[EN BANC ORAL ARGUMENT SET FOR SEPTMEBER 30, 2021]

No. 19-5079

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

Abdulsalam Ali Abdulrahman Al-Hela,
Petitioner-Appellant,

v.

Joseph R. Biden, *et al.*,

Respondent-Appellees.

On Rehearing En Banc of Appeal from the U.S. District Court for the District of Columbia (No. 05-1048) (Hon. Royce C. Lamberth)

Brief *Amicus Curiae* of the National Association of Criminal Defense Lawyers In Support of Petitioner-Appellant

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel for *amicus curiae* certifies as follows:

A. Parties and *Amici*. The National Association of Criminal Defense Lawyers files this brief on its own behalf. All other parties, intervenors and *amici* appearing before this Court and the district court are listed in the Brief for the Petitioner-Appellant.

B. Rulings Under Review. An accurate reference to the order at issue in this appeal appears in the Brief for the Petitioner-Appellant.

C. Related Cases. An accurate statement about related cases appears in the Brief for the Petitioner-Appellant.

/s/ *Matthew S. Hellman*
Matthew S. Hellman

Dated: July 8, 2021

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. Counsel for the National Association of Criminal Defense Lawyers has conferred with counsel for the Petitioner-Appellant regarding the scope of proposed *amicus* briefs. To counsels' knowledge, no other proposed *amicus* addresses the distinct legal issue presented in this brief. Pursuant to Circuit Rule 29(d), the National Association of Criminal Defense Lawyers hereby certifies that filing a single *amicus* brief would be impracticable and would inhibit the Court's full appraisal of the issues before it.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rules 27(a)(4) and 28(a)(1)(A), *amicus curiae*, the National Association of Criminal Defense Lawyers, certifies that it has no parent corporation and no publicly held corporation owns any of its stocks.

/s/ *Matthew S. Hellman*
Matthew S. Hellman

Dated: July 8, 2021

GLOSSARY

CIPA	Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 1-16 (2018).
NACDL	National Association of Criminal Defense Lawyers

PERTINENT GOVERNING LAW

Applicable materials are contained in the Brief for the Petitioner-Appellant.

INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL is keenly interested in cases involving the use of *ex parte* evidence as a ground for depriving individuals of their liberty interests. NACDL believes that reliance on secret evidence is fundamentally un-American and reminiscent of the "processes" used by the English Star Chamber—"processes" the Framers expressly sought to repudiate by adding the Fifth and Sixth Amendments to our Constitution. To the extent the Suspension Clause permits the use of such evidence—and NACDL does not believe it does—we believe the Due Process Clause of the Fifth Amendment was created precisely to reject the use of this sort of secret procedure.

INTRODUCTION

Consistent with the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court has repeatedly recognized the possibility that the Due Process Clause, U.S. CONST. amend. V, applies, at least in some respects, to Guantanamo detainees. A key issue before

this en banc Court is whether *ex parte* evidence—unseen by the detainee or his counsel—can be used to deny habeas relief to a Guantanamo detainee. To the extent the Court concludes that the Suspension Clause does not bar the use of *ex parte* evidence in habeas proceedings, the Court should hold that the Due Process Clause does bar such evidence.

Ex parte evidence is one of the core evils against which the Due Process Clause guards. Since before the Founding, it has been recognized that fundamental fairness requires allowing a litigant to see, and rebut, the evidence the government is relying upon to justify the exercise of its coercive powers. This Circuit has long recognized and enforced "the firmly held main rule" that courts may not decide the merits of a case—particularly one where individual liberty interests are at stake—on the basis of "*ex parte, in camera* submissions." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (citing *In re Application of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. 1981)). If the information required to hold a detainee is classified, the Supreme Court made clear, decades ago: "The government must choose; either leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *Jencks v. United States*, 353 U.S. 657, 671 (1957) (quoting *United States v.*

Andolschek, 142 F.2d 503, 506 (2d Cir. 1944) (Hand, L., J.)); *see also United States v. Nixon*, 418 U.S. 683, 711 (1974) (the Fifth and Sixth Amendments require the production of all relevant and admissible evidence in criminal proceedings).

