No._____

In the Supreme Court of the United States

MOATH HAMZA AHMED AL-ALWI,
Petitioner,

v.

BARACK H. OBAMA, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Ramzi Kassem*
Main Street Legal Services, Inc.
City University of New York
School of Law
65-21 Main Street
Flushing, NY 11367
(718) 340-4558

*Counsel of Record

William J. Murphy
John J. Connolly
Zuckerman Spaeder LLP
100 East Pratt Street, Suite 2440
Baltimore, MD 21202-1031
(410) 332-0444

Counsel for Petitioner

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QUESTIONS PRESENTED

I. Whether a person held at the U.S. Naval Station at Guantánamo Bay, Cuba for nearly ten years had a "meaningful opportunity" to challenge his imprisonment within the meaning of *Boumediene v. Bush* when the lower courts gave his counsel only a few weeks to prepare for a habeas corpus hearing after the government presented its factual return, arbitrarily rejected his unopposed request for adequate time to prepare for the hearing, refused virtually all requests for discovery, applied an improper standard for detention, and relied solely on uncorroborated hearsay intelligence reports.

II. Whether authority to imprison members of a force "associated with" the Taliban terminates when that associated force ceases hostilities.

PARTIES TO THE PROCEEDING

Petitioner in this Court and the appellant in the court below is Moath Hamza Ahmed al-Alwi, a Yemeni national imprisoned at the U.S. Naval Station at Guantánamo Bay, Cuba since 2002. Respondents in this Court and the appellees in the court below are Barack H. Obama, President of the United States; Leon E. Panetta, Secretary of Defense; David B. Woods, Commander, Joint Task Force-Guantánamo (JTF-GTMO); Donnie L. Thomas, Commander, Joint Detention Operations Group, JTF-GTMO.[1]

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Petitioner has inserted in this filing the names of individuals currently holding these official positions, all of whom were named in their official capacities.

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The opinion of the District Court, appended at App. 1, was issued on December 30, 2008 and reported at 593 F. Supp. 2d 24. The Classified Memorandum Opinion of the District Court, App. 7, was issued on January 9, 2009, and declassified as part of the Joint Appendix on appeal. The opinion of the Court of Appeals, App. 17, was issued on July 22, 2011 and reported at 653 F.3d 11.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 22, 2011. On October 14, 2011, Chief Justice Roberts extended the time for filing this petition for certiorari to and including December 5, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), provides that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

RELATED MATTERS

Petitioner is aware that certiorari is pending in the following Guantánamo matters that may have a bearing on this Petition: *Al-Madhwani* v. *Obama*, 642 F.3d 1071 (D.C. Cir. 2011) (No. 11-7020, filed Oct. 24, 2011); *Uthman* v. *Obama*, 637 F.3d 400 (D.C. Cir. 2011) (No. 11-413, filed Aug. 29, 2011); and *Al-Bihani* v. *Obama*, 619 F.3d 1 (D.C. Cir. 2010) (No. 10-1383, filed May 11, 2011); *see also Abdah* v. *Obama*, 630 F.3d 1047 (D.C. Cir. 2011) (No. 11-421, filed Sep. 22, 2011) (whether detainee has right to challenge transfer to foreign country for fear of torture). Petitioner presumes (but does not know) that petitions for certiorari may be forthcoming in *Latif* v. *Obama*, No. 10-5319, 2011 WL 5431524 (D.C. Cir. Oct. 14, 2011), *Khan* v. *Obama*, 655 F.3d 20 (D.C. Cir. 2011), and *Gul* v. *Obama*, 652 F.3d 12 (D.C. Cir. 2011) (*reh'g denied* Sep. 12, 2011). The Court has denied petitions for certiorari in a number of other Guantánamo cases.

STATEMENT OF THE CASE

Petitioner Moath Hamza Ahmed al-Alwi is a Yemeni citizen who was raised in Saudi Arabia. Mr. al-Alwi was twenty-four years old when he was seized in Pakistan and transferred to U.S custody. He has been imprisoned at the U.S. Naval Station at Guantánamo Bay in Cuba for nearly ten years. Yet Mr. al-Alwi never fought against the United States, and the evidence that he fought against anyone is meager. His imprisonment is predicated on a growing body of precedent from the court of appeals that gives dispositive weight to factors such as attendance, however brief or innocuous, at Taliban or al-Qaida "guesthouses." The court of appeals applied that precedent in this case, and as a result Mr. al-Alwi may be imprisoned at Guantánamo indefinitely, possibly for the rest of his life.

Why the United States continues to deprive Mr. al-Alwi of his liberty at this juncture is not at all clear from the record presented at the merits hearing, which consisted almost entirely of raw government intelligence reports. According to those reports, after graduating from high school, Mr. al-Alwi studied and taught at mosques in Saudi Arabia. In 2000 or early 2001, he decided to travel to Afghanistan to live and teach in a society that appeared to honor the ideals of Islam. He arrived in Afghanistan months—perhaps as long as a year—before September 11, 2001 (the record is quite unclear on dates, as the government consistently acknowledged at the merits hearing).

During his travels, Mr. al-Alwi stayed at hostels (or guesthouses), which the government later claimed, again on meager evidence, were affiliated with the Taliban or al-Qaida. Intelligence reports indicated that he obtained less than one full day's training at a Kabul-area training camp known as "Khalid Center." Khalid Center may have been affiliated with an armed force the government refers to as the Omar Sayef Group (OSG) although, as set forth below, the government presented very little evidence about OSG. Mr. al-Alwi denied ever attending Khalid Center.

The government contended that Mr. al-Alwi thereafter was assigned in some vague capacity to OSG, and that OSG was somehow connected to the Taliban. At the time, the Taliban were fighting the Northern Alliance, *not the United States*, and OSG was not the Taliban. The government claimed Mr. al-Alwi went to a "middle line position" in a combat area north of Kabul and spent his time "gathering firewood, cooking, and praying." No evidence was presented that Mr. al-Alwi fired a weapon at anyone during this period.

