[ORAL ARGUMENT NOT YET SCHEDULED]
No. 18-1279

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: ABD AL-RAHIM HUSSEIN MUHAMMED AL-NASHIRI,
PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS
TO THE DEPARTMENT OF DEFENSE AND
THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BRIEF OF THE UNITED STATES IN OPPOSITION

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

I. PARTIES

In this case, Abd Al-Rahim Hussein Muhammed Al-Nashiri is the petitioner, and the United States is the respondent. In the interlocutory appeal before the United States Court of Military Commission Review (USCMCR), Al-Nashiri was the appellee, and the United States was the appellant. In the military commission case, Al-Nashiri is the accused, and the United States is the prosecution.

II. RULINGS

The ruling under review is the decision of the USCMCR denying Al-Nashiri's motion to compel the production of discovery and to vacate orders issued by the military judge who formerly presided over pretrial proceedings in Al-Nashiri's military commission case. Order, United States v. Al-Nashiri, No. 18-002 (USCMCR Sept. 28, 2018) (Pet. Attach. A). Al-Nashiri alleges that the military judge should have disqualified himself when he applied for post-retirement employment as an immigration judge.

III. RELATED CASES

This Court has considered four previous mandamus petitions brought by petitioner or his counsel in this case. See In re Al-Nashiri, 791 F.3d 71 (D.C. Cir. 2015) (denying Al-Nashiri's mandamus petition seeking disqualification of the military judges on the USCMCR panel hearing an interlocutory appeal in his case

on the ground that the judges were placed on the USCMCR in violation of the Appointments Clause); In re Al-Nashiri, No. 16-1152, unpublished order (D.C. Cir. May 27, 2016) (per curiam) (denying Al-Nashiri's mandamus petition seeking disqualification of the military judges on the USCMCR panel on the ground that a federal statute, and the Commander-in-Chief Clause of the Constitution, barred them from being appointed as USCMCR judges); In re Al-Nashiri, 835 F.3d 110 (D.C. Cir. 2016) (denying Al-Nashiri's mandamus petition on the ground that the military commission lacked jurisdiction over his offense conduct); Spears v. United States, No. 18-1087, unpublished order (D.C. Cir. May 21, 2018) (per curiam) (dismissing as moot a petition filed by petitioner's counsel seeking intervention in the USCMCR).

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STATEMENT OF JURISDICTION

The jurisdiction of the military commission rests on 10 U.S.C. § 948d. The jurisdiction of the United States Court of Military Commission Review (USCMCR) over the underlying government interlocutory appeal arises under 10 U.S.C. § 950d. Although Al-Nashiri filed only a free-standing motion in the USCMCR, to the extent the USCMCR construed that motion as a petition for a writ of mandamus, the USCMCR had jurisdiction under 10 U.S.C. § 950f and the All Writs Act, 28 U.S.C. § 1651(a). See Order at 2, United States v. Al-Nashiri (USCMCR Sept. 28, 2018). Al-Nashiri invokes this Court's jurisdiction under 10 U.S.C. § 950g and the All Writs Act. See Pet. 1.

ISSUE PRESENTED

Whether this Court should issue a writ of mandamus ordering vacatur of rulings by the military judge who formerly presided over Al-Nashiri's military commission case, based on Al-Nashiri's claim, raised for the first time during the government's interlocutory appeal of a different matter, that the military judge should have disqualified himself when he applied for a post-retirement position as an immigration judge.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from the ongoing prosecution of Abd Al-Rahim Hussein Muhammed Al-Nashiri before a military commission convened at the United States Naval Station, Guantanamo Bay, Cuba. Al-Nashiri "is the alleged mastermind of the bombings of the *U.S.S. Cole* and the French supertanker the M/V *Limburg*, as well as the attempted bombing of the *U.S.S. The Sullivans*." In re Al-Nashiri, 835 F.3d 110, 113 (D.C. Cir. 2016) (Al-Nashiri II). Al-Nashiri is charged with multiple violations of the law of war under the Military Commissions Act of 2009 ("MCA"), 10 U.S.C. §§ 948a-950t. See Al-Nashiri II, 835 F.3d at 114. The charges carry the possible punishment of death. See id.

Air Force Colonel Vance Spath served as the military judge in Al-Nashiri's case from July 10, 2014 until August 6, 2018, when he was succeeded by Air Force Colonel Shelly Schools due to his impending retirement from the military. See Detailing Memorandum for Colonel Vance Spath, United States v. Al-Nashiri, Appellate Exhibit ("AE") 302 (July 10, 2014); Detailing Memorandum for Colonel Shelly Schools, AE 302A (Oct. 15, 2018).[1] Al-Nashiri claims that at some point

[1] Unless indicated otherwise, all references to an appellate exhibit ("AE") are references to docket entries in Al-Nashiri's military commission case. Unclassified filings in that case can be accessed by visiting the Office of Military Commissions website, https://www.mc.mil/CASES/MilitaryCommissions.aspx, and clicking on the link for "USS Cole: Abd al-Rahim Hussein Muhammed Abdu

while Colonel Spath presided over the case, Colonel Spath applied for a civilian position as an immigration judge in the Executive Office of Immigration Review at the U.S. Department of Justice, thereby allegedly aligning himself with the prosecution and creating a conflict of interest that disqualified him from serving as the military judge in Al-Nashiri's case. See Pet. 2-3. Al-Nashiri seeks mandamus relief from this Court vacating the order convening his military commission, vacating orders issued by Colonel Spath, or directing the USCMCR to order the military commission to conduct an evidentiary hearing. Id. at 1.

This Court should deny Al-Nashiri's mandamus petition because Al-Nashiri has alternative means of relief. He can raise his claims in the still-pending military commission, which he has never done, and then seek any available remedies after the new military commission judge has developed a record, made findings, and issued a ruling. Al-Nashiri cannot invoke the last resort of mandamus when he has not tried the first resort of raising his claims at the trial level. Mandamus would be particularly inappropriate here because there is no factual record for this Court to review, and Judge Schools could narrow the scope of Al-Nashiri's claim, or moot it altogether, by reconsidering Colonel Spath's orders as the rules provide. Also,

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Al-Nashiri (2)." To view the USCMCR docket, open https://www.mc.mil/Cases.aspx?caseType=cmcr and click on case number 18-002.

Al-Nashiri has not shown that a right to relief is clear and indisputable because no clear precedent requires recusal in the circumstances of this case.

BACKGROUND

I. The Military Commissions System

The current military commissions system is "the product of an extended dialogue" among the political Branches and the Supreme Court. In re Al-Nashiri, 791 F.3d 71, 73 (D.C. Cir. 2015) (Al-Nashiri I). After the Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), determined that an earlier military commission process created solely by the Executive Branch exceeded then-existing statutory authority, id. at 590-95, 613, 620-35, Congress and the President enacted the Military Commissions Acts of 2006 and 2009 to authorize the President to establish "a system of military commissions" to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commissions. Al-Nashiri II, 835 F.3d at 115; see 10 U.S.C. §§ 948b(a)-(b), 948c. The procedures for military commissions are "based upon the procedures for trial by general courts-martial under [the Uniform Code of Military Justice]," with some exceptions and modifications. 10 U.S.C. § 948b(c).

As in courts-martial held under the Uniform Code of Military Justice ("UCMJ"), military judges preside over military commissions. See 10 U.S.C.

§ 948j(a). Each military commission judge is a commissioned officer and judge advocate who is "certified to be qualified for duty . . . as a military judge" by the Judge Advocate General of their respective military departments. Id. § 948; see also id. § 826(a). Military judges must, acting under oath, swear to perform their duties faithfully. Id. § 949g(a); see also id. § 842(a). Military judges may be challenged for cause, and the military judge must determine the validity of the challenge. See id. § 949f(a); see also id. § 841(a)(1). Likewise, the procedure and standards governing the disqualification of military judges is the same in military commissions as it is in courts-martial. *Compare* Rule for Military Commissions ("R.M.C.") 902, *with* Rule for Courts-Martial 902. A person is ineligible to serve as a military judge under certain circumstances. See 10 U.S.C. § 948j(c) (providing that a person is ineligible to serve as a military judge if that person is "the accuser or a witness or has acted as investigator or counsel in the same case"); see also id. § 826(d). In addition to other procedural protections ensuring the military judges' impartiality, the MCA prohibits any person from attempting to coerce or unlawfully influence the military commission "in reaching the findings or sentence in any case." Id. § 949b(a)(2)(A); see also id. § 949b(a)(1) (prohibiting any authority convening a military commission from censuring, reprimanding, or admonishing the military judges regarding their findings, sentence, or "functions in

the conduct of the proceedings"); R.M.C. 902(a) (requiring a military judge's disqualification where the "military judge's impartiality might reasonably be questioned").

The accused has the right to representation by counsel. At trial, the accused has the right to retain civilian counsel and the right to representation "by either the defense counsel detailed or the military counsel of the accused's own selection, if reasonably available." Id. § 949a(b)(2)(C)(i). In capital cases, the accused has the right to representation, "to the greatest extent practicable," by at least one additional counsel "who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense." Id. § 949a(b)(2)(C)(ii).

