

NO.

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**In the Supreme Court of the United States**

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**FAYIZ MOHAMMED AHMED AL KANDARI, ET AL.,**

*Petitioners,*

v.

**UNITED STATES OF AMERICA, ET AL.,**

*Respondents.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

In *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court overturned an attempt by Congress to amend 28 U.S.C. § 2241 to deny the detainees imprisoned at the United States Naval Base at Guantanamo Bay their right to meaningful habeas corpus hearings. The court of appeals, in a series of cases demonstrating open disdain for this Court's holding in *Boumediene*, has whittled procedural protections in these habeas hearings down to almost nothing. The court of appeals has disregarded the plain language of Fed. R. Evid. 1101(e), which unambiguously requires the courts to apply the Federal Rules of Evidence in habeas corpus cases under 28 U.S.C. § 2241 except to the extent provided by the statutes that govern procedure in such cases or in other rules prescribed by this Court pursuant to statutory authority. This case presents the following questions:

1. Whether the Federal Rules of Evidence, including the rules governing admissibility of hearsay evidence, apply to habeas corpus cases brought by Guantanamo detainees.

2. Whether the court of appeals' disregard for the unambiguous requirements of the Federal Rules of Evidence so far departs from the accepted and usual course of judicial proceedings as to warrant this Court's exercise of its supervisory power.

## **PARTIES TO THE PROCEEDING BELOW**

The appellants in the proceeding below were Fayiz Mohammed Ahmed Al Kandari and his next friend, Mohammad A.H.M.H. Al Kandari.

The appellees in the proceeding below were the United States of America and the respective successors of George W. Bush, Donald Rumsfeld, Richard B. Myers, Rick Baccus and Terry Carrico in their official capacities.

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner Fayiz Mohammed Ahmed Al Kandari along with his next friend, Mohammad A.H.M.H. Al Kandari, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

**OPINION BELOW**

The unclassified version of the opinion of the district court (Kollar-Kotelly, J.) denying Petitioner's habeas corpus petition is available at *Al Kandari v. United States*, 744 F. Supp. 2d 11 (D.D.C. 2010), and is reprinted at Appendix C (App. a5-a86). The classified version of this opinion is maintained under the direction of the Court Security Office and can be provided to the Court if required. The opinion of the court of appeals affirming the district court's decision is reprinted at Appendix A (App. a1-a3). The order of

the court of appeals denying Petitioner's petition for a rehearing en banc is reprinted at Appendix B (App. a4).

### **JURISDICTION**

The court of appeals entered its judgment on December 9, 2011, and entered its order denying Petitioner's petition for a rehearing en banc on January 30, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (App. a91-a94).

### **APPLICABLE PROVISIONS**

United States Constitution, art. 1, § 9, cl. 2; 28 U.S.C. §§ 2241 and 2246; and Fed. R. Evid. 1101(e). These provisions are set forth in relevant part in Appendix E.

### **INTRODUCTION**

“[T]he Supreme Court's defiant - if only theoretical - assertion of judicial supremacy” is how one judge on the United States Court of Appeals for the District of Columbia Circuit characterized this Court's opinion in *Boumediene v. Bush*, 553 U.S. 723 (2008). *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, S.J. concurring). In fact, however, it is the court of appeals' defiance of this Court's supremacy that has rendered the habeas right recognized in *Boumediene* merely “theoretical.” The habeas procedures now mandated by the court of appeals all but guarantee the government's success. And the fulcrum on which the playing field is tilted in the government's favor is the court's complete rejection of any restriction on the admissibility of the government's hearsay evidence.

Fed. R. Evid. 1101(e)<sup>1</sup> provides that the Federal Rules of Evidence apply in habeas corpus cases under 28 U.S.C. § 2241 except to the extent provided by the statutes governing procedure in such cases or in other rules prescribed by this Court pursuant to statutory authority. Yet the court of appeals requires the district court to disregard the Federal Rules of Evidence, and to consider all hearsay, including hearsay that otherwise would clearly be inadmissible, such as raw intelligence reports of interrogations by unknown interrogators of unknown subjects under circumstances that the government refuses to disclose.