The concurring judge to the panel opinion contended that there was no need to determine whether the Due Process Clause barred *ex parte* evidence here because he concluded that the Suspension Clause offered equivalent protections (and permitted the use of *ex parte* evidence). *See Al-Hela v. Trump*, 972 F.3d 120, 152-54 (2020) (Griffith, J., concurring in part and concurring in the judgment). But to the extent the Court now concludes that the Suspension Clause does not bar the use of *ex parte* evidence—seen neither by the detainee nor his security-cleared counsel—to detain that person for nearly 20 years, without charge or foreseeable end, it should find that the Due Process Clause's more robust protections do. Indeed, the very fact that *ex parte* evidence supposedly could be employed so extensively under the Suspension Clause in this case demonstrates that the Due Process Clause, which has long forbidden *ex parte* evidence, demands more. Put simply, if the "meaningful opportunity" to rebut evidence that the Suspension Clause promises

permits the use of *ex parte* evidence to detain a person possibly for the duration of his lifetime, without charge, then that opportunity provides less than what due process requires.

Tellingly, the authority invoked by the concurrence to support the proposition that the Suspension Clause and Due Process Clause offer equivalent protections rests on inapposite Due Process Clause cases that do not involve the deprivations of a person's liberty—the issue here for the Petitioner-Appellant, Abdulsalam Ali Abdulrahman Al Hela ("Al-Hela"). Instead, those cases concern the freezing of assets of foreign terrorist organizations and drug kingpins, against whom there are ongoing investigations. By comparison, when this Court has discussed the use of classified evidence in Guantanamo cases, when a person's liberty was at stake, it has drawn analogies to criminal cases. Due process in those cases requires the government to make a choice: if it wants to use classified information in a criminal proceeding, it must either disclose the classified information, or forego its use altogether. This is more process than what this Circuit has found that the Suspension Clause affords.

Two key due process considerations in particular strongly favor barring *ex parte* evidence here: the risk of erroneous deprivation and the strength of the government's asserted interest. Al-Hela has been in detention for nearly 20 years—without ever being charged with a crime. The information at issue is aged and the government's interest in maintaining secrecy of such dated information has diminished with the passage of time. At the same time, the risk of a prolonged detention based on erroneous information increases with each passing day. As such, the degree of scrutiny of the evidence used to justify detention must increase as well, requiring, at a minimum here, that Al-Hela's security-cleared counsel be given an opportunity to review *all* of the evidence used to justify Al-Hela's continued detention. There is good reason to be wary of the *ex parte* use of information in this context, given that prior *ex parte* submissions have proven unreliable when subsequently exposed to daylight.

For these reasons, *amicus* respectfully asks this Court to find that the Due Process Clause bars the use of *ex parte* information to support detention in this case.

ARGUMENT

Mathews v. Eldridge, 424 U.S. 319 (1976), provides the standard courts must apply to determine whether the government may withhold *ex parte* evidence in a Guantanamo detention proceeding without violating due process. *Id.* at 335. The *Mathews* balancing test, as adopted by the Supreme Court in *Boumediene* and its plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), requires consideration of "the risk of an erroneous deprivation of [a liberty interest] and the probable value, if any, of additional or substitute procedural safeguards." *Boumediene*, 553 U.S. at 781 (quoting *Mathews*, 424 U.S. at 335); *Hamdi*, 542 U.S. at 529.

In conducting the *Mathews* balancing test, the length of detention is properly considered, and the longer someone is detained, the more procedural safeguards are required. *See Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring) ("[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker."); *Boumediene*, 553 U.S. at 779 ("Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the

circumstances."). Where, as here, *ex parte* evidence is used to hold someone without charge for nearly two decades, the balance of interests requires, *at minimum*, that security-cleared counsel be permitted to view the evidence, and, in particular, the sources of the evidence being used to justify possible lifetime detention without charge.

