No. 11-1027

In the Supreme Court of the United States

ADNAN FARHAN ABDUL LATIF, ET AL.,

Petitioners,

v.

BARACK H. OBAMA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RETIRED FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are 13 former federal judges who are interested in this case because of their years of dedicated service to the United States and their commitment to the Constitution and the rule of law. From their service on the bench, all of the *amici* recognize the centrality of the writ of habeas corpus to the preservation of individual liberty and to the Framers' separation-of-powers scheme, *Boumediene* v. *Bush*, 553 U.S. 723, 743 (2008), as well as the critical role played by the District Courts in giving effect to the Great Writ. Several of the *amici* participated as *amici* in *Rasul* v. *Bush*, 542 U.S. 466 (2004), and/or *Boumediene*.[1]

SUMMARY OF ARGUMENT

In *Boumediene*, this Court held that the privilege of habeas corpus, preserved by the Suspension Clause, guarantees Guantanamo detainees "a meaningful opportunity" to challenge their detentions before an impartial and independent judiciary. 553 U.S. at 779. The Court emphasized the robust and flexible nature of habeas review at common law, *id*. at 742-44, and recognized that the need for habeas review is "most pressing" where, as here, "a person is detained by executive order, rather

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[1] Please see the attached Appendix for a list of the *amici*, along with biographical information for each one. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties' written consents to the filing of this brief have been filed with the Clerk's office.

than, say, after being tried and convicted in a court." *Id.* at 783.

Based on its reading of the historical record, the Court held that habeas courts must have "sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id*. The Court did not impose restrictive evidentiary requirements on the habeas courts, but left such questions to "the expertise and competence of the District Court to address in the first instance." *Id.* at 796.

In the wake of *Boumediene*, the District Judges handling the Guantanamo habeas cases, based upon their own experience evaluating the government's evidence, have uniformly declined to afford that evidence a presumption of accuracy. In its decision below, the divided D.C. Circuit panel cast aside the extensive experience of the District Judges, holding that in this case—and in all other Guantanamo habeas cases—the District Judges are *required* to presume the "regularity" or "accuracy" of the government's evidence. As Judge Tatel recognized in his dissent, the presumption of "accuracy" mandated by the majority "'comes perilously close to suggesting that whatever the government says must be treated as true,'" and deprives the detainees of a "meaningful" opportunity to contest their detention. Pet. App. 74a. Moreover, the majority's decision flies in the face of *Boumediene* and ignores the central purpose of the Great Writ: to provide the Judiciary with a check on potentially arbitrary executive power, particularly in cases of executive detention. As the Court made clear in *Boumediene*, the Suspension Clause "affirm[s] the duty and authority of the Judiciary to call the jailer to account," 553 U.S.

at 745, and "[w]ithin the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person," *id.* at 797.

By requiring the District Judges to presume the accuracy of the government's evidence and severely limiting their ability to judge the government's evidence for themselves on a case-by-case basis, the panel's decision eviscerates the critical role of the habeas court in the separation-of-powers scheme.

ARGUMENT

I. As This Court Recognized In *Boumediene*, Meaningful Habeas Review Is Essential To The Preservation Of Liberty And The Separation Of Powers.

For centuries, habeas corpus has been hailed as the "'great and efficacious writ, in all manner of illegal confinement.'" *Boumediene*, 553 U.S. at 780 (quoting W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 131 (1768)). As this Court recognized in *Boumediene*, in our constitutional system the Great Writ is essential to both the preservation of individual liberty and maintenance of the separation of powers. Indeed, "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." 553 U.S. at 739. "That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension." *Id.* at 743; U.S. CONST. ART. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended,

unless when in Cases of Rebellion or Invasion the public Safety may require it.").

Moreover, "[t]he Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty." *Boumediene*, 553 U.S. at 742. "[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme," *id.* at 743, and understood that the Great Writ protected not only the rights of individual prisoners but the separation of powers and the supremacy of law itself. See *id.* at 744 (the New York ratifying convention "made clear its understanding" that the Constitution's habeas corpus clause "guarantees an affirmative right to judicial inquiry," and "Alexander Hamilton likewise explained that by providing the detainee a judicial forum to challenge detention, the writ preserves limited government") (citing FEDERALIST NO. 84, C. Rossiter ed., p. 512 (1961)).

