No. 19-5079

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

ABDUSALAM 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

KHALID AHMED QASSIM'S PETITION FOR REHEARING *EN BANC* OF THE COURT'S DENIAL OF HIS MOTION TO INTERVENE

Anthony G. Amsterdam
University Professor Emeritus
New York University Law School
295 Sullivan Street, 5th Floor
New York, NY 10012
Telephone: (212) 988-6632

Of Counsel

Thomas B. Wilner
Neil H. Koslowe
SHEARMAN & STERLING, LLP
401 9th Street, N.W., Suite 800
Washington, D.C. 20004
Telephone: (202) 508-8050

Shelby Sullivan-Bennis
Durkin & Roberts
2446 N. Clark Street
Chicago, IL 60614
Telephone: (401) 660-6538

Counsel for Petitioner Khalid Ahmed Qassim

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

Statement

Petitioner Khalid Ahmed Qassim is a Yemeni citizen who has been imprisoned at the U.S. Naval Base, Guantánamo Bay, Cuba for almost 19 years and never charged with unlawful conduct. Qassim filed a petition for habeas corpus in 2004 which was stayed and then re-activated in 2017. On a stipulated factual record, the district court denied Qassim's motion *in limine* claiming procedural protections under the Due Process Clause and dismissed his petition. A unanimous panel of this Court vacated the district court's judgment and held that Qassim's due process claims could not be resolved in the abstract, but that Qassim was entitled to an adjudication of those claims on remand in the context of concrete discovery proceedings. *Qassim v. Trump*, 927 F.3d 522, suggestion by judge for rehearing *en banc* denied by 8-2 vote, 938 F.3d 375 (D.C. Cir. 2019).

While Qassim's case proceeded in the district court, the Court, on August 28, 2020, decided the present *Al Hela* appeal. In an opinion by Judge Rao in which Senior Judge Randolph but not Judge Griffith joined, the divided panel did precisely the opposite of what *Qassim* held: it resolved in the abstract and not in the context of concrete discovery proceedings the very same procedural due process claims that Qassim had raised, rejecting them.

On October 23, 2020, Qassim filed a combination motion for leave to intervene in *Al Hela* and petition for rehearing *en banc*.[1] Judge Rao and Senior Judge Randolph, in an Order dated November 20, 2020 – of which Qassim's counsel were not notified [2] – denied Qassim's motion to intervene.

Qassim seeks rehearing *en banc* of that Order to secure uniformity in the Court's decisions on an issue of exceptional importance. "It is fixed law that 'this Court is bound to follow circuit precedent until it is overruled either by an *en banc* court or the Supreme Court,'" and "when a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being a violation of fixed law, cannot prevail." *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (citation omitted). By ignoring *Qassim*, the divided *Al Hela* panel violated this maxim. The *en banc* Court should give Qassim the opportunity to show that the *Al Hela* opinion "cannot prevail" and that it should restore *Qassim*.

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[1] *Cf.* § XIII.B.2 of the Court's Handbook of Practice and Internal Procedures (Dec. 1, 2020), which provides that, if a litigant seeks to file both a petition for rehearing by a panel and rehearing *en banc*, "the two should be combined in the same document," and that document is then apparently circulated to the *en banc* Court.

[2] Pursuant to § XII.E of the Court's Handbook of Practice and Internal Procedures (Dec. 1, 2020), the Clerk's Office was supposed to transmit electronically a Notice of Docket Activity to Qassim's counsel, notifying counsel of, and attaching, this Order. However, as the Clerk's Office has verified, for unknown reasons it did not do so. Qassim's counsel was informed about the Order on the evening of December 2, 2020, by a nonparty attorney who had checked the docket.

Argument

I. The *En Banc* Court Should Decide Qassim's Motion to Intervene

It is appropriate that the *en banc* Court decide Qassim's motion to intervene. Qassim moved to intervene for the sole purpose of being able to petition the Court to rehear *en banc* the divided panel decision in *Al Hela*, that resolved in the abstract whether the Due Process Clause provides procedural protections to Guantánamo detainees, such as himself. The motion and petition challenged that decision on identical grounds, namely, that it impermissibly overruled the prior decision of the unanimous panel in *Qassim*. The selfsame considerations that are universally recognized as making it inappropriate to give the initial panel the final say on a petition for rehearing *en banc* that challenges the panel's reasoning are equally applicable to a motion for leave to intervene that challenges a panel's reasoning.

II. The Two-Member Panel's Order Denying Intervention is Wrong

The Order of the two-member panel denying Qassim's motion to intervene is wrong.[3] The panel primarily held that Qassim "has not satisfied the requirements of either Fed. R. Civ. P. 24(a) for intervention of right, or Fed. R. Civ. P. 24(b) for permissive intervention." However, Qassim satisfied the requirements for both.

[3] The Order is annexed as Exhibit 1.

A. Qassim Satisfied the Requirements for Intervention of Right

Qassim demonstrated in his opening motion to intervene that he satisfied the requirements for intervention of right under Fed. R. Civ. P. 24(a)(2).[4] This Court "ha[s] identified four prerequisites to intervene as of right" under that rule:

(i) the application to intervene must be timely;

(ii) the applicant must demonstrate a legally protected interest in the action;

(iii) the action must threaten to impair that interest; and

(iv) the applicant's interest may not be adequately represented by any party.

Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008), quoting *S.E.C. v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). An intervenor must also demonstrate Article III standing. *See Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Qassim satisfied all these requirements.

1. Qassim's motion was timely.

Qassim's interest in this case was first implicated when the Court issued its decision on August 28, 2020. The divided panel held that the issue of whether the Due Process Clause provides procedural protections to Guantánamo detainees may be resolved in the abstract, and that the Clause did not provide such protections. The divided panel failed to follow the unanimous panel decision in *Qassim*, that this

[4] Qassim's opening motion to intervene is annexed as Exhibit 2. The government's opposition to that motion is annexed as Exhibit 3. Qassim's reply to that opposition is annexed as Exhibit 4.

exceptionally important constitutional issue may not be resolved in the abstract but only in the context of concrete discovery proceedings, such as those Qassim is now pursuing on remand in the district court.

The Court, on September 18, 2020, extended to October 26, 2020, the time within which a petition for rehearing or rehearing *en banc* could be filed. Qassim timely filed his combination motion to intervene and petition for rehearing *en banc* on October 23, 2020.

Judge Rao and Senior Judge Randolph unfairly ruled that Qassim's motion to intervene was particularly "disfavored" because he did not seek to intervene until "after the court of appeals ha[d] decided [this] case." Qassim could not have anticipated until after *Al Hela* was decided that the divided panel would fail to follow *Qassim*. This is especially so given that the *en banc* Court, by an 8-2 vote, denied the suggestion of one of its judges to rehear *Qassim*, notwithstanding a lengthy dissenting statement by Judge Henderson in which Judge Rao joined. Therefore, Qassim's motion was not untimely.

2. Qassim has a legally protected interest in this appeal.

The requirement that an intervenor demonstrate a legally-protected interest "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). This Court has held that an intervenor's

showing of Article III standing necessarily satisfies this factor. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). Qassim has Article III standing and a vital interest in the outcome of this appeal.

