No. 11-1027

In the Supreme Court of the United States

ADNAN FARHAN ABDUL LATIF, PETITIONER

v.

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

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION
(REDACTED PUBLIC VERSION)

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied a rebuttable presumption that an official report of petitioner's own statement to United States government interviewers accurately reflected the statement petitioner made.

2. Whether the court of appeals correctly determined that errors in the district court's analysis of the evidence required a remand.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION (REDACTED PUBLIC VERSION)

OPINIONS BELOW

The classified opinion of the court of appeals (Pet. App. 1a-112a) is unreported, but a redacted public version of the opinion is reported at 666 F.3d 746. The classified opinion of the district court (Pet. App. 114a-141a) is unreported, but a redacted public version is available at 2010 WL 3270761.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2011 (Pet. App. 113a). The petition for a writ of certiorari was filed on January 12, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an alien detained at the United States Naval Station at Guantanamo Bay, Cuba, under the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. He petitioned for a writ of habeas corpus, and the district court granted the writ. The court of appeals reversed and remanded. Pet. App. 1a-112a.

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

In Section 1021 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1562 (2011), Congress "affirm[ed]" that the authority granted by the AUMF includes the authority to detain, "under the law of war," any "person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."

2. Petitioner, an alien detained at Guantanamo Bay under the AUMF, filed a petition for a writ of habeas corpus challenging the lawfulness of his detention. Af-

ter this Court held in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), that the district court has jurisdiction to consider habeas petitions filed by Guantanamo detainees such as petitioner, the government filed a factual return to the habeas petition, and petitioner filed a traverse.

3. The district court held an evidentiary hearing. The government submitted a report of an interview of petitioner conducted by United States personnel after petitioner was captured while fleeing from Afghanistan into Pakistan [**REDACTED**] Pet. App. [**REDACTED**] 119a-122a. The report explained that petitioner had said that, in 2000, he was recruited to fight with the Taliban in Afghanistan by a man named Ibrahim Al-'Alawi from Ibb, Yemen. *Id.* at 122a. After traveling to Kandahar, Afghanistan, and meeting with 'Alawi at his home, petitioner was taken by 'Alawi "to the Taliban, who gave him weapons training and put him on the front line facing the Northern Alliance north of Kabul." *Ibid.* In his interview, petitioner identified other individuals associated with the Taliban, and he said that he had "remained [in Afghanistan] under the command of [an] Afghan leader" named "Abu Fazl" "until Taliban troops retreated and Kabul fell." *Ibid.* Petitioner "claimed he saw a lot of people killed during the bombings, but never fired a shot." *Ibid.* He explained that, in his retreat, he "went to Jalalabad, then crossed into Pakistan with fleeing Arabs, guided by an Afghan" named "Taqi []Allah." *Ibid.*

The government also presented evidence to show that the report accurately reflected petitioner's statements. First, the government submitted detailed declarations attesting to the care that goes into conducting such interviews and preparing reports of them. Pet. App. 13a; C.A. App. [**REDACTED**] 554-556, 558-559.

Second, the government submitted evidence confirming the accuracy of the biographical and other information about petitioner contained in the report, including his age, his mother's name, and the amount of money he had in his pocket at the time of his capture. Compare [**REDACTED**] with C.A. App. 461, 464, 568, 591. Third, the government submitted later statements by petitioner in which he acknowledged his involvement with individuals he named in the report (such as the recruiter 'Alawi) and the details of his travel. *Id*. at 464, 473, 461, 470, 475, 487, 516, 581 ('Alawi); *id*. at [**REDACTED**] 462, 465 (details of meeting 'Alawi in Kandahar); *id*. at 462, 465 (travel route); *id*. at 465, 575-576, [**REDACTED**] (fellow fighters; *id*. at 465 (Afghan guide). The primary difference between the initial interview and the later accounts was that, in the later accounts, each of the participants was given an innocuous role in a story in which a benefactor named 'Alawi helped petitioner travel to Pakistan and Afghanistan to obtain medical care for injuries sustained in a car accident in 1994. Pet. App. 4a.

