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

OPPOSITION TO PETITION FOR REHEARING EN BANC

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INTRODUCTION AND SUMMARY

Petitioner Abdulsalam Ali Abdulrahman al-Hela is detained at Guantanamo Bay. Before his detention by the United States, al-Hela "was a trusted member of the international jihadi community for decades," with a particular role in "facilitat[ing] the travel of known terrorists by providing travel documents and false identities." Op. 16. In addition, over a period of roughly seven months in 2000 and 2001, al-Hela provided, or was sought out by al Qaeda or its associated forces to provide, logistical support to five "actual or aborted attacks against the United States and its allies" in Yemen. *Id.*; *see* JA 119-21. Based on these activities, the district court concluded that al-Hela had "substantially supported" al Qaeda and its associated forces, and that he was therefore properly detained under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (AUMF). The panel unanimously agreed that these findings were not erroneous and demonstrate that al-Hela is properly detained under the AUMF. Op. 6-18.

In addition, although the panel disagreed about the rationale, the panel was unanimous in rejecting as meritless al-Hela's contention that due process entitles him either to release or to additional procedures in adjudicating his habeas petition. Not only is al-Hela unable to invoke the Fifth Amendment "as an alien detained outside the sovereign territory of the United States," Op. 46, but as Judge Griffith observed, al-Hela's Fifth Amendment arguments all "fail[] under established case law" and

under this Court's "precedent developed under the Suspension Clause," Concurrence 1.[1]

These holdings provide no basis for rehearing en banc. From the panel opinion, the concurrence, and prior cases from this Court and the Supreme Court, it is clear that al-Hela's Fifth Amendment arguments fail twice over: he cannot invoke the Due Process Clause, and even if he could, his arguments are meritless. Given the Supreme Court's prior clear statements rejecting the applicability of the Due Process Clause to law-of-war detainees abroad, the result al-Hela seeks is available only from the Supreme Court, not this Court sitting en banc. And any tension in this Court's prior cases makes no difference to the result here; the full Court's consideration of any such tension should occur, if ever, in "a case in which its answer matters." Concurrence 1. Al-Hela likewise identifies no reason to revisit the panel's conclusion that he substantially supported al Qaeda and associated forces, instead asking the Court to adopt an atextual interpretation of relevant statutes that the panel correctly rejected.

STATEMENT

Al-Hela brought this habeas petition in 2005. The district court held a five-day hearing on al-Hela's petition in 2017, including live testimony from al-Hela. Applying

[1] Judge Randolph also issued a brief concurrence, but joined the majority opinion in full. Throughout this response, cites to the "Concurrence" are to Judge Griffith's concurrence in part and concurrence in the judgment.

a preponderance-of-the-evidence standard, the district court found that al-Hela fought against the Soviet Union in Afghanistan, which brought him into contact with other important jihadist figures. JA 117. After his return to Yemen, al-Hela began to facilitate travel for numerous figures connected with al Qaeda, Egyptian Islamic Jihad, and other terrorist organizations. JA 118. As part of this scheme, al-Hela obtained false or fraudulent travel documents for foreigners and Yemenis, and purchased legitimate passports from Yemenis and sold them to extremists, including bin Laden associates. *Id.* In addition, the district court found that al-Hela was involved in or sought out for five different plots by al Qaeda or the Aden-Abyan Islamic Army (which the district court found to be an associated force of al Qaeda) to attack targets in Yemen, including plots against both the U.S. and British embassies in Sana'a. JA 119-21.

In reaching these conclusions, the district court relied in significant part on al-Hela's own statements. *See, e.g.*, JA 153, 161, 177, 181. Before the merits hearing, al-Hela was provided access to special redacted copies of classified exhibits to the amended factual return containing his own statements. *See* JA 1042-93. The district court also found that al-Hela "made false exculpatory statements" in his live testimony, which were treated "as evidence of guilt." JA 143; *see, e.g.*, JA 152-53.

