[ARGUMENT NOT YET SCHEDULED]
UNITED STATES COURT OF APPEALS
***for the* District of Columbia Circuit**

In re: ABD AL-RAHIM HUSSEIN AL-NASHIRI,	)	No. _______________
	)	**PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION**
	)	Dated: October 15, 2021

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(U) CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(U) I. Parties and *Amici* Appearing Below

(U) The parties and *amici* who appeared before the United States Court of Military Commission Review were:

(U) 1. Abd Al-Rahim Hussein Al-Nashiri, *Petitioner*

(U) 2. United States of America, *Respondent*

(U) II. Parties and *Amici* Appearing in this Court

(U) 1. Abd Al-Rahim Hussein Al-Nashiri, *Petitioner*

(U) 2. United States of America, *Respondent*

(U) III. Rulings under Review

(U) The Court of Military Commission Review issued an order, in effect, dismissing a petition seeking the relief now sought in this Court as moot. A238-A243. COL Lanny Acosta, USA, issued two orders relevant to the relief now sought. A227-A237.

(U) IV. Related Cases

(U) This case has not previously been filed with this court or any other court. Petitioner has a habeas petition in the United States District Court for the District of Columbia, Case No. 08-1207.

(U) Dated: October 15, 2021

(U) By: /s/ Michel Paradis

(U) *Counsel for Petitioner*

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(U) GLOSSARY OF TERMS

(U) CMCR .... United States Court of Military Commission Review

(U) MCA .... Military Commissions Act, Pub. L. No. 111-84 (2009)

(U) MCRE ...........................U.S. Dep't of Def., *Manual for Military Commissions*, Part 3, Military Commission Rules of Evidence (2017)

(U) RMC..............................U.S. Dep't of Def., *Manual for Military Commissions*, Part 2, Rules for Military Commissions (2017)

(U) RTMC .... U.S. Dep't of Def., Regulation for Trial by Military Commission (2011)

(U) UCMJ.. Uniform Code of Military Justice

(U) USN...United States Navy

(U) USAF ....United States Air Force

(U) USA...United States Army

(U) USMC .... United States Marine Corps

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(U) INTRODUCTION

(U) Petitioner was charged before a military commission on capital terrorism charges in 2008. Those proceedings remain ongoing, though no trial date has yet been set. For the six years preceding his being charged, Respondent held Petitioner incommunicado in various "black sites" that were operated by the CIA and subjected him to a protracted campaign of "extreme physical, psychological, and sexual torture" for the purpose of obtaining statements from him during uncounseled interrogations. A221. The last of these uncounseled interrogations was conducted from January 31, 2007, through February 2, 2007. For the purposes of this litigation, Respondent stipulates that its abuse of Petitioner met the legal definition of torture as well as cruel, inhuman, or degrading treatment. This stipulation is supported by any review of the record.

(U) Under 10 U.S.C. § 948r(a), any statements obtained by such methods are inadmissible as evidence "in a military commission …, except against a person accused of torture or such treatment as evidence that the statement was made." Section 948r(a)'s language closely tracks the prohibition contained in Article 15 of the Torture Convention, which is universally interpreted to also forbid the use of evidence obtained by torture for any reason other than proving torture. Nevertheless, the military commission prosecutors in Petitioner's case, and COL Lanny Acosta, USA, the military commission judge Respondent assigned to

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preside over Petitioner's case, have concluded that such statements are admissible as evidence without limitation on any question decided by the military commission judge alone.

(U) Petitioner became aware of Respondent's policy and practice of treating evidence barred by § 948r(a) as generally admissible for the purpose of deciding what has been variously described as "interlocutory" or "preliminary" questions by chance. In May 2021, Respondent included six sentences of argument in a classified pleading relating to discovery, which characterized the factual content of statements obtained from Petitioner while he was being held in the CIA's black sites. Respondent then included summarized versions of those statements as exhibits in support of its pleading.

(U) When Petitioner moved to strike these six sentences, Respondent stipulated that all of these statements would fall under the prohibition of § 948r if offered as evidence at Petitioner's ultimate trial. But Respondent argued that such statements were admissible for the purpose of resolving *any* interlocutory question without limitation. And it further suggested that its use of such evidence had been long accepted to the point of routine in *ex parte* discovery litigation.

(U) COL Acosta agreed with Respondent and ruled that "the prohibition on statements obtained by torture contained in 10 U.S.C. § 948r(a) applies to the admission of those statements into evidence at trial." A231-A232. As a

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consequence, he held "10 U.S.C. § 948r(a) does not bar the Commission from considering the statements referenced … on relevant interlocutory issues." *Ibid*.

(U) Petitioner filed a writ of mandamus in the Court of Military Commission Review ("CMCR"), seeking both the vacatur of COL Acosta's order and the reconsideration of any military commission ruling where Respondent had offered *ex parte* pleadings or arguments that relied upon evidence obtained by torture. The CMCR issued an order to show cause. But rather than respond on the merits, Respondent moved COL Acosta to voluntarily withdraw without prejudice its reliance on the six sentences and two exhibits that had brought its policy to light. Respondent was clear that this voluntary withdrawal did not reflect a change in its legal position or litigation policy and it sought neither the vacatur of COL Acosta's order, nor a ruling that such evidence was inadmissible. Instead, Respondent's stated purpose was its desire to moot the petition in the CMCR.