The government also submitted evidence showing that petitioner's initial account was consistent with documented events in Afghanistan. For example, a man named Ibrahim B'Alawi—a name very similar to Ibrahim Al-'Alawi, the man petitioner identified as his benefactor—was a well-known al-Qaida and Taliban recruiter (also known as Abu Khulud) operating in Yemen and living in Kandahar. C.A. App. 267-268, 275-276; see *Abdah* v. *Obama*, 709 F. Supp. 2d 25, 38 (D.D.C. 2010) (describing recruiter), aff'd *sub nom. Esmail* v. *Obama*, 639 F.3d 1075 (D.C. Cir. 2011); *Suleyman* v. *Obama*, No. 10-5292, 2012 WL 382987, at *1-2 (D.C. Cir. Jan. 27, 2012) (same). The location of the fighting [**REDACTED**] identified by petitioner in the interview also

squared with real-world events. Pet. App. [**REDACTED**] 47a; C.A. App. 437-438.

[**REDACTED**]

Petitioner elected not to testify at the hearing but instead submitted a declaration in which he claimed that he traveled to Pakistan and Afghanistan in 2001 at 'Alawi's behest in order to obtain medical care for an injury suffered in a 1994 automobile accident. Pet. App. 4a; see *id*. at 24a-25a; C.A. App. 525-529. In the declaration, petitioner did not "deny being interviewed [**REDACTED**] nor did he "allege his statements were coerced or otherwise involuntary." Pet. App. 4a. In fact, petitioner's declaration provided no information about the circumstances of the interview at issue. C.A. App. 525-529. Instead, he stated that "his statements [during the initial interview] were misunderstood or, alternatively, [**REDACTED**] were misattributed to him." Pet. App. 4a. According to petitioner, he in fact "never told anyone that I received weapons training, attended a training camp, or participated in military fighting." C.A. App. 528.

4. The district court granted the writ. Pet. App. 138a-141a. The court concluded that the report of petitioner's interview was "not sufficiently reliable to support a finding * * * that [petitioner] * * * trained and fought with the Taliban." Pet. App. 138a. In reaching that conclusion, the court found that petitioner's claim that "mistranslation or misattribution * * * explain the" statements in the report "is plausible." *Id*. at 139a. The court also concluded that petitioner's story about seeking medical care was "not incredible" and he "might have sought treatment" for his injuries. *Id*. at 140a-141a. And the court explained that there was "no corroborating evidence for any of the incriminating

statements in the [report] as they relate specifically to [petitioner]." *Id.* at 139a.

5. The government appealed. While the appeal was pending, the government located documents that had been created by the FBI that provide additional information corroborating the reliability of the report of petitioner's interview. Those documents include a more detailed FBI report of the interview that names the FBI agents who participated, [**REDACTED**] as well as the more detailed report, are fully consistent with the report of petitioner's interview that was already in the record. The documents also include a photograph of petitioner taken at the time of his interview. In the photograph, he is holding a card showing his name and an identification number that also appears [**REDACTED**] in the FBI report. The government disclosed that evidence to counsel for petitioner, and it noted some of the new material in asking the court of appeals to remand the case for further factfinding. Letter from Kathryn C. Mason, Civil Division, United States Department of Justice, to James McCall Smith (Mar. 10, 2011) (2011 Disclosure); Gov't C.A. Reply Br. 15 n.2; Pet. App. 3a-4a.

6. a. The court of appeals reversed and remanded for further proceedings, including consideration of the "new evidence pertaining to the origins of the Report that neither the district court nor our court has had occasion to consider." Pet. App. 52a.

With respect to the evidence already in the record, the court of appeals held that the district court had made three errors in its analysis of that evidence. Pet. App. 2a. First, the district court failed to apply the common-law presumption of regularity for government records to the report of petitioner's interview with United States officials. *Id.* at 5a-31a. That presump-

tion, the court of appeals explained, is that absent other evidence to the contrary, "the statements [recorded] in a government record were actually made." *Id.* at 18a-19a. "[I]t presumes the government official accurately identified the source and accurately summarized his statement." *Id.* at 10a. The court emphasized, however, that the presumption "implies nothing about the truth of the underlying non-government source's statement." *Ibid.* The court further explained that the presumption of regularity not only relates solely to the recording of statements (as opposed to the truth of the statements) but also is rebuttable. *Id.* at 20a. But the court had no occasion to decide precisely how much evidence is necessary to rebut the presumption because it concluded that petitioner had failed to satisfy any standard that might apply. *Id.* at 20a n.5.

