[ORAL ARGUMENT NOT YET SCHEDULED]

No. 18-5297

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

ABDUL RAZAK ALI,
Petitioner-Appellant,

v.

DONALD J. TRUMP, et al.,
Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellant Abdul Razak Ali, by and through his undersigned counsel, and pursuant to D.C. Circuit Rule 28(a)(1), hereby states as follows:

A. Parties and *Amici*

Appellant is Abdul Razak Ali.

Appellees are Donald J. Trump, President of the United States; Patrick M. Shanahan, Acting Secretary of Defense; Rear Admiral Timothy C. Kuehhas, Commander, Joint Task Force – GTMO; and Army Col. Steven Yamashita, Commander, Joint Detention Operations Group, Joint Task Force – GTMO.[1]

Amici before the district court include:

1. Muslim, Faith-Based, and Civil Rights Community Organizations: 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;

[1] A certificate as to parties, rulings and related cases was filed by Petitioner-Appellant Ali on November 12, 2018. Since that time, Acting Secretary Shanahan and Rear Admiral Kuehhas have been automatically substituted for their predecessors in office pursuant to Fed. R. App. P. 43(c)(2).

2. Center for Victims of Torture;

3. Due Process Scholars: Professors Eric M. Freedman, Bernard E. Harcourt, Randy A. Hertz, Eric S. Janus, Jules Lobel, Kermit Roosevelt, Michael J. Wishnie, and Larry Yackle.

There are presently no *amici* or intervenors before this Court.

B. Rulings Under Review

The rulings under review include a memorandum opinion and order denying habeas corpus relief, each dated August 10, 2018, and entered by Senior U.S. District Judge Richard J. Leon in *Ali v. Obama*, No. 10-cv-1020 (RJL) (D.D.C.) (Dkt. Nos. 1540, 1541). The memorandum opinion is published in the federal reporter as *Ali v. Trump*, 317 F. Supp. 3d 480 (D.D.C. 2018).

C. Related Cases

1. This case was previously before a panel of this Court in *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013), which affirmed the denial of Appellant Ali's habeas corpus petition on the ground that he was lawfully detained pursuant to the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) ("AUMF"), because he was more likely than not a member of an Al Qaeda-associated force.

2. On January 11, 2018, Appellant Ali and ten other Guantánamo Bay detainees filed a habeas corpus challenge to the duration of their continuing deten-

tion without charge or foreseeable end, arguing that it violates the Due Process Clause of the Constitution, the AUMF, and international law including the laws of war. The challenge, styled as a motion for an order granting the writ of habeas corpus, was jointly captioned and filed in nine district court habeas cases previously filed by the detainees, including this case, *Ali v. Trump*, No. 10-cv-1020 (RJL) (D.D.C.). By order of the district court, dated January 18, 2018, six of those cases were assigned to Senior U.S. District Judge Thomas F. Hogan for resolution of the detainees' challenge to the duration of their detention. Two cases assigned to U.S. District Judge Emmet G. Sullivan, and this case, assigned to Senior U.S. District Judge Richard J. Leon, were not coordinated before Judge Hogan.

On August 10, 2018, Judge Leon denied habeas relief in *Ali* and this timely appeal followed. The remaining detainees' challenge to the duration of their detention has been fully briefed before Judge Hogan and Judge Sullivan, and Judge Hogan heard argument in July 2018, but neither has issued a decision.

3. On May 18, 2018, Uthman Abdul Rahim Mohammed Uthman (ISN 27), a Yemeni Guantánamo detainee, filed a similar motion seeking an order granting the writ of habeas corpus, based on the arguments that his detention had become punitive and therefore unauthorized under the AUMF, that the relationship between the conflict against Al Qaeda and those that had shaped the development of the law of war had unraveled, that the particular conflict in which he was pur-

portedly detained had ended, and finally that his continued detention violated the Due Process Clause. *See* Mot. to Grant Pet. for Writ of Habeas Corpus, *Abdah v. Trump*, No. 04-cv-1254 (RCL) (D.D.C. May 18, 2018) (Dkt. No. 1072).[2] That motion remains pending before Judge Lamberth.

4. Pending before a panel of this Court is *Qassim v. Trump*, No. 18-5148, which addresses whether prior panel decisions of this Court conflict with *Boumediene v. Bush*, 553 U.S. 723 (2008). The case also addresses subsidiary questions about whether Guantánamo detainees are entitled to due process of law to challenge their detention, and what process is due to persons entitled to due process of law. It does not involve a direct challenge to duration of detention. Oral argument was held on January 15, 2019 before a panel of Judges Millett, Pillard and Edwards.

5. In *Alwi v. Trump*, 901 F.3d 294 (D.C. Cir. 2018), this Court held in part that a Guantánamo detainee forfeited constitutional challenges to his continuing detention by failing to raise them in the first instance before the district court. *Id*. at 301. A petition for a writ of certiorari was filed on December 5, 2018, *Alwi v. Trump*, S. Ct. No. 18-740, with the opposition filed April 3, 2019, and petitioner's

[2] The certificate as to parties, rulings and related cases filed by Petitioner-Appellant Ali on November 12, 2018 neglected to include this case. Counsel apologize for the omission.

reply filed April 16, 2019. The petition was distributed for the Court's conference of May 9, 2019 and relisted for the Court's conference of May 16, 2019.

6. Appellant Ali is not aware of any other related cases.

/s/*Shayana Kadidal*
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GLOSSARY

AUMF: The Authorization to Use Military Force of Sept. 14, 2001, Pub. L. 107-40, 115 Stat. 224.

ODNI: The Office of the Director of National Intelligence, which directs and oversees the programs, projects, and activities of the intelligence community.

JURISDICTION

The district court had jurisdiction under the habeas statute, 28 U.S.C. §§ 2241 and 2243, the Suspension Clause of the Constitution (U.S. Const. art. 1 § 9, cl. 2), and 28 U.S.C. § 1331. On August 10, 2018, the district court denied Petitioner-Appellant Ali's motion for an order granting the writ of habeas corpus, App. 13-19, and entered a final order disposing of all claims on August 10, 2018, App. 20, appeal from which this Court has jurisdiction over pursuant to 28 U.S.C. § 1291. Plaintiffs timely filed their notice of appeal on October 1, 2018. *See* Notice of Appeal, *Ali v. Trump*, No. 10-cv-1020 (RJL) (D.D.C. Oct. 1, 2018) (Dkt. No. 1542).

ISSUES PRESENTED FOR REVIEW

1. Whether the Due Process Clause extends to Guantánamo.
2. Whether the Due Process Clause limits the duration of detention at Guantánamo.
3. Whether the AUMF's authorization of only "necessary and appropriate force" limits the duration of detention at Guantánamo.

