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No. 19-5079

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

ABDULSALAM ALI ABDULRAHMAN AL-HELA,

Petitioner-Appellant,

v.

JOSEPH R. BIDEN, JR., et al.

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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GLOSSARY

AAIA	Aden-Abyan Islamic Army
AUMF	Authorization for Use of Military Force
CIA	Central Intelligence Agency
EIJ	Egyptian Islamic Jihad
NDAA	National Defense Authorization Act of 2012

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STATEMENT OF JURISDICTION

Abdulsalam Ali Abdulrahman al-Hela petitioned for a writ of habeas corpus under 28 U.S.C. § 2241. The district court entered judgment on January 28, 2019. JA 198. Al-Hela timely appealed on March 22, 2019. JA 208-10; Fed. R. App. P. 4(a)(l)(B). This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253(a).

STATEMENT OF THE ISSUE

The Court ordered the parties to "limit briefing to the question of whether petitioner-appellant is entitled to relief on his claims under the Due Process Clause."

STATEMENT OF THE CASE

A. Statutory Background

The Authorization for Use of Military Force (AUMF) authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). In *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004), the Supreme Court held that "Congress' grant of

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authority for the use of 'necessary and appropriate force'" in the AUMF "include[s] the authority to detain for the duration of the relevant conflict." *Id.* at 521 (plurality op.); *id.* at 587 (Thomas, J., dissenting).

Congress subsequently affirmed in the National Defense Authorization Act for Fiscal Year 2012 (NDAA) that the President's authority under the AUMF includes "[d]etention under the law of war without trial until the end of the hostilities authorized by" the AUMF. Pub. L. No. 112-81, § 1021(c)(1), 125 Stat. 1298, 1562 (2011). This authority includes the power to detain 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." *Id.* § 1021(a), (b)(2), 125 Stat. at 1562. Neither the AUMF nor the NDAA "places limits on the length of detention in an ongoing conflict." *Al-Alwi v. Trump*, 901 F.3d 294, 297 (D.C. Cir. 2018).

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B. Al-Hela's Travel Facilitation for Terrorist Groups and Assistance With Successful, Attempted, or Planned Terrorist Attacks

Al-Hela, a Yemeni citizen who has been detained at Guantanamo since 2004, filed this habeas petition in 2005. The district court denied the writ, making extensive factual findings about al-Hela's involvement with al Qaeda and two associated forces—Egyptian Islamic Jihad (EIJ) and the Aden-Abyan Islamic Army (AAIA). A panel of this Court rejected al-Hela's contentions that the district court's factual findings reflected clear error, *see Al-Hela v. Trump*, 972 F.3d 120, 134-35 (D.C. Cir. 2020), and so we present these facts as established.

Al-Hela fought against the Soviet Union in Afghanistan, where he developed relationships with other jihadists. JA 148-51. Al-Hela returned to Yemen, where, according to his own [redacted] statements [redacted] he [redacted] to facilitate the travel of numerous extremists, including members of al Qaeda and EIJ, which the district court found to be an associated force of al Qaeda. JA 144-46, 151-63. As part of this scheme, al-Hela

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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. JA 151-63. [redacted] The district court found that al-Hela "falsely testified during the merits hearing" when he denied these activities, relying on his [redacted] statements and corroboration of his activities by other sources. JA 153, 156-57.

Al-Hela also participated in five planned, attempted, or accomplished terrorist attacks in Yemen in late 2000 and early 2001, including two planned attacks on the U.S. Embassy in Sana'a. Three of those attacks—the bombing of the British Embassy in October 2000, the attempted assassination of the Yemeni Minister of Interior in December 2000, and bombings [redacted] around New Year's Day 2001—were carried out by AAIA members with logistical

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support from al-Hela. JA 169-71. Al-Hela likewise "assist[ed] members" of AAIA with another plot likely targeting the U.S. Embassy. JA 179. [redacted]

The district court also found that al-Hela had extensive connections to prominent al Qaeda, EIJ, and AAIA figures, and was a trusted figure in the jihadist community. JA 122-24. [redacted]

The district court observed that much of the evidence of al-Hela's involvement came from al-Hela's own [redacted] statements [redacted] JA 141-42. Al-Hela "did not testify that he did not make these statements" and did not "testify that he lied [redacted] instead attributing his statements to possible

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misunderstandings. JA 142. But the court concluded that al-Hela's [redacted] his "statements [redacted] are often corroborated by reporting from other sources." *Id.*; [redacted]

The district court concluded that al-Hela had "substantially supported" al Qaeda, EIJ, and AAIA. JA 195-97. The district court therefore denied the writ. JA 198. A panel of this Court affirmed, and this Court granted rehearing en banc.

On June 8, 2021, the Periodic Review Board, which reviews the continued detention of individuals at Guantanamo, issued a final determination designating al-Hela as eligible for transfer, concluding that although al-Hela "presents some level of threat in light of his past activities," that threat could be "adequately mitigated" if al-Hela can be

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transferred to a country with (among other things) "[a]ppropriate security assurances" and that implements "appropriate security measures."[1]

C. Process Provided in Adjudicating Al-Hela's Petition

Al-Hela argues that the procedures employed in adjudicating his habeas petition were constitutionally insufficient. We therefore describe the process provided in some detail.

1. Basic principles governing production of information

Most Guantanamo habeas petitions are governed by a Case Management Order adopted by several judges of the district court, including the judge here. *See* Doc. 155 (original case management order), Doc. 172 (revisions to that order) (collectively, "Order"). Under the Order, the government is required to disclose to a detainee's counsel information on which the government relies to justify detention, as well as "exculpatory" information, that is, information tending to undermine the government's case (*e.g.*, information suggesting that a particular

[1] https://www.prs.mil/Portals/60/Documents/ISN1463/SubsequentFullReview2/210608_UPR_ISN1463_SH2_FINAL_DETERMINATION.pdf

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source was unreliable). Order §§ I.D.1, I.E.1, I.F. A detainee may also seek discovery. Order § I.E.2.

Often, information required to be disclosed under the Order is classified. The government has consented to have petitioner's counsel who can obtain a Secret-level security clearance receive information at that classification level subject to a protective order. Doc. 138 (protective order); Doc. 216 (amendments to protective order). If the government believes that it is necessary to withhold from petitioner's counsel classified information that would otherwise be disclosed—such as information that is classified at the Top Secret level or is otherwise especially sensitive—the government must seek an exception from disclosure from the district court. Order § I.F.

The government typically complies with these disclosure obligations by providing a detainee's counsel with the portions of classified documents on which the government relies to justify detention, as well as all exculpatory information in those documents or that the government otherwise locates in its searches of the reasonably available materials. The government's redactions from these

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documents fall into two broad categories. First, classified material may be redacted that is unrelated to the petitioner, not exculpatory or subject to disclosure, or otherwise not relied on to justify detention, because counsel has no need to know classified information not relevant and material to the detainee's case. *See* Exec. Order No. 13,526, § 4.1(a)(3), 75 Fed. Reg. 707, 720 (Dec. 29, 2009) (a cleared person may access classified information only if he or she "has a need-to-know the information"). For example, a single intelligence report may aggregate several unrelated information items, only one of which is relevant to a particular petitioner's case; in those circumstances, the government may redact the unrelated information before disclosing the document. Second, as noted above, the government may redact information that, although otherwise subject to disclosure requirements, is too sensitive to disclose, even to counsel. In such a situation, the government must seek an exception from disclosure from the district court.

If a detainee's counsel believes the government's redactions or withholdings are erroneous, they may challenge them before the district court, which may order disclosure of classified material under the Order

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if "the information is both relevant and material" and "access by petitioner's counsel (pursuant to a court-approved protective order) is necessary to facilitate" meaningful review. *Al-Odah v. Obama*, 559 F.3d 539, 544-45 (D.C. Cir. 2009) (emphasis omitted).

The district judge in al-Hela's case takes a broader view than some other district judges of the government's obligations under the Order. In most cases, the government redacts information from documents it relies on where that information is not relevant or material to a petitioner's case without seeking an exception from disclosure (and, thus, without *in camera, ex parte* review of those redactions by the district judge). This judge, however, requires the government to seek an exception from disclosure even for those redactions in the amended factual return exhibits that merely withhold classified information on which the government does not rely to justify detention and which is not exculpatory. *See Bin Attash v. Obama*, 628 F. Supp. 2d 24, 36 (D.D.C. 2009).

Thus, the district court required the government to justify each redaction in the exhibits to the government's amended factual return,

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reviewed the redacted materials, and ordered further disclosure when it "concluded that the redacted information was relevant [and] material," *Bin Attash*, 628 F. Supp. 2d at 36, such as by requiring the government to produce revised substitutes with additional information.

2. Procedures governing counsel's access to highly sensitive information

Much of the evidence related to al-Hela's activities on behalf of al Qaeda and associated forces was gathered [redacted] As a result, a substantial quantity of evidence in this case could reveal sources and methods of intelligence gathering. [redacted]

The district court therefore employed procedures to protect the government's "legitimate interest in protecting sources and methods of intelligence gathering." *Boumediene v. Bush*, 553 U.S. 723, 796 (2008). [redacted]

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[redacted]

[redacted] Where possible, the government additionally provided to counsel information about many of the sources in the disclosed documents. The government also provided additional information about the sources and their relationship to the documents *in camera* and *ex parte* to the district court—information that likewise forms part of the record for this Court's review.