The court of appeals emphasized that the government had submitted declarations explaining the standards used in the preparation of reports such as the one at issue here. Pet. App. 21a-22a; see *id.* at 14a n.3 ("When [petitioner's] first interrogation took place and the Report was prepared, the Government * * * was seeking accurate, actionable intelligence to protect the country from imminent attack," and it therefore "had the strongest incentive to produce accurate reports."). The court noted two errors in the report but explained that those errors suggested, "at worst, * * * the presence of minor transcription errors" and suggested no inaccuracy in the substantive information in the report. *Id.* at 25a. The court reasoned that "[i]t is almost inconceivable that a similar mistake could have resulted in the level of inculpatory detail contained in the rest of the Report." *Ibid.* The court observed that, even if it were "possible that the Report's incriminating admissions

were all recorded by mistake while more innocent details, like the name of Latif's mother, his hometown, and the route he traveled, were transcribed accurately," *id.* at 26a, that mere possibility did not make "the Report's description of [petitioner's] incriminating statements * * * fundamentally unreliable," *id.* at 27a.

The court of appeals also noted that the report was corroborated by evidence not considered by the district court, Pet. App. 27a-31a, such as the fact that "[m]any characters from the Report's dramatis personae reappear in [petitioner']s subsequent interrogations," *id.* at 29a-30a. The court of appeals concluded that petitioner's "many statements echoing elements of the Government's evidence corroborate the reliability of the Report." *Id.* at 30a-31a.

Second, the court of appeals held that the district court had erred in that it "relied in part on [petitioner's] declaration in discrediting the Report" but "fail[ed] to make a credibility finding." Pet. App. 31a. Instead of finding petitioner's story to be credible, the district court repeatedly described petitioner's story as merely "plausible." *Id.* at 31a-34a. Only a credible account, the court of appeals explained, "could overcome the presumption of regularity to which the Report was entitled." *Id.* at 31a.

Third, the court of appeals concluded that the district court had erred in isolating discrete pieces of inculpatory evidence to discredit them, rather than "view[ing] the evidence collectively." Pet. App. 38a. The court of appeals explained that the district court's "unduly atomized approach is illustrated by its isolated treatment [of] (or failure to consider) * * * (a) striking similarities between [petitioner's] exculpatory story and the Report, (b) the route [petitioner] admits traveling, * * *

(c) contradictions in [petitioner's] exculpatory statements, [**REDACTED**] *Id.* at 39a. The court of appeals explained that "[o]ne cannot gather from a fair reading of the district court's opinion that any of these facts informed its conclusion about the Government's evidence *Id.* at 49a. That failure to consider the evidence as a whole, the court of appeals held, "provide[d] an alternative basis for remand." *Id.* at 39a.

b. Judge Henderson concurred in the judgment. Pet. App. 54a-67a. In her view, the implausibility of petitioner's account meant that he "could only dig himself deeper into a hole on remand," *id.* at 66a, and therefore, "the better course would be to simply reverse the district court's grant of habeas corpus relief," *id.* at 54a.

c. Judge Tatel dissented. Pet. App. 68a-112a. He argued that it was inappropriate to apply a presumption of regularity concerning the recording of petitioner's statements, *id.* at 70a-86a, and that the district court had not clearly erred in assessing the evidence, *id.* at 87a-112a.

ARGUMENT

Petitioner argues (Pet. 14-21) that the court of appeals erred in applying a rebuttable presumption that an official report of petitioner's statement to a United States government interviewer accurately reflected the contents of that statement, and (Pet. 21-28) that the court further erred in determining that flaws in the district court's evaluation of the evidence required a remand. Those arguments lack merit. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. As an initial matter, this Court's review is unwarranted at this time because the court of appeals remanded to the district court for further factfinding, so the case is still in an interlocutory posture. This Court routinely denies petitions by parties challenging interlocutory determinations that may be reviewed at the conclusion of the proceedings. See, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). That practice ensures that all of a petitioner's claims will be consolidated and presented in a single petition. Here, the interests of judicial economy would best be served by denying review now and allowing petitioner to reassert his claims at the conclusion of the proceedings, if he still wishes to do so at that time.

