No. 13-638

In the Supreme Court of the United States

ABDUL AL QADER AHMED HUSSAIN, 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 government carried its burden to demonstrate that petitioner was more likely than not part of al Qaeda or Taliban forces at the time of his capture in 2002 and therefore is lawfully detained under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 718 F.3d 964. The opinion of the district court (Pet. App. 23a-50a) is reported at 821 F. Supp. 2d 67.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2013. A petition for rehearing was denied on August 21, 2013 (Pet. App. 52a-53a). The petition for a writ of certiorari was filed on November 19, 2013. 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. He petitioned for a writ of habeas corpus and the district court denied the writ. The court of appeals affirmed. Pet. App. 1a-20a.

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 Qaeda terrorist network and the Taliban regime that harbored it in Afghanistan. Armed conflict with al Qaeda 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.

In Section 1021 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1562, Congress "affirm[ed]" that the authority granted by the AUMF includes the authority to detain, "under the law of war," any "person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."

2. Petitioner, an alien detained at Guantanamo Bay under the AUMF, filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. The district court held a four-day hearing, during which petitioner testified live via vid-

eoconference. The court held that a preponderance of the evidence established that petitioner was part of al Qaeda or Taliban forces at the time of his capture and therefore that he is lawfully detained under the AUMF. Pet. App. 42a, 50a.

a. In denying petitioner's habeas petition, the district court declined to rely on a significant quantity of evidence that the government had presented at the evidentiary hearing, including interviews of petitioner and other detainees. Pet. App. 44a n.12. Instead, the district court relied exclusively on the stipulated facts, petitioner's sworn declarations, and petitioner's own habeas testimony. *Ibid.*

That subset of the evidence established that petitioner is a Yemeni native who traveled from Yemen to Karachi, Pakistan in 1999. Pet. App. 25a-27a. From Karachi, petitioner traveled to Quetta, Pakistan. *Id.* at 27a. He was in Quetta for approximately three months, where he stayed at a mosque associated with Jama'at al-Tablighi, a charitable organization that the U.S. government has designated as one that provides financial and operational support to al Qaeda. *Id.* at 2a, 10a. From there he travelled to Kabul, Afghanistan, by way of Kandahar, Afghanistan, with the assistance of a stranger who he had met at the mosque. *Id.* at 28a-29a. The route from Karachi to Kabul via Quetta and Kandahar is a "common al Qaeda route." *Alsabri* v. *Obama*, 684 F.3d 1298, 1302 (D.C. Cir. 2012) (citation omitted). Upon arriving in Kabul, petitioner never saw the person who facilitated his travels into Afghanistan again. Pet. App. 30a.

Petitioner stayed in Kabul for approximately three months, after which he returned to the Jama'at al-Tablighi mosque in Quetta. Pet. App. 30a-31a. He

then returned to Kabul for a few more months, after which he again went back to the Quetta mosque. *Id.* at 31a.

Petitioner made a third and final trip to Kabul around November 2000. Pet. App. 31a. There, petitioner testified, he met three Taliban fighters at a market, who invited him to accompany them to a war-torn area north of Kabul near the battle lines of fighting between the Taliban and the Northern Alliance. *Id.* at 32a. Petitioner admitted that a Taliban fighter provided him with an AK-47 assault rifle and taught him how use to use it. *Id.* at 32a-33a. He testified that he lived with the fighters near the front lines of the battlefield for approximately ten months. *Id.* at 33a.

