[ORAL ARGUMENT NOT YET SCHEDULED]

No. 18-5297

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

ABDUL RAZAK ALI, Detainee,

Petitioner-Appellant,

v.

DONALD J. TRUMP, President of the United States, *et al.*,

Respondents-Appellees.

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

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The appellant is Abdul Razak Ali, a Guantanamo Bay detainee also identified by Internment Serial Number (ISN) 685. The appellees are Donald J. Trump, in his official capacity as President of the United States; Richard V. Spencer, in his official capacity as Acting Secretary of Defense; Rear Admiral Timothy C. Kuehhas, in his official capacity as Commander of the Joint Task Force Guantanamo; and Colonel Steven G. Yamashita, in his official capacity as Commander of the Joint Detention Operations Group, Joint Task Force Guantanamo.

Amici before the district court include: (1) Muslim Advocates, Asian Americans Advancing Justice, Asian American Legal Defense and Education Fund, American-Arab Anti-Discrimination Committee, Capital Area Muslim Bar Association, Council on American-Islamic Relations—National, Muslim Bar Association of New York, Muslim Justice League, Muslim Public Affairs Council, New Jersey Muslim Lawyers Association, Revolutionary Love Project, T'ruah: the Rabbinic Call for Human Rights; (2) Center for Victims of Torture; and (3) Professors Eric M. Freedman, Bernard E. Harcourt, Randy A. Hertz, Eric S. Janus, Jules Lobel, Kermit Roosevelt, Michael J. Wishnie, and Larry Yackle.

Amici before this Court include: (1) Tofiq Nasser Awad al Bihani (ISN 893) and Abdul Latif Nasser (ISN 244); (2) Human Rights First; and (3) Professor Eric S. Janus. There are no intervenors.

B. Rulings Under Review

Appellant seeks review of the district court's memorandum opinion and order denying his motion for a writ of habeas corpus, both of which were entered on August 10, 2018. Mem. Op., Dkt. No. 1540 (published *sub nom. Ali v. Trump*, 317 F. Supp. 3d 480 (D.D.C. 2018) (Leon, J.)); Order, Dkt. No. 1541.

C. Related Cases

In *Ali v. Obama*, this Court affirmed the denial of appellant's habeas corpus petition because "the Government has satisfied its burden to prove that [appellant] more likely than not was part of Abu Zubaydah's force," meaning that appellant was lawfully detained "as an enemy combatant pursuant to the 2001 Authorization for Use of Military Force." 736 F.3d 542, 543, 550 (D.C. Cir. 2013).

In 2018, appellant and ten other Guantanamo detainees filed motions in district court challenging their detention and asking for an order granting a habeas writ. These motions were jointly captioned but individually filed in nine preexisting habeas cases previously filed by the detainees in the U.S. District Court for the District of Columbia. *See* Case Nos. 04-cv-1194; 05-cv-23; 05-cv-764; 05-cv-1607; 05-cv-2386; 08-cv-1360; 08-cv-1440; 09-cv-745; 10-cv-1020. This appeal, as noted, arises from the denial of the motion in Case No. 10-cv-1020. The other motions remain pending in

district court. Counsel for appellees are not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Michael Shih
MICHAEL SHIH

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Rule:

Other Authorities:

GLOSSARY

AUMF	Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)
ISN	Internment Serial Number
NDAA	National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011)

INTRODUCTION

Petitioner Abdul Razak Ali is detained at Guantanamo Bay as an unprivileged alien enemy combatant. In 2005, he filed a habeas petition challenging the legality of his detention. After a three-day evidentiary hearing, the district court found that petitioner had traveled to Afghanistan after September 11, 2001, to fight against U.S. and Coalition forces; that petitioner was captured while living in a safehouse in Pakistan with terrorist leader Abu Zubaydah and senior leaders of Abu Zubaydah's force; that the safehouse contained documents and equipment associated with terrorist operations; that petitioner had participated in Abu Zubaydah's terrorist-training program at the safehouse; and that, after his capture, petitioner had lied to the U.S. government about his identity for two years. The court therefore ruled that the government had demonstrated its authority to detain petitioner, and this Court affirmed that ruling. *Ali v. Obama*, 736 F.3d 542, 543 (D.C. Cir. 2013).

This appeal arises from a motion filed by petitioner in his previously adjudicated habeas case. Identical motions were filed in existing habeas proceedings of ten other petitioners, notwithstanding the different facts underlying each of those detainees' enemy-combatant status. The motion argued that, as a statutory matter, petitioners must be released because their continued detention is inconsistent with the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (AUMF). The motion also argued that, regardless of whether petitioners' detention was authorized by statute, the government was required to release all eleven

petitioners because substantive due process imposes an independent limit on the duration of their law-of-war detention even while hostilities continue. Finally, the motion argued that, to the extent petitioners' detention is indefinite, procedural due process requires the government to prove its authority to detain them by clear and convincing evidence. At no point did the motion explain how that evidentiary standard would have altered the outcome of *this* petitioner's original habeas petition—any challenge to which petitioner has waived.

The district court correctly denied petitioner's motion. With respect to petitioner's statutory argument, both the Supreme Court and this Court have held that the AUMF's authorization of "all necessary and appropriate force" unambiguously permits the government to detain enemy combatants such as petitioner while hostilities remain ongoing. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 573 (2004) (plurality); *id.*, 542 U.S. at 579 (Thomas, J., dissenting)); *see also, e.g.*, *Al-Alwi v. Trump*, 901 F.3d 294, 300 (D.C. Cir. 2018). Because hostilities indisputably remain ongoing, the government's statutory detention authority also continues.

Petitioner's constitutional arguments also lack merit. Even assuming *arguendo* that the Due Process Clause of the Fifth Amendment extends in some respect to Guantanamo detainees, petitioner's detention comports with due process. No authority supports the radical proposition that substantive due process constrains the duration of law-of-war detention during ongoing hostilities, when the Nation's enemies are lengthening hostilities by continuing to fight. Petitioner also has cited no

authority holding that the evidentiary standard governing habeas proceedings initiated by a Guantanamo detainee—which the Supreme Court endorsed even in the context of a *U.S.-citizen* enemy combatant detained *in the United States*—should vary simply because the duration of detention has exceeded some unspecified temporal limit. Even if such procedures were constitutionally required, petitioner has forfeited any argument that application of those procedures would make any difference with respect to the government's authority to detain him.

