No. 11-1054

In the Supreme Court of the United States

FAYIZ MOHAMMED AHMED AL KANDARI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether intelligence reports and other "hearsay" evidence commonly used by the government to justify the detention of individuals captured abroad during armed conflict may be relied upon in habeas corpus proceedings challenging the detention of a foreign national at the United States Naval Station at Guantanamo Bay, Cuba, under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, when a court determines that such evidence is reliable when considered in context.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a3) is unreported. The unclassified version of the opinion of the district court (Pet. App. a5-a86) is reported at 744 F. Supp. 2d 211.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2011. A petition for rehearing was denied on January 30, 2012 (Pet. App. a4). The petition for a writ of certiorari was filed on February 22, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Fayiz Mohammed Ahmed Al Kandari is an alien detained at the United States Naval Station at Guantanamo Bay, Cuba, under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). He petitioned for a writ of habeas corpus, and the district court denied the petition. The court of appeals affirmed. Pet. App. a1-a3.

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 a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."

2. Al Kandari, an alien detained at Guantanamo Bay under the AUMF, petitioned for a writ of habeas corpus. After 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 Al Kandari, the court coordinated pre-trial proceedings for most of the Guantanamo cases, including this one. See *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (D.D.C. July 2, 2008). The Case Management Order entered by the coordinating judge provides that "hearsay evidence that is material and relevant to the legality of the petitioner's detention" is admissible if the party seeking its admission establishes that "the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security." 2008 WL 4858241, at *3 (D.D.C. Nov. 6, 2008). Where hearsay evidence is admitted, the party opposing its admission has "the opportunity to challenge the credibility of, and weight to be accorded, such evidence." *Ibid.*

3. Following an evidentiary hearing, the district court denied the petition. The court relied on Al Kandari's own statements to government interrogators that, once United States and coalition forces began bombing Afghanistan in October 2001, he traveled to Jalalabad and then through Tora Bora. Pet. App. a38-a39, a51-a53, a55-a56. Petitioner acknowledged being in Tora Bora during the most intense period of the Battle of Tora Bora, approximately December 6-17, 2001; he was captured shortly afterwards while attempting to flee. *Id.* at a55-a56.

Al Kandari also told government interrogators that, while he was in Tora Bora, he was issued a Kalashnikov rifle and trained in its use by an individual whom the district court found was associated with al-Qaida or the Taliban. Pet. App. a57-a59, a62-a63. Al Kandari also

admitted that, during that period, he met and associated with various leaders of al-Qaida, Taliban, or associated forces, including two different men who were al-Qaida members and former training camp commanders, and who were leading groups of fighters at Tora Bora. *Id.* at a64-a79. The district court found it "utterly implausible" that someone who was not part of al-Qaida or the Taliban would be permitted to "meet and associate with members and high-level leaders of al Qaeda and/or the Taliban while he was armed with a * * * rifle," and to "closely associate with key leaders and their fighting forces in Tora Bora during the height" of the battle there. *Id.* at a53.

The district court also gave weight to the fact that Al Kandari provided an implausible explanation for his conduct. Pet. App. a54-a55. The court concluded that "the overwhelming weight of the evidence" showed that Al Kandari was part of al-Qaida, Taliban forces, or associated forces. *Id.* at a83-a84.

4. The court of appeals affirmed. Pet. App. a1-a3. Petitioner's sole argument on appeal was that the district court erred in admitting and relying on hearsay evidence to uphold the lawfulness of his detention. The court of appeals rejected the argument, explaining that it was "squarely foreclosed by precedent." *Id.* at a2; see *id.* at a3 (citing *Al Odah* v. *United States*, 611 F.3d 8, 14 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1812 (2011)).

ARGUMENT

Al Kandari renews his claim (Pet. 7-18) that the district court was not permitted to consider hearsay evidence in this Guantanamo habeas case. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or

any other court of appeals. This Court has twice denied petitions for writs of certiorari presenting the same claim, see *Al Odah* v. *United States*, 131 S. Ct. 1812 (2011) (No. 10-439); *Awad* v. *Obama*, 131 S. Ct. 1814 (2011) (No. 10-736), and there is no reason for a different result in this case. Further review is not warranted.

1. This Court has repeatedly recognized that habeas proceedings for detainees held by the military are unique and are not necessarily governed by the standards and evidentiary rules that would apply in a domestic criminal case or a collateral challenge to a domestic criminal conviction. See *Boumediene* v. *Bush*, 553 U.S. 723, 783 (2008) ("Habeas corpus proceedings need not resemble a criminal trial."); *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (recognizing that the "full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate" in habeas proceedings for military detainees). In proceedings challenging the military's detention of individuals captured abroad during an armed conflict, information generated by the military—and by other agencies operating abroad or in a war zone—will generally be not only the most relevant and probative evidence, but often the only evidence bearing on the legality of the detention. It is appropriate for courts to consider the same types of evidence that the military necessarily uses when it makes detention decisions. See *id.* at 531 (plurality opinion) (noting that the "law of war and the realities of combat may render [military] detentions both necessary and appropriate, and * * * our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them").