(U) COL Acosta granted Respondent's motion and, in lieu of filing a merits response in the CMCR, Respondent moved to dismiss the petition below as moot. In an order that is difficult to parse and is entitled "Order Dismissing Petition," the CMCR effectively granted Respondent's motion, writing that COL Acosta's "reconsideration and respondent's withdrawal of the contested language renders the matter moot." A242. The CMCR then held that any further review of Respondent's policy and practice of using evidence obtained by torture was "not

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ripe." *Ibid*. And it denied any relief affecting the military commission's previous *ex parte* rulings on the ground that Petitioner had not shown that COL Acosta had, in fact, relied upon such evidence in making those rulings. *Ibid*. This was despite Respondent's never disputing its regular use of such evidence in *ex parte* litigation.

(U) Petitioner does not come to this Court lightly. He is fully aware that mandamus is a "drastic" remedy reserved for extraordinary circumstances. But the United States Government's use of torture to win a capital conviction is extraordinary by any standard. And the military commission system has left no alternative but this Court's intervention to ensure Respondent's compliance with Congressional and international law.

(U) Petitioner's entitlement to relief is clear and indisputable because the use of torture and its fruits in any judicial proceeding is categorically prohibited by statute, under the Constitution, and as a *jus cogens* norm of international law. Respondent's stated policy of treating these prohibitions as inapplicable to nearly all phases of military commission litigation, except the narrow confines of the trial itself, violates the plain meaning of § 948r, contravenes centuries of clear and unambiguous case law, and subverts a judicial guarantee that is recognized without qualification as indispensable by every civilized justice system.

(U) Petitioner has no other means to enforce this prohibition because neither military commission prosecutors nor the military commission judge believes such

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a prohibition exists. It was only by chance that Petitioner recently learned of Respondent's practice of using evidence obtained by torture. The extent of its actual use is necessarily unknown to Petitioner because the vast majority of discovery litigation is *ex parte* and therefore shielded from the rigors of adversarial scrutiny. But the fact that Respondent would rather manufacture a specious mootness argument than hazard a ruling on the merits of its practice highlights why prompt action from this Court is the only way to prevent the military commission system from playing fast and loose with a principle as legally and morally fundamental to the rule of law as the prohibition on torture.

(U) Finally, the writ is appropriate under the circumstances of this case for two equally compelling reasons. *First*, the question of when, if ever, Respondent may use evidence obtained by torture to obtain a military commission conviction is pervasively significant. Deciding the question presented now, with the benefit of an undisputed record and a merits decision on a pure question of law below, will enable this Court to correct an error that threatens to poison every conviction the military commissions may ultimately yield. *Second*, mandamus is uniquely appropriate to prevent the legal system from being implicated in a *jus cogens* violation of international law. If mandamus is ever appropriate, it is to prevent errant military commission personnel from making the United States a rogue state.

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(U) JURISDICTION

(U) This Court has exclusive supervisory jurisdiction over the military commissions system pursuant 10 U.S.C. § 950g. This Court has jurisdiction to issue all writs necessary and appropriate in aid of that jurisdiction pursuant to 28 U.S.C. § 1651.

(U) RELIEF SOUGHT

(U) Petitioner asks this Court to issue a writ of mandamus and prohibition: 1) enjoining Respondent and its agents from offering the fruits of the use of torture or cruel, inhuman, or degrading treatment in violation of 10 U.S.C. § 948r as evidence in any military commission proceeding, 2) enjoining the military commission judge from considering such evidence, and 3) vacating all orders predicated upon pleadings or arguments that have offered such evidence.

(U) ISSUE PRESENTED

(U) Are statements obtained by torture admissible in a military commission for the purpose of litigating questions decided by a military commission judge alone?

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(U) STATEMENT OF FACTS

(U) A. Petitioner's Initial Seizure and Confinement

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(U) B. Military Commission Proceedings.

(U) In 2008, Respondents ordered Petitioner to stand trial before a military commission for capital charges that alleged his involvement in terrorist plots in Yemen between 2000 and 2002. These charges were withdrawn in 2009 and brought again in 2011 under the Military Commissions Act of 2009 ("MCA"), 123 Stat. 2190 §§ 1801-1807 (codified at 10 U.S.C. §§ 948a, *et seq*.).

(U) Over the past decade, the military commission proceedings against Petitioner have been plagued by irregularity, political interference, and delay, including three interlocutory appeals brought by counsel for the prosecution to the Court of Military Commission Review. The last of these interlocutory appeals was occasioned by the decision of a prior military commission judge, Col. Vance Spath, USAF, to abate proceedings altogether in February 2018. In the course of litigating that appeal, Petitioner discovered that Col. Spath had been secretly negotiating for a job as an Immigration Judge, which ultimately led this Court to vacate a portion of the proceedings below for relitigation before a new military commission judge. *In re Al Nashiri*, 921 F.3d 224 (D.C. Cir. 2019).