To establish Article III standing, Qassim must establish (i) injury-in-fact, (ii) causation, and (iii) redressability. *Fund for Animals*, 322 F.3d at 732-33, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Qassim's position throughout the past four years of litigating his own habeas petition has been that, unless the courts grant him procedural rights under the Due Process Clause, he cannot prevail on that petition and will suffer ongoing imprisonment and indefinite loss of liberty. The Court in *Qassim* demonstrated that no decision of this Court has created "a categorical prohibition" on affording Qassim procedural rights under the Due Process Clause (927 F.3d at 524), and that Qassim was entitled to the presentation and adjudication of his due process claims in the context of an actual discovery dispute.

However, the divided panel decision in *Al Hela* has nullified Qassim's right to such an adjudication of his due process claims which he won on his own appeal by prematurely holding categorically and in the abstract that the Due Process Clause does not confer any procedural rights on Guantánamo detainees such as Qassim. Should the district court in *Qassim* give controlling force to *Al Hela*, it will be precluded from complying with the prior judgment of this Court ordering that, on

remand, it proceed to resolve Qassim's due process contentions within the framework of specific discovery requests and rulings.[5]

This injures Qassim in fact by depriving him of the fundamental procedural protections which he needs to challenge his imprisonment and loss of liberty. That injury is directly caused by the divided panel decision in *Al Hela*, which can be redressed by a decision of the *en banc* Court vacating that decision. Accordingly, Qassim has Article III standing and a legally-protected interest in this case.

3. The divided panel's *Al Hela* decision impairs Qassim's interest.

Fed. R. Civ. P. 24(a)(2) requires that an intervenor be "so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest." The Court has construed this requirement "as looking to the 'practical consequences' of denying intervention, even where the possibility of future challenge … remains available." *Fund for Animals*, 322 F.3d at 735. That is, "it is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977).

[5] During a status conference in the district court on September 15, 2020, former Chief Judge Hogan noted that the *Al Hela* decision is in conflict with the June 21, 2019 ruling of the unanimous *Qassim* panel. In a second status conference on November 16, 2020, Judge Hogan indicated that he has not yet resolved whether, or the extent to which, the implications of the conflict will allow the ongoing discovery proceedings in the *Qassim* remand to continue.

Qassim will have no realistic future opportunity to litigate his habeas petition under standards dictated by the Due Process Clause if the divided panel's decision in *Al Hela* stands. Intervention in this appeal constitutes Qassim's only practicable opportunity to present his due process claims for litigation and avoid the prolonged impairment of his liberty interest.

4. Qassim's interest may not be adequately represented by any party.

Although petitioner al Hela in the present appeal shares Qassim's interest in securing procedural rights under the Due Process Clause and raised a procedural due process claim below and on appeal, al Hela's brief to the panel raised at least six other issues as well. The common procedural due process issue was argued at the tail end of that brief and occupied a seventh of its length. Only 3 of the 17 pages in Al Hela's petition for rehearing *en banc* address the question of whether the Due Process Clause provides procedural protections to Guantánamo detainees. Qassim, in sharp contrast, has raised only the procedural due process issue. **It is the central issue in his case**. If the Court grants rehearing *en banc*, it is hardly likely that Al Hela's briefing will develop the procedural due process issue as thoroughly as Qassim would do.

Moreover, Qassim's ability to challenge the divided panel's decision in the Supreme Court, if necessary, will be protected only if the *en banc* Court grants him leave to intervene. The Supreme Court has held that a litigant with Article III

standing who has been accorded intervenor status in the court of appeals has an independent right to petition for *certiorari* from a decision of that court as to which a party has petitioned for *certiorari*, and even to file briefs and seek to participate in oral argument in the Supreme Court. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of America AFL-CIO Local 283 v. Scofield*, 382 U.S. 205, 214 (1965). *See Diamond v. Charles*, 476 U.S. 54, 64 (1986); Rule 12.6 of the Rules of the Supreme Court. Qassim's interest in Supreme Court review, if necessary, will be adequately protected only if the *en banc* Court grants him leave to intervene in the *Al Hela* appeal.

B. Qassim Satisfied the Requirements for Permissive Intervention

Alternatively, and for essentially the same reasons as those above, Qassim satisfied the requirements for permissive intervention under Fed. R. Civ. P. 24(b). As required by Fed. R. Civ. P. 24(b)(1)(B), Qassim has "a claim or defense that shares with the main action a common question of law or fact," namely whether Guantánamo detainees are constitutionally entitled to procedural due process in the adjudication of their federal habeas corpus petitions. Permissive intervention would not "unduly delay or prejudice the adjudication of the original parties' rights." *See* Fed. R. Civ. P. 24(b)(3). Therefore, the *en banc* Court should permit Qassim to intervene even if it concludes he is not entitled to intervene as of right.

CONCLUSION

For the foregoing reasons, the *en banc* Court should rehear and grant Qassim's motion for leave to intervene in the present appeal.

Dated: December 7, 2020

Respectfully Submitted,

/s/ Neil H. Koslowe

Neil H. Koslowe
Thomas B. Wilner
Shearman & Sterling LLP
401 9th Street, N.W., Suite 800
Washington, DC 20004
Telephone: (202) 508-8050
E-mail: twilner@shearman.com
E-mail: nkoslowe@ptomaclaw.com

Shelby Sullivan-Bennis
Durkin & Roberts
2446 N. Clark Street
Chicago, IL 60614
Telephone: (401) 660-6538
E-mail: ssullivan@durkinroberts.com

Counsel for Petitioner Khalid Ahmed Qassim

Anthony G. Amsterdam
University Professor Emeritus
New York University School of Law
295 Sullivan Street, 5th Floor
New York, NY 10012
Telephone: (212) 988-6632
E-mail: aa1@nyu.edu

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) and D.C. Circuit Rule 28(c) because this brief contains 2,700 words excluding parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman Font.

Dated: December 7, 2020

/s/ Neil H. Koslowe
Neil H. Koslowe
Counsel for Khalid Ahmed Qassim

CERTIFICATE OF SERVICE

I certify that on December 7, 2020, the foregoing document was filed 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 the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 7, 2020

/s/ Neil H. Koslowe
Neil H. Koslowe
Counsel for Khalid Ahmed Qassim

EXHIBIT 2

No. 19-5079

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Anthony G. Amsterdam
University Professor Emeritus
New York University Law School
295 Sullivan Street, 5th Floor
New York, NY 10012
Telephone: (212) 988-6632

Of Counsel

Thomas B. Wilner
Neil H. Koslowe
SHEARMAN & STERLING, LLP
401 9th Street, N.W., Suite 800
Washington, D.C. 20004
Telephone: (202) 508-8050

Shelby Sullivan-Bennis
Durkin & Roberts
2446 N. Clark Street
Chicago, IL 60614
Telephone: (401) 660-6538

Counsel for Movant Khalid Ahmed Qassim

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Introduction

Khalid Ahmed Qassim is a Yemeni citizen who has been imprisoned at the U.S. Naval Base, Guantánamo Bay, Cuba for almost 19 years and never charged with unlawful conduct. He is moving to intervene in the present appeal and he is petitioning for rehearing *en banc* of the panel majority's decision that the Due Process Clause does not provide procedural protections to Guantánamo Bay detainees. This decision is squarely inconsistent with the unanimous decision reached over a year ago by another panel of this Court in *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir.), *suggestion for rehearing en banc denied by a vote of 8-2,* 938 F.3d 375 (2019), that the application of procedural due process guarantees in detainees' federal habeas proceedings is an unresolved question which should be litigated only in the context of a concrete factual record. Qassim satisfies all the requirements for intervention, and the grant of his motion and petition will protect the right granted to him in that prior decision to an adjudication of his claim that he is entitled to the procedural protections of the Due Process Clause.