Thus, the Constitution "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Boumediene,* 553 U.S. at 745 (quoting *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 536 (2004)). For courts to fulfill this essential constitutional function, the review granted to petitioners must be robust; the habeas court's powers must be broad and flexible enough to respond to the particular circumstances before it. Habeas corpus "exists, in Justice Holmes' words, to 'cu[t] through all forms and g[o] to the very tissue of the structure. It

comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.'" *Boumediene*, 553 U.S. at 785 (quoting *Frank* v. *Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting)).

II. The Requirement That Habeas Review Be "Meaningful" And "Flexible" Mandates That Habeas Courts Have Discretion To Assess The Evidence Offered By The Government To Support Detention.

In *Boumediene*, this Court confirmed that "the privilege of habeas corpus entitles the prisoner to a *meaningful opportunity* to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." 553 U.S. at 779 (emphasis added). To assure that this right is effective, the Court has long recognized that habeas is not "a static, narrow, formalistic remedy," *Jones* v. *Cunningham,* 371 U.S. 236, 243 (1963), and that the "precise application and scope" of habeas review must "chang[e] depending upon the circumstances" of a given case. *Boumediene*, 553 U.S. at 779. Indeed, "common-law habeas corpus was, above all, an adaptable remedy." *Id.* (citing *Schlup* v. *Delo*, 513 U.S. 298, 299 (1995), which held that "since habeas corpus is, at its core, an equitable remedy," courts must have leeway to act "when required to do so by the ends of justice").

This flexibility is particularly important where the detention at issue has not been the subject of previous judicial review. As the Court explained in *Boumediene*, "[i]t appears the common-law habeas court's role was most extensive * * * where there had been little or no previous judicial review of the cause

for detention." 553 U.S. at 780; see also *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."). Thus, "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing" and "the need for habeas corpus is more urgent." *Boumediene*, 553 U.S. at 783.

Recognizing that the habeas remedy must be "adaptable," *id*. at 779, the *Boumediene* Court declined to prescribe specific evidentiary or procedural rules to govern "the precise scope of the inquiry" in future habeas cases by the Guantanamo detainees. *Id*. at 783. Rather, the Court expressly left such questions to "the expertise and competence of the District Court to address in the first instance." *Id*. at 796. But the Court made clear that "[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain," *id.* at 783, and that this must include "authority to assess the sufficiency of the Government's evidence against the detainee," *id.* at 786. Accord *id.* at 787 ("when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law *and facts* and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release") (emphasis added).

The historical precedent clearly supports the dynamic and flexible form of habeas that this Court endorsed in *Boumediene*. In particular, the common

law writ involved judicial decision-making that was free from any requirement that the judge defer to the King or his evidence. Deference to a jailer's assessment of his detention power "was entirely unknown in traditional habeas cases." Jared A. Goldstein, *Habeas Without Rights,* 2007 WIS. L. REV. 1165, 1212-13 (2007); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2069 (2007) ("Modern notions of deference to administrative decisionmakers, developed primarily in other contexts, are in considerable tension with the historic office of the Great Writ.").

In their totality, the English writs show that justices frequently resorted to all manner of procedural and equitable mechanisms to expand what the writ could do. See Paul D. Halliday, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 87-93, 102-16 (2010). "At the center of [the common law] jurisprudence stood the idea that the court might inspect imprisonment orders made at any time, anywhere, by any authority. This simple idea, grounded in the [royal] prerogative, marked the point from which the justices' use of the writ expanded. Rather than analogize among cases—follow precedents—their thinking radiated in every direction from this core principle." *Id.* at 160.

