No. 18-740

In the Supreme Court of the United States

MOATH HAMZA AHMED AL-ALWI, PETITIONER

v.

DONALD J. TRUMP, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
SHARON SWINGLE
SONIA M. CARSON
MICHAEL SHIH
BRAD HINSHELWOOD
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in rejecting petitioner's claim that the government's detention authority under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, has "unraveled" because of the duration of hostilities, requiring his release from detention even though the United States remains engaged in active hostilities against Al Qaeda, the Taliban, and their associated forces.

2. Whether the court of appeals erred in rejecting petitioner's claim that the AUMF's detention authority "expired" when the United States transitioned from combat-focused operations against Al Qaeda, the Taliban, and their associated forces to counterterrorism-focused military operations in support of Afghan forces.

3. Whether the government lacks the authority to detain petitioner because he allegedly has not used arms against the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaties, and statutes:

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 18-740

MOATH HAMZA AHMED AL-ALWI, PETITIONER

v.

DONALD J. TRUMP, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 901 F.3d 294. The opinion of the district court (Pet. App. 17-30) is reported at 236 F. Supp. 3d 417.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2018. On October 18, 2018, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including December 5, 2018, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In response to the attacks of September 11, 2001, Congress passed and the President signed into law the 2001 Authorization for Use of Military Force

(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." Pub. L. No. 107-40, § 2(a), 115 Stat. 224.

In *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), five Members of this Court agreed that the AUMF authorizes the President to detain certain enemy forces for as long as the conflict lasts. A plurality of the Court ruled that "Congress' grant of authority for the use of 'necessary and appropriate force'" in the AUMF "include[s] the authority to detain for the duration of the relevant conflict," relying on the "clearly established principle of the law of war" that requires release of prisoners of war only after the cessation of "active hostilities." *Id.* at 520, 521. Justice Thomas "agree[d] with the plurality" that "Congress has authorized the President" "to detain those arrayed against our troops," and stated that "the power to detain does not end with the cessation of formal hostilities." *Id.* at 587-588 (dissenting opinion).

Congress codified this understanding of the President's detention authority in the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Pub. L. No. 112-81, 125 Stat. 1298. In that statute, Congress "affirm[ed]" that the President's authority under the 2001 AUMF includes "[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." § 1021(a) and (c)(1), 125 Stat. 1562. This authority includes the power to detain individuals who were "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, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." § 1021(a) and (b)(2), 125 Stat. 1562.

b. In October 2001, U.S. and coalition forces began a military campaign, Operation Enduring Freedom, to destroy Al Qaeda and remove the Taliban from power. C.A. App. 65. Thousands of U.S. service members participated in this major combat mission in furtherance of the armed conflict against Al Qaeda, the Taliban, and their associated forces. *Id.* at 66. The International Security Assistance Force, an international coalition authorized by the United Nations Security Council and led by the North Atlantic Treaty Organization, also conducted combat and other military operations in Afghanistan. *Id.* at 65-66. The coalition included thousands of military personnel from more than fifty nations, including the United States. *Id.* at 68-69.

Over time, the United States and its coalition partners reduced the number of military personnel in Afghanistan as the Afghan government took on greater responsibility for its own security and reconstruction. In May 2014, President Obama announced that the United States would end combat operations and concentrate on counterterrorism operations, among other missions. C.A. App. 74-75; see *id.* at 108. In September 2014, the United States and the Afghan government reached a bilateral security agreement that provides that U.S. forces will engage in combat operations when "mutually agreed" by the parties. *Id.* at 81 (Security and Defense Cooperation Agreement Between the Islamic Republic of Afghanistan and the United States of America (Bilateral Security Agreement), art. 2, ¶ 1

(signed Sept. 30, 2014)). The agreement expressly preserves the ability of the United States to undertake "military operations to defeat al-Qaida and its affiliates" in cooperation with the Afghan government, *id.* at 82 (art. 2, ¶ 4), and reflects an expectation that the United States will continue to engage in counter-terrorism, *ibid.* (art. 2, ¶ 4), "force protection," *id.* at 87 (art. 7, ¶ 3), "self-defense, consistent with international law," *id.* at 83 (art. 3, ¶ 2).

c. In 2015, the United States ended Operation Enduring Freedom and began Operation Freedom's Sentinel. Operation Freedom's Sentinel focuses on defeating Al Qaeda, the Taliban, and their associated forces; "protecting U.S. forces"; and "preventing Afghanistan from becoming a safe haven for terrorists to plan attacks against the U.S. homeland and U.S. targets and interests in the region." C.A. App. 752-754, ¶¶ 8-11; *id.* at 112, ¶ 10. Participants also train and assist the Afghan National Defense and Security Forces. *Id.* at 111-113, ¶¶ 7-12.