Relevant Background

Qassim filed a petition for habeas corpus in 2004, but it was stayed until he revived it in February 2017. Qassim moved for the entry an adverse judgment, arguing that, because the then-extant law of this Court denied him procedural rights guaranteed by the Due Process Clause and necessary to enable him to contest the

government's case, it was impossible for him to overcome the government's asserted factual justifications for detaining him. The district court (Hogan, S.J.) denied the motion and set an expedited discovery and trial schedule.

As instructed by the district court, Qassim served the government with proposed pre-trial discovery and trial procedures. The government declined to respond to Qassim's proposal or engage in discovery. Instead, the government suggested that the parties agree to a stipulated factual record which would allow the district court to make findings of fact and conclusions of law while preserving Qassim's right to litigate his claims of due process rights to adequate discovery and fair evidence-testing procedures, both in that court and, if necessary, on appeal. Qassim acquiesced in the government's suggestion.

To concretize the dispute over his due process claims, Qassim filed a motion *in limine* asking the district court to preclude the government from relying on evidence obtained through coercion, statements he made but not shown to him in advance, redacted documents whose classified portions could not be seen by him or his security-cleared counsel, or witness testimony he had no opportunity to confront or rebut. The government opposed Qassim's motion on the ground that, under this Court's decision in *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131, *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010), the Due Process Clause did not apply to Guantánamo detainees.

The district court denied Qassim's motion *in limine* because it read *Kiyemba* to hold that Qassim had no right to due process. Based on the stipulated factual record, the district court also dismissed Qassim's habeas petition. *Qassim v. Trump*, No. 04-cv-01194 (TFH), 2018 WL 3951346 (D.D.C. May 8, 2018).

On appeal, Qassim argued that *Kiyemba* was wrong and that, under the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008) and other precedents, he was entitled to have his habeas petition adjudicated through procedures demanded by the Due Process Clause.[1] The government adhered to its argument that, under *Kiyemba*, Qassim had no right to due process. However, the government also argued in this Court – for the first time and despite its district court refusal to participate in setting pre-trial discovery procedures – that it might be able to provide Qassim with most or all of the information to which he claimed due process entitled him, and that therefore the Court should not reach or decide the due process issue.

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[1] The Court denied Qassim's motion to have his appeal initially heard *en banc*. *Qassim v. Trump*, No. 18-5148, 2018 WL 3905809 (D.C. Cir. Aug. 14, 2018). In a concurring opinion, Judge Rogers said it was "not unreasonable" for Qassim to seek *en banc* consideration of whether this Court's precedents "effectively nullified *Boumediene*," noting that "members of the Court have expressed concern that the law of the circuit has 'compromised the Great Writ as a check on arbitrary detention.'" *Id.* at *1. Nevertheless, Judge Rogers concluded that, "initial panel decision would assist the Court in evaluating the merits of the habeas petition." *Id.* Judge Tatel made the same point in a separate concurring opinion and added that a more complete factual record might be necessary for review. *Id.* at *2-3.

A unanimous panel of this Court (Millett & Pillard, JJ, and Edwards, SJ), reversed the district court's decision and remanded for further proceedings. *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019). The Court held that "[t]he district court's denial of Qassim's motion *in limine* and the entry of judgment against Qassim were both predicated on that court's conclusion that *Kiyemba* firmly closed the door on procedural due process claims for Guantanamo Bay detainees," and "[t]hat was error." 927 F.3d at 528. The Court said that *Kiyemba* "ruled only that the Due Process Clause does not invest detainees who have already been granted habeas corpus with a substantive due process right to be released into the United States," and that neither *Kiyemba* nor "any other decision of this circuit adopted a categorical prohibition on affording detainees seeking habeas relief any constitutional procedural protections." *Id.* at 524.

"Nor could *Kiyemba* have slammed the door on the Constitution's procedural protections for Guantánamo Bay detainees in the adjudication of their habeas petitions," said the Court. 927 F.3d at 528. "*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,' . . . (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,' . . . and (iii) to create a record that will support 'meaningful review' by the district court." *Id.* at 528-29.

Nevertheless, the Court held it was "premature" to decide Qassim's procedural due process claims. 927 F.3d at 530-532. It concluded that, "unless and until specific discovery requests are made and ruled upon," it could not resolve Qassim's due process claims. *Id.* "[A]llowing for the discovery process to take its ordinary course and for a factual record to be developed would narrow and frame the constitutional question presented, providing the crystallization and 'clarity needed for effective adjudication.'" *Id.* at 532.

Accordingly, the Court remanded the case to the district court for further proceedings. 927 F.3d at 532. It said that, "[o]n remand, the district court will be free to modify the procedures set out in the [Guantánamo habeas] case management order as necessary to facilitate resolution of the constitutional questions raised in this case." *Id.*

After the Court issued its opinion in *Qassim*, a member of the Court suggested *sua sponte* that the case be reheard *en banc*. *Qassim v. Trump*, 938 F.3d 375 (D.C. Cir. 2019). A vote was called and a majority of the ten judges eligible to vote did not vote to rehear the panel's decision. *Id.* at 376.

Judge Henderson, with whom Judge Rao joined, dissented from the denial of rehearing *en banc*. 938 F.3d at 376-379. Judge Henderson said rehearing *en banc* was warranted because the panel's key ruling – that no precedent categorically prohibited affording Guantánamo detainees constitutional procedural protections –

created an "irreconcilable conflict" with Supreme Court decisions and with *Kiyemba* and other decisions of this Court. *Id.* at 377-78. In Judge Henderson's view, the Supreme Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *Kiyemba* established that the Due Process Clause does not apply to Guantánamo detainees. *Id.* Without discussing the panel's holding that resolution of Qassim's due process claims was premature, Judge Henderson said the panel was "obligated to follow these decisions." *Id.* at 377.

On remand, Qassim promptly moved the district court to amend the case management order to compel the government to respond to discovery requests in a manner consistent with the Due Process Clause. The government opposed the motion. However, before the district court could rule on Qassim's motion, the Court decided the present appeal, *Al Hela v Trump*, 972 F.3d 120 (D.C. Cir. 2020) (Rao & Griffith, JJ., and Randolph, S.J).

Among many other contentions, petitioner Al Hela challenged the district court's rejection of his argument that he was denied procedural rights under the Due Process Clause. 972 F.3d at 138. The government argued, as it had in *Qassim*, that the Court "need not decide whether procedural due process applies extraterritorially because the district court satisfied all applicable procedural due process requirements," and "[c]ourts should not decide constitutional questions when alternative grounds for decision are fairly available." *Id.* at 143-44.