(U) In 2019, COL Lanny Acosta, USA, was assigned to preside as the military commission judge in Petitioner's case and ordered the parties to submit a list of rulings to be reconsidered. Counsel for the prosecution sought to have thirty (30) rulings that COL Spath had issued under what generally referred to as the

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"505 Process" reaffirmed, which had yielded approximately 30,000 pages of summaries and other substituted discovery that COL Spath had permitted Respondent to provide Petitioner in lieu of otherwise discoverable documents.

(U) The 505 Process governs the discovery of classified information in military commission proceedings. Once a military commission judge has found that certain classified information meets the statute's heightened standard of discoverability (*i.e.* both relevant and material to the defense), Respondent is permitted to withhold that discovery by invoking the state secrets privilege. 10 U.S.C. § 949p-4(a)(1); MCRE 505(f)(1)(A). If the military commission judge finds that the information over which privilege has been asserted must be provided to the defense to ensure a fair trial, military commission prosecutors are, in turn, entitled to make an *ex parte*, *in camera* presentation arguing why that information should nevertheless be withheld, summarized, or substituted. 10 U.S.C. § 949p-4(a)-(b); MCRE 505(f). A military commission judge can then permit the withholding, summarization, or substitution of the ordered discovery in an *ex parte*, *in camera* ruling, upon a finding that doing so "would provide the accused with substantially the same ability to make a defense as would discovery of or access to" the underlying information. 10 U.S.C. § 949p-4(b)(3); MCRE 505(f)(2)(C).

(U) Because this process permits Respondent to withhold otherwise relevant and material discovery, the MCA and its implementing rules require Respondent to

make a robust factual presentation to support such a request. The statute envisions not just "written submission[s]" but also oral arguments supported by exhibits to be "received by the court as part of the ex parte presentation[.]" 10 U.S.C. § 949p-4(b)(2); MCRE 505(f)(2)(B). The Military Commission Rules of Court ("RC") both reflect and make provision for the vast amount of evidence submitted in these *ex parte* presentations. They require not just "an index that contains a detailed description of each item to be reviewed," but also contemplate multiple binders of exhibits that must be sequentially numbered and indexed. RC 11.4.a.(3)-(5).

(U) Such presentations have been frequent in Petitioner's case. In the past decade of pre-trial proceedings, Respondent has availed itself of the 505 Process to withhold, summarize, or substitute categories of discoverable information at least one-hundred-eleven (111) times. Thirty (30) of these filings - approximately 29% of the total - relate to Petitioner's treatment in the black sites. Seven (7) pertain to discovery relating to Mr. Mohsen Al-Fadhli, who was killed in a drone strike in July 2015 and allegedly facilitated Al Qaeda's operations in Yemen. Others range from information about the nature of "hostilities" between the United States and Al Qaeda to *ex parte* communications between military commission prosecutors and the CMCR. Of the seventy-four (74) that do not pertain directly to the black sites or Mr. Al-Fadhli, sixty-one (61) - or 82% - bear no titles indicating subject-matter.

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(U) Some of these *ex parte* presentations challenge the relevance and materiality of previously-ordered discovery, effectively seeking *ex parte* reconsideration of prior discoverability findings. For example, one pleading is styled as a request for a protective order "Authorizing the Gov to Withhold Info Not Actually Noncumulative, Relevant, and Helpful, Thus Not Discoverable." AE 337. Others relate to the questioning of potential witnesses. *See*, *e.g.*, AE 399BB at 2 ("the Government's proposed protocol governing the process by which the Defense may request to interview certain witnesses associated with the motions set forth in AE 399 and AE 419.").

(U) In practice, though the 505 Process is highly fact-dependent, the extent and quality of record keeping is inconsistent. For example, review of some *ex parte* presentations has been delegated to staff attorneys with the Military Commissions Trial Judiciary, to include oral arguments where the military commission judge is not present. AE 435B; AE 399BB at 2. No transcripts of these sessions are produced or retained. AE 399BB at 2-3.

(U) C. Proceedings Giving Rise to this Action

(U) On January 5, 2017, Respondent was ordered to produce discovery relating Mr. Al-Fadhli. AE 353C. On February 19, 2021, COL Acosta ordered Respondent to provide a status report respecting its compliance with this and other discovery orders. AE 353U. On March 19, 2021, Respondent filed AE 353V, which

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is classified, and provided facts and argument for why Respondent had met or would meet its discovery obligations. In an unclassified paragraph, this pleading invited COL Acosta's attention to a classified addendum, identified as "Attachment E," which "outlines a view of the roles of Mr. Fadhli and Abu Assem Al-Makki—and by implication of Mr. Al-Nashiri's role—that is necessarily that of the Prosecution." AE 353V at 21. It argued that, in determining its discovery obligations, "there is a need to consider the Prosecution's recitation of facts." *Ibid*. These "facts" included statements attributed to Petitioner while being tortured. AE 353V, Attach. E at 3; 6.

