IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDULLATIF NASSER (ISN 244), *et al.*,	:	
Petitioners,	:	
v.	:	Civil Action No. 05-cv-764-CKK Judge Colleen Kollar-Kotelly
DONALD TRUMP, *et al.*,	:	
Respondents.	:	

PETITIONER NASSER'S SUBMISSION
OF SUPPLEMENTAL AUTHORITY

Petitioner, **ABDULLATIF NASSER (ISN #244),** by and through his attorneys, **THOMAS ANTHONY DURKIN, BERNARD E. HARCOURT,** and **MARK MAHER**, respectfully submits as additional argument and authorities to his October 23, 2020, pleading in the above case (Dkt. #328), the Petition for Rehearing *En Banc* and additional *Amici* filings with the D.C. Court of Appeals in the matter of *Al Hela v. Trump*, No. 19-5079, on October 26, 2020. The Court of Appeals' panel opinion in *Al Hela*, as well as the anticipated filing of his petition for rehearing *en banc*, were referenced in Petitioner Nasser's pleading, along with the Due Process implications of the panel opinion.[1] As such, the arguments and authorities in the recent filings are attached hereto as Exhibits A-1, A-2, and A-3. Due to the significance of the Due Process issues throughout Mr. Nasser's arguments in this proceeding, and the status of the law in

[1] See, pp. 3 n.1, 13–16, 18–19, 22–23.

this Circuit, undersigned counsel would ask leave to adopt the arguments and authorities set forth in the Exhibits as if fully set forth and incorporated by reference in Nasser's pleading of October 23, 2020, (Dkt # 328).

Dated: October 28, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused Petitioner Nasser's Submission of Supplemental Authority to be filed with the Court and served on counsel for Respondents via the Court's CM/ECF system.

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EXHIBIT A-1

No. 19-5079

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

ABDULSALAM ALI ABDULRAHMAN AL HELA,

Petitioner-Appellant,

v.

DONALD J. TRUMP, *et al.*,

Respondents-Appellees.

On appeal from the United States District Court
for the District of Columbia, Civil Action No. 05-1048,
Hon. Royce C. Lamberth, District Judge

PETITION BY PETITIONER-APPELLANT FOR REHEARING EN BANC

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CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Parties and amici curiae. The Petitioner in the district court, and the Appellant in this Court, is Abdulsalam Ali Abdulrahman Al Hela. The Respondents in the district court, and the Appellees in this Court, are Donald J. Trump, President of the United States; Dr. Mark T. Esper, Secretary of Defense; Rear Admiral Timothy C. Kuehhas, U.S. Navy, Commander, Joint Task Force-GTMO; and Colonel William A. Rodgers, U.S. Army, Commander, Joint Detention Group, Guantanamo Bay. Khalid Ahmed Qassim submitted a Motion for Leave to Intervene and Petition for Rehearing *En Banc* on 23 October 2020. We expect that *amici curiae* will file petitions as well.

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INTRODUCTION AND RULE 35 STATEMENT

Petitioner-Appellant Abdulsalam Ali Abdulrahman Al Hela, a Yemeni detained without charge at the U.S. Naval Station at Guantanamo Bay ("Guantanamo") since 2004, respectfully petitions for rehearing en banc pursuant to Federal Rule of Appellate Procedure 35. The panel's categorical ruling that the Due Process Clause does not apply to "aliens without property or presence in the sovereign territory of the United States," and specifically not to Guantanamo detainees, Opinion ("Op.") 2,[1] conflicts with the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), and this Court's decisions in *Ali v. Trump*, 959 F.3d 364 (D.C. Cir. 2020) and *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019). The panel's failure to consider the limitation of the international law of war on detention authority under the Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) ("AUMF"), also conflicts with the Supreme Court plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

Until this case, every Guantanamo case upholding detention involved a

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[1] The opinion has been reported at 972 F.3d 120.

finding that the detainee was "part of . . . al Qaeda, the Taliban, or associated forces." This is the first time this Court has held that a civilian who was not found to be "part of" such groups could be detained solely on grounds that he "substantially supported" such groups. The panel's due process ruling and its construction of the AUMF present questions of exceptional importance.

QUESTIONS PRESENTED

The questions of exceptional importance are:

1. Whether the Due Process Clause applies to Guantanamo detainees.
2. Whether the authority granted by the AUMF to detain persons who "substantially supported" al Qaeda and associated forces extends to persons whose support did not include direct participation in hostilities against the United States or its allies.

BACKGROUND

This case concerns the detention of Abdulsalam Ali Abdulrahman Al Hela, a Yemeni businessman and tribal leader. Al Hela—a civilian—was not found to be a political or religious extremist and was not found to be "part of" al Qaeda or its associated forces. In 2016, the Yemen Government provided express assurances that Al Hela was a respected citizen, who had assisted the Yemen Government in deporting unwanted foreigners, and who had no connection "with any terrorist or extremist organizations." Joint Appendix ("JA") 767.

Al Hela was seized while he was on a business trip to Cairo in 2002. He was "rendered" to the CIA, which took him to secret prisons where he was tortured. Al Hela has been detained at Guantanamo since 2004, without ever having been charged with a crime.

Al Hela filed a petition for a writ of habeas corpus in 2005. The Government filed an Amended Factual Return in 2017, which alleged that Al Hela was a "part of" al Qaeda or its "associated forces." The district court did not conclude whether Al Hela was "part of" al Qaeda or any of its "associated forces." *See* JA 148 n.8. Instead, the district court upheld his detention on the theory that Al Hela "more likely than not provided substantial support to al Qaeda and its associated forces." *Id*. *See also id*. at 197.