Active hostilities continue under Operation Freedom's Sentinel. In recent years, two Presidents have repeatedly reported to Congress that active hostilities "remain ongoing" against Al Qaeda, the Taliban, and their associated forces.[1] The Department of Defense

---

[1] See, *e.g.*, Letter from Donald J. Trump, President of the United States, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Dec. 7, 2018), https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-5/; Letter from Donald J. Trump, President of the United States, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 6, 2017), https://www.whitehouse.gov/the-press-office/2017/06/06/textletter-president-speaker-house-representatives-and-president-pro; C.A. App. 885 (Letter from

has reported to Congress that "[t]he United States remains in an armed conflict" in Afghanistan and that the country bears "the largest concentration of terrorist and extremist organizations in the world." U.S. Dep't of Def., *Enhancing Security and Stability in Afghanistan* 9, 29 (Dec. 2018).[2]

The record in this case also contains detailed declarations by senior military leaders describing military activities under Operation Freedom's Sentinel and efforts by Al Qaeda, the Taliban, and associated forces to harm the United States. C.A. App. 110-113 (Decl. of Rear Admiral Sinclair M. Harris ¶¶ 6, 10-12 (Apr. 14, 2015)); *id.* at 751-755 (Decl. of Rear Admiral Andrew L. Lewis ¶¶ 6, 10-13 (Feb. 1, 2016)). Thousands of U.S. military personnel continue to be deployed to Afghanistan. See *id.* at 110-111 (Harris Decl. ¶ 6); *id.* at 751 (Lewis Decl. ¶ 6). To date, 66 U.S. service members have died during Operation Freedom's Sentinel and 379 have been wounded in action.[3]

2. a. Petitioner is a Yemeni national who was captured in Pakistan near the Afghanistan-Pakistan border in December 2001 and subsequently detained by the United States at the Naval Station in Guantanamo Bay, Cuba. Pet. App. 3. Petitioner has admitted that he vol-

---

Barack Obama, President of the United States, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 13, 2016)); C.A. App. 51 (Letter from Barack Obama, President of the United States, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 11, 2015)).

[2] https://media.defense.gov/2018/Dec/20/2002075158/-1/-1/1/1225-REPORT-DECEMBER-2018.PDF.

[3] U.S. Dep't of Def., *Casualty Status*, https://dod.defense.gov/News/Casualty-Status/.

untarily joined the Taliban; stayed at safehouses operated by Al Qaeda and the Taliban; and attended a Taliban-affiliated training camp, where he learned to fire a rocket-propelled grenade launcher and received "a Kalashnikov rifle, ammunition magazines, and grenades." *Al Alwi* v. *Obama*, 653 F.3d 11, 13-14 (D.C. Cir. 2011), cert. denied, 567 U.S. 907 (2012); see *Al Alwi* v. *Bush*, 593 F. Supp. 2d 24, 28-29 (D.D.C. 2008). He also admitted that he served between eight and eleven months on multiple Afghan fronts in a Taliban combat unit commanded by a high-level Al Qaeda leader, and remained with his unit after September 11, 2001, even after his unit was bombed repeatedly by U.S. warplanes. *Al Alwi*, 653 F.3d at 14, 17; see *Al Alwi*, 593 F. Supp. 2d at 28-29.

b. Petitioner first sought habeas corpus relief in 2005, principally arguing that the United States should not be permitted to detain him on the basis of his own statements. The district court denied the petition, and the court of appeals affirmed, observing that petitioner did not contest "'the truth of the majority of his admissions'" and that his counsel "expressly conceded or did not disavow several" key facts on which the government relied, such as his membership in a Taliban combat unit commanded by a high-level Al Qaeda leader. *Al Alwi*, 653 F.3d at 17-20 (citation omitted). The court of appeals explained that this evidence established that petitioner "was 'part of the Taliban or al Qaeda,'" authorizing his detention. *Id.* at 20. This Court denied certiorari. *Al Alwi* v. *Obama*, 567 U.S. 907 (2012) (No. 11-7700).

