No. 11-413

In the Supreme Court of the United States

UTHMAN ABDUL RAHIM MOHAMMED UTHMAN,
PETITIONER

v.

BARACK H. OBAMA,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner is subject to military detention under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, as part of al-Qaida, where the evidence established that (1) petitioner attended a school in Yemen that was a recruiting ground for al-Qaida, (2) he traveled to Afghanistan along a route used by al-Qaida recruits, (3) he was seen at an al-Qaida guesthouse in Afghanistan, (4) he went into the mountains in the vicinity of Tora Bora during al-Qaida's last stand there, (5) he was captured in the company of a Taliban fighter and two of Usama bin Laden's bodyguards, all of whom he knew from school in Yemen, and (6) he put forward wholly incredible cover stories to explain his actions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 637 F.3d 400. The opinion of the district court (Pet. App. 19a-46a) is reported at 708 F. Supp. 2d 9.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2011. A petition for rehearing was denied on May 31, 2011 (Pet. App. 17a). The petition for a writ of certiorari was filed on August 29, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an alien detained at the United States Naval Station at Guantanamo Bay, Cuba, under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). He petitioned for a writ of habeas corpus, and the district court granted the writ and ordered his release. The court of appeals reversed. Pet. App. 1a-16a.

1. In response to the attacks of September 11, 2001, Congress enacted the AUMF, which authorizes "the President * * * to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. The President has ordered the Armed Forces to subdue both the al-Qaida terrorist network and the Taliban regime that harbored it in Afghanistan. Armed conflict with al-Qaida and the Taliban remains ongoing, and in connection with those military operations, some persons captured by the United States and its coalition partners have been detained at Guantanamo Bay.

2. Petitioner, an alien detained at Guantanamo Bay under the AUMF, filed a petition for a writ of habeas corpus. His petition was filed before this Court held in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), that district courts have jurisdiction to consider habeas petitions filed by Guantanamo detainees, and proceedings were stayed pending resolution of that jurisdictional issue. After *Boumediene*, the government filed a factual return to the habeas petition, and petitioner filed a traverse. See Pet. 4.

3. Following an evidentiary hearing, the district court granted the writ and ordered petitioner's release. Pet. App. 19a-46a.

The district court chose to "giv[e] credence to evidence that" petitioner, a Yemeni citizen who traveled to Afghanistan, "(1) studied at a school at which other men were recruited to fight for Al Qaeda; (2) received money for his trip to Afghanistan from an individual who supported jihad; (3) traveled to Afghanistan along a route also taken by Al Qaeda recruits; (4) was seen at two Al Qaeda guesthouses in Afghanistan; and (5) was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there" in late 2001. Pet. App. 43a. The court found that at least some of the men with whom petitioner was traveling had likely come from Tora Bora, an area in eastern Afghanistan in which al-Qaida forces had made "a last stand in their fight against the United States and its allies." *Id.* at 35a-36a & n.11. The court also found that petitioner had lied about the source of funding for his trip and that his account of his actions in Afghanistan was "less than entirely believable." *Id.* at 43a n.16.

The district court nevertheless held that petitioner was not detainable under the AUMF. The "key question," in the court's view, was "whether an individual receive[s] and execute[s] orders from the enemy force's combat apparatus." Pet. App. 21a (quoting *Gherebi* v. *Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009)) (brackets in original). The court concluded that the evidence in this case was insufficient to establish "by a preponderance of the evidence that [petitioner] received and executed orders from Al Qaeda." *Id.* at 44a.

4. The court of appeals reversed. Pet. App. 1a-22a. It held that the district court had erred in concluding that whether the AUMF authorized petitioner's detention turned on whether he had received or executed orders from al-Qaida. That "command structure test," the court of appeals explained, "does not reflect the full scope of the Executive's detention authority under the AUMF." *Id.* at 5a. Instead, the court held that "the determination of whether an individual is 'part of' al-Qaida must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization." *Ibid.* (internal quotation marks omitted). Although "demonstrating that someone is part of al Qaeda's command structure is *sufficient* to show that person is part of al Qaeda," "it is not *necessary*." *Id.* at 6a.

