No. 10-487

In the Supreme Court of the United States

MOHAMMED AL-ADAHI, ET AL., PETITIONERS

v.

BARACK H. OBAMA, PRESIDENT OF THE 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 the court of appeals correctly held that the district court was required to examine the evidence as a whole and take into account the mutually reinforcing nature of the pieces of evidence, that the district court erred in failing to treat training at an al-Qaida training camp and staying at al-Qaida guesthouses as evidence that would support a finding that petitioner was "part of" al-Qaida, and that some of the district court's findings of fact were clearly erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 613 F.3d 1102. The opinion of the district court (Pet. App. 25a-62a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a-24a) was entered on July 13, 2010. The petition for a writ of certiorari was filed on October 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Al-Adahi (petitioner) 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 granted the writ and ordered his release. The court of appeals reversed. Pet. App. 1a-22a.

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 that conflict, the United States has seized many hostile persons and detained a small fraction of them at Guantanamo Bay.

Many of the detainees at Guantanamo Bay have filed petitions for writs of habeas corpus. See *Boumediene* v. *Bush*, 553 U.S. 723 (2008). In those proceedings, the Court of Appeals for the District of Columbia Circuit—where appeals in all the habeas proceedings for detainees held at Guantanamo Bay are heard (see *id.* at 795-796)—has construed the AUMF to provide that the government may establish the lawfulness of military detention by showing, among other things, that the habeas petitioner "is 'part of' al-Qaida, the Taliban, or associated forces." Pet. App. 4a. The court has recognized that it is "impossible to provide an exhaustive list of criteria for determining whether an individual is 'part of' al Qaeda." *Bensayah* v. *Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010). Instead, the determination "must be made on a case-by-base basis by using a functional rather than

a formal approach and by focusing upon the actions of the individual in relation to the organization." *Ibid.*

Although evidence of following or acting under instructions or directions within the military command structure of al-Qaida or the Taliban would normally establish that an individual was "part of" enemy forces, a lawful basis for detention may be established in other ways as well. See *Bensayah*, 610 F.3d at 725; *Al Odah* v. *United States*, 611 F.3d 8, 16 (D.C. Cir. 2010).[1] For example, evidence that an individual attended al-Qaida training camps and stayed at al-Qaida guesthouses or safehouses, which are not generally open to members of the public, can be "'overwhelming' evidence that the United States had authority to detain that person." Pet. App. 16a.

2. Petitioner, a detainee at Guantanamo Bay, sought a writ of habeas corpus. Following an evidentiary hearing, the district court granted the writ and ordered petitioner's release. Pet. App. 25a-62a.

The district court focused on five categories of government evidence. The court first found that "the record fully supports the Government's allegations that Petitioner had close familial ties to prominent members of the jihad community in Afghanistan." Pet. App. 37a. The court found that petitioner's sister had married a

[1] Many of al-Qaida's operations are carried out by cells acting with significant autonomy, but taking direction from al-Qaida leadership. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2109 & nn. 279-280 (2005) (collecting sources). Moreover, individuals affiliated with al-Qaida typically seek to hide their affiliation. They do not wear uniforms or carry "official membership card[s]," *Al-Bihani* v. *Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010), and they may purposefully attempt to disguise their connection to the organization.

man who was so close to Usama bin Laden, al-Qaida's leader, that bin Laden had hosted a celebration of the couple's wedding in Kandahar. *Id.* at 38a-40a. In addition to meeting bin Laden at the wedding celebration, petitioner had a private meeting with bin Laden a few days later. *Id.* at 40a. Noting petitioner's testimony that "meeting with bin Laden was common for visitors to Kandahar," the district court concluded that petitioner's "familial ties to Usama bin Laden" and his meetings with bin Laden were "distract[ions]" that did not "prove that [petitioner] was a member of al-Qaida's 'armed forces.'" *Id.* at 41a (quoting *Gherebi* v. *Obama*, 609 F. Supp. 2d 43, 71 (D.D.C. 2009)).

Second, the district court found that petitioner had admitted staying at al-Qaida's al-Nebras guesthouse. Pet. App. 41a-43a. Evidence before the court established that al-Nebras was a staging-post for recruits traveling to the Al Farouq paramilitary training camp, but the court stated that "the guesthouse evidence is not in itself sufficient to justify detention." *Id.* at 42a; see *id.* at 13a.