When similar procedures were applied in Combatant Status Review Tribunals (“CSRTs”), this Court rejected them as an inadequate substitute for habeas corpus. *Boumediene*, 553 U.S. at 784 (“[G]iven that there are in effect no limits on the admission of hearsay evidence ... the detainee’s opportunity to question witnesses is likely to be more theoretical than real”). Yet unrestricted admissibility of hearsay, in violation of the plain language of Fed. R.

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<sup>1</sup> Fed. R. Evid. 1101, which was initially enacted by Congress in P.L. 93-595, § 1, 88 Stat. 1947, was amended on December 1, 2011, “as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules.” Notes of Advisory Committee on 2011 Amendments. These changes were “intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.” *Id.* All citations to Fed. R. Evid. 1101 in this Petition are to the version that was in place at the time of Petitioner’s habeas hearing. The result under the current version would not differ in any material respect.

Evid. 1101(e), has now become the rule in Guantanamo habeas hearings.

This case, therefore, presents an important question of federal law that should be settled by this Court, since the court of appeals has decided that question in a way that conflicts with relevant decisions of this Court. *See* R. Sup. Ct. 10(c). Petitioner requests this Court to grant the petition, reverse the judgment of the court of appeals, and remand this case for further proceedings conducted in compliance with the Federal Rules of Evidence.

Of equal importance, if not more, this Court's institutional role at the apex of judicial enforcement of the rule of law is at stake. The court below, in its collective Guantanamo rulings, has openly defied this Court's holding in *Boumediene* that Guantanamo petitioners are entitled to meaningful habeas hearings and has virtually dared the Court to do something about that defiance. The Court in every other context requires the inferior federal courts faithfully to adhere to and apply the Court's binding decisions, and it is legally irrelevant whether the judges of those courts personally agree with the Court or the Court's critics. If the Court stands silently by as the D.C. Circuit eviscerates *Boumediene* and boasts about doing so, the damage to the Court's authority will extend well beyond these Guantanamo cases. The court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* R. Sup. Ct. 10(a).

## STATEMENT OF THE CASE

Petitioner has spent the previous decade of his life imprisoned as an alleged enemy combatant at the U.S. Naval Base at Guantanamo Bay. He and eleven other Kuwaiti detainees filed their complaint in this case, through their next friends, on May 1, 2002, making this case the oldest pending case challenging indefinite detention at Guantanamo. Petitioner was one of the petitioners in *Al Odah v. United States*, No. 03-343, *decided sub nom., Rasul v. Bush*, 542 U.S. 466 (2004), in which this Court held that the District Court had jurisdiction under 28 U.S.C. § 2241 over habeas corpus cases brought by detainees held at Guantanamo, and that those detainees, “no less than American citizens,” have the right to challenge the legality of their detention in the U.S. courts through habeas actions under 28 U.S.C. § 2241. *Rasul*, 542 U.S. at 481.

Four years later, having still not received the habeas hearing to which he was entitled, Petitioner was among the petitioners in *Boumediene*, in which this Court held that detainees in Guantanamo were entitled to the writ of habeas corpus guaranteed by the Constitution. As this Court noted, “today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.” *Boumediene*, 553 U.S. at 801.

Upon remand to the district court, Petitioner at last received his hearing, but it was not the meaningful habeas review the Court required in *Boumediene*. The government did not call a single witness in sup-

port of its case against Petitioner, nor did it offer any testimony by affidavit relating directly to Petitioner. Other than generic declarations on certain foundational issues, the only evidence offered by the government at the hearing consisted of unauthenticated documentary exhibits, largely summaries of unsworn interrogations of subjects about whom little or nothing is known, most of which were conducted years after the alleged events under undisclosed circumstances by unknown interrogators. The government did not make available these interrogators, or interpreters, for cross-examination or to answer interrogatories.