In many instances, the government also provided to counsel classified substitutes that revealed the substance of information redacted from a particular report in a less sensitive form. Whenever

[redacted]

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the government sought an exception from disclosure for information that was required to be disclosed under the order, and when the government provided to al-Hela's counsel a classified substitute for that information, and the district court reviewed each such substitute.[3]

By necessity, the district court's process of reviewing the government's requests for exceptions (including its redactions of information not relevant and material) and the government's classified substitutes took place on an *ex parte* basis. *See* JA 206-07 (noting that such a motion "necessarily requires discussion of the nature and/or substance of the classified information at issue" (quotation omitted)). Over the course of several years, the district court took an active role in addressing the government's requests for exception. The government filed three initial *ex parte* motions for exceptions to disclosure in 2010. In 2011, the original district judge assigned to the case ordered the

[3] The district court did not issue a formal ruling on the government's October 2017 *ex parte* motion for exception to disclosure, which included requests for exceptions related to thirteen exhibits to the amended factual return, but the court did not suggest that these redactions were problematic in issuing its final ruling, which addressed these exhibits (among others).

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government to supplement these motions with an "analytically aggressive assessment" of whether particular information was material. Doc. 290, at 3. After the case was reassigned, the new judge ordered further supplemental briefing on those motions, Doc. 337, and spent nearly two years—from the government's filing of its further supplemental motion in February 2015 (Doc. 346) to the court's final order on the original three motions in December 2016 (Doc. 413-1)—reviewing the government's proposed redactions and substitutes. The court rejected redactions and substitutes that it viewed as insufficient, held *ex parte* hearings to probe the government's justifications for withholdings, and issued both oral and written *ex parte* orders directing the government to reconsider or provide greater justification for various redactions and substitutes. *See, e.g.*, Doc. 413-1, at 1-2 (describing review, including rejection of one substitute, but noting that the court was "satisfied" with a revised substitute). The court likewise addressed two further *ex parte* motions for exceptions filed in October and December of 2017. In connection with those motions, the court ordered the government to produce a new substitute for al-Hela's Exhibit 280

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that revealed additional information. *See* JA 1110-15 (report and revised substitute); Doc. 468 (notice of compliance). Substantive filings and orders on these motions are catalogued in the addendum. Add. 1-5.

Finally, because the district court had *ex parte* and *in camera* access to the additional information provided by the government, it was also able to rely on that information to assess source credibility, if needed, even where it could not be disclosed to al-Hela's counsel. The court relied on such information four times in its opinion, including once to discount evidence the government relied on to justify detention. [redacted]

[redacted]

3. Principles governing al-Hela's personal access to classified information

Al-Hela, as an alien enemy combatant without a security clearance, was provided with less information than his counsel. The government, however, prepared a public version of the government's initial factual return and exhibits, which counsel could share with al-

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Hela. *See* Doc. 333. Al-Hela's counsel subsequently requested that the government prepare a classified version of the redacted material in that factual return and exhibits that could be shared directly with al-Hela. Because of the sensitivity of the classified information—including information that would necessarily reveal the identity of the government's sources—the government was not able initially to provide a less redacted version of the factual return narrative and exhibits for al-Hela's personal review. The government instead provided al-Hela with an unclassified summary containing "many (but not all) of the facts and allegations offered in support of [al-Hela's] detention." JA 200; *see* Suppl. App'x (SA) 74-75.

That document outlined the government's allegations that al-Hela had used his connections to secure the release of extremists from prison; that he had facilitated travel out of Yemen for al Qaeda and EIJ members; including through the use of false passports; and it named specific individuals al-Hela had assisted. SA 74-75. The document also outlined al-Hela's involvement "in planning attacks on the United Kingdom and United States embassies in Yemen," including his

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meetings with an AAIA member about those plans, and his "detailed knowledge of a planned terrorist attack on the U.S. Embassy." SA 75.

After receiving this summary, al-Hela moved for personal access to the classified factual return and classified exhibits, contending that without access to those materials or a substitute, he would "be deprived of the 'meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law' to which he is entitled." JA 200 (quoting *Boumediene*, 553 U.S. at 779). The government opposed the motion. In the course of opposing, the government included a nonpublic but unclassified version of the factual return narrative that disclosed additional information to al-Hela. SA 134-68. The government's response explained, however, that much of the information withheld from al-Hela addressed his extremist activities in Yemen, including the possibility that senior Yemeni government officials were aware of his activities. Disclosure of such information would likely have serious harmful effects on the foreign relations and activities of the United States in Yemen and elsewhere, and as the government explained in greater detail in an *ex parte* filing,

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disclosure of this information would necessarily reveal [redacted]

[redacted]

The district court denied al-Hela's motion. It explained that there was no "support for petitioner's argument that personal access is essential to a meaningful opportunity to contest detention." JA 201. It noted that this Court had previously approved "the use of classified evidence in habeas cases—even when no disclosure was made to defense counsel, let alone to the petitioner," and that these holdings "demonstrate[] that lack of personal access does not per se violate *Boumediene*'s guarantee." JA 202. The court also explained that "revealing an allegation sometimes necessarily reveals the source or method from which it emerged." *Id.* In addition, the court concluded that the government had provided *ex parte* "specific and persuasive reasons to believe that further disclosure [to al-Hela] of the allegations against petitioner and the factual bases therefor would risk revealing U.S. intelligence sources and methods." JA 203. (That *ex parte* filing has been lodged for this Court's review.) Given al-Hela's continued

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ability to put on his own case, the court held that al-Hela's "right to present evidence survives, and to the extent that right is diminished, it is so in order to accommodate respondents' 'legitimate interest in protecting sources and methods of intelligence gathering ... to the greatest extent possible.'" JA 204 (quoting *Boumediene,* 553 U.S. at 796).

In addition, after filing an amended factual return in June 2017, the government gave al-Hela access to classified, redacted versions of the exhibits that contain his own statements on which the government relied that he could view and discuss with his counsel, along with a classified, redacted version of the amended factual return narrative that reflected the discussion and use of these same statements in the government's case. Al-Hela's counsel submitted these versions of the exhibits into the record at the merits hearing, JA 1042-93, but omitted the redacted narrative, *see* JA 1042 (noting provision of "a SECRET//DISPLAY to ISN 1463 ONLY version of the Amended Factual Return narrative regarding the portions of the narrative that discuss your client's pre-detention statements"); JA 1045 (index of enclosures

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noting "SECRET//DISPLAY to ISN 1463 ONLY version of the Amended Factual Return Narrative"). The information disclosed to al-Hela in that document is available as Exhibit 26 to the government's October 2017 *ex parte* motion, lodged with this Court.

SUMMARY OF ARGUMENT

Al-Hela is not entitled to relief on his claims under the Due Process Clause. The United States acknowledges that the Constitution allows al-Hela to challenge the lawfulness of his ongoing detention and afford him certain procedural protections to ensure a "meaningful opportunity" to contest the basis of his detention. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008). Al-Hela received all the process he is due under either the Suspension Clause or the Due Process Clause. He received more process than a plurality of the Supreme Court deemed necessary for a U.S. citizen detained in the United States as an enemy combatant in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The Due Process Clause thus would not provide any greater process than he has already received. Consistent with principles of constitutional avoidance, this Court can and should hold that al-Hela is not entitled to

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relief on his specific claims, without deciding the broader question of whether and how the Due Process Clause applies. If the Court does decide that the Due Process Clause applies, it should hold that it does so only to the extent necessary to effectuate meaningful review in habeas proceedings.

As Judge Griffith recognized in his concurring opinion, all of al-Hela's claims fail under this Court's cases addressing *Boumediene*'s "meaningful opportunity" standard. *Al-Hela v. Trump*, 972 F.3d 120, 151-55 (D.C. Cir. 2020). Al-Hela's contentions about his own and his counsel's access to certain classified evidence fail in light of the government's "legitimate interest in protecting sources and methods of intelligence gathering" in habeas proceedings, which the district court properly accommodated "to the greatest extent possible." *Boumediene*, 553 U.S. at 796. Al-Hela's contentions about the use of hearsay evidence likewise cannot be squared with *Hamdi*, which concluded that use of such evidence is permissible. *See* 542 U.S. at 533-34 (plurality op.). Al-Hela's arguments about the presumption of accuracy afforded government documents and the standard of proof in these proceedings

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were not raised before the panel. But they are meritless even if considered; the limited presumption of accuracy does not offend the Constitution and played little role here, and this Court has repeatedly held that the preponderance-of-the-evidence standard is consistent with *Hamdi*.

Nor is al-Hela entitled to release because of the duration of his detention. Enemy combatants held under the law of war are detained to prevent their return to the conflict, and thus can be detained "for the duration of the relevant conflict." *Hamdi*, 542 U.S. at 520-21. Al-Hela does not argue that the "relevant conflict" has ended. Instead, he attempts to analogize his detention to other schemes that serve different purposes, arguing that the government must prove he poses a threat. But an individualized determination of dangerousness has never been a prerequisite to the detention of enemy combatants, and in any event courts are not equipped to make those determinations. That conclusion is unaffected by the government's recent determination that al-Hela may be released if a destination country agrees to appropriate

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security assurances and security measures to mitigate the threat he still poses.