c. In 2015, petitioner filed the habeas corpus petition at issue here. The new petition did not contest the factual basis for the district court's previous decision

(affirmed by the court of appeals) that he was part of Taliban or Al Qaeda forces; to the contrary, petitioner expressly stated that he did "not seek to re-litigate" that determination. C.A. App. 16, ¶ 21. Instead, petitioner claimed, as relevant here, that the United States' authority to detain him had come to an end, both because the President's detention authority had "unraveled" on account of the duration of the Afghanistan conflict, and because the President's authority had "expired" when the United States ended Operation Enduring Freedom and began Operation Freedom's Sentinel. Pet. App. 9, 26-27, 29-30.

d. The district court denied the petition. Pet. App. 16-30.

The district court rejected petitioner's assertion that the President's detention authority has "unraveled" because of the duration of the Afghanistan conflict. Pet. App. 9, 29-30. The court explained that the *Hamdi* plurality, whose opinion petitioner invoked, did not suggest that the duration of a conflict should "somehow excuse it from longstanding law of war principles." *Id.* at 30. The court also observed that current circumstances resemble the circumstances when *Hamdi* was decided: Thousands of U.S. military personnel are deployed to Afghanistan and engaged in ongoing operations against enemy fighters. *Ibid.*

The district court also rejected petitioner's invitation to declare that active hostilities have ended. Quoting the D.C. Circuit's decision in *Al-Bihani* v. *Obama*, 590 F.3d 866-874 (2010), cert. denied, 563 U.S. 929 (2011), the court explained that the "determination of when hostilities have ceased is a political decision," and that it would accordingly defer "to the Executive's opinion on the matter, at least in the absence of an authoritative

congressional declaration purporting to terminate the war." Pet. App. 23. The court continued that the President and national-security officials have "clearly stated that active hostilities remain ongoing in Afghanistan," *id.* at 25, and that Congress has reaffirmed that the AUMF authorizes detention for the duration of hostilities conducted under it, *id.* at 27-28. The court added that petitioner's claim would fail even putting aside deference to the President's assessment about the status of hostilities, because the government "provided overwhelming evidence that active hostilities *are in fact ongoing.*" *Id.* at 24-25 & n.2.

e. A unanimous panel of the court of appeals affirmed the district court's judgment. Pet. App. 1-15.

The court of appeals began by rejecting petitioner's claim that the duration of the Afghanistan conflict had "unraveled" the President's detention authority under the AUMF. The court explained that the AUMF "remains in force" and, relying on *Hamdi*, reaffirmed that the AUMF authorizes petitioner's detention so long as "hostilities continue." Pet. App. 6-7. As this Court explained in *Hamdi*, "[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be [enemy] combatants who engaged in an armed conflict against the United States." 542 U.S. at 521 (plurality opinion) (internal quotation marks omitted); accord *id.* at 579, 587 (Thomas, J., dissenting). The court of appeals added that petitioner had not identified any international-law principle providing that detention "may *not* continue until the end of active hostilities, even in a long war." Pet. App. 7-8. In rejecting such a limitation, the court also relied on the plurality opinion in *Hamdi*, which concluded that applicable international treaties supported a "'clearly established

principle of the law of war' that detention may continue during 'active hostilities.'" *Id.* at 8 (quoting *Hamdi*, 542 U.S. at 520); see Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135, 224; Convention between the United States and other Powers respecting the laws and customs of war on land, *ratified by the President of the United States*, Feb. 23, 1909, art. 20, 36 Stat. 2301.

The court of appeals also rejected petitioner's assertion that the government's detention authority under the AUMF "expired" when Operation Enduring Freedom ended and Operation Freedom's Sentinel began. Pet. App. 9-14. Quoting this Court's decision in *Ludecke* v. *Watkins*, 335 U.S. 160, 168-169 (1948), the court of appeals explained that "[t]he termination of hostilities is a political act" that is ordinarily left to the political branches. Pet. App. 10 (internal quotation marks omitted). Here, the court reasoned, "the Executive Branch represents, with ample support from record evidence, that the hostilities described in the AUMF continue," and Congress has not declared otherwise. *Id.* at 12-13; see *id.* at 10-11. Neither the AUMF, nor Congress's reaffirmation of the President's detention authority in 2012, nor the bilateral security agreement, "suggests that a change in the form of hostilities" from combat to counterterrorism operations "cuts off AUMF authorization." See *id.* at 12-14.