Over Petitioner's objections, the district court admitted all of the government's exhibits into evidence, including those that did not fit within any exception to the rule against hearsay, Fed. R. Evid. 802, and in spite of the lack of any showing that the hearsay evidence was either reliable or necessary. App. a16-a17; a87. For example, a significant portion of the district court's findings rested on evidence that Petitioner had met or associated with certain alleged al-Qaeda supporters, but the evidence that these individuals were associated with al-Qaeda was almost entirely hearsay from interrogation reports of other detainees or anonymous sources. App. a65-a79. Additionally, the district court relied on multiple reports of interrogations of Petitioner, which Petitioner stated were inaccurate. App. a27-a36. Although Petitioner's own statements would not be hearsay, reports purportedly summarizing his statements are hearsay, and their admissibility is governed by the Federal Rules of Evidence.

Based largely on the hearsay presented by the government, the district court denied Petitioner's habeas corpus petition. Applying circuit precedent in *Al Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), the district court noted that hearsay "is always admissible" in habeas cases brought by Guantanamo detainees, and it considered all hearsay, regardless of its admissibility under the Federal Rules of Evidence and the habeas statute. *See* App. a16 (quoting *Al Bihani*, 590 F.3d at 879).

Petitioner appealed on the ground that *Al Bihani* was wrongly decided, and that the district court erred by failing to apply the Federal Rules of Evidence. Applying its precedent in *Al Bihani*, the court of appeals affirmed the district court's judgment, reiterating that hearsay is always admissible in Guantanamo habeas cases. App. a3. Petitioner filed a petition for rehearing en banc, which the court of appeals denied. App. a4.

## **REASONS FOR GRANTING THE WRIT**

### **A. The D.C. Circuit's Disregard for the Unambiguous Requirements of the Federal Rules of Evidence Warrants Review.**

The plain language of Fed. R. Evid. 1101(e) provides that the Federal Rules of Evidence apply to habeas corpus cases under 28 U.S.C. § 2241 except to the extent provided by the statutes that govern procedure in such cases or in other rules prescribed by this Court pursuant to statutory authority. Other than affidavits submitted in accordance with the procedures set forth in 28 U.S.C. § 2246, hearsay is admissible in habeas corpus cases only in accordance with the Federal Rules of Evidence. The district

court therefore erred by failing to apply the Federal Rules of Evidence and the habeas statute, and the court of appeals was wrong to hold in *Al Bihani* and subsequent cases that hearsay “is always admissible” in habeas corpus cases brought by Guantanamo detainees. *See Al Bihani*, 590 F.3d at 879. The D.C. Circuit’s repeated disregard for this unambiguous rule largely eliminated the value of Petitioner’s right to challenge the accusations against him.

In spite of the fact that this issue has been repeatedly raised to the court of appeals, including in Petitioner’s appeal and his petition for rehearing en banc, the court of appeals has never directly addressed the plain language of Fed. R. Evid. 1101(e). Instead, in support of its holding that hearsay “is always admissible,” the court of appeals cited to dicta in the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) stating that hearsay “may need to be accepted as the most reliable available evidence.” *Al Bihani*, 590 F.3d at 879 (quoting *Hamdi*, 542 U.S. at 533-34 (plurality opinion)). But this uncontroversial statement by the *Hamdi* plurality - made in connection with an affidavit, which would be admissible under the procedures set forth in 28 U.S.C. § 2246 - does nothing to suggest that this Court in *Hamdi* intended to amend the Federal Rules of Evidence to permit unrestricted hearsay in Guantanamo habeas cases. This Court has held that its decisions must not be interpreted to modify procedural rules in the absence of the procedures required by the Rules Enabling Act. *See Swint v. Chambers County Comm’n*, 514 U.S. 35, 48 (1995) (“The procedure Congress ordered for such changes [to procedural rules], how-

ever, is not expansion by court decision, but by rule-making under [28 U.S.C.] § 2072”).