In August 2001, petitioner left the area near the fighting and returned to Kabul. Pet. App. 33a. In November 2001, Taliban-controlled Kabul fell to U.S.-supported Northern Alliance forces, causing a southeastward exodus of Taliban and al Qaeda fighters retreating toward the Pakistani border and into Pakistan. C.A. J.A. 639, 644. At approximately this time, petitioner testified, he also left Afghanistan for Pakistan, entered Pakistan unlawfully, and traveled to Lahore, Pakistan, where, he said, his goal was to procure a flight back to Yemen. Pet. App. 34a. Petitioner stayed at another Jama'at al-Tablighi mosque in Lahore. *Ibid.*

Instead of leaving Pakistan, as he testified he had intended to do, petitioner travelled southwest to Faisalabad, Pakistan, purportedly because he now had decided to enroll in a religious university there. Pet. App. 34a-35a. He never enrolled in the university, but rather began living in a house in Faisalabad with a

number of other occupants. *Id.* at 35a-36a. Petitioner was captured by Pakistani forces in Faisalabad in March 2002 after spending approximately six months in Pakistan. *Id.* at 3a & n.2. He was then transferred to United States custody at Guantanamo Bay.

b. From these facts, the district court concluded that it was more likely than not that petitioner was part of al Qaeda or Taliban forces at the time of his capture and thus is detainable under the AUMF. Pet. App. 42a, 50a. The court rested that conclusion on three factors. See *id.* at 44a-49a.

First, the court cited petitioner's extended stays at two different Jama'at al-Tablighi mosques. Second, it found that "petitioner's receipt of a Kalashnikov rifle from three Taliban guards in an area near the lines of battle between the Taliban and the Northern Alliance, as well as the training he received from one of the Taliban guards regarding how to use the weapon, constitutes probative, if not conclusive, evidence supporting the petitioner's detention." Pet. App. 44a-45a.

Finally, the court found petitioner's sworn testimony—in which he portrayed his travels between Pakistan and Afghanistan and his time with the Taliban as part of an attempt to do charitable work and to engage in other benign activities—to be replete with fabrications. The court cited, for example, petitioner's claim that the Taliban had given him an AK-47 assault rifle "to protect himself from wild animals and potential thieves." Pet. App. 46a. The court found that assertion "inexplicable" because "'it would be beyond any sense of reason . . . that [a] Taliban [guard] would allow a noncombatant to be present in' an area near the battle lines with a deadly weapon." *Id.* at 47a (quoting *Sulayman* v. *Obama*, 729 F. Supp. 2d 26, 51-

52 (D.D.C. 2010)) (alterations in original). Similarly, the court found petitioner's explanations for his post-September 11 actions "nonsensical." *Ibid.* For example, although petitioner claimed to have travelled to Faisalabad to enroll in a university, he never made any attempt to enroll. *Id.* at 46a, 48a-49a. The district court concluded that petitioner's lies about his reasons for travelling between Pakistan and Afghanistan were "damning" evidence against him. *Id.* at 46a.

The district court therefore held that "the stipulated facts, the petitioner's sworn declarations, and [petitioner's] testimony" were sufficient to establish the government's case against petitioner and that petitioner had "failed to put forth persuasive evidence in rebuttal." Pet. App. 44a n.12, 50a. The court accordingly concluded that it was unnecessary to consult the "numerous summary interrogation reports and intelligence information reports" the government had presented in opposition to petitioner's request for habeas relief. *Id.* at 44a. n.12.

3. The court of appeals affirmed.

a. The court of appeals first observed that in opposing a request for habeas relief by a person detained at Guantanamo Bay, the government bears the burden of proving "by a preponderance of the evidence, that the detainee was part of al Qaeda, the Taliban, or associated forces at the time of his capture." Pet. App. 4a (citing six decisions of the D.C. Circuit). But the court rejected petitioner's contention "that the government must show that [a detainee] personally picked up arms and engaged in active hostilities against the United States," noting that it had repeatedly rejected that argument in prior decisions. *Id.* at 5a-6a. "[P]ermitting detention only for those detain-

ees who engaged in active hostilities," the court explained, "would be inconsistent with the realities of 'modern warfare,' in which 'commanding officers rarely engage in hand-to-hand combat; supporting troops behind the front lines do not confront enemy combatants face to face; [and] supply-line forces, critical to military operations, may never encounter their opposition.'" *Id.* at 6a (quoting *Khairkhwa* v. *Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012)). The court also explained that it would review the district court's factual findings for clear error but would review de novo the district court's determination that petitioner was lawfully detained under the AUMF. *Id.* at 3a.