The panel affirmed Al Hela's detention on grounds that he provided substantial support to al Qaeda and its associated forces. It relied on three holdings: first, "the President has authority to detain Al Hela for 'substantially support[ing]' al Qaeda and its associated forces and . . . the district court correctly determined the government's evidence justifies his ongoing detention"; second, "the proceedings below complied with the requirements of the Suspension Clause"; and third, "the Due Process Clause may not be invoked by aliens without property or presence in the sovereign territory of the United States." Op. 2, 6.

ARGUMENT

I. The Panel's Decision Raises Issues of Exceptional Importance.

The panel ruled—for the first time—that individuals detained at Guantanamo, which is "within the constant jurisdiction of the United States," *Boumediene v. Bush*, 553 U.S. at 769, are not entitled to any of the protections of the Due Process Clause. Op. 2. Judge Griffith declined to join this portion of the panel's opinion, which he characterized as involving a question "with immense sweep." Separate Opinion of Judge Griffith ("Sep. Op.") 1.

The panel embraced a broad interpretation of the standard for substantial support that is inconsistent with the law of war. The standard upheld by the panel will permit the indefinite detention of civilians who have never engaged in direct hostilities against the United States or its allies, and who were never "part of" "al Qaeda, the Taliban, or associated forces."

The effect of the decision will be to deprive Al Hela—a civilian who has never been found to have participated in hostilities against the United States or its allies—of his liberty without due process. The broad sweep of this decision will also extend beyond Al Hela's case and impact the due process claims of "aliens without property or presence" in the United States, including all Guantanamo detainees. Op. 2. The circumstances presented by this case are compelling and of

exceptional importance. Accordingly, the panel's decision warrants rehearing en banc.

II. The Panel's Conclusion that the Due Process Clause Does Not Apply to Guantanamo Detainees Is Incorrect and Conflicts With Decisions of this Circuit and the Supreme Court.

Al Hela asserted both substantive and procedural due process claims. The panel majority declined to consider his substantive due process claim on its view that "longstanding precedent forecloses any argument that 'substantive' due process extends to Guantanamo Bay." Op. 26. The panel majority then rejected Al Hela's procedural due process claims "on the threshold determination that, as an alien detained outside the sovereign territory of the United States, he may not invoke protection of the Due Process Clause." *Id*. at 46. Both rulings should be reversed and vacated.

A. The Panel Majority's Conclusion that Circuit Law Precludes Al Hela's Substantive Due Process Rights Conflicts with Circuit Precedent.

The panel majority's conclusion that Guantanamo detainees are precluded from asserting substantive due process rights conflicts with previous decisions of this Court. The panel majority erroneously read Circuit precedent as "foreclos[ing] any argument that 'substantive' due process extends to Guantanamo Bay." Op. 26. In fact, as Judge Griffith recognized, this Court has "never made such a far-reaching statement about the Clause's extraterritorial application." Sep. Op. 3.

Instead, this Court has "repeatedly assumed . . . that detainees could bring substantive due process claims." *Id*.

The panel majority relied on a statement in *Kiyemba v. Obama,* 555 F. 3d 1022, 1026 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131 (2010), *judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010), that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." Op. 27. However, the Court's subsequent decisions explain that *Kiyemba* merely rejected the *particular* right asserted in that case—a "right to release into the United States." *See Ali*, 959 F.3d at 369; *Qassim*, 927 F.3d at 528–29 (same). *Qassim* clarified that "the purely remedial context of that statement necessarily cabined its reach." 927 F.3d at 529.

The panel majority's reliance on *Ali* was also misplaced. In that case, this Court decided the Petitioner's substantive challenge to the length of his detention on the merits. As Judge Griffith recognized, if this Court had previously embraced the decision that the petitioner had no due process rights, then it "would have dismissed [his claim] on the ground that he could not bring it at all." Sep. Op. 3. Despite this precedent, the panel majority erroneously asserted that this Court's "longstanding due process jurisprudence" required it to reject the substantive due process rights of individuals detained at Guantanamo. Op. 32.

Notably, Judge Rao, the author of the panel opinion, joined Judge Henderson's dissent from this Court's denial of rehearing en banc in *Qassim*. Judge Henderson's dissent read precedents of this Court and the Supreme Court to preclude application of the Due Process Clause at Guantanamo. *Qassim v. Trump*, 938 F.3d 375, 376 (D.C. Cir. 2019). In *Ali*, Judge Randolph likewise criticized the *Ali* majority for holding that precedent did not preclude application of the Due Process Clause at Guantanamo. *Ali*, 959 F.3d at 373–80 (D.C. Cir. 2020) (Randolph, J., concurring). In this case, Judge Rao and Judge Randolph transformed their minority view of the application of the Due Process Clause at Guantanamo into binding circuit precedent.

The precedents of this Circuit do not bar the application of substantive due process at Guantanamo. This Court should rule that Guantanamo detainees may assert due process claims, including substantive claims.

B. The Panel Majority's Conclusion that Al Hela Lacks Procedural Due Process Rights Conflicts with Circuit and Supreme Court Precedent.

The panel majority's conclusion that Circuit and Supreme Court precedents foreclose Guantanamo detainees from asserting procedural due process rights likewise conflicts with previous decisions of this Circuit. In *Ali*, this Court rejected the district court's holding "categorically" denying procedural due process rights to Guantanamo detainees, saying the holding "was misplaced." *Ali*, 959 F.3d at 368.

In *Qassim*, this Court reversed and remanded the district court's decision that due process arguments were unavailable to a noncitizen held outside the country. 927 F.3d at 524 ("The district court's ruling that binding circuit precedent denies Qassim all rights to due process was in error.").