According to the government's evidence, at some unknown point, Mr. al-Alwi traveled to a village called Khwaja Ghar in far northern Afghanistan. Mr. al-Alwi said he spent most of his time there swimming. The government claimed that Mr. al-Alwi engaged in a skirmish of sorts, although the evidence was minimal. A line in one interrogation report stated that Mr. al-Alwi's unit "exchanged fire across a river with the Tajiks." Tajikistan is immediately north of the Khwaja Ghar area of Afghanistan. Mr. al-Alwi was in northern Afghanistan on September 11, 2001, and

he allegedly saw two or three U.S. bombing operations before fleeing the area. Mr. al-Alwi also reportedly told interrogators that U.S. bombs killed a number of people in his area, although the reports were conflicting.

The government conceded that Mr. al-Alwi left the north after seeing a U.S. bombing operation. But the government argued, and the district court ultimately concluded, that Mr. al-Alwi remained with his "unit," whatever it was, "for a period of time" after the bombing operations. He allegedly stopped at Khowst, Afghanistan, and then made his way to Pakistan. The parties disputed the circumstances of Mr. al-Alwi's arrival and capture in Pakistan, and the district court did not resolve the dispute. The district court also declined to rule on the government's alternative theory (referred to herein as the "bodyguard theory"), in which Mr. al-Alwi supposedly attended a much better known training camp called al-Farouq and then became a bodyguard for Usama bin Laden. That theory was predicated on highly dubious witness testimony and was largely irreconcilable with the timeline of events under the government's primary OSG theory.

1. District Court Proceedings

After this Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004), Mr. al-Alwi's cousin engaged the Clifford Chance law firm, App. 57-58, and on November 15, 2005, Clifford Chance attorneys filed a habeas corpus petition on behalf of Mr. al-Alwi and five other Guantánamo prisoners. App. 52-79. Counsel had not communicated with Mr. al-Alwi at that point, and they had minimal information

about him. App. 56. The government promptly moved to stay the petition pending jurisdictional appeals in other cases. App. 59-61.

The district court (Judge Richard J. Leon) granted the motion to stay, App. 48-49, but contrary to the practice in most other Guantánamo cases, the court did not require a factual return or enter the protective order that would have enabled counsel to meet with their client. *E.g.,* App. 62-64. The stay remained in place from 2006 through the middle of 2008 as all three branches of government considered the rights of prisoners to petition for habeas relief. Finally, on June 12, 2008, this Court held in *Boumediene* v. *Bush,* 553 U.S. 723 (2008), that Guantánamo prisoners had a constitutional right to habeas review. In July 2008, the district court lifted the stay and finally entered a protective order that would permit counsel to meet with their client about the habeas case. The court also ordered the government to file its factual return by September 23, 2008. App. 72-75.

On September 23, however, the court granted the government a thirty-day extension to file the return, App. 101-02, over Mr. al-Alwi's objection. App. 92-100. By then, Judge Leon had already made clear to all parties that he intended to complete hearings on the merits of all his assigned Guantánamo cases before January 2009, when President-elect Barack H. Obama would take office. App. 65-70; App. 78.

The government's return was finally provided to counsel on October 22, 2008. App. 103-04. It consisted of a "Narrative" and several hundred pages of documents, mostly classified intelligence reports. App. 109-15. An unclassified (and heavily

redacted) version of the return—one that could be shared with Mr. al-Alwi—was not made available until November 5, 2008, App. 50, and a corrected version (including omitted exhibits) was only provided on November 13, 2008. App. 116-18. Despite these delays, on October 31, 2008, the court ordered that all discovery be completed by December 1, 2008, App. 105-08, and that Mr. al-Alwi file his traverse on December 4, 2008, *id.*, only six weeks after the government first provided counsel with the return and exactly three weeks after counsel received a complete version that they could discuss with Mr. al-Alwi. The court scheduled the habeas hearing to begin twelve days after the traverse was due, on December 16, 2008. *Id.*

The delays in obtaining the government's return hampered counsel's hearing preparation, which required personal meetings with a client detained on a remote military base. Counsel's first opportunity to meet with Mr. al-Alwi to discuss the unclassified return would come on a visit scheduled for November 14-15, 2008. App. 126-27. Counsel also intended to use the meeting to identify additional evidence to be gathered, whether through discovery or other methods. App. 128-129. On November 14, 2008, two attorneys and an interpreter met with Mr. al-Alwi for approximately six hours. *Id.* Mr. al-Alwi stated he was on hunger strike to protest his imprisonment at Guantánamo and that he had not consumed food or drink during the seven preceding days. *Id.* Mr. al-Alwi was unable to focus and ill through much of the day. App. 129. When counsel arrived the next morning, Mr. al-Alwi was slumped over the table. App. 130. He reported a severe headache after falling and hitting his head the night before. His limbs were swollen and his hands

and feet numb, and he had difficulty breathing. *Id.* He was soon removed on a stretcher. *Id.* Counsel were not permitted to meet with him the remainder of the day, and they had to leave the base the next morning. *Id.*

On November 20, 2008, promptly after returning from Guantánamo, Mr. al-Alwi's counsel filed a motion for an additional thirty days to complete discovery and file a traverse. App. 119-25. They also asked for an opportunity to revisit scheduling more broadly at the close of that additional period. App. 124. The motion detailed some of the difficulty they had meeting with Mr. al-Alwi the prior week, and discussing the allegations against him under the court's arbitrarily compressed schedule. App. 119-21.

The government did not oppose Mr. al-Alwi's motion to extend the existing deadlines. Nevertheless, Judge Leon denied the motion in a minute order entered four days later. App. 51. During a subsequent hearing on discovery issues conducted on December 1, 2008, he explained that: "Mr. al-Alwi is the author of his own delay in this case. He is the one who chose to go on a hunger strike. No one else. No one else. He is the one who chose to engage in a protest action in Guantanamo. No one else." App. 134. The court further explained that if counsel "weren't able to meet with him because he chose to put himself in a position where he couldn't effectively meet with you, that was his choice; and the Court is not going to prejudice the schedule that affects, reverberates on other detainees to delaying this case." *Id.*

The district court also denied virtually all of Mr. al-Alwi's discovery requests. Judge Leon held that the requests were not narrowly tailored or sufficiently justified by evidence. The court disregarded counsel's argument that their attempt to obtain the necessary evidence had been hampered by their near-total inability to discuss the government's evidence with Mr. al-Alwi. App. 138.