STANDARD OF REVIEW

In reviewing the denial of a petition for a writ of habeas corpus, this Court reviews the district court's factual findings for clear error, its ultimate determination de novo, and any challenged evidentiary rulings for abuse of discretion. *Khan v. Obama*, 655 F.3d 20, 25 (D.C. Cir. 2011). "[L]egal questions" within that framework are "review[ed] de novo." *Id.* at 26.

ARGUMENT

I. This Court Need Not—And Should Not—Decide Whether the Due Process Clause Applies to Enemy Combatants at Guantanamo Bay Because Al-Hela Received All the Process that Would Be Due Under the Constitution

In granting rehearing en banc, the Court asked the parties to address whether al-Hela "is entitled to relief on his claims under the Due Process Clause." Order 2 (Apr. 23, 2021). The answer is no. The United States acknowledges that the Constitution allows al-Hela to challenge the lawfulness of his ongoing detention and affords him

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certain procedural protections to ensure a meaningful opportunity for review through the writ of habeas corpus. With respect to the specific claims al-Hela asserts in this case, the Due Process Clause would provide no greater protections than those that apply under the Suspension Clause to enemy combatants detained at Guantanamo. That principle suffices to resolve this case: for the claims he asserts, al-Hela has received all process due under the Constitution.

The United States previously contended that al-Hela's due process claims could be rejected on the ground that the Due Process Clause is categorically inapplicable to enemy combatants detained at Guantanamo, but we do not renew that argument here. As Judge Griffith observed, "[t]hat is a question with immense sweep that [this] court has repeatedly reserved for a case in which its answer matters." *Al-Hela*, 972 F.3d at 151. Because the answer would not affect the outcome here and would require resolution of sensitive and complex constitutional questions, we disagree with the approach taken in the panel opinion and urge the Court to decline to address the broader issue whether enemy combatants at Guantanamo may ever raise due process

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claims. Instead, and in line with traditional principles of constitutional avoidance, this Court need only hold that with respect to the specific claims asserted here, al-Hela received all necessary process to ensure a "meaningful opportunity" to challenge the basis for his detention through habeas proceedings. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

A. In this habeas action, al-Hela seeks judicial review of the lawfulness of his ongoing detention. He argues that the length of his detention violates principles of substantive due process, and also that the procedural protections afforded to him through habeas do not satisfy the due process requirements of the Constitution. For the category of claims al-Hela asserts here, the Supreme Court and this Court have developed standards and procedural protections to ensure the "meaningful opportunity" to challenge the Executive's determination of a detainee's enemy-combatant status that *Boumediene* held was required by the Suspension Clause. Those standards have been applied to many detainee habeas proceedings over the past decade.

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Any application of the Due Process Clause to the claims al-Hela asserts here would require nothing more.

The Supreme Court in *Boumediene* held that "the constitutional privilege of habeas corpus" extends to persons detained as enemy combatants at Guantanamo Bay and further established that the Suspension Clause by its own force imposes substantive guarantees and procedural protections in this context. 553 U.S. at 732. The Court explained that "the writ must be effective," and that "[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id.* at 783; *accord id.* at 787. As a result, a person detained at Guantanamo as an enemy combatant is constitutionally entitled to those "procedural protections" that ensure a "meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Id.* at 779, 783 (quotation omitted).

In articulating the "meaningful opportunity" standard, the Court emphasized that "common-law habeas corpus was, above all, an adaptable remedy" whose "precise application and scope changed

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depending upon the circumstances." *Boumediene*, 553 U.S. at 779. The Court also provided guideposts for procedural requirements that would ensure a "meaningful" and "effective" habeas proceeding. *Id.* at 779, 783. The Court noted that habeas review in this context does not follow an independent determination following a trial that the petitioner is lawfully detained. Here, where detention is by Executive action, the Court explained that a "habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id.* at 783. At the same time, the Court was careful to hold that "[h]abeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order," so long as the writ is "effective." *Id.*

Due process principles follow a similarly adaptable standard: like habeas, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quotation omitted); *see Boumediene*, 553 U.S. at 791. As applied to the claims al-Hela asserts here, no persuasive reason exists to conclude that the Due Process Clause would require

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greater protections than this Court, and the Supreme Court, have already recognized apply to Guantanamo detainees under the Suspension Clause.

What al-Hela describes as his substantive due process claim is a challenge to the continued lawfulness of his detention. Because that is a traditional habeas-type challenge to "the Executive's power to detain" al-Hela, *Boumediene*, 553 U.S. at 783, falling squarely within the Suspension Clause, the Court need not decide whether this challenge is also authorized by the Due Process Clause. "[T]he historic role of habeas is to secure release from custody." *Department of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1970 (2020); *accord Munaf v. Geren*, 553 U.S. 674, 693 (2008). Here, as explained in greater detail below, *see infra* pp. 65-72, authority to detain al-Hela turns solely on two questions: whether he is properly detained under the governing statutes, as informed by the law of war, and whether the hostilities in which he was captured continue. *See Ali v. Trump*, 959 F.3d 364, 370 (D.C. Cir. 2020) (stating that because the "hostilities authorized by the AUMF are ongoing," the government's "original and legitimate purpose

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for detaining [petitioner] ... persists"). It does not turn, as al-Hela contends, on any individualized assessment of the degree or nature of the threat he poses. *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010). Because the prerequisites for detention under the AUMF are met—and because such detention remains lawful "for the duration of the particular conflict," *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality op.)—al-Hela has no basis to insist on release.

The procedural protections afforded to al-Hela to ensure a meaningful opportunity for review in habeas proceedings of his status as an enemy combatant are also the same, whether they emanate only from the Suspension Clause or additionally from application of the Due Process Clause. *Boumediene* adopted a "calibrated approach" that "tied the constitutional protections afforded to Guantanamo Bay detainees' habeas corpus proceedings to their role in vindicating the constitutional right to the Great Writ and the judicial role in checking Executive Branch overreach." *Ali*, 959 F.3d at 369. The Supreme Court held that "an opportunity for the detainee to present relevant exculpatory evidence" is "constitutionally required," as is an opportunity "to rebut

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the factual basis for the Government's assertion that he is an enemy combatant." *Boumediene*, 553 U.S. at 783, 789. And in concluding that the procedures applied by the Combatant Status Review Tribunal to review enemy-combatant status at Guantanamo were inadequate and required certain additional protections in habeas, the Court drew from due process precedent, stating that "[t]he idea that the necessary scope of habeas review depends upon the rigor of any earlier proceedings accords with [the Court's] test for procedural adequacy in the due process context." *Id.* at 781.

Underscoring that overlap between due process and Suspension Clause standards, this Court has freely borrowed from the Supreme Court's decision in *Hamdi*—which addressed the due process rights of a U.S. citizen detained as an enemy combatant in the United States—in fashioning procedures for habeas review of detention at Guantanamo of non-citizen enemy combatants. In *Boumediene*, the Supreme Court expressly left open the question of "[t]he extent of the showing required of the Government in these cases." 553 U.S. at 787. In addressing that question, this Court has looked to *Hamdi* in holding that a

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preponderance-of-the-evidence standard is appropriate. *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010); *Almerfedi v. Obama*, 654 F.3d 1, 5-6 (D.C. Cir. 2011) (acknowledging that the *Hamdi* plurality "consider[ed] due process limitations" but concluding that *Hamdi* nevertheless provided the "appropriate framework" under the Suspension Clause). The Court likewise relied on *Hamdi* in addressing whether hearsay is admissible in these proceedings. *See Odah v. United States*, 611 F.3d 8, 14 (D.C. Cir. 2010); *Awad*, 608 F.3d at 7; *Al-Bihani*, 590 F.3d at 879. And in another context involving a U.S. citizen detained by the military, this Court has treated habeas and due process rights as essentially indistinguishable. *See Omar v. McHugh*, 646 F.3d 13, 20 & n.5 (D.C. Cir. 2011) (Kavanaugh, J.) (noting that "the protections of due process and habeas corpus are inextricably intertwined and overlapping in the context of a petition for habeas corpus filed by a [U.S. citizen] military transferee").

Al-Hela at times appears to recognize that the due process analysis is not necessarily distinct from the question of what procedures are necessary to make habeas review meaningful for a noncitizen held

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as an enemy combatant at Guantanamo. *See* Br. 21 (noting that "[t]he two concepts are closely entwined"); Br. 24 (contending that due process protections are necessary insofar as they are needed "in order to provide a meaningful review of ... detention"). But he errs to the extent he contends that the Due Process Clause would provide additional protections with respect to the claims he asserts beyond his entitlement to meaningful review under the Suspension Clause. *See, e.g.*, Br. 39, 45, 48, 51. The relevant question instead is what procedures are constitutionally necessary given "the unique context and balancing of interests that *Boumediene* requires when reviewing the detention of foreign nationals captured during ongoing hostilities," *Ali*, 959 F.3d at 369—and the answer to that question here is the same whether analyzed under the Suspension Clause or the Due Process Clause.