The panel majority's ruling that procedural due process does not apply to Guantanamo detainees also conflicts with the Supreme Court's decision in *Boumediene*. As this Court explained in *Ali*, *Boumediene* "teach[es] that the determination of what constitutional procedural protections govern the adjudication of habeas corpus petitions from Guantanamo detainees should be analyzed on an issue-by-issue basis, applying *Boumediene*'s functional approach." *Ali*, 959 F.3d at 369.

> Circuit precedent has not yet comprehensively resolved which "constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions," and whether those "rights are housed" in the Due Process Clause, the Suspension Clause, or both.

Ali, 959 F.3d at 368 (quoting *Qassim*, 927 F.3d at 530). The panel majority's blanket decision thus conflicts with *Boumediene* as interpreted in *Ali*.

In reaching its conclusion that the Due Process Clause does not apply to non-citizens detained at Guantanamo, the panel majority relied heavily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), stating that "*Eisentrager* addressed whether the Fifth Amendment applies to aliens abroad," and answered that question

"categorically in the negative." Op. 23. In *Boumediene*, however, the Supreme Court, citing *Eisentrager*, held that the application of the Constitution does not depend on *de jure* sovereignty, and that practical considerations must be taken into account when determining the reach of constitutional provisions. 553 U.S. at 726–27, 762–64, 766–71. In *Eisentrager*, practical considerations led the Supreme Court to deny Suspension Clause relief to prisoners of war held in Germany. 339 U.S. at 769–79, 781. In *Boumediene*, the Supreme Court held that practical considerations mandated application of the Clause to Guantanamo detainees. *Boumediene*, 553 U.S. at 766–71. Similarly, then-Judge Kavanaugh concluded that the Ex Post Facto Clause applies to Guantanamo, applying *Boumediene*'s '"functional' rather than 'formalistic' analysis." *Al Bahlul v. United States,* 767 F.3d 1, 63, 65 n.3 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in part and dissenting in part) (stating that five of the seven judges participating in the en banc proceeding agreed with this conclusion "in light of *Boumediene*").

As *Qassim* held, the procedural protections of the Suspension Clause include procedural protections comparable to those of the Due Process Clause:

> The Supreme Court's decision in *Boumediene* was explicit that detainees must be afforded those "procedural protections" necessary (i) to "rebut the factual basis for the Government's assertion that he is an enemy combatant," 553 U.S. at 783, 128 S.Ct. 2229; (ii) to give the prisoner "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, 128 S.Ct. 2229 (internal quotation marks and citation omitted); and (iii) to create a record that will support "meaningful review" by the district court, *id.* at 783, 128 S.Ct. 2229. In so holding, the Supreme Court pointed to both the Constitution's guarantee of habeas corpus, U.S. Const., Art. I, § 9, cl. 2; *see Boumediene*, 553 U.S. at 771–92, 128 S.Ct. 2229, and the procedural protections of the Due Process Clause, *id*. at 781, 128 S.Ct. 2229 (scope of habeas review "accords with our test for procedural adequacy in the due process context") . . .

927 F.3d at 528–29. *Qassim* thus recognized that, under *Boumediene,* the procedural protections guaranteed by the Suspension Clause essentially embody those guaranteed by the Due Process Clause. *See also* Sep. Op. 4–5, 7.

C. The Panel Erred in Concluding that the AUMF Authorizes Al Hela's Continued Detention.

The AUMF does not authorize indefinite detention. The AUMF limits the President to actions that are both "necessary and appropriate . . . to prevent any future acts of international terrorism against the United States." AUMF § 2(a). The plurality in *Hamdi* found that the AUMF authorizes detention "to prevent a combatant's return to the battlefield." *Hamdi v. Rumsfeld*, 542 U.S. at 519 (2004); *see also Ali v. Obama*, 736 F.3d 542, 545 (D.C. Cir. 2013) ("The purpose of military detention is to detain enemy combatants for the duration of hostilities so as to keep them off the battlefield and help win the war."). However, the panel's opinion permits Al Hela's detention unless and until the political branches declare

that the "War on Terror" has ended, and holds that courts cannot "second guess" the decisions of the political branches. Op. 17.

In *Hamdi*, the Supreme Court interpreted the AUMF to include authority to detain enemy combatants for the duration of the hostilities, based on its understanding of the law of war. 542 U.S. at 521 (plurality opinion). In recognizing this authority, the plurality cautioned that its recognition of that detention authority might reach a breaking point:

> [W]e understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If 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. at 521.

The Court should conclude that any justification for continued detention of Al Hela has "unravel[ed]." *See also Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring) ("[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker."). Al Hela was found to be a provider of substantial support but has been detained for longer than the maximum criminal sentence of fifteen years for those

convicted of providing "material support" to a terrorist organization. *See* 18 U.S.C. § 2339A.

The AUMF should not be interpreted as authorizing unending, decades-long detention without charge.

D. The Panel's Decision Deprived Al Hela of Meaningful Procedural Protections.

The district court deprived Al Hela of the procedural protections "necessary" under *Boumediene* to give him a "meaningful opportunity" to contest the basis for his detention. *Qassim*, 927 F.3d at 528–29 (citing *Boumediene,* 553 U.S. at 779).

Al Hela was barred access to the Government's thirty-six page factual return purporting to spell out the claims against him, and instead was given a two-page "summary." Pet. Br. 69–70. This greatly hampered his ability to defend himself. Moreover, the district court critically relied not simply on hearsay but on "multiple layers of anonymous hearsay." Op. 36; Pet. Br. 71–75. Al Hela was thus denied meaningful procedural protections.