That course is especially appropriate in this case because, as the court of appeals noted, Pet. App. 52a, the district court on remand will consider significant additional evidence pertaining to the interview centrally at issue here. First, the government has located [**REDACTED**] report of the interview that provides more information about the circumstances of the interview, including [**REDACTED**] Second, the government has located [**REDACTED**] Third, the government has located a photograph of petitioner taken at the time of his interview; in the photograph, he is holding a card showing his name and an identification number that also appears [**REDACTED**] in the FBI report. The government disclosed that new evidence to counsel for petitioner, and, in urging the court of appeals to remand, advised the court that it had discovered new evidence that tended to support the accuracy of the key report in

the record. 2011 Disclosure; Pet. App. 3a-4a; Gov't C.A. Reply Br. 15 n.2.

It would serve little purpose for this Court to review petitioner's detention on the basis of the record addressed in the decision below and in the petition, without regard to the additional evidence now available to the district court. [**REDACTED**] Similarly, Judge Tatel expressed concern that a "game of telephone" between an interviewer, a notetaker, and a translator may have "transformed" petitioner's statement. Pet. App. 91a-92a. On remand, however, the additional evidence may enable development of facts to replace speculation about how petitioner's statement was translated and recorded. Additionally, [**REDACTED**] undermines the speculation that petitioner's path may have been "more akin to traveling along I-95 than a lonely country road," *id.* at 102a, [**REDACTED**] See 2011 Disclosure; *Esmail* v. *Obama*, 639 F.3d 1075, 1076 (D.C. Cir. 2011).

"Habeas corpus is 'governed by equitable principles,'" *Munaf* v. *Geren*, 553 U.S. 674, 693 (2008) (quoting *Fay* v. *Noia*, 372 U.S. 391, 438 (1963)), and the grant of habeas relief would be unwarranted if evidence now available to the district court were to indicate and reinforce that petitioner is, in fact, properly detained. Cf. *Boumediene* v. *Bush*, 553 U.S. 723, 788-792 (2008). The district court should be permitted to consider all of the evidence in the first instance, making this Court's intervention unwarranted at this time.

2. Petitioner argues (Pet. 14) that the court of appeals erred in applying the rebuttable common-law presumption of regularity for government records to the government report in this case. He suggests that the application of that presumption will mean "that whatever the government says must be treated as true."

Pet. 16 (quoting Pet. App. 86a (Tatel, J., dissenting)). That is incorrect. In fact, the court of appeals presumed only that a report of a statement made to a government official has "accurately identified the source and accurately summarized his statement." Pet. App. 10a. That limited presumption, the court made clear, "implies nothing about the truth of the underlying non-government source's statement." *Ibid.*; see *id.* at 18a-19a ("[T]he presumption of regularity, if not rebutted, only permits a court to conclude that the statements in a government record were actually made; it says nothing about whether those statements are true."). That limited, rebuttable presumption follows from settled common-law and evidentiary principles.

a. As the court of appeals explained, Pet. App. 6a-7a, it is well established that a rebuttable "presumption of regularity" attaches to actions that government officials take in the course of their official duties. *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("[C]ourts presume that [public officers] have properly discharged their official duties."); see *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *Lackawanna Cty. Dist. Att'y* v. *Cross*, 532 U.S. 394, 403-404 (2001); *United States* v. *Armstrong*, 517 U.S. 456, 463-464 (1996); *Parke* v. *Raley*, 506 U.S. 20, 30 (1992). As relevant here, courts have applied that principle to support a presumption that a government official has accurately recorded a statement made to the official. See *Espinoza* v. *INS*, 45 F.3d 308, 311 (9th Cir. 1995) (When a statement is based on "information out of the alien's mouth," the officer who recorded the information "cannot be presumed to be * * * other than an accurate recorder."); *Ruckbi* v. *INS*, 285 F.3d 120, 124 & n.7 (1st Cir. 2002); *Felzcerek* v. *INS*, 75 F.3d 112, 117 (2d

Cir. 1996). Thus, this Court has explained that an interview record prepared by a government official can be sufficient to "prove the [government's] case at [a] deportation hearing." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1049 (1984); see *id.* at 1035.