For example, the archival evidence reveals that justices routinely asked prisoners' counsel for extrinsic information about their clients, assigned court officers to independently investigate facts in dispute, accepted various forms of testimonial and written evidence to controvert the jailer's return, and delayed the formal filing of the return (and thus its

incorporation into the record) until after the court's own review was completed. *Id.* at 110-12. In short, judges exercised careful and independent review of the facts to determine whether the prisoner was lawfully confined. See, *e.g.*, *R.* v. *Winton*, 101 Eng. Rep. 51 (K.B. 1792) (refusing to defer to the jailer's view that the petitioner was not in the jailer's control or possession); *Strudwick's Case*, 94 Eng. Rep. 271 (K.B. 1730) (refusing to defer to the jailer's assertion that the petitioner was too sick to be produced in court); *R.* v. *Dawes*, 97 Eng. Rep. 486 (K.B. 1758) (Lord Mansfield "went minutely through the affidavits on both sides" on an order to show cause for the discharge of an impressed sailor, ultimately finding that the impressment was invalid); *Goldswain's Case*, 96 Eng. Rep. 711, 711-12 (K.B. 1778) (rejecting the contention that the court must defer to the admiralty's asserted basis for a sailor's impressment, notwithstanding the admiralty's plea of "urgent necessity").

This highly dexterous, *de facto* equitable writ is the "time-tested device" that was "known to the Framers" and preserved by the Suspension Clause.[2] *Boumediene*, 553 U.S. at 742, 745; accord *Wade* v. *Mayo*, 334 U.S. 672, 681 (1948) ("[T]he flexible nature of the writ of habeas corpus counsels against erecting a rigid procedural rule that has the effect of

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[2] As Professors Halliday and White put it: When the delegates to the Constitutional Convention met in Philadelphia in 1787, "they did so against the backdrop of an English history of habeas corpus, which included two centuries of judicial innovation in habeas corpus jurisprudence." Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 670 (2008).

imposing a new jurisdictional limitation on the writ. Habeas corpus is presently available for use by a district court within its recognized jurisdiction whenever necessary to prevent an unjust and illegal deprivation of human liberty."); *Daniels* v. *Allen*, 344 U.S. 443, 448-49 (1953) (Frankfurter, J., concurring) ("The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention.").

Under the flexible common law writ, courts have long been free to undertake an independent investigation of any facts offered to support detention. See, *e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807) (Marshall, C.J.) (declining to defer to a jailer's assertion that the facts supported detention of prisoners and holding five days of hearings, during which the Court "fully examined and attentively considered" the proffered evidence). Until now, district courts have never been required to take a presumptively deferential view of the government's evidence supporting executive detention. Indeed, courts have long understood that presumptive deference in executive detention cases would undermine the fundamental principle of independent judicial review that underlies the common law writ. See, *e.g.*, *Ex parte Randolph*, 20 F. Cas. 242, 244 (Marshall, Circuit Justice, C.C.D. Va. 1833) (No. 11,558) (refusing to accept an executive official's factual findings regarding the conduct of a naval officer, and taking new evidence "important to the justice of the case" to render the court's own factual conclusions); *In re Jung Ah Lung*, 25 F. 141, 143 (D. Cal. 1885) ("to require the court in its

investigation to be governed by the decisions of an executive officer, acting under instructions from the head of the department in Washington, would be an anomaly without precedent, if not a flagrant absurdity"). Even when, during the Civil War, Congress enacted a statute declaring that the oath given by enlistees at the time of enlistment "shall be conclusive" that the enlistee was of lawful age, courts nonetheless ruled that the factual question of the enlistee's age could still be examined independently in a habeas proceeding. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. at 1220.

The Court's recognition of the centrality to habeas of a full and independent factual review was at the heart of the decision in *Boumediene* that the limited process provided by the Detainee Treatment Act was not an adequate substitute for habeas. Underlying *Boumediene* was the notion that for the judiciary to play its meaningful role in the separation-of-powers scheme, it must have the discretion to correct executive errors through flexible fact-finding powers and an independent evaluation of the evidence. As the Court explained in *Boumediene*, "the DTA disadvantages the detainee by limiting the scope of collateral review to a record that may not be accurate or complete," thus restricting the court's fact-finding powers and increasing the likelihood of error. 553 U.S. at 790-91. "Whatever the merits of this procedure, it is an insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus." *Id.* at 791.

III. In Implementing *Boumediene*, District Courts Have Unanimously Declined To Presume The Regularity Or Accuracy Of The Government's Evidence.

The District Judges handling the Guantanamo habeas cases have uniformly declined to adopt what the D.C. Circuit called a "presumption of regularity," that is, a presumption that the government's documents "accurately" summarize individuals' statements set forth in those documents. See Pet. App. 10a & n.2 (majority opinion). The District Judges—whose "institutional capacity for factfinding is superior" to that of "the appellate judge or Justice," *Boumediene*, 553 U.S. at 778—have refused to adopt any such presumption because, based on their experience in specific cases, there are often serious evidentiary problems with the government's evidence.