Although the panel in this case concluded that the procedural protections recognized in *Boumediene* rest exclusively on the Suspension Clause, another panel had previously expressed doubt about "where those rights are housed in the Constitution (the Fifth Amendment's Due Process Clause, the Suspension Clause, both, or

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elsewhere)." *Qassim v. Trump*, 927 F.3d 522, 529-30 (D.C. Cir. 2019); *accord id.* (observing that *Boumediene* "pointed to both the Constitution's guarantee of habeas corpus and the procedural protections of the Due Process Clause"). Because the Due Process Clause would not afford greater protection to claims like al-Hela's than the Suspension Clause does, this Court can and should resolve this case by holding that the procedural protections the Constitution affords to Guantanamo detainees to ensure meaningful review were provided here—without deciding whether those protections are derived from the Due Process Clause in addition to the Suspension Clause. *See Al-Hela*, 972 F.3d at 154 (Griffith, J., concurring) (noting that al-Hela's claims fail "[w]hether analyzed under the Suspension Clause or the Due Process Clause" because they "provide similar protections" and require "similar balancing").

Declining to decide whether the specific protections detainees are afforded to ensure meaningful review sound only in the Suspension Clause or also in the Due Process Clause as applied in this context would be consistent with this Court's longstanding practice over more

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than a decade in fashioning and applying the applicable standards to many noncitizens held as enemy combatants at Guantanamo. Indeed, this Court has declined to decide the independent applicability of the Due Process Clause and other constitutional provisions on multiple occasions, including while sitting en banc. *See Al-Bahlul v. United States*, 767 F.3d 1, 18 (D.C. Cir. 2014) (en banc); *Aamer v. Obama*, 742 F.3d 1023, 1038-39 (D.C. Cir. 2014); *Kiyemba v. Obama*, 561 F.3d 509, 514 n.4 (D.C. Cir. 2009). There is no reason for the Court to depart from that course in this case.

Because—for the reasons explained more fully below—al-Hela received a meaningful opportunity for review of the lawfulness of his detention, any constitutional protections that apply through the Suspension Clause or through application of the Due Process Clause to habeas proceedings in this context have been satisfied. The Court therefore should hold that al-Hela is not "entitled to relief on his claims under the Due Process Clause," Order 2 (Apr. 23, 2021), without deciding whether the constitutional protections he enjoys emanate from the Due Process Clause in addition to the Suspension Clause. If the en

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banc Court decides that it is necessary to resolve the applicability question and concludes that the Due Process Clause applies, however, it should limit that holding to encompass only the particular due process claims at issue here, and should make clear that the process due in this context is limited to the substantive guarantees and procedural mechanisms that would implement the habeas right to meaningful review of the detainee's status that *Boumediene* recognized.[4]

B. The panel majority here held, at the suggestion of the United States, that the Due Process Clause does not apply to noncitizens

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[4] The Court should carefully limit any such holding to the circumstances of the claims in this habeas proceeding. Absent such clear limitations, a holding in this case about the extraterritorial application of constitutional rights could impact operations by "American military, intelligence, and law enforcement personnel against foreign organizations or foreign citizens in foreign countries" that have long been considered lawful. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 140 S. Ct. 2082, 2086-87 (2020). A decision in this case that extended the extraterritorial application of the Due Process Clause in ways that were not clearly limited to habeas proceedings by noncitizens detained as enemy combatants at Guantanamo could "plunge [government officials] into a sea of uncertainty" about how the Due Process Clause might apply to other operations, *id.*, thereby causing unintended legal consequences.

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detained as enemy combatants at Guantanamo because it categorically does not apply to any noncitizens without property or presence in the sovereign territory of the United States. *Al-Hela*, 972 F.3d at 150. The United States does not renew that categorical argument here and urges the Court to decline to resolve that complex constitutional question—which which has "immense sweep," *id.* at 151 (Griffith, J., concurring)—because it is unnecessary to the proper disposition of this case. The protections al-Hela has received suffice to satisfy any due process rights that he may have in this context. Consistent with principles of constitutional avoidance, the Court should affirm on that basis without addressing questions about the applicability of the Due Process Clause more generally or to other claims or in other contexts. *See Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017) ("'[W]e have often stressed' that ... 'we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.'" (citation omitted; first and third alteration in original)).

In concluding that the Due Process Clause is categorically inapplicable at Guantanamo, the panel relied on *Johnson v.*

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Eisentrager, which held that habeas corpus jurisdiction did not extend to enemy aliens who had been convicted of violating the laws of war and were detained at Landsberg Prison in Germany during the Allied Powers' post-war occupation and further rejected the petitioners' Fifth Amendment claims. 339 U.S. 763, 765-66, 777-85 (1950); *see Boumediene*, 553 U.S. at 763. The panel majority stated that *Eisentrager* "held the Fifth Amendment does not apply to aliens located outside the United States," and that that aspect of *Eisentrager* continues to apply to Guantanamo—and therefore prevents al-Hela from relying on the Due Process Clause. *Al-Hela*, 972 F.3d at 138. In reaching that conclusion, the panel reasoned that *Boumediene*'s holding that habeas corpus jurisdiction extends to enemy combatants at Guantanamo does not also apply to *Eisentrager*'s due process ruling. *See id.* at 140-50.

Upon further consideration, the United States is of the view that relying on *Eisentrager* to conclude that the Due Process Clause is categorically inapplicable at Guantanamo does not sufficiently account for the Supreme Court's analysis of the application of the Suspension

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Clause at Guantanamo in *Boumediene* based on factors including the unique characteristics of the government's operations and the de facto sovereignty the United States exercises there. It is true, as the panel emphasized, that the Court's holding in *Boumediene* was limited to the question of habeas jurisdiction and did not reach the separate question of the Due Process Clause's applicability. *See Boumediene*, 553 U.S. at 795 ("Our decision today holds only that the petitioners before us are entitled to seek the writ; that the [Detainee Treatment Act] review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures ... before proceeding with their habeas actions ...."). But in reaching that holding, the Court interpreted at least some components of *Eisentrager*'s extraterritoriality analysis with respect to the availability of habeas as resting on functional considerations that would differentiate Guantanamo from Landsberg Prison, and did not state that other aspects of *Eisentrager*'s extraterritoriality analysis, including the applicability of the Due Process Clause, should rest on a different test of de jure sovereignty, in the context of claims by Guantanamo

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detainees. *See id.* at 764 ("Nothing in *Eisentrager* says that de jure sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus."). In order to determine whether the Due Process Clause would ever provide protections to noncitizens detained as enemy combatants at Guantanamo under existing Supreme Court precedent, therefore, this Court would need to carefully parse not just *Eisentrager* itself but also the interpretation of *Eisentrager* the Supreme Court employed in *Boumediene*.

That analysis would entail determining whether a functional analysis should govern whether the Due Process Clause applies at Guantanamo, whether such a functional analysis would parallel the one employed for the Suspension Clause in *Boumediene*, whether different types of due process claims should be treated differently, and what the outcome of applying such an analysis to the Due Process Clause would be. And it would be necessary to consider whether judicial enforcement of the asserted rights would be impracticable and anomalous at the military installation at Guantanamo when layered on top of the

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protections afforded by the Suspension Clause, the law of war, and federal statutes governing the detention of noncitizens held as enemy combatants. The Court would additionally need to determine whether it is free to read *Boumediene* to displace *Eisentrager* with respect to the application of the Due Process Clause at Guantanamo. *See Agostini v. Felton*, 521 U.S. 203, 207 (1997).

We urge the Court not to resolve these complex questions here. As described above and elaborated further below, nothing in *Boumediene* or this Court's subsequent cases suggests that it is necessary to resolve these questions with respect to the particular claims al-Hela has raised here, which fail under applicable precedents applying the Due Process Clause to comparable (or identical) claims. Accordingly, "[t]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels" in favor of simply holding that al-Bela is not entitled to relief on his specific claims, without reaching out to decide the broader question of whether and how the Due Process Clause might ever apply to other claims potentially raised by Guantanamo detainees in the future.

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Cohen v. Board of Trs. of the Univ. of D.C., 819 F.3d 476, 485 (D.C. Cir. 2016) (quotation omitted).

II. Al-Hela Is Not Entitled to Relief on His Procedural Due Process Claims

A. Al-Hela Received Far More Than the Limited Process the Supreme Court Approved in *Hamdi* for Enemy-Combatant Habeas Proceedings, and *Hamdi* Remains Controlling

1. In assessing the process due to a U.S. citizen detained in the United States as an enemy combatant, a plurality of the Supreme Court in *Hamdi* explicitly recognized that any due process analysis must be "tailored" to address the "uncommon potential" of "enemy-combatant proceedings ... to burden the Executive at a time of ongoing military conflict." *Hamdi,* 542 U.S. at 533-34. This includes accounting for the "practical difficulties that would accompany a system of trial-like process." *Id.* at 531-32. *Boumediene,* too, observed that habeas proceedings "need not resemble a criminal trial." 553 U.S. at 783. The resulting procedures must be sufficient to ensure that the court is adequately positioned "to make a determination in light of the relevant law and facts." *Id.* at 787; *accord Al-Bihani,* 590 F.3d at 880 (observing

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that the core of habeas is "the independent power of a judge to assess the actions of the Executive").

In striking that balance, the *Hamdi* plurality stated that a citizen-detainee in the United States would be provided due process under a system that (1) applied "a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided"; (2) accepted hearsay "as the most reliable available evidence from the Government in such a proceeding"; and (3) required the government to produce "credible evidence" of detainability before shifting the burden "to the petitioner to rebut that evidence with more persuasive evidence." 542 U.S. at 533-34. The Court also explained that the government could meet its initial burden by having "a knowledgeable affiant ... summarize [detainee] records to an independent tribunal," so long as the detainee could "present his own factual case to rebut the Government's return." *Id.* at 534, 538. That framework is controlling for these purposes: a fifth Justice concluded that no process beyond "a good-faith executive

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determination" of detainability is required. *Id.* at 590 (Thomas, J., dissenting).