STATEMENT OF THE CASE

The factual background of this case is set forth in the prior published decisions of the district court and this Court. *See Ali v. Obama*, 741 F. Supp. 2d 19, 21

(D.D.C. 2011) (Leon, J.), *aff'd*, 736 F.3d 542 (D.C. Cir. 2013). Mr. Ali, a 48-year old citizen of Algeria, was captured by Pakistani forces at a guesthouse in Faisalabad, Pakistan, in March 2002. He was turned over to U.S. forces and transferred to Guantánamo in June 2002, where he has remained for more than 16 years without charge.

1. Mr. Ali filed a habeas petition in December 2005, challenging the legality of his initial capture and detention. The case proceeded to trial, and the district court concluded by a preponderance of the evidence that he was lawfully detained because he was a member of "Abu Zubaydah's force," which the government claimed at the time was associated with Al Qaeda. 714 F. Supp. 2d at 27. In reaching that conclusion, the court, relying on multiple layers of hearsay evidence, found that Mr. Ali was present at the same guesthouse as Zubaydah for about 18 days; another detainee recalled seeing him in Afghanistan prior to his arrival in Pakistan; a name the government associated with him was listed in a diary allegedly propounded by another associate of Zubaydah; the same name was listed in a report of survivors of a fire in a different location in Afghanistan; and Ali supposedly made statements when he was first interrogated admitting that he had traveled to Afghanistan to fight the U.S. and its allies. Mr. Ali denied the allegations and the accuracy of the evidence offered in support of his detention. *Id.* at 26. After trial but before the court announced its decision, the government disclosed that it

had withheld exculpatory evidence from the court and Mr. Ali's counsel, and withdrew reliance on the principal evidence it had offered to justify his detention. *Id.* at 23-24.

After the district court issued its decision denying his habeas petition, *id*., Mr. Ali filed post-trial motions further challenging the reliability of evidence against him and requesting a new trial. He challenged the government's withholding of additional exculpatory evidence concerning a detainee who purportedly identified him and corroborated his presence in Afghanistan. *See* Mem. Order, *Ali v. Obama*, No. 10-cv-1020 (RJL), 2011 WL 1897393 (D.D.C. May 17, 2011) (Dkt. No. 1496). He also challenged photographic evidence against him. *See* Mem. Order, *Ali v. Obama*, No. 10-cv-1020 (RJL) (D.D.C. Jun. 11, 2012) (Dkt. No. 1500).[3] In response, the district court reiterated that Mr. Ali would be detainable in any event because his presence at the guesthouse was enough, *alone*, to find that he was more likely than not a member of Zubaydah's force. *See* Mem. Order, 2011 WL 1897393, at *1.

Mr. Ali appealed, and this Court affirmed the denial of his habeas petition on the ground that he was lawfully detained at Guantánamo under the AUMF because

[3] In addition to the two orders cited in the text (Dkt. Nos. 1496 and 1500), an additional order, summarily rejecting Ali's post-hearing motion for sanctions and entry of the writ or a new hearing, was also issued by Judge Leon after the original published opinion (741 F. Supp. 2d 19) of January 11, 2011 denying the writ. *See* Order, *Ali v. Obama*, No. 10-cv-1020 (D.D.C. Mar. 11, 2011) (Dkt. No. 1474).

he was more likely than not a member of an Al Qaeda-associated force. *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013). The panel's decision was heavily reliant on the preponderance standard. *See, e.g.*, *id.* at 550 ("Ali maintains that many of those facts [offered to support his detention], considered individually, could have innocent explanations. Maybe yes, maybe no."); *id.* at 551 ("Ali more likely than not was part of Abu Zubaydah's force. To be sure, as in any criminal or civil case, there remains a *possibility* that the contrary conclusion is true ... But the preponderance standard entails decisions based on the more likely conclusion.") (emphasis in original).

Judge Edwards concurred in the judgment. *Id*. at 552-54. He noted:

> Nothing in the record indicates that Ali "planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001, or that he "harbored [terrorist] organizations or persons," or that he was "part of or substantially supported al-Qaeda, the Taliban, or associated forces," or that he "committed a belligerent act" against the United States. Ali may be a person of some concern to Government officials, but he is not someone who transgressed the provisions of the AUMF or the NDAA. Ali's principal sin is that he lived in a "guest house" for "about 18 days."

Id. at 553. He added: "The majority's reliance on a 'personal associations' test to justify its conclusion that Ali is detainable as an 'enemy combatant' rests on the case law from this circuit cited in the majority opinion," setting forth procedural and evidentiary rules and detention standards in these Guantánamo habeas cases, "which I am bound to follow." However, in his view that case law went "well be-

yond" what the AUMF prescribed. *Id*. With "no end in sight" to the War on Terror, "the result of our judgment today is that Ali may now be detained for life." *Id*. "The troubling question in these detainee cases is whether the law of the circuit has stretched the meaning of the AUMF and the NDAA so far beyond the terms of these statutory authorizations that habeas corpus proceedings like the one afforded Ali are functionally useless." *Id*. at 553-54.

2. Since Mr. Ali's prior round of appeal concluded, the population at Guantánamo has shrunken to the point where 40 men remain. Five of the remaining prisoners have been cleared for release by processes requiring the unanimous consensus of all relevant agencies (including the ODNI, FBI, State Department, and the military). Despite this, no one has been transferred out of Guantanamo under the current administration (with the exception of a single prisoner released in fulfillment of the terms of his plea bargain before a military commission),[4] and likely will not be, absent judicial intervention.

During his campaign, President Trump pledged to keep Guantánamo open.[5] As President-Elect he declared that "there should be no further releases from

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[4] *See* Charlie Savage, *U.S. Transfers First Guantánamo Detainee Under Trump, Who Vowed to Fill It*, N.Y. Times, May 2, 2018, *available at* https://nyti.ms/2reWHbK.

[5] *See* David Welna, *Trump Has Vowed to Fill Guantánamo With Bad Dudes—But Who?*, NPR, Nov. 14, 2016, *available at* http://n.pr/2CNr01T.

[Guantánamo]."[6] On January 30, 2018, he issued Executive Order 13,823, revoking President Obama's ten-year-old directive to close the prison. Exec. Order 13,823 § 2(c), 83 Fed. Reg. 4831. The President announced this order during his January 30, 2018 State of the Union address by deriding Presidents Bush and Obama for their willingness to release Guantánamo prisoners.[7]

A caveat in the Executive Order permits the Secretary of Defense to transfer prisoners "when appropriate," *id*. § 3(a), 83 Fed. Reg. at 4832. However, the State Department's Office of the Special Envoy for Guantánamo Closure, which has historically been responsible for executing the essential diplomatic, policy and administrative steps incident to a prisoner transfer, has been shut down.[8] The Executive Order also required the Defense Secretary to recommend, within 90 days, "policies to the President regarding the disposition of individuals" currently detained at the base or to be transferred there in the future, but no such policies have been publicly

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[6] Donald J. Trump (@realDonaldTrump), Twitter (Jan. 3, 2017 9:20am) https://twitter.com/realDonaldTrump/status/816333480409833472.