The military commissions system includes multiple layers of review. First, the convening authority has the discretion to dismiss any charge on which the commission found the accused guilty; to convict the accused only of a lesser included offense; and to approve, disapprove, suspend, or commute (but not enhance) any sentence rendered by the commission. Id. § 950b(c)(2), (3). Second, if the convening authority approves a finding of guilt, it must refer the case to the USCMCR, unless the accused expressly waives his right to review and a non-capital sentence has been imposed. Id. § 950c(a)-(b); see Al-Nashiri I, 791 F.3d at

74 (The USCMCR is an "intermediate appellate tribunal for military commissions akin to each military branch's Court of Criminal Appeals (CCA) for courts-martial."). The USCMCR may affirm a finding of guilt and a sentence on appeal only if it determines that they are "correct in law and fact" and "should be approved" in light of "the entire record." 10 U.S.C. § 950f(d).

After exhausting these procedures, an accused may petition for review in this Court, which has "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission" (as approved by the convening authority and sustained by the USCMCR). Id. § 950g(a)-(b). This Court's review extends to all "matters of law, including the sufficiency of the evidence to support the verdict." Id. § 950g(d). The MCA, however, expressly prohibits this Court's review "until all other appeals under [the MCA] have been waived or exhausted." Id. § 950g(b).

II. The Military Commission Proceedings in This Case

In the seven years since the military commission was convened in September 2011 to try Al-Nashiri, there have been extensive pretrial proceedings. More than 2,800 docket entries have been made in the case, most of which are publicly available at the Office of Military Commissions website.

Several attorneys have served on Al-Nashiri's defense team during this time.

Richard Kammen has represented Al-Nashiri as his "learned" counsel since 2008. Opinion at 4, United States v. Al-Nashiri, No. 18-002 (USCMCR Oct. 11, 2018) ("USCMCR Op."). In 2015, Mary Spears and Rosa Eliades, civilian employees of the Department of Defense, were detailed by the Chief Defense Counsel of the Military Commissions Defense Organization to serve as Al-Nashiri's assistant defense counsel. Id. Al-Nashiri is also represented by (among other trial, habeas, and appellate attorneys) Navy Captain Brian Mizer and Navy Lieutenant Alaric Piette.

Three military judges have been assigned to the military commission case. Colonel Spath was the second such military judge. While also serving as the Chief Judge of the Air Force Trial Judiciary, Colonel Spath presided over Al-Nashiri's case from July 10, 2014 until August 6, 2018. See Detailing Memorandum for Colonel Vance Spath, AE 302 (July 10, 2014). On August 6, 2018, Air Force Colonel Shelly Schools was assigned to the case due to Colonel Spath's impending retirement. See Detailing Memorandum for Colonel Shelly Schools, AE 302A (Oct. 15, 2018) (detailing Colonel Schools effective August 6, 2018).

During the four years Colonel Spath presided over the case, he issued approximately 460 written orders and abated the case three times, the first time lasting more than a year. In early 2015, Colonel Spath granted Al-Nashiri's

request to hold the military commission proceedings in abeyance pending the government's two interlocutory appeals from adverse decisions to the USCMCR. Order, AE 340L (July 29, 2016). In those decisions, Colonel Spath granted Al-Nashiri's motions to dismiss four of the nine charges against him and to exclude evidence of facts material to the government's case. In June and July 2016, the USCMCR resolved the interlocutory appeals in the government's favor. United States v. Al-Nashiri, 222 F. Supp. 3d 1093 (USCMCR 2016); United States v. Al-Nashiri, 191 F. Supp. 3d 1308 (USCMCR 2016). Colonel Spath then granted the government's request to resume the litigation of Al-Nashiri's case.[2]

After six years of pretrial proceedings, Colonel Spath announced in March 2017 that the parties should prepare for trial beginning more than a year later, in mid- or late 2018. See Tr. 9326-28, United States v. Al Nashiri (Mar. 15, 2017).[3]

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[2] In July 2017, Colonel Spath also abated the proceedings on the ground that a new policy governing the transportation of military commission participants to and from Guantanamo Bay—which caused the military judges to travel in close proximity to counsel, victims, and witnesses—could expose the military judges to "improper ex parte contacts." Order at 1-2, AE 379 (July 7, 2017). When the new policy was revised, Colonel Spath granted the government's request to resume litigation of the case. Order, AE 379B (July 17, 2017). Colonel Spath abated the proceedings a third time, in February 2018, as discussed below.

[3] Unless stated otherwise, references to the transcript are from the military commission case and are available on the Office of Military Commissions website, along with the case filings.

Colonel Spath authorized the government to preserve, through a deposition, testimony from one of Al-Nashiri's alleged co-conspirators, Ahmed Mohammed Ahmed Haza Al-Darbi. Order, AE 369M (Mar. 17, 2017). Al-Darbi was a detainee at Guantanamo who became eligible for transfer to Saudi Arabia in February 2018. In light of this impending transfer date, Colonel Spath scheduled direct examination for August 2017, with cross-examination to follow in September 2017. At the direct examination, Al-Darbi provided extensive testimony regarding Al-Nashiri's role in Al Qaeda and the *U.S.S. Cole* and M/V *Limburg* bombings. See Mot. at 7-15, AE 369 (Dec. 27, 2016) (summarizing expected testimony).[4]

Since Al-Darbi's direct examination from August 1 through August 4, 2017, neither assistant defense counsel Ms. Spears and Ms. Eliades nor learned counsel Mr. Kammen have appeared at a military commission hearing. A few weeks after the direct examination, Mr. Kammen asked Colonel Spath to reschedule the cross-examination for personal reasons. Mot., AE 356D (Aug. 22, 2017). On October 4, 2017, Colonel Spath agreed to accommodate Mr. Kammen's request and rescheduled the cross-examination for November 2017. Order, AE 388 (Oct. 4,

[4] The deposition transcript is sealed. Order at 2-3, AE 369FF (June 12, 2017).

2017). Two days later, Ms. Spears, Ms. Eliades, and Mr. Kammen submitted requests to the Chief Defense Counsel of the Military Commissions Defense Organization, Brigadier General John Baker, seeking to withdraw from representing Al-Nashiri. USCMCR Op. at 11.

The three civilian defense attorneys claimed that continued representation of Al-Nashiri would violate their respective states' rules of professional responsibility due to alleged intrusions by the government into their attorney-client communications. See id. at 4-9 (discussing the alleged intrusions); Gov't Consolidated Opp. at 2-6, United States v. Al-Nashiri, No. 18-002 (Nov. 5, 2018) (same). Al-Nashiri had presented these allegations to the military commission when it was presided over by Colonel Spath and his predecessor, Army Colonel James Pohl. Colonel Pohl held an evidentiary hearing, and ordered witness testimony, in 2013. See Order, AE 149K (Aug. 5, 2013). Neither judge found that any government intrusion into the attorney-client relationship between Al-Nashiri and his counsel occurred. See USCMCR Op. at 4-9. Similar claims were raised by other military commission defendants, but the military commission did not find any government intrusion into the attorney-client relationship between those defendants and their counsel either. See, e.g., Ruling, United States v. Mohammad, AE 133QQ (Nov. 30, 2016); Ruling, United States v. Mohammad,

AE 292JJJJJ (Dec. 23, 2015); Order, United States v. Mohammad, AE 155II (Oct. 1, 2013).

The most recent allegations arose from a May 2017 notification by the government to Colonel Spath and Al-Nashiri's counsel that certain communications between a small number of detainees and their attorneys—but not between Al-Nashiri and any member of his legal team—were unintentionally overheard when those detainees and their attorneys met in a location other than the designated attorney-client meeting locations. See Gov't Opp. to Mot. To Dismiss at 5-6, United States v. Al-Nashiri, No. 18-002 (Mar. 5, 2018). No government personnel involved in these legal proceedings overheard the communications. Al-Nashiri was not among the affected detainees because he "never met with his attorneys" at the location that was at issue. Id. at 6.

In June 2017, the commander of the detention facility offered to allow defense counsel to personally inspect their legal meeting rooms. Id. In early August 2017, Al-Nashiri's defense team inspected their legal meeting room and "located a legacy microphone" that had not been removed from the room after the room had been repurposed for attorney-client meetings. Id. The room had been repurposed to accommodate a request from Al-Nashiri's counsel to meet with Al-Nashiri outside locations specifically configured for attorney-client meetings. The

legacy microphone was "not in use and not connected to any audio listening/recording device." Id. Judge Spath denied Al-Nashiri's motion for discovery in September 2017 and, having access to the same information upon which Al-Nashiri based his claims of intrusion, found no basis to conclude that the government had intruded into communications between Al-Nashiri and his counsel. See USCMCR Op. at 6-8, 12, 31.

On October 11, 2017, the Chief Defense Counsel issued a memorandum purporting to excuse Al-Nashiri's three civilian defense counsel for "good cause" under R.M.C. 505(d)(2). USCMCR Op. at 11. Two days later, the attorneys notified Colonel Spath "'as a courtesy' that they no longer represented Al-Nashiri." Id. The civilian defense counsel did not seek leave from the military commission to withdraw, something that Al-Nashiri's trial team had done with previous requests for the release of counsel. See, e.g., Mot. To Excuse Counsel, AE 339A (Oct. 7, 2015).