Indeed, the *Hamdi* plurality strongly suggested that intelligence reports should, as a general rule, be admissible in habeas proceedings for detainees held by the military. The plurality explicitly recognized that "[h]earsay * * * may need to be accepted as the most reliable evidence from the Government in such a proceeding," 542 U.S. at 533-534, and that the government could support the detention of a United States citizen with "documentation regarding battlefield detainees already * * * kept in the ordinary course of military affairs," *id.* at 534, such as the intelligence reports that form the core evidentiary basis for most of the Guantanamo habeas cases, see *id.* at 538 (approving of hearsay evidence contained in declaration of government official).[1] Likewise, this Court recognized in *Boumediene* that habeas proceedings are flexible and may be adapted to circumstances as necessary, including the unique military setting at issue here. 553 U.S. at 779 (stressing that "common-law habeas corpus was, above all, an adaptable remedy"). The Court therefore noted that "accommodations can be made" in this distinct context "to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ." *Id.* at 795. And the Court cautioned that, in developing "procedural and substan-

[1] Al Kandari attempts (Pet. 8) to characterize *Hamdi*'s treatment of hearsay evidence as an application of 28 U.S.C. 2246, which provides for the admission of affidavits in habeas corpus proceedings. Although the petitioners in *Hamdi* argued that 28 U.S.C. 2246 applied and governed the admissibility of evidence in that habeas proceeding, see Pet. Br. at 10, 15, *Hamdi*, *supra* (No. 03-6696), the Court did not embrace that reasoning. Instead, the plurality's conclusion that the government could establish the lawfulness of detention through hearsay evidence was based on an evaluation of constitutional requirements. See 542 U.S. at 532-534. *Hamdi*'s reasoning is fully applicable here.

tive standards," the lower courts should accord "proper deference * * * to the political branches." *Id.* at 796.

Adhering to *Hamdi* and *Boumediene*, the district courts and the court of appeals have developed a set of procedural rules to govern the habeas proceedings for the detainees held by the military at Guantanamo. As this case illustrates, within the context of these unique proceedings, district court judges generally admit and consider intelligence reports and other "hearsay" evidence, and assess its reliability and probative value. Pet. App. a16-a17. In making those case-specific and highly contextual assessments, the district courts have not blindly accepted the government's proffers. See *e.g.*, *Al Rabiah* v. *United States*, 658 F. Supp. 2d 11, 28-40 (D.D.C. 2009). Unlike juries, district court judges understand the limitations of certain types of hearsay evidence and have experience in evaluating the reliability of such evidence. Cf. *Bourjaily* v. *United States*, 483 U.S. 171, 180 (1987) (holding that district courts may consider hearsay in assessing the admissibility of evidence); *Rugendorf* v. *United States*, 376 U.S. 528, 533 (1964) (court may consider hearsay in issuing a search warrant); *Crawford* v. *Jackson*, 323 F.3d 123, 128 (D.C. Cir.) (hearsay may be considered in parole-revocation proceeding), cert. denied, 540 U.S. 856 (2003); *Espinoza* v. *INS*, 45 F.3d 308, 310 (9th Cir. 1995) (hearsay may be considered in immigration proceedings); 28 U.S.C. 2246 ("evidence may be taken * * * by affidavit" in statutory habeas proceedings); 18 U.S.C. 3142 (2006 & Supp. IV 2010) (hearsay admissible in pretrial detention hearings); 18 U.S.C. 3661 (hearsay admissible in sentencing hearings). The district court also had the benefit of detailed classified declarations from the government con-

cerning intelligence-gathering practices and the techniques used to create different types of records.

2. Al Kandari argues (Pet. 3) that the decision of the court of appeals "requires" the district court to consider "all hearsay," including "raw intelligence reports of interrogations by unknown interrogators of unknown subjects under circumstances that the government refuses to disclose." But the district court carefully examined each piece of hearsay evidence put forward by the government for indicia of reliability, before relying on it to uphold the lawfulness of Al Kandari's detention. Pet. App. a16, a19, a30, a33-a35, a40-a54. Critically, the district court found that "Al Kandari's own statements and admissions against interest * * * are by themselves sufficient for the Government to meet its burden in this case." *Id.* at a27. Al Kandari had the opportunity to question the reliability and accuracy of his statements, which were documented in intelligence reports, and also to challenge the conditions under which the statements were made. But as the district court emphasized, although Al Kandari made a highly generalized assertion that he was subjected to abuse and coercive interrogation, he never identified a single supposedly false or inaccurate statement in an interrogation report that resulted from that alleged mistreatment. *Id.* at a31-a32. Furthermore, the district court found that Al Kandari's blanket denial of his inculpatory statements was not credible. *Id.* at a34. Al Kandari also had the opportunity to testify on his own behalf, although he chose not to do so. He instead submitted a sworn declaration that, as the district court emphasized, made no attempt to explain the discrepancies between the declaration and Al Kandari's earlier statements to interrogators. *Id.* at a33-a35. The district court did not err in admitting

hearsay evidence and relying on hearsay that the court found to be reliable.