Al-Hela received far more than that limited process. His counsel was provided access to an enormous quantity of inculpatory and exculpatory classified material, [redacted] -not the mere summaries of "a knowledgeable affiant." Al-Hela also received personal access to much of the most critical evidence against him—redacted versions of reports of his own [redacted] statements [redacted] He augmented that information with his own evidence, including a declaration from a former U.S. Ambassador to Yemen, letters from the Yemeni government, and his live testimony at a five-day merits hearing before a district judge sitting as a neutral factfinder. Using this material, al-Hela mounted an extensive case, attacking the credibility of sources, developing an alternative explanation for his travel facilitation activities, and [redacted] The district court assessed this evidence under a preponderance-of-the-evidence standard that "mirrors" the standard articulated in *Hamdi*. *See Al-Bihani*, 590 F.3d at 878.

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2. Al-Hela asks this Court to replace *Hamdi*'s specific application of due process standards in this context with standards drawn from wholly different contexts, such as criminal cases or civil commitment proceedings. *See, e.g.*, Br. 44, 48, 52. But habeas review of enemy-combatant detention is "a different and peculiar circumstance, and the appropriate habeas procedures cannot be conceived of as mere extensions of an existing doctrine." *Al-Bihani*, 590 F.3d at 877. Such habeas proceedings not only implicate the "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," *Hamdi*, 542 U.S. at 531, but also, by necessity, involve evidence gathered in the course of military operations or (as in this case) by America's foreign intelligence agencies. *Boumediene* emphasized that the procedures employed "need not resemble a criminal trial," and encouraged procedural "innovation" to accommodate "the burden habeas corpus proceedings will place on the military." 553 U.S. at 783, 795. And *Hamdi* rejected a district court ruling holding that "the appropriate process would approach the process that accompanies a

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criminal trial" as failing to "strike[] the proper constitutional balance." 542 U.S. at 528, 532-33. The procedures used in other contexts cannot be transposed to enemy-combatant detention.

Al-Hela does not dispute that the procedures this Court has developed post-*Boumediene* meet or exceed the process described in *Hamdi*. Instead, he contends that *Hamdi* should be ignored because of the passage of time. Br. 40. But the *Hamdi* plurality prefaced its due-process analysis with the recognition that detention under the AUMF is authorized "for the duration of the relevant conflict," 542 U.S. at 520-21, and al-Hela has not argued that the "relevant conflict" has ended.[5] This Court, too, "contemplat[ed] that detentions could last for the duration of hostilities" in its earlier cases, a duration that was inherently "uncertain." *Ali*, 959 F.3d at 372-73; *see Boumediene*, 553 U.S. at 785. This Court has also recognized that, "absent a statute that imposes a time limit or creates a sliding-scale standard that becomes more

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[5] In any event, the Supreme Court has made clear that the "termination" of hostilities is "a political act," *Ludecke v. Watkins*, 335 U.S. 160, 168-69 & n.13 (1948), and thus "[w]hether an armed conflict has ended is a question left exclusively to the political branches," *Al Maqaleh v. Hagel*, 738 F.3d 312, 330 (D.C. Cir. 2013).

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stringent over time, it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention." *Ali v. Obama*, 736 F.3d 542, 552 (D.C. Cir. 2013). The constitutional balance articulated by the *Hamdi* plurality and recognized by this Court remains the same so long as the conflict remains ongoing, because the government retains its interest in preventing enemy combatants from returning to the conflict.

Al-Hela alternatively contends that *Hamdi*'s analysis is inapplicable because *Hamdi* "assumed circumstances that are not present here." Br. 42. Al-Hela apparently means that his case does not implicate "waging battle" or "military operations," and so no "military officers" would be "distracted by this litigation." Br. 43. [redacted]

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B. Al-Hela's Specific Due Process Arguments Fail

1. Al-Hela and his counsel received access to information ensuring a "meaningful opportunity" to contest his detention

Al-Hela contends that the government should have been forced to disclose classified information, particularly information about intelligence sources, to him personally or to his counsel, and that the district court's *ex parte* consideration of some evidence violated due process. Br. 43-48, 52-54. Those arguments ignore the government's interest in protecting national security information, particularly sources and methods of intelligence gathering. "The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service," as disclosures of that information could lead sources to "refuse to supply information." *CIA v. Sims*, 471 U.S. 159, 175 (1985) (quotation

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omitted); *accord Larson v. Department of State*, 565 F.3d 857, 864-65 (D.C. Cir. 2009) (recognizing that the "passage of time" does not "alter the need to assure sources of the government's ability to maintain confidentiality"). The same is true of any cooperation from foreign intelligence services. *See Fitzgibbon v. CIA*, 911 F.2d 755, 762-63 (D.C. Cir. 1990); *Afshar v. Department of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983).

In addressing enemy-combatant habeas proceedings, the Supreme Court has explicitly instructed that district courts must "accommodate" the government's "legitimate interest in protecting sources and methods of intelligence gathering … to the greatest extent possible." *Boumediene*, 553 U.S. at 796. *Hamdi*, too, emphasized that the government's need to protect "the sensitive secrets of national defense" is an important consideration in any due-process balancing. 542 U.S. at 531-32; *accord id.* at 539 (cautioning that a court must consider "matters of national security that might arise in an individual case").

This Court has previously recognized these interests in endorsing the use of "reasonable alternatives" to disclosure of source and method

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information, explaining that "where the source of classified information is 'highly sensitive, ... it can be shown to the court ... alone.'" *Khan v. Obama*, 655 F.3d 20, 31 (D.C. Cir. 2012) (first ellipsis in original) (quoting *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008)). Similarly, the Court has recognized that allowing *ex parte* and *in camera* review by the district court in conjunction with "classified, but ... less sensitive information" disclosed to counsel that describes the reports' sources can be sufficient as "an 'effectiv[e] substitute for unredacted access' that ensures [the detainee] the 'meaningful review of both the cause for detention and the Executive's power to detain' required by *Boumediene*." *Id.* (quoting *Al-Odah v. Obama*, 559 F.3d 539, 547-48 (D.C. Cir. 2009)). And this Court has repeatedly concluded in other contexts that due process is not offended by permitting "classified information to be presented *in camera* and *ex parte* to the court," emphasizing that such information "is within the privilege and prerogative of the executive." *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 208 (D.C. Cir. 2001); *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *People's Mojahedin Org. of*

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Iran v. Department of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003); *see Al-Hela*, 972 F.3d at 153 (Griffith, J., concurring). These cases rest on the principle that every additional disclosure of classified information increases the risk to national security. *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978). Those risks are heightened where litigation counsel's "sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy," even if inadvertently. *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983). These principles apply with even greater force in the context of a proceeding in which the detainee is held because of his relationship to enemy forces engaged in hostilities with the United States.

The procedure followed by the district court exemplified the "reasonable alternatives" this Court has encouraged. *Khan*, 655 F.3d at 31. The government made extensive efforts to provide al-Hela personal access to information consistent with protecting sensitive national security information. The government gave al-Hela a summary of the allegations against him that outlined his travel facilitation activities and his involvement in planning attacks on the embassies of the United

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States and the United Kingdom, SA 74-75, among other documents. The district court, on reviewing the summary the government provided and its explanations for not providing additional information, specifically held that further disclosures to al-Hela "would risk revealing U.S. intelligence sources and methods." JA 203.

The government later provided al-Hela with redacted copies of exhibits containing his own statements that the government relied upon. JA 1042-93. Al-Hela erroneously contends that he "was not told how the limited evidence that he was allowed to view supposedly supported his detention." Br. 47. That is wrong. The government also provided al-Hela access to a version of the narrative to the amended factual return that allowed him to see how his statements were used. *See* JA 1042, 1045. [redacted] The same was also clear

from the combination of the summary and the exhibits: the summary explained that the government contended that al-Hela was "involved in aiding al-Qaida and other extremists through the provision of false passports," as well as facilitating travel for "extremist elements out of Yemen" and for "members of EIJ." SA 74. [redacted]

[redacted]

Al-Hela's specific arguments about *ex parte* evidence fare no better. Information about the government's sources that were redacted, as well as information related to the credibility of the sources, was provided to the district court *ex parte*, and the district court relied on that evidence in assessing the credibility of specific sources—including, in one instance, declining to credit a source on which the government relied. [redacted]