On October 16, 2017, Al-Nashiri's remaining military attorney, LT Piette, moved to abate the proceedings until new learned counsel was appointed. USCMCR Op. at 11. LT Piette argued that the power to excuse defense counsel is vested entirely in the Chief Defense Counsel and that the Chief Defense Counsel exercised that unilateral authority to excuse the civilian defense counsel. Mot. To

Abate, AE 389 (Oct. 16, 2017). LT Piette also represented that the civilian defense counsel would not attend the next scheduled hearing session. Id.; see USCMCR Op. at 13.

Because the three-week hearing was set to begin at the end of October—a hearing that was to include cross-examination by Al-Nashiri's counsel of Al-Darbi—Colonel Spath ordered expedited briefing and invited the Chief Defense Counsel to express his views on his authority to excuse counsel who have formed an attorney-client relationship with Al-Nashiri and who have appeared in the military commission on his behalf. USCMCR Op. at 11. Colonel Spath reminded the parties that he had "not found 'good cause' to authorize the termination of the attorney-client relationship" between Al-Nashiri and the civilian attorneys. Briefing Order at 1, AE 389A (Oct. 16, 2017); see Tr. 10757 (Nov. 14, 2017). He made clear that the civilian attorneys "remain counsel of record in this case" and ordered them "to appear at the next scheduled hearing." Briefing Order at 1, AE 389A (Oct. 16, 2017).

On October 27, 2017, Colonel Spath issued a ruling rejecting the Chief Defense Counsel's argument that his decisions to release defense counsel were his alone to make and were not reviewable by the military judge. Ruling at 5-6, AE 389F (Oct. 27, 2017). Colonel Spath concluded that excusal of defense counsel

who have appeared before the military commission must be accomplished by the military judge on the record. Id.; USCMCR Op. at 11-13. Colonel Spath further ruled that "no good cause exists to warrant the excusal of Learned Counsel or the two DoD civilian defense counsel from their duties to represent the Accused in this case." Ruling at 5-6, AE 389F (Oct. 27, 2017). In particular, Colonel Spath found that "thus far no evidence has been presented to demonstrate intrusions [into attorney-client communications] in this case affecting this Accused which would ethically require the withdrawal or disqualification of Learned Counsel." Id.

On October 29, 2017, the Chief Defense Counsel told Colonel Spath that the civilian defense counsel "would not comply with [Colonel Spath's] order to appear at the hearing scheduled for the next day." USCMCR Op. at 13 (citing Tr. 10041-42 (Oct. 31, 2017)). LT Piette again moved to abate the proceedings. Id. Notwithstanding Colonel Spath's findings and orders, the civilian defense counsel did not travel to Guantanamo for the November 2017 hearing session, or at any time since. On October 31, 2017, Colonel Spath reiterated his conclusions that (1) good cause did not exist to excuse the attorneys; (2) no evidence had been presented demonstrating an intrusion into Al-Nashiri's attorney-client communications that would require the civilian defense counsel's withdrawal or disqualification; and (3) excusing learned counsel at this stage would prejudice Al-

Nashiri. Tr. 10025 (Oct. 31, 2017); see USCMCR Op. at 32 (observing that Mr. Kammen "served as Al-Nashiri's learned counsel for nine years" and "received almost two million dollars of DoD funds for his representation").

The Chief Defense Counsel appeared at the October 31 session convened to address the civilian defense counsel's absence. Colonel Spath called the Chief Defense Counsel to testify. USCMCR Op. at 13. The Chief Defense Counsel refused to be sworn in on the basis that he was "invoking privilege." Tr. 10029 (Oct. 31, 2017); see USCMCR Op. at 13. Colonel Spath directed the Chief Defense Counsel to take the stand and invoke privilege for each question asked; the Chief Defense Counsel refused. USCMCR Op. at 13. Colonel Spath ordered the Chief Defense Counsel to rescind his excusal of the civilian defense counsel; the Chief Defense Counsel refused. Id. Colonel Spath observed that giving the Chief Defense Counsel exclusive authority to release defense counsel who have appeared before the military commission

> "would effectively give the defense counsel the ability to dismiss any military commission case or any criminal case at any stage in the process for any reason when they determine good cause, and then refuse to testify in court to even explain what the good cause shown is, other than what is submitted in written form."

Id. (quoting Tr. 10066 (Nov. 1, 2017)).

After a summary proceeding on the following day, Colonel Spath found the

Chief Defense Counsel in contempt. See R.M.C. 809(c) (permitting military judge to punish contemptuous conduct "summarily" if it is "directly witnessed by the commission"). The Convening Authority affirmed the contempt findings, but remitted the penalties associated with those findings. USCMCR Op. at 14. The United States District Court for the District of Columbia granted the Chief Defense Counsel's habeas petition and vacated the conviction on the ground that the MCA does not provide military judges unilateral contempt power and that under the MCA, only a panel of members, "voting as a body," could try and punish a person for contempt. Baker v. Spath, No. 17-cv-2311, 2018 WL 3029140, at *13 (D.D.C. June 18, 2018) (Lamberth, J.).

On November 1, 2017, Colonel Spath issued an order directing the civilian defense counsel to appear on November 3 at the federal office building in Alexandria, Virginia (the Mark Center), which facilitates video teleconferences with the military commission courtroom in Guantanamo Bay. See Order, AE 389J (Nov. 1, 2017). The civilian defense counsel did not appear as ordered, and they were absent for the entire November hearing session from October 31 to November 17. See USCMCR Op. at 14. Their absences, and LT Piette's refusal to participate in the case without learned counsel present, caused significant disruption to the military commission proceedings. See, e.g., Tr. 10058-60 (Nov.

1, 2017); see also id. 10257-60 (Nov. 8, 2017). Every witness for the November hearing had to be rescheduled. See Decl. of John Wells ¶ 48, Baker v. Spath, No. 17-cv-2311 (D.D.C. Jan. 12, 2018), ECF No. 16-1. Also, in Mr. Kammen's absence, LT Piette declined to examine a witness who had traveled from the United Arab Emirates to Guantanamo Bay at the request of Al-Nashiri's defense team. Tr. 10078-86 (Nov. 3, 2017). He invited Al-Nashiri's defense team to seek further review of his rulings regarding the withdrawal issue, but none of them did so.[5] USCMCR Op. at 14.

On December 5, 2017, Colonel Spath ordered Ms. Spears and Ms. Eliades, but not Mr. Kammen, to appear for pre-trial sessions at Guantanamo Bay on January 18-24, 2018. See Orders, AE 389X (Dec. 5, 2017), AE 389Y (Dec. 5, 2017). They did not appear. See Tr. 11052, 11056 (Jan. 19, 2018). On January 18, 2018, Colonel Spath directed military commission prosecutors to serve subpoenas to compel Ms. Spears and Ms. Eliades to testify as witnesses by video conference from the Mark Center. See id. On February 2, 2018, Ms. Spears and

[5] In November 2017, Al-Nashiri moved in district court to enjoin the military commission on the ground that he lacked learned counsel. His request remains pending. See In re al-Nashiri, No. 08-cv-1207 (D.D.C. Nov. 14, 2017). Mr. Kammen filed a habeas petition in Indiana. The district court granted injunctive relief and held in abeyance any writ of attachment or warrant for his appearance before the military commission, until a hearing on the merits. Entry at 2, Kammen v. Mattis, No. 17-cv-3951 (S.D. Ind. Nov. 3, 2017).

Ms. Eliades filed "third party" motions to quash the subpoenas before the military commission, which Colonel Spath denied. See Third Party Mot. To Quash, AE 389RR, AE 389SS (Feb. 2, 2018); Tr. 11535-36 (Feb. 12, 2018).

Ms. Spears and Ms. Eliades did not seek further review of the denial of their motion to quash, by mandamus or otherwise. Instead, they violated the subpoenas and Colonel Spath's orders by failing to appear at the Mark Center on February 13, 2018. See Tr. 11715-16 (Feb. 13, 2018); USCMCR Op. at 46. In response, Colonel Spath made factual findings and initiated the process required by R.M.C. 703(e) to have warrants of attachment issued to compel their testimony by video conference from Virginia. See Tr. 11908-15 (Feb. 13, 2018). Colonel Spath also ordered military commission prosecutors to prepare proposed warrants for his consideration, noting that he would consider the issue further before deciding whether to issue the warrants. Id. Colonel Spath declined to issue the warrants. See Tr. 12357-77 (Feb. 16, 2018).