Applying those standards to the evidentiary record, Pet. App. 3a, the court of appeals held that petitioner was more likely than not part of al Qaeda or Taliban forces at the time of his capture. *Id.* at 7a. Petitioner, the court of appeals underscored, "does not contest that he lived near the battlefront with Taliban warriors who gave him an AK-47 and taught him how to use it." *Ibid.* The court explained that evidence that petitioner "bore a weapon of war while living side-by-side with enemy forces at least invites—and may very well compel—the conclusion that he was loyal to those forces." *Id.* at 8a. The court of appeals also pointed to the district court's finding that petitioner had fabricated an elaborate cover story to explain his movements through Pakistan following his ten-month stay near the Taliban front lines. *Id.* at 9a-10a. Such false cover stories, the court held, "are evidence—often strong evidence—of guilt." *Id.* at 10a (quoting *Al-Adahi* v. *Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1001 (2011)).

In addition, the court of appeals relied on petitioner's "extended stays" at mosques associated with an "Islamic missionary organization that is a Terrorist Support Entity closely aligned with al Qaeda." Pet. App. 10a (quoting *Almerfedi* v. *Obama*, 654 F.3d 1, 6 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 2739 (2012)). The court cautioned that "evidence of association with the [Jama'at al-Tablighi] mosques alone 'presumably would not be sufficient to carry the government's burden.'" *Ibid.* (quoting *Almerfedi*, 654 F.3d at 6). But it explained that his "extended affiliation with the group over time is probative" of his membership in al Qaeda or the Taliban. *Ibid.* (internal quotation marks and citation omitted).

"Having been 'part of' enemy forces while living in northern Afghanistan at least through August 2001," the court of appeals further explained, petitioner "ma[de] no argument that he affirmatively cut those ties before his capture only six months later." Pet. App. 11a. The court could find "[n]othing in the record show[ing] * * * concrete, affirmative steps to disassociate" with enemy forces. *Ibid.* "In fact," the court of appeals observed, "the evidence points the other way": "After living for 10 months at the battlefront in Afghanistan with Taliban guards who armed him, [petitioner] fled to Pakistan, where he remained until his capture shortly thereafter, and, when asked to explain his actions in the interim, [petitioner] lied to the court." *Id.* at 12a.

In light of the evidence in the record, the court of appeals held that "the preponderance standard is easily met here." Pet. App. 5a n.3.

b. Judge Edwards concurred in the judgment. He found "unassailable" the panel's conclusion that peti-

tioner was detainable under established precedent, but he believed that precedent to "conflate[] the preponderance of the evidence and substantial evidence standards." Pet. App. 19a. On his view of the evidentiary record, the government had "failed to carry th[e] burden" of establishing its "case against [petitioner] by a preponderance of the evidence." *Ibid.*

DISCUSSION

The court of appeals correctly concluded that the government had carried its burden of establishing by a preponderance of the evidence that petitioner was part of al Qaeda or Taliban forces at the time of his capture. Most clearly, petitioner admitted to carrying an AK-47 assault rifle during an extended stay with Taliban forces near the front lines of a battlefield in Afghanistan. The court of appeals' case-specific determination does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.[1]

1. As the court of appeals recognized, an individual may be detained under the AUMF if he was part of al Qaeda or Taliban forces at the time of his capture—a point that petitioner does not now dispute. See Pet. App. 4a; see also, *e.g.*, *Uthman* v. *Obama*, 637 F.3d 400, 401-402 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 2739 (2012); *Al-Adahi* v. *Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1001 (2011); *Awad* v. *Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011); accord NDAA § 1021(a)

[1] This Court has previously denied detainees' petitions raising similar objections to the D.C. Circuit's application of the preponderance-of-the-evidence standard. See *Almerfedi* v. *Obama*, No. 11-683 (June 11, 2012); *al-Madhwani* v. *Obama*, No. 11-7020 (June 11, 2012); *Uthman* v. *Obama*, No. 11-413 (June 11, 2012).

and (b)(2), 124 Stat. 1562 ("affirm[ing] * * * the authority of the President to * * * detain" any "person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners").