I. THE DUE PROCESS CLAUSE PROHIBITS THE USE OF *EX PARTE* EVIDENCE.

This Court has consistently left open the question of whether due process protections are available to Guantanamo detainees. *See Qassim v. Trump*, 927 F.3d 522, 530-31 (D.C. Cir. 2019); *Ali v. Trump*, 959 F.3d 364, 368 (D.C. Cir. 2020) ("Circuit precedent has not yet comprehensively resolved which 'constitutional procedural protections apply'. . . and whether those 'rights are housed' in the Due Process Clause, the Suspension Clause, or both." (quoting *Qassim*, 927 F.3d at 530)). Here, to the extent the Court concludes that the Suspension Clause itself does not prohibit the use of *ex parte* evidence, it should find that the Due Process Clause does prohibit the use of such evidence, and that Guantanamo detainees, like Al-Hela, are entitled to those procedural protections guaranteed by the Constitution.

A. The Consideration Of *Ex Parte* Evidence In Judicial Proceedings Is Highly Disfavored In Our Adversarial System.

A "due process concern [is] raised when a court relies on *ex parte* submissions in resolving an issue that is the subject of an adversarial proceeding." *United States v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004). The reason for such a concern is not confounding; "fairness can rarely be obtained by a secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). Indeed, "[i]t is the hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment." *Abourezk*, 785 F.2d at 1060.

Nor is the concern an invention of modern judges; the aversion to *ex parte* evidence predates the Constitution itself, informing the Framers' rejection of the inquisitorial civil law systems they abhorred. *Cf. Crawford v. Washington*, 541 U.S. 36, 41-50 (2004) (chronicling the history informing the Framers' condemnation of the "principal evil" of the "use of *ex parte* examinations as evidence against the accused."); *Greene v. McElroy*, 360 U.S. 474, 496 & n.25 (1959) (describing the "ancient

roots" of the importance of disclosing evidence to an individual facing injury by the government in both civil and criminal contexts).

It is thus "the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions." *Abourezk*, 785 F.2d at 1061. As such, where classified information is at stake, "[t]he government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *Jencks*, 353 U.S. at 671 (quoting *Andolschek*, 142 F.2d at 506) (rejecting government claim of privilege over witness statements).

The strength of the rule is warranted. When a court evaluates the merits of a case based on "undisclosed information" or "redacted evidence—thereby limiting the opportunity to probe or cross-examine that evidence—the risk of erroneous deprivation is especially high." *Fares v. Smith*, 901 F.3d 315, 323-34 (D.C. Cir. 2018); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) ("[T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.").

As the Supreme Court has explained, *ex parte*, *in camera* review is not an adequate substitute. Counsel's access to evidence is particularly important for two reasons: (1) counsel's unique ability to determine the significance and accuracy of facts given their familiarity with the accused and his case, *see Alderman v. United States*, 394 U.S. 165, 182 (1969) (the determination of evidentiary materiality is "too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court" without the assistance of counsel); and (2) counsel's ability to further investigate information and develop additional evidence—a role courts cannot perform on their own, *id.* at 184 ("As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of ex parte procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.").

The "fundamental requirements of fairness" thus dictate that, where classified information "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the [classified information] privilege ***must give way***." *See Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (emphasis added). And, just as important, this

rejection of secret evidence reaffirms the public's trust in the administration of justice itself. *See Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J 1999); *see also Nixon*, 418 U.S. at 709. "Exceptions. . . are both few and tightly contained," *Abourezk*, 785 F.2d at 1061, lest "the protections of our adversarial system [be] rendered impotent." *Kiareldeen*, 71 F. Supp. 2d at 413.

B. Even When Classified Information Is At Issue, The Government Has To Choose Between Disclosure Or Omission.

While the government's classified information privilege protects the disclosure of secret evidence, that protection is not absolute. *United States v. Yunis*, 867 F.2d 617, 622-23 (D.C. Cir. 1989). The Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 §§ 1-16 (2018), mandates procedures to protect the classified information privilege. *Id.*[2] Under CIPA, even when classified information allegedly touches on national security issues—the basis typically used to deny Guantanamo detainees, like Al-Hela, access to classified information—the accused may access the secret evidence if the classified information is

[2]CIPA was enacted "to help ensure that the intelligence agencies are subject to the rule of law and . . . protect both national security and civil liberties." S. REP. NO. 96-823, at 3 (1980).

material, *i.e.*, "helpful to the defense of the accused." *Yunis*, 867 F.2d at 622; *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001). Because defendants "are disadvantaged by not being permitted to see the information—and thus to assist the court in its assessment of the information's helpfulness," courts "appl[y] the 'at least helpful' test in a fashion that gives the defendants the benefit of the doubt." *United States v. Mejia,* 448 F.3d 436, 458 (D.C. Cir. 2006).