Shortly after *Boumediene*, Judge Hogan entered a Case Management Order for Guantanamo detainee cases that were consolidated in the United States District Court for the District of Columbia. The Case Management Order provided that the "Merits Judge"—*i.e.*, the District Judge who would decide the habeas case—"*may* accord a rebuttable presumption of accuracy and authenticity to any evidence the government presents as justification for the petitioner's detention if the government establishes that the presumption is necessary to alleviate an undue burden presented by the *particular* habeas corpus proceeding." *In re Guantanamo Bay Detainee Litig.*, 2008 WL 4858241, at *3 (D.D.C. Nov. 6, 2008) (emphasis added). In many of the habeas cases that followed, the government asked the District Judges to accord such a presumption to its evidence. But

focusing both on the specific evidence involved in each case and this Court's opinion in *Boumediene*, all of the District Judges who have considered the issue in reported opinions have declined the government's requests.

In doing so, the District Judges have explained that such a presumption is inconsistent with the traditional fact-finding function of a habeas court and that the accuracy of the government's evidence must be evaluated on a case-by-case basis to avoid error, an inquiry focused on the particular evidence at issue in each case.

For example, Judge Kennedy declined to "presum[e] 'that intelligence reports in this case * * * accurately reflect what the source stated during the interview in question,'" because "[t]he Court has learned from its experience with these cases that the interrogation summaries and intelligence reports on which respondents rely are not necessarily accurate and, perhaps more importantly, that any inaccuracies are usually impossible to detect." *Abdullah* v. *Obama*, 2010 U.S. Dist. Lexis 144024, at *5-*6 (D.D.C. May 6, 2010). Judge Kennedy carefully explained the basis for this conclusion:

> [T]here are many steps in the process of creating these documents in which error might be introduced. Specifically, to avoid mistakes, the interpreter must understand the question posed and correctly translate it; the interviewee must understand the interpreter's recitation of the question; the interpreter must understand the interviewee's response and correctly interpret it; the interrogator must understand the interpreter's translation of

> the response; the interrogator must take accurate notes of what is said; and the interrogator must accurately summarize those notes when writing the interrogation summary at a later time.

Id. at *6-*7. Moreover, Judge Kennedy continued, "[a]s to most of the relevant documents, there is no way to assess whether each of these steps occurred without flaw because there is no information in the record with which to check the translation and reporting." *Id.* at *7. Accordingly, Judge Kennedy concluded, "the Court cannot accept the proposition that there is a safeguard in making the presumption of accuracy rebuttable." *Id.* And even "in the rare instances in which the Court has had evidence before it that has made an assessment of the accuracy of an interrogation summary possible, that evidence has demonstrated that the summaries are of questionable accuracy." *Id.* For all of these reasons, Judge Kennedy found that, although "there is reason to believe that respondents' interpreters and interrogators attempt to prevent errors from being introduced into their reports[,] * * * there is simply no basis to *presume* that each statement in the reports respondents submit accurately represents the words of the interrogated detainee." *Id.* at *7-*8.

Similarly, Judge Kollar-Kotelly emphasized that a "central function[]" of habeas review "is 'to evaluate the raw evidence' proffered by the Government," and that "[s]imply assuming the Government's evidence is accurate and authentic does not aid that inquiry." *Al Mutairi* v. *United States*, 644 F. Supp. 2d 78, 83 (D.D.C. 2009). Judge Kollar-Kotelly identified "significant reasons" why the government's evidence might be inaccurate. First, some evidence was

"'buried under the rubble of war,' in circumstances that have not allowed the Government to ascertain its chain of custody, nor in many instances even to produce information about the origins of the evidence." *Id.* at 84. Second, "[o]ther evidence is based on so-called 'unfinished' intelligence, information that has not been subject to each of the five steps in the intelligence cycle (planning, collection, processing, analysis and production, and dissemination)." *Id.* And third, "[s]till other evidence is based on multiple layers of hearsay (which inherently raises questions about reliability), or is based on reports of interrogations (often conducted through a translator) where translation or transcription mistakes may occur." *Id.*