(U) On March 21, 2021, Petitioner filed a timely motion to strike, objecting to the inclusion of Attachment E as well as Respondent's use of evidence in violation 10 U.S.C. § 948r(a). AE 353W. Petitioner further challenged Respondent's practice, suggested in its motion papers, of relying on statements obtained by torture in its *ex parte* presentations under the 505 Process. *Id*. at 3-4.

(U) Respondent opposed Petitioner's motion. For purposes of litigation, it did not dispute that Attachment E would "fall within the section 948r(a) prohibition" if admitted at trial. AE 353Y, at 5. Respondent also did not dispute that it had relied upon such evidence in *ex parte* litigation and, instead, reaffirmed its view that the "matters it has and will submit *ex parte* fall under statutory authority for doing so and that these matters properly bear upon the Military Judge's assessment of whether proposed substitutes are adequate, will protect

national security, and are otherwise compliant with the M.C.A." *Id*. at 20 n.8. Respondent nevertheless argued that its use of such evidence was permissible for the litigation of "interlocutory questions" and highlighted the fact that "the Military Judges detailed to this case have also had to delve into a large body of statements of Mr. Nashiri, presumably including ones coming within the section 948r(a) admissibility prohibition." AE 353Y at 25.

(U) On May 18, 2021, COL Acosta denied Petitioner's motion to strike. A227. He concluded that "the prohibition on statements obtained by torture contained in 10 U.S.C. § 948r(a) applies to the admission of those statements into evidence at trial." A231. As a consequence, "10 U.S.C. § 948r(a) does not bar the Commission from considering the statements referenced in AE 353W on relevant interlocutory issues." A232.

(U) On June 3, 2021, Petitioner filed a petition in the CMCR seeking "a writ of mandamus and prohibition vacating Ruling AE 353AA, ... and directing COL Acosta to reconsider any other ruling on which the government offered *ex parte* evidence that is inadmissible under 10 U.S.C. § 948r without considering or relying upon the inadmissible evidence." *United States v. Al-Nashiri*, Case No. 2021-01, Petition, at 1 (C.M.C.R., June 3, 2021).[1] Among the allegations contained

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[1] *Available at* https://int.nyt.com/data/documenttools/petition-for-a-writ-of-mandamus-and-prohibition/c4364a7fa545671f/full.pdf

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in the Petition was that Respondents had engaged in a "practice, suggested in its motion papers, of relying on statements obtained by torture in *ex parte* sessions with the military judge." *Id*. at 5.

(U) On June 10, 2021, the CMCR issued an order to show cause, directing Respondent to respond on the merits within thirty (30) days. Respondent sought and obtained a series of extensions of its deadline to respond until September 13, 2021. In the middle of July, Respondent moved the Commission to voluntarily withdraw the six sentences that had used evidence derived from torture. AE 353EE. Though framed as a "motion to reconsider," Respondent's filing did not ask COL Acosta to vacate or revise his prior ruling. Rather, Respondent was candid that its sole purpose in filing its "motion for reconsideration" was to "establish strong grounds to moot the issue before the U.S. Court of Military Commission Review." AE 353EE at 5. Mooting the CMCR's need to reach the merits, in Respondent's view, served "the overall interests of judicial economy, before this Commission and before the U.S. Court of Military Commission Review." *Ibid*.

(U) COL Acosta obliged. AE 353II at 4. The reason for this, he stated, was not because Respondent's previous reliance on evidence obtained by torture was unlawful. It was because doing so "will best serve the interests of justice and judicial economy." *Ibid*. And while COL Acosta granted Respondent's motion, it notably

did not purport to vacate, supersede, or materially amend his ruling upholding Respondent's policy and practice of using evidence obtained by torture to litigate "interlocutory questions."

(U) On September 10, 2021, Respondent filed a motion to dismiss in the CMCR, contending that the petition below was now moot, in lieu of a responsive brief on the merits. On September 15, 2021, Petitioner filed his brief in opposition arguing that the AE 353II failed to accord Petitioner either form of relief sought from this Court and that, in any event, Respondent's effort to moot this case was simply an exercise in voluntary cessation.

(U) On September 20, 2021, the CMCR issued an order captioned "Order Dismissing Petition." In that order, this CMCR acknowledged that despite Respondent's voluntary withdrawal, COL Acosta's ruling remained law-of-the-case and left open the possibility that COL Acosta would continue to rely on evidence obtained by torture. A240 n.3. Three paragraphs later, however, CMCR construed this ruling as having a "limited scope," which in the CMCR's view left open whether COL Acosta would actually rely on evidence obtained by torture in the future. *Ibid*. The CMCR held that the case was "now moot[,]" since Petitioner had "already obtained all the relief that it has sought." A241. But it then stated "[i]f Judge Acosta used" evidence obtained by torture "to support a [past] interlocutory decision, then this admissibility issue would not be moot, and it would be ripe." A242.