When the government seeks to affirmatively use classified information on an *ex parte* basis, a court may approve the request only if there is an adequate substitute for the evidence. *United States v. Rezaq*, 134 F.3d 1121, 1143 (D.C. Cir. 1998) ("No information was omitted from the substitutions that might have been helpful to [the] defense, and the discoverable documents had no unclassified features that might have been disclosed to [the defendant]."). When the classified material is not merely helpful, but also "essential to a fair determination of a cause," "due process . . . might afford the defendant further relief, even possibly dismissal." *Yunis*, 867 F.2d at 622 n.9.

If the proposed substitutions are not an adequate alternative for access to the classified evidence, the government is put to a choice:

disclose the information or forgo it. *Bostan v. Obama*, 674 F. Supp. 2d 9, 27 (D.D.C. 2009) ("And if the Court determines that some or all of the withheld information is material to the petitioner's case but the government nonetheless refuses to disclose the information, the Court may choose to impose sanctions on the government, such as prohibiting its use of the redacted or withheld information." (citing 18 U.S.C. App. 3 § 6(c)-(e)).

As this Circuit has recognized, "defendants and their counsel [] are in the best position to know whether information would be helpful to their defense." *Mejia,* 448 F.3d at 458; *Fares*, 901 F.3d at 323 (A "court cannot discharge its responsibility" to carry out "effective judicial review" "unless a petitioner's counsel has access to as much as is practical of the classified information regarding his client." (quoting *Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007)); *Alderman*, 394 U.S. at 181-84.

A habeas court has the duty to "fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage," that protect the due process rights of detainees. *See Harris v. Nelson*, 394 U.S. 286, 293, 299 (1969). The Circuit has already identified CIPA criminal proceedings as an appropriate analogue for

Guantanamo detention cases. *Al Odah v. United States*, 559 F.3d 539, 547 (D.C. Cir. 2009) (identifying the analogy to criminal proceedings under CIPA); *Khan v. Obama*, 655 F.3d 20, 31 (D.C. Cir. 2011) (same); *Bostan*, 674 F. Supp. 2d at 26-27 (considering evidence that had been redacted *ex parte* in accordance with CIPA procedures). Based on this Circuit's CIPA precedents, and its conclusions that CIPA procedures are an appropriate analogue for use in habeas cases brought by Guantanamo detainees, this Court should hold that the Due Process Clause provides comparable protections to Guantanamo detainees if the government seeks to use *ex parte* evidence as justification for indefinite detention. Specifically, when classified information is material and an adequate substitute is not available, the government must make a choice: either provide the petitioner (or, at a minimum, their counsel) access to the secret evidence, or forgo the use of such secret evidence.

II. BY BARRING THE USE OF *EX PARTE* EVIDENCE, THE DUE PROCESS CLAUSE REQUIRES MORE THAN THE SUSPENSION CLAUSE.

A. The Due Process Clause Affords More Protection Regarding *Ex Parte* Evidence Than The Suspension Clause.

The classified information framework for Guantanamo detainee habeas petitions that the Court provided in its *Al Odah* decision departs,

in important ways, from CIPA review, and it authorizes the withholding of both inculpatory and exculpatory evidence from detainees and their security-cleared counsel—something which the application of the Due Process Clause would forbid.

In this case, for example, the district court permitted the government to share its factual return only with Al-Hela's counsel, and not with Al-Hela himself. Instead, it shared only a two-page summary of the voluminous factual return with Al-Hela directly. The district court also allowed the government to fully withhold numerous exhibits even from security-cleared counsel. Contrary to Judge Griffith's concurring opinion, the Due Process Clause would provide Al-Hela with significant additional protections against the *ex parte* use of evidence in this way than was afforded to him under the Suspension Clause.

