE CASE

A. Petitioner's Background, ISIL Membership, and Capture.

1. Petitioner, John Doe,¹ is a [REDACTED]-year-old dual citizen of the United States and Saudi Arabia. Supp. App. 82. Petitioner was born to Saudi parents in [REDACTED], and became a Saudi citizen at 10 years old. *Ibid.*; Supp. App. 122. During petitioner's youth, his father taught at [REDACTED]. Supp. App. 122. Between approximately 1999 and 2004, petitioner returned to the United States to attend college in Louisiana. App. 230; Supp. App. 113.

¹ The district court has permitted petitioner to proceed with this action under a pseudonym. App. 27.

In May 2006, petitioner left the United States for Saudi Arabia. App. 231. Between 2006 and approximately 2014, petitioner lived in [REDACTED]. Supp. App. 113. While in [REDACTED], petitioner owned several businesses, married, and fathered a daughter. App. 230; Supp. App. 113. Petitioner reports that his wife now lives in Bahrain. App. 268. Other members of petitioner's extended family continue to live in Saudi Arabia. App. 270. Petitioner returned to the United States for two short stints in 2014. App. 231-32. He has not returned to the United States since December 2014. App. 232.

2. As detailed in the Government's factual return, Syrian Democratic Forces captured petitioner in mid-September 2017 at a checkpoint on an active battlefield in territory then controlled by the Islamic State of Iraq and the Levant ("ISIL"). App. 162-63, 259. All territory within two days' walk of the checkpoint was controlled by ISIL, which had used the nearby desert area for fighter training camps since 2014. App. 192, 245. Petitioner carried \$4,210 in U.S. currency and a GPS device, items that are generally forbidden to civilians in ISIL-controlled areas, and wore clothing atypical for the region. App. 191-92, 245. He also carried a thumb drive containing spreadsheets allotting money and vehicles to other ISIL members and files explaining how to make bombs, how to use different types of weapons, and how to interrogate captives, as well as other manuals for ISIL fighters. App. 199-200, 246-47. Petitioner declared to Syrian Democratic Forces, "I am daesh," an ISIL alias. App. 192, 245. Petitioner also informed them that he was a U.S. citizen and asked to speak to U.S.

personnel. App. 192, 245. Syrian Democratic Forces transported petitioner to U.S. military personnel in the region, who are now detaining petitioner at a U.S. military facility in Iraq. App. 161.

Petitioner joined ISIL in July 2014. App. 162. He acknowledged attending an ISIL Sharia training site, where he swore an oath of allegiance to Abu Hafs al-Maghrebi, who acted on behalf of ISIL's leader, Abu Bakr al-Baghdadi. App. 195, 262. Petitioner served as a fighter in ISIL's Zaqawi Brigade, which was responsible for guarding the front lines, where he procured fuel for ISIL vehicles and distributed money to the head of the brigade for expenses. App. 195, 262-63. Petitioner also served as a guard to an ISIL oil field compound and as a member of ISIL's heavy equipment section, where he monitored civilians working on heavy equipment. App. 195-96, 263. He continued to work in support of ISIL until air strikes and other military offensives against ISIL forced him to flee. The United States has also determined that an internal ISIL document that the Government independently acquired lists petitioner as a "fighter," identifying him by citizenship, country of birth, birthdate, telephone number, and other biographical details. App. 190-91, 230-31.

Based on these and other facts, the Department of Defense has concluded that Petitioner is an enemy combatant. App. 161.

B. The U.S.-[REDACTED] Alliance in the Effort to Defeat ISIL.

In September 2014, then-President Obama announced a "comprehensive and sustained counterterrorism strategy" "to degrade and ultimately destroy the terrorist

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group known as ISIL.” President Barack Obama, *Address to the Nation on United States Strategy To Combat the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization* 1-2 (Sept. 10, 2014), <https://go.usa.gov/xNEs3>. The United States also announced the formation of a broad international coalition to defeat ISIL, recognizing that the group “presents a global terrorist threat which has recruited thousands of foreign fighters to Iraq and Syria from across the globe and leveraged technology to spread its violent extremist ideology and to incite terrorist acts.” U.S. Dep’t of State, *The Global Coalition to Defeat ISIS* (Sept. 10, 2014), <https://go.usa.gov/xn6AB>.

[REDACTED] is [REDACTED] in the international coalition to defeat ISIL. [REDACTED]

[REDACTED]

[REDACTED]. ISIL has conducted attacks around the world, including numerous attacks in [REDACTED] sovereign territory. *See, e.g.,* [REDACTED], *supra*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED] has conducted joint military efforts with the United States in an effort to defeat ISIL. *See, e.g.,* [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]; U.S. Dep't of
Defense, [REDACTED]
[REDACTED]

One of the primary efforts of the global campaign is to prevent the flow of foreign fighters to ISIL. *The Global Coalition to Defeat ISIS, supra*. In support of this effort, [REDACTED]

[REDACTED], *supra*. [REDACTED]
[REDACTED]

[REDACTED] *Ibid.*

C. Petitioner's Habeas Action and Request for an Injunction Prohibiting Transfer.

In October 2017, the American Civil Liberties Union Foundation, acting as next friend, filed an action for habeas corpus on behalf of petitioner to challenge his detention. The district court subsequently ordered the Department of Defense to permit counsel access to petitioner and to refrain from transferring petitioner until counsel's representation of petitioner could be confirmed. App. 39.