The court held a merits hearing for a full day on December 16, 2008, and a half day on December 17, 2008. App. 163-85. No witness testified live. Mr. al-Alwi was permitted to listen to a brief portion of the opening argument conducted on the public record. App. 165. The court then went into closed session, and the parties essentially summarized the materials set forth in the return and traverse and offered related inferential arguments.

On December 30, 2008, the court issued an unclassified Memorandum Opinion and Order denying the Petition. *Al Alwi v. Bush*, 593 F. Supp. 2d 24 (D.C. 2008). On January 9, 2009, the court released a classified Memorandum Opinion further detailing its decision. App. 7-16. The court concluded that Mr. al-Alwi met the standard for detention because he stayed in "at least three guesthouses closely associated with the Taliban and/or al Qaeda," App. 10; received military training, joined OSG, and supported the Taliban through that group, App. 12; and "saw two or three U.S. bombing operations" in Afghanistan but did not immediately disengage from his "unit." App. 15. The court did not rely on the government's alternate bodyguard theory. App. 16.

2. The Court of Appeals' Opinion

Although the court of appeals concluded that the district court had erred in declining to permit a continuance, the court affirmed the judgment and, indeed, went further than the district court in finding a basis for detention. The court of appeals, relying on decisions it had issued after the district court heard this case, found that Mr. al-Alwi was "part of al Qaeda or Taliban forces," *Al Alwi v. Obama,* 653 F.3d 11, 17 (D.C. Cir. 2011), not merely that he had provided substantial support to one of those entities through the OSG. The court also found "neither clear error nor abuse of discretion in the district court's determination that Al Alwi's statements were reliable." *Id.* at 20. The court held that the district court's denial of an unopposed motion for a thirty-day continuance was "hard to understand" but did not result in "actual prejudice" to Mr. al-Alwi. *Id.* at 21. Finally, the court found that the district court did not abuse its discretion in its management of the discovery process. *Id.* at 27.

The court of appeals also denied Mr. al-Alwi's motion for leave to supplement the record on appeal with two new declarations, one from his appellate attorney and an eleven-page declaration by Mr. al-Alwi himself. Order Den. Mot. To Supplement Appellate R.; App. 45.[2]

[2] In response to a recent request by Petitioner's undersigned counsel, Respondents have indicated that they refuse to submit these materials for classification review, so that this Court may view them as part of the Appendix in this case. Respondents have also indicated that they would oppose any motion seeking a judicial order directing classification review of the materials. As a result, these declarations remain classified and cannot be included in the public Appendix here.

REASONS FOR GRANTING THE PETITION

I. The Lower Courts Failed to Afford Mr. al-Alwi a Meaningful Opportunity to Challenge His Imprisonment

This Court has held that prisoners at Guantánamo are entitled to a "meaningful opportunity" to contest their imprisonment. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008). Now more than ever, meaningful judicial review is vital to the men who continue to languish at Guantánamo a decade into the prison's existence. Indeed, owing to statutory restrictions enacted since *Boumediene*, "an order … issued by a court … of the United States having lawful jurisdiction" has become virtually the only path to freedom. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §1033, 124 Stat. 4137, 4351 (2011). But since *Boumediene*, the court of appeals has all but sealed off that sole remaining exit.

The Court of Appeals for the District of Columbia Circuit, the only appellate court that hears Guantánamo appeals, has now construed or applied *Boumediene* in a series published decisions. Thus far, this Court has declined to review any of these decisions, and several appellate judges have openly criticized *Boumediene* and this Court's failure to explicate it. Most recently, one appellate judge summed up her interpretation of the case: "*Boumediene*'s airy suppositions have caused great difficulty for the Executive and the courts." *Latif v. Obama*, No. 10-5319, 2011 WL 5431524, at *15 (D.C. Cir. Oct. 14, 2011). Because of these perceived difficulties, she concluded that "*Boumediene*'s logic is compelling: take no prisoners. Point taken." *Id.* In a concurrence in another recent case, one judge labeled *Boumediene* a "defiant ... assertion of judicial supremacy" and expressed "doubt [that] any of

[his] 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," regardless of the preponderance standard formally adopted by the court of appeals. *Esmail v. Obama,* 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (emphasis added). A third appellate judge likened members of this Court to the characters in *The Great Gatsby*, "careless people, who smashed things up . . . and let other people clean up the mess they made." Hon. A. Raymond Randolph, *The Guantanamo Mess*, Joseph Story Distinguished Lecture (Oct. 20, 2010), http://www.heritage.org/Events/ 2010/10/Guantanamo-Mess.

In the absence of guidance from this Court, the court of appeals has created its own body of law eviscerating *Boumediene*. Under the guise of "a functional rather than a formal approach," *see, e.g., Bensayah v. Obama,* 610 F.3d. 718, 725 (D.C. Cir. 2010), the court of appeals has usurped the district court's fact-finding function. For instance, the court of appeals has created its own rule of law that a visit to an Afghanistan "guesthouse" associated with al-Qaida or the Taliban "overwhelmingly" justifies indefinite imprisonment under the AUMF. *See, e.g.*, *Al-Adahi v. Obama*, 613 F.3d 1102, 1108 (D.C. Cir. 2010); *Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010). But the nature and purpose of a guest house and the reasons why a visitor to Afghanistan would stay at one are intensely factual questions that should be resolved by district court judges on a case-by-case basis.

