ORAL ARGUMENT SCHEDULED SEPTEMBER 30, 2021

No. 19-5079

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABDULSALAM ALI ABDULRAHMAN AL HELA,
Petitioner-Appellant,

v.

JOSPEH R. BIDEN, JR., et al.,
Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PETITIONER ON REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* the Center for Constitutional Rights certifies as follows:

A. Parties and *Amici*

Except for the following *amici* in this Court, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Petitioner-Appellant to the en banc Court:

Tofiq Nasser Awad Al Bihani (Guantánamo detainee ISN 893)
The American Bar Association
The Center for Constitutional Rights
The Commonwealth Lawyers Association
Human Right First & Reprieve US
Professor Eric Janus
The National Association of Criminal Defense Lawyers
Khalid Ahmed Qassim (Guantánamo detainee ISN 242)

B. Rulings under Review

References to the rulings at issue appear in the Brief for Petitioner-Appellant to the en banc Court.

C. Related Cases

Related cases are listed in the Brief for Petitioner-Appellant to the en banc Court.

RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae the Center for Constitutional Rights has no parent corporation and no publicly held corporation owns any of its stock.

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INTEREST OF AMICUS CURIAE

The Center for Constitutional Rights ("CCR") is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. In the early 1990s, CCR challenged the detentions of HIV-positive Haitian political asylum seekers at Guantánamo. *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated sub nom. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918 (1993). Since then the Center has twice victoriously litigated Guantánamo detainee cases to the Supreme Court, in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene v. Bush*, 553 U.S. 723 (2008), and since *Rasul* has coordinated the work of the hundreds of outside counsel working on individual detainees' cases.

CCR currently represents six detainees who continue to be held at Guantánamo. Several of them have now been detained without charge for more than eighteen years. Two are cleared for release; one is a defendant before a military commission at Guantánamo. All will be impacted by the decision in this case.

RULE 29 STATEMENT

No counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(e).

Counsel for both parties have consented to the filing of this brief. *See* Cir. R. 29(b).

The Center has a vast and unique experience with these cases, having represented in excess of seventy individual clients on top of our coordinating role with respect to the entire habeas litigation writ large. Pursuant to Circuit Rule 29(d), undersigned counsel for amicus curiae certifies that a separate brief is necessary because the brief draws on this practical experience to illustrate how the procedural rules currently applied in these cases violate due process.

INTRODUCTION

This case involves "a question undoubtedly of exceptional importance"[1]: whether and to what extent the substantive and procedural protections of the Due Process Clause apply to the detentions at Guantánamo. Al Hela argued that the Due Process Clause reached Guantánamo, that its substantive protections placed limits on the duration of his detention, and that procedural due process should foreclose the district court's use of hearsay, *ex parte* evidence, and evidence he had not had the chance to review himself. The panel majority decided that all of these specific claims were foreclosed because the Due Process Clause does not extend to foreign nationals held at Guantánamo as a categorical matter. *Al Hela v. Trump*, 972 F.3d 120, 147-48 (D.C. Cir. 2020). Judge Griffith's partial concurrence noted that the majority's opinion "cut a wider path than necessary" to resolve the claims before it, instead electing to make "make sweeping proclamations about the Constitution's application at Guantanamo," with potentially "vast scope" for other claims not before the Court. 972 F.3d at 151, 154, 152.

The panel majority's sweeping rule purported to foreclose any substantive or procedural due process claims brought by Guantánamo detainees. 972 F.3d at 147-48. That overbroad pronouncement was inconsistent with *Boumediene* and incorrect. However, both Judge Griffith's concurrence and the majority incorrectly pre-

[1] *Ali v. Trump*, 2019 WL 850757, at *1 (D.C. Cir. 2019) (Tatel, J., concurring in denial of initial hearing *en banc*).

sumed that this Court's prior decisions approving of evidentiary rules in Guantánamo habeas cases foreclose Al Hela's procedural due process claims, when those precedents were neither argued nor decided on Due Process Clause grounds.