The Federal Rules of Evidence likewise recognize the reliability of government records and reports relating to "matter[s] observed under a legal duty to report" where neither the source of the information nor the circumstances indicate a lack of trustworthiness. Fed. R. Evid. 803(8). As the Advisory Committee explained, the Rules are based on "the assumption that a public official will perform his duty properly" and on a recognition of "the reliability factors underlying records of regularly conducted activities." Fed. R. Evid. 803(6) & (8), advisory committee's notes; cf. *Palmer* v. *Hoffman*, 318 U.S. 109, 112 (1943) (noting that business records are "considered reliable and trustworthy" so long as they were not prepared for litigation). As the court of appeals observed, those considerations are fully applicable here because "[w]hen [petitioner's] first interrogation took place and the Report was prepared, the Government had no expectation that its intelligence would be used in litigation." Pet. App. 14a n.3. Instead, the government was "seeking accurate, actionable intelligence to protect the country from imminent attack," and it therefore "had the strongest incentive to produce accurate reports." *Ibid.*

b. Contrary to petitioner's suggestion (Pet. 17), this Court's decision in *Boumediene* provides no basis for reocognizing any special exception in this context to the normal rebuttable presumption of regularity for government reports. In *Boumediene*, this Court held that a key flaw in the prior Combatant Status Review Tribunal

system was that "the detainee would have no opportunity to present evidence" to rebut the "'presumption in favor of the Government's evidence'" that existed in that system. 553 U.S. at 788-789 (quoting Detainee Treatment Act of 2005, § 1005(e)(2)(e)(i), Pub. L. No. 109-148, 119 Stat. 2742). The limited presumption at issue concerns the accuracy of a recording of statements and is not a presumption in favor of the government's evidence. Even as to that more limited presumption, moreover, petitioners in habeas proceedings have an opportunity to rebut it.

In fact, the unique nature of these Guantanamo habeas cases fully supports the application of the limited presumption employed by the court of appeals. In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), a plurality of this Court reasoned that, given the exigencies of military detention, a "presumption in favor of the Government's evidence" may be appropriate "so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided," *id.* at 534.[1] The presumption applied in this case is far more modest than the one approved by the plurality in *Hamdi*. Rather than a presumption "in favor of the Government's evidence," *ibid.*, the court of appeals simply applied the narrower common-law presumption of regularity concerning the recording of statements in government re-

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[1] Petitioner errs in arguing (Pet. 17) that Justice Souter's opinion constitutes the controlling opinion in *Hamdi*. In fact, the four-Justice plurality approved procedures that included a rebuttable presumption, 542 U.S. at 534, and Justice Thomas, in dissent, would have employed a presumption that was virtually irrebuttable, *id.* at 586, 589 (Thomas, J., dissenting) (factual basis for detention cannot be judicially resolved given "the strongest presumptions in favor of the government" and the Executive's authority to "mak[e] virtually conclusive factual findings").

cords, and that presumption applies whether relied upon by the government or by the petitioner. Pet. App. 19a (presumption "says nothing about whether those statements are true"); *id.* at 10a (district courts have declined to apply a "presumption [that] would go to the truth of the 'facts contained in the Government's exhibits'").

Petitioner argues (Pet. 18) that, even if a rebuttable presumption of regularity is appropriate in ordinary cases, it is inappropriate here because the interview of petitioner by United States officials was conducted in wartime conditions. But the wartime circumstances presented here only magnify the need and incentive to make an accurate recording of the interview. See p. 13, *supra*. Moreover, the wartime circumstances at issue were addressed by the government declarations describing the process of obtaining intelligence and the importance of accurately recording that information. See Pet. App. 21a-22a; C.A. App. [**REDACTED**] 554-556, 558-559. The court of appeals thus appropriately applied a limited, rebuttable presumption that a government official's detailed and contemporaneous written interview report accurately reflects the substance of what the interviewee stated during the interview.[2]