Finally, as relevant here, the court of appeals declined to address arguments that petitioner's continued detention violates the Fifth Amendment's Due Process Clause, which petitioner raised for the first time on appeal. Pet. App. 14-15.

ARGUMENT

The petition for a writ of certiorari should be denied. Petitioner is properly detained because he was found to be a "'part of' al Qaeda or Taliban forces." *Al Alwi* v. *Obama*, 653 F.3d 11, 17 (D.C. Cir. 2011), cert. denied, 567 U.S. 907 (2012). Petitioner received combat training at a Taliban-affiliated camp; stayed at Taliban- and Al Qaeda-affiliated safehouses; was issued a rifle, ammunition, and grenades; and served in a Taliban combat unit in Afghanistan commanded by a high-level Al Qaeda leader until well after September 11, 2001. *Al Alwi*, 653 F.3d at 13-14. Petitioner does not now contest these facts. Nor does he contest that the United States remains engaged in active hostilities with the Taliban and Al Qaeda in Afghanistan.

The court of appeals correctly rejected (Pet. App. 9) petitioner's argument that, despite the ongoing active hostilities, the government's detention authority under the AUMF has "unraveled" because of the duration of hostilities. The court also correctly rejected (*ibid.*) petitioner's argument that the government's detention authority has "expired" because what he asserts to be the relevant conflict in Afghanistan has ended. No further review of those issues is warranted. Petitioner's third question presented about due process also does not warrant review, both because the question was neither properly preserved nor passed upon below, and because petitioner's argument is in any event meritless.

1. The court of appeals correctly rejected petitioner's argument that the government no longer has authority to detain him under the AUMF, even if hostilities remain ongoing, because of the duration of the conflict.

a. The AUMF, interpreted in light of the laws of war, authorizes the President to detain individuals who

are part of al Qaeda, the Taliban, or associated forces for the duration of the armed conflict with those groups. That is how this Court interpreted the AUMF in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). The plurality stated: "We conclude that detention of individuals * * * *for the duration of the particular conflict in which they were captured*, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* at 518 (emphasis added). The plurality understood "Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain *for the duration of the relevant conflict*." *Id.* at 521 (emphasis added). The plurality therefore concluded that "[t]he United States may detain, *for the duration of these hostilities*, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'" *Ibid.* (emphasis added). And Justice Thomas likewise concluded that "the power to detain does not end with the cessation of formal hostilities." *Id.* at 588 (dissent). The interpretation of the AUMF adopted in *Hamdi* thus allows the President to detain individuals for as long as the armed conflict remains ongoing.

Congress subsequently codified this interpretation in the 2012 NDAA. In that statute, Congress "affirm[ed] that the authority of the President" under the AUMF "includes the authority * * * to detain covered persons * * * pending disposition under the law of war." § 1021(a), 125 Stat. 1562. Congress further provided that "disposition of a person under the law of war" includes "[d]etention under the law of war without trial *until the end of the hostilities authorized by the [AUMF]*." § 1021(c)(1), 125 Stat. 1562 (emphasis

added). The AUMF thus authorizes detention "until the end of the hostilities"—not until some indeterminate point in time before the end of the hostilities.

This interpretation of the AUMF makes sense and is consistent with the law of war. "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518 (plurality opinion). The risk that a combatant will return to the battlefield lasts as long as active hostilities remain ongoing. As a result, the power to detain also generally lasts as long as active hostilities remain ongoing. "[R]elease is only required when the fighting stops." *Al-Bihani* v. *Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010), cert. denied, 563 U.S. 929 (2011); see U.S. Dep't of Def., *Law of War Manual* § 8.14.3.1 (updated Dec. 2016) (release of "persons who have participated in hostilities or belong to armed groups that are engaged in hostilities" "is generally only required after the conflict has ceased").[4]

b. Petitioner's contrary arguments are without merit.

i. Petitioner asserts (Pet. 11) that the court of appeals disregarded the *Hamdi* plurality opinion. The *Hamdi* plurality "underst[ood] Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict," and this understanding was "based on longstanding law-of-war principles." 542 U.S. at 521. The plurality continued: "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Ibid.* Petitioner contends that the understanding has "unraveled" here.

---

[4] http://ogc.osd.mil/images/law_war_manual_december_16.pdf.