Similarly, the geographical location of a prisoner's capture, *see, e.g., Uthman v. Obama*, 637 F.3d 400, 404 (D.C. Cir. 2011), the illogic of guilt by association, *id.*

at 404-05, and even the utterance of culturally common phrases such as the term "brothers," *id.*, used by billions of Muslims in reference to other Muslims worldwide, have been loaded with ominous meaning as a matter of law. The law of the circuit now appears to hold that two pieces of unreliable evidence somehow amount to a reliable whole, *see, e.g., Almerfedi v. Obama,* 654 F.3d. 1, 3 (D.C. Cir. 2011); *Bensayah*, 610 F.3d. at 726; that Guantánamo prisoners are almost presumed to be al-Qaida members trained to lie, *see, e.g., Al-Adahi,* 613 F.3d. at 1111 ("Put bluntly, the instructions to detainees are to make up a story and lie."), whereas the government always receives the benefit of the doubt, *see, e.g., Khan v. Obama,* 655 F.3d. 20, 28 n.6 (D.C. Cir. 2011); and, broadly, that Guantánamo prisoners enjoy no constitutional due process rights. *See, e.g., Kiyemba v. Obama,* 605 F.3d. 1046, 1051 (D.C. Cir. 2010). Most recently, the court of appeals held that the government's hearsay interrogation reports are not only admissible, they are presumed accurate. *See Latif*, 2011 WL 5431524, at *1. In sum, through its cases, the court of appeals has formulated new rules of law that have handcuffed district court judges and turned habeas hearings into perfunctory reviews of government interrogation reports.

These precedents have all but eliminated the promise of a meaningful opportunity to challenge imprisonment. Of the sixteen Guantánamo merits appeals it decided in the wake of this Court's ruling in *Boumediene*, the court of appeals has not affirmed a single habeas grant, and it has remanded any denial that it did not

affirm. The circuit court reversed three detainee victories,[3] remanding the remaining three.[4] It affirmed eight government wins,[5] remanding the other two.[6]

This result is not a fair implementation of *Boumediene*, which declared it "uncontroversial ... that the privilege of habeas corpus entitles [a] prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." 553 U.S. at 779. Although the Court did not give "a comprehensive summary of the requisites" for a "constitutionally adequate" habeas proceeding, *id.* at 778-79, the *Boumediene* decision still mandated a number of specific guarantees due to men who have been imprisoned at Guantánamo for a decade now. Guantánamo prisoners must have "the means to supplement the record on review," *id.* at 786, and the court conducting habeas proceedings must "assess the sufficiency of the Government's evidence against the detainee," and "admit and consider relevant exculpatory evidence." *Id.*

In Mr. al-Alwi's case, this constitutional baseline has been repeatedly flouted. The court of appeals relied on its own rules of law, including the guesthouse rule, to

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[3] *Almerfedi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011); *Uthman v. Obama,* 637 F.3d 400 (D.C. Cir. 2011); *Al-Adahi v. Obama,* 613 F.3d 1102 (D.C. Cir. 2010).

[4] *Latif v. Obama*, 10-5319, 2011 WL 5431524 (D.C. Cir. Oct. 14, 2011); *Hatim v. Gates,* 632 F.3d 720 (D.C. Cir. 2011); *Salahi v. Obama,* 625 F.3d 745 (D.C. Cir. 2010).

[5] *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011); *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011); *Madhwani v. Obama,* 642 F.3d 1071 (D.C. Cir. 2011); *Esmail v. Obama,* 639 F.3d 1075 (D.C. Cir. 2011); *Al Odah v. United States,* 611 F.3d 8 (D.C. Cir. 2010); *Barhoumi v. Obama,* 609 F.3d 416 (D.C. Cir. 2010); *Awad v. Obama,* 608 F.3d 1 (D.C. Cir. 2010); *Al-Bihani v. Obama,* 590 F.3d 866 (D.C. Cir. 2010).

[6] *Warafi v. Obama,* No. 10-5170, 2011 WL 678437 (D.C. Cir. Feb. 22, 2011); *Bensayah v. Obama,* 610 F.3d 718 (D.C. Cir. 2010).

conclude for the first time on appeal that Mr. al-Alwi was actually a "part of" al-Qaida or Taliban forces—a finding not made by the district court. By giving determinative weight to guesthouse stays, no matter how minimal or justifiable, the court of appeals has denied Mr. al-Alwi and other petitioners a meaningful opportunity to challenge their detention.

This case also presents an array of substantial procedural issues that would help define *Boumediene* and provide guidance to lower courts in resolving habeas petitions from alleged combatants in the protean Afghan conflict and other similar circumstances. By upholding the district court's inexplicable rush to trial, its denial of well-founded discovery requests, its improper reliance on supposed counsel concessions, and its deferential standard of proof, the court of appeals stripped Mr. al-Alwi of his "meaningful opportunity" to demonstrate his unlawful imprisonment. *Id.* at 779. This case should have been remanded for a retrial and the Court should now grant review to redress that injustice and address the larger issues at stake.

First, the district court's arbitrary decision to deny Mr. al-Alwi adequate time to prepare his defense fundamentally conflicts with the notion of a "meaningful opportunity" to demonstrate unlawful imprisonment. The court of appeals recognized that the district court acted "in haste" by denying Mr. al-Alwi's unopposed and well-founded motion for a thirty-day continuance, noting that the lower court's decision was "hard to understand." *Al Alwi v. Obama,* 653 F.3d 11, 21 (D.C. Cir. 2011). The court of appeals wrongly concluded that Mr. al-Alwi incurred no prejudice, however, because the district court offered his counsel at trial a

limited opportunity to amend his traverse and because he had an opportunity to meet once with his counsel in connection with a separate, and less robust, proceeding authorized at that time by the Detainee Treatment Act of 2005 (DTA). Pub. L. No. 109-148, § 1004(a), 119 Stat. 2680, 2740 (2005) (codified as amended at 42 U.S.C. § 2000dd-1 (2006)). What allegations Mr. al-Alwi saw in that setting provided insufficient notice of those he would later face and, importantly, of the evidence in the factual return that would eventually be produced against him just weeks before his habeas hearing. The court of appeals, like the district court, failed to credit the difficulty of preparing a case when the client speaks a different language, is held in a remote military prison, has been subjected to years of interrogation by the government, is justifiably suspicious of his counsel, and is accused of acts that occurred in a war-torn country half a world away.