The D.C. Circuit has held that the determination whether a person is part of al Qaeda or Taliban forces 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." *Uthman*, 637 F.3d at 403 (citation omitted). Proof that an individual engaged in fighting, see Pet. App. 5a (citing *Khairkhwa* v. *Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012)), or that an individual was part of either organization's formal "command structure," *ibid.* (citing *Awad*, 608 F.3d at 11), is sufficient, but not necessary, to demonstrate an individual is part of enemy forces. As the court of appeals explained, "permitting detention only for those detainees who engaged in active hostilities would be inconsistent with the realities of 'modern warfare,'" in which "commanding officers rarely engage in hand-to-hand combat; supporting troops behind the front lines do not confront enemy combatants face to face; [and] supply-line forces, critical to military operations, may never encounter their opposition." *Id.* at 6a (quoting *Khairkhwa*, 703 F.3d at 550).

Under the D.C. Circuit's functional test, proof that a detainee travelled with or maintained a close association with al Qaeda or Taliban fighters, carried a weapon issued by al Qaeda or the Taliban, or received training by al Qaeda or the Taliban is highly probative of whether the detainee is properly deemed to have

been part of one of those groups. See, *e.g.*, *Suleiman* v. *Obama*, 670 F.3d 1311, 1314, cert. denied, 133 S. Ct. 353 (2012); *Alsabri* v. *Obama*, 684 F.3d 1298, 1306 (2012); *Al Alwi* v. *Obama*, 653 F.3d 11, 17 (2011), cert. denied, 132 S. Ct. 2739 (2012); *Al-Madhwani* v. *Obama*, 642 F.3d 1071, 1075 (2011), cert. denied, 132 S. Ct. 2739 (2012). But the D.C. Circuit has also recognized that not everyone having some association with al Qaeda or Taliban forces is "part of" either organization. "'[T]he purely independent conduct of a freelancer,'" it has explained, "'is not enough' to establish that an individual is 'part of' al-Qaida." *Salahi* v. *Obama*, 625 F.3d 745, 752 (2010) (quoting *Bensayah* v. *Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010)). Similarly, the D.C. Circuit has held that "intention to fight is inadequate by itself to make someone 'part of' al Qaeda." *Awad*, 608 F.3d at 9. Rather, the ultimate question in every case is whether "a particular individual is sufficiently involved with the organization to be deemed part of it," an inherently case-specific inquiry that will turn on the particular evidence presented by the government. *Uthman*, 637 F.3d at 403 (quoting *Bensayah*, 610 F.3d at 725).

In holding that the government had met its burden in this case, the court of appeals correctly applied its established functional test to the evidence considered by the district court. Of particular significance, petitioner admitted that he chose to accompany Taliban guards to an area near the front lines of fighting between the Taliban and the Northern Alliance. See Pet. App. 7a. There, a Taliban fighter provided petitioner with an AK-47 assault rifle and taught him how to use it. *Ibid.* Petitioner stayed in this war-torn area for ten months with Taliban fighters, and he did not

leave Afghanistan until after the September 11, 2001 attacks. *Id.* at 7a, 9a. That evidence powerfully demonstrated that petitioner is subject to detention under the AUMF. As the court of appeals observed, "[e]vidence that [petitioner] bore a weapon of war while living side-by-side with enemy forces on the front lines of a battlefield at least invites—and may very well compel—the conclusion that he was loyal to those forces." *Id.* at 7a-8a.[2] Especially considered in conjunction with petitioner's non-credible account of the reasons for his travels and his repeated, extended stays in Jama'at al-Tablighi mosques, the court of appeals correctly held that the government had established "by a preponderance of the evidence[] that [petitioner] was part of al Qaeda, the Taliban, or associated forces at the time of his capture." *Id.* at 4a.