For example, Judge Kollar-Kotelly noted that the government "believed for over three years" that one detainee "manned an anti-aircraft weapon in Afghanistan based on a typographical error in an interrogation report." *Id.* In another case, Judge Kollar-Kotelly observed that "the Government" itself "argue[d] that interrogators and/or interpreters included incorrect dates in *three* separate reports * * * based on misunderstandings between the Gregorian and the Hijri calendars." *Al Odah* v. *United States*, 648 F. Supp. 2d 1, 6 (D.D.C. 2009). Thus, rather than afford a presumption of accuracy, Judge Kollar-Kotelly "consider[ed] the accuracy * * * of the evidence in the context of the entire record and the arguments raised by the parties." *Al Mutairi*, 644 F. Supp. 2d at 84.

Judge Kessler likewise has held that "there is absolutely no reason for this Court to *presume* that the facts contained in the Government's exhibits are accurate." *Mohammed* v. *Obama*, 704 F. Supp. 2d 1,

6 (D.D.C. 2009). Judge Kessler explained that "the accuracy of much of the factual material contained in those exhibits is hotly contested for a host of different reasons ranging from the fact that it contains second-level hearsay to allegations that it was obtained by torture to the fact that no statement purports to be a verbatim account of what was said." *Id.* Judge Kessler further observed that because "this is a bench trial, the Court must, in any event, make the final judgment as to the reliability of these documents, the weight to be given to them, and their accuracy. Those final judgments will be based on a long, non-exclusive list of factors that any neutral fact-finder must consider, such as: consistency or inconsistency with other evidence, conditions under which the exhibit and statements contained in it were obtained, accuracy of translation and transcription, personal knowledge of declarant about the matters testified to, levels of hearsay, recantations, etc." *Id.* (footnote and internal citation omitted).

Also refusing to grant a presumption in favor of the government's evidence, Judge Walton held that to introduce certain intelligence reports, the government would be required to demonstrate, *inter alia*, "that the statements purportedly made by the[] sources were interpreted by a reliable interpreter" and "that the interpreted statements were recorded by the interrogator in a manner that is reliable." *Bostan* v. *Obama*, 674 F. Supp. 2d 9, 28 (D.D.C. 2009). Judge Walton expressed concern that the District Court's "failure to consider the reliability of the hearsay evidence proffered by the government" would "make it virtually impossible for the petitioner to challenge the accuracy of the proffered documents themselves." *Id.* at 24. Citing *Boumediene*, Judge

Walton has also stressed that "[t]he very notion that the Court should lower its standards of admissibility to whatever level the government is prepared (or even able) to satisfy is contradictory to the fundamental principles of fairness that inform the Great Writ's existence." *Bostan* v. *Obama*, 662 F. Supp. 2d 1, 5 (D.D.C. 2009).

Every other District Judge that has considered the issue in reported decisions in the Guantanamo habeas cases has similarly declined the government's request to afford a presumption of accuracy to the government's evidence. See *Hatim* v. *Obama*, 677 F. Supp. 2d 1, 10 (D.D.C. 2009) (Urbina, J.) (analyzing "the government's request for a presumption of accuracy," and agreeing with Judge Kessler "that there is ample reason not to afford the government's evidence this presumption * * *. Accordingly, the court will not presume that the hearsay evidence offered in this case is accurate."), vacated on other grounds, 632 F.3d 720 (D.C. Cir. 2011); *Almerfedi* v. *Obama*, 725 F. Supp. 2d 18, 21-22 (D.D.C. 2010) (Friedman, J.), reversed on other grounds, 654 F.3d 1 (D.C. Cir. 2011), petition for cert. filed (No. 11-683) (Nov. 7, 2011); *Awad* v. *Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (Robertson, J.); *cf. Anam* v. *Obama*, 696 F. Supp. 2d 1, 4 (D.D.C. 2010) (Hogan, J.) (noting that the Court "would determine the accuracy, reliability, and weight, if any, of each piece of evidence after considering the evidence as a whole and the arguments presented during the Merits Hearing"); *Al-Qurashi* v. *Obama*, 733 F. Supp. 2d 69, 78-79, 80-81 (D.D.C. 2010) (Huvelle, J.) ("The same concerns for a statement's reliability are applicable here. 'The habeas court must have sufficient authority to conduct a meaningful review of' not only 'the Executive's power to detain' but also the