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(U) The CMCR then indicated that the legality of Respondent's use of such evidence is *not* moot. A242. It noted that a "'weak assurance' about the likelihood of recurrence of the agency policies" was insufficient to moot challenge to those policies, A241 (citing *Payne Enters. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988)), and cited the relevant Supreme Court case law on voluntary cessation. A242. Yet, immediately after doing so, the CMCR stated without explanation that "the petition for the instant writ [has been] render[ed] ... moot." *Ibid*. It held that the admissibility of evidence obtained by torture was not ripe because Respondent's future reliance on such evidence is "contingent." *Ibid.* It faulted Petitioner for failing to prove that COL Acosta had "considered any other statements from petitioner that were obtained during the RDI program," for example, in the *ex parte* 505 Process. A241. But it then concluded, "[s]ome limited relief" was called for "to clarify the evidence being considered at petitioner's military commission." A242.

(U) The CMCR then granted the vacatur of AE 353AA, despite the fact that it had previously concluded this request was moot, granted Respondent's motion to file a motion to dismiss, and denied the petition, not on mootness grounds, but on the lack of a factual record supporting the vacatur of *ex parte* rulings. It did not, however, dismiss the petition.

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(U) REASONS FOR GRANTING THE WRIT

(U) In the military commission context, the All Writs Act empowers this Court to "issue all writs necessary or appropriate in aid of our jurisdiction such that we can issue a writ of mandamus *now* to protect the exercise of our appellate jurisdiction *later*." *In re al-Nashiri*, 791 F.3d 71, 75-76 (D.C. Cir. 2015) (cleaned up) (original emphasis). On the merits, writs of mandamus turn on three factors:

> First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires.... Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney v. United States District Court, 542 U.S. 367, 380-81 (2004) (cleaned up). Here, all three factors are readily met.

(U) I. IT IS CLEAR AND INDISPUTABLE THAT EVIDENCE OBTAINED BY TORTURE IS INADMISSIBLE AT ALL PHASES OF A MILITARY COMMISSION PROSECUTION.

(U) A. Section 948r's prohibition on the use of evidence obtained by torture is categorical.

(U) In a section entitled, "Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment," the MCA bars the use of such evidence in the broadest possible terms:

> No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment …, whether or not under

> color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

10 U.S.C. § 948r(a). This provision's one – and only – exception is drawn from the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 15), Dec. 10, 1984, 1465 U.N.T.S. 85 ("Torture Convention"), and permits the use of evidence obtained by torture for the purpose of proving torture.

(U) This past spring, Respondent revealed that it did not view this prohibition as categorical, or even as a prohibition. Instead, it insisted that § 948r(a) only "pertain[ed] to evidence for trial on the general issues of guilt or sentencing," AE 353Y, at 17, and that it was Respondent's policy and practice to use such evidence without limitation "to resolve preliminary questions." *Id*. at 4. COL Acosta agreed with Respondent and ruled that when resolving "preliminary" and "interlocutory" questions (*i.e.* questions decided by a military commission judge alone), he was not bound by § 948r(a). A231.

(U) Simply as a matter of statutory interpretation, this narrowing of § 948r(a) is clearly and indisputably wrong because if Congress wanted to create an "interlocutory questions" exception to the general prohibition on the use of evidence obtained by torture, it would have provided for one. Instead, Congress enumerated one explicit exception, permitting the use of such statements solely for

the purpose of proving torture, and "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Const.*, 446 U.S. 608, 616–17 (1980).

(U) COL Acosta based this additional, atexual exception for "interlocutory questions" on the language of § 948r(c), which governs the admissibility of statements made by the accused in general. Because that provision states a "statement of the accused may be *admitted in evidence* in a military commission" under prescribed circumstances, COL Acosta reasoned, "There is no reason to believe that Congress intended to use those similar and related terms within the same provision of the statute to refer to substantially different procedures for handling statements made by an accused." A229.

(U) As an initial matter, even assuming the language of § 948r(c) excluded evidence only from trial proceedings, COL Acosta's reasoning is backwards. When Congress uses "certain language in one part of the statute and different language in another," courts must presume, in the absence of strong evidence to the contrary, that "different meanings were intended." *Sosa v. Alvarez–Machain*, 542 U.S. 692, 711, n. 9 (2004).

(U) But even had Congress used the same phrase in § 948r(a) as it did in § 948r(c), that language choice would still not support the inference that these

provisions apply only to evidence offered at trial. Section 948r is one of three sections included within the MCA's subchapter on "Pre-trial Procedures." Had Congress intended the scope of any of its provisions to govern only military commission trial procedures, it is difficult to understand why Congress did not include those provisions in the immediately following subchapter, governing "Trial Procedure." *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); *Sierra Club v. E.P.A.*, 325 F.3d 374, 381 (D.C. Cir. 2003).