3. Despite the flexibility that this Court contemplated in *Hamdi* and *Boumediene*, Al Kandari argues that Federal Rule of Evidence 1101(e) compels strict application of the rules generally applicable to hearsay evidence, even in habeas proceedings involving detainees held by the military. His argument is flawed in several respects.

As an initial matter, the Federal Rules of Evidence do not apply because this is a constitutional habeas case, not a statutory one. Rule 1101(e) enumerates various categories of cases in which the rules of evidence "apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein," including "habeas corpus under sections 2241-2254 of title 28, United States Code."[2] But this is not a statutory habeas case; to the contrary, 28 U.S.C. 2241(e) makes clear that courts have no statutory jurisdiction to consider habeas petitions from Guantanamo detainees. As Justice Souter observed in his concurring opinion in *Boumediene*, what remains "must be constitutionally based jurisdiction or none at all." 553 U.S. at 799; see *Al-Bihani* v. *Obama*, 590 F.3d 866, 877 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011) (these habeas proceedings are not "bound by the procedural limits created for other detention contexts"). Because this is not a proceeding "under sections 2241-2254," it is not addressed

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[2] The Federal Rules of Evidence were amended effective December 1, 2011, but the changes were "stylistic only" and were not intended "to change any result in any ruling on evidence admissibility." Fed. R. Evid. 1101 advisory committee's note (2011). Like the petition (Pet. 3 n.1), this brief will refer to the version of the rules that was in effect at the time of the district court proceeding.

in Rule 1101(e). The courts below were therefore correct to conclude that the relevant question is not whether hearsay is admissible under the Federal Rules of Evidence but rather whether such evidence is sufficiently reliable to provide support for the specific detention at issue. See *Al-Bihani*, 590 F.3d at 879 (explaining that "the question a habeas court must ask when presented with hearsay is not whether it is admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits").

Al Kandari relies (Pet. 10) on the court of appeals' statement in *Kiyemba* v. *Obama*, 561 F.3d 509 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1880 (2010), that *Boumediene* "invalidate[d] § 2241(e)(1) with respect to all habeas claims brought by Guantanamo detainees" and "necessarily restored the status quo ante, in which detainees at Guantanamo had the right to petition for habeas under § 2241." *Id.* at 512 & n.2. But although the court of appeals in *Kiyemba* considered whether a district court has authority to entertain a claim seeking advance notice of transfer from Guantanamo, the court did not analyze procedural aspects of the proceedings or the applicability of the Federal Rules of Evidence.

Moreover, Al Kandari misconstrues this Court's decision in *Boumediene*. In *Boumediene*, the Court held that, because the procedures for review of detention status set out in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2742, "are not an adequate and effective substitute for habeas corpus," Section 7(a) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2635 (MCA), "operates as an unconstitutional suspension of the writ" as applied to detainees at Guantanamo. 553 U.S. at 732-733; see *id.* at 793-794. Contrary to Al Kandari's suggestion, the Court

did not invalidate Section 7(a) in its entirety, and it clearly envisioned that habeas courts would decide petitions for relief in conformity with the constitutional standards articulated in the decision, not that the courts adjudicating these actions would apply the existing statutory and procedural regime for collateral challenges to domestic criminal convictions. See *id.* at 779-787, 792, 798. The analysis in *Boumediene* of the circumstances in which a habeas court may properly defer to the government's need for delay or a suspension of a habeas proceeding, see *id.* at 793-794, together with the discussion of the "accommodations" that federal courts can make to protect the government's interests in this context, see *id.* at 795-796, would make little sense if district courts were bound by the requirements in 28 U.S.C. 2241-2255 (2006 & Supp. IV 2010) and the Federal Rules.