For these reasons, this Court need not decide whether the Due Process Clause extends to petitioner. But should the Court find it necessary to reach the question, the answer is clearly that the Clause does not. Both the Supreme Court and this Court have held that the Due Process Clause does not extend to aliens without property or presence in U.S. sovereign territory. *E.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 1950)); *People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1241 (D.C. Cir. 2003). That settled principle applies with full force to petitioner—an Algerian national who is detained outside the sovereign territory of the United States and who claims no rights with respect to property in the United States—and forecloses his constitutional claims. This conclusion is not altered by *Boumediene v. Bush*, 553 U.S. 723 (2008), which extended the privilege of habeas corpus to persons detained as unprivileged enemy combatants at Guantanamo. "*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions[] other than the Suspension Clause." *Rasul v. Myers*, 563 F.3d

527, 529 (D.C. Cir. 2009) (per curiam). And even if "*Boumediene* has eroded the precedential force of *Eisentrager* and its progeny," this Court must follow pre-*Boumediene* case law, and leave it to the Supreme Court whether to overrule its own prior decisions. *Id.*

STATEMENT OF JURISDICTION

In 2005, petitioner sought a writ of habeas corpus, invoking the district court's jurisdiction under 28 U.S.C. § 2241. In 2018, petitioner filed a Corrected Motion for Order Granting Writ of Habeas Corpus. Mot., Dkt. No. 1529. The district court entered judgment denying the motion on August 10, 2018. App. 20. Petitioner timely appealed. Notice of Appeal, Dkt. No. 1542 (filed Oct. 1, 2018); *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the government has statutory authority to detain petitioner.

2. Whether, assuming that the Due Process Clause of the Fifth Amendment extends to petitioner, petitioner's detention comports with due process.

3. Whether, insofar as this Court would otherwise hold that petitioner's detention does not comport with due process, petitioner—an Algerian national who is detained at Guantanamo as an unprivileged enemy combatant—may invoke the protections of the Due Process Clause.

STATEMENT OF THE CASE

A. Statutory Background

After the attacks of September 11, 2001, Congress authorized the President to "use all necessary and appropriate force" against al Qaeda, the Taliban, and associated forces. AUMF § 2(a). This grant of authority, the Supreme Court has held, "authorizes detention of [unprivileged] enemy combatants 'for the duration of the particular conflict in which they were captured.'" *Al-Alwi v. Trump*, 901 F.3d 294, 297 (D.C. Cir. 2018) (discussing *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 521 (2004) (plurality); *id.* at 579 (Thomas, J., dissenting)).

A decade later, Congress "affirm[ed] that the authority of the President to use all necessary and appropriate force pursuant to" the AUMF "includes the authority" to "detain" individuals who "w[ere] a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States." National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), (b)(2), 125 Stat. 1298, 1562 (2011) (NDAA). Congress reiterated that the President's detention authority extends through "the end of the hostilities authorized by the" AUMF. *Id.* § 1021(c)(1). Neither the AUMF nor the NDAA "places limits on the length of detention in an ongoing conflict." *Al-Alwi*, 901 F.3d at 297.

B. Factual Background

As part of the ongoing hostilities underlying both the AUMF and the NDAA, petitioner Abdul Razak Ali—identified by Internment Serial Number (ISN) 685—

traveled to Afghanistan from his native Algeria to fight against U.S. and Coalition forces. *Ali v. Obama*, 736 F.3d 542, 543 (D.C. Cir. 2013).

In 2002, petitioner was apprehended at a four-bedroom safehouse in Pakistan. He was captured along with "an al Qaeda-associated terrorist leader named Abu Zubaydah," "four former trainers from a terrorist training camp in Afghanistan, multiple experts in explosives, and an individual who had fought alongside the Taliban." *Ali*, 736 F.3d at 543. The safehouse's living quarters contained a "device typically used to assemble remote bombing devices," "electrical components," and al Qaeda-designated documents. *Id.* Petitioner had lived in the safehouse for eighteen days, and "participated in Abu Zubaydah's terrorist training program" while there. *Id.* Petitioner falsely identified himself as "Abdul Razzaq of Libya" to an FBI investigator, and maintained that lie for two years. *Id.*

Since June 2002, petitioner has been detained as an unprivileged alien enemy combatant at Guantanamo Bay. *Ali*, 736 F.3d at 543. In 2005, petitioner sought habeas relief from his detention. *Id.* at 544-45. After the Supreme Court decided *Boumediene v. Bush*, 553 U.S. 723 (2008), the district court held a three-day hearing and ruled that petitioner's detention was lawful. *Ali*, 736 F.3d at 545. Petitioner appealed, arguing that he was not an a member of Abu Zubaydah's force and had "mist[aken] the Abu Zubaydah facility for a public guesthouse." *Id.* at 544. This Court rejected that argument because "[i]t strain[ed] credulity." *Id.* at 547. The Court held that petitioner's "presence at an al Qaeda . . . terrorist guesthouse" would alone

"constitute[] 'overwhelming' evidence that [he] was part of the enemy force." *Id.* at 545. Petitioner's affiliation with the enemy force was further confirmed by the district court's other findings. *Id.* at 546.

The Court declined to credit petitioner's alternative account, which "pile[d] coincidence upon coincidence": that petitioner "ended up in the guesthouse by accident and failed to realize his error for more than two weeks"; that Abu Zubaydah and his senior leaders "tolerated an outsider living within their ranks"; that a different person with the same biographical information happened to travel to Afghanistan to fight against U.S. and Coalition forces; and that, "despite knowing that he was an innocent man, [petitioner] lied about his true name and nationality for two years." *Ali*, 736 F.3d at 550. The Court concluded that the government had "prove[n]" petitioner's "status by a preponderance of the evidence." *Id.* at 543-44.

In 2009, President Obama convened a task force to determine "whether it is possible to transfer or release" individuals detained at Guantanamo "consistent with the national security and foreign policy interests of the United States." 74 Fed. Reg. 4897, 4898-99 (Jan. 22, 2009). The task force recommended detainees for transfer if any threat they posed could be adequately mitigated. After reviewing petitioner's case, the task force did not recommend petitioner for transfer or release. *See Suleiman v. Obama*, No. 1:10-cv-1411, Dkt. No. 36-1, at 2 (D.D.C. July 8, 2013) (discussing review of ISN 685).

In 2011, President Obama established a Periodic Review Board to determine whether continued custody of certain Guantanamo detainees remains necessary to protect against a continuing significant threat to the security of the United States. 76 Fed. Reg. 13,277, 13,277 (Mar. 7, 2011) (Exec. Order No. 13,567). Each time the Board has considered petitioner, it has recommended that petitioner remain detained.[1] The Board's next review of petitioner's file is currently scheduled for July 17, 2019.

C. Prior Proceedings

In 2018, petitioner filed a motion in district court that amounted to a renewed petition for a writ of habeas corpus. Identical motions were filed on behalf of ten other petitioners, notwithstanding the different facts underlying each of those detainees' enemy-combatant status.