[7] Donald J. Trump, President of the United States, State of the Union Address (Jan. 30, 2018).

[8] Josh Lederman, *Tillerson to Abolish Most Special Envoys, Including Guantánamo "Closer,"* Miami Herald, Aug. 28, 2017, http://hrld.us/2Fd7b13; Charlie Savage, *U.S. Misses Deadline to Repatriate Detainee Who Plead Guilty*, N.Y. Times, Feb. 20, 2018, http://nyti.ms/2CyweK1; Lee Wolosky, former Department of State Special Envoy for Guantánamo Closure, Remarks at Fordham University Law School Center on National Security Symposium: Revisiting Guantánamo Bay: Where We've Come, Where We're Headed (Feb. 17, 2018) (describing responsibility of office for negotiating—and ensuring ongoing compliance with—monitoring and well-being commitments by receiving governments), *available at* http://bit.ly/2H184ut.

released, and Defense Secretary Mattis has since resigned with no permanent replacement yet named. Even if it were possible to execute a transfer in the current environment, the only process nominally capable of designating detainees as cleared for release, review before the Periodic Review Board, has not cleared a single detainee under the current administration[9] (and in any event lacks the power to effectuate its decisions by ordering release). The Administration's rhetorical commitment to make no discretionary transfers has been reinforced by its actions: as confirmed by filings made in parallel proceedings below, the government has not made an iota of effort to transfer even the cleared detainees who moved for the same relief as Mr. Ali did.[10]

Given the Executive Branch's categorical opposition to detainee transfers, regardless of individualized circumstances, detainees appear to face two to six more years with no possibility of release and the real prospect of life detention even after President Trump leaves office. For Mr. Ali, this means 18 to 22 years—

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[9] Eighteen Periodic Review Board hearings have been held between January 20, 2017 and the filing of this brief. Of the fifteen hearings initiated via notice to the detainee under this administration, ten were initially noticed only after the January 2018 filing of the motion at issue in this appeal. *See* https://www.prs.mil/Review-Information/Full-Review/; https://www.prs.mil/Review-Information/Subsequent-Full-Review/.

[10] *See* Resp'ts' Opp'n to Pet'rs' Mot. for Order Granting Writ of Habeas Corpus at 6-10, *Nasser v. Trump*, No. 04-cv-1194 (TFH) (D.D.C. Feb. 16, 2018) (Dkt. No. 1126) (failing to document any efforts at transfer for eight petitioners, two cleared, in response to district court order (Dkt. No. 1110) to report on status of movant detainees, including "whether the Government intends to transfer the Petitioners previously designated for transfer").

and a possibility of lifetime detention—without trial and based upon nothing more than a preponderance of the evidence.

3. Several years after his prior appeal was denied, on January 11, 2018, Mr. Ali and ten other Guantánamo detainees filed a habeas corpus challenge to the duration of their continuing detention without charge or foreseeable end, arguing that it violates the Due Process Clause and the AUMF as informed by the laws of war. The challenge, styled as a motion for an order granting the writ of habeas corpus, was jointly captioned and filed in the nine district court habeas cases previously filed by these eleven detainees. By order of the district court, dated January 18, 2018, eight of those detainees' cases were assigned to Senior U.S. District Judge Thomas F. Hogan for resolution of the detainees' duration of detention challenge. Two detainees' cases assigned to U.S. District Judge Emmet G. Sullivan, and this one assigned to Senior U.S. District Judge Richard J. Leon, were not coordinated before Judge Hogan.

On August 10, 2018, Judge Leon denied habeas relief in Mr. Ali's case, summarily dismissing Ali's constitutional challenge to the duration of his detention based on this Court's decision in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*"), *vacated and remanded*, 559 U.S. 131 (2010), *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010), which Judge Leon interpreted categorically to preclude extension of the Due Process Clause to Guantánamo. *See Ali*, 317

F. Supp. 3d at 488 (the Court of Appeals "has already held that the due process clause does *not* apply in Guantanamo." (emphasis in original)). The district court concluded that other panel decisions of this Court barred Mr. Ali's claim that the AUMF limits the duration of his detention, even if that means he will die in Guantánamo. *Id*. at 485-87. Ali filed a timely notice of appeal. *See* Notice of Appeal, *Ali v. Trump*, No. 10-cv-1020 (RJL) (D.D.C. Oct. 1, 2018) (Dkt. No. 1542).

Mr. Ali petitioned this Court for initial consideration *en banc*, seeking a conclusive statement that this Circuit's precedents do "not preclude extension of the Due Process Clause to Guantánamo." Petition for Initial Hearing *En Banc* at 13, *Ali v. Trump*, No. 18-5297 (D.C. Cir. Nov. 28, 2018) (Doc. # 1761870). The petition noted the "obvious confusion" engendered in the district courts by dictum in *Kiyemba I* and various opinions by judges of this Court in the decade since, which led to the district court's erroneous conclusion that Ali's claims were foreclosed by Circuit precedent in this case. *Id*. at 16. In response, the government asserted that this Court has "clearly and repeatedly" asserted that the Due Process Clause does not apply at Guantánamo. Gov't Response at 7 (D.C. Cir. Jan. 17, 2019) (Doc # 1768928). The Court denied the petition, Order, *Ali v. Trump*, No. 18-5297, 2019 WL 850757 (D.C. Cir. Feb. 22, 2019), App. 21-23, and set a schedule for panel briefing. Judge Tatel issued a concurrence in the denial of initial hearing *en banc*, noting that "*Kiyemba I* did not resolve whether the Fifth Amendment

affords detainees any procedural due process protections," nor did subsequent opinions from this Court. *Id.* at *2 (Tatel, J., joined by Pillard, J., concurring in the denial of initial hearing *en banc*), App. 22-23.