In the portion of its opinion written by Judge Rao and joined in by Senior Judge Randolph but not Judge Griffith, the Court brushed that argument aside. 972 F.3d at 144-45. The Court also concluded that the due process question was "not premature" and that, "[u]nlike in *Qassim*, remand to the district court is unnecessary" because Al Hela "raised it below, both before and during his merits hearing," and it was "a pure question of law." *Id.* at 147. The Court went on to hold that, under *Eisentrager* and other precedents, Al Hela "may not invoke the protection of the Due Process Clause" because he is "an alien detained outside the sovereign territory of the United States." *Id.* at 150.

Judge Griffith disagreed with the majority's decision to reach out and decide whether Al Hela was entitled to procedural due process. 972 F.3d at 151-155. Citing *Qassim* and other precedents, Judge Griffith concluded that, "[b]ecause the Due Process Clause would not provide Al Hela more procedural protections than he received, the court today had no need to reach the question of the Clause's application at Guantánamo." *Id.* at 155.

On September 15, 2020, the district court in *Qassim* convened a telephonic conference on the status of Qassim's motion to amend the case management order consistent with the Due Process Clause. The district court referred to the tension between the panel decision in *Qassim* holding that the due process issue was premature, which the *en banc* Court declined by a vote of 8-2 to rehear, and the panel

majority decision in *Al Hela* reaching and deciding that issue. However, believing itself bound by this Court's remand instructions in *Qassim*, the district court ordered further pre-trial proceedings which would set the scene for adjudication of Qassim's procedural due process contentions. It also scheduled another status conference for November 16, 2020.

ARGUMENT

I. The Court Should Grant Qassim's Motion to Intervene

A. Qassim is Entitled to Intervention as of Right

Intervention in this Court under Circuit Rule 28(d) "is governed by the same standards as in the district court." *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997) (emphasis omitted). *Accord, U.S. House of Representatives v. Price*, No. 16-5202, 2017 WL 3271445 (D.C. Cir. Aug. 1, 2017). This Court "ha[s] identified four prerequisites to intervene as of right" under Fed. R. Civ. P. 24(a)(2):

(i) the application to intervene must be timely;

(ii) the applicant must demonstrate a legally protected interest in the action;

(iii) the action must threaten to impair that interest; and

(iv) the applicant's interest may not be adequately represented by any party.

Karsner v. Lothian, 532 F.3d 876, 885 (D.C. Cir. 2008), quoting *S.E.C. v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). An intervenor must also demonstrate

Article III standing. *See Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Qassim satisfies all these requirements.

1. Qassim's motion is timely.

Qassim's interest in this case was first implicated when the panel majority issued its decision on August 28, 2020. The Court, on September 18, 2020, extended the time within which Al Hela may petition for rehearing or rehearing *en banc* to October 26, 2020. Qassim's motion to intervene is timely because it is being filed today, prior to that deadline.

2. Qassim has a legally protected interest in this appeal.

The requirement that an intervenor demonstrate a legally-protected interest "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). This Court has held that an intervenor's showing of Article III standing necessarily satisfies this factor. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). Qassim has Article III standing and a vital interest in the outcome of this appeal.

To establish Article III standing, Qassim must show (i) injury in fact, (ii) causation, and (iii) redressability. *Fund for Animals*, 322 F.3d at 732-33, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Qassim's position throughout the past three years of litigating his own habeas petition has been that,

unless the courts grant him procedural rights under the Due Process Clause, he cannot prevail on that petition and will suffer ongoing imprisonment and indefinite loss of liberty.

Under the Court's decision in *Qassim*, which the *en banc* Court declined to rehear, no ruling of this Court has created "a categorical prohibition" on affording Qassim procedural rights under the Due Process Clause (927 F.3d at 524). To the contrary, Qassim is entitled to the presentation and adjudication of his due process claims in the context of an actual discovery dispute. *See* 927 F.3d at 532 (remanding so that "the district court will be free to modify the procedures set out in the case management order as necessary to facilitate resolution of the constitutional questions raised in this case"). However, the panel majority's decision in the present *Al Hela* appeal holds categorically that the Due Process Clause does not confer any procedural rights on Guantánamo detainees such as Qassim. This injures him in fact by nullifying his right to such an adjudication which he won on his own appeal and thereby depriving him of the fundamental procedural protections which he needs in order to challenge his imprisonment and loss of liberty. That injury is directly caused by the ruling of the panel majority. Qassim's injury can be redressed by a decision of the *en banc* Court withdrawing the panel majority's ruling. Therefore, Qassim has Article III standing and a legally-protected interest in this case.

3. The panel majority's decision impairs Qassim's interest.

Fed. R. Civ. P. 24(a)(2) requires that an intervenor be "so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest." The Court has construed this requirement "as looking to the practical consequences of denying intervention, even where the possibility of future challenge … remains available." *Fund for Animals*, 322 F.3d at 735. That is, "it is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977).

Qassim will have no realistic future opportunity to litigate his habeas petition under standards dictated by the Due Process Clause if the panel majority's decision that the Clause does not confer procedural rights upon Guantánamo detainees stands. Intervention in this appeal constitutes Qassim's only practicable opportunity to present his due process issues for litigation and avoid the prolonged impairment of his liberty interest.

4. Qassim's interest may not be adequately represented by any party.

Although Al Hela shares Qassim's interest in securing procedural rights under the Due Process Clause and raised a procedural due process claim below and on appeal, Al Hela's panel brief raised at least six other issues as well. The common procedural due process issue is argued at the tail end of that brief and occupies a

seventh of its length. Qassim, in sharp contrast, has raised only the procedural due process issues. If the Court grant rehearing or rehearing *en banc*, it is hardly likely that Al Hela's briefing will develop the procedural due process issue as thoroughly as Qassim's would do.

Moreover, Qassim's ability to seek further review independently in the Supreme Court will be protected only if this Court grants him leave to intervene. Qassim does not know whether Al Hela will petition the Supreme Court for a writ of *certiorari* should this Court deny rehearing or rehearing *en banc*, or should this Court grant rehearing or rehearing *en banc* and decide that the Due Process Clause does not apply to Guantánamo detainees. The Supreme Court has held that a person or entity with Article III standing who has been accorded intervenor status in the court of appeals has an independent right to petition for *certiorari* from a decision of that court and to file briefs and seek to participate in oral argument in the Supreme Court. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of America AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 214 (1965). *See Diamond v. Charles*, 476 U.S. 54, 64 (1986) and Rule 12.6 of the Rules of the Supreme Court. Qassim's interest in Supreme Court review will be adequately protected only if this Court grants his motion for leave to intervene.

B. Qassim Satisfies the Requirements for Permissive Intervention

Alternatively, and for essentially the same reasons as those above, Qassim satisfies the requirements for permissive intervention under Fed. R. Civ. P. 24(b). As required by Fed. R. Civ. P. 24(b)(1)(B), Qassim has "a claim or defense that shares with the main action a common question of law or fact," namely whether Guantánamo detainees are constitutionally entitled to procedural due process in the adjudication of their federal habeas corpus petitions. And intervention would not "unduly delay or prejudice the adjudication of the original parties' rights," Fed. R. Civ. P. 24(b)(3). Therefore, the Court should grant Qassim permissive intervention if it concludes he is not entitled to intervention as of right.

