[ORAL ARGUMENT NOT YET SCHEDULED]
No. 21-1208

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 AND PROHIBITION
TO THE DEPARTMENT OF DEFENSE AND
THE MILITARY COMMISSION

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 mandamus proceedings before the U.S. Court of Military Commission Review (USCMCR), Al-Nashiri was the petitioner, and the United States was the respondent. 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, dated September 20, 2021, granting in part and denying in part, without prejudice, Al-Nashiri's petition for a writ of mandamus. Order, *United States v. Al-Nashiri*, No. 21-001 (USCMCR Sept. 20, 2021).

III. RELATED CASES

This Court has considered six 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that the judges were placed on the USCMCR in violation of the Appointments Clause); *In re Al-Nashiri*, No. 16-1152, unpublished order (D.C. Cir. May 27, 2016) (per curiam) (denying Al-Nashiri's mandamus petition seeking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, and affirming the denial of his motion to preliminarily enjoin his military commission trial, 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that the military commission lacked jurisdiction over his offense conduct); *Spears v. United States*, No. 18-1087, unpublished order (D.C. Cir. May 21, 2018) (per curiam) (dismissing as moot a petition filed by petitioner's counsel seeking intervention in the USCMCR); *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019) (granting Al-Nashiri's mandamus petition seeking vacatur of orders from a military judge who formerly presided over the military commission on the ground that the military judge's application for post-retirement employment created a disqualifying conflict of interest); *id.* (dismissing as moot a mandamus petition brought by Al-Nashiri's defense counsel challenging the military commission's order, later vacated by this Court, directing them to continue their representation of Al-Nashiri after their supervisor allowed them to withdraw from the case).

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Appellate Exhibit ..... AE

Central Intelligence Agency .....CIA

Classified Information Procedures Act.....CIPA

Military Commissions Act.....MCA

United States Court of Military Commission Review.....USCMCR

STATEMENT OF JURISDICTION

The jurisdiction of the military commission rests on 10 U.S.C. § 948d. The U.S. Court of Military Commission Review had jurisdiction over the mandamus petition under 10 U.S.C. § 950f and the All Writs Act, 28 U.S.C. § 1651(a). Al-Nashiri invokes this Court's jurisdiction under 10 U.S.C. § 950g and the All Writs Act. *See* Pet. 6.

ISSUE PRESENTED

Whether petitioner's challenge to the admission of evidence allegedly in violation of 10 U.S.C. § 948r(a) is ripe for review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner is an alien detained by the Department of Defense at Guantánamo Bay, Cuba. The government charged petitioner with capital offenses under the Military Commissions Act (10 U.S.C. § 948a) for his alleged role in the bombings of the *U.S.S. Cole* and the M/V *Limburg*, and the attempted bombing of the *U.S.S. The Sullivans*.

In the military commission proceedings, the government has acknowledged that Central Intelligence Agency (CIA) personnel subjected petitioner to enhanced interrogation techniques before he was delivered to Department of Defense custody. The government has also acknowledged that the statements made during

the CIA's former Rendition, Detention, and Interrogation Program were, by their nature, coerced and involuntary. Further, the government does not dispute that, for purposes of this case, the military commission should assume that statements petitioner made while he was in CIA custody should be treated as "statement[s] obtained by the use of torture or by cruel, inhuman, or degrading treatment" under 10 U.S.C. § 948r(a), which provides that such statements are not "admissible in a military commission." Accordingly, the government has represented that it would not seek to use any statements petitioner made while in CIA custody at trial or during sentencing.

In 2021, the government submitted two such statements to the military commission as part of a pretrial filing addressing the government's searches for potentially exculpatory evidence. Petitioner objected on the ground that submitting the statements violated 10 U.S.C. § 948r(a). The military commission ruled that, although Section 948r(a) bars admission of such statements at trial or sentencing, it does not prohibit the commission from considering them for limited purposes in resolving discovery issues at the pretrial stage.