Petitioner's argument is incorrect. As the court of appeals explained (Pet. App. 6-7), the *Hamdi* plurality identified the "practical circumstances" sufficient to justify an enemy belligerent's continued detention: "If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are * * * authorized by the AUMF." 542 U.S. at 521. The record so established in 2004, when "[a]ctive combat operations against Taliban fighters apparently [we]re ongoing in Afghanistan." *Ibid.* And the record so establishes today, when, as the court of appeals correctly determined, "'[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan.'" Pet. App. 9 (quoting *Hamdi*, 542 U.S. at 521 (plurality opinion)) (brackets in original).

Petitioner errs in arguing that, despite the ongoing hostilities, the authority to detain must nevertheless have terminated because the armed conflict "has continued for more than seventeen years." Pet. 10. The *Hamdi* plurality tied the continuation of the detention power under the AUMF to the continuation of "[a]ctive combat operations"—not to an arbitrary temporal deadline. 542 U.S. at 521. In addition, there is no sound basis for petitioner's suggestion (Pet. 10) that a conflict becomes "entirely unlike * * * the conflicts that informed the development of the law of war," 542 U.S. at 521, simply because it lasts for 17 years.

ii. Petitioner asserts that the court of appeals erred in relying on the 2012 NDAA. The 2012 NDAA states that detention authority under the AUMF lasts "until the end of the hostilities." § 1021(c)(2), 125 Stat. 1562. Yet petitioner insists (Pet. 12) that Congress has not authorized his continued detention, because the 2012

NDAA also provides that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force." § 1021(d), 125 Stat. 1562.

Petitioner's reading of the 2012 NDAA is incorrect. The statute does not expand or limit the scope of the AUMF, but it does clarify that the AUMF has all along authorized detention "until the end of the hostilities." § 1021(c)(2), 125 Stat. 1562. The text of the 2012 NDAA is controlling, both in its own right and because "if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman*, 44 U.S. (3 How.) 556, 564-565 (1845).

iii. Petitioner asserts that international law-of-war principles cut off a state's detention authority at some undefined point before the end of active hostilities. Pet. App. 20-23. Petitioner is wrong. A majority of this Court has concluded that "a clearly established principle of the law of war" allows detention until "'*the cessation of active hostilities*.'" *Hamdi*, 542 U.S. at 520 (plurality opinion) (emphasis added; citation omitted); see *id.* at 587-588 (Thomas, J., dissenting). And in the 2012 NDAA, Congress defined "disposition of a person under the law of war" to include "[d]etention under the law of war without trial *until the end of the hostilities*." § 1021(c)(1), 125 Stat. 1562 (emphasis added).

As the court of appeals noted, petitioner has not identified "any international law principle affirmatively stating that detention of enemy combatants may *not* continue until the end of active hostilities, even in a long

war." Pet. App. 8. To the contrary, petitioner's authorities addressing international armed conflicts confirm the "open-ended and unqualified" nature of the basic rule. *Ibid.*; see, *e.g.*, Third Geneva Convention, art. 118, 6 U.S.T. 3406, 75 U.N.T.S. 224 (requiring that prisoners of war be "repatriated without delay *after the cessation of active hostilities*") (emphasis added). And petitioner acknowledges that the law applicable to non-international armed conflicts "is relatively silent on durational limits for detention." Pet. 21.

iv. Petitioner contends that the court of appeals' interpretation of the AUMF raises serious constitutional doubts. The court ruled that petitioner "forfeited" the claim that "his continued detention, even if authorized by the AUMF, violates substantive due process protections." Pet. App. 14. Petitioner does not contest that conclusion, but instead attempts to advance his forfeited argument by invoking (Pet. 17-20) the doctrine of constitutional avoidance.

Constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Nielsen* v. *Preap*, No. 16-1363, 2019 WL 1245517, at *13 (Mar. 19, 2019) (citation omitted). Petitioner fails to explain how the AUMF could be susceptible of more than one construction. A majority of Justices in *Hamdi* recognized that the AUMF "clearly and unmistakably" authorizes the detention of enemy forces who, like petitioner, were captured in the course of the conflict authorized by the AUMF. 542 U.S. at 519 (plurality opinion); see *id.* at 589 (Thomas, J., dissenting). The *Hamdi* plurality further recognized that the AUMF authorizes detention "for the duration of these hostilities." *Id.* at 521. And Congress later codified that

interpretation of the AUMF by "affirm[ing]" that the President's detention authority under the AUMF includes "[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF]." § 1021(c)(1), 125 Stat. 1562. Constitutional avoidance cannot be used to disregard Congress's clear statement.