The government had seven years to prepare its case, during which time it had continuous, unfettered ex parte access to Mr. al-Alwi, and countless ways to frighten and goad Mr. al-Alwi into making inculpatory statements, which ultimately formed the bulk of the government's case. By contrast, Mr. al-Alwi's trial counsel were given six weeks after receiving the factual return—and merely three weeks after being provided the information they needed in a format that could be shared with Mr. al-Alwi—to prepare a defense that represented Mr. al-Alwi's only hope to challenge the legality of his already lengthy and potentially lifelong imprisonment. This Court should review the court of appeals' judgment in order to

determine the nature and scope of a detainee's right to prepare for a hearing that could leave him imprisoned for life.

Second, Mr. al-Alwi was denied a meaningful opportunity to challenge his imprisonment when he was forced to prepare his defense without fair notice of the allegations and evidence against him. Mr. al-Alwi did not have any opportunity to review the CSRT allegations with counsel until May 19, 2008, the earliest practicable date counsel could travel to Guantánamo after receiving security clearance and needed information. While counsel had received the unclassified CSRT allegations prior to that date (but not any underlying classified evidence), this provided little assistance in the preparation of Mr. al-Alwi's defense, as he could not discuss even those summary accusations with counsel until that meeting. Also, in order for a prisoner to have a meaningful opportunity to contest his detention, he must be aware of the allegations *and* the evidence against him. *See* App. 81-90 (counsel for Guantánamo petitioners insisting on rapid declassification of evidence so clients can participate in their own defense).

The court of appeals acknowledged that Mr. al-Alwi's counsel "did not receive the government's factual return until October 22, 2008, and did not receive an unclassified version until November 5," six weeks before the habeas hearing. *Al Alwi*, 653 F.3d at 22. (In fact, the complete unclassified version was not supplied to counsel until November 13, App. 116, less than a month before the hearing.) But the court concluded that the materials provided in the earlier, and much narrower, review process established by the DTA provided sufficient notice of the basis for

detention. In the court's view, the unclassified CSRT record, which counsel received fourteen months before the habeas hearing, was sufficient (and should have been used) to prepare for a habeas review proceeding not yet available when counsel received the CSRT record. *See Al Alwi*, 653 F.3d at 24. That record consisted of only 39 pages of materials. The government's factual return in the habeas proceeding, first filed in complete form on November 13, 2008, App. 116-18, was approximately 400 pages. Mr. al-Alwi could not have prepared to rebut the government's habeas case by focusing on the unclassified CSRT record. Even under the DTA, counsel could do little until they received the full CSRT record, including its classified parts. The DTA protective order gave counsel only two visits to Guantánamo to secure authorization to represent a client. *See Bismullah v. Gates,* 501 F.3d 178, 199 (D.C. Cir. 2007) *reh'g denied,* 503 F.3d 137 (D.C. Cir. 2007), *en banc reh'g denied,* 514 F.3d 1291 (D.C. Cir. 2008). For these reasons, counsel prudently decided not to meet with Petitioner until the government provided the classified CSRT record, which was in August 2008, after *Boumediene* issued, calling into question the adequacy of the CSRT process and, with it, the significance of that CSRT record.

Indeed, reason counseled against assuming that the CSRT record comprised what would become the government's case against Mr. al-Alwi at his habeas hearing. Appellate review under the DTA was limited to CSRT findings. *See* DTA §1005(e)(2)(C). The government argued in DTA proceedings that prisoners were not permitted to introduce new evidence, but were limited to challenging whether the

totality of the evidence before the CSRT supported its conclusion. *See Bismullah*, 501 F.3d at 186. And, ironically, prior to Mr. al-Alwi's habeas hearing, the government itself characterized the CSRT allegations as "very stale evidence," expressing its wish not to be bound by them at the hearing. *See* Tr. of Status Conf. Before the Hon. Richard J. Leon (July 10, 2008), App. 65-71 (attorney for Respondents asserting they did not wish to be held to CSRT record). The sentiment was also voiced in other cases. *See, e.g., In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 309, 310.

Furthermore, and contrary to the lower courts' findings, Respondents introduced new evidence and allegations in their factual return and at oral argument, without prior notice to Mr. al-Alwi. The factual return contained new evidence, by way of a declaration, that a guesthouse Mr. al-Alwi allegedly visited was connected to al-Qaida. App. 111-15. Even more egregiously, the government also introduced new allegations at oral argument, stating that Mr. al-Alwi fought under the direction of a high-level al-Qaida member as a part of the Omar Sayef Group. No evidence or allegations from Mr. al-Alwi's CSRT record, or even the factual return, reasonably supported a connection between that purported leader of OSG and al-Qaida. *See* App. 152-62, *cf.* App. 179-80. In sum, it was prejudicial error for the lower courts to hold that counsel should have known to prepare a habeas defense based on a record from a CSRT process that this Court found fatally deficient in *Boumediene*, containing evidence that was "very stale" and that did not include crucial elements ultimately relied upon by the district court.

Third, Mr. al-Alwi's right to a meaningful opportunity to challenge his detention was infringed by the lower courts' refusal to require the government to disclose all exculpatory evidence. This Court specifically identified as a feature distinguishing habeas courts the authority "to admit and consider relevant exculpatory evidence." *Boumediene,* 553 U.S. at 786. Without this authority, the writ of habeas corpus would fail to "function as an effective and proper remedy." *Id.* The record in Mr. al-Alwi's case strongly indicates that the courts below did not exercise their authority to "admit and consider" all relevant exculpatory evidence. *Id.*

This became evident on appeal, when the court required the government to submit post-argument explanation of how it searched for exculpatory evidence. The government's submissions show that, at the time of the hearing in this case, the government simply did not look beyond an arbitrarily limited number of document repositories, which were searched using patently inadequate means. The government's declaration explained that "[i]n creating the factual returns, the attorneys from DOD and DOJ included all exculpatory information relevant to the allegations stated in the return which they reviewed during the preparation of the return." *England Decl.* (Nov. 18, 2008) at ¶ 12; App. 194. The declaration confirms that the government did not "conduct searches for information at Department components/agencies beyond OARDEC and the JIG." *Id.* at ¶ 13; App. 194. Moreover, searches in the OARDEC and JIG databases were conducted by "analysts," not "attorneys." *Id.* at ¶ 7; App. 191-92. The analysts had received

"approximately two weeks of training," *McGarrah Decl.* (Nov. 18, 2008) at ¶ 5; App. 197-98, and were therefore not well-equipped to identify exculpatory information.