Meanwhile, Colonel Spath continued to hold pretrial proceedings where the government called witnesses to establish the foundation for the preadmission of physical evidence from the *U.S.S. Cole*. See USCMCR Op. at 14. Al-Nashiri was represented by LT Piette. "During commission sessions, LT Piette did little more than object to all proceedings before the commission on the ground that he was not

competent to represent Al-Nashiri in the absence of learned counsel." Id. The Acting Chief Defense Counsel, who replaced the Chief Defense Counsel as a result of the contempt proceedings, "would not detail additional counsel to represent Al-Nashiri." Id. He also withdrew three military lawyers "who had been designated to assist in the defense of Al-Nashiri but who had not yet established an attorney-client relationship with him" because, in his view, only learned counsel had the "authority to determine who would assist in Al-Nashiri's representation." Id. at 14-15. Colonel Spath found that the actions of the civilian defense counsel, the Chief Defense Counsel, and the Acting Chief Defense Counsel "were a deliberate strategy to 'de-resource' Al-Nashiri's defense." Id. at 15 (quoting Tr. 11480-81 (Jan. 22, 2018)). Colonel Spath directed the defense to hire additional learned counsel for Al-Nashiri, and, at Colonel Spath's request, the Navy recalled a military lawyer, Navy Captain Brian Mizer, who had previously been assigned to Al-Nashiri's defense team and whom the military judge found is qualified to represent defendants facing a possible sentence of death. See Order, AE 348M (Nov. 17, 2017). That military lawyer is now representing Al-Nashiri in this Court and in the USCMCR.

In light of the continued absences of the civilian defense counsel and LT Piette's refusal to participate in the proceedings, on February 16, 2018, Colonel

Spath issued an order abating the proceedings. See USCMCR Op. at 15-16; Tr. 12363-77 (Feb. 16, 2018). Colonel Spath explained that moving forward with the case in its current posture would not promote "the efficient administration of justice." Tr. 12376 (Feb. 16, 2018). He concluded that the issues presented by defense counsel's absence needed to be answered by "a court superior to me." Id. at 12363-77.

III. The Government's Interlocutory Appeal

The government filed an interlocutory appeal in the USCMCR challenging the indefinite abatement order. See 10 U.S.C. § 950d. On October 11, 2018, the USCMCR issued its merits opinion. As relevant here, the USCMCR held that Colonel Spath had the authority to determine whether good cause exists to excuse defense counsel, that no good cause warranted excusal of the civilian defense counsel in Al-Nashiri's case, and that the civilian defense counsel remain counsel of record. USCMCR Op. at 37. The USCMCR also observed that "the door is not closed to Al-Nashiri" on whether good cause exists to excuse the civilian defense counsel. The USCMCR explained that Al-Nashiri could present evidence of intrusions into his attorney-client relationship to the new military commission judge to allow her to "make findings and consider an appropriate remedy." Id. at 31, 37.

The USCMCR further found that Colonel Spath's orders directing the civilian defense counsel to continue representing Al-Nashiri "were lawful" and that they were required to obey those orders notwithstanding their disagreement with them. Id. at 37. The USCMCR found that the civilian defense counsel's "abandonment of Al-Nashiri . . . disrupted the orderly and expeditious progress of the proceedings," id. at 36 (internal quotation marks and citation omitted), and left Al-Nashiri "without several available counsel, including learned counsel, for more than six months," id. The USCMCR also found that "the trial was abated because [Colonel Spath] reasonably concluded that the trial could not proceed any further under the circumstances." Id. The USCMCR accordingly reversed the abatement order and ordered trial proceedings to resume. Id. at 2, 38.

Judge Pollard concurred and dissented. As relevant here, he wrote separately to address counsel's "duty to obey the military judge," explaining that, in his view, the majority opinion "fails to explain fully the level of [the defense counsel's] defiance." Id. at 46. Judge Pollard found that the civilian counsel defied the military commission's orders, despite their obligation as lawyers to "obey the orders of the military judge and respect the judge." Id. In Judge Pollard's view, the civilian defense counsel's "disobedience obstructed the military judge's ability to continue the trial." Id. at 56. Judge Pollard concluded that, under

these circumstances, Colonel Spath "had no other choice" than to abate the proceedings. Id. (finding that the Chief Defense Counsel's conduct also contributed to the abatement).

Al-Nashiri and the Chief Defense Counsel moved in the USCMCR for reconsideration and reconsideration en banc. See USCMCR Rule of Practice 20(g) (A motion for reconsideration "does not stay the decision of the [USCMCR]."). The government opposed those motions, and Al-Nashiri applied for leave to file a reply brief. The USCMCR had not ruled on the reconsideration motions, and the new military judge had not resumed proceedings in the military commission, when this Court granted Al-Nashiri's stay motion. See Order, In re Al-Nashiri, No. 18-1279 (D.C. Cir. Nov. 7, 2018) (per curiam).

IV. The Underlying Disqualification Motion in the USCMCR

While the government's interlocutory appeal was pending, on September 13, 2018, Al-Nashiri filed a motion asking the USCMCR to compel the production of discovery and to vacate Colonel Spath's rulings in the underlying military commission case. Al-Nashiri alleged that Colonel Spath, while presiding over the military commission, had sought a post-retirement position as an immigration judge and that, as a result, Colonel Spath should have disqualified himself. The government opposed the motion, arguing, inter alia, that Al-Nashiri's claims

should be adjudicated in the first instance in the military commission. See Gov't Resp. at 11, United States v. Al-Nashiri, No. 18-002 (Sept. 18, 2018).

On September 28, 2018, the USCMCR denied the motion. See Order, United States v. Al-Nashiri, No. 18-002 (USCMCR Sept. 28, 2018). The court, apparently construing Al-Nashiri's motion as a mandamus petition, found that Al-Nashiri had failed to satisfy the mandamus standard. The court noted that, because none of Al-Nashiri's contentions had been raised before the military commission (which at that time was abated), "we have no factual record or findings of the military judge at the trial level . . . for this Court to review." Id. at 2.

On October 4, 2018, Al-Nashiri filed the instant mandamus petition in this Court. On October 15, 2018, Al-Nashiri moved the USCMCR to stay its review of Al-Nashiri's own motion for reconsideration pending this Court's resolution of his mandamus petition. While that stay motion remained pending, Al-Nashiri moved this Court for a stay on October 26, 2018.

On November 2, 2018, the USCMCR denied Al-Nashiri's stay motion. The USCMCR noted that Al-Nashiri should present his disqualification claim to the military commission, where "a factual record [can be] created" and the new military judge can rule on the claim. Order at 3, United States v. Al-Nashiri, No. 18-002 (USCMCR Nov. 2, 2018). The USCMCR explained that if, after doing so,

Al-Nashiri "is dissatisfied with the manner in which the new military judge resolves his complaint, Al-Nashiri is free to seek review in [the USCMCR] through mandamus if appropriate or on direct appeal if there is a conviction." Id. The USCMCR further found that Al-Nashiri was not likely to prevail on the merits "[g]iven the sparse factual record and a lack of findings and substantive rulings by the military judge and [the USCMCR] for the D.C. Circuit to consider." Id. The USCMCR also rejected his claim of irreparable injury because a new military judge had been assigned to his military commission case.

On November 7, 2018, this Court stayed all proceedings in the USCMCR and the military commission until further order of this Court. Order, In re Al-Nashiri, No. 18-1279 (D.C. Cir. Nov. 7, 2018) (per curiam).

ARGUMENT

I. The Mandamus Standard

The Supreme Court has recognized three "conditions" that limit a court's authority to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651. Cheney v. United States Dist. Court, 542 U.S. 367, 380 (2004). First, "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires." Id. (citation omitted). Second, the party seeking the writ must demonstrate "that his right to issuance of the writ is clear and indisputable." Id. at

381 (brackets, citation, and internal quotation marks omitted). Third, that party must also demonstrate that issuance of the writ is "appropriate under the circumstances," by pointing to "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion." Id. at 380-81 (citations and internal quotation marks omitted).

Because issuing a writ of mandamus is a "drastic and extraordinary" remedy, id. at 380, this Court's mandamus jurisdiction "is strictly confined," "available only in 'extraordinary situations'; [and] it is hardly ever granted." In re Cheney, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc).

This Court has cautioned that the mandamus standards must be strictly enforced in the military commission context. See Al-Nashiri I, 791 F.3d at 78. That caution is necessary to give effect to the strict final-judgment rule in the MCA, which limits this Court's jurisdiction to "determin[ing] the validity of a final judgment rendered by a military commission," as approved by the convening authority, once "all other appeals under this chapter have been waived or exhausted." 10 U.S.C. § 950g(a)-(b); see also id. § 950g(d) (This Court "may act . . . only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside . . . by the [USCMCR]."); Al-Nashiri II, 835 F.3d at 124 ("By providing for direct Article III review of . . . any conviction in the

military system, Congress and the President implicitly instructed that judicial review should not take place before that system has completed its work."); Khadr v. United States, 529 F.3d 1112, 1116 (D.C. Cir. 2008) (by deferring review "until after a military commission has found guilt and announced a sentence," the MCA "clarifies that the 'final judgment' contemplated by the statute is very 'final'").