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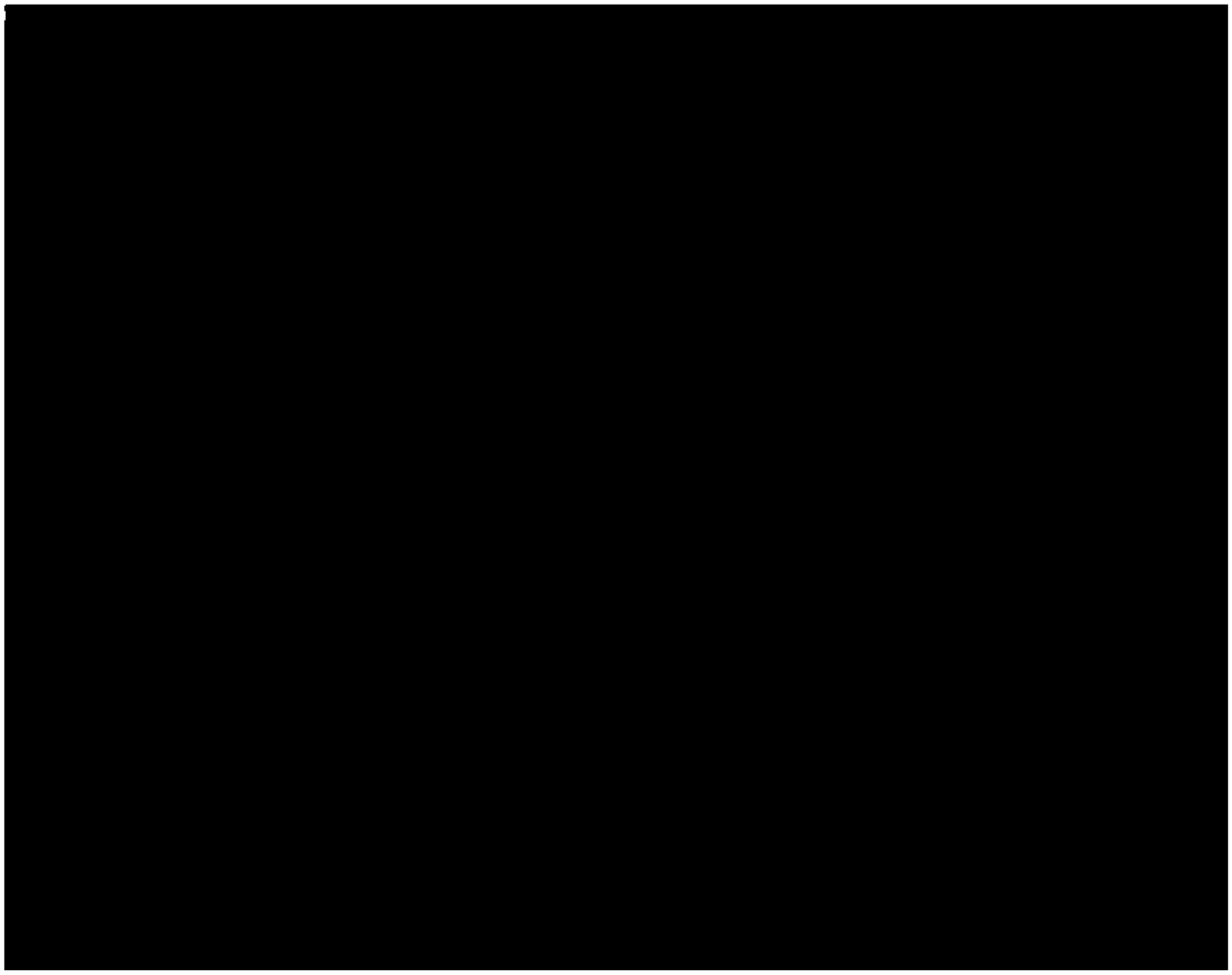
The government provided al-Hela's counsel with materials "still classified, but with less sensitive information[]" concerning the sources, including source credibility. *See Khan*, 655 F.3d at 31; *see* JA 264-78.



The government also produced classified substitutes that revealed the substance of information redacted from particular reports in a less sensitive form. The district court took an active role in adjudicating the

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government's requests for exceptions to disclosure, ordering the government to produce more detailed substitutes or reconsider (or more fully justify) redactions. *See, e.g.*, Doc. 413-1; *see also Al-Hela*, 972 F.3d at 153 (Griffith, J., concurring); Add. 1-5.

Al-Hela likewise errs in asserting that it is unclear "whether the redacted information modifies, contextualizes, or contradicts what remains after the redactions." Br. 47. The government is required to produce to a detainee's counsel information on which the government relies to justify detention, as well as exculpatory information (including information suggesting that a particular source was unreliable), and any other information required under the Order. If information "modifies, contextualizes, or contradicts" the information in the document, *id.*, such that the information, for these reasons or others, falls within any disclosure obligations of the Order, then the government would be required to disclose that information or to seek an exception from disclosure. And if al-Hela's counsel was dissatisfied with the degree of redaction of a particular document, counsel had every opportunity to raise that objection with the district court pursuant to

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the procedures this Court has established. *See Al-Odah*, 559 F.3d at 544-45.

That process of automatic disclosure (absent a specifically justified exception) and subsequent judicial review, where necessary, is more than sufficient to balance the government's need to protect classified information against counsel's need to access relevant and material information. And here, far more occurred: this district judge goes beyond what many other judges require, mandating that the government seek exceptions for all redactions in documents the government relies on to justify detention. *See Bin Attash*, 628 F.Supp.2d at 36. Each redaction in the amended factual return exhibits was thus reviewed by the district court to ensure that the information sufficed to provide al-Hela with a meaningful opportunity to contest his detention.

This Court has "never held that a detainee must have unrestricted personal access to the evidence against him to guarantee a meaningful hearing under *Boumediene*," just as it has "never said that the Due Process Clause requires such unrestricted personal access" in other

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cases. *Al-Hela*, 972 F.3d at 154 (Griffith, J., concurring). As the district court correctly recognized, "[t]he back-and-forth of a full dress adversarial proceeding cannot be made completely available in habeas where, as here, the needs of national security clearly preclude disclosure to the petitioner." JA 204. Nevertheless, "the district court's rulings [on personal access] provided Al Hela a meaningful opportunity for review of his detention." *Al-Hela*, 972 F.3d at 154 (Griffith, J., concurring).

2. The Constitution does not impose the burdens on the use of hearsay evidence that al-Hela advocates

Al-Hela attempts to import inapposite standards in arguing that consideration of hearsay evidence is impermissible unless the evidence would be admissible under the Federal Rules of Evidence. Br. 49. The Supreme Court rejected such a rule in *Hamdi*, observing that hearsay "may need to be accepted as the most reliable available evidence from the Government in such a proceeding." 542 U.S. at 533-34. The Court stated that the district court, on remand, could consider a hearsay document—the "Mobbs Declaration," which summarized the government's evidence, *id.* at 512-13, and which the district court had

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refused to consider because of its "hearsay nature," *id.* at 528—"so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return," *id.* at 538. Hearsay—in the form of intelligence reports, reports of interrogations, or other information gathered by the military or intelligence agencies—is inevitably a key component of the government's evidence in many enemy-combatant detainee cases, given the realities of information collection and intelligence gathering in the field. And forcing the government to produce intelligence officers, intelligence sources, or military officers would go far beyond the "minimal" "factfinding imposition" the Supreme Court envisioned in *Hamdi*. 542 U.S. at 534; *see id.* at 595-96 (Thomas, J., dissenting).

This Court has repeatedly relied on *Hamdi* in holding that hearsay evidence is admissible, subject to an assessment of its reliability and probativeness. *E.g.*, *Alsabri v. Obama*, 684 F.3d 1298, 1309 (D.C. Cir. 2012). The Court has also treated that holding as equally applicable to claims that "the Due Process Clause precludes the use of hearsay evidence." *Ali*, 959 F.3d at 372. A procedure that

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focuses on hearsay's reliability, rather than its admissibility, is especially appropriate for habeas petitions decided by district judges. Judges are "experienced and sophisticated fact finders" whose "eyes need not be protected from unreliable information in the manner the Federal Rules of Evidence aim to shield the eyes of impressionable juries," and they are tasked with "review[ing] and assess[ing] *all* evidence from both sides" in determining the lawfulness of detention. *Al-Bihani*, 590 F.3d at 880 (emphasis added).

Al-Hela's contention (Br. 49-50) that the court must restrict the use of hearsay to the maximum extent possible is inconsistent with this framework. The Court in *Hamdi* did not suggest that the Mobbs Declaration would be admissible only after the government demonstrated it had eliminated as many layers of hearsay as possible, instead "point[ing] to a declaration from a government official describing his expertise regarding the facts of the case as an example of reliable hearsay." *Al-Bihani*, 590 F.3d at 878. Nor did the Court suggest that due process in this context would require a confrontation right of undefined scope (Br. 44), instead emphasizing the "minimal"

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nature of burdens such as "requiring a knowledgeable affiant to summarize" military records pertaining to a particular detainee. 542 U.S. at 534. The burdens are particularly manifest here, as al-Hela apparently envisions [redacted] Br. 50.

Al-Hela contends that the use of hearsay is problematic because the government's evidence "could not be challenged in any meaningful way[] because it relied on anonymous sources" [redacted] whose "reliability" could not be assessed. Br. 49. But as discussed above, not all sources that the government relied upon were anonymous, and information that would call into question the reliability of the various sources was disclosed to al-Hela's counsel or the district court *ex parte*.

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[redacted]

3. If the Court considers these forfeited arguments, the presumption of accuracy and the preponderance-of-the-evidence standard are constitutional in these proceedings

Al-Hela advances two additional arguments that he did not present to the panel or in his petition for rehearing. *See Al-Hela*, 972 F.3d at 153 (Griffith, J., concurring) (addressing challenges to "hearsay evidence, *ex parte* evidence, and lack of personal access to the evidence"); *id.* at 135-37, 143 (majority addressing same three arguments). This Court therefore need not consider these arguments. *See Keating v. FERC*, 927 F.2d 616, 625-26 (D.C. Cir. 1991). But even if the Court overlooks al-Hela's forfeiture, those arguments are meritless.