Petitioner confirmed that he wanted the Foundation's representation and sought a preliminary injunction to prevent any involuntary transfer to another sovereign country while his habeas action remains pending. The sole justification

petitioner offered for precluding transfer is “to prevent the United States from pretermittting this habeas action while the Court considers the lawfulness of his detention.” Mot. 3 n.4 (ECF 32). Petitioner disavowed any claim based on allegations that he might be tortured in the receiving country or that the receiving country might detain or prosecute him. *Ibid.* (explaining that petitioner “makes no claims requiring the Court to examine conditions in any receiving country”); *see also* App. 54 (stating that petitioner seeks release that would “allow to him to go free”).

The Government opposed petitioner’s requested injunctive relief. The Government pointed out that petitioner had identified no legal authority for a preliminary injunction requiring the Government to *retain* custody of him pending resolution of his habeas claim, given that the ordinary remedy of habeas corpus is *release* from custody. The Supreme Court in *Munaf* held that the judiciary should not “second-guess” the Executive’s determination that transfer to another sovereign is an appropriate disposition of an individual captured and detained overseas, as the Government explained. *Munaf v. Geren*, 553 U.S. 674, 699-700, 702 (2008). In *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (*Kiyemba II*), this Court, applying *Munaf*, refused to bar (or require advance notice of) the transfer of Guantanamo detainees who feared that they would face prosecution or torture once they were transferred, even if doing so would “protect the court’s jurisdiction over [the petitioner’s] underlying claims of unlawful detention.” *Id.* at 513 n.3. The Government argued that those cases precluded the district court from entering injunctive relief.

The Government further explained that an injunction prohibiting transfer would impair the Executive's ability to conduct military operations abroad, by limiting the Executive's ability to relinquish custody of petitioner when the Executive deems such relinquishment to be appropriate. Supported by a then-classified *ex parte* declaration from the State Department, the Government explained that an injunction barring transfer would impair ongoing diplomatic discussions with [REDACTED] about relinquishing petitioner to [REDACTED] custody.³ Ex Parte App. 1-8; Supp. App. 165-67.

The State Department explained that those discussions are being considered "at the highest levels" of the [REDACTED]
[REDACTED]. Decl. ¶ 3 (App. 153; Supp. App. 166).

The State Department urged that enjoining transfer would compromise the sensitive diplomatic process with its [REDACTED] counterparts by creating uncertainty about "whether or not it will be possible to implement the transfer arrangements once they are concluded," frustrating [REDACTED] "likely * * * strong expectation of prompt implementation" of any transfer. Decl. ¶ 4 (App. 153; Supp. App. 166). An

³ Petitioner's counsel was provided a sealed, redacted version of the classified, *ex parte* State Department declaration. Supp. App. 1-8. The sealed, redacted version omitted, among other details, the specific country ([REDACTED]) to which the Government is considering transferring him. The identity of the country has since been declassified (although that information remains sealed in light of the sensitivity of the ongoing sovereign-to-sovereign negotiations), and a version of the declaration without the country name redacted was filed under seal in the district court and shared with petitioner's counsel. See Supp. App. 162-67. The Government would be amenable to making public the version of the declaration that it has shared with opposing counsel once any transfer to [REDACTED] is complete.

injunction would also risk harm to the United States’ “credibility” and “the diplomatic process” by undermining the State Department’s “ability to make reliable representations and commitments when engaging directly with [REDACTED] on a matter of such sensitivity.” *Ibid.* The declaration also pointed out that an injunction could also “damage ongoing bilateral cooperation” with the [REDACTED] government, “including on future detainee transfers,” and that the ability to safely transfer detainees to [REDACTED] “has been a significant benefit to the United States in combatting terrorism.” *Ibid.*

D. The District Court’s Order.

The district court declined petitioner’s request to enter an order enjoining transfer, stating that “the Defense Department has not yet decided” to transfer petitioner. Op. 5-6 (App. 46-47). Instead, the district court entered an order precluding the Government from transferring petitioner to any foreign sovereign without seventy-two hours’ advance notice, “at which time Petitioner may file an emergency motion contesting his transfer.” *Id.* at 6, 8 (App. 47, 49).

The district court first ruled that petitioner had demonstrated a likelihood of success on the merits of his claim that “there should be some restriction on the Defense Department’s ability to transfer him during the pendency of this litigation.” Op. 4 (App. 45). The court held that the Government had failed to present “positive legal authority” to transfer petitioner. *Ibid.* The court found *Munaf* inapplicable because “this case does not implicate another country’s ‘sovereign right’ to punish

offenses within its borders.” *Id.* at 5 (App. 46). It deemed *Kiyemba II* inapposite because that case “involved non-citizens who * * * could not be released into the United States,” and who opposed transfer based on a fear of further detention, prosecution, or torture in the recipient country. *See ibid.*

The district court also ruled that the balance of harms and the public interest favor petitioner. The court proceeded on the premise that petitioner enjoys a right “to challenge his detention without fear of his transfer to another country,” and that transfer would irreparably harm petitioner because he “would no longer be in U.S. custody, and will likely be unable to pursue his habeas petition” if the United States completed a transfer. Op. 6-7 (App. 47-48). The court concluded that this alleged harm outweighed the Government’s “right to conduct diplomacy and foreign relations as it sees fit,” at least “[a]bsent an articulated legal reason for the transfer, such as an extradition request or an allegation of criminal conduct committed in the receiving country” and “a showing that the government—for international relations reasons or otherwise—needs to transfer Petitioner *now*.” *Id.* at 7-8 (App. 48-49). The court further stated that its order did “not prevent[]” the Government “from continuing negotiations or discussions regarding the transfer, or from obtaining further information that might support a transfer.” *Id.* at 7 (App. 48).