The other ten detainees' parallel Due Process-based challenges to their detention, filed on the same date as Mr. Ali's sixteen months ago, have not yet been decided by Judges Hogan or Sullivan. Judge Hogan, who heard oral argument on the motions on July 11, 2018, repeatedly indicated during argument that he felt himself bound by the *Kiyemba* dictum.[11]

SUMMARY OF ARGUMENT

The Due Process Clause of the Constitution applies at Guantánamo and places substantive and procedural limitations on executive detention of the kind at issue here, including a durational limitation that compels relief regardless of the original bases for the detention. Mr. Ali has been detained for nearly seventeen years without charge and has far surpassed that constitutionally-imposed durational limit, particularly in light of the fact that the executive branch has apparently determined that no one—regardless of circumstance and independent of any legal

[11] *See* Transcript of Oral Argument, *Anam v. Trump*, No. 04-cv-1194 (TFH) (D.D.C. Jul. 11, 2018) at 11-12, App. 25-26 ("I understand your arguments, [that] it's dicta. But how many times do I have to have dicta to make it the law for me to follow? ... Maybe they're repeating what someone else had already said...."); *id*. at 69, App. 28 (concluding argument by stating "petitioners ... have presented some serious issues. I do not, however, come away convinced that this Court has a position to overrule our Court of Appeals").

rationale—will be transferred from Guantánamo. Perpetual, ongoing detention cannot be based on past conduct alone, but must be evidentiarily tethered to an ongoing, specific and non-punitive purpose. And, to be sure, perpetual detention on the basis of no more than executive fiat is a purposeless and arbitrary restraint on liberty that must be remediated by the judicial branch. In addition, detention of this length cannot continue, consistent with due process, based only on a preponderance of the evidence that an individual was nearly two decades ago a member of or associated with a detainable group, particularly where that low burden of proof is substantiated only with multiple-level hearsay. The risk of ongoing, erroneous detention based on such thin procedural protections likewise compels relief.

This Court should hold that the Due Process Clause applies at Guantánamo, and: (1) order Mr. Ali's release as a matter of law on the ground that the duration of his continuing detention violates substantive due process; or (2) remand to the district court to determine in the first instance whether Mr. Ali's continuing detention violates substantive and procedural due process. If the Court orders remand, it should do so with instructions to the district court to apply a clear and convincing evidence burden of proof; to scrutinize more closely the use of hearsay evidence offered to support detention; to mandate that the government articulate a legitimate and particularized purpose for Mr. Ali's continuing noncriminal detention; and to consider whether application of due process requires additional procedural protec-

tions. This Court (and, on any remand, the district court) should also consider whether these issues may be avoided by a limiting reading of the scope of detention authorized by the AUMF.

ARGUMENT[12]

I. The Due Process Clause Applies at Guantánamo

In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that the Suspension Clause of the Constitution protects the right of detainees held at Guantánamo to challenge the legality of their detention. In reaching this conclusion, the Court explained that it was merely reaffirming its long-standing jurisprudence to determine what constitutional standards apply when the government acts with respect to non-citizens outside the territorial boundaries of the United States. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) ("The proposition is, of course, not that the Constitution 'does not apply' overseas but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.") (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

Specifically, in *Boumediene*, the Court applied a functional test in determining that the Suspension Clause restrains the Executive's conduct as to Guantánamo

[12] All issues presented in this appeal are issues of law. This Court reviews the district court's legal conclusions and denial of the writ *de novo*. *See, e.g.*, *Ameziane v. Obama*, 699 F.3d 488, 494 (D.C. Cir. 2012); *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2011).

detainees, and concluded that it would not be "impracticable and anomalous" to grant detainees habeas review because "there are few practical barriers to the running of the writ" at Guantánamo. *See* 553 U.S. at 769-71; *id.* at 784-85 (addressing due process). The Court reasoned that "Guantánamo Bay ... is no transient possession. In every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States." *Id.* at 768-69; *see also Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) ("Guantánamo Bay is in every practical respect a United States territory" where our "unchallenged and indefinite control ... has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.").

After *Boumediene*, it inescapably follows that the Due Process Clause also applies—in the same measure as the Suspension Clause—at Guantánamo to constrain certain executive branch actions. This is particularly apt given that the concepts animating due process and habeas corpus are intertwined. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 525-26 (2004) (discussing interaction of habeas and due process); *id.* at 555-57 (Scalia, J., dissenting) (same). The *Boumediene* Court's functional analysis led to recognition of the applicability of the Suspension Clause in Guantánamo. Therefore, at least some of the protections of the Due Process Clause must also reach Guantánamo because there are no practical barriers that would apply to one provision but not the other. *See id.* at 538 ("[A] court that re-

ceives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."); *Boumediene*, 553 U.S. at 784-85 (addressing due process); *cf. Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014) (statement of Justice Breyer respecting denial of certiorari) (Supreme Court has not yet decided if AUMF authorizes detention of individuals merely for being "part of" Al Qaeda or Taliban, or, if so, whether "either the AUMF or the Constitution limits the duration of detention").

Just as there are no practical or structural barriers that make it impracticable or anomalous to adjudicate the factual or legal justification for detention under the Suspension Clause, there are no such barriers to preclude adjudication of the question of durational limits to detention under the Due Process Clause, or of the other substantive and procedural requirements imposed by the Due Process Clause that would protect against arbitrary detention.

II. This Court's Precedents Are Not to the Contrary

As two judges of this Court recently noted in denying Ali's petition for initial hearing *en banc* in this case, this Court's "cases do 'not preclude extension of the Due Process Clause to Guantánamo.'" 2019 WL 850757, at *1 (Tatel, J., joined by Pillard, J., concurring in denial of initial hearing *en banc*) (quoting petition). In the district court the government argued—and the court agreed—that a single sentence in this Court's decision in *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C.

Cir. 2009) (*Kiyemba I*), precluded the application of due process at Guantánamo: "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." That statement is clearly dictum. The *Kiyemba I* decision addressed only the narrow question of whether due process compels entry and release into the United States of non-citizens without property or presence in the country—a particular context in which the political branches' authority to regulate immigration is maximal. *Id.* at 1026-27. "The relevant passage in *Kiyemba I* refuted the premise that a 'fundamental right of liberty' [protected by substantive due process] required the government to release the detainees onto United States soil. ... [W]e should not lightly read our opinions to sweep far beyond the facts of a given case." *Ali*, 2019 WL 850757, at *2.