Furthermore, Mr. al-Alwi's counsel independently discovered and produced an exculpatory document discrediting one of the detainees whose statements were used to implicate Mr. al-Alwi. App. 139-44. The district court swept this troubling fact under the rug by holding that the government was not required to turn over exculpatory information deemed cumulative. Tr. of Closed Status Hr'g (Dec. 1, 2008), App. 141-42. Of course, a document showing that a key government witness was not reliable could not fairly have been characterized as cumulative, certainly not when that exculpatory record also evinced the government's failure to comply with its court-imposed obligation to produce all exculpatory evidence.

Absent remand in this case, Mr. al-Alwi is left with an incomplete record containing only some of the materials that should have been produced under *Bensayah*'s articulation of the disclosure obligation in these cases. 610 F. 3d at 338-39.

Fourth, the courts below improperly relied on remarks by counsel to corroborate out-of-court statements by Mr. al-Alwi. The majority of the evidence used against Mr. al-Alwi consisted of his own uncorroborated statements. The court of appeals agreed that the absence of corroboration should be taken into consideration when assessing the reliability of a detainee's out-of-court statements. *Al Alwi v. Obama*, 653 F.3d 11, 19 (D.C. Cir. 2011). The court further stated that this rule was "in line" with its own precedents, which established that "the question

a habeas court must ask when presented with hearsay is not whether it is admissible[,] ... but what probative weight to ascribe to whatever indicia of reliability it exhibits." *Al-Bihani v. Obama,* 590 F.3d 866, 879 (D.C. Cir. 2010). The court of appeals also recently reiterated the applicability of this rule in *Latif v. Obama,* declaring that in "*Al-Alwi* we adopted a rule—that 'the district court must take the absence of corroboration into account in assessing the reliability of petitioner's out-of-court statements.'" *Latif v. Obama*, No. 10-5319, 2011 WL 5431524, at *11 (D.C. Cir. Oct. 14, 2011).

Even in the absence of actual corroboration of Mr. al-Alwi's out-of-court statements, however, the court of appeals affirmed, finding that the district court had identified several indicia of reliability. Chief among these were supposed counsel concessions made at the habeas hearing. *See, e.g.,* App. 9, 30. But, as detailed above, Mr. al-Alwi had not been afforded an opportunity to develop a defense with counsel and, importantly, he was not in a position to challenge any of his counsel's statements during the hearing. Most of the alleged counsel admissions occurred during the classified session, to which Mr. al-Alwi was not privy. *See* App. 175-78, 181-82, 184. And during the unclassified opening statement heard by Mr. al-Alwi, counsel made no concessions. The opening statement began and ended with blanket denials of all allegations. *See* App. 171 (former counsel clarifying that "[l]est there be any doubt, he denies the allegations"); App. 173 ("From his original detention to this day, Mr. al-Alwi has denied these allegations.").

In any event, Mr. al-Alwi could not have objected to arguments made by his counsel during the unclassified opening statements presented to the district court in open session on December 16, 2008 because the telephone link during that public session was a line to the courtroom, not a private line to Mr. al-Alwi's counsel. Moreover, Mr. al-Alwi would not have been permitted to address the court over an unsecured telephone line in an open session accessible to the public because all of his utterances were presumptively classified under the protective court governing these cases. And the record provides ample reason to doubt that Mr. al-Alwi could have heard and understood everything that was said. Indeed, the live telephone link failed on one known occasion during the hearing. *See* App. 169 (intervention by sergeant from Guantánamo because proceedings inaudible). And, crucially, the interpretation was deficient, including when counsel made the very statement characterized as a "concession" by the court of appeals. *Al Alwi*, 653 F.3d at 20; App. 166-68, 172, (interpretation problems leading to replacement of interpreter followed by continuing issues with substitute interpreter).

Of course, statements made by Mr. al-Alwi's counsel should not be imputed to Mr. al-Alwi as if these statements were in-court concessions by Mr. al-Alwi himself. In the criminal context, counsel concessions are acceptable only when they are authorized by the defendant, or part of a trial strategy that in some way benefits the defendant. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Richardson v. United States*, 698 A.2d 442, 444–45 (D.C. 1997).

Finally, the statements by Mr. al-Alwi's counsel that the court of appeals relied upon are not "concessions" matching the allegations at issue. The court of appeals referred to a statement made by counsel at the habeas hearing about Mr. al-Alwi allegedly traveling to Afghanistan to fight against the opponents of the Taliban in the Afghan civil war. App. 172. In this same statement, however, counsel stated unequivocally that Mr. al-Alwi "did not join al Qaeda or the Taliban," and that "his sum battle experience consisted of spending five to six months north of Kabul on the back lines of the war between the Northern Alliance and the Taliban, during which time he cooked, collected firewood and prayed." *Id.* Counsel added that Mr. al-Alwi's "days were spent looking after his horse, swimming with his friends and bartering for food." *Id.* Even more relevant to the issue of detainability, Mr. al-Alwi's counsel correctly pointed out that "nothing on the record" indicated that Mr. al-Alwi "even so much as participated in the fire fight." *Id.* Viewed in context, counsel made no inculpatory concessions, but rather provided a non-incriminating explication of Mr. al-Alwi's activities in Afghanistan.

Fifth, the "preponderance of the evidence" standard applied by the courts below vitiates the meaningful opportunity to challenge imprisonment guaranteed by *Boumediene*. This Court made clear that the ultimate burden of persuasion rests with the government, although it left the district court to decide the "extent of the showing required of the Government in these cases." *Boumediene*, 553 U.S. at 787. The district court adopted an ill-suited preponderance of the evidence standard,

which the court of appeals ratified.[7]

The preponderance standard of proof requires merely "that the existence of a fact is more probable than its non-existence." *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993). When the risk of error is indefinite imprisonment, that standard cannot possibly serve the purpose of justice nor guarantee the meaningful opportunity promised by *Boumediene*. This was one of the preliminary issues litigated in these cases. *See* App. 80. While the district court noted that the preponderance of evidence standard was used in other contexts, namely for those held in detention pre-trial who posed a flight risk, counsel pointed out that those detainees would be subsequently entitled to a full merits trial with all procedural protections. App. 79. Mr. al-Alwi and other Guantánamo detainees have no analogous right.