In fact, many of the rules panels of this Circuit have accepted under a Suspension Clause analysis are inconsistent with the requirements imposed by the Due Process Clause. Due process bars unreliable hearsay and requires that detainees be permitted to confront evidence where feasible. Enforcing those basic due process requirements by mandating the government produce evidence of the sources of its interrogation records and the conditions under which they were taken, as contemplated by the initial Case Management Order Judge Hogan issued in 2008, would work a sea change in the litigation of these cases below, particularly given its interaction with other procedural rules (such as the presumption of regularity for the government's submissions) applied solely in the Guantánamo context.

ARGUMENT

I. Under the logic of *Boumediene*, the Due Process Clause should apply at Guantánamo

Boumediene applied a functional test to determine whether the application of a constitutional provision abroad would be "impracticable and anomalous." The Supreme Court held that because "there are few practical barriers to the running of the writ" at Guantánamo, the protections of the Suspension Clause reach the prison there, 553 U.S. at 769-71. Likewise there are no practical or structural barriers that

would render it impracticable and anomalous to resolve Al Hela's substantive or procedural claims under the Due Process Clause. Throughout this proceeding and the other cases recently before this Court in which Guantánamo detainees asserted due process claims, the government has failed even to suggest any such barriers exist. Indeed, the rights are historically intertwined: as Justice Scalia summarized it, "[t]he two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned—found expression in the Constitution's Due Process and Suspension Clauses." *Hamdi v. Rumsfeld*, 542 U.S. 507, 555-56 (2004) (Scalia, J., with Stevens, J., dissenting).[2]

The logic of *Boumediene* mandates that, in some measure, the Due Process Clause must apply at Guantánamo.[3] What particular process is due under the Clause presents a more complex question: as always with due process claims, the specific procedural and substantive protections that apply will be dependent on the context. But to categorically hold that no measure of the Due Process Clause ap-

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[2] The panel majority placed great stock in *Johnson v. Eisentrager*, 972 F.3d at 140-42, but the habeas petitioners in that case had been captured abroad (in China), convicted by military commission there, and were detained in Landsberg Prison in the newly-formed Federal Republic of Germany. *Boumediene* itself distinguished *Eisentrager* at great length on precisely such practical circumstances. *See* 553 U.S. at 762-770.

[3] *Cf. Boumediene v. Bush*, 476 F.3d 981, 993 (D.C. Cir. 2007) (Randolph, J.) (the "notion that the Suspension Clause is different from the … Fifth … Amendment[] … cannot be right."), *rev'd*, 553 U.S. 723 (2008).

plies carries implications far beyond this single case. Previous panels of this Court have been exceptionally careful to not resolve due process claims in a fashion that forecloses all applications of the clause at Guantánamo. *See Qassim v. Trump*, 927 F.3d 522, 530 (D.C. Cir. 2019); *Ali v. Trump*, 959 F.3d 364, 366, 369 (D.C. Cir. 2020) (appearing to fault detail and contextualization of due process claims). As Judge Griffith's concurrence noted, 972 F.3d at 151, the panel majority here was not as cautious, instead establishing a rule that would foreclose many important detainee claims beyond those presented in this appeal, including the procedural due process claims that are the subject of this brief.

II. Due process mandates procedural fairness beyond what this Court has deemed the Suspension Clause to require

Judge Griffith's concurrence nonetheless would hold that this Court's procedural precedents have granted detainees all the process that would be due even if the Due Process Clause applied. 972 F.3d at 153-54. Although a number of decisions from this Court and the courts of this district have admitted hearsay and evidence hidden from the view of petitioners or submitted *ex parte*, this Court has never ruled that such evidentiary rulings comported with the requirements of the Due Process Clause. Past panels of this Court have endorsed broad acceptance of hearsay, the preponderance standard, and various other procedural rules on "constitutional" grounds. But none of those earlier cases were argued and decided on *due process* grounds. *See Al-Bihani v. Obama*, 590 F.3d 866, 878-79 (D.C. Cir. 2010)