The additional protections begin with the differing standards employed under the two clauses. The Due Process Clause prohibits the use of *ex parte* information that is merely "helpful" to the defense. Conversely, courts interpreting this Circuit's Suspension Clause jurisprudence impose an additional requirement beyond that of helpfulness: they require that counsel's access to the evidence be

necessary to facilitate meaningful review. *Al Odah*, 559 F.3d at 547-48; *Khan*, 655 F.3d at 31; *Mousovi v. Obama*, 916 F. Supp. 2d 67, 73 (D.D.C. 2013) (requiring petitioner to show that counsel's access was relevant, material, *and* necessary to facilitate meaningful habeas review). As a result, courts allow the government to withhold material information from both petitioner and counsel, even when the consequence is that "it is not possible to identify sources or assess reliability based on the redacted versions of the [evidence]." *Khan*, 655 F.3d at 30; *Mousovi*, 916 F. Supp. 2d at 75.

Furthermore, while the Due Process Clause requires that substitutions for classified evidence be *adequate* substitutes, such that no helpful information is omitted, *see Rezaq*, 134 F.3d at 1143, the Suspension Clause requires only that a substitution "suffice to provide the detainee with 'a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law,'" a demonstrably lower standard for the government to meet. *Al Odah*, 559 F.3d at 547 (quoting *Boumediene*, 553 U.S. at 779); *Khan*, 655 F.3d at 31 (holding that a combination of otherwise-inadequate substitutes together permitted "meaningful review."). Even

when the information might "assist [the] petition," and when "there is no adequate substitute" for the information, courts applying the Suspension Clause have nonetheless permitted the government to rely on classified evidence submitted *ex parte*. *Mousovi*, 916 F. Supp. 2d at 73-74 (government not required to disclose classified source information despite the absence of adequate substitute). In contrast, when courts apply CIPA procedures in accord with the Due Process Clause, the government is put to a choice: disclose the information or forgo it. *See, e.g., Bostan*, 674 F. Supp. 2d at 27.

Under the Due Process Clause, at minimum any evidence and exhibits offered in the government's factual return justifying detention are necessarily material to the case, and Al-Hela, or at least his counsel, would be entitled to access them. *See Yunis*, 867 F.2d at 622; *cf. Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007) ("We presume counsel for a detainee has a 'need to know' all Government Information concerning his client, not just the portions of the Government Information presented to the Tribunal.") (Detainee Treatment Act case), *cert granted and judgment vacated on other grounds by* 554 U.S. 913 (2008). Counsel access would allow Al-Hela's attorneys to investigate the

government's evidence independently, and place the evidence in appropriate context—which, in turn, would materially assist the court in its review of the totality of the evidence offered to detain Al-Hela indefinitely without charge. Thus, the Suspension Clause provides Al-Hela less protection than the Due Process Clause.

B. The Due Process Cases Cited By The Panel Concurrence Are Inapposite.

In support of the contention that the Due Process Clause provides Al-Hela no additional protection than what he would be entitled to under the Suspension Clause, Judge Griffith, in his concurring opinion, invoked cases involving the designation of a foreign terrorist organization or foreign drug kingpin. 972 F.3d at 153; *see also Nat'l Council*, 251 F.3d at 196; *Fares*, 901 F.3d at 324. Judge Griffith relies on these cases to conclude that "under established law," the Due Process Clause permits the use of *ex parte* evidence in Al-Hela's case. 972 F.3d at 153-54. However, those cases are distinguishable for at least three reasons.

First, those cases involve administrative designations of foreign organizations and individuals living abroad, which triggered freezing of the petitioner's assets in the United States, thereby impairing the petitioners' property interests in their U.S. bank accounts. *See Nat'l*

Council, 251 F.3d at 196; *Fares*, 901 F.3d at 324. In contrast, Al-Hela's case involves his indefinite detention in a location over which the United States exercises complete control. The property interests at stake in the terrorist organization and drug kingpin cases are simply not comparable to Al-Hela's liberty interest regarding his two decades-long detention.