Indeed, this limited reading of *Kiyemba I* is the only one consistent with *Boumediene* or even subsequent panel decisions of the D.C. Circuit. *See Kiyemba v. Obama*, 561 F.3d 509, 514 n.4 (D.C. Cir. 2009) (*Kiyemba II*) ("[W]e assume arguendo these alien detainees have the same constitutional rights ... as ... U.S. citizens" detained by the U.S. military in Iraq); *id.* at 518 n.4 (Kavanaugh, J., concurring) ("[A]s explained in the opinion of the Court and in this concurring opinion, the detainees do not prevail in this case even if they are right about the governing legal framework: Even assuming that the Guantánamo detainees ... possess constitutionally based due process rights" they would not prevail); *Kiyemba v. Obama*,

605 F.3d 1046, 1048 (D.C. Cir. 2010) (*Kiyemba III*) ("[P]etitioners never had a constitutional right to be brought to this country and released."); *id.* at 1051 (Rogers, J., concurring) ("Whatever role due process and the Geneva Conventions might play with regard to granting the writ, petitioners cite no authority that due process or the Geneva Conventions confer a right of release in the continental United States."); *cf. Aamer v. Obama*, 742 F.3d 1023, 1039 (D.C. Cir. 2014) ("As the government does not press the issue, we shall, for purposes of this case, assume without deciding that the constitutional right to be free from unwanted medical treatment extends to nonresident aliens detained at Guantánamo.").[13]

Unsurprisingly, therefore, the government has conceded, and subsequent decisions of the D.C. Circuit have assumed, that the Ex Post Facto Clause of the Constitution, U.S. Const. art. I, § 9, cl. 3, applies at Guantánamo in light of *Boumediene* and notwithstanding *Kiyemba I*. *See Al Bahlul v. United States*, 767 F.3d 1, 18 (D.C. Cir. 2014) (en banc) (noting that government concedes Ex Post Facto Clause applies at Guantánamo); *id.* at 49 (Rogers, J., concurring)

[13] Questions from the bench during the recent oral argument before this Court in *Qassim v. Trump*, No. 18-5148, similarly expressed great skepticism concerning any broader reading of *Kiyemba*. *See* Transcript of Oral Argument (Jan. 15, 2019) at 61, App. 33 (Millett, J.: "the only issue [in *Kiyemba*] was whether there were different ... asserted sources with a right for a specific remedy of release into the United States, and in that context the Court says due process clause, that's not a source for a right of release into the United States, see how we've dealt with exclusion...."); *id*. at 62, App. 34 (Edwards, J.: "I'm just stunned [by reliance on *Kiyemba*;]... it's not about the issues we are considering today").

("[*Boumediene*'s] analysis of the extraterritorial reach of the Suspension Clause applies to the Ex Post Facto Clause because the detainees' status and location at Guantánamo Bay are the same, and the government has pointed to no distinguishing 'practical obstacles' to its application."); *id.* at 65 n.3 (Kavanaugh, J., dissenting) ("As the Government concedes, the *Boumediene* analysis leads inexorably to the conclusion that the ex post facto right applies at Guantánamo."). As then-Judge Kavanaugh explained, "[d]etermining whether the Constitution applies to non-U.S. citizens in U.S. territories requires a 'functional' rather than 'formalistic' analysis of the particular constitutional provision and the particular territory at issue. ... In *Boumediene*, the Court determined that Guantánamo was a *de facto* U.S. territory—akin to Puerto Rico, for example, and not foreign territory." *Id.* (distinguishing *Johnson v. Eisentrager*, 339 U.S. 763, 777-81 (1950)); *see also Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979) (Due Process Clause applies in Puerto Rico); *Haitian Ctrs. Council v. McNary*, 969 F.2d 1326, 1343 (2d Cir. 1992) (application of Fifth Amendment at Guantánamo would not be impracticable or anomalous), *vacated as moot, Sale v. Haitian Ctrs. Council*, 509 U.S. 918 (1993).

"[A]lthough this court has occasionally restated *Kiyemba I*'s holding, ... it has never purported to expand the original opinion's ambit" beyond the immigration context. *Ali*, 2019 WL 850757, at *2 (Tatel, J. concurring in denial of initial review *en banc*). This Court's decisions in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir.

2009), and *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011), do no more than restate the content of the *Kiyemba* dictum in their own dictum: Neither case rested on application of the Due Process Clause, as the government conceded below.[14] *Rasul*, a damages action by former detainees for their torture and abuse at Guantánamo, was dismissed on qualified immunity grounds after the panel concluded that, for conduct *prior* to the Supreme Court's decision in *Boumediene*, it was not clearly established that detainees at Guantánamo have due process rights. *See* 563 F.3d at 530-32. The *Rasul* court expressly declined to address the plaintiffs' due process claims. *Id.* It did not, and could not, hold that *Boumediene* limited the Constitution's extraterritorial reach to the Suspension Clause; the government's concession in *Bahlul* regarding the Ex Post Facto Clause proves this could not be the case. *Al-Madhwani* concerned a detainee's objection to consideration of evidence outside the record during a habeas corpus hearing. The panel deemed the legal basis for the objection "obscure," noted that Al-Madhwani cited a due process case as the basis for it, but then stated that it need not decide what the legal basis for the objection was because, as a factual matter, the district court did not rely on the contested evidence at all. *Al-Madhwani*, 642 F.3d at 1077. The panel's passing reference to the *Kiyemba* dictum, *id.*, is thus itself dictum.

[14] *See* Resp'ts' Opp'n to Pet'rs' Mot. for Order Granting Writ of Habeas Corpus at 36, *Ali v. Trump*, No. 10-cv-1020 (Dkt. No. 1525) ("both the *Rasul* and *al-Mad[hwan]i* decisions from the Court of Appeals ultimately rested on non-due-process grounds").

"This limited understanding of *Kiyemba I* helps explain why subsequent panels of this court have demurred from reading the case to resolve, for all time, the due process rights of Guantanamo detainees. ... If *Kiyemba I* had actually decided that territorial sovereignty offers the only possible basis for extending any due process protections, then *Rasul* and *Al-Madhwani* would have had no reason to avoid the question." *Ali*, 2019 WL 850757, at *2 (Tatel, J,. concurring in denial of initial hearing *en banc*). Accordingly, whatever the case may be with respect to due process rights to enter the United States for release addressed in the *Kiyemba* cases, it is plain that some measure of due process extends to executive actions undertaken in Guantánamo.

At the same time, it is also clear that confusion about the proper interpretation of this Court's dicta has caused the district courts to decline Mr. Ali's and other[15] detainees' requests to apply the Due Process Clause to their detentions. As the prison approaches its second decade in operation, continued misapplication of this precedent forecloses a just and proper disposition of profound claims of substantive and procedural fairness brought by the remaining detainees.

III. Petitioner's Detention Violates Due Process

Mr. Ali has already been detained for seventeen years, almost all of that time spent in Guantánamo. He is detained because he was held "more likely than not" to

[15] *See supra* note 11 (discussing Judge Hogan's questions from the bench during hearing on parallel claims of eight other detainees).

be part of a force "associated" with an actual target of the AUMF based on inferences made primarily from his eighteen-day stay at a guesthouse nearly twenty years ago. The evidence used to meet that negligence standard of proof was multiple-level hearsay, impossible to confront and challenge from a practical perspective. For this he faces the prospect of lifetime detention without charge, pursuant to a conflict that has already lasted longer than any in modern history and continues without foreseeable end, and he may well die in Guantánamo absent judicially-enforced limitations. This is entirely unprecedented in American law: never has a court upheld indefinite, potentially lifetime non-criminal detention under such circumstances. Such an outcome is incompatible with both the substantive and procedural guarantees of the Due Process Clause.