The panel majority said that it was applying the Suspension Clause with "sensitivity to national security interests and with respect for the war powers vested in the political branches." Op. 22. Accepting the Executive's Branch's assertion of "national security interests" as a justification for limiting or restricting

these procedural protections will vitiate *Boumediene*'s guarantee of a "meaningful opportunity" to contest a detention.

III. The Panel Erred in Concluding that the AUMF Permits Detention of Civilians for Providing "Substantial Support" to Al Qaeda or Associated Forces when the Alleged Support Was Not in the Context of Hostilities Against the United States or its Allies.

Al Hela is a civilian who was not found to be "part of" al Qaeda or its associated forces. *See* JA 148 n.8. Unlike in any prior decision of this Court, Al Hela was found to be detainable solely because he provided "substantial support to al Qaeda and associated forces." JA 197. The panel erroneously rejected Al Hela's contention that detention of a civilian on grounds of "substantial support" is justified only if the support is provided in the context of hostilities against the United States or its allies. *See* Pet. Br. 23–26.

The panel held that "the AUMF and 2012 NDAA authorize the President to detain individuals who 'substantially supported' enemy forces irrespective of whether they also directly supported those forces or participated in hostilities." Op. 12. The panel added that "[i]nvolvement in hostilities has never been a prerequisite for detention under the AUMF." *Id*. at 11. Relying on "cases interpreting the 'part of' prong of the 2012 NDAA," the panel stated that precedent "squarely rejected direct participation in hostilities as a categorical requirement." *Id.* at 12. But the panel confused the detention standard for members of armed

groups with that of civilians—these standards are distinct under international law. [2] The AUMF must be interpreted in light of "law-of-war principles." *Hamdi*, 542 U.S. at 521 (plurality). The 2012 NDAA affirms this proposition, stating that AUMF detention is "[d]etention under the law of war." *National Defense Authorization Act for Fiscal Year 2012*, Pub. L. No. 112–81 ("NDAA"), § 1021(c)(1), 125 Stat. 1298, 1562 (2011).

The panel's decision relied heavily on this Court's decision in *Al Bihani v. Obama,* 590 F.3d 866 (D.C. Cir. 2010), skirting the relevance of the international law of war. Op. 8–9. The panel's reliance on *Al Bihani* was misplaced. As seven Judges of this Court recognized, the determination in *Al Bihani* that international law lacks relevance to the interpretation of the AUMF was dictum. *Al Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (denying rehearing en banc) (Sentelle, C.J., Ginsburg, Henderson, Rogers, Tatel, Garland, Griffith, JJ., concurring in denial of rehearing en banc) (declining to review the case en banc "to determine the role of

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[2] The panel relied on the fact that this Court's decisions involving detainees who were "part of" al Qaeda do not require proof that the detainee was involved in combat. Op. 12. It also relied on a decision involving a detainee who had been "part of" a Taliban military unit. *Id*. at 13 (citing *Al Bihani v. Obama,* 590 F.3d. 866, 869 (D.C. Cir. 2010)). These "part of" decisions, however, have no relevance to this case, which solely involves a civilian who was not found to be "part of" anything. While a private in an army may be detainable even if he never saw combat, or was only a cook or a typist, a different rule applies to civilians.

international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits"); *see also Al Bihani*, 590 F.3d at 885 (Williams, J., concurring in the judgment). In fact, *Al Bihani* directly contradicts the Supreme Court's holding in *Hamdi*. 542 U.S. at 521 (plurality) (describing the President's detention authority under the AUMF as "based on longstanding law-of-war principles"); *id.* at 548 (opinion of Souter, J., joined by Ginsburg, J.) ("[T]he military and its Commander in Chief are authorized to deal with enemy belligerents according to . . . the laws of war."). This error merits rehearing in this case.

Although the law of war permits detention of civilians who participate directly in hostilities, this does not extend to every civilian supporter. *See* Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2113–16 (May 2005). The law of war allows detention of civilians who pose a security threat, only when "absolutely necessary" and only "for imperative reasons of security." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 42, 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Geneva Convention"). The Fourth Geneva Convention makes clear that civilian detainees must be released when the threat has ended. *Id.* art. 132. Whether Al Hela's continued detention remains

"absolutely necessary" for security reasons was not litigated in the court below.[3] Moreover, under the Fourth Geneva Convention, the detaining party must "endeavour during the course of hostilities" to release civilian "internees who have been detained for a long time." *Id.*

The NDAA, moreover, provides that its reference to detention of those who have "substantially supported al-Qaeda, the Taliban, or associated forces" includes "any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." NDAA §1021(b)(2). The panel held that this statutory language is just an example of substantial support and does not limit the Government's detention authority. Op. 10. The panel may have correctly observed that the "including" clause of NDAA § 1021(b)(2) is non-exhaustive, *id*., but the panel erred in failing to recognize that, under the *ejusdem generis* canon, the examples of "substantial[] support[]" provided in the "including" clause limit such support to activities in the same class as the examples provided. *See, e.g., Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001). That class is reasonably

[3] The Executive Branch has stated that Al Hela represents "'a continuing significant threat to the security of the United States.'" Sep. Op. 3 (citing Gov't Unclass. Br. 55). The district court, however, did not receive evidence concerning any alleged threat posed by Al Hela's release and the issue was not litigated in the habeas case. Accordingly, there is neither evidence nor a judicial finding that Al Hela's continued detention—as a civilian—is necessary for security reasons.

read to consist of individuals who "participated in hostilities." *Cf. Salahi v. Obama*, 710 F. Supp. 2d 1, 5 (D.D.C. 2010) (stating that for purposes of AUMF detention authority (which the NDAA affirms but does not expand, *see* NDAA § 1021(d)), "support" consists of activities "in hostilities against U.S. coalition partners"), *vacated and remanded on other grounds*, 625 F.3d 745 (D.C. Cir. 2010). Accordingly, in order to justify detention of a civilian on ground of substantial support, that support must be consistent with the law of war. Al Hela was not found to have engaged in any such activities.