Second, the cases in the concurring opinion are also distinguishable because exigent circumstances compelled the courts' decisions not to disclose information. *See Nat'l Council*, 251 F.3d at 196; *Fares*, 901 F.3d at 319, 324. In the foreign terrorist organization cases, the disclosure would have caused an immediate breach in national security based on the socio-political circumstances at that time. *Nat'l Council*, 251 F.3d at 208-09. Similarly, in the drug kingpin cases, the classified information "could not be disclosed without compromising ongoing criminal investigations or risking the lives of key sources." *Fares*, 901 F.3d at 319; *see also id.* (government contended that "uncovering any additional increment of the redacted information or its sources would compromise ongoing law enforcement efforts, potentially even risking bodily harm or death to individuals."). Thus, in both types of cases, the government had both "exigent reasons" for the deprivation

of the private property interest at stake, and "pressing interests in the nondisclosure of the highly sensitive classified information." *Id.* In contrast, the classified information involved in Al-Hela's case is nearly two decades old, and it has grown increasingly unlikely that the government's interest in keeping the information secret from Al-Hela and his counsel could credibly be characterized as "exigent" or "pressing."

Third, it is an understatement to observe that when a person or entity challenges a designation that causes injury, the D.C. Circuit "do[es] not require [the] agency to provide procedures which approximate a judicial trial." *Holy Land Found. for Relief & Dev. v. Ashcroft,* 333 F.3d 156, 164 (D.C. Cir. 2003). The organizations and individuals challenging their designation had no procedure for petitioners' counsel to request access to classified information, even upon a showing of necessity. The D.C. Circuit required disclosure of only the unclassified portion of the administrative record supporting the designation. *See People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003)*; Fares*, 901 F.3d at 324. That is not the case here for Al-Hela, or for other Guantanamo detainees. To the extent that any portion of the classified record in Al-Hela's case once involved information that could

affect national security, the sensitivity of such sources and methods have eroded over the past twenty years, and the government should be required to make a specific showing in support of its invocation of the privilege.

Thus, the cases relied upon in Judge Griffith's concurrence are distinguishable because they address property interests, and not the liberty interest here; they focus on exigent circumstances, which are absent here; and they fail to require the government to support with evidence its invocation of the privilege to use secret evidence. Because Al-Hela's liberty interest in freedom from indefinite detention at Guantanamo is at stake, those decisions do not dictate the outcome of the *Mathews* balancing test that should be conducted here.

C. The Case Law Supports Extending Due Process Protections To The Use Of *Ex Parte* Evidence.

Rather than relying on the inapposite cases cited in Judge Griffith's concurrence, the Court should focus instead on cases implicating the use of secret evidence bearing on liberty interests, because the principles underlying those cases justify a divergence between the dictates of the Suspension Clause and the Due Process Clause. *See, e.g.*, *Rafeedie v. INS,* 880 F.2d 506, 512 (D.C. Cir. 1989), *on remand,* 795 F. Supp. 13, 18-

20 (D.D.C.1992) (applying the *Mathews* balancing test to determine that subjecting a returning resident alien, who was accused of being an officer of the Popular Front for the Liberation of Palestine, to summary exclusion proceedings utilizing secret information violated due process); *Kaur v. Holder*, 561 F.3d 957, 962 (9th Cir. 2009) (holding that the "use of the secret evidence without giving [asylum petitioner] a proper summary of that evidence was fundamentally unfair and violated her due process rights").

Specifically, the cases focusing on the liberty interests at stake also factor in, per the *Mathews* framework, the particular dangers of *ex parte* evidence, and the high risk of erroneous deprivation. *See Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1069. "There is no direct evidence in the record to show what percentage of decisions utilizing undisclosed classified information result in error; yet, as the district court below stated, 'One would be hard pressed to design a procedure more likely to result in erroneous deprivations.'" *Id.*; *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) ("The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the

meddlesome, and the corrupt to play the role of informer undetected and uncorrected.").