The panel unanimously rejected al-Hela's factual and legal challenges related to the merits of his detention, concluding that "the President has authority to detain al-Hela for 'substantially support[ing]' Al Qaeda and its associated forces and that the

district court correctly determined that the government's evidence justifies his ongoing detention." Op. 6; *see* Op. 6-18; Concurrence 1. As relevant here, the panel rejected al-Hela's argument that "'involvement in hostilities [is] a prerequisite for a finding of substantial support' and that 'the support must take place in hostilities against U.S. Coalition partners' to justify detention." Op. 11 (quoting al-Hela Br. 23-24) (emphases omitted). The panel explained that detention authority under the AUMF extends to individuals who were "part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), (b)(2), 125 Stat. 1298, 1562 (2011) (NDAA). The text of the NDAA thus "does not require involvement in hostilities" for detention; "the phrase 'engaged in hostilities' describes which 'associated forces' fall within the definition's scope," and "the phrase 'who has committed a belligerent act' … merely states one example of the type of conduct within the statute's scope." Op. 11. And the panel observed that this Court's prior cases "have also squarely rejected direct participation in hostilities as a categorical requirement" for detention of individuals who are "part of" al Qaeda and associated forces. Op. 12.

The panel likewise unanimously rejected two other arguments relevant here. The panel observed al-Hela's argument that detention authority under the AUMF had

"unraveled" because of the duration of the conflict was "identical" to one the Court rejected in in *Al-Alwi v. Trump*, 901 F.3d 294 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 1893 (2019). Op. 16-17; Concurrence 1. And the panel observed that the procedures al-Hela was afforded in district court were those dictated by "[m]ore than a decade of case law" from this Court addressing the requirements of the Suspension Clause. Op. 18; *see* Op. 18-22, Concurrence 1, 4-8.

The panel differed only in the reasoning behind rejecting al-Hela's arguments that the Due Process Clause of the Fifth Amendment entitles him to release from detention (as a matter of substantive due process) or rendered the procedures applied in his habeas proceedings constitutionally inadequate. The majority concluded that all of these arguments are unavailable to al-Hela based on precedent from this Court and the Supreme Court. As the majority explained, the Supreme Court has repeatedly made clear that the Due Process Clause does not apply to aliens outside the sovereign territory of the United States, and this Court correspondingly "has consistently refused to extend extraterritorial application of the Due Process Clause." Op. 25. Thus, al-Hela cannot assert a substantive due process claim "because longstanding precedent forecloses any argument that 'substantive' due process extends to Guantanamo Bay." Op. 26. The panel majority reached the same conclusion on al-Hela's procedural due process arguments. The Supreme Court's decisions, the panel majority noted, have not distinguished between substantive and procedural due process when addressing "extraterritorial application of the Due Process Clause," Op.

42, and this Court's prior decisions have also declined to extend procedural due process requirements to noncitizens outside the sovereign territory of the United States, Op. 43-44. The panel majority therefore concluded that "as an alien detained outside the sovereign territory of the United States, [al-Hela] may not invoke the protection of the Due Process Clause." Op. 46.

Judge Griffith concurred only in the judgment on these points, explaining that he would have rejected al-Hela's arguments on different grounds. Concurrence 1. First, Judge Griffith concluded that al-Hela's substantive due process argument was "foreclose[d] … on the merits" by *Ali v. Trump*, 959 F.3d 364 (D.C. Cir. 2020). Concurrence 2-3. Second, Judge Griffith would have resolved al-Hela's procedural due process arguments on the ground that "[a]nalyzing the district court's rulings under the Due Process Clause yields the same result" as would obtain under "a decade of case law" from this Court that "has defined the procedures required to guarantee detainees the meaningful opportunity for habeas review required by the Suspension Clause." Concurrence 4; *see* Concurrence 4-8.

ARGUMENT

The petition for rehearing en banc should be denied. The panel decision correctly applies longstanding precedent to conclude that the Due Process Clause, unlike the Suspension Clause, does not apply to al-Hela. Even if that were not the case, al-Hela's claims would fail in any event: as Judge Griffith correctly explained, al-Hela's substantive due process claim is meritless, and al-Hela has received all the

process to which he would be entitled even if the Due Process Clause applied. That al-Hela's arguments fail under any standard demonstrates that rehearing en banc is not merited in this case.