In sum, there was no legal basis for the panel's conclusion that Al Hela provided substantial support to al Qaeda or its associated forces in the context of hostilities against the United States or its allies. His detention is therefore unauthorized by the AUMF.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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Dated: October 26, 2020

CERTIFICATE OF COMPLIANCE

I certify that the foregoing petition for rehearing en banc of the petitioner-appellant complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) and contains 3,882 words, excluding portions of the brief excluded by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

Dated: October 26, 2020

/s/ Andrew D. Garrahan
Andrew D. Garrahan
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CERTIFICATE OF SERVICE

I certify that on this 26th day of October, 2020, I caused to be filed the foregoing petition for rehearing en banc with the Court via the appellate CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 26, 2020

/s/ Andrew D. Garrahan
Andrew D. Garrahan
Counsel for Petitioner-Appellant

EXHIBIT A-2

No. 19-5079

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

ABDULSALAM ALI ABDULRAHMAN AL-HELA,
DETAINEE CAMP DELTA
Appellant.

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET. AL.
Appellees.

BRIEF ON REHEARING EN BANC OF AMMAR AL BALUCHI AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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CONSTITUTIONAL PROVISIONS AND STATUTES

MISCELLANEOUS

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(A)(1)

A. Parties and *Amici*.

All parties and *amici* appearing in this Court are listed in the Brief for Petitioners; this brief is filed on behalf of *amicus curiae* Ammar al Baluchi.

B. Ruling Under Review.

The ruling at issue accurately appears in the Brief for Petitioners.

C. Related Cases.

An accurate statement regarding related cases appears in the Brief for Petitioners.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

Mr. al Baluchi filed his notice of intent to participate in this case as *amicus curiae* on October 26, 2020.

INTEREST OF THE AMICUS CURIAE

Mr. al Baluchi is a co-defendant in *United States v. Khalid Sheikh Mohammad et al* (the 9/11 case), a capital military commission convened at Guantanamo Bay. Under the panel's current decision, Mr. al Baluchi may be deprived of both his liberty and his life without the fundamental Constitutional protections of the Due Process Clause. Central elements of Mr. al Baluchi's defense relate to the admissibility of involuntary statements obtained by coercion in violation of the Fifth Amendment.

ARGUMENT

In *al Hela v. Trump*,[1] the panel's reach exceeded its grasp. Through broad language about the Due Process Clause at Guantanamo, the panel unnecessarily created the risk that lower courts will read the opinion to say that the government may disregard Fifth Amendment protections in capital military commissions. Although the Due Process Clause prohibits the government from using the fruit of overseas coercive interrogations of foreign defendants, the panel opinion could be read to exempt Guantanamo Bay defendants from that protection. Likewise, although Congress has defined Guantanamo Bay as United States territory for criminal procedure purposes, the panel opinion could be read to permit coerced confessions in Guantanamo Bay capital prosecutions. This Court should grant *en banc* review to ensure that this Circuit does not overrule extensive, historically sound criminal procedure jurisprudence without the benefit of briefing or a factual record.

[1] 972 F.3d 120 (D.C. Cir. 2020).

The question before this Court in *al Hela* was narrow but the panel's answer was broad. The first paragraph of the panel's opinion states, "the Due Process Clause may not be invoked by aliens without property or presence in the sovereign territory of the United States."[2] Later, the panel writes, "the protections of the Due Process Clause, whether labeled 'substantive' or 'procedural,' do not extend to aliens without property or presence in the sovereign territory of the United States."[3]

In concurrence, Judge Griffith critiqued the "vast scope" of the panel's language.[4] Judge Griffith explained that "the broader question of whether the Due Process Clause applies at Guantanamo . . . is a question with immense sweep that [this] court has repeatedly reserved for a case in which its answer matters."[5] *Al Hela* is not that case.

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[2] *Id.* at 127.

[3] *Id.* at 148.

[4] *Id.* at 152 (Griffith, J., concurring).

[5] *Id.* at 151 (Griffith, J. concurring).

But the answer does matter in the 9/11 case—a prosecution in which the United States seeks to execute Mr. al Baluchi and four others on the basis of incriminating statements it coerced from them in horrific circumstances. Read broadly, the *al Hela* panel opinion would give the government the power of the Spanish Inquisition:[6] not only to extract confessions by *tormenta de toca*,[7] but then to introduce those confessions in a trial which may result in the execution of the confessor.

The broad *al Hela* language could be read to authorize the compelled self-incrimination abhorred by the Framers, so long as it takes place at Guantanamo Bay. The application of the Due Process Clause in Guantanamo Bay has been litigated since 2012 in the military commissions, with massive factual and legal development. The panel's language could be read to unintentionally decide a monumental legal issue—using the fruit

[6] The Fifth Amendment "is based on the painful lessons of history, among the most prominent of which was the Spanish Inquisition, and it teaches that to be silent is safe and to speak risks betrayal of oneself." *Weaver v. Brenner*, 40 F.3d 527, 530 (2d Cir. 1994).

[7] "Torture of the cap"— the cloth placed over the face to increase the sensation of drowning—is the name the Spanish Inquisition used for waterboarding.

of physically compelled self-incrimination to obtain capital sentences—without the benefit of briefing, much less a record.