2. Petitioner does not argue that the court of appeals articulated the wrong legal standard for determining whether he was properly detained. To the contrary, he apparently agrees with the court of appeals that the government must "show[], by a preponderance of the evidence, that the detainee was part of al Qaeda, the Taliban, or associated forces at the time of his capture." Pet. App. 4a; see Pet. 7 & n.1. But he contends that the court of appeals "effectively" ap-

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[2] See *Alsabri*, 684 F.3d at 1306 ("[I]t is difficult to believe that Taliban fighters would allow an individual to infiltrate their posts near a battle zone unless that person was understood to be a part of the Taliban.") (citation and internal quotation marks omitted); *Suleiman*, 670 F.3d at 1313-1314 ("Taliban fighters would be unlikely to allow an armed" individual "to twice visit their staging area" for a total of 19 days near the battle lines "unless he was part of them."); see also *Al-Madhwani*, 642 F.3d at 1074.

plied a different standard than it articulated. Pet. 6, 8, 13. His argument lacks merit.

a. Petitioner asserts (Pet. 7-11), that the court of appeals, "[d]espite recognizing preponderance of the evidence as the governing standard * * * effectively applied the less rigorous substantial evidence standard" to the question whether petitioner is detainable. Pet. 8. His principal basis for that assertion is that the court of appeals did not require any "findings that [petitioner] used the gun, engaged in battle, or otherwise supported the activities of al Qaeda or the Taliban." Pet. 10. But as the court of appeals correctly recognized, such findings are not required to demonstrate that an individual is "part of" enemy forces; any other view would be inconsistent with the realities of modern warfare. See pp. 9-11, *supra*.

Petitioner also faults (Pet. 10-11) the court of appeals for relying on his repeated visits to mosques associated with Jama'at al-Tablighi, arguing that "nothing in the District Court's findings distinguishes [petitioner] from the thousands of other Muslim travelers who regularly stayed at [Jama'at al-Tablighi] mosques in the relevant time frame." Pet. 11. But the court of appeals was careful to note that his stays were probative, not necessarily dispositive, and to emphasize that it was his "extended affiliation with the group over time" that weighed in favor of his affiliation with al Qaeda or the Taliban. Pet. App. 10a. That holding did not establish a "'categorical rule' that 'any contact with the [Jama'at al-Tablighi] organization suggests an affiliation with al Qaeda.'" Pet. 11 (quoting Pet. App. 11a); see Pet. App. 11a ("[Petitioner] misstates the district court's analysis. As we have just shown, the district court did not rely on such a categorical

rule, but engaged in the type of fact-specific inquiry we require."). On the record here—particularly petitioner's admission that he bore a weapon while present with the Taliban near the frontline of a battlefield—his stays at Jama'at al-Tablighi mosques merely fortified the court of appeals' conclusion that he was detainable under the AUMF.[3]

b. Petitioner also contends (Pet. 12-14) that the district court and the court of appeals—again, despite express statements to the contrary—placed the burden on him to prove that he was not detainable. He rests that argument on the lack of specific findings by the district court about petitioner's activities in the period between his departure from near the Taliban front lines in August 2001 and his eventual capture in March 2002.

As an initial matter, petitioner failed to raise that argument before the district court or in his appellate briefs. A question about that period of time was raised for the first time by the panel during oral argument, and the only written argument that petitioner

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[3] In the court of appeals, the government noted that in the district court, it did not "seek to justify petitioner's detention on the ground that he was associated with Jama'at Al Tablighi," Gov. C.A. Br. 42, although the government did agree that "stays with mosques associated with Jama'at Al Tablighi may be probative of being part of al Qaeda or Taliban forces," *id.* at 41. In the district court, the government stipulated that "it would not seek to prove [petitioner's] formal affiliation with [Jama'at al-Tablighi]." Pet. App. 11a n.7. Accordingly, the court of appeals did not rely on "a formal affiliation between [petitioner] and [Jama'at al-Tablighi]," *ibid.*, but rather found his stays at Jama'at al-Tablighi mosques probative of "an affiliation with al Qaeda," *id.* at 11a; see *Almerfedi* v. *Obama*, 654 F.3d 1, 6 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 2739 (2012).