A. The Duration and Circumstances of Petitioner's Detention Violate Substantive Due Process

Due process is a concept that requires rationality and proportionality in government action; it is designed to limit excessive or arbitrary executive action. Accordingly, the Due Process Clause "contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Today, the individual facts of Mr. Ali's case—what he may or may not have done, or who he may have or not associated with seventeen years ago—are essentially irrelevant to the decision to continue depriving him of liberty. His detention is

driven by a new *de facto* executive branch policy to no longer consider or work towards effectuating any new transfers out of Guantánamo,[16] and untethered to any ongoing, individualized purpose to detain him. The constitutionally-mandated response to such a manifestly arbitrary and punitive form of executive detention is judicial intervention.

The Supreme Court has instructed that substantive due process places limits on the duration of executive detention—undertaken for special circumstances outside criminal process—of the kind at issue here. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); *see also Clark v. Martinez*, 543 U.S. 371, 384 (2005) (recognizing that detention only authorized for "a period consistent with the purpose" of the original detention); *United States v. Salerno*, 481 U.S. 739, 747 (1987) (upholding pre-trial civil detention statute in part because maximum length of detention was "limited by the stringent time limitations of the Speedy Trial Act"). Indeed, the Court in *Hamdi* recognized that the purpose for which the Court

[16] Even the five detainees cleared for transfer (by unanimous consent of the relevant agencies, through either the 2009-10 Guantanamo Review Task Force or the Periodic Review Board process) remain detained, with no apparent action whatsoever by this administration towards effectuating their transfer. *See, e.g.*, Resp't's Opp'n to Pet'rs' Mot. for Order Granting Writ of Habeas Corpus at 9-10, *Nasser v. Trump*, No. 04-cv-1194 (TFH) (D.D.C. Feb. 16, 2018) (Dkt. No. 1126) (reporting to the district court, at the court's request, on lack of any action for two cleared detainees who joined in filing near-identical motion to the one giving rise to this proceeding).

ratified an initial "enemy combatant" detention—incapacitation from battle—had to be time bound. *Hamdi*, 542 U.S. at 521 (holding that "indefinite or perpetual detention" is impermissible); *id*. at 536 ("[A] state of war is not a blank check for the President."); *see also Boumediene*, 553 U.S. at 797-98 (courts may be required to define the outer boundaries of war powers if terrorism continues to pose a threat for years to come).

The scope of detention authority at Guantánamo, both in terms of duration and permissible purpose, must be reconciled with the limitations imposed by substantive due process.[17] *See Hussain v. Obama*, 134 S. Ct. 1621 (2014) (statement of Justice Breyer respecting denial of certiorari) (Supreme Court has not "considered whether, assuming detention on these bases is permissible, either the AUMF

[17] Several judges of this Court have noted that the argument rejected in *Kiyemba* was whether *substantive* due process provided a right that trumped the political branches' control over admission of non-citizens into the United States. *See Ali*, 2019 WL 850757, at *2 ("The relevant passage in *Kiyemba I* refuted the premise that a 'fundamental right of liberty' required the government to release the detainees onto United States soil. ... That hardly sounds like a procedural protection. ... the relevant dispute ... concerned only whether the law gave the detainees a substantive right to enter the United States. The detainees asserted no procedural due process rights...."); *see also* Transcript of Oral Argument at 58-59, *Qassim v. Trump*, No. 18-5148 (D.C. Cir. Jan. 15, 2019) (Pillard, J.: *Kiyemba* "deals with effectively a substantive due process question about whether there's a liberty interest...to be released into the United States [in light of] sovereign authority ... on the part of the political branches to make decisions about who comes in [to the United States] and who doesn't"). While that characterizes the limited nature of the issue in dispute in *Kiyemba* accurately, it remains the case that *Kiyemba* says nothing about the availability of substantive (as opposed to procedural) due process rights at Guantánamo *generally*—to the extent those rights do not directly collide with the power of the political branches over immigration.

or the Constitution limits the duration of detention"). As Judge Edwards noted six years ago in this very case, "[i]t seems bizarre, to say the least, that [a detainee] who has never been charged with or found guilty of a criminal act and who has never 'planned, authorized, committed or aided [any] terrorist attacks' is now marked with a life sentence." *Ali*, 736 F.3d at 553 (Edwards, J., concurring). Perpetual detention based on the "principal sin" of an eighteen-day stay in a guesthouse "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), flouting principles "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and therefore violates the guarantees of substantive due process.

B. Mr. Ali's Continuing Detention, Justified by Only a Preponderance of the Evidence and Deficient Procedural Protections, and Disconnected from Any Ongoing Legitimate Purpose, Violates Due Process

In habeas proceedings conducted nearly nine years ago, the government asserted that Ali was a member of a force "associated" with Al Qaeda, primarily based on the fact he stayed at a guesthouse for about 18 days. This Court ultimately accepted the district court's conclusion that a preponderance of the evidence supported the finding that Ali was part of that force. But "[n]othing in the record indicate[d]" directly that Ali was "part of or substantially supported" that "[Al Qaeda-]associated force[]." *Ali*, 736 F.3d at 553 (Edwards, J., concurring). Instead, as the district court's order on reconsideration noted, it found that "'petitioner's

presence at [the Faisalabad] guesthouse is enough, *alone*, to find that he was more likely than not a member of Abu Zubaydah's force' and was therefore detainable." Mem. Order, *Ali v. Obama*, No. 10-cv-1020 (RJL), 2011 WL 1897393, at *1 (D.D.C. May 17, 2011) (Dkt. No. 1496) (quoting *Ali*, 741 F. Supp. 2d at 26).