Petitioner's motion—like all the other motions—advanced three arguments. First, the motion argued that all eleven movants must be released because their continued detention is inconsistent with the AUMF. Mot., Dkt. No. 1529, at 29-37. Second, the motion argued that, regardless of whether movants' detention was statutorily authorized, movants were entitled to release because the Due Process Clause of the Fifth Amendment imposes an independent limit on the duration of their law-of-war detention, notwithstanding the fact that hostilities are continuing. *Id.* at 15-22 (invoking substantive due process). Finally, the motion argued that, to the

[1] These determinations can be viewed at https://www.prs.mil/ by accessing the categories beneath the "Review Information" tab and searching for "ISN 685."

extent petitioners' detention is indefinite, the Due Process Clause requires the government to prove the lawfulness of that detention with clear and convincing evidence. *Id.* at 22-26 (invoking procedural due process). The motion did not explain how that standard would have altered the outcome of petitioner's habeas petition, any challenge to which he expressly waived. App. 14, 16 n.6. Nor did the motion address this Court's decision upholding the legality of petitioner's detention. The motion merely discussed, in general terms, the purported unconstitutionality of the preponderance-of-the-evidence standard governing habeas petitions brought by Guantanamo detainees.[2]

The district court denied the motion in its entirety. As to petitioner's substantive and procedural due process claims, the court ruled—following "a string of Supreme Court cases" and the precedent of this Court—that the "due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." App. 18. As to petitioner's statutory claim, the court ruled—again following decisions of the Supreme Court and of this Court—that the detention authority contained in the AUMF authorizes the government to detain enemy

[2] The motion separately argued that the continued detention of two other unprivileged enemy combatants—Tofiq Nasser Awad al Bihani (ISN 893) and Abdu Latif Nasser (ISN 244)—violates substantive due process because those detainees had previously been recommended for transfer. Mot., Dkt. No. 1529, at 26-29. This issue is not properly presented in this appeal. *See* App. 16 n.5. Neither al Bihani nor Nasser is a party to this case, and petitioner has never been recommended for transfer. *Id.* That the motion filed in petitioner's case raised claims on behalf of al Bihani and Nasser further underscores the motion's boilerplate nature.

combatants such as petitioner while hostilities are ongoing, even if those hostilities are protracted. App. 16-17.

On appeal, petitioner sought initial hearing en banc as to his constitutional arguments. The Court denied the petition. Judge Tatel, joined by Judge Pillard, concurred in the denial of initial hearing en banc. The concurring opinion construed petitioner's constitutional arguments to sound in procedural due process and not substantive due process. App. 22. The concurring opinion acknowledged that this Court has stated that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." App. 22 (quoting *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (per curiam), *reinstated in relevant part*, 605 F.3d 1046, 1047-48 (D.C. Cir. 2010) (per curiam), *cert. denied*, 563 U.S. 954 (2011)). But the concurring opinion suggested that the Court's statement in *Kiyemba* "neither implicated the right to procedural due process nor decided whether its protections reach Guantanamo." App. 21.

A panel of this Court subsequently held that, although *Kiyemba* foreclosed "substantive due process claim[s] [brought by Guantanamo detainees] concerning the scope of the habeas remedy," it did not decide "whether Guantanamo detainees enjoy procedural due process protections under the Fifth Amendment (or any other constitutional source . . .) in adjudicating their habeas petitions." *Qassim v. Trump*, 927 F.3d 522, 2019 WL 2553829, at *4 (D.C. Cir. June 21, 2019) (citation omitted). The

Qassim Court remanded the case to the district court to consider that question in the first instance. *Id.* at *8.

SUMMARY OF ARGUMENT

A. Petitioner argues that the government lacks statutory authority to detain him. But the AUMF "clearly and unmistakably" authorizes the detention of individuals captured in the course of the conflict it authorized. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality); *id.* at 589 (Thomas, J., dissenting). Congress ratified that holding in a statute "affirm[ing]" that "the authority of the President" under the AUMF "includes the authority . . . to detain covered persons . . . pending disposition under the law of war . . . until the end of the hostilities." NDAA § 1021(a), (c)(1). And as recently as last year, this Court reiterated that both the AUMF and the NDAA "authorize detention until the end of hostilities." *Al-Alwi v. Trump*, 901 F.3d 294, 298 (D.C. Cir. 2018). Petitioner's only response to these authorities is that the canon of constitutional avoidance requires the Court to interpret the AUMF in a manner that would require his release. That canon is inapplicable where, as here, the relevant statute is not susceptible of more than one construction—and where, as here, the statute raises no serious constitutional concerns.

B. Petitioner also asserts that his detention violates the Due Process Clause of the Fifth Amendment. But even assuming for the sake of argument that the Fifth Amendment extends to petitioner, his detention fully comports with both substantive and procedural due process. Petitioner has not cited, and the government is not

aware of, any case holding that substantive due process requires the Executive to release enemy combatants before active hostilities have ended. Accepting that substantive due process entitles petitioner to release would effectively reward the Nation's enemies for extending a conflict by continuing to fight. The Fifth Amendment does not compel that radical outcome.

Petitioner has likewise cited no authority holding that, based on the length of his detention, the government must now prove his detention's legality by clear and convincing evidence, rather than by a preponderance of the evidence. A majority of the Supreme Court has agreed that, even in the context of a *U.S.-citizen* enemy combatant detained *in the United States*, the preponderance standard is consistent with due process. *Hamdi*, 542 U.S. at 533-34 (plurality); *id.* at 590 (Thomas, J., dissenting). And this Court has upheld that standard against constitutional challenge. *See, e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010). Those holdings control here. And even if they did not, petitioner has forfeited any argument that application of those procedures would make any difference with respect to the government's authority to detain him.

C. Because petitioner's detention is consistent with due-process requirements, this Court need not and should not decide whether petitioner—an Algerian national detained outside the Nation's sovereign territory—may assert due-process rights at all. The Court should not rule on constitutional questions that are unnecessary to decide the case, and this Court should decline to issue an advisory opinion on the application

of the Due Process Clause to unprivileged alien enemy combatants detained at Guantanamo. But should the Court find it necessary to reach the question, it should rule that petitioner lacks due-process rights in connection with his detention. Both the Supreme Court and this Court have emphatically rejected the "extraterritorial application of the Fifth Amendment" to aliens without presence or property in the sovereign territory of the United States. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)); *People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1241 (D.C. Cir. 2003). This test applies regardless of whether the alien's asserted Fifth Amendment right sounds in substantive or procedural due process. Because petitioner is unquestionably an alien outside the United States and claims no rights with respect to property in the United States, the Due Process Clause does not extend to him.