(endorsing preponderance standard of proof and liberal admission of hearsay); *id.* at 873 n.2 (visiting Al Qaeda affiliated guesthouses "overwhelmingly, if not definitively" justifies detention); *Al Odah v. United States*, 611 F.3d 8, 13 (D.C. Cir. 2010) (preponderance standard "is constitutional"); *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010) (same); *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011) (affording presumption of regularity to government intelligence reports); *Ali v. Obama*, 736 F.3d 542, 546 (D.C. Cir. 2013) (stay in "guesthouse" supports inference of al Qaeda membership). In each of those cases the parties and therefore this Court assumed the Due Process Clause did not apply.[4] That is unsurprising, given that the district courts generally viewed dictum in *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), as foreclosing any such claims. The only constitutional arguments considered by those prior panels of this Court were those flowing from the Suspension Clause-based standard set forth in *Boumediene*: whether the detainee has a "meaningful opportunity" to challenge the government's evidence, *Boumediene*, 553 U.S. at 779, 786.

[4] In *Bihani*, a barely-developed reference was made to due process, *see* Pet. Br. (Jun. 10, 2009) at 47, 50-51, but never mentioned in the opinion or subsequent *en banc* petition. A majority of the *en banc* Court agreed that the discussion of whether the procedures used were constitutional was unnecessary to the resolution of the case and is therefore dictum. *See Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, J., joined by six other judges, concurring in denial of *en banc*) (citing 590 F.3d at 883-85 (Williams, J., concurring in the judgment)).

Based on its briefing before the panel in this case, the Government appears to agree. *See* Gov't Br., *Al-Hela v. Trump*, Case No. 19-5079 (D.C. Cir. filed Dec. 5, 2019) (Doc. 1818985), at 55 (Circuit precedent rejected Hela's arguments "in interpreting *Boumediene*'s 'meaningful opportunity' standard"); *id.* at 57 (Court has "already held" existing hearsay rules "satisfy the Suspension Clause"). It was therefore entirely correct for this Court in *Qassim* to hold that that the question whether the Constitution demanded more than the limited procedural protections that had been applied by the district courts to date had not been resolved by any of this Circuit's cases. *Qassim*, 927 F.3d at 530, *reh'g en banc denied*, 938 F.3d 375 (D.C. Cir. 2019). Whether the Due Process Clause sets minimum standards for procedural fairness that go beyond what this Court has permitted under the Suspension Clause remains an open question so long as the possibility that the Due Process Clause applies at Guantánamo remains open.

III. Due process requires hearsay be reliable and susceptible to confrontation

The vast majority of evidence introduced against Guantánamo detainees in their habeas cases consists of hearsay interrogation records and declarations, many of which are anonymously sourced.[5] The Due Process Clause bars unreliable hear-

[5] *See, e.g.*, *Al-Bihani*, 590 F.3d at 879 (hearsay "made up the majority, if not all, of the evidence on which the district court relied"); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 56-59 (D.D.C. 2009) (describing "second- and third-hand hearsay" from a host of problematic fellow-detainees whose interrogation statements were

say and requires that detainees be permitted to confront evidence where feasible, including challenging the sources of the evidence. *See Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972). In the immigration, parole revocation, and sentencing contexts, where, as here, the Federal Rules of Evidence do not apply, reliability is nonetheless required because the Due Process Clause applies. *See, e.g.*, *Saidaner v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997) (immigration); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 & 782 n.5 (1973) (parole); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (sentencing). This Court's *Qassim* opinion pointedly cited Supreme Court precedent requiring as much in its remand instructions. *See Qassim*, 927 F.3d at 531 (citing *Gagnon* and *Morrissey*). The en banc Court should make clear that the same holds true in all Guantánamo cases.

Initially, it did. The coordinated 2008 Case Management Order issued by Judge Hogan in the immediate wake of *Boumediene*, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008), applied to nearly all the detainees' cases. It set forth hearsay admission requirements compliant with the Due Process Clause and paralleling the process that would apply under Fed. R. Evid. 807, by requiring the government to make a mo-

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used against petitioner); *Ali*, 736 F.3d 542, 548-51 (D.C. Cir. 2013) (unsourced translated diary and various dubious witness statements); *see also Parhat v. Gates*, 532 F.3d 834, 848-49 (D.C. Cir. 2008) (characterizing a host of hearsay "that all may ultimately derive from a single source" in challenge to CSRT process brought via Detainee Treatment Act of 2005).