[2] Petitioner argues that the district courts have "unanimously rejected" a presumption like that applied by the court of appeals. Pet. 20 (quoting Pet. App. 80a (Tatel, J., dissenting)). But the presumption rejected in those cases was either a broad presumption in favor of the government's evidence or a presumption that the facts recorded in interview documents were themselves accurate. See, *e.g.*, *Ahmed* v. *Obama*, 613 F. Supp. 2d 51, 55 (D.D.C. 2009). The cited cases did not consider a narrower presumption like the one applied here. The few district courts that have considered that issue have employed a mode of analysis that is consistent with a rebuttable presumption that a government official has accurately recorded a statement in an official report of an interview. See, *e.g.*, *Alsabri* v. *Obama*, 764 F. Supp. 2d 60,

c. Petitioner asserts that applying a rebuttable presumption that his words were accurately recorded by the government officials who interviewed him would deprive him of "a 'meaningful opportunity' to challenge the lawfulness of [his] detention." Pet. 21 (quoting *Boumediene*, 553 U.S. at 779). But the court of appeals did not determine the quantum of evidence necessary to rebut the presumption, at most stating that "a merely 'plausible' explanation" was insufficient. Pet. App. 35a; see *id.* at 20a n.5 ("We need not decide precisely how much * * * the detainee must show to overcome the presumption of regularity."). Petitioner is therefore incorrect, and certainly premature, to suggest (Pet. 15) that review is warranted based on his claim that, the court of appeals "plac[ed] a heavy burden of proof on the detainee."

As the court of appeals explained, even "intrinsic flaws in the document" can be sufficient by themselves to "undermine its reliability" and rebut the presumption of accuracy. Pet. App. 21a. In addition, extrinsic evidence, including the petitioner's own statements and testimony, can rebut the presumption. *Id.* at 27a. Here, for example, the court of appeals carefully analyzed the other evidence in the case, including petitioner's subsequent sworn statements, and it concluded that a remand

66-68 (D.D.C. 2011) (explaining that, while the court would not "presume the accuracy of the government's exhibits," it would find that the "translation and transcription of certain statements that the reports attribute to [petitioner]" have "inherent reliability" that was not "called into question" by petitioner's factual showing); *Al Kandari* v. *Obama*, 744 F. Supp. 2d 11, 26 (D.D.C. 2010) ("blanket denial" by detainee insufficient to show that "he never made certain inculpatory statements attributed to him"), aff'd, No. 10-5373, 2011 WL 6757005 (D.C. Cir. Dec. 9, 2011), petition for cert. pending, No. 11-1054 (filed Feb. 22, 2012).

was needed to permit further consideration by the district court. *Id.* at 21a-53a. Thus, the court of appeals' own actions here demonstrate that the presumption is not dispositive, as petitioner suggests, but is simply one consideration to be weighed in evaluating the totality of the evidence.

d. Even if the question presented otherwise warranted this Court's review, this case would be an inappropriate vehicle for considering it because there is strong evidence of the reliability of the report at issue here. The application of a presumption therefore is unlikely to affect the outcome.

In addition to noting the declarations attesting, as a general matter, to the reliability of reports such as those at issue in this case, Pet. App. 21a-23a, the court of appeals also relied on a large body of other evidence that corroborated the report's accuracy. That evidence includes fact that petitioner, in later interviews, confirmed the non-inculpatory details in the report, including "[m]any characters from the Report's dramatis personae" such as Ibrahim Al-'Alawi, *id.* at 26a & 29a-30a; his hometown and his mother's name, *id.* at 29a; the existence of a real man, Ibrahim B'Alawi, whose role as a jihadi recruiter closely follows petitioner's initial account of his own recruitment by Ibrahim Al-'Alawi, *id.* at 28a; and petitioner's travel route ("to Afghanistan via Sana'a, Karachi, and Quetta," *id.* at 29a) [**REDACTED**] The court also observed that the report accurately stated the amount of money petitioner had in his pocket when captured, *id.* at 29a, and that details in the report square with real world facts such as [**REDACTED**] the location of fighting north of Kabul, *id.* at 26a. The court further noted [**REDACTED**]

On the other side of the balance, evidence undermining the credibility of the report is almost entirely absent from the current record: there is nothing from petitioner's family or anyone else to confirm his story; the medical records petitioner submitted corroborate the report and do more to undermine petitioner's story than confirm it, Pet. App. 43a-44a; and petitioner's declaration provides scant details to support his side of the story, while at the same time corroborating the accuracy of many details in the report, *id.* at 29a. Petitioner claims (Pet. 16) that he has "little access to any evidence [to rebut the report] other than [his] own words," but aside from the spare declaration, he declined to provide his "own words" to challenge the report or tell his story. *Id.* at 37a-38a.