Petitioner's only response to this unbroken line of case law is to declare it irrelevant in light of *Boumediene v. Bush*, 553 U.S. 723 (2008). But *Boumediene* held only that the Suspension Clause of the Constitution had "full effect at Guantanamo Bay" in the specific context of law-of-war detainees who had been detained there for an extended period. *Id.* at 771. The Court repeatedly emphasized that this *sui generis* holding turned on the unique role of the writ of habeas corpus in the separation of powers. And the Court "disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions[] other than the Suspension Clause." *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (per curiam). Thus,

Boumediene does not undermine settled pre-*Boumediene* precedent holding that the Due Process Clause does not extend to individuals such as petitioner. In any event, this Court must follow pre-*Boumediene* case law and leave it to the Supreme Court whether to overrule its own prior decisions, even if "*Boumediene* has eroded the precedential force of *Eisentrager* and its progeny." *Id.*

STANDARD OF REVIEW

In assessing the denial of a writ of habeas corpus, this Court reviews de novo the district court's ultimate determination and the legal rulings underlying it. *Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010).

ARGUMENT

I. Petitioner's Detention Is Authorized By The AUMF.

The threshold question presented by petitioner's appeal—albeit one that petitioner addresses only in perfunctory terms at the end of his brief (Br. 31-33)—is whether his law-of-war detention is authorized by statute. Because the statutory argument informs petitioner's constitutional arguments and its resolution could obviate the need to decide the constitutional questions presented in this case, we address it first. As the district court correctly determined, petitioner's claim that the government lacks statutory authority to detain him is foreclosed by controlling precedent.

The government's authority to detain petitioner derives from the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), as informed by

the laws of war. The AUMF authorizes the use of "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Id.*

The Supreme Court has interpreted this language as unambiguously allowing the President to detain an enemy combatant captured in the armed conflict authorized by the AUMF for the duration of that conflict. As a plurality of the Court explained in *Hamdi v. Rumsfeld*, the "detention of individuals . . . for the duration of the particular conflict in which they were captured[] is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 542 U.S. 507, 518 (2004) (plurality). The plurality thus held that "Congress' grant of authority for the use of 'necessary and appropriate force' . . . include[s] the authority to detain for the duration of the relevant conflict." *Id.* at 521; *see also id.* ("The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'"). Justice Thomas, in dissent, would have issued an even broader ruling. *Id.* at 588 (Thomas, J., dissenting) (stating that "the power to detain does not end with the cessation of formal hostilities"). *Hamdi* thus makes clear that the President may detain enemy combatants such as petitioner for as long as the armed conflict in which they were captured remains ongoing.

Congress ratified *Hamdi*'s holding in the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), (b)(2), 125 Stat. at 1562. The NDAA "affirms that the authority of the President" under the AUMF "includes the authority . . . to detain covered persons . . . pending disposition under the law of war." *Id.* § 1021(a). The NDAA further provides that "disposition of a person under the law of war" includes "[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." *Id.* § 1021(c)(1). The NDAA thus makes clear that the AUMF authorizes detention "until the end of the hostilities"—not until some indeterminate deadline before the end of the hostilities.

This interpretation of the AUMF makes sense, and comports with the laws of war. "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518. The risk that a combatant will return to the battlefield lasts as long as active hostilities remain ongoing. As a result, the power to detain also lasts as long as active hostilities remain ongoing—a principle this Court reaffirmed as recently as last year. *Al-Alwi v. Trump*, 901 F.3d 294, 298 (D.C. Cir. 2018) ("[W]e continue to follow *Hamdi*'s interpretation of the [2001] AUMF and the [NDAA's] plain language. Both of those sources authorize detention until the end of hostilities.").

Petitioner does not address the Supreme Court's holding in *Hamdi*, Congress's subsequent enactment of the NDAA, or this Court's reaffirmation of the President's statutory detention authority in *Al-Alwi*. Petitioner's sole contention (Br. 32-33) is

that the canon of constitutional avoidance requires this Court to interpret the AUMF in a manner that would require his release. But that canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018). The AUMF, as informed by the laws of war, is not susceptible of more than one construction. To the contrary, a majority of the Justices in *Hamdi* recognized that the AUMF "clearly and unmistakably" authorizes the detention of individuals captured in the course of the conflict it authorized. 542 U.S. at 519 (plurality); *see id.* at 589 (Thomas, J., dissenting). Indeed, the plurality specifically relied upon the clarity of that authorization to reject the argument that Hamdi's detention was forbidden by a different statute providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Id.* at 517 (plurality) (alteration in original) (quoting 18 U.S.C. § 4001(a)).

Even if the AUMF were susceptible of more than one construction, petitioner has failed to demonstrate that the detention authority conferred by the AUMF raises any serious constitutional questions. *See Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) ("Statutes should be interpreted to avoid *serious* constitutional doubts, not to eliminate all possible contentions that the statute *might* be unconstitutional.") (emphasis in original) (citation omitted). Petitioner merely restates (Br. 32-33) the same arguments he advances in support of his substantive and procedural due-process claims. Those arguments, as set forth in greater detail below, lack merit.

II. Even Assuming *Arguendo* That The Due Process Clause Extends To Petitioner, His Detention Comports With Due Process.

Petitioner separately argues (Br. 19-30) that, whether or not his detention is statutorily authorized, he is entitled to habeas relief because his detention violates substantive and procedural due process. To reject that argument, the Court need not address the question whether petitioner has due-process rights. For even accepting for the sake of argument the mistaken premise that he does, the district court's judgment should be affirmed because petitioner's detention fully comports with whatever the Due Process Clause could be thought to contemplate in this context.

A. Substantive due process does not impose temporal limits on law-of-war detention.

Petitioner first argues (Br. 20-23) that his law-of-war detention while ongoing hostilities continue violates substantive due process. As noted, petitioner cannot reasonably dispute that the government's detention authority, conferred by the AUMF as informed by the laws of war, allows detention while hostilities continue. *Supra*, Part I. And petitioner does not contest that hostilities remain ongoing. *See Al-Alwi*, 901 F.3d at 298 ("Although hostilities have been ongoing for a considerable amount of time, they have not ended."). Petitioner nevertheless proposes that the Fifth Amendment imposes an unspecified limit on the length of law-of-war detention even while hostilities continue—a limit the government would transgress whenever a court determines that the duration of that detention "shocks the conscience." Br. 23 (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)). The clear implication of this

argument is that *no* amount of process could justify petitioner's continued detention, since substantive due process would forbid the government from detaining him at all.