(U) COL Acosta ignored the structure of the MCA and instead devoted most of his ruling to the various ways the words "admissible," "inadmissible," and "evidence" can be used. In support of his conclusion that § 948r only regulates what evidence may be admitted at trial, he chiefly relied upon the wording of § 949a(b)(3)(D), which is contained in the MCA's "Trial Procedure" subchapter and directs the Secretary of Defense to promulgate rules of procedure that include, *inter alia*, specific standards for when hearsay may be "admitted in a trial by military commission." A229-A230.

(U) But the use of the phrase "admitted *in a trial by* military commission" in the subchapter on "Trial Procedure" simply reaffirms the broader sweep of the torture prohibition contained in § 948r(a). "Where Congress includes particular language in one section of a statute but omits it in another provision of the same Act, it is generally presumed that Congress acts intentionally and purposefully in

the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (cleaned up).

(U) In fact, COL Acosta ignored the subsection that precedes the subsection governing the use of hearsay at trial, even though that subsection squarely instructs the Secretary to promulgate rules governing when coerced evidence should be "excluded from trial by military commission." 10 U.S.C. § 949a(b)(3)(B). This subsection instructs the Secretary to promulgate rules that make statement evidence admissible at trial "so long as the evidence complies with the provisions of section 948r of this title." This subsection would be wholly redundant if the scope of § 948r was already limited to trial proceedings.

(U) This redundancy would also lead to anomalous results. Between the prohibitions on the use of statements obtained by torture, § 948r(a), and the use of coerced statements of the accused, § 948r(c), is the general right of all persons not "to testify against himself or herself at a proceeding of a military commission." 10 U.S.C. § 948r(b). If the scope of § 948r were limited to trial proceedings, the compulsory self-incrimination of any witness would only be prohibited during a military commission trial. There is no sound reason why Congress would afford witnesses the right against self-incrimination when giving trial testimony, but not when called to testify on "interlocutory questions." And even assuming a carve-out for § 948r(b), so that it would be the only subsection of § 948r that applied in the

pre-trial context, the practical effect would be the same. If Respondent's cramped reading of § 948r(a) is correct, a recalcitrant witness called to testify on an "interlocutory" question could simply be tortured into making a statement that could then be used without constraint.

(U) Petitioner's right to relief is clear and indisputable because § 948r was not written to be absurd or a nullity. If Congress wanted the prohibition on evidence obtained by torture and other coercion to only apply at a "trial by military commission," it would have said so. Reading § 948r to imply exceptions Congress did not enact defies the statute's plain meaning, its structure, and common sense. *See United States v. Fokker Services*, 818 F.3d 733, 749 (D.C. Cir. 2016).

(U) B. The use of evidence obtained by torture in any judicial proceeding violates a jus cogens prohibition of international law.

(U) "To construe [§ 948r(a)] as empowering" Respondent to rely upon evidence obtained by torture "would seriously impinge on principles of international law." *CFTC v. Nahas*, 738 F.2d 487, 493 (D.C. Cir. 1984). Even assuming, therefore, that § 948r(a) was ambiguous respecting whether its prohibitions applied to "interlocutory questions," that ambiguity must be resolved "consistent with international law." *United States v. Ali*, 718 F.3d 929, 936 (D.C. Cir. 2013); *see also Nahas*, 738 F.2d at 493. And international law forbids the use of evidence obtained by torture for any purpose other than proving torture.

(U) Section 948r(a)'s text is drawn nearly verbatim from Article 15 of the Torture Convention. This was no accident. Section § 948r was originally included in the Military Commissions Act of 2006, 120 Stat. 2600, and was intended to "exclude from military commission proceedings statements obtained by use of torture (as defined in section 2340 of title 18, United States Code)." H.R. Rep. 109-664(I). Section 2340, for its part, was enacted to implement the Torture Convention. Pub L. 103–236 § 506, April 30, 1994. And where a statute, like § 948r, aims to implement an international agreement, the judicial construction of that statute should conform to the text and shared understanding of that international agreement. *Bond v. United States*, 572 U.S. 844, 855 (2014); *Zicherman v. Korean Air Lines*, 516 U.S. 217, 226 (1996).

(U) Article 15 of the Torture Convention, for its part, clarifies that the exclusionary rule must be applied in *all* instances in which the state attempts to use evidence derived from torture, not simply the narrow context of a criminal trial. *See Mohammed v. Obama*, 704 F. Supp. 2d 1, 24 (D.D.C. 2009) (concluding the Torture Convention forbade evidence obtained by torture in habeas proceedings).

(U) A 2014 report by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, described Article 15 as "an absolute prohibition on the use of statements made as a result of torture or other ill-treatment in any proceedings" that is itself "a norm of customary

international law and is not limited to the Convention, which is only one aspect of it." Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/25/60 ¶ 17 (Apr. 10, 2014) ("UN Torture Report"). "The exclusionary rule," the report continued, "must be considered as one element under the overarching absolute prohibition against acts of torture and other ill-treatment and the obligation to prevent such acts." *Ibid*. Contrary to Respondent's fine parsing of the prohibition, the "exclusionary rule is not limited to criminal proceedings but extends to military commissions, immigration boards and other administrative or civil proceedings. Moreover, the use of the phrase 'any proceedings' suggests that a broader range of processes is intended to be covered; essentially, any formal decision-making by State officials based on any type of information." *Id*. ¶ 30.