The government has argued that the Federal Rules of Evidence do not apply because the district court’s jurisdiction in Guantanamo habeas cases comes directly from the Suspension Clause of the Constitution, and not from 28 U.S.C. § 2241. *See, e.g., Al Kandari v. United States*, Brief for Respondents-Appellees, No. 10-5373, at 28 n. 6 (D.C. Cir. Jul. 22, 2011). Notably, neither the district court nor the court of appeals has ever addressed or adopted the government’s argument. As this Court has consistently held, lower federal courts have no jurisdiction other than that which is conferred by statute. *See Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (“[T]he courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute ...”); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (“Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress”); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to ‘ordain and establish’ inferior courts, conferred on Congress by Article III, § 1, of the Constitution”). Indeed, this Court has held that even its own jurisdiction in a habeas corpus case must be conferred by statute. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (“[T]he power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law. ... The inquiry there-

fore on this motion will be, whether by any statute, compatible with the constitution of the United States, the power to award a writ of habeas corpus ... has been given to this court”).

This Court held in *Rasul* that the district court had jurisdiction in Guantanamo habeas cases under 28 U.S.C. § 2241. *Rasul*, 542 U.S. at 481. In *Boumediene*, this Court held that section 7 of the Military Commissions Act of 2006, which amended 28 U.S.C. § 2241 to withdraw habeas corpus jurisdiction, violated the Suspension Clause of the Constitution. *See Boumediene*, 553 U.S. at 795. Because 28 U.S.C. § 2241 is “the statute that would govern in MCA § 7’s absence” (*Boumediene*, 553 U.S. at 777), this Court “necessarily restored the status quo ante, in which detainees at Guantanamo had the right to petition for habeas under [28 U.S.C.] § 2241.” *Kiyemba v. Obama*, 561 F.3d 509, 512 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010). Accordingly, 28 U.S.C. § 2241 is the source of the district court’s jurisdiction, and the district court was bound to apply the Federal Rules of Evidence as required by Fed. R. Evid. 1101(e).

The court of appeals did not even address the language of Fed. R. Evid. 1101(e). The court of appeals’ cursory rejection of any restriction on the admissibility of the government’s hearsay evidence deprived detainees of the meaningful hearings mandated by *Boumediene*.

**B. By Disregarding Unambiguous Statutory Requirements, the Court of Appeals Departed So Far From the Accepted and Usual Course of**

### **Judicial Proceedings as To Warrant This Court's Exercise of Its Supervisory Power.**

This Court denied certiorari on essentially the identical hearsay issue presented in this case in *Al Odah v. United States*, Case No. 10-439. Developments since the denial of certiorari in *Al Odah*, however, demonstrate that this Court needs to intervene to enforce the habeas corpus rights of Guantanamo detainees in the face of the open disdain displayed by members of the court of appeals for this Court's decision in *Boumediene*. In case after case, the court of appeals has relied upon unrestricted hearsay in order to cut away at the detainees' opportunity for a meaningful hearing. The cumulative effect of the decisions of the court of appeals has been to transform Guantanamo habeas cases into a sham.

Judges on the court of appeals have expressed in no uncertain terms their disdain for this Court's decision in *Boumediene*. Senior Judge Laurence H. Silberman (one of the three judges on the panel that decided Petitioner's case) practically taunted this Court in his concurring opinion in *Esmail v. Obama*:

I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter. Unless, of course, the Supreme Court were to adopt the preponderance of the evidence standard (which it is unlikely to do -- taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush* ...).

*Esmail*, 639 F.3d at 1078 (Silberman, S.J. concurring). He went on to characterize *Boumediene* as “the Supreme Court’s defiant - if only theoretical - assertion of judicial supremacy.” *Id.*

Similarly, Judge Janice Rogers Brown (the author of the court of appeals’ opinion in *Al-Bihani*, the first case to remove all restrictions on hearsay in Guantanamo habeas cases) wrote for the majority in *Latif v. Obama*, -- F.3d --, 2011 U.S. App. LEXIS 22679 (D.C. Cir. 2011):

As the dissenters warned and as the amount of ink spilled in this single case attests, *Boumediene*’s airy suppositions have caused great difficulty for the Executive and the courts. ... *Boumediene*’s logic is compelling: take no prisoners. Point taken.

*Latif*, 2011 U.S. App. LEXIS 22679, at \*51-52. Even commentator Benjamin Wittes, ordinarily one of the leading voices in support of the court of appeals’ post-*Boumediene* jurisprudence, found Judge Brown’s opinion in *Latif* to be “disturbing.”