D. The Risk Of Erroneous Deprivation From The Use Of *Ex Parte* Evidence Is Particularly High In Al-Hela's Case.

Due process concerns are at their height in this case because the *ex parte* evidence the government uses to justify Al-Hela's indefinite detention is now, presumably, nearly two decades old. Given the dated nature of the evidence, the risk of a court reaching an incorrect result without the benefit of an adversarial review of such evidence is particularly high. This outcome is not a theoretical one. The dangers of *ex parte* evidence and lack of counsel access to evidence supporting indefinite military detention are unfortunately illustrated all too well in the Federal Reporter.

Take for example *Hirabayashi v. United States*, 627 F. Supp. 1445, (W.D. Wash. 1986), *aff'd in part, rev'd in part*, 828 F.2d 591 (9th Cir. 1987), a *coram nobis* case vacating the petitioner's conviction for failing to report to a Civil Control Station, in violation of the Japanese exclusion laws. 627 F. Supp. at 1446, 1457-58. There, the court described at length the falsity of General DeWitt's purported evidence supporting the

"military necessity" of interning Japanese-Americans—which was withheld from petitioners in the 1940s when they challenged their internment, resulting in a gross miscarriage of justice. *Id.* at 1454. And it agreed that "the reason stated by General DeWitt for the exclusion of the Japanese"—namely, that it was impossible to separate "the loyal persons from the disloyal ones no matter how much time was devoted to that task," thus requiring the indefinite internment of persons of Japanese ancestry—was concealed from Mr. Hirabayashi and his counsel. *Id.* As a result, it held that Mr. Hirabayashi's conviction be vacated. *Id.* at 1457. As the court noted:

> Had the statement of General DeWitt been disclosed to petitioner's counsel, they would have been in a position to argue that, contrary to General DeWitt's belief, there were in fact means of separating those who were loyal from those who were not; that the legal system had developed through the years means whereby factual questions of the most complex nature could be answered with a high degree of reliability. Counsel for petitioner could have pointed out that with very little effort the determination could have been made that tens of thousands of native-born Japanese Americans—infants in arms, children of high school age or younger, housewives, the infirm and elderly—were loyal and posed no possible threat to this country.

Id. at 1456.

Another cautionary tale about the dangers of *ex parte* evidence was recounted during oral argument in *Boumediene*, where an oralist discussed the detention of Murat Kurnaz for nearly five years on the basis of *ex parte* evidence supposedly connecting him to a suicide bomber. *See* Tr. of Oral Arg. 75:6-24, *Boumediene*, 553 U.S. 723 (2008) (No. 06-1195), https://bit.ly/364WkWj; *see also Five Years of My Life: An Innocent Man at Guantanamo by Murat Kurnaz*, GUARDIAN (April 23, 2008), https://bit.ly/3whKJOo. When the government ultimately provided the name of the alleged suicide bomber, within 24 hours, Mr. Kurnaz's counsel had affidavits not only from a German prosecutor but also from the supposedly deceased suicide bomber himself, a resident of Dresden, who had never been involved in terrorism. Tr. of Oral Arg. 75:25-76:11, *Boumediene*, 553 U.S. 723 (2008) (No. 06-1195), https://bit.ly/364WkWj.

If the government had been permitted to withhold evidence from counsel in each of these instances, then Hirabayashi's unjust conviction would remain on the books, and the public would never know the full extent of the horrors of Japanese internment. Similarly, Kurnaz's counsel never would have been able to conduct an independent investigation and find the alleged suicide bomber, which was essential in

disproving the government's evidence to support Kurnaz's continued detention—exactly what Al-Hela's counsel is being prohibited from doing here.

Furthermore, the passage of time has diminished any national security interest in keeping the evidence secret from Al-Hela, and even more so, from his security-cleared counsel. Thus, there is even less justification for withholding this secret evidence from Al-Hela and his counsel, particularly given the dangers of reaching an incorrect result, and continuing to detain Al-Hela indefinitely.

CONCLUSION

For the reasons discussed above, *amicus* respectfully requests that the Court conclude that, under the Due Process Clause, *ex parte* evidence cannot be used to justify Al-Hela's continued detention.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 5,297 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6)-(7) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook 14 point font.

/s/ *Matthew S. Hellman*
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Dated: July 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was filed electronically on July 8, 2021 and will therefore be served electronically on all counsel.

/s/ *Matthew S. Hellman*
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Dated: July 8, 2021