Al-Hela does not explain why application of the Due Process Clause would alter any aspect of the procedures to which he is entitled, instead offering tangentially related arguments this Court has repeatedly rejected. Separately, al-Hela's contention that his detention is not authorized is contrary to the plain text of the relevant statutes.

A. 1. Al-Hela primarily takes issue with the panel's holding that "as an alien detained outside the sovereign territory of the United States, he may not invoke the protection of the Due Process Clause." Op. 46; *see* Pet. 5-10. But that conclusion was correct. The Supreme Court's "rejection of extraterritorial application of the Fifth Amendment" has been "emphatic." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). As the panel majority correctly recognized, the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950), rejected the notion that "enemy combatants detained by American military forces in Germany" could invoke the Due Process Clause in challenging their detention. Op. 23. The Supreme Court emphasized that "[s]uch extraterritorial application … would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment." *Eisentrager*, 339 U.S. at 784. Yet "[n]ot one word can be cited. No decision of this Court supports such a view. None of the

learned commentators on our Constitution has even hinted at it." *Id.* The Court's holding in *Eisentrager* "establish[es]" that the "Fifth Amendment's protections" are "unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). And in applying that principle, the Supreme Court has never distinguished between the substantive and procedural variants of due process; it has instead repeatedly addressed the Due Process Clause as a whole, dismissing the due process claims in *Eisentrager*, for example, without parsing whether they sounded in substance or procedure.

Al-Hela contends that the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), abandoned the rule that due process does not apply to noncitizens without presence or property in U.S. territory. Pet. 8-9. But as the panel correctly explained, Op. 27-31, *Boumediene* was clear that its holding was limited to the Suspension Clause, and did not affect the extraterritorial application of other constitutional provisions. *Boumediene* held only that "Art. I, § 9, cl. 2 of the Constitution"—which prohibits Congress from suspending the privilege of the writ of habeas corpus—"has full effect at Guantanamo Bay" in the specific context of law-of-war detainees who had been detained there for an extended period. 553 U.S. at 771. The Court repeatedly emphasized that its holding turned on the unique role of the writ in the separation of powers. *E.g.*, *id.* at 739 ("In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause."); *id.* at 746 ("The broad historical narrative of the writ and its

function is central to our analysis."); *id.* at 743 ("[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."). The Court concluded that treating "*de jure* sovereignty [as] the touchstone of habeas," even though the United States has *de facto* sovereignty over Guantanamo given its complete control, was "contrary to fundamental separation-of-powers principles." *Id.* at 755. And the Court expressly acknowledged that *Boumediene* is the only case extending a constitutional right to "noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty," and admonished that "our opinion does not address the content of the law that governs … detention." *Id.* at 770, 798.

In any event, en banc review would not be the appropriate mechanism for vindicating al-Hela's arguments. As this Court has previously recognized, given *Boumediene*'s express refusal to decide the extraterritorial scope of the substantive law governing detention, and given settled pre-*Boumediene* precedent holding that the Due Process Clause does not extend to aliens outside the sovereign territory of the United States—and specifically not to alien law-of-war detainees—this Court must follow the latter body of case law even where a party "maintain[s] that *Boumediene* has eroded the precedential force of *Eisentrager* and its progeny." *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (per curiam); *see Agostini v. Felton*, 521 U.S. 203, 237 (1997) (explaining that lower courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions" (quotation omitted)).

2. Al-Hela contends that the panel's conclusion "conflicts with previous decisions of this Circuit." Pet. 7. The decisions on which al-Hela relies did not purport to decide whether the Due Process Clause extends to Guantanamo. They instead addressed the more limited question of whether pre-existing precedent from this Court foreclosed due process claims. *Ali*, 959 F.3d at 368 (stating that "[t]he district court's decision that the Due Process Clause is categorically inapplicable to detainees at Guantanamo Bay was misplaced" because "[c]ircuit 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" (quoting *Qassim v. Trump*, 927 F.3d 522, 530 (D.C. Cir. 2019))).