Petitioner has not cited, and the government is not aware of, any case embracing the proposition that substantive due process requires the government to release enemy combatants before active hostilities have ended. Nor does such detention "shock the conscience" even if that standard were proper in the context of law-of-war detention, which it is not given the history and tradition of such detention. The purpose of law-of-war detention is to "prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518 (plurality). Such detention is a "fundamental and accepted . . . incident to war" that is accepted by "'universal agreement and practice.'" *Id.* (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). Neither precedent nor common sense suggests that the government's detention authority should dissipate simply because hostilities are protracted. *Id.* at 520-21; *Al-Alwi*, 901 F.3d at 297-98. Accepting that substantive due process entitles petitioner to release would effectively reward the Nation's enemies for continuing to fight. Indeed, the government would be forced to release enemy fighters whenever a court believed that a conflict had gone on too long. Nothing in the Fifth Amendment, even if applied to enemy combatants detained at Guantanamo, would compel these radical results.

Petitioner attempts (Br. 21-22) to justify his position that substantive due process precludes his detention with a trio of cases involving detention in contexts far

removed from this one. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (immigration); *Clark v. Martinez*, 543 U.S. 371, 384 (2005) (immigration); *United States v. Salerno*, 481 U.S. 739, 746-47 (1987) (pre-trial detention). All three cases are inapposite because they did not concern the detention of enemy combatants captured abroad during active hostilities. Indeed, *Zadvydas* supports the conclusion that petitioner's detention comports with due process.

In *Zadvydas*, the Court recognized that the indefinite detention of aliens seeking initial admission at the Nation's border, to effectuate their exclusion, does not violate the Constitution. 533 U.S. at 692-93 (discussing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which held that the indefinite detention of an excludable alien at Ellis Island, pursuant to the immigration laws, "did not deprive[] him of any . . . constitutional right"). But the Court construed the Immigration and Nationality Act to prohibit the government from effectuating through detention the removal of aliens who already lived inside the Nation's borders (and had thereby acquired due-process rights), when that detention was potentially indefinite and no longer served an immigration purpose. *Id.* In *Clark*, the Court then extended, as a statutory matter, *Zadvydas*'s construction of the Act to aliens excluded at the border. Both cases are thus fully consistent with the principle that the ongoing detention of an alien excluded at the border pursuant to federal immigration law comports with due process because its purpose—excluding the alien from entering the United States—continues to be served. It cannot be the case that aliens detained at Guantanamo Bay

as unprivileged enemy combatants should be entitled to more due-process protections than aliens detained at Ellis Island for immigration reasons, especially when the detention of aliens found to be enemy combatants continues to serve the purposes of law-of-war detention while hostilities continue.

Petitioner also asserts (Br. 22) that the Supreme Court's plurality decision in *Hamdi* held that indefinite detention is impermissible in the context of law-of-war detention. But the quoted passage actually states that "indefinite detention *for the purpose of interrogation* is not authorized" by the AUMF. *Hamdi*, 542 U.S. at 521 (plurality) (emphasis added). Petitioner has at no point alleged that the government is unlawfully lengthening his detention for the purpose of interrogating him.

Even if petitioner's reliance on these cases were not misplaced, petitioner's detention would not offend substantive due process because it is not indefinite. Petitioner is detained because he was part of forces associated with al Qaeda, *Ali v. Obama*, 736 F.3d 542, 551 (D.C. Cir. 2013), and remains detained because hostilities against al Qaeda remain ongoing. His detention, in short, is bounded by the duration of those hostilities—which the Nation's adversaries are themselves extending by continuing to fight—and continues to serve the purposes of the detention while hostilities are ongoing. *See Demore v. Kim*, 538 U.S. 510, 527-29 (2003); *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018). Nor is petitioner's detention "arbitrary and punitive," as he asserts (Br. 21). "Captivity in war is neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of

war from further participation in the war." *Hamdi*, 542 U.S. at 518 (plurality) (alterations and quotation marks omitted). Moreover, to ensure that military detention at Guantanamo remains "carefully evaluated and justified, consistent with [U.S.] national security and foreign policy," the Executive has chosen periodically to review whether certain Guantanamo detainees' continued confinement is necessary to protect against a continuing significant threat to the security of the United States. 76 Fed. Reg. 13,277, 13,277 (Mar. 7, 2011) (Exec. Order No. 13,567); *see* NDAA § 1023 (establishing procedures for periodic detention review of unprivileged alien enemy combatants detained at Guantanamo). Pursuant to that process, the Executive has exercised its discretion to transfer out of U.S. custody most of the individuals detained at Guantanamo at the time of the Executive Order's issuance. In petitioner's case, however, the Executive has consistently determined through multiple periodic reviews that petitioner poses a continuing and significant threat to the security of the United States, and therefore should not be transferred.

B. The procedures governing petitioner's habeas proceeding are consistent with procedural due process.

Petitioner separately argues (Br. 23-30) that, given the length of his detention, the government is required as a matter of procedural due process to prove the legality of his detention with "clear and convincing evidence," rather than by a preponderance of the evidence. But even assuming that petitioner has rights under the Due Process Clause, due process does not impose that heightened standard on habeas proceedings

for an alien detained as an unprivileged enemy combatant at Guantanamo Bay. A majority of the Supreme Court has agreed that, even in the context of a *U.S. citizen* detained as an enemy combatant *in the United States*, requiring the government merely to put forward "credible evidence" of the lawfulness of detention is consistent with due process. *Hamdi*, 542 U.S. at 533-34 (plurality); *id.* at 590 (Thomas, J., dissenting) (reasoning that no process beyond "good-faith executive determination" is required). The framework that is constitutionally permissible for U.S. citizens detained within U.S. sovereign territory is *a fortiori* sufficient for noncitizens detained at Guantanamo Bay. In light of *Hamdi*, this Court has held that the preponderance standard is constitutionally adequate. *Hussain v. Obama*, 718 F.3d 964, 967 n.3 (D.C. Cir. 2013); *Uthman v. Obama*, 637 F.3d 400, 403 n.3 (D.C. Cir. 2011); *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010). Those holdings control here.

Petitioner suggests (Br. 25-26) that the passage of time requires the government to satisfy a heightened evidentiary burden, rather than the evidentiary standard both the Supreme Court and this Court have held sufficient. But as this Court has previously recognized, in the context of a habeas petition filed by this very petitioner, "it is not the Judiciary's proper role to devise a novel detention standard that varies with the length of detention." *Ali*, 736 F.3d at 552.

Moreover, even setting aside that the length of petitioner's detention does not permit this Court to ignore binding precedent and address petitioner's constitutional

argument anew, the constitutional balance continues to weigh in the government's favor. That is because, petitioner's assertions (Br. 25-26) notwithstanding, the government's interest in preventing enemy combatants such as petitioner from returning to the battlefield while hostilities continue has not "grown weaker" over time. To the contrary, our "troops . . . remain in active combat with the Taliban and al Qaeda." *Al-Alwi*, 901 F.3d at 300; *see also* Letter from President Donald J. Trump (June 11, 2019), https://go.usa.gov/xyET6 (reporting to Congress that active hostilities "remain ongoing" against al Qaeda, the Taliban, and associated forces).