Nor can petitioner show that the detention authority conferred by the AUMF, interpreted in light of the laws of war, raises any serious constitutional doubts. Petitioner argues (Pet. 18) that his detention "amounts to punishment without charge." But petitioner's detention "is neither a punishment nor an act of vengeance"; rather, it "is a simple war measure" designed "to prevent the captured individual from serving the enemy." *Hamdi*, 542 U.S. at 518 (plurality opinion) (citations omitted). Petitioner also maintains that continued detention "would raise constitutional questions with respect to a U.S. citizen." Pet. 17. No claim of a U.S. citizen is at issue here; petitioner is a Yemeni national. And as the plurality in *Hamdi* explained, "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant," as a citizen "would pose the same threat of returning to the front during the ongoing conflict." 542 U.S. at 519.

v. Finally, invoking an opinion by Justice Breyer, petitioner contends that "the Court ha[s] yet to consider 'whether . . . either the AUMF or the Constitution limits the duration of detention.'" Pet. 15 (quoting *Hussain* v. *Obama*, 572 U.S. 1079, 1080 (2014) (statement of Breyer, J., respecting denial of a writ of certiorari)). Petitioner overreads the opinion on which he relies. In that opinion, Justice Breyer expressly acknowledged the *Hamdi* plurality's determination that the AUMF

authorizes detention of certain enemy combatants "for the duration of the particular conflict in which they were captured." *Hussain*, 572 U.S. at 1079 (citation and emphasis omitted). But Justice Breyer recognized that *Hamdi* addressed persons "who engaged in an armed conflict against the United States" in Afghanistan. *Ibid.* (internal quotation marks omitted). In Justice Breyer's view, the Court "ha[d] not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not 'engaged in an armed conflict against the United States' in Afghanistan." *Ibid.* Nor, Justice Breyer believed, had the Court addressed whether "either the AUMF or the Constitution limits the duration of detention" for those particular persons. *Ibid.*

Even if *Hamdi* had left some ambiguity about the extent of detention authority under the AUMF, Congress removed that ambiguity in the 2012 NDAA. There, Congress made clear that the AUMF empowered the President to detain 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" "until the end of the hostilities." § 1021(b)(2) and (c)(1), 125 Stat. 1562.

In all events, this case would be an unsuitable vehicle for addressing the issues posited in Justice Breyer's opinion. Most importantly, petitioner *was* "engaged in an armed conflict against the United States." *Hussain*, 574 U.S. at 1079 (statement of Breyer, J.) (citation omitted). He served several months in a Taliban combat unit in Afghanistan that was repeatedly bombed by U.S. warplanes. See *Al Alwi*, 653 F.3d at 14. Petitioner errs

in arguing that he was not engaged in an armed conflict simply because he did not "actually us[e] arms against U.S. or coalition forces." Pet. 3 (citation omitted). A member of a combat unit may still be engaged in armed conflict even if he has not yet had occasion to fire a shot against opposing forces.

Further, petitioner has failed to preserve the contentions identified in Justice Breyer's opinion. As shown below (p. 22, *infra*), petitioner has forfeited any claim that the AUMF and the Constitution preclude "detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not 'engaged in an armed conflict against the United States' in Afghanistan." *Hussain*, 574 U.S. at 1080 (statement of Breyer, J.). And as shown above (p. 15, *supra*), petitioner has forfeited any claim that "the Constitution limits the duration of detention" of such individuals. *Hussain*, 574 U.S. at 1080 (statement of Breyer, J.).

2. The court of appeals also correctly rejected petitioner's argument that the government's detention authority under the AUMF has "expired" because the relevant conflict in which petitioner was captured and detained has now ended.

a. As the court of appeals recognized, the determination whether an armed conflict has ended is entrusted to the political branches, which have repeatedly stated that the conflict here remains ongoing. Pet. App. 9-14. This Court has long "refus[ed] to review the political departments' determination of when or whether a war has ended." *Baker* v. *Carr*, 369 U.S. 186, 213 (1962) (citing *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827)); see, *e.g.*, *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 57 (1923) (ruling that a court "cannot estimate the effects

of a great war and pronounce their termination at a particular moment of time"); *The Three Friends*, 166 U.S. 1, 63 (1897) (ruling that "it belongs to the political department to determine when belligerency shall be recognized"); *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1872) (ruling that a court must "refer to some public act of the political departments of the government to fix the dates" of war); *United States* v. *Anderson*, 76 U.S. (9 Wall.) 56, 70-71 (1870) (noting the "inherent difficulty of determining" when the Civil War had ended and rejecting claims that a court could identify the end of a war based on events).