The court of appeals held that the undisputed evidence was "more than sufficient to show that [petitioner] more likely than not was part of al Qaeda." Pet. App. 8a. Petitioner was captured in December 2001 "in the vicinity of Tora Bora," "an isolated, mountainous area" that was "widely known" to be a battleground in the fight between al-Qaida and the United States, and in which "few, if any noncombatants" were present. *Id.* at 8a-9a. In addition, petitioner was traveling with a small group of men, two of whom confessed to being al-Qaida members and bodyguards for Usama bin Laden, and one of whom fought with the Taliban against the United States. *Id.* at 9a.

The court of appeals observed that "the narrative of [petitioner's] journey before his capture suggests that it was not an accident that he ended up near Tora Bora on December 15, 2001, in [that] company." Pet. App. 10a.

Petitioner admitted that he had attended a religious school in Yemen that the district court found to be a recruiting ground for al-Qaida. *Id.* at 10a-11a, 15a. He also admitted that the bin Laden bodyguards and the Taliban fighter with whom he was captured were men whom he knew from that school. *Ibid.* The court of appeals reasoned that petitioner's "long association with those three fellow travelers, dating back to their shared time at an al Qaeda recruiting ground, renders it rather unlikely that their travel together near al Qaeda's embattled stronghold at Tora Bora in December 2001 was a coincidental reunion of old schoolmates." *Id.* at 11a.

The court of appeals further noted that petitioner had traveled to Afghanistan along a route taken by al-Qaida recruits. Pet. App. 11a. He lied about who paid for his trip, a fact that the court held made his "route to Afghanistan * * * even more suspicious." *Id.* at 12a. Additionally, once inside Afghanistan, petitioner was seen at an al-Qaida guesthouse. *Ibid.* Based on its examination of record evidence about al-Qaida guesthouses, the court concluded that "[i]t is highly unlikely that a visitor to Afghanistan would end up at an al Qaeda guesthouse by mistake." *Id.* at 13a.

In addition, the court of appeals concluded that petitioner's account of his actions "at best strains credulity." Pet. App. 15a. Petitioner claimed that he went to Afghanistan to teach the Koran at a school in Kabul, but "he does not remember the names of any of his students and cannot describe his school." *Id.* at 13a. Moreover, "[u]nlike many civilians living in Kabul at the time," petitioner remained in the city as the United States began its attack against the Taliban, choosing to leave only after the Taliban lost control of Kabul. *Id.* at 13a-14a. Although petitioner claimed that he wanted to flee to

Pakistan when he left Kabul, petitioner did not take the eastward road that leads directly to Pakistan. *Id.* at 14a. Instead, "he fled south," where, according to petitioner, "he chanced to meet up with schoolmates from his school days in Yemen" in the mountains near Tora Bora, and those schoolmates "happened to be" two bin Laden bodyguards and a Taliban fighter. *Ibid.*

The court of appeals acknowledged that "it remains *possible* that [petitioner] was innocently going about his business and just happened to show up in a variety of extraordinary places—a kind of Forrest Gump in the war against al Qaeda." Pet. App. 15a. But the court concluded that "the far more likely explanation for the plethora of damning circumstantial evidence is that he was part of al Qaeda." *Ibid.*

ARGUMENT

Petitioner argues (Pet. 11-17) that an individual who was part of al-Qaida may not be detained under the AUMF in the absence of a showing that he was "within the command structure" (Pet. 12) of that organization. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The lower courts have properly performed the task that this Court assigned them in *Boumediene* v. *Bush*, 553 U.S. 723 (2008)—they have developed "procedural and substantive standards," *id.* at 796, for habeas proceedings for military detainees. This Court has declined to review numerous decisions applying those standards, and there is no reason for a different result in this case.

As relevant here, the court of appeals has repeatedly held that an individual may be detained under the AUMF if he was part of al-Qaida at the time of his capture. See, *e.g.*, *Al-Adahi* v. *Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010) ("The government may * * * hold at Guantanamo and elsewhere those individuals who are 'part of' al-Qaida, the Taliban, or associated forces."), cert. denied, 131 S. Ct. 1001 (2011); accord *Al Odah* v. *United States*, 611 F.3d 8, 10 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1812 (2011); *Awad* v. *Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011); *Al-Bihani* v. *Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011).