I. The language of the panel opinion runs the risk of authorizing executions rooted in compelled self-incrimination.

The *al Hela* decision, of course, arose in the context of *habeas* review of indefinite detention, and that context inherently limits the opinion. But the broad language of the opinion could be read to govern the application of the Due Process Clause to Mr. al Baluchi and other defendants in the Guantanamo military commissions. Indeed, the Due Process Clause is at the heart of the military commission controversy over use of fruits of coercive interrogation.

In the 9/11 capital case at Guantanamo Bay, the government's use of coercive interrogations to compel Mr. al Baluchi and other defendants to make incriminating statements is not in dispute. Indeed, the Guantanamo prosecution concedes that the black site interrogations of the defendants in that case

"were coercive by their very nature."[8] The debate in the Guantanamo military commission is the effect of that coerced self-incrimination on later statements when the coercion does not rise to the level of torture and other cruel, inhuman and degrading treatment.

The application of the Due Process Clause at Guantanamo Bay may be determinative of whether the government can lawfully use the fruits of coercion as evidence in a capital trial. If the Due Process Clause governs Guantanamo military commissions, the fruit of coercion is inadmissible; if the Due Process Clause does not apply, only the fruit of torture and other cruel inhuman and degrading treatment is inadmissible.[9] Furthermore, the Due Process Clause prohibits interrogation methods which shock the conscience as well as the use of

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[8] AE628C (GOV) Government Response to Mr. Ali's Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture at 18, placeholder at https://www.mc.mil/Portals/0/pdfs/KSM2/FileNotAvailable.pdf.

[9] 10 U.S.C. § 948r.

statements made involuntarily.[10] The application of these principles at Guantanamo has been the subject of hundreds of pages of briefing and dozens of days of testimony in the military commission.

Up to this point, the Circuits have consistently applied Fifth Amendment protections against coerced statements by non-U.S. citizen defendants taken overseas.[11] The Second Circuit held that the Fifth Amendment protected the first four East Africa Embassy Bombing defendants.[12] The Southern District of New York excluded on Fifth Amendment grounds the fruit of black site and Guantanamo interrogations of the fifth East Africa Embassy

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[10] *See, e.g.*, *Chavez v. Martinez*, 538 U.S. 760, 769-70 (2003) (plurality op. of Thomas, J.); *Bram v. United States*, 168 U.S. 532, 542 (1897).

[11] *See, e.g.*, *United States v. Conti*, 864 F.3d 63, 80 (2d Cir. 2017); *United States v. Abdi Wali Dire*, 680 F.3d 446, 470-75 (4th Cir. 2012); *United States v. Rommy*, 506 F.3d 108, 131-35 (2d Cir. 2007); *United States v. Yousef*, 327 F.3d 56, 123, 134 (2d Cir. 2003); *United States v. Heller*, 625 F.2d 594, 599-600 (5th Cir. 1980).

[12] *In re Terrorist Bombings of the U.S. Embassies in East Africa*, 552 F.3d 177, 200 (2d Cir. 2008); *see also United States v. bin Laden*, 132 F. Supp. 2d 168, 190–94 (S.D.N.Y. 2001).

Bombing defendant, Ahmed Ghailani.[13] And the D.C. District Court has applied Fifth Amendment principles to terrorism interrogations at sea.[14]

In *United States v. Yunis*,[15] FBI agents arrested Yunis, a Lebanese hijacker, off Cyprus and interrogated him in international waters. The government conceded that the Fifth Amendment protected Yunis, and two judges of this Circuit accepted this concession.[16] Judge Mikva, however, did not accept the government's concession, and independently analyzed how the Fifth Amendment prevents admission of involuntary confessions by non-U.S. citizens interrogated outside the United States.[17]

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[13] *United States v. Ghailani*, 2010 U.S. Dist. LEXIS 107830 (S.D.N.Y. 2010); *United States v. Ghailani*, 743 F. Supp. 2d 242, 250 (S.D.N.Y. 2010).

[14] *United States v. al-Imam*, 2019 U.S. Dist. LEXIS 59876, *36-*55 (D.D.C. Apr. 8, 2019); *United States v. Abu Khatallah*, 275 F. Supp. 3d 32, 66–67 (D.D.C. 2017); *see also United States v. Apodaca*, 275 F. Supp. 3d 123, 149 (D.D.C. 2017).

[15] 859 F.2d 953 (D.C. 1988).

[16] *Id.* at 957; *see also United States v. Straker*, 800 F.3d 570, 621-22 (D.C. Cir. 2015) (accepting similar concession).

[17] *Id.* at 970-71 (Mikva, J., concurring specially).

Prior to *al Hela*, the D.C. District Court concluded based on Circuit precedent that, "It is by now well-established that the Fifth Amendment privilege against self-incrimination protects nonresident aliens facing a criminal trial in the United States even where the questioning by United States authorities takes place abroad. This proposition is based on the status of the privilege against self-incrimination as a 'fundamental trial right,' as to which a violation occurs not at the moment of custodial interrogation, but at the time a defendant's statement is used against him at an American criminal proceeding."[18]

The language of *al Hela* jeopardizes this extensive jurisprudence of Fifth Amendment protections in a U.S. court for foreign defendants interrogated overseas. Read broadly, the panel language could wipe out these fundamental and historical protections from Guantanamo capital defendants, all without the benefit of briefing or a record. The record in the 9/11 case—which is of course not before the Court—will demonstrate the true implications of a wholesale exemption from the Due Process

[18] *United States v. Clarke*, 611 F. Supp. 2d 12, 28-29 (D.D.C. 2009).

Clause: convictions and death sentences rooted in the worst abuses of *incommunicado* detention.

II. The panel opinion runs the risk of conflating *de jure* sovereignty with the territorial reach of American criminal protections.