Furthermore, even if petitioner were correct that this habeas action is a "habeas corpus [proceeding] under sections 2241-2254" within the meaning of Federal Rule of Evidence 1101(e), that rule requires application of the Federal Rules of Evidence only insofar as "matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court." In the unique context of Guantanamo habeas cases, strict applications of the restrictions on hearsay set out in the Federal Rules of Evidence cannot be reconciled with the relevant congressional enactments, the DTA and the MCA. In both statutes, Congress explicitly precluded statutory habeas review and sought to substitute instead a regime of direct review in the court of appeals. In so doing, Congress recognized that the ordinary statutory habeas rules and procedures were a poor fit for the process of

assessing evidence drawn from military and intelligence information. See, *e.g.*, 151 Cong. Rec. 25,731, 25,735-25,737 (Nov. 10, 2005) (statement of Sen. Graham) (explaining need for substitute review process). As noted, although *Boumediene* held that Congress could not eliminate the right to constitutional habeas review in this context, the Court did not invalidate Section 7(a) of the MCA in its entirety, nor did it mandate the application of the normal procedures and standards for statutory habeas review. To the contrary, *Boumediene* expressly recognized that these are unique cases and that "common-law habeas" is "an adaptable remedy." 553 U.S. at 779.

In light of Congress's manifest purpose for these specific proceedings, it would be inappropriate to require rigid application of the general evidentiary rules governing hearsay in civil cases in federal court. Contrary to petitioner's assertion, Pet. 8-9, that result is not an impermissible modification of procedural rules by judicial decision, but instead an application of the plain terms of Rule 1101(e) and the "commonplace" principle of construction "that the specific governs the general." *Morales* v. *TWA, Inc.*, 504 U.S. 374, 384 (1992).

In addition, it is significant that these military detention habeas cases are being adjudicated in bench trials before district court judges who have become well-versed in dealing with these unique cases. Even outside of this unique context, "[t]he rules of evidence are not ordinarily applied as stringently in bench trials or in administrative proceedings as in jury trials." *Vatyan* v. *Mukasey*, 508 F.3d 1179, 1187 (9th Cir. 2007). As the Tenth Circuit has observed, "in bench trials questions raised relative to the admission or exclusion of evidence . . . become relatively unimportant, because the rules

of evidence are intended primarily for the purpose of withdrawing from the jury matters which might improperly sway the verdict." *Tosco Corp.* v. *Koch Indus., Inc.*, 216 F.3d 886, 896 (2000) (internal quotation marks and citation omitted). That recognition fortifies the conclusion that strict application of the hearsay rules is inappropriate in this unique context.

4. As Al Kandari acknowledges (Pet. 11), this Court has already "denied certiorari on essentially the identical hearsay issue presented in this case in *Al Odah* v. *United States*, Case No. 10-439." In fact, this Court has denied review of the issue twice within the past year: not only in *Al Odah*, but also in *Awad*. And the court of appeals has held on nine separate occasions that hearsay evidence is admissible in a Guantanamo habeas proceeding, subject to district-court scrutiny to determine its credibility and strength. See Pet. App. a2-a3; *Khan* v. *Obama*, 655 F.3d 20, 26 (D.C. Cir. 2011); *Al Alwi* v. *Obama*, 653 F.3d 11, 19 (D.C. Cir. 2011), petition for cert. pending, No. 11-7700 (filed Dec. 5, 2011); *Al-Madhwani* v. *Obama*, 642 F.3d 1071, 1077-1078 (D.C. Cir. 2011), petition for cert. pending, No. 11-7020 (filed Oct. 24, 2011); *Al-Adahi* v. *Obama*, 613 F.3d 1102, 1111 n.6 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1001 (2011); *Al Odah*, *supra*; *Barhoumi* v. *Obama*, 609 F.3d 416, 422 (D.C. Cir. 2010); *Awad*, *supra*; *Al-Bihani*, 590 F.3d at 879-881. Those decisions have involved every member of the court of appeals, with no judge dissenting.

Al Kandari nevertheless argues (Pet. 11) that this Court's review is needed "in the face of the open disdain displayed by members of the court of appeals for this Court's decision in *Boumediene*." The *Boumediene* Court, in analyzing what was required for "the writ of habeas corpus, or its substitute, to function as an effec-

tive and proper remedy in this context," outlined two criteria: that the reviewing court has the authority "to assess the sufficiency of the Government's evidence against the detainee," and that it can "admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding." 553 U.S. at 786. The approach of the district court and the court of appeals, under which intelligence reports and other hearsay evidence is admitted but the district court scrutinizes that evidence to determine its credibility and strength, is completely in harmony with those standards. As the district court noted, Al Kandari's own statements and admissions against interest established the lawfulness of his detention at Guantanamo. Pet. App. a27.

Finally, Al Kandari suggests (Pet. 11-12, 14-16) that the Court should grant review because judges on the court of appeals have disagreed about other legal issues that have arisen in Guantanamo habeas cases. But every judge has agreed that the district court may admit hearsay evidence in Guantanamo habeas proceedings, subject to the court's determination of the reliability of the particular evidence at issue. To the extent that judges may have disagreed on other legal issues, this case does not present a vehicle for their review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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