Moreover, any tension between those cases and the panel decision here is irrelevant. In *Ali*, this Court assumed that the petitioner could invoke substantive due process protections in arguing that his "continued detention for more than seventeen years violates substantive due process." 959 F.3d at 369. But this Court rejected Ali's argument on the merits, explaining that detention continues to "serve[] the established law-of-war purpose of prevent[ing] captured individuals from returning to the field of battle and taking up arms once again." *Id.* at 370 (quotation omitted). The Court also explained that "the fact that hostilities have endured for a long time, without more, does not render the government's continued detention of Ali a shock to the conscience," noting that the government had repeatedly determined that the

petitioner continued to pose a threat. *Id.* at 370-71. The same conclusions would compel rejection of al-Hela's substantive due process argument on the merits. Concurrence 3.

The same is true of al-Hela's procedural due process arguments. As Judge Griffith explained, "[i]n each of the three areas of process that Al Hela challenges … we have already afforded detainees as much protection under the Suspension Clause as we have afforded non-detainees in similar settings under the Due Process Clause." Concurrence 4-5. As a result, "[a]nalyzing Al Hela's three specific claims under the Due Process Clause adds nothing to the analysis." Concurrence 7. This Court's decision in *Ali* confirms as much. The Court there rejected "procedural due process" arguments as "foreclose[d]" by "circuit precedent," noting, for example, that the Court has "repeatedly held" that "the use of hearsay evidence" is constitutional in these proceedings. 959 F.3d at 372; *see id.* at 373 (declining to apply the constitutional avoidance canon "because the specific constitutional claims that Ali presses have already been considered and rejected by circuit precedent").

Al-Hela acknowledges that "the procedural protections guaranteed by the Suspension Clause essentially embody those guaranteed by the Due Process Clause." Pet. 10; *accord* Pet. 9. That recognition simply underscores that al-Hela's due process arguments would fail on their merits. If en banc consideration of the question of due process's general applicability to Guantanamo were warranted at all, it should occur in "a case in which its answer matters." Concurrence 1.

3. Al-Hela does not explain how the application of due process to his case would alter the result. He instead invokes in passing arguments unanimously rejected by the panel and inconsistent both with Congressional enactments and repeated decisions of this Court. He first contends that detention authority under the AUMF has "unravel[ed]." Pet. 11. But this Court just two years ago rejected precisely this argument, observing that "hostilities between the United States and the Taliban and al Qaeda continue" and that the AUMF and NDAA "authorize detention until the end of hostilities." *Al-Alwi*, 901 F.3d at 297-98; *see* Op. 16-18; *see also* NDAA § 1021(c)(1). Al-Hela does not contest that hostilities between the United States and al Qaeda and its associated forces are ongoing.

Second, al-Hela briefly contends that he was deprived of a "'meaningful opportunity' to contest the basis for his detention." Pet. 12. But al-Hela received precisely those protections that this Court has developed and approved under the Suspension Clause over more than a decade. Op. 18-22; Concurrence 4. And those procedural protections are extensive. Al-Hela's counsel received an enormous quantity of classified material tending to support, as well as undermine, the government's allegations, and al-Hela augmented that information with his own evidence, including his live testimony before a district judge sitting as a neutral factfinder. Using those resources, al-Hela mounted an extensive case over a multi-day hearing, including attacking the credibility of numerous sources and laying out an alternative story for his travel facilitation activities. Al-Hela protests that he was not

given personal access to the government's full factual return, Pet. 12, but he omits that he was provided with personal access to redacted versions of the narrative and exhibits of the government's amended factual return reflecting the most critical evidence against him: his own statements. *See* JA 1042-93. As the district court explained, the government provided "specific and persuasive reasons to believe that further disclosure [to al-Hela personally] of the allegations against petitioner and the factual bases therefor would risk revealing U.S. intelligence sources and methods." JA 203; *see* Op. 21; Concurrence 4. That approach was "consistent with [this Court's] precedents on the requirements of habeas review," Op. 21, and reflects the Supreme Court's admonition that district courts should "accommodate … to the greatest extent possible" the government's "legitimate interest in protecting sources and methods of intelligence gathering," *Boumediene*, 553 U.S. at 796.