II. The Court Should Rehear *En Banc* the Panel Majority's Decision Regarding the Inapplicability of the Due Process Clause to Guantánamo Detainees' Federal Habeas Corpus Petitions

For two independent reasons, the Court should review *en banc* the panel majority's merits decision that the Due Process Clause does not confer procedural rights on Guantánamo detainees. First, the panel majority's decision is irreconcilable with the prior unanimous panel decision in *Qassim* on that issue, which the *en banc* Court, by a vote of 8-2, declined to rehear. Second, the panel majority's decision creates an irreconcilable conflict with Supreme Court and other circuit precedent. *See* Fed. R. App. P. 35(a)(1).

The law of this Court is that, "when a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being a violation of fixed law, cannot prevail." *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). The unanimous panel in *Qassim* held that resolution of the issue of whether the Due Process Clause affords procedural rights to Guantánamo detainees is premature and inappropriate outside the context of a specific discovery dispute. *Qassim*, 927 F.3d at 530-532. The *en banc* Court, by a vote of 8-2, declined to rehear that decision.

Yet, inconsistently with *Qassim*, in the teeth of the Court's *en banc* 8-2 vote, and contrary to the government's submission that the procedural due process issue need not be decided on the *Al Hela* record, the panel majority in *Al Hela* characterized the procedural due process issue as a "a pure question of law" (972 F.3d at 147) requiring no concrete factual framing and proceeded to reverse *Qassim's* conclusion that no decision of this Court, including *Kiyemba*, adopted a "categorical prohibition" against affording Guantánamo detainees procedural rights under the Due Process Clause (927 F.3d at 524). It did so by adopting the arguments Judge Henderson had made in her dissenting opinion from the denial of *en banc* rehearing in *Qassim* and in which Judge Rao, who wrote the *Al Hela* panel majority decision, had joined.

Even if the *en banc* Court believes it is appropriate to reach and decide the question of whether the Due Process Clause applies to habeas proceedings filed by Guantánamo detainees, it should overturn the panel majority's decision because that conflicts with *Boumediene* and the express holdings of other Supreme Court decisions. The panel majority's core theory – that the Guantánamo detainees lack constitutional rights because they are aliens without property or presence in U.S. sovereign territory — is exactly the argument the government made in *Rasul v. Bush*, 542 U.S. 466 (2004) and in *Boumediene*, first, in contending that the detainees lack access to the U.S. courts and, then, in contending that they have no constitutional right to seek the writ of habeas corpus. That argument was squarely rejected by the Supreme Court. No matter what force it might have in other geographic areas around the world, it has no force with respect to Qassim and the detainees the government has imprisoned at the U.S. Naval Base at Guantánamo.

The Supreme Court in *Boumediene* explicitly rejected the contention that, "as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends."[2] It acknowledged that the United States lacks formal, *de jure* sovereignty over Guantánamo, but emphasized "the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de*

[2] *Boumediene*, 533 U.S. at 755.

facto sovereignty over this territory."[3] That was sufficient for the Constitution to apply. As the Supreme Court pointed out, adopting a categorical rule limiting the Constitution's reach to areas of *de jure* sovereignty would contradict "fundamental separation-of-power principles," effectively granting the Executive Branch the power to switch the Constitution on and off by manipulating the sites of its detentions to avoid legal restraint over its actions. That was impermissible.[4] As the Supreme Court explained:

> The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'[5]

The Supreme Court also found the government's argument inconsistent with a long line of precedents. The Court reviewed the so-called Insular Cases, which had addressed the application of constitutional provisions to noncitizens in overseas territories controlled by the United States following the Spanish-American war. The Court pointed out that, even in "unincorporated territories" such as the Philippines, which were destined for independence rather than

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[3] *Boumediene*, 533 U.S. at 755.

[4] *Id.*, at 755, 764-66.

[5] *Id.* at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

incorporation into the United States, "[t]he Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.'"[6] And *Balzac v. Porto Rico*, 258 U.S. 298, 312-313 (1922) – the case cited by the *Boumediene* Court – made clear that the prime example of those guaranteed "fundamental personal rights declared in the Constitution" was the principle "that *no person could be deprived of life, liberty, or property without due process of law* [which] had from the beginning full application in the Philippines (emphasis added)."

It is simply not credible to say that the *Boumediene* Court's analysis applies only to the Suspension Clause and to no other provision of the Constitution. The Executive can no more switch the Due Process Clause off by spiriting its prisoners to Guantánamo than it can the Suspension Clause. And the men imprisoned by the United States in that U.S.-controlled territory can no more be deprived of the fundamental personal right of due process than could the foreign inhabitants of the Philippines when it was under U.S. control.[7]

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[6] *Boumediene*. 533 U.S. at 758.

[7] Indeed, as *Boumediene* explained, there is even greater reason to ensure that fundamental constitutional guarantees apply at Guantanamo because, unlike the Philippines and other unincorporated territories, which "the United States did not intend to govern indefinitely[,] Guantanamo Bay . . . is no transient possession. In every practical sense, Guantánamo is not abroad; it is within the constant jurisdiction of the United States." *Id.*, 553 U.S. at 768-69.

In fact, this Court has recognized that *Boumediene* guarantees the Guantánamo detainees fundamental constitutional protections. In *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014), the *en banc* Court considered the application of the Constitution's Ex Post Facto Clause to the detainees at Guantánamo. The government conceded and the Court assumed that the Clause applies. In his concurring opinion, Judge Kavanaugh stated that the government "concedes (correctly)" that the Clause applies,[8] and that five of the seven members of the Court "agree in light of *Boumediene v. Bush* that the Ex Post Facto Clause applies at Guantánamo."[9] "In light of *Boumediene v. Bush*," the Due Process Clause applies as well. Indeed, Judge Kavanaugh assumed that the Guantánamo detainees were covered by the Due Process Clause, although he concluded that the equal protection claim made under that Clause in *Al Bahlul* itself failed on the merits.[10]

In sum, the panel majority's decision with respect to the Due Process Clause "cannot prevail" on any ground. Consequently, this Court should grant Qassim's petition for rehearing *en banc*.

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[8] *Al Bahlul*, 767 F.3d at 65. Judge Kavanaugh also believed that Guantánamo detainees "arguably" have some First Amendment rights at Guantánamo. *Id.* at 76.

[9] *Id.* at 63.

[10] *See id.* at 75.

CONCLUSION

For the foregoing reasons, the Court should grant Qassim's motion for leave to intervene and his petition to rehear *en banc* the panel majority's decision that the Due Process Clause has no application to habeas corpus proceedings filed in federal courts by Guantánamo detainees.

Dated: October 23, 2020

Respectfully Submitted,

/s/ Thomas B. Wilner

Thomas B. Wilner
Neil H. Koslowe
Shearman & Sterling LLP
401 9th Street, N.W., Suite 800
Washington, DC 20004
Telephone: (202) 508-8050
E-mail: twilner@shearman.com
E-mail: nkoslowe@ptomaclaw.com

Shelby Sullivan-Bennis
Durkin & Roberts
2446 N. Clark Street
Chicago, IL 60614
Telephone: (401) 660-6538
E-mail: ssullivan@durkinroberts.com

Counsel for Movant Khalid Ahmed Qassim

Anthony G. Amsterdam
University Professor Emeritus
New York University School of Law
295 Sullivan Street, 5th Floor
New York, NY 10012
Telephone: (212) 988-6632
E-mail: aa1@nyu.edu

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) and D.C. Circuit Rule 28(c) because this brief contains 4,276 words excluding parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman Font.