Furthermore, no decision by this Court has approved anything less than proof by clear and convincing evidence in a case involving prolonged detention. This Court has held, for example, that in spite of society's undoubted interest in detaining an individual who poses a danger to himself or others as a result of a mental disorder, "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 427 (1979); *see also Woodby v. INS*,

[7] But that ratification did not come without repeated declarations that an even lower standard would pass constitutional muster in its judgment, *see, e.g.*, *Almerfedi*, 654 F.3d at 5 n.4; *Uthman*, 637 F.3d at 403 n.8; *Al-Adahi*, 613 F.3d at 1103; *Awad*, 608 F.3d at 11 n.2, and the court of appeals even went so far as to offer, without so holding, that *Boumediene* can be read to place the burden of proof on the prisoner, not the government. *See, e.g., Al-Adahi*, 613 F.3d at 1104 n.1.

385 U.S. 276, 286 (1966) (holding that alien deportation orders must be supported by "clear, unequivocal and convincing evidence").

A clear and convincing standard should serve as the floor for Guantánamo detainees, who face severe and long-term restrictions on individual liberty. Most respondents in immigration court and defendants in criminal cases do not suffer deprivations of liberty of the magnitude currently facing Guantánamo detainees. Even deported individuals typically retain their freedom, the most significant consequence being their inability to return legally to the United States. In criminal cases, defendants not only have the possibility of a full-blown trial, they may even remain free until trial, and, following trial, they know the period of confinement and other penalties to which they have been sentenced. This Court has held that lower standards such as preponderance are reserved for "private suits" involving "a monetary dispute between private parties." *Addington,* 441 U.S. at 423. Considering the severity of the penalty that Mr. al-Alwi and other Guantánamo prisoners face, this Court should require a standard more demanding than that applied in the adjudication of mere monetary disputes.

Sixth, and finally, the lower courts' excessive reliance on hearsay evidence in these cases guts Guantánamo detainees' meaningful opportunity to challenge their imprisonment. Both the district court and the court of appeals held that the hearsay evidence against Mr. al-Alwi, which included unsourced allegations and unsubstantiated intelligence reports, bore sufficient indicia of reliability to serve as admissible (and effectively irrefutable) evidence. *Al Alwi*, 653 F.3d at 19-20; Dist.

Ct. Classified Op. (Jan 9, 2009), App. 8. This Court should review this case to determine whether indiscriminate admission of hearsay evidence effectively deprives a Guantánamo prisoner of a meaningful opportunity to challenge the legality of his imprisonment.

The plain language of the Federal Rules of Evidence makes clear that the Rules apply in habeas corpus cases under 28 U.S.C. § 2241, "to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court." Fed. R. Evid. 1101(e). The Rules also allow a limited hearsay exception for the admission of affidavits at the Court's discretion. Fed. R. Evid. 803-07.

In Guantánamo cases, however, the court of appeals has concluded that hearsay is "*always* admissible" and the court must merely decide what weight to give it. *Al-Bihani v. Obama*, 590 F.3d 866, 879 (emphasis added). In fashioning its blanket ruling, the *Al-Bihani* court relied on this Court's plurality decision in *Hamdi v. Rumsfeld*, which had merely held that hearsay "*may* need to be accepted as the most reliable available evidence from the Government in such a proceeding." 542 U.S. 507, 533-34 (2004) (emphasis added). A fair reading of *Hamdi* does not support *Al-Bihani*'s wholesale modification of the Federal Rules of Evidence governing the use of hearsay in federal habeas corpus proceedings.

Hamdi involved a battlefield detainee captured by allies in Afghanistan. The *Hamdi* decision merely acknowledged the leeway that must be afforded courts to admit hearsay in certain circumstances. *See* 28 U.S.C. § 2246; Fed. R. Evid. 803-

807. Nothing in that plurality opinion indicates that this Court was decreeing a rule for all Guantánamo habeas cases. *See Al-Marri v. Pucciarelli,* 534 F.3d 213, 268 (4th Cir. 2008) ("[T]he *Hamdi* plurality neither said nor implied that normal procedures and evidentiary demands would be lessened in every enemy-combatant habeas case, regardless of the circumstances.") (Traxler, J., concurring in the judgment), *vacated as moot*, 129 S. Ct. 1545 (2009).

Instead of a complete abandonment of the Federal Rules of Evidence governing habeas proceedings, what is required is an assessment of the actual government interests of "national security that might arise in an individual case" weighed against the compelling interests of a prisoner. *Al-Marri*, 534 F.3d at 268. This judicial balancing must occur in order to determine whether a loosening of normal evidentiary rules is warranted. *Id.* at 270 n.14; *see also Hamdi*, 542 U.S. at 529, 539 (plurality opinion) (procedural analysis must consider "the burdens the Government would face in providing greater process" (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). A case-specific analysis, which in turn dictates case-specific evidentiary procedures, accords with *Boumediene*. Any deviations from standard evidentiary and procedural rules should be assessed by the district courts, based on the government's showing of an actual and undue burden in complying with the usual rules of evidence. This individual assessment of the government's burden, and not general invocations of "national security" or "war efforts," may help a court determine whether actual deviations from normal procedures and evidentiary demands are warranted.

Taken together, these procedural flaws deprived Mr. al-Alwi of a meaningful opportunity to challenge his imprisonment. Absent review by this Court, the lower courts will replicate these flaws in all remaining Guantánamo cases. Because it is becoming increasingly likely that a denial of habeas will result in lifetime imprisonment, this Court should grant review to determine what procedures will reasonably minimize the risk of grave error.

II. The Court Should Decide how Long the Government may Detain Members of an "Associated Force"

A core element of the government's case was Mr. al-Alwi's alleged participation in an armed force the government referred to as the Omar Sayef Group (OSG). The government contended that OSG associated with the Taliban or al-Qaida by fighting against the Northern Alliance prior to September 11, 2001, and perhaps for a time thereafter. But the government introduced almost no evidence about OSG's history, purpose, or structure, and nothing in the record suggested that OSG still existed at the time of the hearing, much less that it was engaged in hostilities against the United States or anyone else.