tion establishing the reliability of its hearsay submissions and demonstrating the burden of producing equivalent non-hearsay evidence. *Id*. at *3, Section II.C. A series of this Court's decisions—decided when *Kiyemba* appeared to have foreclosed the application of the Due Process Clause to Guantánamo—subsequently absolved the government of that burden, instead permitting liberal admission of hearsay in these cases. *See Al-Bihani v. Obama*, 590 F.3d. 866, 879 (D.C. Cir. 2010) ("hearsay is always admissible" in these cases); *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010) (burden of showing unreliability is on petitioner).

To say that a habeas court may simply accord the proper weight to freely-admitted hearsay of suspicious origin is no safeguard. *See, e.g*., *Al-Bihani v. Obama*, 590 F.3d 866, 880 (2010) (interpreting Judge Leon's 2008 Case Management Order). Under current practice, the government may introduce interrogation records of other detainees wholesale, without being required to make any showing that an individual record is reliable based upon the circumstances of that particular interrogation—the date, place, and, most importantly (given most of the records are from interrogations of other Guantánamo detainees) the nature and extent of the coercion applied. Additionally, information that would routinely be present in any domestic context is almost never produced: the qualifications of the translator, the contemporaneity of the notetaking, or often even the identity of the person being interrogated. Absent any direct showing of the circumstances under which the

interrogations were taken, the district court is left to piece together a rationale for reliability after the fact, and invariably must do so from factors intrinsic to the records rather than extrinsic—that is, from the content of the hearsay statements rather than any actual knowledge about how they were made, or who made them.

In short, without the information establishing reliability that would have been required by the motions contemplated by Judge Hogan's initial Case Management Order, the hearsay is left to serve as its own context. The risks this presents to the truth-determining process are obvious. Among other problems, this approach allows the same story, repeated multiple times, to be taken as true (even without applying any special "conditional probability" rule, *see, e.g.*, *Al-Adahi v. Obama*, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010)). Frequently the government and the courts have expressed this as an imperative that one "should evaluate the reliability of any hearsay evidence and intelligence reports at issue here based on the evidence as a whole," Unclassified Appellate Appx. at JA536, *Ali v. Obama*, No. 11-5102 (D.C. Cir. Jun. 11, 2013) (Doc. # 1443998); *see also Bostan v. Obama*, 662 F. Supp. 2d 1, 8 (D.D.C. 2009). The consistency of the content the government chooses to present is taken as a factor proving reliability rather than, for example, a sign that interrogators are suggesting the same story to one or more detainees. The end result is a rule that, as Judge Walton put it, "a rumor must be true if enough people repeat it." *Bostan*, 662 F. Supp. 2d at 8 (citing *Parhat v. Gates*, 532 F.3d

834, 848 (2008)). "This … approach is a direct inversion of what takes place in any other kind of adjudicative process, where factual findings are made on the basis of admissible evidence, not the other way around. … Ultimately, attempting to determine the admissibility of evidence by comparing one piece of hearsay with no intrinsic guarantees of trustworthiness to other, similarly unreliable pieces of hearsay is a fruitless exercise: it establishes only that all of the hearsay is either accurate or inaccurate, but it does not establish that any of the hearsay actually is accurate." *Id*. at 7.[6]

Instead, as Judge Hogan's order contemplated, "hearsay evidence … must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability." *Parhat v. Gates*, 532 F.3d at 849. Given that the vast majority of evidence introduced in these cases consists of detainee

[6] The *Ali* case recently before this court illustrates the dangers of uncritically accepting the accuracy of an accumulation of hearsay interrogation records without the corresponding information needed to test their reliability. The 2013 panel opinion affirming denial of the writ relied on Ali's brief stay in a guesthouse and inferences from a number of additional "facts," concluding that they reinforced each other's veracity in pushing the case over the preponderance threshold. *Ali*, 736 F.3d 542, 545-51 (D.C. Cir. 2013). But the "facts" themselves were established by hearsay of dubious provenance and reliability: from a "diary" of unknown authorship and origin to the purported interrogation statements of other mentally-ill or tortured detainees, the reliability of nearly every source of the relevant facts was contested during his habeas hearing. *See* Unclassified Appellate Appx. at JA1-JA60, *Ali v. Obama*, No. 11-5102 (D.C. Cir. Jun. 11, 2013) (Doc. # 1443998). Ali, like all detainees, was left unable to confront even the sourced hearsay introduced against him, all of which was presumed admissible, with each additional item of hearsay reinforcing the others. *See* 736 F.3d at 548, 550.