The court of appeals has emphasized that the determination whether a person is part of al-Qaida should be made "on a case-by-case basis * * * using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization." *Salahi* v. *Obama*, 625 F.3d 745, 751-752 (D.C. Cir. 2010) (quoting *Bensayah* v. *Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010)). That test appropriately takes account of the nature of al-Qaida. In particular, many of al-Qaida's operations are carried out by terrorist cells made up of volunteers acting with significant autonomy but taking direction from al-Qaida leadership. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2109 (2005). Moreover, individuals who are part of al-Qaida typically seek to hide their association. They often do not wear uniforms or carry "official membership card[s]," and they may purposefully attempt to disguise their connection to the organization. *Al-Bihani*, 590 F.3d at 873; see Bradley & Goldsmith, 118 Harv. L. Rev. at 2113. Accordingly, the fact "[t]hat an individual oper-

ates within al Qaeda's formal command structure is surely sufficient but is not necessary to show he is 'part of' the organization." *Bensayah*, 610 F.3d at 725; accord *Awad*, 608 F.3d at 11. Instead, "[i]ndicia other than the receipt and execution of al Qaeda's orders may prove 'that a particular individual is sufficiently involved with the organization to be deemed part of it.'" Pet. App. 6a (quoting *Bensayah*, 610 F.3d at 725). Under that functional test, proof of attending an al-Qaida training camp, staying at al-Qaida guest houses that were not open to the public, and travel and close association with other al-Qaida fighters are highly probative of whether a detainee is properly deemed to have been part of the group. See, *e.g.*, *Al Alwi* v. *Obama*, 653 F.3d 11, 17 (D.C. Cir. 2011); *Al-Madhwani* v. *Obama*, 642 F.3d 1071, 1075 (D.C. Cir. 2011), petition for cert. pending, No. 11-7020 (filed Oct. 24, 2011); *Barhoumi* v. *Obama*, 609 F.3d 416, 427 (D.C. Cir. 2010); *Awad*, 608 F.3d at 9-10.

Conversely, the court of appeals has correctly recognized that not everyone having some association with al-Qaida is "part of" that organization. For example, the court has held that "the purely independent conduct of a freelancer is not enough" to show that he is "part of" al-Qaida. *Salahi*, 625 F.3d at 752 (quoting *Bensayah*, 610 F.3d at 725). Similarly, "intention to fight is inadequate by itself to make someone 'part of' al Qaeda." *Awad*, 608 F.3d at 9. At bottom, the inquiry is whether "a particular individual is sufficiently involved with the organization to be deemed part of it." *Bensayah*, 610 F.3d at 725.

2. In this case, the court of appeals engaged in a careful analysis and determined that the district court's factual findings and other uncontested evidence demonstrated that petitioner was part of al-Qaida. Petitioner

"was captured in December 2001 in the vicinity of Tora Bora, an isolated, mountainous area where al Qaeda forces had gathered to fight the United States and its allies." Pet. App. 7a. Moreover, "when captured, [petitioner] was traveling with a small group of men, two of whom were al Qaeda members and bodyguards for Osama bin Laden and one of whom was a Taliban fighter." *Ibid.* Petitioner's "journey began at a religious school in Yemen where al Qaeda had successfully recruited fighters." *Ibid.* The bin Laden bodyguards and the Taliban fighter who were captured with petitioner had all attended the same school and met petitioner there. *Id.* at 7a, 10a. Petitioner traveled to Afghanistan along a route used by al-Qaida recruits and lied to hide the fact that someone else paid for his trip. *Id.* at 7a. Petitioner was seen at an al-Qaida guesthouse in Afghanistan, a place he would be unlikely to be "by mistake." *Id.* at 7a, 13a. Finally, his "explanation of why he went to Afghanistan and why he was traveling in a small group that included al Qaeda members and a Taliban fighter near Tora Bora during the battle there involves a host of unlikely coincidences." *Id.* at 7a-8a.

Petitioner does not challenge any of those factual determinations but instead argues (Pet. 11) that the evidence is insufficient because the government did not "specify" the "functions" he performed for al-Qaida—that is, it did not identify any particular orders that he executed. But the AUMF does not require such evidence, nor would it be reasonable to do so in light of al-Qaida's hidden and frequently shifting organizational framework. Rather, the circumstances of petitioner's capture and the events leading up to it, combined with his unlikely account of his actions in Afghanistan, demonstrate that he is more likely than not part of al-Qaida,

even without evidence that he received and executed a formal order.

3. Petitioner suggests (Pet. 13) that the AUMF does not permit his detention without evidence that he actually participated in battle. Petitioner failed to preserve that argument in the court of appeals, and it lacks merit in any event.

The AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." AUMF § 2(a), 115 Stat. 224. The President has determined that al-Qaida was responsible for those attacks and, consistent with that statutory authorization, has since pursued an armed conflict against al-Qaida. The AUMF therefore authorizes the detention of individuals who are part of al-Qaida.

Law-of-war principles properly inform the construction of the AUMF, see *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion), and thus the understanding of what actions are "necessary and appropriate" for the President to undertake in waging war against al-Qaida. Those principles leave no doubt that individuals who are part of an enemy force when captured may be detained, whether or not they personally engaged in hostilities. In *Ex parte Quirin*, 317 U.S. 1 (1942), this Court explained that individuals "who associate themselves with the military arm of the enemy government * * * are enemy belligerents within the meaning of the * * * law of war," even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Id.* at 37-38; see *id.* at 37 ("It is

without significance that petitioners were not alleged to have borne conventional weapons."); cf. Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Art. 4(A)(1), Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138 (contemplating detention of "[m]embers of the armed forces of a Party to the conflict, as well as militias or volunteer corps forming part of such armed forces," without making a distinction based on whether they have engaged in combat).

Petitioner further errs in suggesting (Pet. 13) that the Executive's detention authority in this case is dependent upon making an individualized showing that petitioner would re-engage in hostilities if released. As this Court made clear in *Hamdi*, the AUMF permits the detention of enemy belligerents for the duration of the conflict. 542 U.S. at 518, 521 (plurality opinion). Consistent with *Hamdi*, the court of appeals has recognized that whether such a detainee "would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF." *Awad*, 608 F.3d at 11.

Of course, the Government has no interest in holding any detainee longer than necessary. Accordingly, on January 22, 2009, the President issued an Executive Order providing for review of the appropriate disposition of Guantanamo Bay detainees by an interagency group of cabinet-level participants led by the Attorney General. Exec. Order No. 13,492, 3 C.F.R. 203 (2010). The Executive Order established a rigorous process to determine appropriate dispositions for the Guantanamo Bay detainees, including "whether it is possible to transfer or release * * * individuals [detained at Guan-

tanamo Bay] consistent with the national security and foreign policy interests of the United States." *Id.* § 4(c)(2), at 205. Those determinations, however, are not subject to judicial review, and whether the transfer or release of petitioner would be consistent with national security is a question for the Executive Branch and not the courts. Cf. *Ludecke* v. *Watkins*, 335 U.S. 160, 170 (1948).

Petitioner's argument is also flawed because it proceeds from the incorrect factual premise that the evidence did not place him at the battlefield. In fact, petitioner was captured in December "in the vicinity of Tora Bora," "an isolated, mountainous area" that was "widely known" to be a battleground in the fight between al-Qaida and the United States. Pet. App. 7a-8a. And when he was captured, he was with bin Laden bodyguards and a Taliban fighter at a time when "few, if any noncombatants would have been in the vicinity." *Id.* at 8a-9a.

4. Finally, there is no basis for petitioner's assertion that the D.C. Circuit "is effectively 'abstaining from'" review of military detention under the AUMF. Pet. 14 (quoting *Boumediene*, 553 U.S. at 771). Far from "abstaining" from the exercise of its responsibility to review petitioner's case, the court engaged in a detailed analysis of the evidence and concluded that petitioner "more likely than not was part of al Qaeda." Pet. App. 16a.

The court of appeals has likewise engaged in careful analysis in other cases. Petitioner acknowledges (Pet. 15) that the court has vacated and remanded the district court's judgment in two of the cases in which the government prevailed in the district court. Nor is bringing a habeas petition "an exercise in futility" (*ibid.*), as peti-

tioner asserts. The government has previously explained to this Court—and it remains true today—that every Guantanamo Bay detainee with a final, non-appealable order granting a habeas petition has been repatriated, resettled to another country, or offered resettlement and declined. See Gov't Br. in Opp. at 14 n.8, *Kiyemba* v. *Obama*, 131 S. Ct. 1631 (2011) (No. 10-775).

Petitioner's only support for his assertion that the court of appeals is not properly performing its task under *Boumediene* (Pet. 15-16) comes from statements by judges who were not on the panel in this case. The cited opinion reflects disagreement over whether a "some evidence" standard should be applied instead of the more-demanding "preponderance of the evidence" standard. See *Esmail* v. *Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring). In all of its post-*Boumediene* decisions, however, the court of appeals has expressly applied the preponderance standard, as it did here. Pet. App. 6a & n.3. The statements to which petitioner refers therefore have no relevance to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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