No. 13-638

In The Supreme Court of the United States

ABDUL AL QADER AHMED HUSSAIN,

Petitioner,

v.

BARACK OBAMA, President of the United States;
CHARLES T. HAGEL, Secretary of Defense;
JOHN BOGDAN, Colonel, U.S. Army;
RICHARD W. BUTLER, Admiral, U.S. Navy.

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

I. THE COURT OF APPEALS REVIEWED THE DISTRICT COURT'S FACTUAL FINDINGS UNDER A LESS RIGOROUS STANDARD THAN A PREPONDERANCE OF THE EVIDENCE, DENYING PETITIONER MEANINGFUL REVIEW OF HIS DETENTION.

A. The Lower Courts Circumvented This Court's Precedent by Reciting the Proper Legal Standard, but Neglecting to Implement It.

The Government's opposition brief fails to contest the fundamental reason a grant of certiorari is warranted and essential in this case: the lower courts have once again attempted an end run around this Court's precedent by correctly reciting that the preponderance of the evidence standard governs these Guantanamo habeas cases, only to then hold the Government to a much less rigorous standard of proof. As a result, the lower courts held Petitioner to be detainable under the AUMF on the basis of the trial court's factual findings, which nowhere state that Petitioner enlisted in, fought with, or otherwise supported the Taliban or Al Qaeda. Sadly, the lower courts' approach to Petitioner's case follows a well-worn path in which the Circuit has found that essentially any set of purported facts proffered by the Government will justify the indefinite detention of men in Guantanamo. Respectfully, it is high time this Court hold the Government and the lower courts

to the meaningful review of detention promised in *Boumediene*, and this case presents the Court with the perfect opportunity to do so.

The Government asserts that "Petitioner does not argue that the Court of Appeals articulated the wrong legal standard for determining whether he was properly detained." *Brief for Respondents* ("Opp.") at 12. While it is true that Petitioner does not contest that the Court of Appeals announced that it was applying the governing preponderance of the evidence standard, Petitioner contends that the Court of Appeals failed to apply that standard. Rather than holding the Government to the burden of proving the requisite relationship between Mr. Hussain and an enemy organization, the Court in effect applied the "substantial evidence" standard. In doing so, the Court of Appeals denied Mr. Hussain a meaningful review of his detention.

While the Government asserts the conclusion that "the Court of Appeals correctly applied its established functional test to the evidence considered by the district court," Opp.11, the Government fails to explain how the findings of fact in this case could support a determination that Mr. Hussain was "more likely than not a part of enemy forces at the time of his capture." *Petition Appendix* ("App.") 2a. Indeed, the Government fails to rebut the numerous examples Petitioner identified in his opening brief in which the Court of Appeals misapplied the preponderance standard to the lower court's findings of fact.

The Government does not contest what it cannot deny—Mr. Hussain never "used the gun, engaged in

battle, or *otherwise supported the activities of al Qaeda or the Taliban*." *Petition* ("Pet.") at 10 (emphasis added). Rather, the Government contends that no such findings are required in these Guantanamo habeas cases and that such a requirement would be "inconsistent with the realities of modern warfare." Opp.13. But it defies logic to suggest that an individual could be "sufficiently involved with [an enemy] organization to be deemed part of it," *Id.* at 11, without *any* showing that the individual supported or aided the activities of the organization *in any way*.

Similarly, although the Government argues that the District Court's reliance on Mr. Hussain's stays at Jama'at al-Tablighi ("JT") mosques was proper because of his "extended affiliation" with the organization, the Government does not address how Petitioner's repeated stays at JT mosques in fact "distinguish[ ] Hussain from the thousands of other Muslim travelers who regularly stayed at JT mosques in the relevant time frame." Pet.11. A finding of fact that Mr. Hussain engaged in the same conduct as legions of travelers not alleged to have been affiliated with an enemy organization is insufficient to support a finding that Mr. Hussain was "more likely than not a part of enemy forces at the time of his capture." App.2a.

For these reasons and those in Petitioner's opening brief, the Court of Appeals failed to apply the preponderance of the evidence standard and, accordingly, deprived Mr. Hussain of the meaningful review guaranteed by this Court in *Boumediene v. Bush*, 553 U.S. 723 (2008).