Third, the district court found that petitioner had also admitted attending "al-Qaida's Al Farouq training camp," Pet. App. 43a, and "receiv[ing] training while there," *id.* at 44a. The district court noted petitioner's statements that he had "sought general weapons training and 'Islamic education'" at Al Farouq, and had "pursued [paramilitary] training" there in order "to satisfy 'curiosity' about jihad, and because he found himself in Afghanistan with idle time." *Id.* at 44a-45a. The district court declined to treat petitioner's decision to train at an al-Qaida paramilitary facility as evidence that he was part of al-Qaida. Crediting petitioner's assertion that he had been expelled from Al-Farouq "for failing to comply

with the rules" prohibiting smoking, *id.* at 16a, 45a, the court reasoned that petitioner's "demonstrated unwillingness to comply with orders from individuals at Al Farouq" showed that petitioner was not part of al-Qaida, *id.* at 47a. The district court found it insignificant that instead of being punished by al-Qaida after his expulsion from Al-Farouq, petitioner returned to Kandahar to stay with his "powerful brother-in-law," the close associate of Usama bin Laden. *Id.* at 46a. In the court's view, "this fact demonstrates at most that [petitioner] was being protected by a concerned family member; it most certainly is not affirmative evidence that [petitioner] embraced al-Qaida, accepted its philosophy, and endorsed its terrorist activities." *Id.* at 47a.

Fourth, the district court disregarded the government's evidence that petitioner had "more than a passing familiarity" with Usama bin Laden's personal bodyguards. Pet. App. 55a. The court acknowledged that petitioner's knowledge of the men suggested more than just a casual relationship between petitioner and bin Laden's security detail, but it declined to "credit this evidence as sufficient corroborative information to help carry the Government's burden." *Id.* at 56a.

Fifth, the district court accepted the government's evidence that petitioner had remained in Afghanistan in 2001 after the United States began combat operations in that country against al-Qaida and the Taliban. The court acknowledged that bin Laden had directed al-Qaida members to remain in Afghanistan and fight, Pet. App. 57a, and it found that petitioner had traveled around Afghanistan after the American military campaign began, *id.* at 61a, had been wounded, *id.* at 58a, and had eventually been captured fleeing Afghanistan on a bus in the company of Taliban fighters, *id.* at 59a.

Without "statements or confessions to support" the allegation that petitioner had fought for al-Qaida or the Taliban, however, the district court concluded that the government lacked "affirmative evidence of this allegation." *Id.* at 57a.

Summing up the evidence, the district court stated that "[w]hile it is tempting to be swayed by the fact that Petitioner readily acknowledged having met bin Laden on two occasions and admitted that perhaps his relatives were bodyguards and enthusiastic followers of bin Laden, such evidence—sensational and compelling as it may appear—does not constitute actual, reliable evidence that would justify the Government's detention of this man." Pet. App. 61a-62a. The court ordered the government to make arrangements for petitioner's release "forthwith." *Id.* at 62a.

3. The court of appeals reversed. Pet. App. 1a-22a. The court of appeals held that it was "manifestly incorrect—indeed startling"—for the district court to conclude that the record contained no reliable evidence that petitioner was part of al-Qaida. *Id.* at 9a. Instead, reviewing the substantial evidentiary record, the court held that "there can be no doubt that [petitioner] was more likely than not part of al-Qaida." *Id.* at 21a. The court concluded that the district court had committed reversible error in that it "clearly erred in its treatment of the evidence," reaching a conclusion that "was simply not a 'permissible view[] of the evidence.'" *Id.* at 20a (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985)).

The court of appeals held that the district court had improperly examined each item of evidence in isolation and had mistakenly believed that "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." Pet. App. 8a. The appellate court identified several specific examples of that erroneous approach in the district court's opinion. *Id.* at 8a-9a.