interrogation records, the vital missing "additional information" relates to the full set of circumstances under which the interrogations were taken. The absence of evidence of the circumstances under which interrogations of other detainees were taken also vitiates the ability to confront those interrogation records. For example, it has been publicly reported that a small number of individuals held at Guantanamo implicated a vast number of other detainees. Obvious reliability concerns relating to these detainees—for instance, preexisting mental illnesses, the fact they were tortured, the fact that they made similar allegations against an implausibly-vast number of fellow detainees, or the benefits they received[7]—only came to light by happenstance.[8] Such episodes make plain that allowing the admission of detainee interrogation records without any information about the circumstances under which the interrogations took place poses the same problems as ex parte evidence:

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[7] *See, e.g.*, Del Q. Wilber, *Detainee-Informer Presents Quandary for Government*, Wash. Post, Feb. 3, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR2009020203337.html

[8] *See, e.g.*, *Ahmed v. Obama*, 613 F. Supp. 2d 51, 57-58 & 58 n.6 (D.D.C. 2009) (a fellow-detainee whose interrogation statement was used against petitioner was "diagnosed by military medical staff as having a 'psychosis'"; "It is very troubling that Petitioner learned of the witness' medical condition only through the diligent work of his counsel, and not as a result of the Government's obligation to provide him exculpatory information about the statements upon which the Government relies in justifying detention. *See* CMO at § I.D.1. Petitioner's counsel obtained this information when [redacted] counsel turned over the document to him. It appears that counsel was able to retrieve the medical records only by resorting to a FOIA request. Tr. at 106 (Apr. 16, 2009)."). This incident is just one of many, many similar examples.

it makes it impossible for petitioners to confront the evidence in the manner our adversarial system contemplates. (Indeed, the *Al-Bihani* panel seems to have understood as much. *See* 590 F.3d at 880 (musing that habeas is not "adversarial"; instead, "judge acts as a neutral decisionmaker charged with seizing the actual truth of a simple, binary question").

* * *

Even assuming *arguendo* that it might reasonably be the case that diminished process might have been acceptable in the direct aftermath of capture, it does not follow that such diminished process is acceptable now, close to twenty years later. Due process requires consideration of "the risk of an erroneous deprivation of [a liberty interest] and the probable value, if any, of additional or substitute procedural safeguards." *Boumediene*, 553 U.S. at 781 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). With "the private interest" to be balanced under *Mathews* now measured in decades rather than years, and the prospect of lifelong detention at Guantánamo appearing realistic, the thin procedural protections that might arguably have passed constitutional muster earlier no longer suffice under *Mathews*.

A plurality of the Supreme Court, as Judge Griffith notes, had "suggested" the use of hearsay might be necessary in a case involving military detention of a U.S. citizen, *see* 972 F.3d at 153 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004) (plurality op.)), but that part of Justice O'Connor's opinion was contingent-

ly worded, was expressly not joined by Justices Souter and Ginsburg, and only garnered four of nine votes. *See* Al Hela Br. at 42. *Boumediene*, in contrast, sharply criticized the effects of unbridled use of hearsay by the government in the Combatant Status Review Tribunal ("CSRT") proceedings. 553 U.S. at 784. Moreover, Yasser Hamdi was captured on a battlefield bearing arms. Again, the context of individual cases matters: the majority of Guantánamo detainees were not captured by U.S. forces, and of the 40 remaining detainees, officially acknowledged government documents and reporting indicate that approximately three-quarters came to Guantánamo from *non-military* detentions.[9] The *Hamdi* plurality's speculation expressly relied on the "exigencies of the circumstances … at a time of ongoing military conflict." 542 U.S. at 533.[10] That rationale has particularly limited force in the many cases not involving military operations of any sort, including the case presently before this Court. *See* Al Hela Br. at 16-17 (describing Petitioner's initial two-year detention prior to his rendition to military custody in Guantánamo).