As this Court has recognized, the MCA's final-judgment rule "serves an important purpose that would be undermined if [the Court] did not faithfully enforce the traditional prerequisites" for an extraordinary writ. Al-Nashiri I, 791 F.3d at 78; see also Flanagan v. United States, 465 U.S. 259, 263-64 (1984) (noting that the final-judgment rule is "crucial to the efficient administration of justice" and "serves several important interests"). Among other things, rigorous enforcement of the final-judgment rule "helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation," and it "reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals." Flanagan, 465 U.S. at 263-64; see also Al-Nashiri I, 791 F.3d at 78 (recognizing that a "judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation" would lead to the harms associated with "piecemeal appellate litigation").

Finally, because the policy against piecemeal review "is at its strongest" in criminal cases, United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982) (per curiam), this Court should be particularly reluctant to grant mandamus relief in a military commission prosecution. See Will v. United States, 389 U.S. 90, 96-98 (1967) (explaining that, when "the underlying proceeding is a criminal prosecution, . . . appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court"). Congress has expressly permitted appeals from pretrial orders in military commission cases, in limited circumstances, only to the USCMCR. See 10 U.S.C. § 950d (authorizing USCMCR jurisdiction over government appeals from certain pretrial dismissal and suppression orders). For other pretrial orders, "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." Cobbledick v. United States, 309 U.S. 323, 325-26 (1940).

II. Al-Nashiri Has Adequate Alternative Means To Obtain Relief

Al-Nashiri has not shown that he has "no other adequate means to attain the relief he desires." Cheney, 542 U.S. at 380 (citation omitted); see also Al-Nashiri I, 791 F.3d at 78 (denying mandamus petition where Al-Nashiri had other adequate

means to obtain relief). In this case, Al-Nashiri seeks vacatur of pretrial orders issued by Colonel Spath. But he has multiple other means to obtain such relief. First, Al-Nashiri can raise his claims in the still-pending military commission, which he has never done and which the USCMCR has expressly invited him to do. Second, Al-Nashiri can seek reconsideration of Colonel Spath's orders on the merits by the new military judge, which would effectively remedy Al-Nashiri's disqualification claims. Third, if convicted, Al-Nashiri can appeal after final judgment and assert that the military commission erred in failing to vacate Colonel Spath's orders. Given those available avenues for relief, this Court should deny Al-Nashiri's mandamus petition, which he has erroneously "used as a substitute for the regular appeals process." Cheney, 542 U.S. at 380-81.

A. Al-Nashiri Can Raise His Claims in the Military Commission, With the Newly Assigned Military Judge

Mandamus is a remedy of last resort for a litigant who has "exhausted all other avenues of relief." Heckler v. Ringer, 466 U.S. 602, 616 (1984). In this case, Al-Nashiri has failed to exhaust even the first resort for every litigant, which is to raise his claims in the first instance in the trial court. Nothing prevents Al-Nashiri from asserting his disqualification claims in the still-pending military commission. He may then seek any available appellate remedies after the military

commission, with a newly assigned military judge, has developed a record, made findings, and issued a ruling.

This Court, like other courts of appeals, has refused to consider disqualification claims raised for the first time on appeal. See United States v. Barrett, 111 F.3d 947, 951-52 (D.C. Cir. 1997) (rejecting disqualification claim because the defendant "did not request recusal below").[6] Al-Nashiri's attempt to raise his disqualification claim for the first time through mandamus petitions in appellate courts conflicts with the bedrock principle that litigants must raise claims in the trial court before seeking appellate review. See, e.g., In re White, 46 F. App'x 179, 180 (4th Cir. 2002) (denying mandamus petition seeking to compel the district court to hold a hearing because the issue "should be raised in the district court in the first instance").

That fundamental rule applies with particular force here, because the result of Al-Nashiri's decision to raise his claim for the first time on appeal is that there

[6] This Court held in Barrett that the disqualification claim was too late because the defendant was aware of the relevant facts while the trial was pending but failed to seek disqualification until appeal after final judgment. 111 F.3d at 951-53. Here, the disqualification claim is too early, because petitioner raised it for the first time in an interlocutory appeal even though nothing prevents him from raising it in the military commission when it resumes. Either way the principle is the same: if the defendant becomes aware of grounds for recusal while trial proceedings are ongoing, he must raise his disqualification claim in the first instance in the trial court.

is no factual record for this Court to review. Al-Nashiri has jumped the gun by raising his claim in the first instance in appellate courts where there are no relevant facts in the record, and the underlying proceeding, where such a record can be properly developed, is still pending. Appellate review should come after, not before, the military commission has done its work. Al-Nashiri I, 791 F.3d at 78 ("'The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it.'") (quoting Ex parte Rowland, 104 U.S. 604, 617 (1881)).

Al-Nashiri has not identified any obstacle preventing him from raising his disqualification claims in the military commission. Although the military commission proceedings were abated when Al-Nashiri raised his disqualification claim, that does not excuse him from raising those claims in the military commission now. The USCMCR has reversed the abatement order, and nothing prevents Al-Nashiri from raising his claims there. See Order at 3, 5, United States v. Al-Nashiri, No. 18-002 (USCMCR Nov. 2, 2018) (explaining that Al-Nashiri should raise his disqualification claims with the military commission and "return[ing] jurisdiction over this case to the military commission," except as to the issue of Al-Nashiri's representation); see USCMCR Rule of Practice 20(g) (providing that a motion to reconsider does not stay the USCMCR's decisions).

Al-Nashiri cites no authority suggesting that an appellate court should grant interlocutory mandamus on a claim that the petitioner raised for the first time on appeal. That lack of authority is not surprising. A writ of mandamus is warranted only in "exceptional" cases "'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)). Here, the USCMCR did not act outside its authority when it ruled that Al-Nashiri must return to the military commission to raise his claims there and then seek appellate remedies after the military commission has rendered a ruling. Requiring a petitioner who has raised a claim for the first time in an interlocutory appeal (by another party on another issue) to first present his claim to the trial court is a reasonable order that is entirely consistent with precedent and ordinary principles of appellate litigation, and is well within the bounds of the USCMCR's authority. The USCMCR's decision is accordingly not subject to a writ of mandamus. See Cheney, 542 U.S. at 380-81 (mandamus is not appropriate unless the lower court acts *ultra vires*).

Al-Nashiri contends that he should not be required to raise his claims in the military commission because his allegations are "matter[s] of public record." Pet.

46. Al-Nashiri supports that contention with citations to media reports and a photograph pasted into his brief from the internet. But the fact that relevant information may have been reported in the media does not mean that a record exists for appellate review. Appellate decisions must be properly grounded in a record created in the trial court, not just a "public record" available online. See, e.g., NLRB v. Maidsville Coal Co., 693 F.2d 1119, 1123 (4th Cir. 1982) (explaining that "an appellate court, with very rare exceptions, must confine its review to that which comprised the record in the trial court").

It is true that the government has not disputed Al-Nashiri's assertion that Colonel Spath is now an immigration judge. But that does not excuse Al-Nashiri from the requirement to establish facts in the trial court. The factual assertions Al-Nashiri relies on, including the timing of Colonel Spath's hiring and the alleged alignment between the Attorney General, the Executive Office of Immigration Review, and the prosecutors in this case, are based on speculation and insinuation, not on a trial court record. Finding the facts, including determining which facts are in dispute, is what trial courts are for. This Court should not conduct that function for the first time in response to a mandamus petition.

Even if Al-Nashiri were correct in suggesting that his claim does not involve any disputed facts, that would not excuse him from the ordinary requirement to

raise his claims in the military commission first. There is no exception to that well-established requirement even for purely legal claims. Al-Nashiri cites no precedent suggesting that a petitioner may raise non-jurisdictional claims—whether legal, factual, or mixed—for the first time in an interlocutory appeal.

Al-Nashiri contends that presenting his claims to the military commission would be futile because the USCMCR has already rejected them. See Pet'r's Reply in Support of Mot. for Stay ("Pet. Stay Reply") at 5-6 (Nov. 5, 2018). But the USCMCR rejected Al-Nashiri's claims only on the non-existent record that was then before it. See Order, United States v. Al-Nashiri, No. 18-002 (USCMCR Sept. 28, 2018) (finding that, because the court had "no factual record or findings" to review, Al-Nashiri had failed to establish that Colonel Spath should have been disqualified). In denying Al-Nashiri's motion for a stay, the USCMCR left no doubt that the question remains open:

> Our disposition of Al-Nashiri's prior motion [seeking discovery and vacatur of Colonel Spath's orders] does not foreclose him from making a motion before the military commission seeking the same relief. If he does and is dissatisfied with the manner in which the new military judge resolves his complaint, Al-Nashiri is free to seek review in this Court through mandamus if appropriate or on direct appeal if there is a conviction.

Order at 3, United States v. Al-Nashiri, No. 18-002 (USCMCR Nov. 2, 2018). This Court should likewise deny the instant mandamus petition because Al-Nashiri

has not yet raised his claim in the trial court. In doing so, this Court can make clear, as the USCMCR did, that its decision does not prejudice any appellate remedies Al-Nashiri may have from the military commission's resolution of his disqualification claim.