A panel of this Court upheld that finding, in a ruling that the concurring judge accurately characterized as relying on "personal associations" to infer membership in the armed force in question. 736 F.3d at 553 (Edwards, J., concurring). Like the district court, the panel placed special emphasis on the detainee's "principal sin," *id*., that he spent eighteen days living in a guesthouse with "an al Qaeda-associated" individual, 736 F.3d at 543, 545 (panel op.). From that and a number of allegations based upon hearsay, the panel found enough "indicia" to support membership in this "enemy force," noting that "determining whether an individual is part of ... an associated force almost always requires drawing inferences from circumstantial evidence, such as that individual's personal associations." *Id*. at 546. The panel expressly relied on the preponderance standard in determining that the evidence was sufficient to uphold his detention. *Id*. at 550 ("Ali maintains that many of those facts, considered individually, could have innocent explanations. Maybe yes, maybe no."); *id*. at 551 ("To be sure, as in any criminal or civil case,

there remains a *possibility* that the contrary conclusion is true—in other words, that Ali was not part of Abu Zubaydah's force").[18]

The practical consequence of this "is that Ali may now be detained for life"[19]—a conclusion made more stark by the current executive policy to no longer make discretionary transfers. That this Court accepted such a low burden of proof, with its attendant risk of error, on a substantive detention standard requiring no more than membership in or indirect support for an "associated" force, was expressly premised on the theory that these were temporary wartime detentions that need not meet a higher threshold. 736 F.3d at 545 (standard of proof is lower "because military detention ends with the end of the war"); *id*. at 552 ("Importantly, the standard of proof for such military detention is not the same as the standard of proof for criminal punishment, in part because [it is non-punitive] and in part because military detention ... comes to an end with the end of hostilities.").

That construct has long since dissipated. Ali's detention can no longer be based upon "no higher degree of proof than applies in a negligence case." *Woodby v. INS*, 385 U.S. 276, 285 (1966). There is no precedent in the law that would tolerate such prolonged, indefinite detention based on a preponderance standard and

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[18] The panel opinion noted that "we need not and do not rely on evidence from two detainees whose credibility Ali has contested, Muhammed Noor Uthman and Musa'ab al-Madhwani" (both of whom have, incidentally, long since left Guantánamo). 736 F.3d at 550 n.5.

[19] 736 F.3d at 553 (Edwards, J., concurring).

its correspondingly heightened risk of error. In evaluating the constitutionality of prolonged detention schemes, the Supreme Court has consistently required no less than clear and convincing evidence. *See, e.g.*, *Woodby*, 385 U.S. at 286 (deportation); *Kansas v. Hendricks*, 521 U.S. 346, 352 (1997) (civil commitment of sex offenders); *Foucha*, 504 U.S. at 81 (civil commitment of criminal defendant found not guilty by reason of insanity); *Salerno*, 481 U.S. at 747 (pre-trial detention based on dangerousness); *Nowak v. United States*, 356 U.S. 660, 663 (1958) (denaturalization)*; see also United States v. Jordan*, 256 F.3d. 922, 923 (9th Cir. 2011) (sentence enhancements that would have an "extremely disproportionate" effect on the sentence relative to the offense must be proved by clear and convincing evidence). Accordingly, due process requires that noncriminal detention of this duration satisfy no less than a clear and convincing evidence standard of proof.

Indeed, the government's asserted security interests have only grown weaker since Ali's initial apprehension and detention. At the same time, nearly seventeen years into his detention—already a term of imprisonment far greater than the average federal sentence for a felony conviction—it is Ali who now faces an intolerable burden. Although his liberty interest may be balanced with national security considerations, those national security considerations have become weaker, and his interest has become stronger, as the years of indefinite detention have dragged on. *See Rasul*, 542 U.S. at 488 (Kennedy, J., concurring) ("as the period of detention

stretches from months to years, the case for continued detention to meet military exigencies becomes weaker."). Due process cannot tolerate imprisonment without end on such thinly-based proof. Indeed, the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), as adopted by the Supreme Court in *Boumediene* and by the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), requires consideration of "the risk of an erroneous deprivation of [a liberty interest] and the probable value, if any, of additional or substitute procedural safeguards." *Boumediene*, 553 U.S. at 781 (quoting *Mathews v. Eldridge*, 424 U.S. at 335); *Hamdi*, 542 U.S. at 529.

Likewise, the thin procedural protections that had been in place when this Court validated the legality of Ali's detention (and many others) years ago are insufficient to provide due process for continuing—and potentially lifelong—detention. *See, e.g.*, *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011) (affording "presumption of regularity" to government's evidence); *Al-Adahi v. Obama*, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010) (accepting the "conditional probability" that otherwise unreliable evidence might be reliable if assessed in light of other, often itself unreliable evidence); *Al-Bihani v. Obama*, 590 F.3d. 866, 879 (D.C. Cir. 2010) ("hearsay is always admissible" in these cases); *id.* at 873 n.2 (visiting Al Qaeda affiliated guesthouses "overwhelmingly, if not definitively" justifies detention).

This case illustrates the dangers of uncritically accepting the accuracy of an accumulation of hearsay interrogation records without the corresponding information needed to test their reliability. The 2013 panel opinion affirming denial of the writ relied on the guesthouse stay as well as six "additional facts" from the factual return's exhibits, and concluded that they reinforced each other's veracity in reaching the conclusion that the government had met its preponderance threshold. *Ali*, 736 F.3d at 546. But accepting these "additional facts" as accurately established by hearsay exhibits to the factual return "leaves unacknowledged ... the central problem with [circuit precedent requiring such records be accorded a presumption of regularity]: it requires courts to presume the accuracy, albeit not the truth, of documents 'produced in the fog of war by a clandestine method that we know almost nothing about'—just as they presume the accuracy of, say, ordinary 'tax receipts'—and thus unjustifiably shifts the burden of proof to the detainee." Order, *Qassim v. Trump*, No. 18-5148, 2018 WL 3905809, at *2 (D.C. Cir. Aug. 14, 2018) (Doc. # 1745386) (Tatel, J., concurring in denial of petition for initial hearing *en banc*) (quoting *Latif v. Obama*, 677 F.3d 1175, 1208 (D.C. Cir. 2011) (Tatel, J., dissenting)).

As Judge Tatel summarized it, the procedural rules accepted by the court years ago have "call[ed] the game in the government's favor" and denied detainees the "'meaningful opportunity' to contest the lawfulness of [their] detention guaran-

teed by *Boumediene*." *Latif*, 666 F.3d at 770, 779 (Tatel, J., dissenting). But these rules were accepted years ago when the *detentions* they justified appeared unlikely to span a generation even if the *conflict* did. Given that the "grave consequences of inaccuracy" in accepting such procedures—continued deprivations of liberty—will soon stretch into their second decade, now is "the appropriate time [for the courts to] reconsider whether these documents merit the presumption that *Latif* affords them." *Qassim*, 2018 WL 3905809, at *3 (Tatel, J., concurring in denial of petition for initial hearing *en banc*).