After petitioner filed a mandamus petition in the U.S. Court of Military Commission Review (USCMCR), the military commission granted the government's motion to withdraw the statements. The USCMCR then vacated the

military commission order in which the commission had concluded that the statements could be considered.

Petitioner now seeks a writ of mandamus from this Court (1) enjoining the government from offering evidence in violation of Section 948r(a) in any military commission proceeding; (2) enjoining the military commission judge from considering such evidence; and (3) vacating any orders predicated on such evidence. The petition should be dismissed because it no longer presents a live case or controversy appropriate for adjudication under Article III.

The government recognizes that torture is abhorrent and unlawful, and unequivocally adheres to humane treatment standards for all detainees. *See* Executive Order 13491. In the absence of direct authority interpreting Section 948r(a), the government took the position below that Section 948r(a)'s prohibition on admission of statements obtained through torture or cruel, inhuman, or degrading treatment applies only to the trial and sentencing phases of a military commission and not to pretrial proceedings. Since that filing, the government has reconsidered its interpretation of Section 948r(a) and, as a result of that review, has concluded that Section 948r(a) applies to all stages of a military commission case, including pretrial proceedings. In accordance with that conclusion, the

government will not seek admission, at any stage of the proceedings, of any of petitioner's statements while he was in CIA custody.

Since the government now agrees that Section 948r(a) applies to all stages of military commission proceedings, petitioner's speculation that the government might offer, and the military commission might admit, evidence in violation of Section 948r(a) is unfounded. Petitioner's request for a broad injunction, which he did not seek below, against hypothetical future events in his military commission proceedings amounts to an unripe request for an advisory opinion and should therefore be denied.

Petitioner's request for vacatur of any past orders predicated on evidence admitted in violation of Section 948r(a) is likewise non-justiciable at this time. Petitioner has not identified any such orders, so this request for relief is again based on pure speculation. But in any event, the prosecution has conducted a search of this case's voluminous record, including the prosecution's *ex parte* submissions. As explained below and in the declaration attached to this response, the prosecution has found no such submissions or orders, with one exception that the government will move promptly to correct.

Finally, even if the petition presented a live case or controversy that was ripe for review, the Court should deny it because petitioner cannot satisfy the

mandamus standard. Petitioner fails to show why a claim that the military commission admitted evidence in violation of Section 948r(a) cannot be addressed on direct appeal following a final judgment. And petitioner cannot show why discretionary relief would be appropriate now, in the absence of any specific adverse order or particular concrete context. There is no reason to believe that any additional prior orders predicated on statements inadmissible under Section 948r(a) exist, or that the government will seek to admit any such statements in the future. If a dispute arises regarding any particular past orders or any future attempt to admit such statements, the issue should be adjudicated in the first instance, in its specific concrete context, in the military courts below. Petitioner could then seek review of any adverse ruling on direct appeal or, if appropriate, by mandamus.

BACKGROUND

Petitioner Abd Al-Rahim Hussein Muhammed 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*). Petitioner was captured in late 2002 and has been detained since that time, first in the custody of the CIA (from 2002 to 2006) and then in the custody of the Department of Defense

(from 2006 to present). *See* Resp. at 3, AE 120A (Oct. 9, 2012).[1] In 2011, petitioner was 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. Conviction of the charges as sworn and subsequently referred in petitioner's case may result in a punishment of up to life imprisonment or the death penalty. *See id*.

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 Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), determined that an earlier military commission process exceeded then-existing statutory authority, *id.* at 590-95, 620-35, Congress and the President enacted the MCA. The MCA established an "integrated scheme dictating how enemy belligerents are to be tried" by military

[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 the military commission case can be accessed by visiting the Office of Military Commissions website, https://www.mc.mil/CASES.aspx, and clicking on the link for "USS Cole: Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)." To view the docket for the USCMCR mandamus case, open https://www.mc.mil/Cases.aspx?caseType=cmcr in a web browser and click the link for case number 21-001.

commission and how they can obtain appellate review. *Al-Nashiri II*, 835 F.3d at 122-24 (internal quotation marks omitted). 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).