(U) Torture and the use of its fruits contravenes a non-derogable – or *jus cogens* – prohibition of international law. UN Torture Report ¶ 22 ("As the prohibition against torture and other ill-treatment is absolute and non-derogable under any circumstances, it follows that the exclusionary rule must also be non-derogable under any circumstances, including in respect of national security."); *see also Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988); Restatement (Third) of Foreign Relations § 702. A *jus cogens* prohibition is a "principle of international law that is accepted by the international

community of States as a whole as a norm from which no derogation is permitted." *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (cleaned up). And that prohibition is violated not simply where a State employs torture, but also where it "*encourages or condones* … torture or other cruel, inhuman, or degrading treatment or punishment." *Ibid*. (cleaned up) (emphasis added).

(U) As the House of Lords ruled more than a decade-and-a-half ago, "the *jus cogens erga omnes* nature of the prohibition of torture requires member states to do more than eschew the practice of torture. … There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law." *A v Secretary*, [2005] UKHL 71 ¶ 34.

(U) International authorities are also uniform in treating the use of evidence obtained by torture in *any* proceeding for *any* purpose other than proving torture as a violation of this non-derogable prohibition, rendering any proceeding such evidence taints fundamentally unfair. *See*, *e.g.*, *Kaçiu v. Albania*, Nos. 33192/07 & 33194/07 ¶ 117 (ECtHR., Jun. 25, 2013) ("The admission of statements obtained as a result of torture or of other ill-treatment … to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair"); *Othman v. United Kingdom*, App. No. 8139/09 ¶ 267 (ECtHR, Jan. 17, 2012) ("[T]he

admission of torture evidence is manifestly contrary … to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome."); *Cabrera García v. Mexico*, Series C, No. 220 ¶ 165 (IACtHR, Nov. 26, 2010) (This "exclusionary rule" is "intrinsic to the prohibition of such acts," "absolute," and "irrevocable"); *Martín del Campo Dodd v. Mexico*, Opinion No. 9/2005) ¶ 10 (UNWGAD, May 25, 2005) ("No kind of proceedings based on torture can be fair").

(U) It is therefore clear and indisputable that § 948r(a) prohibits the use of evidence obtained torture for any purpose, save as evidence of torture itself. Any other construction would require the United States to run afoul of a *jus cogens* prohibition of international law and "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804).

(U) C. Permitting evidence obtained by torture to be admitted at any stage of a military commission prosecution offends long-settled principles of due process.

(U) Even in the absence of § 948r's prohibition, the use of evidence obtained by torture for any purpose at any phase of a criminal proceeding violates due process. *See*, *e.g.*, *Rochin v. California*, 342 U.S. 165, 172 (1952); *United States v. Walls*, 70 F.3d 1323, 1329-30 (D.C. Cir. 1995). At issue here is not merely a "coerced confession" as that term is typically used. The statements Respondent has relied

upon did not simply involve Petitioner being questioned for too long before being *Mirandized*. They were extracted through a campaign of "physical, psychological, and sexual torture" on a scale and for a duration that lacks any comparison in American case law. *See* 7-29 *supra*.

(U) The most recent precedent that is even remotely comparable to what this Court now confronts is *Brown v. Mississippi*, 297 U.S. 278 (1936), in which the Supreme Court detailed "brutal treatment" upon "helpless prisoners" to procure capital convictions in the Jim Crow South. Finding the State's use of evidence obtained by torture"a clear denial of due process," the Court took care to point out that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these prisoners[.]" *Id.* at 286.

(U) The record here, too, "reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government." *Brown*, 297 U.S. at 282. And yet, Respondent insists that it remains free to use evidence obtained through such "medieval" practices for any purpose, at any phase of the proceedings, and the military commission judge can rely upon that evidence for the facts asserted, so long as prosecutors refrain from formally introducing such evidence at "trial on the general issues of guilt or sentencing." 353Y, at 17.

(U) To be sure, judges are generally unconstrained by the rules of evidence. MCRE 104(a); *cf.* Fed. R. Evid. 104(a). But the prohibition on using evidence obtained by torture is not a technical rule of evidence. Wright & Miller, 21A Fed. Prac. & Proc. Evid. § 5055 (2d ed.) ("Rule 104 cannot override the prohibitions on coerced confessions."). Rather, "[t]he use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego v. Twomey*, 404 U.S. 477, 484–85 (1972). Hence in *Brown*, the Supreme Court ruled that the use of evidence obtained by torture was not "mere error[]" or a "mere question of state practice," but instead was "a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." *Brown*, 297 U.S. at 286-87.