Furthermore, petitioner has failed to show that his preferred evidentiary standard would make any difference with respect to the lawfulness of his detention. This Court has already held that the record in petitioner's habeas case supplies "overwhelming" evidence of the legality of his detention. *Ali*, 736 F.3d at 545-46. Petitioner's boilerplate filings in district court, which were identical to those filed on behalf of ten other Guantanamo detainees, made no attempt to address this Court's analysis of the circumstances of his capture and his two-year deception of investigators. *See* Dkt. No. 1529 (corrected motion for order granting writ of habeas corpus); Dkt. No. 1528 (reply in support of motion). Only on appeal has petitioner attempted to explain how his theory—that a series of coincidences caused the government to mistakenly determine that he was an enemy combatant—could overcome the government's evidence under his preferred standard of review. That is

too late. *See Chichakli v. Tillerson*, 882 F.3d 229, 234 (D.C. Cir. 2018) (holding that arguments not presented to the district court are forfeited).

In any event, petitioner's belated explanation lacks merit. Petitioner mischaracterizes (Br. 23) this Court's prior decision as upholding his detention "primarily based on the fact [that] he stayed at a guesthouse [operated by al Qaeda] for about 18 days." In truth, this Court held that "at least six additional facts" supported a determination that petitioner is lawfully detained—including that petitioner's "housemates" included "the terrorist leader Abu Zubaydah" and "the senior leaders of Zubaydah's force"; that the safehouse contained "documents and equipment associated with terrorist operations"; that petitioner had "participated in Abu Zubaydah's terrorist training program"; and that petitioner "lied about his identity" and "maintained his false cover story for more than two years." *Ali*, 736 F.3d at 546. The accuracy of these findings was "undisputed" when the Court rejected his first habeas petition, *id.* at 546, 547, 548, 549, and their accuracy remains undisputed in this proceeding. The Court further upheld the district court's finding that petitioner had "traveled to Afghanistan after September 11, 2001" to "fight in the war against U.S. and Coalition forces." *Id.* at 548. Petitioner has not introduced any evidence that would undermine this "damning" finding. *See id.* (citation omitted).

Rather than contest these findings, petitioner asserts (Br. 27) that they are illegitimate because they were made against the backdrop of various decisions governing the adjudication of Guantanamo habeas petitions. *See Latif v. Obama*, 666

F.3d 746 (D.C. Cir. 2011) (recognizing that certain intelligence reports recounting interrogations are entitled to a presumption of accuracy); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010) (holding that, when deciding whether a detainee is legally detained, a court must consider the evidence as a whole and not piecemeal); *Al-Bihani*, 590 F.3d at 879 (holding that hearsay is always admissible in detainee habeas cases). Petitioner believes that the passage of time has rendered these decisions erroneous.

This argument should be rejected as well. To begin with, a panel of this Court lacks authority to overrule Circuit precedent. *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009) (per curiam) (citing *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc)). Moreover, petitioner has at no point explained how any of these precedents violate procedural due process, let alone based on the passage of time. And petitioner has also failed to show how overruling those decisions would affect his case. Petitioner's district court filings did not discuss how the evidentiary rules he prefers would apply to the facts this Court found sufficient to justify his detention. Petitioner's opening brief merely speculates, in a single paragraph (Br. 28), that those facts might be inadmissible or warrant less weight if the habeas court had been governed by different procedures—without ever specifying what those procedures might be.

Finally, petitioner asserts (Br. 29-30) that his continued detention cannot be justified under *any* evidentiary standard unless the government can prove that he would currently pose a "specific and articulable danger" if released. But the cases on

which petitioner relies arose in the context of pretrial detention and are inapposite. When fashioning procedures governing habeas petitions brought by Guantanamo detainees, "courts are neither bound by the procedural limits created for other detention contexts nor obliged to use them as baselines from which any departures must be justified." *Al-Bihani*, 590 F.3d at 877. "Detention of aliens outside the sovereign territory of the United States during wartime is a different and peculiar circumstance" that "cannot be conceived of as mere extensions of an existing doctrine." *Id.* Adopting a constitutionalized specific-and-articulable-danger standard would be especially inappropriate because the detention authority conferred under the AUMF is not contingent "[up]on whether an individual would pose a threat . . . if released"; instead, the Executive's detention authority turns exclusively "upon the continuation of hostilities." *Awad*, 608 F.3d at 11; *accord* Department of Defense, Law of War Manual § 8.14.3.1 (last updated Dec. 2016) ("For persons who have participated in hostilities or belong to armed groups that are engaged in hostilities, the circumstance that justifies their continued detention is the continuation of hostilities."), https://go.usa.gov/xymRX.

Furthermore, whether or not courts may assess a detainee's future dangerousness in other contexts, the question of petitioner's future dangerousness would not be justiciable in *this* context because it involves assessments of military conditions and national-security risks that the judiciary is ill-suited to address. *See Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (upholding an order removing an "enemy

alien[]" during wartime because such a detainee's "potency for mischief" is a "matter[] of political judgment for which judges have neither technical competence nor official responsibility"); *People's Mojahedin Org. of Iran v. Department of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (*People's Mojahedin I*) (holding that the government's finding that "the terrorist activity of [an] organization threatens . . . the national security of the United States" is "nonjusticiable").

III. The Due Process Clause Does Not, In Any Event, Extend To Petitioner.

Because petitioner's detention comports with both substantive and procedural due process, this Court need not and should not decide whether the Due Process Clause extends to individuals such as petitioner, an Algerian national who is not present in the sovereign territory of the United States but rather is detained as an unprivileged enemy combatant outside that territory. Because petitioner's detention complies fully with any due process requirements that might apply, a judicial ruling on the threshold question whether petitioner has any due-process rights would be at best a gratuitously broad constitutional holding (if this Court holds that petitioner has no due-process rights) and at worst an improper advisory opinion (if this Court holds that petitioner has some due-process rights, though not the ones he claims in this case). Should the Court nevertheless reach the question, however, it should hold—consistent with controlling precedent—that petitioner lacks due-process rights.

A. The Due Process Clause does not extend to unprivileged alien enemy combatants detained at Guantanamo under the AUMF.

The Supreme Court's "rejection of extraterritorial application of the Fifth Amendment" has been "emphatic." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that aliens arrested and imprisoned overseas could not seek writs of habeas corpus on the theory that their convictions had violated the Fifth Amendment. The Court explained that "[s]uch extraterritorial application . . . would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment." *Id.* at 784. Yet "[n]ot one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it." *Id.* (citation omitted); *accord United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The Court's holding in *Eisentrager* "establish[es]" that the "Fifth Amendment's protections" are "unavailable to aliens outside of our geographic borders." *Zadvydas*, 533 U.S. at 693 (citations omitted).