Dated: October 23, 2020

/s/ Thomas B. Wilner
Thomas B. Wilner
Counsel for Khalid Ahmed Qassim

CERTIFICATE OF SERVICE

I certify that on October 23, 2020, the foregoing document was filed 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 the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 23, 2020

/s/ Thomas B. Wilner
Thomas B. Wilner

Counsel for Khalid Ahmed Qassim

EXHIBIT 3

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.	No. 19-5079

OPPOSITION TO MOTION TO INTERVENE

The government respectfully submits this opposition to Khalid Ahmed Qassim's motion to intervene in this case. The motion to intervene should be denied.

STATEMENT

1. This is an appeal from a district court order on Abdulsalam Ali Abdulrahman al-Hela's petition for writ of habeas corpus. Al-Hela is detained at Guantanamo Bay, Cuba, as an enemy combatant. Al-Hela and the government were the only parties to the case in district court, which resulted in a judgment denying the writ. Al-Hela filed a notice of appeal in March 2019, and al-Hela and the government remained the only parties in this case through the proceedings before the panel. In August 2020, the panel issued a decision affirming the district court's denial of al-Hela's petition. *Al-Hela v. Trump*, 972 F.3d 120 (D.C. Cir. 2020). Among the panel's legal holdings was the conclusion "that 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." *Id.* at 148. On October 26, 2020, al-Hela filed a petition for rehearing. In his petition, al-Hela presents two questions, one of which is "[w]hether the Due Process Clause applies to Guantanamo detainees." Pet. 2; *see* Pet. 5-13.

2. On October 23, shortly before the due date for al-Hela's rehearing petition, Qassim for the first time sought to intervene in al-Hela's case, asserting both that he is entitled to intervention as of right and that he should be granted permissive intervention. Qassim, who is also detained at Guantanamo Bay, has a habeas petition pending in district court. The district court initially denied his petition, but this Court reversed on appeal. *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019). In reversing, this Court concluded that the district court had erred in believing that Qassim's due process arguments were foreclosed by existing circuit precedent, and that "[c]ircuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions." *Id.* at 529. And the Court expressly declined to decide whether due process protections applied because that question was "premature," noting that it was unclear (among other things) "whether any information that might be withheld [from Qassim or his counsel] even implicates possible constitutional disclosure obligations." *Id.* at 531-32. The Court's decision in *Al-Hela* thus explicitly noted that it was "[r]esolving the

constitutional question raised by *Qassim*" because that question was "squarely before" the Court and "not premature." *Al-Hela*, 972 F.3d at 147-48.

ARGUMENT

Qassim's motion to intervene should be denied. He does not meet the standard for intervention as of right, both because he lacks standing and because al-Hela adequately represents any interest Qassim has in the litigation of the sole legal question Qassim identifies. And Qassim identifies no reason why permissive intervention should be granted at this late stage, and any interest he has in presenting legal arguments about the panel opinion would be fully addressed by filing a brief as amicus curiae.

A. To obtain intervention as of right, a party must satisfy each of the four requirements of Federal Rule of Civil Procedure 24(a)(2): "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 192 (D.C. Cir. 2013) (quoting *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008)). In addition, because "[i]ntervenors become full-blown parties to litigation . . . all would-be intervenors must demonstrate Article III standing." *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1233 (D.C. Cir. 2018).

1. Qassim has failed to demonstrate standing. Qassim seeks to become a "full-blown party" to al-Hela's petition for habeas corpus, which seeks as relief an order requiring al-Hela's release from detention. Qassim identifies no Article III interest in that petition or in al-Hela's release, and indeed lacks standing to seek an order directing the government to release al-Hela from detention.

Instead, Qassim claims that his injury-in-fact stems from the panel's decision on the question—previously "open and unresolved," *Qassim*, 927 F.3d at 530—whether the Due Process Clause extends to enemy combatants at Guantanamo. Qassim suggests that the remand in his prior appeal conferred on him a right "to the presentation and adjudication of his due process claims in the context of an actual discovery dispute," and that by foreclosing those claims as a matter of circuit precedent, the panel's decision injures him by "nullifying his right to such an adjudication" before the district court. Mot. 10.

This argument is wrong at every turn. To begin, Qassim cites no authority for the proposition that an Article III injury results from a panel's opinion establishing a rule of law in an entirely separate case simply because that rule of law might have application in other cases. On the contrary, this Court has repeatedly rejected the premise that the precedential effect of a decision is sufficient to generate an injury-in-fact. *E.g.*, *American Family Life Assur. Co. of Columbus v. FCC*, 129 F.3d 625, 629-30 (D.C. Cir. 1997) ("[T]he 'mere precedential effect of [an] agency's rationale in later adjudications' is not an injury sufficient to confer standing on someone seeking

judicial review of the agency's ruling." (quoting *Radiofone, Inc. v. FCC*, 759 F.2d 936, 939 (D.C. Cir. 1985)); *Kansas Corp. Comm'n v. FERC*, 881 F.3d 924, 931 (D.C. Cir. 2018); *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007); *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994). That those cases have addressed agency adjudications supports the conclusion that Qassim lacks standing on the basis of the precedential effect of an opinion from this Court: "[s]tanding to challenge agency adjudications is . . . more expansive than standing to appeal lower court judgments," *Radiofone*, 759 F.2d at 939, and "standing to appeal" requires that a party be injured by "the judgment sought to be reviewed," *Parr v. United States*, 351 U.S. 513, 517 (1956). The panel's judgment—that al-Hela's petition for habeas corpus was properly denied—inflicts no injury on Qassim, who has no Article III interest in al-Hela's detention or release. Indeed, were it otherwise, *any* person or entity disadvantaged by a rule of law announced in a precedential decision of this Court would have standing to intervene, regardless of whether the underlying judgment has any effect on them whatsoever.

Nor does Qassim's prior appeal to this Court alter the calculus. Qassim appears to believe that the decision in his previous appeal to this Court granted him a legally protected interest in litigating the question of due process's applicability, such that no other panel of this Court could resolve the "open and unresolved" question of law identified in his appeal, *Qassim*, 927 F.3d at 530, adverse to his position without creating an Article III injury. *See* Mot. 10. Nothing in the Court's opinion, which

simply remands "for further proceedings consistent with this opinion," *Qassim*, 927 F.3d at 532, provides such a right, especially where the Court's opinion noted that it was unclear "whether any information that might be withheld even implicates possible constitutional disclosure obligations," *id.* at 531. Qassim cites nothing to support the premise that a remand for further proceedings operates as an exclusive and enforceable right to be the first to litigate a particular issue, or that courts routinely create Article III injuries by deciding cases addressing unsettled questions of law. And in any event, Qassim remains free to advance any due process arguments he wishes before the district court in the course of litigating his habeas petition; to appeal any adverse judgment to this Court; and to seek en banc or Supreme Court review in his own case, if he so desires. Because neither the panel opinion nor its judgment inflict Article III injury on Qassim, he lacks standing to intervene.