underlying 'cause for detention'"; "in determining the credibility of * * * allegations as to voluntariness, the Court must engage in 'a fact-specific inquiry that depends almost entirely on an assessment of the credibility of the witnesses * * * as well as any reliable documentary evidence'"); *Khan* v. *Obama*, 646 F. Supp. 2d 6, 11 (D.D.C. 2009) (Bates, J.) (not expressly deciding whether to afford a presumption of accuracy but stating nonetheless that "[e]ven under relaxed evidentiary standards, however, the credibility or reliability of the evidence must be assessable by a court lest the presumptions in favor of respondents become irrebuttable").

In sum, these District Judges—those closest to the evidence—have done "exactly what we expect of careful factfinders and precisely what our case law demands: scrupulously assess the reliability of each piece of evidence." Pet. App. 68a (Tatel, J., dissenting). In other words, they fulfilled the historical role of the habeas court that *Boumediene* described by *judging* the evidence presented, one case at a time, without artificial evidentiary presumptions one way or the other.

IV. By Imposing A Presumption Of "Regularity" Or "Accuracy," The D.C. Circuit Undermined The Great Writ And *Boumediene*.

The divided panel in this case "discard[ed] the unanimous, hard-earned wisdom of our district judges" and their "uniquely valuable perspective," Pet. App. 68a (Tatel, J., dissenting), by imposing a "presumption of regularity" that requires District Judges to presume that "the government official accurately identified the source and accurately summarized his statement" for every piece of

evidence that the government proffers in Guantanamo habeas hearings. *Id*. at 9a, 19a-20a (majority opinion). On a number of grounds, the majority's imposed presumption merits this Court's review.

In holding that such a presumption should be required, the majority cited "the horizontal separation of powers," observing that "courts have no special expertise in evaluating the nature and reliability of the Executive branch's wartime records." Pet. App. 11a. Similarly, the majority invoked "inter-branch * * * comity" in support of its presumption of accuracy, *id.* at 12a, seeming almost to apologize for subjecting the Executive's detention decision to any review at all, *id.* at 39a ("As the dissenters warned and as the amount of ink spilled in this single case attests, *Boumediene*'s airy suppositions have caused great difficulty for the Executive and the courts"). But the majority's decision ignores the very purpose of the writ of habeas corpus: to provide the Judiciary with a check on potentially arbitrary executive power. As the Court emphasized in *Boumediene*, the Suspension Clause "affirm[s] the duty and authority of the Judiciary to call the jailer to account." 553 U.S. at 745. "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Id.* at 797. The majority's invocation of "horizontal separation of powers" and "inter-branch * * * comity" turns this fundamental separation-of-powers principle on its head.

The presumption of accuracy that the majority would impose also undermines *Boumediene*'s

requirement that detainees have a "meaningful opportunity" to contest the lawfulness of their detention. 553 U.S. at 779. Without even explaining what exactly the detainee's burden in rebutting the presumption would be,[3] the majority held that Mr. Latif "fail[ed] to meet" it. Pet. App. 20a. And while the majority states that its presumption "does not require a court to accept the truth" of statements contained in government intelligence reports, *id.* at 8a, as a practical matter, the majority's disclaimer notwithstanding, its presumption "'comes perilously close to suggesting that whatever the government says must be treated as true.'" *Id.* at 74a (Tatel, J., dissenting). Indeed, in the real world, it will be exceedingly difficult for many of the Guantanamo detainees to rebut a presumption of accuracy, especially where the inculpatory statements in the Government's reports are from a third party. As Judge Kennedy recognized in *Abdullah*, "any inaccuracies are usually impossible to detect." 2010 U.S. Dist. Lexis 144024, at *6. Moreover, even if the detainee offers testimony to the habeas court to rebut the majority's presumption, under the majority's decision, that testimony may be dismissed on the ground that it is "self-serving" (ignoring the fact that *any* party's testimony in *any* case is self-serving). See Pet. App. 11a n.2 (quoting *Thompson* v. *Estelle*, 642 F.2d 996, 998 (5th Cir. 1981), for the proposition that "[t]he district court could properly rely on the regularity of the state court's documents in preference to Thompson's own self-serving