B. Al-Nashiri Can Seek Reconsideration on the Merits of Colonel Spath's Orders

The relief Al-Nashiri ultimately seeks is reconsideration by a new military judge of any adverse pretrial decisions rendered by Colonel Spath. But because Colonel Spath has left the case, Al-Nashiri already has that remedy available. Rule for Military Commissions 905(f) provides that, "[o]n request of any party or sua sponte, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge." In addition, it is well established in military law and practice that a successor military judge may revisit the prior judge's pretrial decisions. See, e.g., United States v. Morris, 13 M.J. 297, 300 (C.M.A. 1982) (explaining that a military court's prior decision may be reconsidered "by 'a successor judge' if the original judge is 'unavailable'"); see also Langevine v. Dist. of Columbia, 106 F.3d 1018, 1023 (D.C. Cir. 1997) ("[T]he interlocutory orders and rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment, and may be modified to the same extent if the case is

reassigned to another judge.") (internal quotation marks and citation omitted); Order, United States v. Khadr, AE 132 (Aug. 14, 2008) (successor military commission judge reconsidering order of his predecessor).

Because no factual record for Al-Nashiri's claim exists, it is unclear at this point how many of Colonel Spath's orders are potentially implicated by it. Many of those orders might fall outside the scope of Al-Nashiri's disqualification claim because they (1) were outside the relevant time period; (2) were not adverse to Al-Nashiri; (3) were purely ministerial; or (4) have been rendered moot by subsequent rulings or events. It may turn out that the number of relevant decisions is limited, and Judge Schools might well decide to revisit those decisions on the merits. If she does so, that would provide an effective remedy for Al-Nashiri's disqualification claim and render any disqualification error harmless. See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 862-64 (1988) (applying harmless-error analysis to an alleged violation of the federal recusal statute). At a minimum, the military commission could narrow the scope of Al-Nashiri's claim for any subsequent appellate review.

C. Al-Nashiri Can Raise His Claims on Direct Review

Even if Al-Nashiri were somehow prevented from raising his disqualification claim in the military commission, he would have another effective

avenue of review: direct appeal after final judgment. As this Court has explained, "[m]andamus is inappropriate in the presence of an obvious means of review: direct appeal from final judgment." Al-Nashiri I, 791 F.3d at 78 (citing Roche, 319 U.S. at 27-28). If the judiciary exercised a "readiness to issue the writ of mandamus in anything less than an extraordinary situation," it would defeat the "judgment of Congress that appellate review should be postponed until after final judgment." Id. at 78 (quoting Kerr v. U.S. Dist. Court, 426 U.S. 394, 403 (1976)) (internal quotation marks omitted); see 10 U.S.C. § 950g(b) (requiring an accused to waive or exhaust "all other appeals under this chapter" before this Court's review).

If the military commission members do not find Al-Nashiri guilty, or if Al-Nashiri succeeds in setting aside his conviction on review by the convening authority or on direct appeal to the USCMCR, Al-Nashiri's disqualification claims will be moot. Alternatively, if Al-Nashiri does not obtain reconsideration, is convicted by the military commission, and does not prevail on direct review to the USCMCR, he may reassert his current contentions—together with any other appropriate claims that may arise—in a direct appeal to this Court after final judgment. There is no reason for this Court to preempt that process now. Doing so would short-circuit the extensive review process Congress created. See 10

U.S.C. § 950g(b) (requiring an accused to waive or exhaust "all other appeals under this chapter" before this Court's review).

Al-Nashiri has not shown, as he must, see Al-Nashiri I, 791 F.3d at 78-79, that he would suffer irreparable injury if this Court does not grant mandamus relief now. Al-Nashiri contends (Pet. 30), relying on Cobell v. Norton, 334 F.3d 1128, 1139 (D.C. Cir. 2003), that his disqualification claim is "by its nature irreparable." But the "irreparable" injury that supported mandamus in that case was allowing a case to proceed under a disqualified judicial officer. See Al-Nashiri I, 791 F.3d at 79; Cobell, 334 F.3d at 1139 (holding that "the injury suffered by a party required to complete judicial proceedings overseen by [a disqualified] officer is by its nature irreparable"). Here, the allegedly disqualified judicial officer has already left the case. Al-Nashiri is seeking retroactive relief—i.e., vacatur of previous orders—not a forward-looking order preventing his trial before a disqualified judge. Reversal of prejudicial errors is the kind of relief that is routinely obtained through direct review. There is no risk that, absent mandamus relief, Al-Nashiri would be required to continue proceedings overseen by a disqualified judge.

Al-Nashiri also suggests that failure to grant him mandamus relief could create a risk that this Court would lose jurisdiction over any challenge to the USCMCR's decision on the merits. See Pet. Stay Reply at 2-3. But that

suggestion is based on a misunderstanding of the government's argument in In re Mohammad, 866 F.3d 473 (D.C. Cir. 2017). In that case, the government argued that the USCMCR merits opinion mooted the pending petition in this Court because the petition sought only disqualification of the judge and not reversal of the USCMCR's judgment. The petitioner supplemented his petition to include a request for vacatur, and this Court's review followed without any jurisdictional objection from the government. See id. at 475 ("The Government does not contest our jurisdiction to entertain Petitioner's writ."). Here, the denial of a mandamus petition would not threaten this Court's jurisdiction to consider a challenge to the USCMCR's eventual merits judgment in this case.

Al-Nashiri similarly contends that the government's opposition to mandamus review amounts to a nefarious attempt to evade this Court's jurisdiction. Pet. Stay Reply at 2-4. To the contrary, the government has never disputed that, if Al-Nashiri is convicted and his conviction is affirmed by the USCMCR, this Court will have exclusive jurisdiction to determine the validity of that judgment. See 10 U.S.C. § 950g. In this case, and in Al-Nashiri's three other attempts to date to obtain a writ of mandamus from this Court, the government has argued for prudential application of the mandamus standard in order to avoid the delays and harms associated with piecemeal appellate litigation that have been

explicitly recognized in the Supreme Court's and this Court's cases. See, e.g., Al-Nashiri I, 791 F.3d at 79 (noting that the government acknowledged that this Court can consider the constitutional challenges raised by Al-Nashiri on direct appeal).[7]

Al-Nashiri further contends that immediate mandamus relief is necessary because, now that the USCMCR has decided the interlocutory appeal on the merits, Al-Nashiri would lose the opportunity to litigate the issues decided by the USCMCR before the new military judge. See Pet. 30-31; Pet. Stay Reply at 9-10. But Al-Nashiri's argument is based on the mistaken premise that a writ of mandamus vacating Colonel Spath's orders would also effectively vacate the

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[7] Al-Nashiri suggests (Pet. Stay Reply at 2-3) that, in Spears v. United States, the government withdrew its opposition to Ms. Spears and Ms. Eliades's intervention in the USCMCR appeal to evade judicial review of Al-Nashiri's intrusion allegations. That accusation is unfounded. The government has already submitted declarations and otherwise addressed Al-Nashiri's allegations of intrusion in the military commission, the USCMCR, and Article III courts. See, e.g., Decl. of John Wells, Yaroshefsky v. Mattis, No. 17-cv-8718 (S.D.N.Y Nov. 13, 2017), ECF No. 17, reprinted in 4 App. in Supp. of Resp. to Mot. To Dismiss at 512, United States v. Al-Nashiri, No. 18-002 (U.S.C.M.C.R. Mar. 8, 2018); Decl. of John Wells, Baker v. Spath, No. 17-cv-2311 (D.D.C. Jan. 12, 2018), ECF No. 16-1, reprinted in 2 App. in Supp. of Resp. to Mot. at 404, United States v. Al-Nashiri, No. 18-002 (USCMCR Mar. 8, 2018); see also Opp. to Mot. To Dismiss at 5-6, United States v. Al-Nashiri, No. 18-002 (USCMCR Mar. 5, 2018) (discussing the alleged intrusions). The government withdrew its opposition to intervention "in the interests of advancing the USCMCR appeal to the merits and in light of the government's view that whether [counsel] are labeled 'amici' or 'intervenors'" had little practical significance. Gov't Letter, Spears v. United States, No. 18-1087 (D.C. Cir. May 15, 2018).

USCMCR's merits opinion. Contrary to Al-Nashiri's assumption, a finding that the trial judge should have recused himself does not somehow render the whole case, including the three interlocutory decisions by the unchallenged judges of the USCMCR, void *ab initio*. That assumption is inconsistent with case law establishing that an untainted appellate panel may remedy recusal violations by reviewing the lower court's prior rulings on the merits. See Liljeberg, 486 U.S. at 862; Harris v. Champion, 15 F.3d 1538, 1571-72 (10th Cir. 1994). Al-Nashiri is not harmed by the fact that the new military judge may not revisit the legal issues that the USCMCR resolved because he had the opportunity to litigate those issues de novo before that court. As for factual questions, there is also no harm to Al-Nashiri because the USCMCR made clear that he remains free to present evidence of alleged intrusions before the new military judge. Accordingly, Al-Nashiri would not lose any opportunities he would otherwise have had if he were required to present his disqualification claim to the military commission in the first instance.