First, al-Hela attacks the district court's application of a presumption of accuracy. Br. 54-55. The presumption of accuracy assumes that government documents (such as intelligence reports) "accurately identif[y] the source and accurately summarize[] his statement," but "implies nothing about the truth of the underlying non-government source's statement." *Latif v. Obama*, 677 F.3d 1175, 1180

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(D.C. Cir. 2011). Even that limited presumption can be rebutted by demonstrating internal inconsistencies or inconsistencies with other evidence. *Id.* at 1186. And often, the presumption is "unnecessary or irrelevant": "[t]he Government has frequently been able to prove its detention authority without relying on any presumption that its records are accurate," and detainees often "do not challenge the Government's recordkeeping," instead contesting "the sufficiency of the evidence" or the reliability of evidence derived from "multiple layers of hearsay[] or unknown sources." *Id.* at 1181.

This presumption is entirely consistent with due process in the context of enemy-combatant habeas petitions. *See Ali*, 959 F.3d at 372 (rejecting Due Process Clause challenge to presumption). In addressing the unique challenges of these proceedings, *Hamdi* recognized that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." 542 U.S. at 534. Under that standard, the government need only "put[] forth credible evidence that the habeas petitioner meets the enemy-

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combatant criteria" to place the burden on the petitioner "to rebut that evidence with more persuasive evidence" of his own. *Id.*; *see Latif*, 677 F.3d at 1179. The presumption of accuracy—a manifestation of the usual presumption of regularity afforded government documents—is narrower, insofar as it relates only to the accuracy of the recorded statements, not their truth. The presumption follows from "the horizontal separation of powers," given the Executive's special expertise in this area. *Id.* at 1181. And the government provides "explanatory declarations" that address "the personnel, process, and standards involved in producing intelligence records," such that there is "no reason to suspect such documents are fundamentally unreliable." *Id.* at 1181-82; *see* JA 280-93, 295-300. Moreover, as this Court anticipated in *Latif*, 677 F.3d at 1185, al-Hela took advantage of the presumption as well, introducing government documents recording his own statements (and the statements of others) in the course of mounting his case at the merits hearing. *See, e.g.*, JA 824-25, 829-31.

Al-Hela provides no specific reason why the presumption was inappropriate given the limited role it played here. He does not identify

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any particular statement he believes was inaccurately recorded, or point to any internal inconsistencies in his reported statements or inconsistencies with other documents. *See Latif*, 677 F.3d at 1186-88 (addressing specific, identified inaccuracies). Al-Hela instead generally asserts that the court "presumed, without any testing, that the intelligence officials who wrote the documents on which the Government relied had recorded facts accurately." Br. 54. But the accuracy of those statements and their probative value *was* tested in the merits hearing. Al-Hela testified at the merits hearing [redacted] and he argued that this should call into question the accuracy of his statements. But al-Hela's testimony was "vague"; as in his brief here, he "never elaborated on these alleged misunderstandings," such as by identifying specific examples or providing "a reasonable justification for his [redacted] statements," [redacted] Nor did al-Hela "testify that he did not make these statements" or that "he lied [redacted]

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[redacted] JA 142. And al-Hela's "statements [redacted] are often corroborated by reporting from other sources." *Id.*

Second, al-Hela suggests that the court erred in applying a preponderance-of-the-evidence standard. Br. 58-60. While asserting that "Supreme Court precedents call for at least a clear and convincing standard where deprivations of liberty are at stake," Br. 59, al-Hela ignores the Supreme Court's approval in *Hamdi* of a procedural scheme under which the government must produce "credible evidence" of detainability before shifting the burden "to the petitioner to rebut that evidence with more persuasive evidence." 542 U.S. at 533-34. That standard "mirrors" the preponderance-of-the-evidence standard. *Al-Bihani*, 590 F.3d at 878. This Court has correspondingly treated the preponderance-of-the-evidence standard as constitutionally sufficient "as a matter of procedural due process." *Ali*, 959 F.3d at 372; *see Almerfedi*, 654 F.3d at 5-6. That standard meets "the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the

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detainee is in fact an enemy combatant." *Hamdi*, 542 U.S. at 534. Moreover, habeas review traditionally "did not entail review of factual findings," and where factual review did occur, the burden has sometimes been placed on the petitioner to prove the relevant facts under a clear-and-convincing standard. *Al-Bihani*, 590 F.3d at 878. Given the acceptability of those more restrictive schemes, a preponderance-of-the-evidence standard with the "ultimate burden" placed "on the government," *Almerfedi*, 654 F.3d at 6, is constitutionally sufficient.

III. Al-Hela Is Not Entitled to Relief on His Substantive Due Process Claim

The power to detain enemy combatants is a "fundamental and accepted ... incident to war" that is accepted by "'universal agreement and practice.'" *Hamdi*, 542 U.S. at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 30 (1942)). "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again," and that authority is based on "longstanding law-of-war principles." *Id.* at 518, 521. Authority to detain under the law of war persists "for the duration of the relevant conflict." *Id.* at 520-21; *see id.*

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at 587-88 (Thomas, J., dissenting). Congress reaffirmed these principles in the NDAA, reiterating the authority for "[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force." NDAA § 1021(c)(1), 125 Stat. at 1562. This Court has repeatedly held that detention remains statutorily authorized. *See Al-Hela*, 972 F.3d at 135; *Al-Alwi*, 901 F.3d at 297-300.

Al-Hela's detention thus is not "punitive," Br. 34, but is instead tied to the continuation of hostilities. As this Court recently recognized in rejecting essentially identical arguments, al-Hela's "detention is long because the armed conflict out of which it arises has been long, continuing to the present day." *Ali*, 959 F.3d at 370. Because the armed conflict continues, al-Hela's "detention still serves 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.* (quoting *Hamdi*, 542 U.S. at 518); *see Al-Alwi*, 901 F.3d at 297-98; *Al-Hela*, 972 F.3d at 151-52 (Griffith, J., concurring).

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Al-Hela contests this premise on two related grounds. First, al-Hela insists that substantive-due-process standards that apply to pretrial detention or civil commitment must be imported wholesale into law-of-war detention. Br. 30-31 (citing *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997), and *United States v. Salerno*, 481 U.S. 739, 750-51 (1987)). Thus, al-Hela contends that the government must demonstrate, by clear-and-convincing evidence, that he specifically poses a danger, and that the ultimate determination of dangerousness must be made by a court. Br. 32-38.

Those cases offer no guidance about the standards that apply to the wholly different circumstance of law-of-war detention during an ongoing conflict, particularly given the history and continuing practice of such detention. An individualized determination of dangerousness has never been a prerequisite to the detention of enemy combatants. *See Awad*, 608 F.3d at 11; Department of Def., *Law of War Manual* § 8.14.3.1 (updated Dec. 2016), https://go.usa.gov/xymRX ("For persons who have participated in hostilities or belong to armed groups that are engaged in hostilities, the circumstance that justifies their continued

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detention is the continuation of hostilities."). Neither precedent nor common sense suggests that the government's detention authority should dissipate simply because hostilities are protracted. *Hamdi*, 542 U.S. at 520-21; *Al-Alwi*, 901 F.3d at 297-98.

Importation of inapposite standards from the civil commitment context would be all the more anomalous because the question of any particular detainee's future dangerousness necessarily involves assessments of military conditions and national-security risks that the judiciary is ill-suited to address. As the Supreme Court noted in upholding an order for the deportation of an "enemy alien[]" during wartime, a detainee's "potency for mischief" is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility." *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948). Al-Hela does not address this principle, much less justify a departure from it.

These same principles establish that a discretionary decision by the Executive Branch that al-Hela is eligible for transfer does not affect the legal authority to detain him. As noted above, the Periodic Review

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Board has designated al-Hela as transfer-eligible, concluding that although al-Hela "presents some level of threat in light of his past activities," that threat could be "adequately mitigated" if al-Hela can be transferred to a country with "[a]ppropriate security assurances" and "appropriate security measures." Because we anticipate that al-Hela may argue that this determination bears on his substantive due process arguments, we briefly address that issue here.

The periodic review process is a "discretionary" review of the continued law-of-war detention of most individuals held at Guantanamo. Exec. Order No. 13,567, § 1(a), (b), 76 Fed. Reg. 13,277, 13,277 (Mar. 7, 2011). The Executive has exercised its discretion to transfer out of U.S. custody most individuals eligible for such review who were held at Guantanamo at the time of the Executive Order's issuance. But the periodic review process "does not address the legality of any detainee's law of war detention." *Id.* § 8, 76 Fed. Reg. at 13,279. Instead, the Board assesses whether continued detention of the individual is necessary to protect against a continuing significant threat to the security of the United States. *Id.* § 2, 76 Fed. Reg. at 13,277. By

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definition, a detainee may still pose a threat and be deemed eligible for transfer, so long as that threat can be mitigated through appropriate conditions. *See id.* §§ 1(a), 3(a)(7), 76 Fed. Reg. at 13,277, 13,288; *see also* Memorandum from the Acting Sec'y of Def. to Dep't of Def. Officials 22 (Feb. 15, 2019), https://go.usa.gov/x6tT2 (defining continuing significant threat as "[a] threat to the national security of the United States that cannot be sufficiently mitigated through feasible and appropriate security measures").