The panel reasoned that because "Guantanamo Bay 'is not part of the sovereign territory of the United States,' . . . the Fifth Amendment's Due Process Clause does not apply outside the territorial United States and therefore cannot be invoked by detainees at Guantanamo Bay."[19] On its face, this language could suggest that Mr. al Baluchi—a detainee at Guantanamo Bay—cannot invoke the protections of the Fifth Amendment in a military commission. But territory for criminal procedure purposes is not co-extensive with *de jure* sovereignty.

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[19] *Al Hela*, 972 F.3d at 140 n.5 (quoting *Kiyemba v. Obama*, 555 F.3d 1022, 1026 n.9 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131, *judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam)).

In contrast to *de jure* sovereignty over its insular territories, the United States exercises *de facto* sovereignty over Naval Station Guantanamo Bay. "[U]nder the terms of the lease between the United States and Cuba, Cuba retains 'ultimate sovereignty' over the territory while the United States exercises 'complete jurisdiction and control.'"[20] "Under the terms of the 1934 treaty, however, Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons the base."[21] At this point, "The United States has maintained complete and uninterrupted control of the bay for over 100 years."[22] "By the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control

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[20] *Boumediene*, 553 U.S. at 754 (citing Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418; *Rasul*, 542 U.S., at 471, 124 S. Ct. 2686, 159 L. Ed. 2d 548).

[21] *Id.* at 754 (citing Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866).

[22] *Id.* at 764.

permanently if it so chooses."[23] Accordingly, it is an "obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory."[24]

By statute, Guantanamo Bay is not extraterritorial at all; it is part of the United States for purposes of criminal law and procedure. Title 18 U.S.C. § 5 defines the United States to "include[] all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone."[25] "The criminal jurisdiction of the United States is wholly statutory,"[26] and 18 U.S.C. § 7(3) includes military facilities like

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[23] *Rasul*, 542 U.S. at 480.

[24] *Boumediene*, 553 U.S. at 755 (citing *Rasul*, 542 U.S. at 480; *id.* at 487 (Kennedy, J., concurring in judgment)).

[25] *See United States v. Gurr*, 471 F.3d 144, 154 (D.C. Cir. 2006) (holding that American Samoa is part of the United States under § 5); *United States v. Taitano*, 442 F.2d 467, 469 (9th Cir. 1971) (holding that Guam is part of the United States under § 5); *United States v. Holmes*, 414 F. Supp. 831, 836 (D. Md. 1976) (holding that Aberdeen Proving Ground is part of the United States under § 5); *cf. Perez v. The Bahamas*, 652 F.2d 186, 188 (D.C. Cir. 1981) (construing similar definition in 28 U.S.C. § 1603(c)).

[26] *United States v. Flores*, 289 U.S. 137, 151 (1933).

Naval Station Guantanamo Bay to fall within the special territorial and maritime jurisdiction of the United States.[27] Civilians alleged to commit crimes on Guantanamo Bay are prosecuted under U.S. law in U.S. courts.[28] Territories under either *de jure* or *de facto* sovereignty of the United States are part of the United States for purposes of criminal law and procedure.[29] And of course, aliens within the United States territory are clearly protected by the Constitution.[30]

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[27] *See Haitian Ctrs Council, Inc. v. McNary*, 969 F.2d 1326, 1342-43 (2nd Cir. 1992) (explaining that Guantanamo Bay is under U.S. criminal law jurisdiction), *vacated as moot sub nom. Sale v. Haitian Centers Council*, 509 U.S. 918 (1993); *see also United States v. Erdos*, 474 U.S. 157, 159 (4th Cir. 1973) (holding that lease, rather than fee simple ownership, of embassy had no effect on U.S. jurisdiction); *United States v. Holmes*, 699 F. Supp. 2d 818, 829 (E.D. Va. 2010) ("Section 7(3) defines the term 'special territorial and maritime jurisdiction of the United States' to include, among other places, military bases.").

[28] *See, e.g.*, *United States v. Lee*, 906 F.2d 117, 117 & n.1 (4th Cir. 1990); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975).

[29] *See Jones v. United States*, 137 U.S. 202, 211-12 (1890) (applying Sixth Amendment to Caribbean "guano island" of Navassa under equivalent of § 7).

[30] *See Sanchez-Llamas*, 548 U.S. at 350; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

The *al Hela* panel did not consider any of these criminal procedure issues, because the case arose on *habeas* review. But the panel's broad language could be read to apply to the Fifth Amendment as criminal procedure as opposed to review of indefinite detention. This Court should grant rehearing *en banc* to ensure that this Circuit does not unintentionally decide important issues of criminal procedure without a criminal case before it.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

//s//
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//s//
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2559 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

//s//
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Date: October 26, 2020

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R.25(a), that on October 26, 2020, 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.

//s//
ALKA PRADHAN
Defense Counsel

Counsel for Mr. al Baluchi

Date: October 26, 2020

EXHIBIT A-3

No. 19-5079

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

ABDULSALAM ALI ABDULRAHMAN AL HELA,
Petitioner-Appellant,

v.

DONALD J. TRUMP, 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 PETITION FOR REHEARING EN BANC

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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. One is cleared for release; one is a defendant before a military commission at Guantánamo. All are impacted by the panel decision in this case.[1]

[1] 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).

INTRODUCTION

The petition for rehearing *en banc* presently before this Court involves "a question undoubtedly of exceptional importance"[2]: 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.