Ludecke v. *Watkins*, 335 U.S. 160 (1948), illustrates this principle. In that case, this Court held that the President retained the power to deport enemy aliens, notwithstanding an enemy's surrender, because "[t]he political branch of the Government ha[d] not brought the war with Germany to an end," but had, on the contrary, "proclaimed that 'a state of war still exists.'" *Id.* at 170 (citation omitted). The Court explained that a court "would be assuming the functions of the political agencies of the Government" by undertaking to decide when a conflict had ended, and that "[t]hese are matters of political judgment for which judges have neither technical competence nor official responsibility." *Ibid.*

Here, Congress and the President agree that the United States is engaged in active hostilities against Al Qaeda, the Taliban, and their associated forces. As noted above (pp. 4-5, *supra*), Congress has reaffirmed the President's continuing authority under the AUMF, and the President continues to determine that active hostilities against Al Qaeda, the Taliban, and their associated forces "remain ongoing." In light of these facts, the court of appeals correctly recognized that

"[t]he Executive Branch represents that armed hostilities between United States forces and [the Taliban and Al Qaeda] persist." Pet. App. 10.

b. Petitioner's contrary arguments are again without merit.

i. Petitioner relies on this Court's observation in *Ludecke* that "'[w]hether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.'" Pet. 27 (quoting 335 U.S. at 169) (brackets in original). Petitioner contends that this observation entitles him to a "judicial evaluation of a factual record" to determine whether the conflict in which he is detained remains ongoing. Pet. 28.

Petitioner's contention is incorrect. The court of appeals correctly recognized that "[t]he question alluded to in *Ludecke*"—"'[w]hether and when it would be open to [a court] to find that a war though merely formally kept alive had in fact ended'"—"is not compelled here." Pet. App. 10 (quoting 335 U.S. at 169). "The record confirms the Executive Branch's representations" that the conflict in Afghanistan remains ongoing. *Id.* at 11; see *id.* at 12-13 ("[T]he Executive Branch represents, with ample support from record evidence, that the hostilities described in the AUMF continue."); *id.* at 14 ("The record * * * manifests * * * [that] United States troops * * * remain in active combat with the Taliban and al Qaeda."). Petitioner "does not contest the accuracy of this record." *Id.* at 11. Quite the opposite, his counsel "conceded" in the court of appeals that "'there is a shooting war in Afghanistan [that] involves U.S. elements.'" *Ibid.* (citation omitted; brackets in original). And he acknowledges in this Court that the United

States remains engaged in armed conflict with "Taliban and al-Qaida fighters and associated groups." Pet. 6. There is thus no sound basis for the suggestion that the armed conflict in Afghanistan "ha[s] in fact ended" and is "merely formally kept alive." *Ludecke*, 335 U.S. at 169.

ii. Petitioner contends that the signing of a bilateral security agreement between the United States and Afghanistan in 2014 "mark[ed] the end of the original armed conflict and the commencement of a new one." Pet. 25. But as the court of appeals correctly observed, the agreement indicates at most "that the United States' military operations in Afghanistan have changed." Pet. App. 13. The agreement contemplates that U.S. forces will engage in combat operations when "mutually agreed" by the parties, C.A. App. 81 (Bilateral Security Agreement, art. 2, ¶ 1); that the United States will use "military operations to defeat al-Qaida and its affiliates" in cooperation with the Afghan government, *id.* at 82 (art. 2, ¶ 4); and that the United States will continue to engage in "force protection," *id.* at 87 (art. 7, ¶ 3), "counter-terrorism," *id.* at 82 (art. 2, ¶ 4), and "self-defense, consistent with international law," *id.* at 83 (art. 3, ¶ 2). In sum, "the Agreement does not declare an end to the conflict on which [petitioner]'s detention is based," Pet. App. 13, but instead presupposes that active hostilities continue.

iii. Finally, Petitioner erroneously suggests (Pet. 26-27) that the bilateral security agreement would require the United States to release him if he were captured in Afghanistan today. Even assuming for the sake of argument that the agreement creates rights enforceable by private parties, the agreement would require no such thing. The provision on which petitioner relies states

that the United States will not "maintain or operate detention facilities in Afghanistan." C.A. App. 83 (Bilateral Security Agreement, art. 3, ¶ 3). A voluntary agreement about facilities in Afghan sovereign territory does not deprive the United States of authority to detain petitioner elsewhere. Petitioner's arguments were properly rejected by the court of appeals, and further review is unwarranted.