Under the MCA, a convening authority, who is either the Secretary of Defense or an officer or official designated by the Secretary, may convene a military commission. 10 U.S.C. § 948h; *see also Al Bahlul v. United States*, 967 F.3d 858, 863-64 (D.C. Cir. 2020). A military commission may try an "alien unprivileged enemy belligerent" for certain enumerated law-of-war violations and other offenses triable by military commission. 10 U.S.C. §§ 948c, 950t. At trial, a military judge presides over the case, along with a "jury" that, in capital cases, consists of at least twelve military officers known as "members." 10 U.S.C. §§ 948m, 949m(c).

The military commissions system includes multiple layers of appellate review. *See Al-Nashiri II*, 835 F.3d at 122 ("These review structures closely (and intentionally) mirror[] the current structure for . . . review of courts-martial.") (alterations in original) (internal quotation marks omitted). Ordinarily, a defendant may have a final guilty finding reviewed by the U.S. Court of Military

Commission Review. *See id.* (citing 10 U.S.C. §§ 950f, 950c). A defendant may also obtain review in this Court after all proceedings in the military courts have concluded. *See* 10 U.S.C. § 950g(a)–(b). Where appropriate, a defendant may also seek a writ of mandamus before a final judgment. *In re al-Tamir*, 993 F.3d 906, 909 (D.C. Cir. 2021).

The MCA includes classified information procedures that are modeled on the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3. *See* 10 U.S.C. § 949p. Like CIPA, the MCA authorizes the judge, "in assessing the accused's discovery of or access to classified information," to authorize the government "to delete or withhold specified items of classified information"; "to substitute a summary for classified information"; and "to substitute a statement admitting relevant facts that the classified information or material would tend to prove." *Id.* § 949p-4(b)(1); *see id.* § 949p-6(c); *cf.* 18 U.S.C. app. 3 § 4. Also like CIPA, the MCA provides that the government may show that the use of such alternatives is warranted in an *in camera*, *ex parte* submission to the judge. 10 U.S.C. § 949p-4(b)(2); *cf.* 18 U.S.C. app. 3 § 4.

Under the MCA, the judge must permit the government to use the alternative if the judge "finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery

of or access to the specific classified information." 10 U.S.C. § 949p-4(b)(3); *cf.* 18 U.S.C. app. 3 § 4. If the judge grants the government's request, the entire presentation "shall be sealed and preserved in the records of the military commission to be made available to the appellate court in the event of an appeal." 10 U.S.C. § 949p-4(b)(2); *see id.* § 949p-6(e); *cf.* 18 U.S.C. app. 3 § 4.

In this case, petitioner has sought, and the commission has ordered, discovery of petitioner's statements while in CIA custody. *See* Order at 10, AE 120AA (June 24, 2014). For national security reasons, portions of those statements must be disclosed to petitioner's counsel in substitute form. Pursuant to the MCA's classified information procedures, the government has submitted such statements to the commission for its approval of the substitutions. *See, e.g.*, Ruling, AE 406U (Oct. 27, 2021).

II. Proceedings Below

As part of the lengthy discovery process in this case, the military commission in February 2021 directed the government to provide a status report describing its compliance with an earlier discovery order requiring the government to search for and to produce certain potentially exculpatory material related to a Kuwaiti terrorist financier named Mohsen Al-Fadhli. Ruling, AE 353U (Feb. 19, 2021); USCMCR Op. 2. Petitioner had previously alleged that U.S. intelligence

agencies suspected Al-Fadhli of involvement in the *U.S.S. Cole* and M/V *Limburg* attacks and that the government had withheld intelligence reporting to that effect from the defense. Ruling at 1, AE 353U (Feb. 19, 2021). The government's response explained that there were no additional reports of the kind sought by petitioner because government analysts in 2003 had rejected the theory that Al-Fadhli financed the attacks. Resp. at 2-3, AE 353Y (Apr. 14, 2021).

The government's filing included a classified addendum, which was filed *in camera* but not *ex parte*. USCMCR Op. 2. The addendum included two statements petitioner made while he was in CIA custody. *Id.* The government explained that the statements were not offered for their truth, but to help provide the commission and the defense with additional context regarding how the government's own beliefs and internal reporting concerning Al-Fadhli's involvement had developed over time. *See* Resp. at 14, AE 353Y (Apr. 14, 2021); USCMCR Op. 1-2.

Petitioner moved to strike the statements, arguing that 10 U.S.C. § 948r(a) barred the military commission from considering such statements for any purpose at any stage of the proceedings.[2] USCMCR Op. 2. In response, the government

[2] Section 948r(a) provides, as relevant here, that "[n]o statement obtained by the use of torture or by cruel, inhuman, or degrading treatment" as defined in the Detainee Treatment Act "shall be admissible in a military commission."

contended that, while Section 948r(a) prohibits introducing the statements at trial or sentencing, the military judge could lawfully consider them at the discovery stage in evaluating the government's explanations of why the additional reporting petitioner sought did not exist. Resp. at 15-25, AE 353Y (Apr. 14, 2021). The military commission ruled that the statements could be considered for that limited purpose in pretrial discovery motions practice. Ruling at 3-6, AE 353AA (May 18, 2021). The military commission reasoned that Congress's use of the phrase "admissible in a military commission" indicated an intent that "statements obtained through torture would not be received in evidence at trial [or sentencing], not that such statements couldn't be considered by a military judge in resolving an interlocutory question." *Id.* at 5. The military commission noted that its ruling was limited to considering the statements "for the limited purpose for which they [were] offered." *Id.* at 6. The commission made "no ruling" on whether it would "consider similar statements on other interlocutory issues," and it warned the parties to "proceed with caution" in relying on such statements because they were "necessarily of highly suspect reliability." *Id.*

Petitioner filed a mandamus petition in the USCMCR seeking an order vacating the military commission's ruling and directing the commission to reconsider any other ruling in which the government offered evidence inadmissible

under Section 948r(a). USCMCR Op. 1-2. While that petition was pending, the government moved in the military commission to withdraw the statements and asked the commission to reconsider the discovery issue without relying on them. *Id*. at 2-3. Petitioner opposed the motion and asked the military commission to "preserve the adverse ruling" so that petitioner could "continue to pursue an appeal." *Id.* The commission granted the government's motion, ordered the government to file an amended pleading without referring to petitioner's statements, and ruled that the commission would not consider them in adjudicating the pending discovery issues. *Id.* at 3.

The government submitted an amended pleading without the statements. The military commission, without considering petitioner's statements, ruled on the pending discovery issues, finding that the government had "complied with its discovery obligations and disclosed discoverable materials relating to Al-Fadhli to the [d]efense." Ruling at 4, AE 353KK (Jan. 6, 2022).

After the military commission granted the motion to withdraw the statements, the USCMCR issued an opinion granting in part and denying in part the mandamus petition. The USCMCR granted petitioner's request to vacate the military commission order ruling that petitioner's statements could be considered. *Id.* at 5. The USCMCR explained that the military commission's decision to

reconsider that order rendered petitioner's challenge moot with regard to the underlying discovery issue, but the USCMCR nevertheless vacated the military commission's decision in order to further "clarify" what evidence was properly "being considered at petitioner's military commission." *Id.* at 4-5.

The USCMCR denied without prejudice petitioner's request for an order directing the commission to reconsider any previous rulings in which the government had offered evidence violating Section 948r(a). The USCMCR explained that the request was not ripe for review because petitioner had not identified any such orders and had not sought discovery concerning whether any *ex parte* order relying on such evidence existed. *Id.* at 3-5. The USCMCR ordered further that "petitioner may refile a petition with this court if the military judge relies upon evidence that is inadmissible under 10 U.S.C. § 948r(a)." *Id.* at 6.

ARGUMENT

Petitioner seeks a writ of mandamus from this Court (1) enjoining the government from offering evidence in violation of Section 948r(a) in any military commission proceeding; (2) enjoining the military commission judge from considering such evidence; and (3) vacating any orders predicated on such evidence. Those claims are not ripe for review. And even if they were, petitioner could not satisfy the mandamus standard.

I. Petitioner's Request for Injunctive Relief Is Not Ripe

Petitioner's request for injunctive relief is not ripe because his assertion that the government will offer, and that the military courts below will admit, evidence that is inadmissible under Section 948r(a) is purely speculative. The government has withdrawn the statements it previously offered. The military commission has decided the discovery issue without considering them. The USCMCR has vacated the order that considered them and invited petitioner to refile a mandamus petition if the military commission admits evidence in violation of Section 948r(a). Moreover, the government has from the beginning of this case maintained that it would not rely on statements obtained while petitioner was in CIA custody at trial or sentencing, and the government now agrees that Section 948r(a) applies at all stages of a military commission. In these circumstances, petitioner's request for broad injunctions against hypothetical future events is unripe.

A. The Ripeness Doctrine

The ripeness doctrine aims to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). It also protects against unnecessary "judicial interference" until the decision below has been "formalized" and "its effects felt in a concrete way." *Id.* A claim is not ripe "if it rests upon

'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)); *accord Thomas*, 473 U.S. at 581 (while a plaintiff need not "await the consummation of threatened injury to obtain preventive relief," the injury must, at least, be "certainly impending") (citation omitted); *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163-64 (1967) (claim was not ripe for review because, even though the issue was framed as a "purely legal question," the purported injury was nonetheless entirely speculative).

In determining whether a claim is ripe for judicial consideration, this Court first determines whether the issues are fit for judicial review. *Cause of Action Inst. v. U.S. Dep't of Justice*, 999 F.3d 696, 704 (D.C. Cir. 2021). Second, the Court inquires whether the party seeking review can demonstrate hardship sufficient to show that the issue warrants immediate review. *Id.* Under the "fitness" inquiry, the Court determines whether the case "presents a concrete legal dispute" in which "no further factual development is essential to clarify the issues" and in which there is "no doubt" that the issue has "crystallized sufficiently for purposes of judicial review." *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540 (D.C. Cir. 1999). In analyzing the "hardship" prong, "[i]t is axiomatic that mere delay,

absent other extenuating circumstances," is insufficient. *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1297 (D.C. Cir. 2000).

B. Petitioner's Claims Are Unripe and Do Not Warrant Immediate Review

Petitioner's claims for injunctive relief against the prosecution and the military commission judge are unripe because they rest on future events—a prosecution offer of evidence that violates Section 948r(a) and a military commission decision admitting it—that are entirely speculative. Petitioner does not point to any particular statement that he alleges the government intends to introduce. Nor does he claim that the government has announced its intent to introduce such statements in any particular pretrial context. Instead, petitioner's speculation depends on the statements that the government previously offered and the order concluding that they could be considered. But the government withdrew the statements, and the USCMCR vacated the military commission's order, before the case reached this Court. Any claim arising from consideration of those statements is now moot. Withdrawn statements and a vacated order cannot reasonably support an inference that the government intends to offer, and the commission intends to admit, similar statements for similar purposes in the future.

Although the government argued below that Section 948r(a) applies only to evidence submitted at trial or sentencing, the government has reconsidered its

interpretation of Section 948r(a). The government has now concluded that Section 948r(a) prohibits the admission of statements obtained through torture or cruel, inhuman, or degrading treatment at all phases of a military commission.[3] Given the government's conclusion regarding the scope of Section 948r(a), there is no basis for petitioner's speculation that the government will seek admission of other statements that both parties now agree are inadmissible under Section 948r(a).[4]

The government will, of course, continue to fulfill its discovery obligations as to such statements, including by seeking approval for substitutions (when necessary) under 10 U.S.C. § 949p. In addition, there may be some circumstances where the military judge could properly consider such statements if such consideration were necessary to adjudicate a motion that the defense might file to suppress evidence allegedly derived from the statements. In any event, the question whether Section 948r(a) applies in such circumstances is not properly before this Court. If the military commission considers petitioner's statements in

[3] The statute includes an exception, not applicable here, for statements introduced against a person accused of torture or cruel, inhuman, or degrading treatment "as evidence that the statement was made." 10 U.S.C. § 948r(a).

[4] In light of the government's interpretation of Section 948r(a), this Court need not consider petitioner's alternative contentions that the Due Process Clause and international law bar admission of statements obtained by torture or cruel, inhuman, or degrading treatment in pretrial military commission proceedings.

such circumstances and petitioner objects, the issue should first be resolved, in a specific and concrete context, in the military courts below before it would be ripe for this Court's review.

The unusual nature of petitioner's requested relief—an injunction against the prosecution and the judge in a criminal case—further underscores that his claim is unripe. In criminal cases, where the defendant seeks to preclude admission of evidence, the ordinary remedy is not to seek injunctions but instead to file a motion to suppress or a motion in limine excluding the evidence. And in that context, courts have recognized that ruling on such a motion is premature when the court must speculate on what the specific allegedly inadmissible evidence is or whether the government will seek to introduce it at all. *See, e.g.*, *In re Basciano*, 542 F.3d 950, 958 (2d Cir. 2008) (holding that a mandamus petition challenging admission of evidence was unripe, even after the government had indicated its intent to introduce it, where "the defendant ha[d] not yet challenged the admissibility of this evidence" in district court "nor ha[d] the district court made any ruling in this regard"); *United States v. Flax*, 988 F.3d 1068, 1076 n.5 (8th Cir. 2021) (noting the parties' agreement that the defendant's challenge to admission of expert testimony was unripe because he did not "identify the expert or any particular testimony" that he sought to exclude); *United States v. Bocio*, 103 F. Supp. 2d 531, 535 (N.D.N.Y.

2000) (holding that a request to exclude evidence was unripe where "the Government disavows any intent to introduce such evidence in its direct case"). That practice is appropriate because the admissibility of evidence is generally a fact-specific inquiry. Here, there is no longer any specific evidence that has been offered, any argument why it might be admissible, or any adverse decision from the courts below. This Court should therefore defer ruling on the scope of Section 948r(a) unless and until the issue arises in the context of a specific challenge to the admissibility of particular evidence that the courts below have found to be admissible.

Petitioner's attempt to portray the actions of the government and the military judge as merely "voluntary cessation" of the challenged activity has no merit. The military commission has now made clear that it did not consider the challenged statements in resolving the discovery issue that gave rise to this petition. And the USCMCR not only vacated the challenged ruling but expressly invited petitioner to "refile" a mandamus petition "if the military judge relies upon evidence that is inadmissible under 10 U.S.C. § 948r(a)." USCMCR Op. 6. Petitioner's suggestion that his claim might evade judicial review if this Court does not decide it now is unfounded.

At bottom, petitioner can point to no adverse decision below to be corrected. He has asserted only the speculative claim that the government might seek to introduce statements that are inadmissible under Section 948r(a) in the future. That claim is an unripe challenge to a hypothetical future action in a highly factbound context, and this Court should not address it at this time.

II. Petitioner's Request for Vacatur of Unspecified Prior Orders Is Not Ripe

Petitioner's request for vacatur of any past orders predicated on evidence admitted in violation of Section 948r(a) is also not ripe for review. The USCMCR correctly rejected this claim because petitioner had not identified any such orders, nor had he sought discovery concerning whether any *ex parte* order relying on such evidence existed. USCMCR Op. 3-5; *see also id.* at 5 ("The issue of admissibility of such evidence is not ripe or ready for judicial review because 'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (quoting *Cause of Action Inst.*, 999 F.3d at 704). And the USCMCR invited petitioner to refile his petition in that court once he had remedied that deficiency and identified any order in which the military commission allegedly "relie[d] upon evidence that is inadmissible under 10 U.S.C. § 948r(a)." *Id.* at 6. Instead of moving in the military commission to discover whether there were any such orders and, if so, renewing his petition in the USCMCR, petitioner sought

mandamus relief in this Court despite his inability to point to any specific adverse ruling below that remains in effect. This Court should reject that premature claim and require petitioner to exhaust the remedies that the USCMCR explicitly provided. *See* 10 U.S.C. § 950g(b) (requiring military commission petitioners to exhaust remedies); *Al-Nashiri I*, 791 F.3d at 78 (noting that mandamus is not available if an alternative remedy exists).

In any event, the Office of the Chief Prosecutor of Military Commissions has conducted a search of the voluminous record in this case, including the prosecution's *ex parte* submissions. With the single exception discussed below, the only circumstance in which the government has submitted to the military commission, *ex parte*, petitioner's statements while in CIA custody (other than the withdrawn statements that gave rise to this petition) was solely for the purpose of enabling the commission to compare the underlying statements with the government's proposed substitutions and thereby to adjudicate the adequacy of the government's disclosures to the defense. *See* Declaration of Lieutenant Commander Charles M. Roman (attached); *see also* 10 U.S.C. § 949p-4 (authorizing this procedure). The only exception consists of one sentence in two pleadings quoting the same brief statement petitioner made to a medical provider in order to show, consistent with the military commission's discovery orders, *see*

Ruling at 9, AE 120AA (June 24, 2014), that the provider's identity could be redacted from discovery because he or she lacked "direct and substantial" contact with petitioner. Consistent with its actions below in this case, the government will withdraw petitioner's statement from its pleadings and resubmit the pleadings for reconsideration of the commission's orders as to that specific provider.

If a dispute arises regarding any past orders or any future attempt to admit such statements, the issue should be adjudicated in the first instance, in its specific concrete context, in the military courts below. To the extent that petitioner claims the substitution process authorized by the MCA to enable disclosures to the defense is inconsistent with Section 948r(a), he should raise that contention in the military commission and, if necessary, the USCMCR in the first instance. And if the military commission or USCMCR determine, contrary to the government's review, that any other pre-existing orders rely on evidence in violation of Section 948r(a), the government agrees that such orders should be vacated.

III. Petitioner Cannot Satisfy the Standards for Mandamus Relief

Mandamus is a "drastic" remedy, "to be invoked only in extraordinary circumstances." *Al-Nashiri I*, 791 F.3d at 78. The petitioner must "have no other adequate means to attain the relief he desires," he must show that his right to relief

is "clear and indisputable," and "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.*

Mandamus cannot "be used as a substitute for the regular appeals process." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380-81 (2004). Accordingly, "[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.

Petitioner fails to show why direct appeal from final judgment would not be an adequate alternative remedy for a claim that the government prejudicially used evidence against him in pretrial proceedings that was inadmissible under Section 948r(a). The MCA "empowers this Court to review all 'matters of law' once a military commission issues a final judgment and both the convening authority and the [USCMCR] review it." *Id*. at 79 (quoting 10 U.S.C. § 950g(a), (d)). That provision would allow this Court to consider, in a post-judgment direct appeal, a claim that the military commission impermissibly relied on evidence that was inadmissible under Section 948r(a) in resolving pretrial matters.

Petitioner speculates that, in *ex parte* proceedings, the military commission may have relied on inadmissible statements in a way that the record would not adequately reflect. But the MCA classified information provisions mirror CIPA in requiring that the government's *ex parte* presentation be preserved and "made

available to the appellate court in the event of an appeal." 10 U.S.C. § 949p-4(b)(2). Petitioner does not explain why that provision is insufficient to ensure adequate appellate review, particularly in light of the courts of appeals' decades of experience in successfully conducting post-judgment appellate review of district courts' *ex parte* rulings under CIPA.

There is no question that the government's decision to subject petitioner to enhanced interrogation techniques has created, and will continue to create, difficult issues related to discovery, admissibility of evidence, and other challenges petitioner may raise. But the MCA, the mandamus standard, and the requirement that claims must be ripe for review all counsel against this Court's intervention at this time. The government has no intention of relying on statements that are covered by Section 948r(a) at any stage of petitioner's military commission proceedings, and the military courts below stand ready to entertain petitioner's challenge to any specific ruling that he claims was based on such statements. In these circumstances, any intervention by this Court, especially through a writ of mandamus, would be inappropriate.

CONCLUSION

For the reasons set forth above, this Court should deny Al-Nashiri's petition for a writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 21-1208.

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 January 31, 2022.

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: January 31, 2022

/s/ Joseph Palmer
Joseph Palmer
Attorney for the United States

CERTIFICATE OF COMPLIANCE WITH VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This opposition complies with the volume limitation of this Court's November 30, 2021 Order directing the government to file a response, not to exceed 14,000 words, because:

   this response contains 5,249 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:

   this response has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point font size and Times New Roman type style.

DATED: January 31, 2022

/s/ Joseph F. Palmer
Joseph F. Palmer
Attorney for the United States

Attachment

DECLARATION OF LIEUTENANT COMMANDER
CHARLES M. ROMAN, JAGC, USN

Pursuant to 28 U.S.C. § 1746, I, Lieutenant Commander Charles M. Roman, JAGC, USN, hereby declare:

I am a lieutenant commander in the U.S. Navy and have been on active duty with the Judge Advocate General's Corps since 2010. I am a member of the bar of the Commonwealth of Virginia.

I am a detailed counsel to the *United States v. Abd Al Hadi Al-Iraqi* military commission. I have never been detailed or otherwise associated with the *Abd Al Rahim Hussayn Muhammad Al Nashiri* military commission.

I was assigned the task to review all ex parte filings in the *Nashiri* military commission to find statements the petitioner made while he was in CIA custody ("Petitioner's CIA statements"). To accomplish the assignment, I was given access to all filings and transcripts in the case.

I have completed my review of all the Prosecution's ex parte submissions, the transcripts of all ex parte Prosecution presentations, and all ex parte Orders/Rulings by the Commission in *Nashiri*. This review was comprised of over 100,000 pages, and I found no instances where the Prosecution sought an order from the Commission predicated on Petitioner's CIA statements.

The Prosecution has submitted the Petitioner's CIA statements to the Commission solely to consider the adequacy of proposed summaries of those statements under M.C.R.E. 505 and 10 U.S.C. § 949p-4, with two exceptions. The first exception is an ex parte presentation pursuant to M.C.R.E. 505(f)(2) that dealt with the two statements included in AE 353V, Attachment E, which the Prosecution subsequently withdrew. The second exception is one footnote in both AE 120LL and AE 120DDDDDD that included a brief statement the Petitioner made to a medical provider illustrating the provider's lack of direct and substantial contact with the Petitioner. Apart from these two exceptions, I have not found any Commission order predicated on, or any Prosecution submission, discussion, or presentation referencing, the Petitioner's CIA statements.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true, accurate and correct to the best of my knowledge.

Dated: 31 JAN 2022

Charles M. Roman
Lieutenant Commander
JAG Corps, U.S. Navy