Mr. al-Alwi argued in the court of appeals that detention authority arising from participation in an "associated force" like OSG requires proof that the force remains engaged in hostilities. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949 (requiring release or repatriation "without delay after the cessation of active hostilities"). If the force has dissolved or even switched alliances—a common enough occurrence in the long

Afghan conflict—the underlying basis for detention is eliminated, and the law of war requires release.

The relevant law-of-war principles are embedded in the AUMF, which allows the President:

> [T]o use necessary and appropriate force against nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

The President and the courts have interpreted this authority to permit detention of persons who were "part of, or substantially supported, Taliban or al-Qaida forces or associated forces that *are engaged in hostilities* against the United States or its coalition partners." *See Al Alwi*, 653 F.3d at 15 (emphasis added).

Where the detained person was part of an *associated* force, the standard prudently focuses on whether the associated force is *currently* engaged in the fight. As this Court has recognized, the purpose of wartime detention "is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality). A person who owes allegiance to an associated force is not a threat if the force dissolves or changes affiliation and becomes an ally, and the force itself is unlikely to engage in "future acts of international terrorism against the United States."

This issue apparently was last addressed by a United States court in *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946), before the Third Geneva Convention

modernized the relevant law-of-war principles. In *Territo*, an Italian soldier (who happened to be a U.S. citizen) was captured in Italy in July 1943 while the United States and Italy were at war. The soldier argued that "the change of Italy from belligerency against the United States to that of active participation against another of the axis powers" warranted his release on habeas. *Id.* at 147. In a cryptic opinion, the court of appeals rejected that argument because "no treaty of peace has been negotiated with Italy and petitioner remains a prisoner of war." *Id.* at 148.

In 1949, however, the Third Geneva Convention established that repatriation of combatants was required after the cessation of active hostilities irrespective of whether the parties had entered into an agreement. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949 ("In the absence of stipulations [regarding release] in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.").

The court of appeals declined to consider this argument on the ground that Mr. al-Alwi had failed to raise it in the district court. *See* 653 F.3d at 18 n.7. On the contrary, the issue had been adequately preserved for appeal. Mr. al-Alwi argued in the district court that hostilities had effectively ceased with the installation of a new government in Afghanistan. *See id.* Petitioner also argued

extensively in the district court that he did not support the Taliban, notwithstanding his alleged connection to OSG. App. 145-151. He argued that OSG "has nothing to do with Taliban or al-Qaeda. There's nothing on the record. The government hasn't put anything in. It's simply not in any way affiliated with Taliban or al-Qaeda." App. 175-76. The district court rejected these arguments, and by the time this case was heard on appeal the court of appeals had held that hostilities in Afghanistan were continuing. *See Al-Bihani* v. *Obama*, 590 F.3d 866, 874-75 (D.C. Cir. 2010).

Accordingly, Mr. al-Alwi presented a refined version of the argument on appeal: that the government failed to prove that the alleged force, which was not the Taliban or al-Qaida, was still engaged in hostilities. Mr. al-Alwi's arguments in the district court were more than sufficient to preserve the refined version of the argument for appellate review. *See LeBron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (party who argued below that, while a "private entity," Amtrak was "connected with federal entities," could argue on appeal that Amtrak was a government entity, not a private entity); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

The court of appeals also decided that the evidence was sufficient to find that Mr. al-Alwi was a "part of the Taliban or al Qaeda" and not merely a part of an associated force. 653 F.3d at 18 n.7. But the district court did *not* conclude that

Mr. al-Alwi was part of either entity, and the court of appeals should not have made that factual finding in the first instance. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) (when district court "fail[s] to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings"); *id.* at 292 ("Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue."); *see also Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 259-60 (2009); *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008) (declining to consider independent ground for affirmance that was not resolved below); *National Coll. Ath. Ass'n v. Smith*, 525 U.S. 459, 470 (1999) (same). If Mr. al-Alwi's participation with OSG can no longer support his continued detention, one leg of the government's stool is missing, and the district court should decide in the first instance whether it will stand.

This case presents an opportunity to address difficult questions about the duration of the government's wartime detention authority as the Afghan war morphs and wanes, but seemingly never ends. This Court foresaw some of these questions in *Hamdi*, where the petitioner argued that "the AUMF does not authorize indefinite or perpetual detention." *Hamdi*, 542 U.S. at 521. Citing its understanding of Congressional intent in light of law-of-war principles, however, the plurality concluded that the AUMF authorized "the United States [to] detain, for the duration of these hostilities, individuals legitimately determined to be

Taliban combatants who 'engaged in an armed conflict against the United States.'" *Id.* The plurality added that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Id.*

Seven years after *Hamdi*, the United States is still detaining Mr. al-Alwi and many other Guantánamo prisoners on the ground that hostilities in Afghanistan are continuing. The court of appeals has affirmed that authority in a number of cases, including this one. *See Al Alwi*, 653 F.3d at 18 n.7. This petition is filed ten years to the day after execution of the Bonn Agreement, which installed a new post-Taliban government in Afghanistan. Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. S/2001/1154, Dec. 5, 2001. This Court should grant review so it can clarify the scope and duration of the government's detention authority in the current context of the Afghan conflict.

CONCLUSION

Guantánamo, ever the world symbol, is aging. If it is to become the isle of lifelong imprisonment without trial, its charter should not be written by the nation's inferior courts. This Court should grant review in this case and determine whether Mr. al-Alwi received the meaningful opportunity to challenge his imprisonment that the Constitution promises.

Respectfully submitted,

Ramzi Kassem*
Main Street Legal Services, Inc.
City University of New York.
School of Law
65-21 Main Street
Flushing, NY 11367
(718) 340-4558

*Counsel of Record

William J. Murphy
John J. Connolly
Zuckerman Spaeder LLP
100 East Pratt Street, Suite 2440
Baltimore, MD 21202-1031
(410) 332-0444

Counsel for Petitioner

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