2. Qassim also fails to meet the other requirements for intervention as of right. As his lack of standing indicates, he identifies no "interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2); *see* Mot. 9-10 (contending that this factor is met solely because Qassim has standing). And most significantly, al-Hela is an "adequate representative" of Qassim's interest in the due process question. *Deutsche Bank*, 717 F.3d at 192. Qassim acknowledges that al-Hela "shares Qassim's interest in securing procedural rights under the Due Process Clause and raised a procedural due process claim below and on appeal." Mot. 11. But he contends that al-Hela is an inadequate representative because "Al Hela's panel brief

raised at least six other issues as well," and that any further briefing from al-Hela is unlikely to "develop the procedural due process issue as thoroughly" as Qassim's briefing would. Mot. 11-12. That complaint is nothing more than a "quibble[] over litigation tactics" that cannot suffice to demonstrate inadequacy of representation. *Jones v. Prince George's County*, 348 F.3d 1014, 1020 (D.C. Cir. 2003); *see Massachusetts Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 781 (D.C. Cir. 1997). And whatever the merits of those arguments when Qassim filed his motion, they bear no relationship to the rehearing petition al-Hela actually filed three days later, which presents the applicability of due process as one of two questions for en banc consideration, Pet. 2, and devotes the lion's share of its argument to that question, Pet. 5-13.

Qassim alternatively suggests that al-Hela is an inadequate representative because al-Hela might not seek Supreme Court review. Mot. 12. Qassim cites no case suggesting that uncertainty about further appellate proceedings is a basis for concluding that representation is inadequate in ongoing proceedings. On Qassim's view, representation would be inadequate whenever a party does not commit in advance to exhausting all appellate options. Nor does Qassim explain how he could alone seek Supreme Court review of the judgment in this case, which, as discussed, affirms the denial of al-Hela's petition for habeas corpus. *See Parr*, 351 U.S. at 517; *see also Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is

contingent upon a showing by the intervenor that he fulfills the requirements of Art. III."). And Qassim is wrong to suggest that his ability "to seek further review independently in the Supreme Court" will be impaired if this Court denies him intervention. Mot. 12. Nothing precludes Qassim from raising his arguments and seeking review from this Court and the Supreme Court in his own case.

B. This Court should likewise deny Qassim's request for permissive intervention. Even aside from his lack of standing,[1] "permissive intervention is an inherently discretionary enterprise," *EEOC v. National Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998), and Qassim identifies no basis for granting it here, instead repeating his arguments for intervention as of right, Mot. 13. In addition, Qassim's belated intervention as a "full-blown party," *Old Dominion*, 892 F.3d at 1233, could create significant practical problems that would threaten to delay resolution of

[1] Although this Court has suggested that "[i]t remains . . . an open question in this circuit whether Article III standing is required for permissive intervention," *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1327 (D.C. Cir. 2013) (quotation omitted), the Court has subsequently stated that "*all* would-be intervenors must demonstrate Article III standing," *Old Dominion Elec. Coop.*, 892 F.3d at 1233 (emphasis added); *see id.* at 1232 n.1 (stating that intervening Supreme Court precedent did not "cast doubt upon . . . our settled precedent that all intervenors must demonstrate Article III standing"); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732 (D.C. Cir. 2003) (stating that "a Rule 24 intervenor" must have standing (quotation omitted)). But even if that question is viewed as unsettled, the same result obtains under the Court's unquestioned discretion to deny permissive intervention, *cf. Defenders of Wildlife*, 714 F.3d at 1327 (avoiding the question by declining to exercise pendent jurisdiction), and Qassim's lack of standing surely supports denying intervention, *see SEC v. Prudential Secs. Inc.*, 136 F.3d 153, 156 n.7 (D.C. Cir. 1998) (explaining that district court did not abuse its discretion in denying permissive intervention where the prospective intervenors lacked standing).

this case. Much of the factual record in this case consists of highly sensitive classified material, *see, e.g.*, Pet. 12-13 (contending that al-Hela's due process rights were violated because he did not receive personal access to certain classified material); *Al-Hela*, 972 F.3d at 137 (discussing arguments presented about access to classified information), that has no bearing on Qassim's petition. The government therefore anticipates that it would object to efforts by Qassim to access at least some of the classified information in this case even if he were to obtain party status, and any litigation over that question would be both inappropriate in this Court in the first instance and a distraction from the final disposition of al-Hela's appeal. *See* Fed. R. Civ. P. 24(b)(3).

At bottom, Qassim's interest is in advancing arguments against the legal rule adopted by the panel opinion because of its application to other cases. That is the same interest as any prospective amicus curiae, and would thus be fully addressed by granting him leave to file an amicus brief, as this Court has done in the past when presented with improper requests to intervene. *See Old Dominion*, 892 F.3d at 1234; *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 535, 539 (D.C. Cir. 1999).

CONCLUSION

The Court should deny Qassim's motion to intervene.

Respectfully submitted,

SHARON SWINGLE
(202) 353-2689

/s/ Brad Hinshelwood
BRAD HINSHELWOOD
(202) 514-7823
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 7256
Washington, D.C. 20530

NOVEMBER 2020

CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,297 words. This motion 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 November 2, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Brad Hinshelwood
Brad Hinshelwood

EXHIBIT 4

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

ABDUSALAM ALI ABDULRAHMAN AL HELA	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 19-5079
	)	
DONALD J. TRUMP, *et al.*,	)	
	)	
Respondents-Appellees.	)	
	)	

REPLY TO OPPOSITION TO MOTION TO INTERVENE

The government's opposition to the motion of Khalid Ahmed Qassim to intervene in this appeal is based on the government's mischaracterization of the reasons for Qassim's motion. Qassim must briefly reply.

1. The government argues that Qassim lacks Article III standing, and that, therefore, he has failed to demonstrate a legally protected interest that would justify intervention. Opposition to Motion to Intervene ("Gov't Mot.") at 4-6. The government asserts that Qassim's claim of Article III "injury-in-fact" stems from the decision by the panel majority in the present appeal that the Due Process Clause does not provide procedural protections to Guantánamo detainees, a matter it says was left '"open and unresolved"' in *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir.), *suggestion for rehearing en banc denied*, 938 F.3d 375 (2019). *Id.* at 4. The government contends that Article III injury cannot result from "a panel's opinion

establishing a rule of law in an entirely separate case simply because that rule of law might have application in other cases." *Id.*

However, the government is wrong. Although *Qassim* did leave open the question of whether the Due Process Clause provides procedural protections to Guantánamo detainees, that was ***not*** the panel's holding. The ***holding*** in *Qassim* was that Qassim was entitled to have his right to procedural due process protections resolved in the context of a concrete discovery dispute. Based on that holding, *Qassim* instructed the district court to give Qassim the opportunity on remand to develop a record in which the due process question could be resolved in the context of such a dispute. That is exactly what Qassim was doing – until now.

What the panel majority in the present appeal did was to ***overrule*** *Qassim*'s holding by reaching and resolving the due process question in the abstract, and not in the context of a concrete discovery dispute. In a remarkable turnabout, the government, in its opposition, abandons the position it took itself in the present appeal that the panel should ***not*** have done that. The panel majority's decision inflicts Article III injury on Qassim because it rescinds the right previously conferred on him by *Qassim* to have his due process claim adjudicated in the context of a concrete discovery dispute. Thus, the panel majority's decision ***intrudes directly*** into Qassim's pending habeas case in the district court.