B. Certiorari Is Proper to Preserve the Precedential Value of *Boumediene* and Correct the Court of Appeals' Misinterpretation of the AUMF.

The Government incorrectly asserts that "[f]urther review is . . . unwarranted" because there is no "conflict with any decision of this Court or another court of appeals." Pet.9. In this case and other Guantanamo habeas cases, the Court of Appeals has applied its "functional" test in a manner that permits detention under virtually any set of facts. This watered-down review directly contravenes the directive of this Court in *Boumediene* that habeas courts reviewing the legality of Guantanamo detainees' detention "conduct a *meaningful review* of both the cause for detention and the Executive's power to detain." *Boumediene*, 553 U.S. at 783 (emphasis added). The Court of Appeals' consistent disregard of the preponderance of the evidence standard in Mr. Hussain's and other detainees' habeas cases effectively deprives them of the right guaranteed by this Court in *Boumediene*—the "privilege" of "challeng[ing] the legality of their detention" through habeas corpus. *Id.* at 771. This error by the Court of Appeals is more than sufficient to create a conflict with decisions of this Court.

Furthermore, review is warranted here, because "there is a clear disjunction between the law of the circuit and the statutes that the case law purports to uphold." *Ali v. Obama*, 736 F.3d 542, 553 (D.C. Cir. 2013) (Edwards, J. concurring). Where, as here, a Guantanamo detainee brings a habeas petition challenging the legality of his detention under the AUMF, the lower courts are charged with

interpreting and applying that statute. By its terms, the AUMF only permits the President to detain individuals who "planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001." AUMF, Pub. L. No. 107-40 § 2(a), 115 Stat. 224 (2001). The manner in which the Court of Appeals has applied its functional test to uphold detention under virtually any set of facts reflects an unduly broad interpretation of the detention authority granted by the AUMF that is inconsistent with the statute's plain language. *Cf. Ali,* 736 F.3d at 553-54 ("[t]he 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."); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 4 (10th ed. 2013). Factors Motivating the Exercise of the Court's Certiorari Appellate Jurisdiction ("Many of the cases coming to the Supreme Court on certiorari involve the construction and application of acts of Congress and federal administrative regulations. In some of them, it can be shown that there is a conflict of decisions among lower courts or that there is a probable conflict with applicable decisions of the Supreme Court. In others, however, the importance of the issue is the major basis for securing review.").

II. THE DISTRICT COURT AND COURT OF APPEALS IMPROPERLY SHIFTED THE BURDEN OF PROOF TO MR. HUSSAIN REQUIRING HIM TO PROVE NON-MEMBERSHIP IN AL QAEDA AND THE TALIBAN.

A. Petitioner's Burden-Shifting Argument Is Properly Before the Court.

The Government's assertion that Mr. Hussain failed to preserve the issue of burden-shifting is disingenuous—Hussain's central contention throughout the lower court proceedings was that the Government has produced no evidence to justify holding him—*i.e.* the government has failed to meet its burden of proof.

This Court has repeatedly recognized that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330 (2010) (internal citations and quotations omitted); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Here, Mr. Hussain's consistent claim has been that he was denied meaningful review of his detention as required by this Court in *Boumediene*. The burden-shifting argument is made "in support of that claim" and is therefore properly before this Court. *See Citizens United*, 558 U.S. at 331 ("a new argument to support what has been a consistent claim" is properly considered by the Court); *see also United States v. Williams,* 504 U.S. 36, 41 (1992) ("The Solicitor General . . . submits that the petition for certiorari should be dismissed . . . on

the argument that petitioner did not properly present the merits of the timeliness issue to the Court of Appeals, and that this Court should not address that question for the first time. . . . We reject[ ] that argument . . . because the Court of Appeals, like the District Court before it, decided the substantive issue presented.") (*quoting Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991)).[1]

B. Mr. Hussain's Allegedly "False Cover Story" Is Insufficient to Bridge the Temporal Gap in the Evidence.

The Government correctly recites that this Court must determine if Mr. Hussain "was part of al Qaeda, the Taliban, or associated forces *at the time of his capture*." Opp.12 (emphasis added). The Government does not contest that the District Court's factual findings with respect to Mr. Hussain's