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[9] *See* Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (Dec. 3, 2014), Appendix 2: CIA Detainees from 2002-2008. This unclassified government document indicates that of the 28 uncharged detainees, 15 were detained by the CIA prior to transfer to Guantánamo (ISNs 841, 893, 1017, 1094, 1453, 1456, 1457, 1460, 1461, 1463 (Al Hela), 10016, 10017, 10023, 10025, 10029), with 3 more captured in CIA raids (ISNs 682, 685, 694), *see* Unclassified Tr. of Oral Arg., *Ali v. Trump*, No. 18-5297.

[10] *See also Boumediene*, 553 U.S. at 795 ("accommodations can be made to reduce the burden habeas corpus proceedings will place *on the military*") (emphasis added).

Moreover, the government often implied that other detainees whose interrogation records were used to justify a habeas petitioner's detention were unavailable to testify (or created practical impediments to such testimony) while those other detainees were detained at Guantánamo. *See, e.g.*, *Al-Bihani v. Obama*, 662 F. Supp. 2d 9, 17-18 (D.D.C. 2009). Now, however, over seven hundred detainees have been released, including many of the mass accusers; they are (ironically) more likely at this advanced date to be able to testify than they were earlier, when they were still detained by the government.

The ubiquity of the hearsay issue across these cases demands that this Court address it by mandating the uncontroversial principle that due process bars unreliable hearsay and requires that detainees be permitted to confront evidence where feasible.

IV. Other procedural rules particular to Guantánamo cases violate due process, particularly when combined with current permissive hearsay standards

A number of other rules applied to Guantánamo cases cannot possibly comport with due process, despite the fact that decisions of this Court have accepted them as sufficient under the "meaningful review" Suspension Clause standard announced in *Boumediene*. *See, e.g.*, *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011) (affording "presumption of regularity" to government's evidence); *Al-Adahi v. Obama*, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010) (district courts must take into

account "conditional probability" that otherwise unreliable evidence might be reliable if assessed in light of other, often itself unreliable evidence); *Al-Bihani*, 590 F.3d. at 873 n.2 (visiting Al Qaeda-affiliated guesthouses "overwhelmingly, if not definitively" justifies detention). That is particularly so given the fact that hearsay records are introduced without any accompanying proof of their reliability.

For instance, this Court's opinion in *Latif* afforded a presumption of regularity to government evidence—a single report of dispositive importance to the merits of the case. The majority noted that "the presumption of regularity, if not rebutted, only permits a court to conclude that the statements in a government record were actually made; it says nothing about whether those statements are true." 666 F.3d at 755. However, the majority concluded that "because the Report, if reliable, proves the lawfulness of Latif's detention, we can only uphold the district court's grant of habeas if Latif has rebutted the Government's evidence with more convincing evidence of his own." *Id*. Of course, the fact that the government is not required to produce information about the circumstances under which interrogation records were taken makes it practically impossible to for "the party against whom a presumption is directed [to carry its] burden of producing evidence to rebut the presumption," albeit that "the burden of persuasion [nominally] remains on the party who had it originally." *Goldman Sachs Group, Inc., v. Arkansas Teacher Re-*

tirement System, 594 U.S. ___, Slip Op. at 3 (Jun. 21, 2021) (Gorsuch, J., concurring) (quoting Fed. R. Evid. 301).

In Judge Tatel's view, "requir[ing] courts to presume the accuracy, albeit not the truth, of documents 'produced in the fog of war by a clandestine method that we know almost nothing about' … unjustifiably shifts the burden of proof to the detainee," denying the "meaningful review" required under the Suspension Clause. *Qassim v. Trump*, No. 18-5148, 2018 WL 3905809, at *2 (D.C. Cir. Aug. 14, 2018) (Doc. # 1745386) (Tatel, J., concurring in denial of petition for initial hearing *en banc*) (quoting *Latif v. Obama*, 677 F.3d 1175, 1208 (D.C. Cir. 2011) (Tatel, J., dissenting)).[11] It surely violates due process as well.