[3] The majority noted that the possibilities included requiring a petitioner to come forward with "'clear and specific'" or "'clear and convincing evidence,'" rather than "a mere preponderance of the evidence." Pet. App. 20a n.5.

testimony"). Thus, as Judge Tatel warned, "it is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'" *Id.* at 74a. See also Br. of Former Intelligence Professionals and Scholars of Evidence and Criminal Procedure (explaining how the panel's required presumption of regularity or accuracy would affect Guantanamo habeas hearings and why such a presumption would effectively rubber stamp executive detention).

The majority invoked other circumstances in which presumptions of regularity or accuracy operate, but as Judge Tatel noted, those contexts are far different. Courts presume the government's evidence to be "generally reliable" where processes are "transparent, accessible, and often familiar." Pet. App. 56a-57a (Tatel, J., dissenting). Here, however, the majority's presumption of regularity or accuracy is "deeply misguided," *id.* at 67a, because the government's evidence, like "the Report at issue here," often is "produced in the fog of war by a clandestine method that we know almost nothing about." *Id.* at 58a. In fact, the majority conceded, the report at issue in this case was "prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes." *Id.* at 4a-5a. These circumstances cast the government's evidence "into serious doubt" and make it *more*, not less, likely that the government's evidence might be flawed. *Id.* at 63a (Tatel, J., dissenting). Indeed, as discussed above, the District Judges who are closest to the type of evidence at issue here have universally declined to extend such reports a presumption of accuracy.

Moreover, unlike federal habeas review of state incarcerations, where criminal defendants have had a trial and state judges have already reviewed the evidence, "constitutional habeas is the only process afforded Guantanamo detainees." *Id.* at 59a (Tatel, J., dissenting). There is no other review "by an independent Article III court." *Id.* at 61a. To equate habeas review in the executive detention context to federal review of state convictions, as the majority does, *id.* at 10a, completely ignores the "pressing" and "more urgent" need for "meaningful review" of executive detention orders. *Boumediene*, 553 U.S. at 783.

Finally, while the majority suggested that the District Judges "confus[ed]" the presumption of regularity with a presumption of "the truth of the underlying non-government source's statement," Pet. App. 9a,[4] "there are no grounds for assuming the district courts are confused about this distinction." *Id.* at 71a (Tatel, J., dissenting). Indeed, in *Abdullah*, Judge Kennedy expressly noted that "[r]ather than seeking a presumption that what was said in any

[4] Curiously, the majority appears to have disregarded the presumption of accuracy in its own opinion. Latif argued that his "purported benefactor" Ibrahim Al-Alawi was a different person from "al-Qaida facilitator" Ibrahim Ba-alawi, and that "at least seven detainees reported their recruiter's name as Ba'alawi or some variant thereof." Pet. App. 36a-37a. The majority rejected the distinction between the two names, reasoning that "such a minor phonetic mistake could easily result from a translation or transcription error." *Id.* at 37a. But if the presumption of accuracy means anything, the majority should have *presumed* that the government's translations and transcriptions were accurate and that Al-Alawi and Ba-alawi are different people, a presumption that may well have affected the panel's ultimate disposition.

interrogation summary or intelligence report is *credible*, respondents seek a presumption 'that intelligence reports in this case, including the reports that reflect interviews with Petitioner and other detainees, accurately reflect what the source stated during the interview in question.'" 2010 U.S. Dist. Lexis 144024, at *5 (emphasis in original; citing the government's reply brief). Judge Kennedy then denied the government's request for such a presumption, explaining that he "learned from [his] experience with these cases that the interrogation summaries and intelligence reports on which respondents rely are not necessarily accurate and, perhaps more importantly, that any inaccuracies are usually impossible to detect." *Id.* at *6; see also *Al Mutairi*, 644 F. Supp. 2d at 84 (noting that some of the evidence at issue "is based on reports of interrogations (often conducted through a translator) where translation or transcription mistakes may occur"); *Ahmed* v. *Obama*, 613 F. Supp. 2d 51, 55 (D.D.C. 2009) (in making a "final judgment as to the reliability of [the government] documents, the weight to be given to them, and their accuracy," the Court would consider "a long, non exclusive list of factors that any fact-finder must consider," including "conditions under which the exhibit and statements contained in it were obtained" and the "accuracy of translation and transcription"). In short, the District Judges have not rejected a presumption of regularity because they were "confus[ed]," Pet. App. 9a, but because, based on their considerable experience, they concluded that the type of evidence at issue here is much too problematic in too many cases to warrant the adoption of an across-the-board presumption of regularity or accuracy that would restrict their

discretion in evaluating specific evidence in individual cases.