SUMMARY OF ARGUMENT

The district court abused its discretion by entering a broad order prohibiting any transfer of petitioner without advance notice for the express purpose of

permitting the court to pass on the validity of any transfer. The Executive Branch has determined that [REDACTED] has a legitimate sovereign interest in [REDACTED] petitioner, and that allowing [REDACTED] to do so would advance the military and foreign policy interests of the United States. The United States and [REDACTED] are thus actively discussing possible transfer of petitioner to [REDACTED]. The district court's order significantly impedes the ability of the United States to negotiate that transfer and contravenes precedent of the Supreme Court and this Court.

1. The Supreme Court's decision in *Munaf v. Geren*, 553 U.S. 674 (2008), and this Court's decision in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (*Kiyemba II*), support the Executive Branch's authority to transfer petitioner without judicial interference. In *Munaf*, the Supreme Court explained that U.S. citizens who had voluntarily traveled abroad and committed crimes on foreign soil may not use habeas as a vehicle to thwart a foreign sovereign's prerogative to prosecute them. 553 U.S. at 697. In *Kiyemba II*, this Court vacated an order requiring the Government to provide advance notice of a transfer that the district court lacked authority to prohibit. 561 F.3d at 516. Under the circumstances of this case, those decisions preclude the order the district court entered here.

As we explain below, there are equally compelling reasons to conclude that petitioner has voluntarily subjected himself to [REDACTED] jurisdiction. [REDACTED] [REDACTED] who has spent much of his life outside the United States. He voluntarily traveled to Syria to join ISIL, a terrorist

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organization that has murdered scores of [REDACTED], including during his time as an ISIL member. Petitioner is detained by the U.S. military because he was part of or substantially supported ISIL. As the Department of State informed the district court, the government of [REDACTED] Decl. ¶ 4 (App. 153; Supp. App. 166). [REDACTED] is an ally of the United States in the war against ISIL, and the United States has a strong interest in maintaining “ongoing bilateral cooperation with [REDACTED], including on future detainee transfers.” *Ibid.* [REDACTED] for appropriate next steps consistent with [REDACTED] law “has been a significant benefit to the United States in combatting terrorism.” *Ibid.*

The district court ruled that petitioner had shown a likelihood of success on the merits, on the theory that the Government had not provided “positive legal authority” to transfer petitioner. Op. 4 (App. 45). The court located this requirement in the Supreme Court’s decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), a case about extraditing U.S. citizens from the territorial United States, and this Court’s decision on remand from *Munaf* in *Omar v. McHugh*, 646 F.3d 13 (D.C. Cir. 2011). But principles governing the extradition of U.S. citizens *from U.S. territory* do not apply to a wartime detainee who is captured abroad on an active battlefield and held in military custody adjacent to that battlefield, as *Munaf* explained. In *Omar*, this Court recognized that “the Executive Branch had the affirmative authority to

transfer” the detainees in *Munaf*. 646 F.3d at 24. And as we explain below, neither *Valentine* nor *Omar* undercuts the force of *Munaf* and *Kiyemba II* here.

2. In addition to miscalculating petitioner’s likelihood of success, the district court erred in deciding that advance notice was warranted to protect petitioner’s “right to challenge his detention without fear of his transfer to another country.” Op. 7 (App. 48). Petitioner’s habeas action challenges only whether he is properly being detained by the U.S. military; he does not raise any claim of collateral consequences or fear of mistreatment or prosecution after release from U.S. custody. Depriving petitioner of his asserted right to *remain* in U.S. custody, for the purpose of challenging the legality of that very custody, does not constitute irreparable injury. Mere inability to litigate a habeas action is not irreparable harm where, as here, prevailing in the habeas action would provide the same remedy the contemplated transfer would furnish—release from the custody of the United States.

3. The district court also improperly discounted the harm that an order prohibiting transfer without advance notice inflicts on the Government. The notice requirement (and the attendant possibility of an eleventh-hour injunction scuttling an agreed-upon transfer) make it significantly more difficult for the Government to actually conclude a transfer arrangement; at best, the order renders any such arrangements contingent. The order contemplates that if petitioner successfully challenges his transfer, the Government must continue to detain petitioner until the district court disposes of his habeas case—even if the Executive decides that foreign

policy and military objectives warrant immediate transfer. As a result, the order inflicts the same unwarranted intrusion into the decision-making constitutionally reserved to the political branches as an order prohibiting transfer outright. *See Kiyemba II*, 561 F.3d at 515. Petitioner's interest in prolonging this litigation to avoid mootness cannot outweigh the Government's significant interest in conducting diplomacy and waging war free from undue judicial interference.

4. Finally, the public interest favors allowing the Executive Branch, which is constitutionally vested with the authority both to conduct military functions (such as detaining enemy combatants during hostilities) and engage in foreign relations, to act without undue intrusion within its constitutional sphere of responsibility. Judicial inquiry or oversight into executive decisions regarding release or transfer of wartime detainees impairs the Executive Branch's ability to carry out these essential functions. It is in the interests of all, including the public and petitioner, to ensure that wartime detainees remain in U.S. custody no longer than is necessary.