Al-Nashiri cannot challenge the USCMCR's merits ruling through a mandamus petition alleging that the trial judge was disqualified. Instead, Al-Nashiri may seek review of that decision on direct appeal after final judgment or, if he can satisfy the mandamus standard, through a separate petition for an extraordinary writ. Al-Nashiri I, 791 F.3d at 79 (recognizing that, because the

MCA provides for direct review after final judgment, Al-Nashiri "must identify some 'irreparable' injury that will go unredressed" by that direct review). In any event, on the question whether good cause warranted excusal of his defense counsel, the USCMCR has made clear that "the door is not closed to Al-Nashiri" and that Al-Nashiri can present evidence of intrusions into his attorney-client relationship to the new military judge to allow her to "make findings and consider an appropriate remedy." USCMCR Op. at 31, 37. To the extent Al-Nashiri believes he will be irreparably injured by any other ruling, he can, if appropriate, bring a separate petition challenging it.

III. Al-Nashiri Has Not Demonstrated a Clear and Indisputable Right to the Writ

Al-Nashiri also cannot show that his right to relief is "clear and indisputable." Cheney, 542 U.S. at 381. This Court should not "use mandamus to remedy anything less than a clear abuse of discretion or usurpation of judicial power." Al-Nashiri I, 791 F.3d at 82 (internal citation and quotation marks omitted). Otherwise, "every interlocutory order which is wrong might be reviewed" by mandamus, which would improperly "enlarge[]" the writ "to actually control the decision of the trial court rather than [be] used in its traditional function of confining a court to its prescribed jurisdiction." Id. (quoting Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953)).

The Rules for Military Commissions incorporate the judicial recusal statute, 28 U.S.C. § 455. The relevant rule provides that a military judge "shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.M.C. 902(a). That provision requires an objective inquiry into whether a reasonable person, fully informed of the relevant facts and circumstances, would entertain a significant doubt about the judge's impartiality. See Liteky v. United States, 510 U.S. 540, 548 (1994). There is a strong presumption that a military judge is impartial, and a party seeking to demonstrate otherwise must overcome a "high hurdle." United States v. Quintanilla, 56 M.J. 37, 44 (C.A.A.F. 2001).

Al-Nashiri has not cited any authority requiring disqualification in the circumstances of this case. Al-Nashiri relies (Pet. 37-38) on cases, particularly Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985), and judicial canons establishing that a judge should recuse himself from cases being handled by a private law firm if he is negotiating for employment with that firm. But Pepsico did not address the different circumstances alleged here, where a judge in the Defense Department is being considered for a judicial position in the Justice Department, not a private law firm. The Pepsico court stressed that its "holding is narrow"—indeed, it did not even purport to address other cases of potential

employment by private law firms. See id. at 461 ("We do not explore the outer bounds of propriety in a resigning judge's negotiating with law firms for future employment.").

Al-Nashiri relies on an opinion of the District of Columbia Court of Appeals (DCCA), Scott v. United States, 559 A.2d 745 (D.C. 1989), in contending that it is "clear and indisputable" that recusal is required in the circumstances of this case. However, Scott does not control the outcome here. In that case, the DCCA held that a judge, who presided over a criminal trial prosecuted by the local U.S. Attorney's office while considering a position as "senior litigation counsel" in the Executive Office for United States Attorneys (EOUSA), should have recused himself. Id. at 750. The court emphasized that the EOUSA position "directly relat[ed] to the operations of United States Attorneys' offices." Id. at 754. The court noted further that the employment sought by the trial judge involved "oversight responsibility and policy guidance" to those offices. Id. (internal quotation marks and citation omitted). The court concluded, under the specific circumstances of that case, that consideration of employment in the executive office for all federal prosecutors, while one of the federal prosecutors was prosecuting the case, required recusal. Id.; see also id. at 756 n.23 ("Had the connection between the prosecutor and the employment sought by the trial judge

been more remote, our conclusion of the need for vacation of a conviction might well be different. . . . [W]e need not decide whether a judge's negotiations for employment for any attorney position in the [DOJ] would necessarily cause an objective observer to question a judge's impartiality.").

Scott is inapposite. Unlike the EOUSA position in that case, immigration judges do not have any supervisory or other relationship whatsoever with the prosecutors in Al-Nashiri's case.[8] Moreover, other cases have rejected Al-Nashiri's premise that a judge considering another government position is governed by the same rules as if he were applying to a private law firm. See, e.g., Laxalt v. McClatchy, 602 F. Supp. 214 (D. Nev. 1985) (holding that a federal

[8] Al-Nashiri refers (Pet. 39-40) to the "deep involvement" of Justice Department prosecutors in his case. The Chief Prosecutor of Military Commissions represents the government in the military commissions and before the USCMCR. See 10 U.S.C. §§ 948k(b), (d). The Chief Prosecutor is a military officer "appointed by the Secretary of Defense or his or her designee." Regulation for Trial by Military Commission ("RTMC") ¶ 8-1. The Chief Prosecutor "supervise[s] the overall prosecution efforts." RTMC ¶ 8-1; id. ¶ 8-2(c). The Chief Prosecutor's staff primarily consists of military and civilian attorneys employed by the Department of Defense. The Chief Prosecutor supervises all attorneys on his staff, including any attorneys on detail to the Department of Defense from U.S. Attorney's Offices. RTMC ¶ 8-6(a). The Chief Prosecutor has assigned four attorneys to represent the government in Al-Nashiri's military commission case, including the Chief Prosecutor himself and two other military attorneys. Memo., AE 338H (Feb. 22, 2017). The fourth attorney, who serves as the trial counsel, is on detail to the Department of Defense from the U.S. Attorney's Office for the Eastern District of Louisiana. See id.

magistrate was not required to recuse herself where a U.S. Senator was the plaintiff and the magistrate had asked the senator to recommend her for a federal judgeship); Baker v. City of Detroit, 458 F. Supp. 374 (D. Mich. 1978) (district judge denied recusal motion where the defendant chaired the judicial selection committee that recommended the judge for elevation to the Sixth Circuit); Toxel v. State, 875 N.W.2d 302 (Minn. 2016) (holding that recusal was not required in a criminal case where the judge was negotiating for employment as a prosecutor in the neighboring county).

Al-Nashiri alleges that Colonel Spath favored the prosecution in order to make it more likely that the Attorney General would approve his appointment as an immigration judge. That allegation is too speculative, contingent, and remote to overcome the "strong presumption" that a military judge is impartial. Quintanilla, 56 M.J. at 44; see also United States v. Hutchins, No. 200800393, 2018 WL 580178, at *38 (N-M. Ct. Crim. App. Jan. 29, 2018) ("An actual or apparent conflict of interest between a military judge's rulings and his or her personal interest in protecting career prospects arises only in extraordinary circumstances."); Withrow v. Larkin, 421 U.S. 35, 47 (1975) (the contention that the combination of investigative and adjudicatory functions necessarily disqualifies an administrative adjudicator "must overcome a presumption of honesty and

integrity in those serving as adjudicators"); Smith v. Phillips, 455 U.S. 209, 217 (1982) (rejecting a claim that bias should be imputed to a juror who had an application for employment pending with the prosecuting attorney's office at the time of trial).

The Supreme Court has rejected the related argument that military judges presumptively favor the prosecution because they are responsible to superior officers and their rulings in military cases could affect their promotion opportunities. See Weiss v. United States, 510 U.S. 163, 180 (1994). The Court ruled that "the applicable provisions of the UCMJ," which "insulat[e] military judges from the effects of command influence," were sufficient to "preserve judicial impartiality." Id. at 179; see also United States v. Mitchell, 39 M.J. 131, 140 (C.M.A. 1994) (holding that the fact that the Judge Advocate General prepares and signs military judges' performance reports does not call into question the impartiality of those judges). The Court explained that, in enacting those provisions, Congress appropriately struck a "balance" between a military judge's independence and his responsibility to superior officers. Weiss, 510 U.S. at 180. The protections cited in Weiss also apply in the military commission context, see 10 U.S.C. § 949b, and are likewise sufficient to preserve military commission judges' impartiality, even though those judges, as serving military officers, are

accountable to superior officers in the military with influence over the judges' promotion opportunities and future assignments. Accordingly, an allegation that a military judge might be seeking promotion or employment in an executive branch department headed by an official who arguably has an interest in the successful prosecution of accused enemy belligerents is not sufficient to mandate recusal.