For example, the court of appeals explained that the evidence of petitioner's close personal ties to al-Qaida's inner circle, including a relationship by marriage with an individual with "'very high status' in al-Qaida" and personal meetings with bin Laden himself, Pet. App. 10a-11a, helped to make it "far more likely" that petitioner himself "was or became part of the organization," *id.* at 12a. For similar reasons, petitioner's stay at the al Nebras guesthouse "greatly strengthened the government's case." *Id.* at 13a. Al Nebras was "not just another gathering place," but rather was "a staging area for al-Qaida recruits en route to the Al Farouq training camp." *Ibid.* Thus, petitioner's "voluntary decision to move to an al-Qaida guesthouse, a staging area for recruits heading for a military training camp, makes it more likely—indeed, very likely—that [petitioner] was himself a recruit." *Ibid.*

Similarly, the court of appeals observed that petitioner's attendance at al-Qaida's Al Farouq paramilitary training camp showed that petitioner had "received and followed orders" from al-Qaida. Pet. App. 15a. "[A]ttendance at an al-Qaida military training camp is therefore—to put it mildly—strong evidence that [petitioner] was part of al-Qaida." *Id.* at 16a. The court of appeals further determined that the district court had erred in disregarding petitioner's training at Al Farouq on the basis that petitioner had been expelled from the camp for smoking; petitioner's "violation of a rule or rules did not erase his compliance with other orders," just as

"[o]ne would not say that an Army trainee ceased to be part of the Army if he failed to shine his shoes or overslept one morning." *Ibid.*

As another example of the same pervasive error in the district court's analysis, the court of appeals discussed petitioner's knowledge of personal details about bin Laden's personal bodyguards. The court of appeals stated that petitioner's "detailed personal knowledge" about bin Laden's bodyguards was strong evidence of petitioner's "close relationship with these men and thus strengthened the probability that he was part of al-Qaida." Pet. App. 17a.

Finally, the court of appeals held that the district "court was wrong, and clearly so," when it determined that there was no evidence that petitioner had been part of a band of fighters fleeing Afghanistan when he was captured. Pet. App. 19a. The court of appeals observed that petitioner had given inconsistent explanations for what he had been doing during the period of the American military offensive in Afghanistan, that he had been injured seriously enough to require hospitalization, and that he had been captured on a bus with wounded fighters. *Ibid.* Those pieces of evidence, the court of appeals held, while not in themselves conclusive, "add to the weight of the government's case," and "the district court clearly erred in tossing them aside." *Ibid.*[2]

ARGUMENT

Petitioner argues (Pet. 13-28) that the court of appeals erred in setting aside the district court's finding

[2] The court of appeals also observed that "[o]ne of the most damaging and powerful items of evidence against [petitioner] is classified." Pet. App. 21a. That evidence cannot be described in detail in this public filing, but it will be made available to the Court on request.

that he was not a part of al-Qaida. The court of appeals correctly held that the district court committed several legal errors in evaluating the evidence, and that its findings were clearly erroneous. That factbound determination does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the facts established by the government were more than sufficient to show that petitioner was part of al-Qaida. As the court of appeals explained, the district court's contrary ruling was premised on a legally erroneous approach to the record—looking at each piece of evidence in isolation and asking whether that item, standing alone, established that petitioner was part of al-Qaida. This Court has long disapproved of that type of analysis of trial evidence, and there is accordingly no conflict between the court of appeals' decision here and any decision of this Court or any other court of appeals. See, *e.g.*, *Bourjaily* v. *United States*, 483 U.S. 171, 179-180 (1987) ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in culmination prove it," because the "sum of an evidentiary presentation may well be greater than its constituent parts."); *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945) (L. Hand, J.) (noting that, even in criminal cases, "most convictions result from the cumulation of bits of proof which, taken singly, would not be enough in the mind of a fair minded person").

Petitioner errs in asserting (Pet. 13) that the court of appeals imposed "'conditional probability' as a standard of appellate review" in non-jury cases. Contrary to petitioner's apparent view that "conditional probability" is a novel legal standard (Pet. 17-18), it is instead a term