[11] Practical experience has shown that any presumption of accuracy in this context is, in fact, misplaced. *See, e.g.*, *Ahmed v. Obama*, 613 F. Supp. 2d 51, 61-62 (D.D.C. 2009) (government admitted that two detainees were given the same identification number, creating obvious difficulties in clarifying which one made hearsay statement); *Al Mutairi v. Obama*, 644 F. Supp. 2d 78, 84 (D.D.C. 2009) ("Government believed for over three years that Al Mutairi manned an anti-aircraft weapon in Afghanistan based on a typographical error in an interrogation report"); *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 18 (D.D.C. 2009) ("record contains two reports written about the same interrogation" with discrepancies the government "did not address" or attempt "to reconcile."); *Al Odah v. United States*, 648 F. Supp. 2d 1, 6 (D.D.C. 2009) (government admitted "that interrogators and/or interpreters included incorrect dates in three separate reports that were submitted into evidence based on misunderstandings between the Gregorian and the Hijri calendars."). There are many, many more such examples.

Indeed, a far more rational conclusion to draw from an analysis of the broad span of detainee cases that have come before this Court is that the loose hearsay rules, combined with the other rules complained of in this part of this brief, have given the government an incentive to dump as many statements as possible into the

Taken together, these evidentiary rules, combined with the preponderance standard of proof this Court has applied, have rendered it impossible for detainees to prevail, regardless of how weak a case the government cobbles together against them. Even detainees cleared for release by the unanimous consent of the military and intelligence agencies have lost their habeas cases. Adnan Latif, having been cleared for release for six years, killed himself a year after this Court reversed the district court's issuance of the writ. Petitioner Al Hela, having been cleared for transfer during the pendency of this rehearing, is now among this group.[12] Indeed, eleven men cleared for release now languish at Guantánamo. Three of them have been cleared for a decade.

The present set of rules governing these cases have long ago "move[d] the goalposts" and "call[ed] the game in the government's favor." *Latif*, 666 F.3d at 770 (Tatel, J., dissenting). The "meaningful opportunity" to develop and challenge evidence that *Boumediene* held the Suspension Clause mandates has proved so pliant a standard in this Court's hands that for all practical purposes no such opportunity exists today. An explicit ruling that the familiar standards of the Due Process

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mass of factual-return exhibits submitted in any given case, without investing the work to sort reliable evidence from patently unreliable chaff.

[12] *See* Unclassified Summary of Final [Periodic Review] Board Determination, ISN 1463 (Jun. 8, 2021), *available at* https://www.prs.mil/Portals/60/Documents/ISN1463/SubsequentFullReview2/210608_UPR_ISN1463_SH2_FINAL_DETERMINATION.pdf

Clause apply to these detentions would allow the lower courts to finally vindicate *Boumediene*'s promise.

V. The preponderance standard of proof is incompatible with substantive and procedural due process

Substantive and procedural due process require the application of a clear-and-convincing standard of proof—mandated both by the Supreme Court's civil commitment cases and also by the balancing test required by *Matthews v. Eldridge*, under which the length of detention is relevant to the balance of harms between the parties.

As to the former, the Supreme Court's civil commitment jurisprudence mandates that continuing noncriminal detention of this length cannot be justified solely by past conduct or association. Rather, the government must justify detention by articulating a specific, present danger justifying continued detention, supported by clear and convincing evidence. *See Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (requiring proof of past violent conduct coupled with an additional present condition to justify indefinite commitment); *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (detention under carefully limited circumstances, including proof by clear and convincing evidence that a person presents an "identified and articulable threat" and "no conditions of release can reasonably assure" public safety, satisfies due process). The minimum requirements are clear: the putative danger would have to be articulated and individualized, not presumed (as in traditional law of

war detentions in an international armed conflict); forward-looking rather than solely rooted in past conduct; and—while some deference to executive expertise and predictive judgments might be due—rebuttable by the detainee. Review must be periodic,[13] must take place via a judicial process, and must require proof by clear and convincing evidence. *Id*.