In addition, due process should prevent perpetual non-criminal detention based on a detention standard focused solely on past conduct or association, rather than one grounded in present conditions that connect continuing detention to its ostensible purpose of allaying a specific and articulable danger posed by release. *See Salerno*, 481 U.S. at 750-51 (detention under carefully limited circumstances, including proof by clear and convincing evidence that a person presents an "identified and articulable threat" and "no conditions of release can reasonably assure" public safety, satisfies due process); *Hendricks*, 521 U.S. at 358 (requiring proof of past violent conduct coupled with an additional present condition to justify indefinite commitment); *Foucha*, 504 U.S. at 77 ("Even if the initial commitment was permissible, 'it could not constitutionally continue after that basis no longer existed.'" (citations omitted)). Ali's potential lifetime detention follows solely from

seventeen-year-old associations, alleged only with the support of double- and triple-hearsay, that in turn allowed this Court to "draw[] inferences from circumstantial evidence" and conclude that Ali was "part of" a now-defunct force "associated" in some manner with one of the actual named targets of the AUMF. *See Ali*, 736 F.3d at 546; *Ali*, 741 F. Supp. 2d at 26 (petitioner's presence at guesthouse for two weeks is "enough, *alone*, to find he was more likely than not" a member of Al Qaeda and thus detainable). The executive cannot be permitted to imprison individuals perpetually based on evidence of the kind and quality relied on previously in this case. Due process compels a more robust judicial intervention—particularly after seventeen years of detention, as the deprivation of liberty grows ever greater and the analogy to traditional armed conflicts weakens.[20]

[20] If the Court determines that remand is required, the district court should be required to revisit and refine the legal basis and procedures for Mr. Ali's detention—including whether there is clear and convincing evidence that he is, under current circumstances, likely to "return to the battlefield," and thus that his detention continues to serve its only lawful purpose. *See Hamdi*, 542 U.S. at 517; *id.* at 522 n.1 ("the permissible bounds of the category [of individuals who may be lawfully detained] will be defined by the lower courts as subsequent cases are presented to them"). Only then, consistent with the protections against limitless non-criminal detention, could due process be satisfied. *See Boumediene*, 553 U.S. at 781 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (due process requires consideration of "the risk of an erroneous deprivation of [a liberty interest] and the probable value, if any, of additional or substitute procedural safeguards")).

IV. The Court Should Apply Principles of Constitutional Avoidance and Construe the AUMF Narrowly to Limit Continuing Detention Authority at Guantánamo

The only positive-law authority under which the executive branch claims it can continue to detain Mr. Ali is the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001). But the AUMF does not include a clear statement authorizing indefinite detention; indeed, it says nothing at all about detention. The AUMF only authorizes the use of:

> 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, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

AUMF § 2(a). The Supreme Court has inferred detention authority from the authorization of "necessary and appropriate" force, but only in the "narrow circumstances" where necessary to prevent return to the battlefield consistent with long-standing law-of-war principles. *Hamdi*, 542 U.S. at 520. As noted above, the Court has also stated that indefinite or perpetual detention is not permitted. *Id.* at 521; *see also id.* at 536 ("[A] state of war is not a blank check for the President."). Mr. Ali now endures an increasing likelihood of life imprisonment without charge because of his "principal sin" of staying at a guesthouse for about 18 days nearly two decades ago. *Ali*, 736 F.3d at 553 (Edwards, J., concurring). In light of the serious constitutional issues that would be posed by such indefinite non-criminal detention,

this Court should apply principles of constitutional avoidance and hold that the AUMF, which authorizes only "necessary and appropriate force," limits the government's continuing detention authority at Guantánamo in a manner that avoids the substantive and procedural due process issues. *See Ashwander v. Tennessee*, 297 U.S. 288 (1936).

The Supreme Court took precisely that approach in addressing limits on executive detention of non-removable and non-admitted non-citizens. *See Zadvydas*, 533 U.S. at 689-90 (construing statute authorizing detention of admitted aliens to contain reasonable time limitation in order to avoid serious constitutional concerns raised by indefinite detention); *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (construing statute to limit detention of aliens not formally admitted to the United States to avoid constitutional issues); *see also INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (applying habeas statute and stating that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems") (citation omitted). Any court adopting this approach would be well within its jurisdiction, and would be fairly construing the language of the statute to avoid otherwise serious constitutional concerns. *See Skilling v. United States*, 561 U.S. 358, 411 n.44 (2010); *Hussain v. Obama*, 134 S. Ct. 1621 (2014) (statement of Justice Breyer respecting denial of certiorari) (Su-

preme Court has not "considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention").

As Justice Souter explained in his opinion concurring in the *Hamdi* judgment, when a court is asked to infer detention authority from a wartime resolution such as the AUMF that grants implied powers to the Executive, it must assume that Congress intended to place no greater restraint on liberty than was unmistakably indicated by the language it used.

> "In interpreting a wartime measure we must assume that [its] purpose was to allow for the greatest possible accommodation between ... liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

542 U.S. at 544 (quoting *Ex Parte Endo*, 323 U.S. 283, 300 (1944)). The AUMF plainly does not include a clear statement authorizing indefinite detention; as noted above, it says nothing about detention. If the right to use force under the AUMF is qualified and limited, so too must the inferred right to detain under it be similarly qualified and limited.

Because the district court erroneously concluded that the application of the Due Process Clause was foreclosed by this Court's precedent, it never considered whether constitutional avoidance principles should be applied. This Court could either apply avoidance principles, hold that the AUMF limits continuing detention

authority at Guantánamo, and order Mr. Ali's release, or instruct the district court to consider that avoidance argument on remand.

CONCLUSION

Mr. Ali has been held for more than 17 years without charge. Absent judicial intervention and the application of a due process limit to his continuing indefinite detention, he is increasingly likely to die at Guantánamo, based on a burden of proof no more rigorous than what is required to prove negligence, which in turn has been met with evidence of essentially unknown provenance and untested reliability. Our Constitution demands better of us.

The Court should reverse the district court decision, conclude that the Due Process Clause applies at Guantánamo, and (1) order Appellant's release as a matter of law on the ground that the duration of his continuing detention violates substantive due process, or (2) remand to the district court to determine in the first instance whether Appellant's continuing detention violates substantive and procedural due process. If the Court orders remand, it should, consistent with Supreme Court precedent governing noncriminal detention, do so with instructions to the district court to apply a clear and convincing evidence standard; to scrutinize more closely the use of hearsay evidence offered by the government in support of Mr. Ali's continuing detention; to mandate that the government articulate a legitimate and particularized purpose for Mr. Ali's continuing noncriminal detention;

and to consider whether application of due process requires additional procedural protections. Either this Court or the district court on remand should also consider whether these issues may be avoided by a limiting reading of the scope of detention authorized by the AUMF.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 8,787 words, and was prepared in 14-point Times New Roman font using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 on May 15, 2019.

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