CONCLUSION

In mandating a presumption of regularity or accuracy that rigidly restricts the District Judges in evaluating the government's evidence, the panel majority has fatally undermined *Boumediene*'s central principles. The panel's holding should be reviewed now. Many Guantanamo detainees have already been imprisoned for more than a decade. Unless the decision of the court of appeals is reviewed now and reversed, Guantanamo detainees may never receive the "meaningful opportunity" for habeas relief, *Boumediene*, 553 U.S. at 779, that this Court promised in 2008.

The petition for a writ of certiorari should be granted and the panel's decision should be reversed.

Respectfully submitted.

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APPENDIX

AMICI INFORMATION

The *amici curiae* are as follows:

Judge William G. Bassler served on the United States District Court for the District of New Jersey from 1991 to 2006. He also served on the Superior Court for the State of New Jersey from 1988 to 1991.

Judge David H. Coar served on the United States District Court for the Northern District of Illinois from 1994 to 2010. He served as Bankruptcy Judge for the Northern District of Illinois from 1986 to 1994.

Judge John J. Gibbons served as Judge from 1969 to 1987 and as Chief Judge from 1987 to 1990 for the United States Court of Appeals for the Third Circuit. He is the Director and Founder of the John J. Gibbons Fellowship in Public Interest and Constitutional Law and is currently a Director of Business and Commercial Litigation at the Gibbons PC law firm.

Judge Nathaniel R. Jones served on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002 and as Assistant United States Attorney for the Northern District of Ohio from 1962 to 1968. He is currently Of Counsel at Blank Rome LLP in Cincinnati, Ohio.

Judge Thomas D. Lambros served on the United States District Court for the Northern District of Ohio from 1967 to 1995 and served as Chief Judge from 1990 to 1995.

Judge George N. Leighton served on the United States District Court for the Northern District of Illinois from 1976 to 1987. He served as Justice of the Illinois Appellate Court from 1969 to 1976 and as Judge on the Circuit Court of Cook County, Illinois from 1964 to 1969.

Judge Abner J. Mikva served on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and served as Chief Judge from 1991 to 1994. He served as White House Counsel from 1994 to 1995. He served Illinois as a member of the United States House of Representatives from 1969 to 1973 and from 1975 to 1979. He was an Illinois State Representative from 1956 to 1966. He was a visiting professor at the University of Chicago from 1996 until 2008.

Judge Stephen M. Orlofsky served on the United States District Court for the District of New Jersey from 1996 to 2003 and was Magistrate Judge for the District of New Jersey from 1976 to 1980. He is currently the Administrative Partner in the Princeton Office of Blank Rome LLP and chairs the firm's appellate practice.

Judge James Robertson served on the United States District Court for the District of Columbia from 1994 to 2010. He served on the Foreign Intelligence Surveillance Court from 2002 to 2005.

Judge Stanley J. Roszkowski served on the United States District Court for the Northern District of Illinois from 1977 to 1998.

Judge H. Lee Sarokin served on the United States Court of Appeals for the Third Circuit from 1994 to 1996 and served on the United States

District Court for the District of New Jersey from 1979 to 1994.

Judge William S. Sessions was Director of the Federal Bureau of Investigation from 1987 to 1993. He served on the United States District Court for the Western District of Texas from 1974 to 1987, and served as Chief Judge from 1980 to 1987. He was United States Attorney for the Western District of Texas from 1971 to 1974. He is currently a partner at Holland & Knight LLP.

Judge Alfred M. Wolin served on the United States District Court for the District of New Jersey from 1987 to 2004. He was Presiding Judge for the Superior Court of New Jersey Criminal Division from 1983 to 1987, and a judge on the Superior Court of New Jersey, Civil Division, from 1982 to 1983.