Petitioner makes much of minor errors in the report (Pet. 18-20), and he cites declarations submitted by his experts questioning the accuracy of government reports. All of those facts—together with any other evidence that is properly before the district court on remand—may be considered by the court in determining whether the report is ultimately deemed accurate. The rebuttable presumption of regularity is just one of many factors that will be considered by the district court in resolving the accuracy and truth of the facts set out in the report of the interview of petitioner. And the role of the trial judge in making the ultimate factual finding will ensure that the presumption does not work an injustice. See *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 156 (1979) (presumption acceptable in criminal case when, among other things, it does not "curtail[] the fact finder's freedom to assess the evidence independently"). On the present record, there is no reason to believe that application of the presumption will be outcome determi-

native. And there is no reason to grant review at this time, before the district court applies the limited presumption, and before the district court does so in the context of the more complete record now available to it. This Court's review is therefore not warranted.

3. a. Petitioner contends (Pet. 21) that the court of appeals has shown itself to be "unwilling[] to give appropriate deference to the factual findings and analysis of the district court." That argument ignores the court's express statements to the contrary in this and other cases. Pet. App. 5a (court reviews the district court's "'specific factual determinations' for clear error"); accord, *e.g.*, *Awad* v. *Obama*, 608 F.3d 1, 6-7 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011). As the court explained, *de novo* review is limited to the ultimate determination whether a detainee's conduct justifies detention under the facts found. Pet. App. 5a; see *Barhoumi* v. *Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010). Applying that deferential standard, the court of appeals has not reversed the grant of a habeas petition except in cases where the evidence, viewed as a whole, has demonstrated that it is more likely than not that the petitioner was "part of" al Qaeda. See, *e.g.*, *Uthman* v. *Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011), petition for cert. pending, No. 11-413 (filed Aug. 29, 2011); *Al-Adahi* v. *Obama*, 613 F.3d 1102, 1111 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1001 (2011). And of course, the court expressly declined to reverse outright in this case, instead remanding for further factfinding. Pet. App. 52a.

b. Petitioner next contends (Pet. 23) that the court of appeals "has created a regime in which Guantanamo habeas cases are becoming exercises in futility." In fact, the rulings of the court of appeals have carefully examined the issues in each case in an even-handed fashion.

Petitioner emphasizes that the court of appeals has reversed and remanded in several cases in which the government has appealed the grant of a habeas petition, but the court has also reversed and remanded for further fact finding in cases in which a detainee has appealed the denial of a habeas petition. See *Bensayah* v. *Obama*, 610 F.3d 718 (D.C. Cir. 2010); *Warafi* v. *Obama*, 409 Fed. Appx. 360 (D.C. Cir. 2011). In addition, petitioner overlooks the many cases in which the district court has granted a writ of habeas corpus and the government has chosen not to appeal. More than 25 former detainees who obtained habeas relief from the district court have been released from detention at Guantanamo Bay and are no longer housed there, and three additional detainees who cannot safely be repatriated to their home country have declined prior government offers of resettlement.

Petitioner quotes (Pet. 25) a concurring opinion written by Judge Silberman in another case in which he suggested that detention could possibly be based on a showing that it is "somewhat likely that the petitioner is an al Qaeda adherent or an active supporter." *Esmail*, 639 F.3d at 1077-1078 (Silberman, J., concurring). As Judge Silberman himself acknowledged, that is not the law of the circuit, and it was not the standard applied by the panel opinion that Judge Silberman joined in that case. See *id.* at 1077 (per curiam opinion) ("[W]e conclude as a matter of law that Esmail was more likely than not 'part of' al Qaeda at the time of his capture."). Nor was it the standard applied by the court in this case. Pet. App. 5a.

c. At bottom, petitioner's argument amounts to a claim that the court of appeals misapplied principles of clear-error review in determining that the case should

be remanded for further factfinding. Even if that were true, that factbound claim of the "misapplication of a properly stated rule of law" would not warrant this Court's review. Sup. Ct. R. 10. In any event, petitioner's claim lacks merit.