[T]his sort of fevered criticism ... will not engender confidence that the court is honoring, rather than subverting, binding precedent.

Benjamin Wittes, *Thoughts on Latif #4: A Fuller Analysis*, Lawfare (Nov. 12, 2011), <http://www.lawfareblog.com/2011/11/thoughts-on-latif-4-a-fuller-analysis> (accessed on Feb. 9, 2012).

It is perhaps not surprising, therefore, that the government has prevailed in ten out of the twelve cases that the court of appeals has decided in which detainees appealed the district court’s denial of their

habeas petitions,<sup>2</sup> as well as in all six cases it has decided in which the government appealed grants of detainee habeas petitions.<sup>3</sup> The resulting regime for Guantanamo habeas cases is one in which:

- Government hearsay is freely admissible without any compliance with the Federal Rules of Evidence or showing of reliability (*Al Bihani*, 590 F.3d at 879).

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<sup>2</sup> See *Al Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010); *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010); *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011); *Al Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011); *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011); *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011); *Al Kandari v. United States*, No. 10-5373, 2011 U.S. App. LEXIS 24656 (D.C. Cir. Dec. 9, 2011); *Suleiman v. Obama*, No. 10-5292, 2012 U.S. App. LEXIS 2281 (D.C. Cir. Jan. 27, 2012). The two cases in which the government did not prevail outright were remanded for consideration of certain issues related to the scope of the government's detention authority. *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010); *Al Warafi v. Obama*, 409 F. App'x 360 (D.C. Cir. 2011). The government subsequently prevailed on remand in one of those cases. See *Al Warafi v. Obama*, Civ. Act. No. 09-2368, 2011 U.S. Dist. LEXIS 126798 (D.D.C. Sep. 1, 2011). The other case, *Bensayah*, is still pending in the court of appeals, where the parties have agreed to a motion to extend the time to file a petition for rehearing.

<sup>3</sup> *Al Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010); *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011); *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011); *Latif v. Obama*, -- F.3d --, 2011 U.S. App. LEXIS 22679 (D.C. Cir. Oct. 14, 2011).

- The government’s burden of proof might be as low as “some evidence, reasonable suspicion, or probable cause” (*id.* at 878 n. 4).
- Evidence as weak as staying in a guesthouse believed to be frequented by al-Qaeda members is regarded as “overwhelming” evidence in support of detention (*id.*; *Al Adahi*, 613 F.3d at 1109).
- Merely traveling along one of the few common routes into Afghanistan is regarded as substantial evidence in the government’s favor (*Al Odah*, 611 F.3d at 16; *Uthman*, 637 F.3d at 405; *Latif*, 2011 U.S. App. LEXIS 22679, at \*40).
- Detainees can be held solely on the basis of uncorroborated interrogation reports (*Al Alwi*, 653 F.3d at 19).
- The government’s own assessment of its evidence as reliable is given almost conclusive weight (*Khan*, 655 F.3d at 28).
- Government intelligence reports are presumed to be reliable, even when lacking any circumstantial guarantees of trustworthiness (*Latif*, 2011 U.S. App. LEXIS 22679, at \*12).
- Factual findings in favor of detainees are routinely rejected on appeal, even when supported by evidence in the record (*see, e.g., Al Adahi*, 613 F.3d 1102; *Salahi*, 625 F.3d 745; *Latif*, 2011 U.S. App. LEXIS 22679).

Each of the obstacles to a fair hearing that the court of appeals has erected is built on a foundation of unrestricted hearsay.

Ironically, the habeas procedures now mandated by the court of appeals are little better than - and in some ways worse than - the Combatant Status Review Tribunal (“CSRT”) procedures that this Court found in *Boumediene* to be an inadequate substitute for habeas corpus. For example, as this Court noted with respect to the CSRT procedures:

given that there are in effect no limits on the admission of hearsay evidence ... the detainee’s opportunity to question witnesses is likely to be more theoretical than real.