STANDARD OF REVIEW

The district court's determination to grant petitioner's motion for preliminary injunctive relief is reviewed for abuse of discretion, but the district court's legal conclusions in granting such relief are subject to *de novo* review. *See Munaf v. Geren*, 553 U.S. 674, 691-92 (2008) (reviewing *de novo* the legal question of a district court's authority to order habeas petitioners released without transfer to Iraqi government); *Kiyemba v. Obama*, 561 F.3d 509, 513 (D.C. Cir. 2009) (*Kiyemba II*) (reviewing *de novo* the

legal question whether a district court may require the Government to provide advance notice before transferring habeas petitioners to a foreign sovereign).

ARGUMENT

THE DISTRICT COURT ERRED BY ENJOINING THE GOVERNMENT FROM TRANSFERRING PETITIONER TO ANY COUNTRY WITHOUT ADVANCE NOTICE

Preliminary injunctive relief “is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *accord Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). To prevail in a request for a preliminary injunction, a movant “must ‘demonstrate (1) a substantial likelihood of success on the merits, (2) that [he] would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.’” *See Katz v. Georgetown University*, 246 F.3d 685, 687-88 (D.C. Cir. 2001) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)).

The movant’s likelihood of success on the merits is a “free-standing requirement for a preliminary injunction.” *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011). “If the moving party can show no likelihood of success on the merits, then preliminary relief is obviously improper and the appellant is entitled to reversal of the order as a matter of law.” *Kiyemba v. Obama*, 561 F.3d 509, 513 (D.C. Cir. 2009) (*Kiyemba II*). The irreparable harm that must be shown to justify a preliminary

injunction “must be both certain and great; it must be actual and not theoretical.”

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

A. Petitioner Failed To Show A Likelihood Of Success On The Merits.

The United States and [REDACTED] are actively discussing a possible transfer of petitioner from U.S. custody to [REDACTED] authorities. These negotiations arose out of the Executive Branch’s determination that [REDACTED] has a legitimate sovereign interest in [REDACTED] petitioner, and that allowing [REDACTED] to do so would advance the military and foreign policy interests of the United States.

The district court’s order prohibiting transfer to any country—including [REDACTED] [REDACTED]—without seventy-two hours’ advance notice substantially interferes with these diplomatic efforts. The Supreme Court and this Court have explained in analogous circumstances that the Executive Branch is entitled to transfer wartime detainees like petitioner to interested nations like [REDACTED] without judicial interference. Those decisions underscore the district court’s error in issuing the injunction here.

1. The Executive’s prerogative to transfer petitioner to [REDACTED] in the particular circumstances of this case follows from the Supreme Court’s decision in *Munaf v. Geren*, 553 U.S. 674 (2008), and this Court’s decision in *Kiyemba II*, 561 F.3d 509 (D.C. Cir. 2009).

a. In *Munaf*, the Supreme Court considered habeas petitions filed on behalf of two U.S. citizens detained by U.S. military forces in Iraq, who challenged the legality

of their detention and sought to enjoin their transfer to the Iraqi government for criminal prosecution. 553 U.S. at 689. The unanimous Court held that, because it was “clear * * * that the power of the writ ought not to be exercised,” the detainees’ request for an injunction “should have been promptly dismissed.” *Id.* at 692.

First, the Court ruled that habeas could not be used to thwart Iraq’s legitimate sovereign interest in prosecuting crimes committed on Iraqi soil by prohibiting the United States from relinquishing the detainees to Iraqi custody. *Munaf*, 553 U.S. at 692-700; *see also id.* at 704-05. “Habeas is at its core a remedy for unlawful executive detention,” the Court explained, and “[t]he typical remedy is, of course, release.” *Id.* at 693. Habeas “does not require the United States to shelter * * * fugitives from the criminal justice system of the sovereign with authority to prosecute them” and thereby “defeat precisely that sovereign authority.” *Id.* at 705. This is because “the same principles of comity and respect for foreign sovereigns that preclude judicial scrutiny of foreign convictions necessarily render invalid attempts to shield citizens from foreign prosecution in order to preempt such nonreviewable adjudications.” *Id.* at 698-99. The fact that “the detainees were captured by our Armed Forces for engaging in serious hostile acts against an ally in what the Government refers to as ‘an active theater of combat’” further supported this holding. *Id.* at 699-700. A contrary conclusion, the Court explained, would raise “concerns about unwarranted judicial intrusion into the Executive’s ability to conduct military operations abroad,” in violation of separation-of-powers principles. *Id.* at 699-702.

Second, the Court rejected the notion that it should intervene despite claims by the detainees that they would be abused in Iraqi prisons. The Court reasoned that “[t]he Judiciary is not suited to second-guess” the U.S. Government’s contrary judgment. *Munaf*, 553 U.S. at 700-03. Accepting the detainees’ arguments would “undermine the Government’s ability to speak with one voice” on “sensitive foreign policy issues.” *Id.* at 702; *see also id.* at 692. That the detainees’ petitions arose “in the context of ongoing military operations conducted by American forces overseas” reinforced the need “to proceed with * * * circumspection.” *Id.* at 689.

b. This Court elaborated on *Munaf* in *Kiyemba II*. There, this Court reviewed an order requiring the Government to provide advance notice to the district court and to counsel thirty days before transferring petitioners detained at Guantanamo Bay to any country. 561 F.3d at 515. Although the detainees were aliens, this Court assumed that they enjoyed “the same constitutional rights with respect to their proposed transfer as * * * U.S. citizens.” *Id.* at 514 n.4. The Court explained that habeas does not “bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws,” even if the court does not know the identity of the other sovereign or whether it may detain or prosecute the detainee. *See id.* at 516. “Judicial inquiry into a recipient country’s basis or procedures for prosecuting or detaining a transferee from Guantanamo would implicate not only norms of international comity,” the Court reasoned, “but also the same separation of powers principles that preclude the courts

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from second-guessing the Executive's assessment of the likelihood a detainee will be tortured by a foreign sovereign." *Id.* at 515. The same concerns preclude a court from imposing "the requirement that the Government provide pre-transfer notice," the Court explained, for "pre-transfer notice interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers." *Ibid.*

2. a. Under the circumstances of the transfer contemplated here, *Munaf* and *Kiyemba II* foreclose the preliminary injunction entered by the district court. The Executive Branch has determined that [REDACTED] has a legitimate sovereign interest in [REDACTED] petitioner. As explained above, [REDACTED]

[REDACTED]. During the two-and-a-half years that petitioner was part of or substantially supported ISIL before his capture in Syria, the terrorist group targeted [REDACTED]

[REDACTED], *supra*. [REDACTED]

[REDACTED], *supra*.

[REDACTED] is also an important U.S. ally in combatting terrorism perpetrated by multiple groups, including ISIL. [REDACTED] is [REDACTED]

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[REDACTED] in the global coalition to defeat ISIL. [REDACTED], *supra*. [REDACTED]

[REDACTED]

[REDACTED], *supra*.

As the Department of State has explained, the government of [REDACTED]

[REDACTED]

[REDACTED] Decl. ¶ 4 (App. 153; Supp. App. 166). Accordingly, the United States has previously relinquished custody to [REDACTED] of [REDACTED] detained as enemy combatants. U.S. Dep't of State, [REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], *supra*. [REDACTED] legitimate interest

⁴ [REDACTED]

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in petitioner [REDACTED] is clear in this case notwithstanding petitioner's dual U.S. citizenship, because petitioner's [REDACTED]

[REDACTED].

These facts fully support the Executive Branch's conclusion that [REDACTED] has a legitimate sovereign interest in bringing petitioner into [REDACTED] custody. Petitioner's activities with ISIL implicate [REDACTED] national security, law enforcement, international relations, and foreign policy interests. Indeed, customary international law generally recognizes a state's right to exercise prescriptive jurisdiction over an individual with a "genuine connection" to the state, even when the individual is located outside the state's territory. Restatement (Fourth) of Foreign Relations Law of the United States—Jurisdiction § 211 (Am. Law Inst. Draft No. 2, 2016) (Restatement (Fourth)). [REDACTED]

[REDACTED]

[REDACTED] An individual may also bring himself within a state's jurisdiction through his conduct, such as by committing acts against a state's nationals. *Id.* § 211 cmt. c; *see also id.* § 215 & cmt. a (noting that states "increasingly have exercised" this form of jurisdiction, "particularly with respect to terrorist offenses"). He also may bring himself within a state's jurisdiction by committing acts outside that state's territory, such as conduct that is "directed against the security of the state or against a limited class of other fundamental state interests,"

including “certain acts of terrorism.” *Id.* § 216 & cmt. a. [REDACTED]

[REDACTED]

b. In addition to determining that [REDACTED] has a legitimate sovereign interest in petitioner, the Executive Branch has also decided that transferring petitioner to [REDACTED] custody would advance the military and foreign policy interests of the United States. ISIL is one of the most dangerous terrorist organizations in the world, responsible for countless murders and violent attacks against innocent civilians around the globe. The United States cannot defeat ISIL alone: that effort requires support from international partners, especially nations in the regions where ISIL is concentrated. The [REDACTED] government’s participation in [REDACTED] [REDACTED] ISIL in Syria and Iraq furthers this shared goal. [REDACTED], *supra*. The [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Ibid.* The United States also benefits from maintaining “ongoing bilateral cooperation with [REDACTED], including on future detainee transfers.” State Dep’t Decl. ¶ 4 (App. 153; Supp. App. 166). [REDACTED] “has been a significant benefit to the United States in combatting terrorism.” *Ibid.*

Accordingly, the Executive Branch is actively pursuing the possibility of relinquishing petitioner to [REDACTED], which in turn [REDACTED]

[REDACTED] State Dep’t Decl. ¶ 3 (App. 153; Supp. App. 166). International law contemplates that states will resolve such matters

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diplomatically; for example, international law “recognizes no hierarchy of bases of prescriptive jurisdiction and contains no rules for assigning priority to competing jurisdictional claims.” *See* Restatement (Fourth) § 211 cmt. d; *cf. Baker v. Carr*, 369 U.S. 186, 213-14 (1962) (explaining that the need for judicial deference to Executive decision-making is most acute when a case “directly implicates” the separation of powers and there are no “clearly definable criteria for decision”). Indeed, when [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. a. The district court erred in deeming *Munaf* inapplicable on the theory that “this case does not implicate another country’s ‘sovereign right’ to punish offenses within its borders.” Op. 5 (App. 46). But international law recognizes multiple bases for a country to exercise jurisdiction. Although territorial control is one basis, [REDACTED] and certain conduct outside a sovereign’s borders provide others. *See supra* pp. 23-24. [REDACTED] “sovereign right” over petitioner carries the same weight—and is implicated equally—whether or not the government of [REDACTED] initiates a criminal investigation of petitioner before receiving him, or chooses to announce publicly to U.S. courts whether it intends to prosecute petitioner, divert him to rehabilitation, or take other measures to serve its sovereign interests.

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[REDACTED] sovereign interest in taking custody of this petitioner is no less weighty or legitimate than Iraq's interest in the petitioners in *Munaf*. Petitioner voluntarily joined ISIL, a terrorist group that is at war with [REDACTED] and that engaged (including during his time with the group) in attacks against [REDACTED] [REDACTED]. See *supra* pp. 7, 21 (describing attacks) and pp. 23-25 (discussing international law); cf. *Munaf*, 553 U.S. at 694 (explaining that "Iraq has a sovereign right to prosecute" the petitioners "for crimes committed on its soil"). Petitioner joined ISIL after voluntarily traveling to Syria, a country that is a primary front for the armed conflict against ISIL in which [REDACTED] and the United States are allies. See *supra* pp. 7-8 (describing joint U.S.-[REDACTED] airstrikes in Syria); cf. *Munaf*, 553 U.S. at 694 (explaining that petitioners "voluntarily traveled to Iraq"). He is detained in Iraq, another major site of the conflict against ISIL, because he voluntarily invoked his U.S. citizenship and asked to speak to U.S. forces, who determined that the facility where petitioner is sheltered was the most appropriate place to transport petitioner, given the need to remove him from the battlefield without placing U.S. personnel at undue risk in the process. Cf. Geneva Convention Relative to the Treatment of Prisoners of War art. 19, Aug. 12, 1949, 6 U.S.T 3316 (requiring evacuation of prisoners to "an area far enough from the combat zone for them to be out of danger").

[REDACTED]

[REDACTED] 553 U.S. at 681 [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 553 U.S. at 681 [REDACTED]

[REDACTED]

[REDACTED] State

Dep't Decl. ¶ 4 (App. 153; Supp. App. 166), [REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶ 3 (App. 153; Supp. App. 166); *cf. Munaf*, 553

U.S. at 694 (explaining that petitioners had been prosecuted or referred for

prosecution by Iraqi authorities). [REDACTED]

[REDACTED]

[REDACTED]. *See supra* p. 22; *cf. Munaf*, 553 U.S. at 697

(explaining that Iraq had “undoubted authority” to prosecute the detainees).

Because the United States has determined that [REDACTED] has a legitimate sovereign interest in [REDACTED] petitioner, and because that interest is directly analogous to the sovereign territorial interest of Iraq in receiving the *Munaf* detainees, it would be inappropriate for the judiciary to second-guess the Government's determination and bar petitioner's transfer to [REDACTED] absent advance judicial notice and review, especially in the context of ongoing military operations overseas. *See Munaf*, 553 U.S. at 697 (explaining that “habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with

undoubted authority to prosecute them”); *ibid.* (rejecting claim that petitioners could seek “release in a form that would avoid transfer”). That is all the more true here, where petitioner’s [REDACTED]

[REDACTED].

Further, the separation-of-powers principles underlying *Munaf* are broader than the district court acknowledged. The Supreme Court reaffirmed in *Munaf* that the courts are “not suited to second-guess” political determinations on “sensitive foreign policy issues,” 553 U.S. at 702, and that “[o]ur constitutional framework” likewise requires that the courts be “scrupulous not to interfere with legitimate [military] matters.” *Id.* at 700. The Executive has the authority to assess and seek to honor [REDACTED] interest in petitioner and to effectuate that decision by relinquishing petitioner to [REDACTED] custody. The Executive’s judgment on that score is equally committed to its discretion. *See id.* at 700-01 (“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.”). An order barring transfer absent advance notice and judicial review equally trenches on Executive prerogatives in diplomatic relations and military operations abroad. *See id.* at 700-02; *Kiyemba II*, 561 F.3d at 516 (holding that a “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”).

b. The district court also erred in distinguishing *Kiyemba II* on the ground that “release” in that case was impossible because the non-citizen detainees “could not be released into the United States.” Op. 5 (App. 46). But the same concern exists here. Petitioner is detained at a U.S. military facility in Iraq because he was part of or substantially supported ISIL, whose terrorism inside Iraq’s sovereign borders poses a grave threat to Iraq’s national security and to security in the region. As 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. *See Munaf*, 553 U.S. at 704 (recognizing similar concerns). Even then, nothing would prevent Iraq from detaining petitioner and transferring him to [REDACTED]. Nor does petitioner’s U.S. citizenship affect the analysis: even assuming petitioner enjoys a citizenship-based right to return to the United States, as he has alleged in passing, he has never asserted a right to require the U.S. military (or any other U.S. instrumentality) to bring him to the United States.

4. The district court also erred in ruling that petitioner had shown a likelihood of success on the merits on the theory that the Government must provide “positive legal authority” to transfer petitioner. Op. 4 (App. 45). The court located this requirement in the Supreme Court’s decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936), a case about extraditing U.S. citizens from the territorial United States, and this Court’s decision on remand from *Munaf* in *Omar v. McHugh*, 646 F.3d 13 (D.C. Cir. 2011). But *Munaf* and *Kiyemba II* show that the Government is

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authorized to transfer detainees like petitioner to interested nations like [REDACTED] without judicial interference. Nothing about *Valentine* or *Omar* undercuts that.

First, principles governing extradition of U.S. citizens *from U.S. territory* do not apply to a wartime detainee who is captured abroad on an active battlefield and held in military custody adjacent to that battlefield. The Supreme Court in *Munaf* found *Valentine* and extradition “readily distinguishable”: *Munaf* involved “the transfer” of “an individual captured and already detained” abroad, not an individual within the United States. 553 U.S. at 704. Petitioner has not set foot in the United States since 2014 (and then only for a brief time); he voluntarily traveled from a foreign country to Turkey and then to Syria, where Syrian Democratic Forces captured him and transferred him to U.S. custody. Though his own voluntary actions, petitioner long ago removed himself from the “territorial jurisdiction * * * of the United States.” *Id.* at 704. Principles governing extradition of domestic prisoners do not apply.