Consistent with this unbroken line of precedent, this Court has declined to extend the Due Process Clause to aliens "without property or presence" in the sovereign territory of the United States. *See, e.g.*, *People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1240-41 (D.C. Cir. 2003) (*People's Mojahedin II*)

(describing this Court's application of the property-or-presence test to determine whether various foreign entities could invoke the Due Process Clause to challenge their designation as foreign terrorist organizations); *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (reiterating that "non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections").

The principle that the Due Process Clause extends only to aliens who are present in the United States (or claim due-process rights in connection with property they own in the United States) precludes the Clause's extension to petitioner, an alien unprivileged enemy combatant detained at Guantanamo under the AUMF. Both the Supreme Court and this Court have recognized that, as a *de jure* matter, the U.S. Naval Station at Guantanamo Bay is not part of the sovereign territory of the United States. *Rasul v. Bush*, 542 U.S. 466, 471 (2004) (explaining that Cuba exercises "ultimate sovereignty" over the base); *Kiyemba v. Obama*, 555 F.3d 1022, 1026 n.9 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (per curiam), *reinstated in relevant part*, 605 F.3d 1046, 1047-48 (D.C. Cir. 2010) (per curiam), *cert. denied*, 563 U.S. 954 (2011) (same). This Court has therefore rejected due-process claims brought by identically situated detainees. *Kiyemba*, 555 F.3d at 1026-27 (holding that, because the Due Process Clause does not extend to Guantanamo detainees, a district court lacked authority to order the government to release seventeen detainees into the United States). And in *Al-Madhwani v. Obama*, the Court similarly declined to accept the "premise[]" that Guantanamo detainees have a "constitutional right to due process," before

concluding that even if they did, any procedural violation had been harmless. 642 F.3d 1071, 1077 (D.C. Cir. 2011). Because petitioner is indisputably an alien with no presence in the United States, the Due Process Clause does not extend to him with respect to his detention at Guantanamo. His substantive and procedural due process claims are therefore foreclosed.

The Court's decision in *Qassim v. Trump*, 927 F.3d 522, 2019 WL 2553829 (D.C. Cir. June 21, 2019), does not alter this conclusion. The question at issue in *Qassim* was whether *Kiyemba*'s recognition that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States," *id.* at *3 (quoting *Kiyemba*, 555 F.3d at 1026), constituted binding Circuit precedent as to "whether Guantanamo detainees enjoy procedural due process protections under the Fifth Amendment . . . in adjudicating their habeas petitions," *id.* at *4. The Court held that the answer was no, and construed *Kiyemba*'s holding to apply only to "substantive due process claim[s] concerning the scope of the habeas remedy." *Id.* According to the Court, the district court's decision rested on the premise that "*Kiyemba* [had] firmly closed the door on procedural due process claims for Guantanamo Bay detainees." *Id.* The Court thus reversed the district court's judgment and remanded for that court "to consider in the first instance whether and how the Due Process Clause" applied to the *Qassim* petitioner's procedural due process claims. *Id.*

Qassim casts no doubt on the settled principle that substantive due process does not extend to aliens without property or presence in the United States. In *Kiyemba*,

this Court applied that principle to reject a substantive due process claim regarding the scope of habeas relief. 555 F.3d at 1026-27; *accord* App. 22 (Tatel, J., concurring in denial of initial hearing en banc) ("Context . . . indicates that the [*Kiyemba*] court was referring to the right to substantive due process."). And *Qassim* had no occasion even to consider the question because the *Qassim* petitioner's constitutional claims sounded exclusively in procedural due process. 2019 WL 2553829, at *4. Thus, petitioner's substantive due process argument—that the Fifth Amendment independently limits the duration of his law-of-war detention even while hostilities remain ongoing and statutory authorization exists, and that *no* amount of process could justify his detention past that unspecified temporal limit, Br. 20-23—remains foreclosed.

Nor does *Qassim* undermine the vitality of the property-or-presence test as applied to procedural due process claims brought by foreign entities and persons. The Court declined to decide, or even to opine on, the merits of the *Qassim* petitioner's procedural-due-process claim. 2019 WL 2553829, at *6-7. The Court simply held that "Circuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions." *Id.* at *6. That uncertainty is resolved by the Supreme Court's categorical refusal to apply the Fifth Amendment extraterritorially. *Eisentrager*—the Court's leading case, and indeed directly addressing the detention of enemy combatants under the laws of war—did not parse whether petitioners' due process claims sounded in substance or procedure before rejecting them out of hand. And

the Court has continued to characterize *Eisentrager*'s holding broadly, never distinguishing between the Due Process Clause's substantive and procedural components. *Zadvydas*, 533 U.S. at 693; *Verdugo-Urquidez*, 494 U.S. at 269.

This Court's decisions in prior Guantanamo cases may not have answered "the specific question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions." *Qassim*, 2019 WL 2553829, at *6. Nevertheless, the Court's application of *Eisentrager* in *People's Mojahedin I* clearly resolves the question against petitioner. In that case, two foreign entities challenged the State Department's decision to designate them as "foreign terrorist organizations" pursuant to 8 U.S.C. § 1189. *People's Mojahedin I*, 182 F.3d at 18. The entities asserted that, because the State Department had failed to "giv[e] them notice and opportunity to be heard," their designations violated procedural due process. *Id.* at 22. Relying on *Eisentrager* and its progeny, this Court rejected the entities' constitutional claims. The Court explained that, because the Due Process Clause does not extend to aliens without property or presence in the United States, the entities "ha[d] no constitutional rights[] under the due process clause." *Id.* Thus, "[w]hatever rights [the entities] enjoy in regard to [their designations] are . . . statutory rights only." *Id.*

B. *Boumediene v. Bush* did not alter the principle that the Fifth Amendment does not apply to aliens such as petitioner.

Petitioner's only response to this body of precedent (Br. 12-14, 15-16) is to declare it irrelevant in light of the Supreme Court's decision in *Boumediene v. Bush*, 553

U.S. 723 (2008). *Boumediene*, however, held only that "Art. I, § 9, cl. 2 of the Constitution"—which prohibits Congress from suspending the privilege of the writ of habeas corpus—"has full effect at Guantanamo Bay" in the specific context of law-of-war detainees who had been detained there for an extended period. 553 U.S. at 771. The Court repeatedly emphasized that its holding turned on the unique role of the writ of habeas corpus in the separation of powers. *E.g.*, *id.* at 739 ("In the system conceived by the Framers the writ had a centrality that must inform proper interpretation of the Suspension Clause."); *id.* at 746 ("The broad historical narrative of the writ and its function is central to our analysis."); *id.* at 743 ("[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."). The Court concluded that treating "*de jure* sovereignty [as] the touchstone of habeas," even though the United States has *de facto* sovereignty over Guantanamo given its complete control, was "contrary to fundamental separation-of-powers principles." *Id.* at 755. Accordingly, *Boumediene* is consistent with the rule that the Fifth Amendment does not extend to aliens without property or presence in the United States.