the court of appeals used in its opinion to describe a commonplace element of sound logical reasoning. The court of appeals explained what it meant by the term by giving an example: "the probability that a person chosen at random from the phone book is over 250 pounds is quite small," but "if it's known that the person chosen is over six feet four inches tall, then the conditional probability that he or she also weighs more than 250 pounds is considerably higher." Pet. App. 8a (quoting John Allen Paulos, *Innumeracy: Mathematical Illiteracy and Its Consequences* 63 (1988)). Because the court of appeals did not create a new legal standard but merely emphasized a principle of reasoning that is consistent with this Court's decisions, petitioner is mistaken in arguing that the court's holding is inconsistent with standards of appellate review. Indeed, in a more recent Guantanamo Bay habeas appeal, the court of appeals has reaffirmed "that a [district] court considering a Guantanamo detainee's habeas petition must view the evidence collectively rather than in isolation." *Salahi* v. *Obama*, No. 10-5087, 2010 WL 4366447, at *7 (D.C. Cir. Nov. 5, 2010). Although the court in that case did not use the term "conditional probability," it expressly "reiterate[d] this Court's admonition in *Al-Adahi*" that the district courts' consideration of the evidence in the habeas proceedings should not be "unduly atomized." *Id.* at *7-*8.

Petitioner repeats the error of the district court when he argues (Pet. 23) that "string[ing] together six or seven facts, each with a non-culpable inference, does not prove the important conclusion—that [petitioner] became part of al-Qaeda." As an initial matter, the individual pieces of evidence in this case were hardly innocuous. More importantly, as the court of appeals recog-

nized, each fact tending to establish that petitioner was part of al-Qaida—from petitioner's close personal ties to al-Qaida's most senior leader, to his obtaining weapons training at an al-Qaida camp and being captured in the company of wounded fighters—significantly increased the likelihood that petitioner was part of al-Qaida. Pet. App. 9a. In addition, the government produced "damaging and powerful" classified evidence that petitioner was part of al-Qaida. *Id.* at 21a. The court of appeals recognized that it would be inherently highly improbable for all of those facts to be true of an individual who was *not* part of al-Qaida. Thus, far from "stringing together" isolated facts, the government presented a number of facts related to al-Qaida activities, which, taken as a whole, constituted a compelling showing that petitioner was part of al-Qaida.

2. The court of appeals also correctly identified other legal errors in the trial court's evaluation of the evidence. In addition to failing to consider the evidence as a whole, Pet App. 8a-9a, the district court's "series of legal errors," *id.* at 20a, included at least these: it disregarded, as a "distraction," evidence of petitioner's close personal ties to senior al-Qaida leaders, *id.* at 13a; it failed to recognize that staying in an al-Qaida guesthouse and undertaking weapons training at an al-Qaida military training camp were evidence that petitioner was part of al-Qaida, *id.* at 13a-14a; it erroneously reasoned that if petitioner smoked at Al Farouq, then he had not taken orders from al-Qaida there, *id. at* 16a; it dismissed petitioner's training at Al Farouq on the ground that this evidence was insufficient to prove that petitioner "embrace[d] every tenet of al-Qaida," *id.* at 15a; and it failed to ask whether petitioner "was generally a credible witness or whether his particular explanations

for his actions were worthy of belief," *id.* at 19a. The court of appeals did not err when it reversed the trial court's decision on the basis of those obvious and pervasive errors.

Petitioner argues (Pet. 16) that the court of appeals was required to leave the district court's flawed analysis intact because "the crucial evidence was the live testimony" of petitioner himself. There is no basis in the record for concluding that petitioner's statements played a significant part in the district court's decision. As the court of appeals pointed out, the district court did not hold that petitioner was credible or determine "whether his particular explanations for his actions were worthy of belief." Pet. App. 19a. Instead, without deciding between the alternative versions of events, the trial court concluded that the government had failed to carry its burden of proof on particular issues, "display[ing] little skepticism about [petitioner's] explanations for his actions," despite their inconsistencies and implausibility, while at the same time expressing doubts about the government's case "on the mistaken view that each item of the government's evidence needed to prove the ultimate issue in the case." *Id.* at 20a. As the court of appeals correctly held, such reasoning is wrong.

Moreover, an appellate court may reverse findings based upon witness testimony if "[d]ocuments or objective evidence * * * contradict the witness' story," or if the story itself is "so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985). Here, the court of appeals correctly pointed out that allegations that bin Laden held casual meetings with any visitor to Kandahar were "utterly

implausible" because bin Laden was, at the time, in hiding under tight security. Pet. App. 11a.