Nor does *Omar*, issued on remand from the Supreme Court in *Munaf*, alter this analysis. Like the Supreme Court in *Munaf*, this Court explained that rejecting Omar’s arguments did not mean “that the Executive Branch may detain or transfer Americans or individuals *in U.S. territory* at will, without any judicial review of the positive legal authority for the detention or transfer.” *Omar*, 646 F.3d at 24 (emphasis added). This Court recognized that *Munaf* “determined that the Executive Branch had the affirmative authority to transfer” the detainees at issue. *Ibid.* (citing *Munaf*, 553 U.S. at 704). The Supreme Court explained that the detainees were “subject to the territorial

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jurisdiction” of Iraq because they “voluntarily traveled to Iraq and are being held there.” *Munaf*, 553 U.S. at 704. The Supreme Court accordingly rejected assertions that “the Executive lacks the discretion to transfer a citizen absent a treaty or statute.” *Id.* at 705. There are equally compelling reasons here to conclude that petitioner has voluntarily subjected himself to [REDACTED] jurisdiction.

5. Because petitioner’s transfer to [REDACTED] is permitted under the principles reflected in *Munaf* and *Kiyemba II*, the district court lacks authority to review or ultimately bar his transfer. And, as this Court has recognized, if a court lacks authority to enjoin transfer, then it likewise cannot require advance notice of such a transfer. *See Kiyemba II*, 561 F.3d at 516 (vacating advance-notice-of-transfer order where, pursuant to *Munaf*, court could not enjoin underlying transfer). The district court’s order should therefore be vacated. At a minimum, the order should be narrowed to exempt any country that the Executive Branch determines has a legitimate sovereign interest, including [REDACTED].⁵

B. Petitioner Failed To Show Irreparable Injury.

1. The district court concluded that petitioner would be irreparably injured if he were transferred because he “would no longer be in U.S. custody, and will likely be

⁵ A transfer to the custody of the [REDACTED] also would be consistent with *Munaf*. As discussed above, petitioner voluntarily travelled to a war zone [REDACTED]

[REDACTED]

unable to pursue his habeas petition.” Op. 6 (App. 47). But even if petitioner were to prevail on the merits of his habeas challenge, the remedy to which he would ordinarily be entitled is release from U.S. custody. *See, e.g., Munaf*, 553 U.S. at 693 (“Habeas is at its core a remedy for unlawful executive detention,” and “[t]he typical remedy for such detention is, of course, release.”); *id.* at 697 (rejecting suggestion that detainees may use habeas as a vehicle to seek “release in a form that would avoid transfer” to another country); *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“[T]he essence of habeas corpus is an attack by a person in custody upon the legality of *that* custody.”) (emphasis added). Habeas does not guarantee petitioner a right to *remain* in custody, nor does it encompass a right to have the United States shelter petitioner from another government. Accordingly, petitioner cannot support a claim of irreparable injury arising from a transfer that would release him from U.S. custody.

The district court recognized that if petitioner were transferred, he “would no longer be in U.S. custody,” and that release from U.S. custody generally renders a habeas action moot. Op. 6 (App. 47) (citing *Qassim v. Bush*, 466 F.3d 1073, 1076-77 (D.C. Cir. 2006) (per curiam)). In *Qassim*, this Court held that Guantanamo detainees whom the United States transferred to Albania had been “released,” mooted their habeas claims. 466 F.3d at 1076-77. Their habeas claims were moot because their release from U.S. custody provided them all the relief to which they were entitled in habeas. *Ibid.*; *see also Gul v. Obama*, 652 F.3d 12, 22 (D.C. Cir. 2011) (concluding that transfer of Guantanamo detainees mooted the habeas petitions because detainees

failed to demonstrate any cognizable collateral consequence to warrant relief after release). Similarly here, petitioner's release from U.S. custody and transfer to [REDACTED], would provide him with all the relief to which he would be entitled under habeas, especially where he has raised no claim based on fear of prosecution or torture in that (or any other) country. Petitioner cannot be irreparably injured by the Government's refusal to maintain the very custody he alleges is unlawful.

Further, there would be no purpose in prohibiting petitioner's release simply so his legal challenge may be heard. A court may not artificially prolong a case or controversy by issuing an injunction that prevents the Government from rendering the petition moot by granting relief. *Cf. Franks v. Bowman Transp. Co.*, 424 U.S. 747, 754 (1976) ("Insofar as the concept of mootness defines constitutionally minimal conditions for the invocation of federal judicial power, its meaning and scope, as with all concepts of justiciability, must be derived from the fundamental policies informing the 'cases or controversies' limitation imposed by Art. III."). Indeed, the Supreme Court rejected in *Munaf* the notion that a district court could bar a transfer simply to preserve its habeas jurisdiction. 553 U.S. at 705; *accord Kiyemba II*, 561 F.3d at 513 n.3 (explaining that a detainee who argues that a court must act to protect its jurisdiction over underlying claims of unlawful detention must still "satisfy the standard for a preliminary injunction"). But that is precisely what the district court's order does.