In the NDAA, Congress confirmed that the periodic review process does not bear on the lawfulness of detention. § 1023(b)(1), 125 Stat. at 1564 ("[T]he purpose of the periodic review process is not to determine the legality of any detainee's law of war detention …."). The NDAA makes clear that the Secretary of Defense is not bound by the Board's determination, but instead makes the final decision on whether to transfer a detainee deemed eligible for transfer. *Id.* § 1023(b)(2). The Executive Order establishes a process for review of the Board's determination and for efforts to determine whether a transfer should proceed in light of the security assurances provided, among other

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considerations. Exec. Order No. 13,567, §§ 3(d), 4, 7, 9(d), 76 Fed. Reg. at 13,279, 13,280. In addition, before effecting any transfer, the Secretary must make a variety of certifications to Congress, including that the transfer is in the national security interests of the United States. National Def. Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1034(a), 129 Stat. 726, 969 (2015).

This discretionary decision does not alter the legality of al-Hela's continued detention. The government's authority to detain al-Hela stems from his status as an enemy combatant in ongoing hostilities—a determination unaffected by al-Hela's perceived level of threat. Thus, "[w]hether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF." *Awad*, 608 F.3d at 11. Al-Hela's detention continues to serve its original law-of-war purpose of ensuring that he cannot assist in the ongoing conflict. This Court has recognized as much, noting that a discretionary decision deeming a detainee eligible for transfer "is irrelevant to whether a petitioner may be detained lawfully." *Almerfedi*, 654 F.3d at 4 n.3. And

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in any event, the Board's determination was not that al-Hela no longer poses a threat, but instead that al-Hela continues to "present[] some level of threat," albeit one that can be "adequately mitigated" with "appropriate" "security assurances" and "security measures."

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CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JULY 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,987 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Brad Hinshelwood
BRAD HINSHELWOOD

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2021, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by causing an original and eleven copies to be deposited with the Department of Justice Classified Information Security Officer. I also served the foregoing brief to counsel for appellant by causing one copy to be deposited with the Classified Information Security Officer for delivery to the appropriate secure facility.

/s/ Brad Hinshelwood
BRAD HINSHELWOOD

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ADDENDUM

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Substantive Ex Parte Filings and Orders on Motions for Exception to Disclosure

The below catalogues substantive filings and orders from the district court on the government's ex parte motions for exception from disclosure under Section I.F of the case management order. It does not include matters such as extension requests or orders on those requests, many of which are likewise noted on the docket.

March 11, 2010: First Ex Parte Motion for Exception from Disclosure. Notice of Classified Filing at Doc. 238.

March 11, 2010: Second Ex Parte Motion for Exception from Disclosure. Notice of Classified Filing at Doc. 238.

August 13, 2010: Third Ex Parte Motion for Exception from Disclosure. Notice of Classified Filing at Doc. 269.

February 16, 2011: Ex parte order directing Respondents to file supplemental briefing on the First and Third Ex Parte Motions for exception from disclosure "to provide an analytically aggressive assessment of the materiality issue for each document." Public version of order available at Doc. 290.

April 11, 2011: Ex parte supplement to Third Ex Parte Motion. Notice of Classified Filing at Doc. 293.

May 2, 2011: Ex parte supplement to First Ex Parte Motion. Notice of Classified Filing at Doc. 298.

June 1, 2011: Ex parte errata on prior ex parte motions. Notice of Classified Filing at Doc. 301.

April 27, 2012: Case reassigned to Judge Lamberth.

November 19, 2014: Public order giving the parties the opportunity to file supplemental briefs on the three prior ex parte motions (as well as a pending discovery motion from petitioner). Doc. 337.

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February 13, 2015: Ex parte supplemental memorandum in support of prior ex parte motions. Notice of Classified Filing at Doc. 346.

March 10, 2015: Ex parte submission of report referred to in Second Ex Parte Motion. Notice of Classified Filing at Doc. 348.

March 27, 2015: Ex parte response to court's request for an unredacted factual return. Notice of Classified Filing at Doc. 349.

April 22, 2015: Ex parte response to an order from the court issued during an ex parte hearing on April 15, 2015. Notice of Classified Filing at Doc. 354; *see* Docket Entry of Apr. 15, 2015 (noting hearing).

June 19, 2015: Ex parte response to an order from the court issued during an ex parte hearing on April 29, 2015. Notice of Classified Filing at Doc. 359; *see* Docket Entry of Apr. 24, 2015 (noting hearing).

June 30, 2015: Ex parte order issued. The court ordered the government to further address specific redaction issues related to the April 29, 2015 order, which it believed were not fully addressed in the government's June 19, 2015 response. Notice of order at docket entry for July 2, 2015.

July 10, 2015: Ex parte response to June 30, 2015 ex parte order. Notice of Classified Filing at Doc. 361.

August 14, 2015: Second ex parte response to June 30, 2015 ex parte order. Notice of Classified Filing at Doc. 366.

August 25, 2015: Order requiring supplemental briefing from the government on Third Ex Parte Motion for exception from disclosure to address redaction issues the court believed were not fully addressed in the government's July 10 and August 14 responses. Notice of order at docket entry for August 26, 2015.

September 4, 2015: Partial response to the August 25, 2015 ex parte order. Notice of Classified Filing at Doc. 372.

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September 16, 2015: Ex parte motion justifying redactions to the factual return exhibits. Notice of Classified Filing at Doc. 378.

October 16, 2015: Second ex parte response to August 25, 2015 ex parte order. Notice of Classified Filing at Doc. 382.

October 16, 2015: Third ex parte response to June 30, 2015 ex parte order. Notice of Classified Filing at Doc. 384.

October 30, 2015: Ex parte supplement to the September 16, 2015 ex parte motion justifying the redactions to the factual return exhibits. Notice of Classified Filing at Doc. 385.

November 16, 2015: Third ex parte response to the August 25, 2015 ex parte order. Notice of Classified Filing at Doc. 386.

November 16, 2015: Ex parte submission of less-redacted versions of documents from the Third Ex Parte Motion. Notice of Classified Filing at Doc. 387.

November 30, 2015: Ex parte submission of less-redacted version of document from the Third Ex Parte Motion. Notice of Classified Filing at Doc. 389.

December 17, 2015: Ex parte order issued. Order approves redactions of less-redacted documents submitted on October 16, 2015 and November 16, 2015, and orders further justification of redactions in one document filed on November 30, 2015. Order disclosed in full to petitioner's counsel on January 6, 2016.

January 6, 2016: Ex parte response to ex parte order of December 17, 2015, providing a less-redacted version of the one outstanding document from the December 17, 2015 Order. Notice of Classified Filing at Doc. 390.

March 17, 2016: Ex parte submission of less-redacted versions of documents from the First Ex Parte Motion. Notice of Classified Filing at Doc. 393.

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April 19, 2016: Ex parte order requiring government to explain specific redactions in two exhibits to the Third Ex Parte Motion and approving redactions to two other exhibits (including the remaining document from the December 17, 2015 order). Unredacted version of order served on petitioner's counsel on May 9, 2016 (notice of service given in Notice of Classified Filing at Doc. 402).

April 27, 2016: Ex parte response to the ex parte order of April 19, 2016. Notice of Classified Filing at Doc. 400.

May 9, 2016: Ex parte memorandum and order granting September 16, 2015 ex parte motion justifying redactions to the exhibits to the factual return along with the October 30, 2015 ex parte supplement to that motion, and addressing redactions from the First and Third Ex Parte Motions for exception from disclosure, approving almost all documents but ordering creation of a revised classified substitute for one document from the First Ex Parte Motion.

May 9, 2016: Ex parte order granting Second Ex Parte Motion for exception from disclosure.

May 20, 2016: Ex parte motion for clarification of certain portions of the district court's May 9 ex parte memorandum and order regarding First and Third Ex Parte Motions. Notice of Classified Filing at Doc. 405.

May 27, 2016: Ex parte order granting motion for clarification, granting in full Third Ex Parte Motion for exception from disclosure, and approving the complete exception from disclosure of three exhibits from the First Ex Parte Motion.

May 31, 2016: Ex parte response to the May 9, 2016 memorandum and order providing a proposed revised classified substitute for document from the First Ex Parte Motion. Notice of Classified Filing at Doc. 407.

December 23, 2016: Ex parte order approving revised classified substitute submitted on May 31 and noting that all then-pending ex

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parte motions had been resolved. Public version on docket at Doc. 413-1.

June 2, 2017: Government files amended factual return and exhibits. Notice of Classified Filing at Doc. 427.

October 18, 2017: Ex parte motion for exception from disclosure related to redactions from thirteen exhibits to the amended factual return that were not previously addressed in the prior motions for exception from disclosure, as well as some additional documents. Notice of Classified Filing at Doc. 444. This motion and exhibits have been lodged with the Court.

December 19, 2017: Final ex parte motion for exception from disclosure, dealing with exculpatory information redacted from documents that were disclosed to petitioner's counsel in October and November of 2017. Notice of Classified Filing at Doc. 454. This motion and exhibits have been lodged with the Court.

January 23, 2018: Ex parte order granting in part and denying in part the December 2017 motion for exception from disclosure, ordering the government to produce a revised substitute for one document but otherwise granting the motion.

February 8, 2018: Revised substitute required by January 23 order disclosed to petitioner's counsel. Notice of Disclosure at Doc. 468.

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