Petitioner concedes that *Boumediene*, which "decided only that the Suspension Clause applies" at Guantanamo, did not itself confer Fifth Amendment rights on Guantanamo detainees such as himself. Pet. for Initial Hrg. En Banc 12. But petitioner suggests (Br. 12-14) that *Boumediene*'s "functional" standard—which the Court created to govern the Suspension Clause's extraterritorial scope—should govern the extraterritorial scope of other constitutional provisions, including the Due

Process Clause. Petitioner fails to appreciate the limits on *Boumediene*'s holding that the Supreme Court itself imposed. The Court expressly admonished that "our opinion does not address the content of the law that governs [the] detention" of Guantanamo detainees. *Boumediene*, 553 U.S. at 798.

Moreover, as *Boumediene* itself acknowledged, it is the *only* case extending a constitutional right to "noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty." 553 U.S. at 770. These caveats reflect the reality that, contrary to petitioner's suggestion that due process and habeas corpus are necessarily "intertwined" for purposes of extending due-process rights to Guantanamo detainees (Br. 13), the Suspension Clause secures "the common-law writ" of habeas corpus. In fact, the Clause was enacted "in a Constitution that, at the outset, had no Bill of Rights" or even a Due Process Clause. *Boumediene*, 553 U.S. at 739. Accordingly, *Boumediene*'s standard for determining whether the Suspension Clause extended to Guantanamo detainees does not apply *ipso facto* to the Due Process Clause and instead must be understood as limited to the Suspension Clause, in light of that Clause's centrality to the separation of powers. Indeed, this Court has previously recognized that "*Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions[] other than the Suspension Clause." *Rasul*, 563 F.3d at 529.

In any event, the Supreme Court has instructed that, "[i]f a precedent of th[e] Court has direct application in a case, yet appears to rest on reasons rejected in some

other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Given *Boumediene*'s express refusal to decide the extraterritorial scope of the substantive law governing detention, and given settled pre-*Boumediene* precedent holding that the Due Process Clause does not extend to aliens outside the sovereign territory of the United States—and specifically to alien law-of-war detainees—this Court must follow the latter body of case law even if "*Boumediene* has eroded the precedential force of *Eisentrager* and its progeny." *Rasul*, 563 F.3d at 529; *see also Kiyemba*, 555 F.3d at 1031 ("[T]he lower federal courts may not disregard a Supreme Court precedent even if they think that later cases have weakened its force.").

Petitioner suggests (Br. 16-17) that, in *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc), the government conceded that *Boumediene*'s functional standard governs the extraterritorial scope of all constitutional rights. But the government's brief made no such concession. Gov't Br. at *64, *Al Bahlul v. United States*, *supra*, 2013 WL 3479237. That brief stated only that the "Ex Post Facto Clause applies in military commission prosecutions" of certain Guantanamo detainees due to a "unique combination of circumstances" not present in this case. *Id.* at *64. Most significantly, the Ex Post Facto Clause was placed in Article I of the Constitution to constrain Congress's legislative authority by forbidding the criminal punishment of certain conduct. *Id.* And regardless, the Court's controlling *en banc* opinion in

Al Bahlul assumed without deciding that the Ex Post Facto Clause would apply, underscoring that "we are not to be understood as remotely intimating in any degree an opinion on the question." 767 F.3d at 18 (quotation marks omitted). *Al Bahlul*'s treatment of the Ex Post Facto Clause does not bear on the question presented here.

C. Petitioner's particular due-process claims are at a minimum barred because they are not sufficiently intertwined with vindicating the Suspension Clause.

Finally, the due-process claims asserted by petitioner would not be available even if the Due Process Clause applied in some manner to Guantanamo detainees. Petitioner's due-process claims are cognizable only insofar as the Suspension Clause compels their adjudication through a habeas petition, because Congress eliminated statutory jurisdiction for this Court to consider his due-process claims. *Boumediene*, 553 U.S. at 771; *see* 28 U.S.C. § 2241(e). The Suspension Clause, however, "protects only the fundamental character of habeas proceedings," not "all the accoutrements of habeas for domestic criminal defendants." *Al-Bihani*, 590 F.3d at 876.

Thus, even if the Fifth Amendment applied to Guantanamo detainees such as petitioner, he would not be entitled to raise the full panoply of due-process rights possessed by domestic detainees, but at most only those fundamental rights recognized at the time of the Founding as part of the common and statutory law redressable through a habeas petition—and particularly as they would be applied to unprivileged enemy combatants. Petitioner's due process arguments, in contrast, are premised on substantive and procedural rights that, at the very least, lack this historic

pedigree. Petitioner has thus failed to demonstrate how any of his due-process claims are sufficiently intertwined with vindicating the writ's constitutional core that they may be asserted in habeas under the Suspension Clause notwithstanding Congress's elimination of statutory jurisdiction. This conclusion is amplified by the fact that the Due Process Clause, at its core, is likewise aimed at protecting "those settled usages and modes of proceeding existing in the common and statute law of England." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856); *see Kerry v. Din*, 135 S. Ct. 2128, 2132-33 (2015) (plurality) (explaining that, "at the time of the Fifth Amendment's ratification, the words 'due process of law'" were coextensive with "the words 'by the law of the land'").

The government acknowledges that the Court has previously held that, when *Boumediene* concluded that the Suspension Clause barred application of 28 U.S.C. § 2241(e)(1) to preclude habeas petitions brought by unprivileged alien enemy combatants seeking to challenge the legality of their detention at Guantanamo, the *Boumediene* Court "necessarily restored the status quo ante[] in which detainees at Guantanamo had the right to" bring not only "core habeas claims" but a panoply of other habeas claims under the federal habeas statute. *Kiyemba v. Obama*, 561 F.3d 509, 512 n.2 (D.C. Cir. 2009); *see also Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014) (holding that the federal habeas statute encompasses conditions-of-confinement claims, even though they "undoubtedly fall outside the historical core of the writ"). The government continues to disagree with that result, which incorrectly

interprets *Boumediene* to have improperly invalidated applications of 28 U.S.C. § 2241(e)(1) to collateral habeas claims that are not actually protected by the Suspension Clause, and preserves the issue for further review.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,668 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 Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that, on July 17, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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