Al-Nashiri relies on recusal by members of this Court from deciding cases while their nominations to the U.S. Supreme Court were pending. Pet. 34-35. But Al-Nashiri does not cite any authorities that *require* recusal in these circumstances. Nor does he establish that it is common practice for district judges to recuse themselves when a nomination to a higher court is pending. And, more generally, he does not suggest that Article III judges recuse themselves from all cases involving the government when they are under consideration for a new Presidential appointment. Indeed, the Supreme Court has expressed skepticism that federal judges' decisions are influenced by offers of other federal positions. Mistretta v. United States, 488 U.S. 361, 409-10 (1989) ("We have never considered it incompatible with the functioning of the Judicial Branch that the President has the power to elevate federal judges from one level to another or to tempt judges away from the bench with Executive Branch positions."). Al-Nashiri's reliance on such recusals underscores why this Court should not adopt the broad recusal standard he

advocates. Whether and under what circumstances judges in the military, other executive branch agencies, or the judiciary must recuse themselves when they are considering different positions within the executive branch or judiciary presents difficult questions in an area where precedent is sparse. Al-Nashiri's automatic recusal rule would have implications far beyond the military commission context. This Court should not announce a broad new recusal standard in this mandamus case, where Al-Nashiri cannot establish a clear and indisputable right and where he has alternative avenues of relief

Nor is it clear and indisputable that R.M.C. 902(b), which requires recusal where the judge knows that he has an interest "that could be substantially affected by the outcome of the proceeding," would require Colonel Spath's disqualification. R.M.C. 902(b)(5)(B); see 28 U.S.C. § 455(b)(4) (requiring recusal where a judge has a financial interest in the subject matter in controversy or has an interest that "could be substantially affected by the outcome of the proceeding"). Courts interpreting the analogous provision in 28 U.S.C. § 455(b)(4) have explained that "where an interest is not direct, but is remote, contingent or speculative, it is not the kind of interest which reasonably brings into question a judge's partiality." See, e.g., In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir. 1988). Al-Nashiri does not contend that the outcome of his case—whether he is convicted

or not—will directly affect any interest of Colonel Spath.

In sum, Al-Nashiri cannot cite any precedent that clearly and indisputably requires disqualification here. In the absence of any such precedent, the question whether disqualification was required in this case is "open," and such open questions "are the antithesis of the clear and indisputable right needed for mandamus relief." Al-Nashiri I, 791 F.3d at 85-86 (internal quotation marks omitted).

IV. The Writ Is Inappropriate Under the Circumstances of This Case

Al-Nashiri fails to demonstrate any reasons for this Court to exercise its discretion to award him mandamus relief. Granting Al-Nashiri the remedies he seeks (Pet. 47-50) would harm the public interest in avoiding unwarranted delays in the administration of justice. This military commission case has proceeded, as Al-Nashiri notes, "[o]ver the course of the past decade." Id. at 5. During the four years that Colonel Spath presided over the case, he issued more than 460 written rulings. Vacating those rulings or dissolving the military commission would entail enormous cost to the parties and to the judicial system. Doing so, or even ordering the USCMCR to direct the military commission to hold an evidentiary hearing, is particularly inappropriate because it is unnecessary here, where the new military judge can consider the rulings anew or consider Al-Nashiri's disqualification

claims, including by holding an evidentiary hearing to find facts, to make a record, and to issue a ruling. See In re School Asbestos Litig., 977 F.2d 764, 786-87 (3d Cir. 1992) (declining to vacate the orders of a disqualified judge, and instead authorizing the successor judge to reconsider those orders, where vacating the orders would "upset tremendously" the complex litigation in the case).

Al-Nashiri also purports to "complain" with "clean hands" about delays in his military commission proceedings. Pet. Stay Reply at 1. But he routinely seeks abatements and stays and declines to contest continuances.[9] The government's first two interlocutory appeals, after adverse rulings by Colonel Spath, were stayed for nearly a year pending the confirmation of appellate military judges to the USCMCR. As this Court observed in declining to find the delay unreasonable, Al-Nashiri did not oppose postponing his trial. Al-Nashiri II, 835 F.3d at 135. "In fact, it was Al-Nashiri himself who argued that, in accordance with the Rules for Military Commissions and 'basic equity,' the military-commission proceedings

[9] See, e.g., Mot., AE 389 (Oct. 16, 2017); Mot., AE 369RR (July 14, 2017); Mot., AE 357 (Aug. 23, 2016); Mot., AE 092S (July 14, 2016); Mot., AE 354 (July 13, 2016); Mot., AE 353 (July 13, 2016); Mot., AE 352 (July 8, 2016); Mot., AE 350 (July 8, 2016); Mot., AE 348 (Oct. 8, 2015); Mot., AE 340A (Mar. 30, 2015); Mot., AE 333 (Jan. 13, 2015); Mot., AE 332 (Jan. 13, 2015); Mot., AE 317 (Sept. 23, 2014); Mot., AE 205BB (Sept. 16, 2014); Mot., AE 217 (Feb. 10, 2014); Mot., AE 205 (Jan. 22, 2014); Mot., AE 187 (Dec. 6, 2013); Mot., AE 178 (Nov. 15, 2013); Mot., AE 153R (Sept. 11, 2013); Mot., AE 153 (Apr. 8, 2013); Mot., AE 149 (Feb. 1, 2013); Mot., AE 025 (Dec. 9, 2011).

should be stayed while the government pursued its interlocutory appeals." Id. When the government asked for the stay in the USCMCR to be lifted in April 2016, "Al-Nashiri moved to *continue* the stay." Id.

Al-Nashiri also accuses Colonel Spath of rushing the proceedings by anticipating a mid- to late 2018 trial date. See, e.g., Pet. 2. But Al-Nashiri cannot credibly make this claim where he previously represented to this Court that his trial could commence as early as 2018. Al-Nashiri II, 835 F.3d at 134 ("Al-Nashiri estimated in his briefing that trial will not commence until 2018 at the earliest."). And although Al-Nashiri repeatedly states that Colonel Spath himself described the litigation schedule "as an 'aggressive schedule,'" that mischaracterizes the record. Pet. 2, 14; Pet. Stay Reply at 7. That description was apparently offered by Al-Nashiri's counsel, not Colonel Spath, who "expressed tremendous reservation" about having to spend "significant time" in Guantanamo Bay trying the case. Tr. 12344 (Feb. 15, 2018).

In any event, a mid- to late 2018 trial date hardly qualifies as a "mad rush" to trial, Pet. 42, given that pretrial proceedings began seven years ago in 2011 and that the trial date was still more than a year away when Colonel Spath gave the parties notice in March 2017 of his intent to set a trial date. See Tr. 9326-28 (Mar.

15, 2017).[10] During his time on the case, Colonel Spath abated the military commission proceedings three times, the first time at Al-Nashiri's request and for more than a year pending the government's two interlocutory appeals from adverse orders granting Al-Nashiri's motions to dismiss four charges and to exclude evidence that was substantial proof of a fact material to the government's case. See Al-Nashiri II, 835 F.3d at 115. Colonel Spath abated the case a second time, on July 7, 2017, Order, AE 379 (July 7, 2017), several months after Al-Nashiri claims that the allegedly disqualifying conduct occurred. See Pet. 40, 44, 49. By that time, the pretrial proceedings had transitioned to the preadmission of evidence in preparation for trial. Given that trial was still more than a year away, Colonel Spath's litigation schedule does not support any inference of bias.

Al-Nashiri contends that Colonel Spath's criticism of his counsel's behavior shows bias. Pet. 42-44. But, as the Supreme Court has found, opinions held by judges as a result of what they learned in earlier proceedings are "not subject to deprecatory characterization as 'bias.'" Liteky, 510 U.S. at 550-52 ("If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.") (internal quotation marks and citation omitted).

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[10] Colonel Spath later scheduled the findings phase of trial for 2019. See Order, AE 392 (Jan. 23, 2018).

Al-Nashiri attempts to challenge remarks that Colonel Spath made in the context of proceedings before him and that were directly addressed to the conduct of the attorneys before him; they did not extend to extrajudicial matters. See In re Drexel Burnham Lambert Inc., 861 F.2d at 1316 (finding no bias where the judge made remarks directly addressed to counsel's conduct); In re IBM, 618 F.2d 923, 931-32 (2d Cir. 1980) (finding no bias where the judge expressed his dissatisfaction with a party's counsel). Accordingly, the Supreme Court has explained that "[o]pinions formed by the judge on the basis of . . . prior proceedings[] do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555.

Colonel Spath's words and actions did not establish bias under that standard. The USCMCR, which examined more than 14,000 pages of record material comprising more than 140 filings, found that Colonel Spath was correct about the unremarkable proposition that attorneys must comply with court orders and that, if an attorney disagrees with a court order, then that attorney should seek review—not quit the case without leave of the court. See USCMCR Op. at 32, 37-38, 46-47. The USCMCR found that Al-Nashiri's counsel had done just that, "abandon[ing]" their client and "disrupt[ing] the orderly and expeditious progress of the proceedings." Id. at 36 (internal quotation marks and citation omitted); cf.

id. at 46 (Pollard, J., concurring and dissenting) (the majority opinion "fails to explain fully the level of defiance" of the civilian defense counsel). Over several months, Colonel Spath considered various options to ensure Al-Nashiri was represented by counsel. But the remaining military defense counsel refused to participate without learned counsel present, and the Acting Chief Defense Counsel withdrew attorneys who had been assigned to the team. Id. at 14-15. Colonel Spath's remarks, informed by defense counsel's conduct before him in the military commission, do not constitute evidence of extrajudicial bias against Al-Nashiri.

CONCLUSION

For these reasons, this Court should deny the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 18-1279.

I hereby certify that I electronically filed the foregoing Opposition with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on November 13, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: November 13, 2018

/s/ Joseph Palmer
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CERTIFICATE OF COMPLIANCE WITH VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This opposition complies with the volume limitation of this Court's October 12, 2018 Order because:

   this response contains no more than 12,659 words.

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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DATED: November 13, 2018

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