As the court of appeals explained, one cannot read the district court's analysis, Pet. App. 138a-141a, without concluding that its "failure to address certain relevant evidence leaves us with no confidence in its conclusions about the evidence it did consider," *id.* at 31a. In particular, the district court made two fundamental errors that required a remand.

First, the district court "fail[ed] to make a credibility finding," even though petitioner's entire case rested on the claim in his declaration that he did not in fact make the statement attributed to him in the government record. Pet. App. 31a. The court of appeals is properly skeptical where a district court appears to give evidentiary weight to a petitioner's exculpatory account without finding the petitioner to be credible. See, *e.g.*, *Al-Adahi*, 610 F.3d at 1110 ("One of the oddest things about this case is that despite an extensive record and numerous factual disputes, the district court never made any findings about whether Al-Adahi was generally a credible witness or whether his particular explanations for his actions were worthy of belief."). Even Judge Tatel acknowledged that "the question of reliability turns entirely on witness credibility," but he would have concluded that the necessary credibility finding had been made. Pet. App. 86a, 95a.

Second, the district court failed to view the evidence as a whole, instead making the "fundamental mistake" of adopting a mode of analysis whereby "if a particular fact does not itself prove the ultimate proposition (*e.g.*,

whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist." *Al-Adahi*, 613 F.3d at 1105; see *Bensayah*, 610 F.3d at 726 (observing that "two pieces of evidence, each unreliable when viewed alone" can "corroborate each other"); *Salahi* v. *Obama*, 625 F.3d 745, 753 (D.C. Cir. 2010) ("[Wle think it appropriate to reiterate this Court's admonition in Al-Adahi * * * that a court considering a Guantanamo detainee's habeas petition must view the evidence collectively rather than in isolation."). As this Court recently explained, "it is a manner of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture" when considered as a whole. *Ryburn* v. *Huff*, 132 S. Ct. 987, 991 (2012) (per curiam). The application of that established principle to the record in this case does not warrant this Court's review, particularly where the court of appeals has remanded for the district court to conduct the requisite holistic analysis in the first instance.

Here, as the court of appeals explained, the district court's "unduly atomized approach is illustrated by its isolated treatment [of] (or failure to consider) * * * (a) striking similarities between [petitioner's] exculpatory story and the Report, (b) the route [petitioner] admits traveling, * * * (c) contradictions in [petitioner's] exculpatory statements," [**REDACTED**] Pet. App. 39a. For example, the district court made no factual assessment of key corroborating evidence concerning petitioner's benefactor, Ibrahim 'Alawi. *Id.* at 30a; see *id.* at 139a (concluding, without addressing 'Alawi, that there was "no corroborating evidence"). As the court of appeals noted, the district court did not address either to credit or reject—the evidence linking the well known

jihadi recruiter Ibrahim B'Alawi to the similarly named Ibrahim Al-'Alawi, whom petitioner initially described as his jihadi recruiter, but later stated was only his benefactor. *Id.* at 30a, 50a.

That evidence, and other similar evidence, linked the account in the report, petitioner's later accounts, and real-world events, serving as powerful corroboration for the accuracy of the report. Pet. App. 51a (noting the significance of the "link between [petitioner']s current story and a known recruiter whose *modus operandi* matches up so closely with the Report's account of [petitioner's] recruiter"). As the court of appeals explained, the district court failed to consider the likelihood "that [petitioner's] charity worker and imam just happened to have names virtually identical to those of a known Taliban recruiter and commander." *Id.* at 40a.

Those flaws in the district court's analysis show that the court made a critical factfinding error. The court of appeals did not itself engage in factfinding, as petitioner claims, but properly "remand[ed] [for] the unfinished task of weighing this evidence in the aggregate" given the district court's "expertise as a fact finder." Pet. App. 39a, 53a. That decision does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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