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2. In concluding that petitioner would be irreparably harmed absent relief, the district court supposed that the Government had conceded irreparable harm. Op. 6, (App. 47) (“The Defense Department does not—because it cannot—argue that Petitioner will not be irreparably harmed absent some relief from this court.”). That is incorrect. The Government argued below that it could transfer petitioner to a country with a legitimate interest—here, [REDACTED]. And the Government explained that habeas is a remedy for release from custody, not a “device for *requiring continued custody*.” Opp’n 2, ECF 33. That argument was plainly and equally relevant to the absence of both a valid merits claim and irreparable harm. And of course, petitioner bears the burden of satisfying all of the elements for injunctive relief. As explained above, *see supra* pp. 18-31, petitioner cannot show that he is likely to succeed on the merits of his claim. That alone is sufficient to vacate the district court’s order. *See Kiyemba II*, 561 F.3d at 513 (explaining that without a likelihood of success on the merits, “preliminary relief is obviously improper”).

C. The District Court Improperly Discounted The Substantial Government Harms That Injunctive Relief Inflicts.

1. The district court barred the United States from relinquishing custody of petitioner without advance notice for the express purpose of allowing the court to approve or reject any transfer. Op. 6 (App. 47) (explaining that the order would “afford Petitioner the opportunity to contest his transfer should he decide to do so”). As explained above, judicial supervision of wartime transfers of battlefield detainees

among military allies inappropriately curtails the Executive's discretionary authority to conduct military operations abroad and impairs the Executive's ability to speak with one voice on behalf of the Nation in discussing release or transfers. *Supra* pp. 18-31.

These harms are real. High-ranking officials, [REDACTED], [REDACTED], have discussed the possibility of relinquishing U.S. custody of petitioner with their [REDACTED] counterparts, who in turn [REDACTED] [REDACTED] State Dep't Decl. ¶¶ 2-3 (App. 152-53; Supp. App. 165-66). 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," frustrating [REDACTED] [REDACTED] "likely * * * strong expectation of prompt implementation" of any transfer. *Id.* ¶ 4 (App. 153; Supp. App. 166). It also risks long-term harm to the State Department's "ability to make reliable representations and commitments when engaging directly" with foreign sovereigns on "a matter of such sensitivity." *Ibid.* The State Department's credibility plays a critical role in the success of "ongoing bilateral cooperation" with [REDACTED] "including on future detainee transfers." *Ibid.* The ability to safely transfer detainees into [REDACTED] care "has been a significant benefit to the United States in combatting terrorism." *Ibid.*

Even if the district court ultimately approves a transfer, the damage would be done. An 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. Such requirements at best delay transfers, and at worst could prevent the repatriation or release of detainees held by the Executive Branch in connection with ongoing armed conflict. Hindering an international arrangement with a foreign sovereign harms the credibility of the United States and makes it more difficult to engage in diplomatic negotiations in other areas. *See Kiyemba II*, 561 F.3d at 516. These harms weigh heavily against injunctive relief here.

2. The district court recognized “the government’s significant interest in maintaining fruitful, diplomatic relations.” Op. 7 (App. 48). It nonetheless ruled that petitioner’s “right to challenge his detention” without “fear of his transfer to another country” outweighs these interests because the order does not “prevent[] [the Defense Department] from continuing negotiations or discussions regarding the transfer, or from obtaining further information that might support a transfer.” *Ibid.*

This overlooks the reality that the notice requirement (and the attendant possibility of an eleventh-hour injunction scuttling an agreed-upon transfer) makes it significantly more difficult for the Government to actually conclude a transfer arrangement; at best, the order renders any such arrangement contingent. State Dep’t Decl. ¶ 4 (App. 153; Supp. App. 166). The order contemplates that if petitioner successfully challenges his transfer, the Government must continue to detain him until the district court disposes of his habeas case—even if the Executive decides that foreign policy and military objectives dictate otherwise and impel immediate transfer. As a result, the order inflicts the same unwarranted intrusion into the decision-making

constitutionally reserved to the political branches as an order prohibiting transfer outright. *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.”).

D. The District Court’s Order Is Contrary To The Public Interest.

Finally, the public interest favors allowing the Executive Branch, which is constitutionally vested with the authority both to conduct military functions (such as detaining enemy combatants during hostilities), and to engage in foreign relations, to act without undue intrusion within its constitutional sphere of responsibility. *See Munaf*, 553 U.S. at 699-700, 702-03; *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (“[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch.”). Judicial inquiry or oversight into executive decisions regarding release or transfer of wartime detainees impairs the Executive Branch’s ability to carry out these essential functions. *See Kiyemba II*, 561 F.3d at 520 (Kavanaugh, J., concurring) (“Given th[e] sensitivities [of confidential transfer negotiations], as well as the delays and burdens associated with obtaining judicial pre-approval of transfers and transfer agreements, it comes as no surprise that war-related transfers traditionally have occurred without judicial oversight.”). It is in the interests of all, including the public and petitioner, to ensure that such detainees remain in U.S. custody no longer than is necessary. A delay in

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transferring wartime detainees could also undermine the United States' ability to elicit cooperation of foreign governments, *see* State Dep't Decl. ¶ 4 (App. 153; Supp. App. 166), which is likewise contrary to the public interest. The district court failed to take these significant public interests into account.

CONCLUSION

For the foregoing reasons, the district court's order should be vacated and its judgment reversed. In the alternative, the order should be vacated insofar as it prohibits the Government from transferring petitioner without advance notice to the court and counsel to [REDACTED] or any other country that the Executive Branch determines has a legitimate interest in petitioner.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,629 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Sonia M. Carson

Sonia M. Carson

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Sonia M. Carson

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