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[1] Even if the burden-shifting argument were construed as analytically distinct from the meaningful review issue, it is still properly before this Court. Certiorari on an issue is precluded "only when the question presented was not pressed or passed upon below." *Williams*, 504 U.S. at 41 (internal citations and quotations omitted); *see also* 19 *Moore's Federal Practice* § 205.05[1] (explaining that certiorari is proper "when [the issue] fairly appears in the record as having been raised or decided."). Both prongs are satisfied here. The burden-shifting argument was "pressed" below because Mr. Hussain specifically challenged the lack of factual findings regarding his status at the time of his capture in oral argument before the appellate court and in a letter brief submitted thereafter. *See* 11-5344 Docket entry (D.C. Cir. Oct. 23, 2012) (Letter from Wesley R. Powell to Mark J. Langer). It was likewise "passed upon" because J. Edwards, in his concurrence, specifically noted that "the majority implicitly shift[ed] the burden of proof from the Government to Hussain." App.18a.

status concern events only up to the point when he left Afghanistan, which was six months before his capture. App.7a-8a, 45a. In order to bridge the gap between these findings and his apprehension six months later, the courts below found that (i) Mr. Hussain's explanation for his post-Afghanistan travel was not credible, and therefore amounts to a "cover story" that supports a finding of Mr. Hussain's membership in an enemy force, and (ii) Mr. Hussain failed to "affirmatively cut ties" with that purported enemy force. App.10a-11a. The Court determined these factors were sufficient to support a conclusion that Mr. Hussain "more likely than not" remained a member of an enemy force when he was captured, six months after he left Afghanistan. The Government concedes this was the lower courts' approach in Mr. Hussain's case but contends the approach is consistent with *Boumediene*.

But the Government's argument fails to acknowledge that, in finding the *absence* of a believable story to be evidence of the requisite association, the courts below shifted to Mr. Hussain the burden of proving his innocence, which is inconsistent with *Boumediene*. *Cf.* App.18a-19a (J. Edwards, concurring). With the burden of proof shifted, the standard applied to determine whether Mr. Hussain has been properly detained pursuant to the AUMF becomes whether he could convince a court that, as a teenager, he had a coherent set of motivations for his travel that he definitively and intelligently executed. *See id.* Under these circumstances, the Government's burden of proving Mr. Hussain was a member of an enemy force when captured effectively evaporates.

C. Mr. Hussain Could Not Have "Affirmatively Cut Ties" with Organizations He Was Not a Part of, and He Abandoned the Circumstances the District Court Found Dispositive When He Left Afghanistan.

The Government's argument that Mr. Hussain "made no attempt" to "come forward with evidence that he affirmatively cut ties to the Taliban or Al Qaeda before his capture" is misplaced for two additional reasons. Opp.16, n.4. First, presenting evidence of disassociation requires as a prerequisite that Mr. Hussain was in fact a member of the Taliban or Al Qaeda—it is impossible to "affirmatively cut ties" with an organization with which one has no affiliation. Mr. Hussain has maintained at all times that he was *never* part of an enemy organization; it defies logic to expect Mr. Hussain to prove disassociation with forces he has denied being affiliated with.

Second, Hussain provided the court the most compelling evidence of his disassociation with the Taliban—his departure. The centerpiece of the Government's argument that Mr. Hussain is a member of an enemy force is that he (i) spent time in a region in Afghanistan near where fighting occurred and (ii) associated with members of the Taliban, who (iii) gave him a rifle. *Id.* at 12. The Court of Appeals found that, six months before his capture, Hussain (i) left Afghanistan, leaving behind (ii) the Taliban housemates who had (iii) given him the rifle. App.3a, 9a. The Court made no finding that Mr. Hussain carried either the relationships or the rifle with him when he left the country. *See id.* Accordingly, the

record on appeal demonstrates that Mr. Hussain affirmatively terminated—six months before his capture—the circumstances that the courts below found "invite—and may very well compel—the conclusion that he was loyal to those forces." App.7a-8a. Accordingly, the courts below erred in concluding that Mr. Hussain had not demonstrated that he took "affirmative steps" to discontinue the purported conduct that the courts below identified as indicative of an affiliation with an enemy force.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that his petition for a writ of certiorari should be granted.

Respectfully Submitted,

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February 10, 2014

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