This was not supposed to happen. Although the government inexplicably does not mention this in its opposition, the full Court, by a vote of 8-2, denied rehearing *en banc* in *Qassim*. Judge Henderson, joined by Judge Rao, dissented on the ground that, notwithstanding the absence of a concrete discovery dispute, the *Qassim* panel should have reached and decided on the merits that the Due Process Clause does not provide procedural protections to Guantánamo detainees. But none of the other judges voted with Judges Henderson and Rao.

The Court's denial of rehearing *en banc* in *Qassim* should have ensured that *Qassim*'s holding could not be overturned by another panel, and that Qassim could proceed unhindered in adjudicating his right to procedural due process protections before the district court. Instead, the panel majority in the present appeal did just the opposite; it adopted the reasoning in Judge Henderson's dissent in *Qassim* and effectively overruled *Qassim*. In so doing, the panel majority injured Qassim by impermissibly depriving him of the fruits of the partial victory he won in *Qassim* and intruding directly into his pending proceedings before the district court.

And it is clear at the very least, that the panel majority's decision in the present appeal has inflicted Article III injury on Qassim by threatening the viability of his pending habeas case in the district court. Under the law of this Court, "[w]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being a violation of fixed law, cannot prevail."

Sierra Club v. Jackson, 648 F.3d 848, 854 (D.C. Cir. 2011). Given that the panel majority's decision in the present appeal overrules the holding of the prior panel in *Qassim*, the district court must now decide whether to follow the "norm" and be bound by the earlier holding and remand instructions in *Qassim* or opt to be bound by the holding of the panel majority in the present appeal. Put between a rock and a hard place by the panel majority, the district court may elect not to proceed with Qassim's habeas case. This, too, qualifies as Article III injury to Qassim.

In sum, Qassim has Article III standing to intervene in the present appeal and seek rehearing *en banc*.

2. The government disputes Qassim's assertion that petitioner Al Hela may not adequately represent Qassim's interest on the issue of whether the Due Process Clause provides procedural protections to Guantánamo detainees. Gov't Opp. at 6-7. According to the government, Al Hela's petition for rehearing *en banc* "presents the applicability of due process as one of two questions for en banc consideration … and devotes the lion's share of its argument to that question." Opp. at 7.

The government is wrong again. Al Hela filed a 17-page petition for rehearing *en banc*. Only three of those 17 pages address the question of whether the Due Process Clause provides procedural protections to Guantánamo detainees. Al Hela Petition for Rehearing *En Banc* at 7-10.

In contrast, during four years of litigation in the district court and this Court Qassim's sole argument has been that he is entitled to have his habeas petition adjudicated through procedures demanded by the Due Process Clause, and that adherence to those procedures is both required in a habeas proceeding in federal court and essential for him to prevail on his habeas petition. The government's apparent strategic aim of preventing the full Court from hearing and considering Qassim's well-considered arguments is not a reason to deny Qassim intervention.

3. Finally, the government makes the bogus argument that granting Qassim intervention "could create significant practical problems that would threaten to delay resolution of this case." Gov't Opp. at 8-9. The only "significant practical problems" the government identifies are speculative "efforts by Qassim to access at least some of the classified information in this case," to which the government "anticipates that it would object." *Id.* at 9.

However, Qassim seeks to intervene for the sole purpose of securing a rehearing *en banc* of the panel majority's decision as to whether the Due Process Clause provides procedural protections to Guantánamo detainees. Resolution of that issue will not require access by Qassim or his counsel to any classified information, and Qassim does not expect to request such access. Indeed, the panel majority reached its decision without discussing any classified information, and its published decision was not classified. In any event, Qassim's experienced counsel

have security clearance, they have had access to classified Guantánamo information for more than 18 years. The grant of Qassim's motion to intervene will not cause any delay in the resolution of this case.

For the foregoing reasons and the reasons given by Qassim in his motion to intervene, the Court should allow Qassim to intervene in this appeal and also grant his petition to rehear *en banc* the panel majority's decision that the Due Process Clause does not confer procedural rights on Guantanamo detainees.

Dated: November 6, 2020

Respectfully Submitted,

/s/ Neil H. Koslowe

Thomas B. Wilner
Neil H. Koslowe
Shearman & Sterling LLP
401 9th Street, N.W., Suite 800
Washington, DC 20004
Telephone: (202) 508-8050
E-mail: twilner@shearman.com
E-mail: nkoslowe@ptomaclaw.com

Shelby Sullivan-Bennis
Durkin & Roberts
2446 N. Clark Street
Chicago, IL 60614
Telephone: (401) 660-6538
E-mail: ssullivan@durkinroberts.com

Counsel for Movant Khalid Ahmed Qassim

Anthony G. Amsterdam
University Professor Emeritus
New York University School of Law
295 Sullivan Street, 5th Floor
New York, NY 10012
Telephone: (212) 988-6632
E-mail: aa1@nyu.edu

Of Counsel

CERTIFICATE OF COMPLIANCE

This reply complies with the length-limits of Fed. R. App. P. 27(d)(2)(C) and Circuit Rule 27(a)(2) because it contains 1,343 words excluding parts of the reply exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This reply complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), 32(a)(5) and the type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman Font.

Dated: November 6, 2020

/s/ Neil H. Koslowe
Neil H. Koslowe
Counsel for Khalid Ahmed Qassim

CERTIFICATE OF SERVICE

I certify that on November 6, 2020, the foregoing document was filed 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 the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 6, 2020

/s/ Neil H. Koslowe
Neil H. Koslowe

EXHIBIT 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5079 **September Term, 2020**

1:05-cv-01048-UNA

Filed On: November 20, 2020

Abdulsalam Ali Abdulrahman Al-Hela, Detainee Camp Delta, also known as Abd Al-Salam Ali Al-Hila and Abdulwahab Ali Abdulrahman Al-Hela, As Next Friend of Abdulsalam Ali Abdulrahman Al-Hela,

Appellants

v.

Donald J. Trump, President of the United States, et al.,

Appellees

BEFORE: Rao, Circuit Judge, and Randolph, Senior Circuit Judge

ORDER

Upon consideration of Khalid Ahmed Qassim's motion for leave to intervene and petition for rehearing en banc and the lodged petition, it is

ORDERED that the motion be denied. Qassim has not satisfied the requirements of either Fed. R. Civ. P. 24(a) for intervention of right, or Fed. R. Civ. P. 24(b) for permissive intervention. See Building & Constr. Trades Dep't. AFL-CIO v. Reich, 40 F.3d 1275, 1282-83 (D.C. Cir. 1994) ("standards for intervention applicable in the district court" also apply in the court of appeals). This court will allow "intervention at the appellate stage where none was sought in the district court 'only in an exceptional case for imperative reasons.'" Amalgamated Transit Union Int'l, AFL-CIO v. Donovan, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (per curiam) (citations omitted); see also Richardson v. Flores, 2020 WL 6636352, at *2 (5th Cir. Nov. 12, 2020) (noting that because no rule "explicitly allow[s] intervention on appeal," it is "reserved for truly exceptional cases"). Moreover, intervention is "even more disfavored" where, "as here, the motion for leave to intervene comes after the court of appeals has decided a case." Amalgamated Transit, 771 F.2d at 1552.

The Clerk is directed to note the docket accordingly.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk