[ORAL ARGUMENT NOT SCHEDULED]
No. 19-1234

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

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PHILIP LAWRENCE SUNDEL, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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ON PETITION FOR REVIEW

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# RESPONSE BRIEF OF THE UNITED STATES

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## CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

### I. PARTIES

In this Court, Philip Lawrence Sundel is the petitioner, and the United States is the respondent. In the proceedings before the United States Court of Military Commission Review ("USCMCR"), Ibrahim Ahmed al Qosi is the putative appellant, and the United States is the putative appellee.

### II. RULING UNDER REVIEW

Petitioner is seeking review of the USCMCR's order issued on October 21, 2019, Pet. App. 1-7. *See* Pet. Br. i.

### III. RELATED CASE

This Court dismissed a previous petition filed in this Court purportedly on behalf of al Qosi. *In re Al Qosi*, 602 F. App'x 542 (D.C. Cir. 2015) (per curiam).

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## Glossary of Abbreviations

al Qaeda in the Arabian Peninsula ..... AQAP

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

## INTRODUCTION

This Court lacks jurisdiction over the petition both because it falls outside of this Court's statutory subject-matter jurisdiction and because it is incurably unripe, having been filed while a motion for reconsideration was pending before the United States Court of Military Commission Review ("USCMCR"). The petition also lacks legal merit because the hearing that Mr. Sundel sought to attend in his personal capacity was properly closed to the public in order to protect classified national security information.

## STATEMENT OF JURISDICTION

The military commission that accepted Ibrahim Ahmed al Qosi's guilty plea and sentenced him had jurisdiction pursuant to 10 U.S.C. § 948d. The appeal purportedly on behalf of al Qosi in the USCMCR is premised on 10 U.S.C. § 950f, but the United States is disputing that court's jurisdiction in that proceeding.

In his brief to this Court, Petitioner Sundel cited 10 U.S.C. § 950f as the basis for this Court's jurisdiction over his petition. Pet. Br. 1.[2] That provision,

[2] "Pet. Br. __" refers to Mr. Sundel's opening brief, which was filed on April 27, 2020. "Pet. App. __" refers to his appendix, which was filed the same day. "Pet. __" and "Pet. Ex. __" refer to the petition that was filed by Mr. Sundel on November 8, 2019 and to its exhibit. "Gov't App. __" refers to the government's appendix, which is being filed along with this brief. The documents in the government's appendix are all from the record in this case.

however, deals exclusively with the USCMCR. *See* 10 U.S.C. § 950f (entitled "Review by United States Court of Military Commission Review"). Mr. Sundel presumably intended to cite 10 U.S.C. § 950g, the statute he cited in his petition. *See* Pet. 1; 10 U.S.C. § 950g (entitled "Review by United States Court of Appeals for the District of Columbia Circuit; writ of certiorari to Supreme Court"). But that statutory provision also does not provide this Court with jurisdiction over the petition. *See infra* Argument Part I.A.

## ISSUES PRESENTED

1. Whether 10 U.S.C. § 950g(a), which provides this Court with jurisdiction to review "the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [USCMCR])," provides jurisdiction over a petition that does not seek review of a final judgment rendered by a military commission that has been approved by a convening authority.

2. Whether the petition for review is incurably unripe because it was filed while the petitioner's motion for reconsideration remained pending before the USCMCR.

3. Whether a government employee who seeks to use his security clearance for private benefit and who lacks an Executive Branch need-to-know determination

has a First Amendment right to attend a classified hearing as a member of the public.

## STATEMENT OF THE CASE

### I. The Military Commissions Act of 2009

Military commissions "have historically been used," among other purposes, "to try members of enemy forces for violations of the laws of war." *Ortiz v. United States*, 138 S. Ct. 2165, 2171 n.1 (2018) (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 595-97 (2006) (plurality opinion)). The Military Commissions Act of 2009, the statute that governs military commissions that try certain enemy belligerents for law-of-war violations, "is the product of an extended dialogue among the President, the Congress and the Supreme Court." *In re Al-Nashiri*, 791 F.3d 71, 73 (D.C. Cir. 2015) ("*Al-Nashiri I*"). As this Court has explained, "Congress—with the approval of two Presidents—exercised its legitimate prerogatives when it decided, in response to *Hamdan*, that the ordinary federal court process was not suitable for trying certain enemy belligerents." *In re Al-Nashiri*, 835 F.3d 110, 124 (D.C. Cir. 2016) ("*Al-Nashiri II*").

A convening authority, either the Secretary of Defense or any officer or official designated by the Secretary, can convene a military commission. 10 U.S.C. § 948h; *cf. United States v. Nealy*, 71 M.J. 73, 78 (C.A.A.F. 2012) (Baker, C.J., concurring) (describing the analogous role of the convening authority

in the military courts-martial system). Once convened, a military commission may try an "alien unprivileged enemy belligerent" for certain enumerated law-of-war violations. 10 U.S.C. §§ 948c, 950t. If the defendant is convicted, the military commission's findings and sentence are reported to the convening authority who, in his or her "sole discretion and prerogative," may set aside any conviction or substitute a conviction for a lesser-included offense. 10 U.S.C. § 950b(a), (c)(1)-(2). The convening authority also may approve, disapprove, commute, or suspend (but not increase) the defendant's sentence. 10 U.S.C. § 950b(c)(3)(C). Where a guilty verdict is approved as to one or more charges, and the defendant has not waived his appeal, the convening authority will refer the case to the U.S. Court of Military Commission Review, an Article I court of record. 10 U.S.C. §§ 950c, 950f(a). The USCMCR "review[s] the record in each case that is referred to the Court by the convening authority . . . with respect to any matter properly raised by the accused." 10 U.S.C. § 950f(c). After the proceedings in the military courts have concluded, this Court has "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [USCMCR])." 10 U.S.C. § 950g(a). However, this Court may not review such a judgment "until all other appeals under [the Military Commissions Act] have been waived or exhausted." 10 U.S.C. § 950g(b).

The Military Commissions Act further provides that the jurisdiction provided by Section 950g permits this Court to act "only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the [USCMCR], and shall take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict." 10 U.S.C. § 950g(d)

## II. Military Commission Proceedings Concerning al Qaeda Terrorist Ibrahim Ahmed al Qosi

In July 2010, Ibrahim Ahmed al Qosi, a longtime al Qaeda member and onetime associate of Usama bin Laden, pleaded guilty to one count of conspiracy to engage in terrorism and to provide material support to terrorism, *see* 10 U.S.C. § 950t(29), and one count of providing material support to terrorism, *see* 10 U.S.C. § 950t(25). *United States v. Al Qosi*, 28 F. Supp. 3d 1198, 1200 (U.S.C.M.C.R. 2014). Al Qosi waived his appellate rights. *Id.* at 1201. Two years later, in July 2012, al Qosi was transferred to Sudan. *Id.* at 1200. Al Qosi then rejoined al Qaeda's fight against the United States, *see* Gov't App. 33-34, ultimately prompting the State Department, in November 2019, to offer, through its Rewards for Justice program, a reward of up to four million dollars for information leading

to al Qosi's identification or location. *See* https://rewardsforjustice.net/english. The Rewards for Justice website summarizes:

> Al-Qosi is part of the leadership team that assists the current 'emir' of [al Qaeda in the Arabian Peninsula ("AQAP")]. Since 2015, he has appeared in AQAP recruiting materials and encouraged lone wolf attacks against the United States in online propaganda. He joined AQAP in 2014, but has been active in al-Qa'ida for decades and worked directly for Usama bin Laden for many years.

*Id.*

Approximately two months after al Qosi was transferred from U.S. custody, the head of the Military Commissions Defense Organization within the Department of Defense appointed new counsel to represent al Qosi for the apparent purpose of pursuing the appellate remedies that al Qosi had waived and that his previous counsel had accordingly not pursued. *See Al Qosi*, 28 F. Supp. 3d at 1200; *see also id.* at 1202 ("In the absence of any evidence to the contrary, we presume that Al Qosi's trial defense counsel properly and effectively consulted with him about his agreement to waive those rights and then abided by Al Qosi's decisions not to appeal or collaterally attack his conviction."); *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (holding that "the decision to appeal rests with the defendant"). Unable to contact al Qosi to obtain a decision about whether to pursue further litigation, defense counsel sought Department of Defense funding to travel abroad in search of him. *Al Qosi*, 28 F. Supp. 3d at 1201. Defense counsel went so far as to seek

relief in this Court, which dismissed the petition for review and the petition for a writ of mandamus for lack of jurisdiction because al Qosi had not authorized them. *See In re Al Qosi*, 602 F. App'x 542, 543 (D.C. Cir. 2015) (per curiam) ("There is no evidence that al Qosi authorized Captain McCormick to pursue these petitions.").

In 2017, defense counsel returned to the USCMCR on behalf of al Qosi, asserting that court's appellate jurisdiction. Initially deferring a ruling as to whether al Qosi had authorized the appeal, the USCMCR recognized another potential bar to appellate relief—the fugitive disentitlement doctrine. *See, e.g.*, *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239-42 (1993). In order to develop a factual record regarding al Qosi's current location and activities so the USCMCR could determine whether the fugitive disentitlement doctrine barred al Qosi's appeal, the USCMCR ordered a "*DuBay* hearing," a procedure where a military appellate court assigns a trial judge to take evidence and to find facts that are necessary for the appellate court's decision. *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) (per curiam).

On February 13, 2019, the USCMCR directed the *DuBay* judge "to make findings of fact and conclusions of law regarding whether (a) al Qosi is currently an unprivileged enemy belligerent, and (b) under present circumstances whether al Qosi can be made to respond to any judgment that the Court may render in

response to his appeal." Pet. App. 2. As the USCMCR described it, this order directed a "collateral and independent factual inquir[y] to aid [the USCMCR] in determining whether [it] should exercise [its] appellate jurisdiction." Gov't App. 58.

In early May 2019, both parties provided notice of their intent to introduce classified evidence at the *DuBay* hearing. *See* Gov't App. 1, 5-6, 14-15; *see also id.* at 10 (defense filing providing belated notice of additional classified evidence that had been offered the previous day). On June 12, 2019, the *DuBay* judge held a public evidentiary hearing that ran from 9:04 a.m. until 6:39 p.m. *See* Gov't App. 39-40. That same day, the judge determined that in order to make a full and fair determination of the issues before him, he needed to consider classified material, and that there existed an "overriding government interest in preventing public disclosure of the [particular classified] information" because disclosure "could reasonably be expected to cause serious damage to national security." Gov't App. 19. The judge thus concluded that "[c]losure of a portion of these proceedings [was] necessary to protect information the disclosure of which could reasonably be expected to cause serious damage to national security, including intelligence or law enforcement sources, methods, or activities." *Id.* The following day, the *DuBay* judge held a 75-minute closed hearing. *See* Pet. App. 3.

Neither party objected to the closure. *Id.* at 2; Gov't App. 18. A partially redacted transcript of the closed hearing was publicly released eight days later. Pet. App. 3.

On July 11, 2019, the *DuBay* judge issued his ruling, finding:

> The evidence demonstrates that beginning on or about December 2015, and as recently as on or about January 2019, Mr. al Qosi is part of al Qaeda and has purposefully and materially supported al Qaeda by, *inter alia*: (1) recruiting for AQAP; (2) encouraging lone-wolf attacks against the United States and its allies; (3) providing training in terrorism [and] acting as a leader and member of the AQAP Shura Council.

Gov't App. 33-34.

On May 21, 2020, the USCMCR issued a decision holding that the appeal could not proceed "[u]ntil defense counsel can satisfactorily establish that Al-Qosi has authorized an appeal and has authorized specific counsel to represent him in that appeal and related matters." Gov't App. 53; *see also id.* at 65 ("We reach this conclusion because the scope of Ms. Lachelier's authorized representation of Al-Qosi is, at best, uncertain, and more likely does not extend to prosecuting an appeal. Moreover, Ms. Lachelier has not spoken with Al-Qosi in nearly eight years."). The USCMCR noted that the appeal "might result in Al-Qosi facing (a) prosecution for some or all of the original charges against him, or (b) confinement exceeding the specified term in his pretrial agreement," potential consequences that his counsel is not permitted to risk in the absence of an informed decision by al Qosi to proceed with an appeal. *Id.* at 67. The USCMCR

accordingly abated its proceedings until defense counsel receive explicit authorization to represent him in an appeal before the USCMCR. *Id.* at 68.

## III. Mr. Sundel Seeks Access as "a Member[] of the Public"

Petitioner Philip Lawrence Sundel is a civilian attorney who works for the Military Commissions Defense Organization, which, as noted, is an office within the Department of Defense. Pet. App. 1. Mr. Sundel does not represent al Qosi, but in a motion he submitted to the *DuBay* judge, he sought access to the closed, classified hearing as a "member[] of the public." *Id.* He argued that anyone "possessing adequate security clearances" should be admitted to closed, classified proceedings, irrespective of any need to access the relevant classified information. *Id.* The *DuBay* judge denied Mr. Sundel access because the judge found that Mr. Sundel had failed to establish that he had a "need to know" the classified information that would be discussed at the hearing. *Id.* at 3; *see also* Exec. Order No. 13,526, § 4.1(a), 75 Fed. Reg. 707, 720 (Dec. 29, 2009).

On August 12, 2019, Mr. Sundel filed a brief in the USCMCR asking it to enter an "order allowing [him] access to the closed session transcript." Pet. App. 1 (alteration omitted). In an order issued on October 21, 2019, the USCMCR declined to decide whether it had jurisdiction over Mr. Sundel's request for access to classified information, *id.* at 4, but it nevertheless found that Mr. Sundel was not entitled to any relief because he "has no right to access the classified information

that was presented at the closed session." *Id.* at 5; *see also id.* at 7 ("Mr. Sundel has not provided any case law or statutory support for his claim that he has a right of access to classified information without a need to know that information."). On October 28, 2019, Mr. Sundel filed a motion for reconsideration of the October 21 order. Gov't App. 41-42; Pet. App. 10.

On November 4, 2019, the USCMCR entered an order explaining that there had been an error in the earlier appointment of two of the USCMCR judges to the panel handling this matter. Pet. App. 8. The November 4, 2019 order further explained that on October 29, 2019, the two judges were properly appointed to the panel, and on November 4, 2019, the three panel members had "conferred and reconsidered [the October 21, 2019 order and four other orders] and voted to ratify and reaffirm each of the aforementioned orders." *Id.* at 9. The USCMCR made clear, however, that this ratification did not address or affect Mr. Sundel's motion for reconsideration, which remained "pending." *Id.* at 9 n.2. That same day, the government filed an opposition to Mr. Sundel's pending motion for reconsideration. Gov't App. 44-51.

On November 8, 2019, four days after the USCMCR announced that it was still adjudicating Mr. Sundel's motion for reconsideration, Mr. Sundel filed his petition for review of the USCMCR's October 21, 2019 order in this Court. In his petition, Mr. Sundel bases his claim that this Court has jurisdiction on 10 U.S.C.

§ 950g, and he seeks this Court's "review of a final order of the [USCMCR] issued on October 21, 2019 . . . denying Petitioner's appeal of [the] closure of a post-trial fact-finding hearing." Pet. 1.

On December 27, 2019, the USCMCR completed its adjudication of Mr. Sundel's claim, denying Mr. Sundel's motion for reconsideration. Pet. App. 10-12. The USCMCR held that it lacked appellate jurisdiction over Mr. Sundel's action under the collateral order doctrine, as that doctrine is an interpretation of the term "final decisions" in 28 U.S.C. § 1291, a statutory provision that does not apply to the USCMCR. *Id*.

## SUMMARY OF ARGUMENT

The jurisdictional statute that Mr. Sundel invokes in his petition provides this Court with jurisdiction to review only "the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review)." 10 U.S.C. § 950g(a). The decision that Mr. Sundel asks this Court to review is not a judgment rendered by a military commission that has been approved by a convening authority. Thus, this Court lacks jurisdiction over his petition for review.

The petition is also incurably unripe. It was filed on November 8, 2019, while the issue of Mr. Sundel's claimed right of access to the closed classified

hearing was still pending before the U.S. Court of Military Commission Review. Indeed, the USCMCR had stated, in an order issued a few days earlier, that it was still adjudicating Mr. Sundel's pending motion for reconsideration. Pet. App. 9 n.2. The USCMCR ultimately disposed of Mr. Sundel's claim on December 27, 2019, when it denied his motion for reconsideration. Pet. App. 10-13. Because Mr. Sundel filed his petition for review in this Court while the USCMCR was still adjudicating his motion for reconsideration, his petition for review is incurably unripe.

Finally, the petition for review lacks merit. The First Amendment right of public access does not permit access to hearings that have been closed to protect classified national security information from disclosure, and Mr. Sundel concedes that the hearing at issue was properly closed to the public for that reason. *See* Pet. Br. 12. Mr. Sundel's security clearance did not entitle him to attend a classified hearing that was properly closed to the public. Mr. Sundel has no right to convert the security clearance, which the government granted to him so that he could fulfill his employment duties, into a personal benefit. And, in any event, a security clearance alone is insufficient for access to classified information in the absence of a determination by an appropriate Executive Branch official that the holder has a need to know the classified information in order to conduct or assist in an authorized governmental function. As no such need-to-know determination was

made here, Mr. Sundel's security clearance did not entitle him to access the classified hearing.

## ARGUMENT

### I. This Court Lacks Jurisdiction over the Petition

It is axiomatic that "[f]ederal courts are courts of limited subject-matter jurisdiction," *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 317 (D.C. Cir. 2012), and "'[w]ithout jurisdiction [a] court cannot proceed at all in any cause,'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). "The requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception." *Id.* at 94-95 (quotation marks omitted).

As the Supreme Court has explained, "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004). Congress possesses "'the sole power of creating the tribunals (inferior to the Supreme Court) and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)). For a court to exercise jurisdiction over a case, "the action must be 'described by any jurisdictional statute' as the kind of action

that Congress intended to be subject to 'a court's adjudicatory authority.'" *In re Opinions & Orders by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, __ F.3d __, 2020 WL 2029907, at *2 (FISA Ct. Rev. Apr. 24, 2020) (per curiam) (Cabranes, Tallman, Sentelle, JJ.) (quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962), and *Eberhart v. United States*, 546 U.S. 12, 16 (2005)).

The category of cases assigned by Congress to a particular court is thus found only in "the relevant jurisdictional statutes," *Ankenbrandt,* 504 U.S. at 698, and "is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *accord Gunn v. Minton*, 568 U.S. 251, 256-58 (2013). Rather, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (internal citation omitted); *accord Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008).

### A. The Military Commissions Act Does Not Provide This Court with Jurisdiction over the Petition

Given that courts of appeals have "only [the] jurisdiction [that] Congress has chosen to confer," *Moms Against Mercury v. FDA*, 483 F.3d 824, 827 (D.C. Cir. 2007), and that jurisdiction can be found only in "the relevant jurisdictional statutes," *Ankenbrandt*, 504 U.S. at 698, it is striking that Mr. Sundel's brief does

not include *any* discussion of the text of the relevant jurisdictional provision. *See* Pet. Br. 4-6. Indeed, Mr. Sundel mentions 10 U.S.C. § 950g, the jurisdictional provision cited in the petition, *see* Pet. 1, only to assert that this "Court [has] suggested without deciding that the collateral order doctrine governs its construction of 10 U.S.C. § 950g," and this "Court has recognized the mandamus exception to § 950g's finality requirement." Pet. Br. 5. His reference to mandamus is irrelevant as he does not seek mandamus relief here, and, in any event, mandamus, unlike the appellate review he seeks under Section 950g, does not require a final, appealable judgment. *See Al-Nashiri I*, 791 F.3d at 76 (explaining that the All Writs Act empowers a court to "issue a writ of mandamus *now* to protect the exercise of [its] appellate jurisdiction *later*") (emphasis in original). And while Mr. Sundel is correct that this Court has never decided whether the collateral order doctrine applies to Section 950g, that too is irrelevant. The collateral order doctrine addresses only whether an order or decision is a "final" one, but even if, contrary to the record (*see infra* Part I.B), Mr. Sundel was seeking review of a final decision by the USCMCR, his petition for review would not fall within the jurisdiction provided by Section 950g.

Section 950g grants this Court jurisdiction over a petition seeking review of "the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as

incorrect in law by the [USCMCR])." 10 U.S.C. § 950g(a). Section 950g, as its text makes clear, "requires a final judgment by a military commission, approved by the convening authority," as a prerequisite to this Court's jurisdiction. *Khadr*, 529 F.3d at 1117;[3] *see also Al-Nashiri II*, 835 F.3d at 124-25 ("Before an Article III appellate court may step in, a defendant must first be tried and convicted in the military system, the convening authority must have approved the conviction, and the defendant must appeal the conviction to the CMCR or affirmatively waive his right to do so."). It is, in short, a provision for jurisdiction over an appeal of a "conviction in the military [commission] system." *Al-Nashiri II*, 835 F.3d at 124; *see also* 10 U.S.C. § 950g(d) (defining the scope of this Court's review).

Mr. Sundel does not even argue otherwise; he merely cites the collateral order doctrine. Pet. Br. 4-6. But the collateral order doctrine cannot provide jurisdiction here. As an initial matter, the doctrine is inapplicable because it applies only to "decisions that are conclusive." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quotation marks omitted). Mr. Sundel's claim was not conclusively resolved in the October 21, 2019 order that the petition asks this

[3] Although *Khadr* applied the Military Commissions Act of 2006, these jurisdictional requirements were reenacted in the Military Commissions Act of 2009 and remain in force today. *See* 10 U.S.C. § 950g; *see also Al-Nashiri I*, 791 F.3d at 74 & n.1 (comparing the 2006 and 2009 Military Commissions Acts).

Court to review, but by the December 27, 2019 order issued weeks after Mr. Sundel filed his petition. *See infra* Part I.B.

More broadly, the collateral order doctrine is not an independent basis for jurisdiction but rather "a practical construction" of the term "final" in jurisdictional statutes. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 41-42 (1995) (quotation marks omitted). Thus, for example, the jurisdiction to review "final decisions of the district courts" provided by 28 U.S.C. § 1291 "permits appeals not only from a final decision by which a district court disassociates itself from a case, but also from a small category of decisions that, although they do not end the litigation, must nonetheless be considered 'final'" because they conclusively resolve issues unrelated to the merits that would otherwise be unreviewable on appeal. *Id.* at 42; *see also* Pet. App. 12 (USCMCR explaining that "there is a direct statutory grant of jurisdiction to the courts of appeals to review district courts' final decisions, and the Supreme Court has interpreted that jurisdiction to include certain final collateral orders").

The collateral order doctrine is not limited to Section 1291; it also provides a construction of the term "final" in statutes that provide for the review of certain agency orders, including 28 U.S.C. § 2342, which provides jurisdiction to review "final orders" of specified agencies. *See Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 527-28 (D.C. Cir. 2018); *cf. CalPortland*

*Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 839 F.3d 1153, 1159-60 (D.C. Cir. 2016) (applying the collateral order doctrine to construe the term "an order" in 30 U.S.C. § 816(a), which had previously been interpreted to refer only to final orders). But the collateral order doctrine is limited to construing the term "final" in jurisdictional statutes, and it cannot "manufacture subject matter jurisdiction where none exists." *In re Opinions & Orders*, __ F.3d __, 2020 WL 2029907, at *7.

Because the collateral order doctrine is a tool of statutory construction and not an independent basis for jurisdiction, the doctrine cannot be applied independent of the relevant statutory provision. For example, the Administrative Procedure Act provides for judicial review over "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The collateral order doctrine might inform the question whether a particular decision was final, *see DRG Funding Corp. v. Sec'y of HUD*, 76 F.3d 1212, 1220-21 (D.C. Cir. 1996) (Ginsburg, J., concurring), but it would have no bearing on whether there is another adequate remedy in a reviewing court.

The jurisdictional provision that Mr. Sundel relies on in his petition grants this Court jurisdiction to review "the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [USCMCR])." 10 U.S.C. § 950g(a). Applying the collateral order doctrine to this provision might

inform the construction of the term "final," but the collateral order doctrine has no bearing on whether a particular order is a "judgment rendered by a military commission" that has been "approved by the convening authority." *Id.*; *see also* 10 U.S.C. § 950g(d). As Mr. Sundel does not contest, the order he asks this Court to review is not a judgment rendered by a military commission that has been approved by a convening authority. It is not, in short, a "conviction in the military [commission] system." *Al-Nashiri II*, 835 F.3d at 124.

Because Section 950g does not provide jurisdiction over the petition, and the collateral order doctrine is not an independent basis of jurisdiction, this Court lacks jurisdiction over the petition.

**B. The Petition Is Incurably Unripe**

The law is "well-established that a party may not simultaneously seek both agency reconsideration and judicial review of an agency's order." *Am. Rivers v. FERC*, 895 F.3d 32, 43 (D.C. Cir. 2018) (quotation marks omitted); *see also* 10 U.S.C. § 950g(b) (providing that this Court "may not review a final judgment described in [Section 950g(a)] until all other appeals under [the Military Commissions Act] have been waived or exhausted"). But that is precisely what Mr. Sundel did here: on October 28, 2019, he filed a motion for reconsideration in the USCMCR of that court's October 21, 2019 order, and then, while his motion for reconsideration was still pending, he filed his petition for review in this Court.

Because Mr. Sundel filed his petition for review while his motion for reconsideration "was still pending" before the USCMCR, his petition for review "was incurably premature and must be dismissed for lack of jurisdiction." *Am. Rivers*, 895 F.3d at 43 (quotation marks omitted); *accord Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002).

On October 28, 2019, Mr. Sundel filed a motion for reconsideration asking the USCMCR to reconsider its October 21, 2019 order. *See* Pet. App. 10. On November 4, 2019, the USCMCR issued an order making clear that the motion for reconsideration remained "pending" before it. *Id.* at 9 n.2. Yet, on November 8, 2019, while his motion for reconsideration remained pending before the USCMCR, Mr. Sundel filed his petition in this Court, seeking "review of a final order of the [USCMCR] issued on October 21, 2019 . . . denying Petitioner's appeal of [the] closure of a post-trial fact-finding hearing." Pet. 1; *see also* Fed. R. App. P. 15(a)(2)(C) (requiring petition to "specify the order or part thereof to be reviewed"). He attached that order (and only that order) to his petition. Pet. Ex. A; *see also* Fed. R. App. P. 5(b)(1)(E)(i) (requiring petition to include an attached copy of "the order, decree, or judgment complained of and any related opinion or memorandum"). And in the "ruling under review" section of his brief, Mr. Sundel identifies the October 21, 2019 order as the only order before this Court. Pet. Br. i.

Mr. Sundel did not seek review in this Court of the USCMCR's November 4, 2019 order. Nor could he have, because that order explicitly stated that his motion for reconsideration was "pending," Pet. App. 9 n.2, making it a non-final order. Nor did Mr. Sundel petition in this Court for review of the December 27, 2019 order that finally disposed of his claim before the USCMCR. He only seeks review of the October 21, 2019 order, but because his motion for reconsideration was pending at the time he filed his petition, his petition for review was incurably unripe. *Am. Rivers*, 895 F.3d at 43.

Mr. Sundel's arguments in support of ripeness are meritless. First, he contends that his motion for reconsideration was "denied by default" on November 5, 2019 (15 days after the entry of the October 21, 2019 order, *see* USCMCR Rule of Practice 20(a)) because "the [USCMCR] neither entered an order announcing its intent to reconsider, nor took any other action with respect to Petitioner's motion for reconsideration." Pet. Br. 8. This contention is puzzling because on November 4, 2019, the USCMCR did enter an order that announced that Mr. Sundel's motion for reconsideration was "pending" before it. Pet. App. 9 n.2.

Mr. Sundel argues in the alternative that the October 21, 2019 order was "void" when issued because the USCMCR panel had not been properly appointed, and therefore his motion for reconsideration was "nullified." Pet. Br. 9. But if that

is correct, then his petition for review in this Court is equally "nullified" because it too seeks review of only the allegedly void October 21, 2019 order. This Court cannot review a "void" order. Such an order would have no legal effect on Mr. Sundel, and thus he would lack standing to petition for review. *See Am. Rivers*, 895 F.3d at 40-41 (explaining that a petitioner must meet the Article III standing requirements, including injury-in-fact and redressability).

The USCMCR's December 27, 2019 order denying Mr. Sundel's motion for reconsideration is the only ruling that finally disposed of his claim in the USCMCR. Thus, his petition for review, filed in this Court on November 8, 2019, while the USCMCR was still adjudicating Mr. Sundel's motion for reconsideration, is incurably unripe.

## II. The Petition Lacks Merit

In addition to falling outside the jurisdiction of this Court, Mr. Sundel's petition is meritless. Members of the public do not have a First Amendment right to attend a hearing that has been properly closed in order to protect classified national security information. *Dhiab v. Trump*, 852 F.3d 1087, 1097-98 (D.C. Cir. 2017).

### A. There Is No Right of Access to a Hearing Where Classified National Security Information Is Discussed

Mr. Sundel relies on the qualified First Amendment right of public access recognized by the Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). That qualified right of access applies to judicial proceedings where both (1) "the place and process have historically been open to the press and general public," and (2) "public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8. Where the right applies, it can be overcome, and a proceeding closed, where "specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 13-14 (quotation marks omitted).

One of those "higher values," *id.*, is the protection of national security, which is "an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *see also Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.") (quoting *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)). To close a hearing in order to protect national security, the presiding "court 'need only be satisfied that there is a reasonable danger [that a public hearing] w[ould] expose" classified information "which, in the interest of national security, should not be divulged.'" *Dhiab*, 852 F.3d at 1095 (Op. of Randolph,

S.J.) (quoting *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978)); *see also id.* at 1102 (Rogers, J., concurring in part and concurring in the judgment) ("The [Supreme] Court's test protects against threats to our nation's security by prohibiting disclosure when it will cause a substantial probability of harm to an overriding interest.") (quotation marks omitted).

The First Amendment right recognized in *Press-Enterprise* does not entitle a member of the public to attend a judicial hearing at which classified information will be discussed. As an initial matter, such a hearing does not meet the *Press-Enterprise* test for application of the right because "from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information involved in civil cases, or for that matter, in criminal cases. The tradition is exactly the opposite." *Dhiab*, 852 F.3d at 1094 (Op. of Randolph, S.J.).

And, in any event, the need to protect national security in this case "clearly overcomes" any First Amendment right, permitting closure of the hearing to the public. *Id.* at 1097 (Op. for the Court) ("The government's interest in ensuring safe and secure military operations clearly overcomes any qualified First Amendment right of access."). This Court, like other courts, routinely closes its hearings "when classified information might be revealed during an oral argument in [its] courtroom." *Id.* at 1094 (Op. of Randolph, S.J.). In the words of Judge

Randolph: "One may be confident that over many years none of the members of our court, past and present, ever supposed that in [doing so in compliance] with the Chief Justice's rules,[4] we were somehow violating the Constitution." *Id.*

Of course, this Court's practice of closing hearings to protect classified information from disclosure is perfectly constitutional. Indeed, "[i]t bears repeating that the government has a compelling interest in protecting the secrecy of information important to our national security." *Id.* at 1098 (Op. for the Court) (quotation marks omitted). Where material has been properly classified, "[b]y definition, the unauthorized disclosure of [that information] reasonably could be expected to cause serious damage to the national security." *Id.* (quotation marks omitted). For this reason, this Court in *Dhiab* denied the claim by a group of media organizations that they had a First Amendment right of access to classified material filed in a district court proceeding. *Id.* at 1096-98.

Nor can there be any doubt that the *DuBay* judge in this case made the requisite finding that weighty national security interests would have been endangered in the absence of a closure order. *See* Gov't App. 19. Neither party objected to the *DuBay* judge's conclusion that there was an "overriding

[4] *See* 18 U.S.C. app. 3 § 9 note (Security Procedures Established Pursuant to Pub. L. No. 96-456, 94 Stat. 2025 (1980), by the Chief Justice of the United States for the Protection of Classified Information).

government interest in preventing public disclosure of the [particular classified] information" to be discussed in the closed hearing because disclosure "could reasonably be expected to cause serious damage to national security." *Id.* Mr. Sundel does not object to that conclusion even now. To the contrary, he concedes "that the existence of a compelling interest [in closure] was established by the anticipated introduction into evidence of classified information." Pet. Br. 12 (citing *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989)). Moreover, the closure order was narrowly tailored, lasting only 75 minutes and limited to a discussion of classified information.

Once a hearing is lawfully closed to the public, as occurred here, it follows *a fortiori* that members of the public have no right, constitutional or otherwise, to attend the hearing. Because Mr. Sundel bases his claim on his status as a member of the public, and because the hearing was properly closed to the public, his claim necessarily fails.

### B. Mr. Sundel's Security Clearance Does Not Entitle Him To Access Classified Information in the Absence of an Executive Branch Determination that He Has a Need To Know

That Mr. Sundel may be one of approximately four million people who possess a security clearance, *see* Pet. Br. 14 n.4, makes no difference to the outcome of his petition. *See United States v. Asgari*, 940 F.3d 188, 191 (6th Cir. 2019) ("the existence of a security clearance by itself does not change the equation

or offer a legitimate basis for changing course"). The holder of a security clearance can assert no personal right based on his security clearance because he may not convert the security clearance that the government has provided to him, to enable the performance of assigned governmental functions, into a personal benefit. And a security clearance does not, in any event, authorize its holder to access classified information unless an appropriate official within the Executive Branch has determined that the holder has a need to know the information in order to support or carry out a lawful and authorized governmental function. There has been no such determination here, and Mr. Sundel has no such need-to-know.

Mr. Sundel's security clearance is not a personal benefit that affords him rights in his private capacity as a member of the public. Rather, his security clearance was granted for use in his official capacity as a Department of Defense employee for the purpose of carrying out his official responsibilities. Like others granted a security clearance, he agreed that classified information remains "the property of, or under the control of[,] the United States Government." Pet. App. 41. He is forbidden from converting either the government-issued security clearance or any classified information for his personal use. *See* 18 U.S.C. § 641.

But that is precisely what he is attempting to do here. He seeks to assert a personal right—the right to attend a classified hearing as a member of the public—that he claims to have only because of a government-provided security clearance.

And he seeks to acquire classified information for himself, in his personal capacity as a member of the public, rather than in his official capacity in order to undertake his duties as a Department of Defense employee.

In any event, the granting of a security clearance does not entitle its holder to *carte blanche* access to classified national security information. A security clearance is insufficient, by itself, to enable its holder to access classified information. Rather, the holder of an appropriate clearance may only access classified information for which he has a "need-to-know." Exec. Order No. 13,526, § 4.1(a), 75 Fed. Reg. 707, 720 (Dec. 29, 2009) (providing that a person "may have access to classified information provided that: (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee; (2) the person has signed an approved nondisclosure agreement; *and* (3) *the person has a need-to-know the information*") (emphasis added). A "need-to-know" means "a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." *Id.* § 6.1(dd), 75 Fed. Reg. at 729.

Thus, in order to access classified information, "in addition to having the requisite clearance[,] the seeker must convince the holder of the information of the seeker's need to know it." *United States v. Daoud*, 755 F.3d 479, 484 (7th Cir.

2014). If security cleared individuals lack a need-to-know, "their security clearances [do] not entitle them to any of those materials." *Id.* Thus, even security-cleared defense attorneys may be denied access to case-related classified materials where they lack the requisite need-to-know. *Id.* at 484-85 (reversing district court order allowing cleared defense counsel access to classified materials pertaining to electronic surveillance of the defendant); *Asgari*, 940 F.3d at 191-92 (reversing, as an abuse of discretion, district court order granting cleared defense counsel access to classified materials over the government's objection).

Mr. Sundel is not even counsel to a party in this case, and the *DuBay* judge and the USCMCR were correct to deny him access to classified information that he had no need to know. *See* 10 U.S.C. § 949p-1(a) ("Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information.").

The need-to-know determination does not depend on the trustworthiness of the particular individual, but rather recognizes that every additional individual entrusted with a piece of classified information raises the risk of a harmful disclosure of that information to the detriment of national security. *See Asgari*, 940 F.3d at 192 ("Even the most competent and ethical lawyers make mistakes."); *Colby v. Halperin*, 656 F.2d 70, 72 (4th Cir. 1981) ("Disclosure to one more person, particularly to one found by the [Government] to be a person of discretion

and reliability, may seem of no great moment, but information may be compromised inadvertently as well as deliberately."). The need-to-know determination balances this added risk against the government's operational requirements, allowing for dissemination, and the additional risk this entails, only where the recipient (in addition to holding an appropriate security clearance) has a need to know the information in order to support or carry out an authorized governmental function.

While Mr. Sundel argues that he has a need-to-know, he does not explain how his access as a member of the public to the classified information at issue is necessary for him "to perform or assist in a lawful and authorized governmental function." Exec. Order No. 13,526, § 6.1(dd), 75 Fed. Reg. at 729. And, in any event, the need-to-know determination must be made by an authorized official within the Executive Branch, and not by a member of the public or by a government employee acting in his personal capacity. *Id.* The Supreme Court has explained that the authority to determine who may have access to any particular classified information "is committed by law to the appropriate agency of the Executive Branch," which has "broad discretion to determine who may have access" to such information. *Dep't of Navy v. Egan*, 484 U.S. 518, 526-27, 529 (1988). Here, the Department of Defense has made no determination that Mr. Sundel has a need to know the classified information at issue.

Because there has been no Executive Branch determination that Mr. Sundel has a need to know the classified information discussed in the closed portion of the *DuBay* hearing, his security clearance is insufficient to entitle him to access that information. Moreover, because the July 13, 2019 hearing was properly closed (as Mr. Sundel concedes) in order to protect national security, Mr. Sundel had no First Amendment right to attend that closed hearing as a member of the public, and he has no right of access to the classified transcript of that hearing.

## CONCLUSION

For the reasons set forth above, the petition for review should be dismissed for want of jurisdiction. If the Court finds that it has jurisdiction, it should affirm the decision of the USCMCR.

May 27, 2020

Respectfully submitted,

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DATED: May 27, 2020

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Numbers 19-1234.

I hereby certify that I electronically filed the foregoing Response Brief of the United States 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 May 27, 2020.

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DATED: May 27, 2020

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