Petitioner responds with a new rationale (Pet. 20) for his one-on-one meeting with bin Laden: bin Laden supposedly "met newcomers to Kandahar to determine if they were dangerous to him." The petition does not explain why Usama bin Laden, after sitting next to petitioner during the meal to celebrate the wedding between bin Laden's bodyguard and petitioner's sister, Pet. App. 11a, might believe a second meeting "to check out" petitioner (Pet. 4 n.2) would be necessary. Nor is it plausible that bin Laden would arrange for in-person meetings with strangers in order to determine whether they were dangerous. Petitioner's explanation also does not address other basic improbabilities in his story, such as why a father of two young children from Yemen, Pet. App. 66a, would, during a supposed vacation in Afghanistan, casually decide to undertake paramilitary training and "learn using weapons," *id.* at 80a, or why such a person would choose to extend his vacation once the United States began military attacks on that country. The record fully supports the court of appeals' conclusion that elements of petitioner's story were simply incredible, and in any event, that factbound issue does not warrant this Court's review.[3]

[3] Petitioner's accusation (Pet. 24) that the court of appeals "ma[de] up facts not in the record, such as its paragraph devoted to the Al Qaeda training manual for resisting interrogation," is unfounded. A declaration describing al-Qaida's counter-interrogation techniques was in the record below. C.A. App. 308-309. Al-Qaida counter-interrogation techniques are relevant to petitioner because, as the court of appeals recognized, if petitioner had been trained in those techniques (for example, during his paramilitary training at Al Farouq), that training would increase the likelihood that petitioner would lie to military interrogators.

3. Petitioner argues (Pet. 27) that this court should grant review to determine whether staying at an al-Qaida guesthouse and training at an al-Qaida training camp would be sufficient, standing alone, to show that an individual is part of al-Qaida. The court of appeals concluded that petitioner's stay at the al-Nebras guesthouse and weapons training at Al Farouq were "powerful" evidence that petitioner was part of al-Qaida, Pet. App. 14a, especially given that the guesthouse "served as a staging area for al-Qaida recruits en route to the Al Farouq training camp," *id.* at 13a, and "[a]t least eight of the September 11th hijackers had trained at Al Farouq," *id.* at 14a, before launching the al-Qaida attack. The court of appeals was correct to recognize that petitioner's decision to seek out and obtain weapons training at Al Farouq is highly probative of whether he was part of al-Qaida.

The court of appeals did not hold, however, that the guesthouse and training-camp evidence would necessarily have been sufficient on their own, and because of all of the other evidence in the record, this case would be a poor vehicle for resolving that issue. The government also presented evidence that petitioner's travel from Yemen to Afghanistan had been arranged and paid for by al-Qaida, Pet. App. 10a, that petitioner had access to al-Qaida's most trusted inner circle, *id.* at 11a, that when petitioner left the paramilitary training camp he returned to his brother-in-law, "one of bin Laden's most trusted associates," *id.* at 15a, that petitioner traveled among war-torn cities in Afghanistan after the United States' military operations in that country began, *id.* at 18a, and that he was captured "on a bus carrying wounded Arabs and Pakistanis," *id.* at 20a. The government had powerful classified evidence, as well, to show

that petitioner had remained in Afghanistan to fight. *Id.* at 21a. The court of appeals did not err in concluding that this evidence, as a whole, showed that it was more probable than not that petitioner was part of al-Qaida.

4. Although petitioner also suggests (Pet. 16-17) that the court of appeals erred in holding that some of the district court's factual findings were clearly erroneous, certiorari is not warranted to review that aspect of the court of appeals' holding. The courts of appeals have undoubted authority to reverse trial court decisions for clear error when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573 (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Reversal for clear error, moreover, is appropriate when the trial court's "interpretation of the facts is illogical or implausible." *Id.* at 577. Here, the court of appeals correctly concluded that the district court committed legal and logical errors in evaluating the evidence, Pet. App. 8a-9a, 17a-18a, and that the trial court had reached a conclusion that was so implausible as to be impermissible, *id.* at 20a. But even if the court of appeals had erred in applying the clear-error standard, which it did not, the misapplication of a properly stated rule of law would not warrant this Court's review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

* The Acting Solicitor General is recused in this case.