The panel dismissed Al Hela's substantive due process claims on the ground that the Due Process Clause did not apply in any respect to Guantanamo. 972 F.3d at 140 (citing *Ali*, 959 F.3d at 368-69). Judge Griffith's narrower approach would hold that the AUMF and the laws of armed conflict that it incorporates permit detention until the end of "the ongoing conflict with al Qaeda." 972 F.3d at 152. But what the AUMF or laws of war might permit if they were standing alone is not dispositive of what limitations the Due Process Clause might apply to cabin that *continuing* detention authority two decades hence. *Cf. Hussain v. Obama*, 572 U.S. 1079, 1080 (2014) (Breyer, J., respecting denial of certiorari) (Supreme Court has not yet decided full reach of AUMF or whether "either [it] or the Constitution limits the duration of detention").

As a matter of procedural due process, *Mathews* also requires that, as the period of detention lengthens and the corresponding burden on the detainee's liberty interest increases, the burden on the government should similarly rise, as noted

[13] *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992).

above. *See supra* pg. 12.[14] To hold otherwise would permit lifetime detention based on no more evidence than the law requires to prove a traffic violation.

CONCLUSION

Judges of this Court have frequently expressed exasperation at the lack of guidance from the Supreme Court on many of the issues discussed above.[15] Yet the *Boumediene* opinion expresses a central concern with placing effective "check[s on] the executive's unilateral, unchecked detention authority," and, in discussing the approach habeas courts should take, "repeatedly returned to the notion that a judge's discretion over evidentiary evaluation would be enough to both deter and reverse executive overreach."[16] *See Boumediene*, 553 U.S. at 767, 773, 780-81, 783-84, 786, 789, 790-91. The vast body of existing precedent under the Due Process Clause provides a ready, detailed guide for the approach the courts should have taken to these cases.

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[14] Because claims modeled on civil commitment standards combine elements of procedural due process with substantive due process—for example, the use of the clear and convincing evidence standard—al Hela's substantive due process claims cannot be disposed of by reference to this Court's Suspension Clause-based procedural precedents. *Contra* Judge Griffith's partial concurrence, noting "the Due Process Clause and the Suspension Clause provide similar protections," 972 F.3d at 154.

[15] *See* Stephen I. Vladeck, *The D.C. Circuit after* Boumediene, 41 Seton Hall L. Rev. 1451, 1453-56 (2011) (citing cases).

[16] Jasmeet K. Ahuja & Andrew Tutt, *Evidentiary Rules Governing Guantánamo Habeas Petitions: Their Effects and Consequences*, 31 Yale L. & Pol'y Rev. 185, 225 (2012).

To date that body of precedent has not guided the approach of the courts to these cases, primarily because of the impact of this Court's decade-old dictum in *Kiyemba v. Obama*. This Court has now disavowed that dictum,[17] and then, in granting rehearing in this case, vacated the panel's subsequent attempted codification of the dictum. But the question of whether the Due Process Clause applies to Guantánamo, which has remained an open question in the federal courts for three decades,[18] remains open. This Court should, at long last, resolve it, deciding that the Due Process Clause applies to the detentions at Guantánamo, and mandates the procedural protections described herein.

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[17] *Qassim v. Trump*, 927 F.3d 522, 524 (D.C. Cir. 2019), *reh'g* en banc *denied*, 938 F.3d 375 (D.C. Cir. 2019).

[18] *See Haitian Ctrs. Council v. McNary*, 969 F.2d 1326, 1339-46 (2d Cir. 1992) (due process likely applies to screened-in Haitian nationals held at Guantánamo, supporting district court's issuance of preliminary injunction), *vacated as moot, Sale v. Haitian Ctrs. Council*, 509 U.S. 918 (1993); *Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005) ("petitioners possess no cognizable constitutional rights"); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 453-64 (D.D.C. 2005) ("it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply," including "the right not to be deprived of liberty without due process of law.").

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition is in compliance with Rules 29(a) and 32(a)(5-6) of the Federal Rules of Appellate Procedure. The brief contains 5,402 words, and was prepared in 14-point Times New Roman font using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(a), that on July 2, 2021, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

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