3. A writ of certiorari is also unwarranted to review the third question presented, which asks whether petitioner can be legally detained without evidence that he actually used arms against U.S. forces.

This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation and internal quotation marks omitted). Petitioner admits (Pet. 33, 37) that he did not argue the third question presented to the district court or court of appeals. Petitioner further admits (Pet. 37-39) that neither the district court nor the court of appeals passed on the question. This Court's ordinary practice therefore "precludes a grant of certiorari." *Williams*, 504 U.S. at 41; see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

Moreover, petitioner's argument has no merit. The AUMF authorizes the use of "all necessary and appropriate force against those nations, organizations, or persons" responsible for the September 11, 2001 terrorist attacks. § 2(a), 115 Stat. 224. The court of appeals has long recognized that this language is not confined to individuals who actually use arms against U.S. forces, but extends to all those who, like petitioner, were "'part of al Qaeda or Taliban forces.'" *Al Alwi*, 653 F.3d at 17;

see *Al-Bihani*, 590 F.3d at 873. Congress codified this interpretation in the 2012 NDAA, which provides that the President's detention authority under the AUMF reaches anyone 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." § 1021(b)(2), 125 Stat. 1562. There is no doubt that the AUMF authorizes petitioner's detention.

Contrary to petitioner's assertion (Pet. 36), his detention as part of Al Qaeda or Taliban forces is fully consistent with the law of war. In the 2012 NDAA, Congress expressly defined the "disposition of a person under the law of war" to include "[d]etention" of "[a] 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." § 1021(b) and (c), 125 Stat. 1562. This declaration comports with the longstanding law-of-war principle that permits the detention of members of enemy forces, even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." *Ex parte Quirin*, 317 U.S. 1, 38 (1942).

This principle is not limited to conflicts between States. Common Article 3 of the Geneva Conventions provides standards for the treatment of persons who are part of armed forces in non-international armed conflicts and who have been "placed *hors de combat* by * * * detention." Third Geneva Convention, art. 3, 6 U.S.T. 3318, 75 U.N.T.S. 136. This provision presupposes that States engaged in conflict with a non-State armed group can detain individuals who are part of the

group. Likewise, Additional Protocol II to the 1949 Geneva Conventions—which the United States has not signed, but which the Executive has supported—provides standards for the treatment of persons detained "for reasons related to the armed conflict." Protocol Additional to the Geneva Conventions, arts. 5(3), 6(5), 1125 U.N.T.S. 613, 614; see *id.* art. 2(2), 1125 U.N.T.S. 611 (Additional Protocol II). The International Committee of the Red Cross's Commentary to Additional Protocol II explains that, "[i]n principle, measures restricting people's liberty, taken for reasons related to the conflict, should cease at the end of active hostilities." International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* ¶ 4493 (1987).[5]

Petitioner's contrary rule would ignore the realities of the armed conflict authorized by the AUMF. "In modern warfare, commanding officers rarely engage in hand-to-hand combat; supporting troops behind the front lines do not confront enemy combatants face to face; supply-line forces, critical to military operations, may never encounter their opposition." *Khairkhwa* v. *Obama*, 703 F.3d 547, 550 (D.C. Cir. 2012). On petitioner's theory, none of these individuals, however essential to the combat or terrorist operations of the enemy, would be detainable. Petitioner's passing suggestion (Pet. 36 & n.16) that his capture in Pakistan is relevant to his detention only underscores the point: to conclude that someone who was part of an enemy armed group is immune from capture because he flees the bat-

[5] http://www.legal-tools.org/doc/6d222c/pdf/.

tle or conceals himself as a civilian would allow the enemy to regroup and launch fresh attacks against U.S. forces.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
SHARON SWINGLE
SONIA M. CARSON
MICHAEL SHIH
BRAD HINSHELWOOD
Attorneys

APRIL 2019