*Boumediene*, 553 U.S. at 784. As with the CSRTs rejected by this Court, the court of appeals has rendered a detainee’s right to question witnesses in a habeas corpus proceeding “more theoretical than real.” Indeed, according to the court of appeals, such a right does not even exist in theory. *Al Bihani*, 590 F.3d at 879 (“hearsay ... is always admissible”).

As Judge David S. Tatel noted in his dissenting opinion in *Latif*, “Not content with moving the goal posts, the court calls the game in the government’s favor.” *Latif*, 2011 U.S. App. LEXIS 22679, at \*98 (Tatel, J. dissenting). Judge Tatel’s comments were in the context of the court of appeals’ recognition of an unsupportable presumption of reliability in favor of the government’s evidence, but they could apply equally well to the court’s unlimited admission of government hearsay generally:

In *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 84 (D.D.C. 2009)], the district court even pointed to evidence in that very case exemplifying such problems [with a presumption in favor of the government’s evidence]: “for over three years” the government had, “based on a typographical error in an interrogation report,” erroneously insisted “that Al Mutairi manned an anti-aircraft weapon in Afghanistan.” ... [S]ee also *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 18 (D.D.C. 2009) (noting “discrepan[cies]” between two reports summarizing *the same interrogation* that the government had made no attempt to reconcile); *Al Odah v. United States*, 648 F. Supp. 2d 1, 6 (D.D.C. 2009) (noting that “interrogators and/or interpreters included incorrect dates in *three* separate reports that were submitted into evidence based on misunderstandings between the Gregorian and Hijiri calendars”).

*Id.* at \*92-93 (emphasis in original). Judge Tatel noted the district court’s finding in another case that “the interrogation summaries and the intelligence reports on which [the Government] relies are not necessarily accurate and, perhaps more importantly, that *any inaccuracies are usually impossible to detect.*” *Id.* (quoting *Odah v. Obama*, Civ. Act. No. 06-1668, 2010 U.S. Dist. LEXIS 144024, \*6 (D.D.C. May 6, 2010)) (emphasis added). It is precisely such inaccuracies as these, impossible to detect without the benefit of cross-examination, that the Federal Rules of Evidence and the hundreds of years of common law before them were designed to protect against.

To be sure, there are good faith disagreements among members of the bench and the legal community as to whether *Boumediene* was correctly decided. Nobody questions the right of judges on the court of appeals to hold or voice such views. But as an opinion of this Court interpreting the Constitution, *Boumediene* is “the supreme law of the land.” *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. ... No ... judicial officer can war against the Constitution without violating his undertaking to support it.

*Id.* Lower court judges are not permitted to disregard or undermine this Court’s precedents, in spite of their disagreements with them. *See Jaffree v. Board of School Com'rs of Mobile County*, 459 U.S. 1314 (1983) (Powell, Circuit Justice); *Cavazos v. Smith*, 132 S. Ct. 2, 7-8 (2011). Nor may they disregard the plain language of laws enacted by Congress or rules made by this Court pursuant to its rulemaking authority, like the Federal Rules of Evidence, in order to advance their own policy preferences in contravention of this Court’s decisions. *See Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 188 (1994) (“Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result ‘so bizarre’ that Congress could not have intended it”).

The undeniable fact that the stakes are high in these cases balancing individual liberty and the prospect of potential lifetime detention against possible risks to national security is all the more reason to apply, and not to selectively ignore, generally applicable procedural rules.

A principle applied only when unimportant is not much of a principle at all, and charges of judicial activism are most effectively rebutted when courts can fairly argue that they are following normal practices.

*Boumediene*, 553 U.S. at 806 (Roberts, C.J. dissenting). The “normal practice” - indeed, the statutorily required practice - in habeas corpus cases under 28 U.S.C. § 2241 is to apply Fed. R. Evid. 1101(e) as written.

## CONCLUSION

For the foregoing reasons, Petitioner requests this Court to grant his Petition for Writ of Certiorari, reverse the judgment of the court of appeals, and remand for further proceedings in compliance with the Federal Rules of Evidence.

Respectfully submitted,

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