B. En banc review is likewise unwarranted for the panel's conclusion that al-Hela is properly detained on the basis of his substantial support for al Qaeda and associated forces.

Al-Hela contends that such detention is permissible "only if the support is provided in the context of hostilities against the United States or its allies." Pet. 13. But the NDAA makes clear that detention authority under the AUMF extends to "[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has

directly supported such hostilities." NDAA § 1021(b)(2). As the panel correctly observed, al-Hela's argument that participation in hostilities is required for detention "has no basis in the 2012 NDAA's text." Op. 11. The "engaged in hostilities" language "describes which associated forces fall within the definition's scope," not "the type of support sufficient for detention," and the references to individuals who have "committed a belligerent act" or have "directly supported such hostilities" are part of the illustrative "'including' clause," not a description of the full universe of individuals who may be detained. Op. 10-11. It is thus unsurprising that this Court has consistently "reject[ed] the notion that a detainee must have engaged in hostilities" to be subject to detention. *Hussain v. Obama*, 718 F.3d 964, 968 (D.C. Cir. 2013).

Al-Hela appears to acknowledge the absence of a textual basis for his argument, noting that "[t]he panel may have correctly observed that the 'including' clause … is non-exhaustive." Pet. 16. He now suggests for the first time that the canon of *ejusdem generis* limits "substantial support" for al Qaeda and associated forces to only individuals who "participated in hostilities." Pet. 16-17. But that reading would render the including clause no longer illustrative; al-Hela does not explain what individuals could be said to have "participated in hostilities" without having also either "directly supported" hostilities or "committed a belligerent act." Instead, as the panel correctly explained, "a person may be found to substantially support enemy forces without directly supporting them," in other words, without directly supporting

hostilities in aid of enemy forces or otherwise personally engaging in hostilities. Op. 11.

Al-Hela contends that the panel decision overreads this Court's decision in *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), to "skirt[] the relevance of the international law of war." Pet. 14 (citing Op. 8-9). The cited discussion of *Al-Bihani* addressed al-Hela's now-abandoned argument that he could only be detained if he was "effectively a part of the enemy armed forces." Op. 8 (quoting al-Hela Br. 25). Al-Hela likewise errs in relying on provisions of the Geneva Conventions related to the detention of civilians in an international armed conflict. Pet. 13-14, 15, 17. If al-Hela means that the Fourth Geneva Convention directly governs his detention, *cf.* Pet. 15-16, that is plainly incorrect; that treaty applies to international armed conflicts between treaty parties (or between a party and a non-party that "accepts and applies" its provisions). Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516; 75 U.N.T.S. 287. Regardless, al-Hela is no mere civilian: he provided substantial support to al Qaeda and two of its associated forces over a period of years in the form of travel facilitation and logistical assistance with various plots, JA 117-24, 151-82, and the law of war provides for the detention until the end of hostilities for individuals in analogous circumstances, *cf., e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135 (recognizing propriety of detention of persons like "supply contractors" who "accompany the armed forces without actually being

members thereof"). That also reflects the unique nature of the conflict here, in which groups like al Qaeda operate through loosely affiliated cells that often try to hide their connection to the broader organization. If al-Hela's substantial support does not (as the government continues to believe) render him "part of" one or more of the organizations he spent years aiding, it would be anomalous to conclude that al-Hela has insulated himself from detention by distributing his support among multiple organizations covered by the AUMF. That would undermine both the statutory authority for detention and the law of war by rewarding terrorist groups for diffusing pivotal tasks.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

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December 2020

CERTIFICATE OF COMPLIANCE

This response complies with the Court's order of November 9, 2020, limiting appellees' response to 3,900 words, because it contains 3,900 words. This response was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Brad Hinshelwood
Brad Hinshelwood

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2020, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brad Hinshelwood
Brad Hinshelwood