submitted on the question (apart from his petition for rehearing) was a two-page post-argument letter. See 11-5344 Docket entry (D.C. Cir. Oct. 23, 2012) (Letter from Wesley R. Powell to Mark J. Langer); see also *World Wide Minerals, Ltd.* v. *Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002) ("[A] party waives its right to challenge a ruling of the district court if it fails to make that challenge in its opening brief."), cert. denied, 537 U.S. 1187 (2003). Even then, petitioner did not expressly contend that by failing to make a specific finding about his affiliation with al Qaeda or the Taliban after he left the area near the Taliban front lines, the district court had shifted the burden of proof to him. Nor did the court of appeals pass on that argument. Accordingly, this is not a suitable case to consider petitioner's second question presented. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari only when the question presented was not pressed or passed upon below.") (internal quotation marks and citation omitted).

In any event, neither the district court nor the court of appeals shifted the burden of proof to petitioner. Rather, they found that the evidence demonstrated that petitioner continued to be a part of al Qaeda or Taliban forces at the time of his capture. The court of appeals noted that petitioner was "part of" enemy forces "while living in Northern Afghanistan at least through August 2001." Pet. App. 11a. It then pointed to the district court's finding that petitioner had provided conflicting explanations for his reasons for returning to Pakistan in the period between his departure from near the Taliban front lines and his capture, a period of time when numerous Tali-

ban fighters were fleeing into Pakistan. One was that he wanted to return to Yemen to get married and reunite with his family; another was that he wanted to enroll in a religious university; and still another was that he wanted to learn about computers—even though he could not speak the native language. See C.A. J.A. 2766, 2811, 2825-2830. Petitioner also stated that he wished to travel to the Yemeni embassy in Islamabad in order to renew his Pakistani visa, which had expired. *Id.* at 2893, 2897.

Given that petitioner did none of the things he purportedly intended to do despite having ample opportunity, nor made any credible attempt to do them, the district court, which observed petitioner's demeanor during his testimony, did not clearly err in concluding that his story was an elaborate fabrication. And, as the court of appeals correctly observed, such "false cover stories * * * 'are evidence—often strong evidence—of guilt.'" Pet. App. 10a (quoting *Al-Adahi*, 613 F.3d at 1107). That evidence substantiated the view that petitioner remained a part of al Qaeda or the Taliban after leaving the area near the front lines. And in opposition to that strong inference, petitioner "ma[de] no argument that he affirmatively cut * * * ties" with enemy forces "before his capture only six months later." *Id.* at 11a. The court of appeals therefore correctly determined that "the evidence points" to the conclusion that he continued to be a part of al Qaeda or Taliban forces after leaving the area near the front lines. *Id.* at 12a.[4]

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[4] Quite apart from that factual link establishing petitioner as part of enemy forces up until the time of his capture, moreover, the court of appeals was correct to observe that, in light of the particular circumstances of this case, petitioner had failed to meet his

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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burden to come forward with evidence that he "affirmatively cut" his ties to the Taliban or Al Qaeda before his capture. Pet. App. 11a; see *Alsabri*, 684 F.3d at 1306-1307. Petitioner made no attempt to do so. Applying such an evidentiary presumption—similar to the burden-shifting scheme familiar in Title VII cases—does not shift the burden of proof, which always remains on the government. See *Reeves* v. *Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000); see also *Al-Bihani* v. *Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010) (noting that *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004) (opinion of O'Connor, J.), contemplated in Guantanamo Bay habeas cases a "burden-shifting scheme" that "mirrors a preponderance standard"), cert. denied, 131 S. Ct. 1814 (2011).