There is ample cause for this Court to rehear this case *en banc*. The majority's sweeping rule purports to foreclose any substantive or procedural due process claims brought by Guantánamo detainees. 972 F.3d at 147-48. That prohibition

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

would extend beyond this case to important procedural claims not presented here, such as whether the Clause prohibits the introduction of coerced and involuntary confessions in support of what may become lifelong preventive detention. It might also bar challenges to conditions of confinement at Guantánamo brought under the Due Process Clause. Even Judge Griffith's opinion would incorrectly dispose of the substantive due process claims raised by Al Hela based on rulings regarding only the scope of detention authorized by the AUMF, not the Due Process Clause. And both the concurrence and the majority incorrectly presume 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.

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).[3]

The logic of *Boumediene* mandates that, in some measure, the Due Process Clause must apply at Guantánamo.[4] 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 applies 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

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[3] 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.

[4] *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).

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.

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 (D.C. Cir. 2010); *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010); *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011); *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013). In each of those cases the parties and therefore this Court

assumed the Due Process Clause did not apply.[5] 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.

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

[5] 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. *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)).

this Circuit's cases. *Qassim*, 927 F.3d at 530, *reh'g en banc denied*, 938 F.3d 375 (D.C. Cir. 2020).

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. It would be just as inappropriate for this Court to allow this case to foreclose all possible due process claims as it was for the district courts to assume for a decade that the dictum in *Kiyemba* did the same.

III. The procedural due process claims before the Court are of exceptional importance

The vast majority of evidence introduced against Guantánamo detainees in these habeas cases consists of hearsay interrogation records and declarations, many of which are anonymously sourced. The Due Process Clause bars unreliable hearsay and requires that detainees be permitted to confront evidence where feasible. *See Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972). In the immigration, parole revocation, and sentencing contexts, the Federal Rules of Evidence do not apply, but reliability is nonetheless required because the Due Process Clause applies. 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 v. Scarpelli*, 411 U.S. 778, 782 & 782 n.5 (1973), and *Morrissey*).

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 the citizen in question was captured on a battlefield bearing arms. Again, the context of individual cases matters: the majority of Guantánamo detainees were not detained by U.S. forces, and of the 40 remaining detainees, public reporting indicates that approximately two-thirds came to Guantánamo from non-military black-site detentions. The *Hamdi* plurality's speculation has particularly limited force in the many cases not involving military operations of any sort. The ubiquity of the hearsay issue across these cases demands that this Court rehear the panel's sweeping, context-independent ruling.

Moreover, as Judge Griffith noted in his concurrence, "it is possible that other procedural claims may fare better under the Due Process Clause than under the Suspension Clause[;] we need not address claims not before us today." 972 F.3d at 154. The panel's haste to declare the Due Process Clause categorically inapplicable at Guantanamo forecloses an exploration of many important issues in the context of an appropriate case.

For example, as Judge Walton has noted, the Due Process Clause's prohibitions on coerced confessions may well be far stronger than those imposed by the Suspension Clause. *See Bostan v. Obama*, 674 F. Supp. 2d 9, 29-30 (D.D.C. 2009).

A number of detainees have also advanced the argument that substantive and procedural due process requires the application of a clear-and-convincing standard of proof—mandated, they argue, 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. A categorical bar on all claims under the Due Process Clause would foreclose consideration of these arguments in the specific context of each individual case.

IV. Substantive due process claims may only proceed under the Due Process Clause

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 deten-

tions 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,[6] and proof by clear and convincing evidence. *Id*. Finally, the process would need to be a judicial one, not an executive review.

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").

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

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

claims cannot be disposed of by reference to this Court's Suspension Clause-based procedural precedents.[7] Reexamination of al Hela's substantive due process claims would therefore require reversing the panel's determination that the Due Process Clause does not apply in any respect at Guantánamo.

Moreover, *Ali* specifically reserved judgment on whether detainees cleared for release—five of whom currently linger at Guantánamo, three of them having been cleared for over a decade—can challenge the arbitrariness of their continuing detention under substantive due process. *See Ali*, 959 F.3d at 371 n.4. Their claims should not be rendered stillborn by the overbroad rule announced by the panel majority.

V. The Due Process Clause is the basis for conventional conditions of confinement claims

In these habeas cases, a number of challenges to abusive conditions of confinement at Guantánamo have proceeded as claims that a detainee's liberty interests under the Due Process Clause have been unlawfully violated. *See, e.g.*, *Aamer v. Obama*, 742 F.3d 1023, 1040 (D.C. Cir. 2014). The panel majority's categorical rejection of claims under the Due Process Clause would threaten the ability to bring such claims under the conventional Fifth Amendment standard, familiar to the district courts from cases such as *Bell v. Wolfish*, 441 U.S. 520 (1979), and its

[7] *Cf.* Judge Griffith's partial concurrence, noting "the Due Process Clause and the Suspension Clause provide similar protections," 972 F.3d at 154.

progeny (*see, e.g.*, *Brogsdale v. Barry*, 926 F.2d 1184, 1188 n.4 (D.C. Cir. 1991) ("the threshold for establishing a constitutional violation is clearly lower for … pretrial detainees" than for those convicted of crime, who may bring conditions claims only under the Eighth Amendment)).[8] Foreclosing all claims under the Due Process Clause may reopen the door to past abuses (*e.g*. prolonged solitary confinement), and preempt claims regarding the adequacy of medical care that will be of increasing importance as the geriatric population of detainees increases.

CONCLUSION

This Court should rehear this matter *en banc*, decide that the Due Process Clause applies to the detentions at Guantánamo, and remand for further development of the question of what specific process is due.

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Respectfully submitted,

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[8] As Judge Randolph observed at oral argument in *Ali*, Tr. 29 ll.21-22, Eighth Amendment conditions-of-confinement challenges would have to meet a higher standard.

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition is in compliance with Rules 29(b)(4) and 32(a)(5-6) of the Federal Rules of Appellate Procedure. The brief contains 2,591 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 October 27, 2020, 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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