(U) Respondent's promise not to seek to admit evidence obtained by torture at Petitioner's trial, therefore, does not launder its use of such evidence at every other stage of the proceedings. "[S]uch is not the law. … The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber v. United States*, 251 U.S. 385, 392 (1920). "A coerced confession is offensive to basic standards of justice … because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944); *see also Rochin*, 342

U.S. at 173-74 ("[T]o sanction the [Government's] brutal conduct ... would be to afford brutality the cloak of law. Nothing could be more calculated to discredit law and thereby to brutalize the temper of a society.").

(U) Such a promise is also hollow. Respondent's principal use of evidence obtained by torture thus far has been to shape the discovery process and therefore the evidence that will ultimately be presented at trial. "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty." *Nardone v. United States*, 308 U.S. 338, 340 (1939) (cleaned up). A subpoena may not be based on information gained through an unlawful search. *United States v. McSurely*, 473 F.2d 1178, 1194 (D.C. Cir. 1972). A probable cause determination may not be supported by evidence obtained through entrapment, because "[e]ntrapment to commit crime is not a legal way of acquiring evidence." *Fletcher v. United States*, 295 F.2d 179, 182 (D.C. Cir. 1961); *see also Gilliam v. Sealey*, 932 F.3d 216, 235 (4th Cir. 2019) ("a coerced confession could not form the basis of probable cause for an arrest."). And "*any* criminal trial use against a defendant of his involuntary statement is a denial of due process." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (emphasis added).

(U) Petitioner recognizes that at the time of this filing, the applicability of the Due Process Clause to Guantanamo detainees remains an open and contested

question. However, Congress enacted § 948r against the background of testimony from the Justice Department that the MCA's strict controls on the use of coerced evidence were required because, "Our analysis, Senator, is that the due process clause applies to military commissions and imposes a constitutional floor on the procedures that would govern such commissions, including against enemy aliens." Senate Armed Services Committee, Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and The Trial of Detainees for Violations of the Law of War, S. Hrg. 111-190, at 17 (July 7, 2009) (Testimony of Assistant Attorney General David Kris).

(U) Petitioner's entitlement to relief is therefore clear and indisputable because Respondent's policy and practice of using evidence obtained by torture makes the proceedings below "void for want of the essential elements of due process." *Brown*, 297 U.S. at 287. "To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol." *Chambers v. Florida*, 309 U.S. 227, 240 (1940). A rule "so basic to our system of laws should go without saying." *Al-Nashiri*, 921 F.3d at 239.

(U) II. ONLY ACTION FROM THIS COURT CAN PREVENT THE MILITARY COMMISSION SYSTEM FROM CONTINUING TO VIOLATE THE PROHIBITION ON TORTURE.

(U) A. The violation of the torture prohibition uniquely and pervasively undermines the integrity of the proceedings below.

(U) In the ordinary military justice context, extraordinary writs are deemed both necessary and appropriate, where a "military judge's ruling has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the [military commission] on the issues of guilt or innocence—which will form the very foundation of a finding and sentence." *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013). Under this Court's precedents too, extraordinary relief is warranted where, as here, evidentiary rulings will necessarily "frustrate[] later review," *In re Al Baluchi*, 952 F.3d 363, 368 (D.C. Cir. 2020), and "in the discovery context where necessary to correct an error with potentially far-reaching consequences." *In re Clinton*, 973 F.3d 106, 118 (D.C. Cir. 2020).

(U) Without this Court's intervention, military commission judges will continue to base their conclusions of law and fact on evidence that the government is explicitly prohibited from obtaining and using by § 948r, the Constitution, international law, and basic human decency. Not only will the public reputation of these proceedings be irreparably harmed if they become "torture courts," the use of

evidence obtained by torture to shape the discovery process and motions *in limine* guarantees that the record in these cases will be irreparably contaminated in ways that cannot be corrected post-trial.

(U) For example, because the military commissions do not apply the *Miranda* rule, statement evidence is admissible so long as "the totality of circumstances renders the statement reliable and possessing sufficient probative value" and "the interests of justice would best be served by admitting the statement into evidence." 10 U.S.C. § 948r(c); MCRE 304(a). Similarly, evidence derived from statements obtained by torture is admissible so long as "consistent with the interests of justice," which the Discussion to the rule states includes – but is not limited to – being derived from any "statement that was made incident to lawful conduct during military or intelligence operations." MCRE 304(a)(5).

(U) If a military commission judge is free to rely upon the ostensibly corroborating effect of statements obtained by torture in making judgements as nebulous as "reliable," "probative," and "in the interests of justice," evidence obtained by torture becomes admissible at trial through the backdoor. And if this clearly erroneous interpretation of the law is allowed to stand, this Court will be put in the impossible position of evaluating the corrupting effect of torture on every piece of evidence admitted at trial in support of a potential death sentence.

(U) B. Petitioner will have no meaningful remedy in any post-trial appeal if evidence obtained by torture is used ex parte.

(U) The most insidious and necessarily irreparable effect of Respondent's practice of using evidence obtained by torture to prevail on "interlocutory questions" will be on the discovery process and related litigation dealing with classified evidence. In the so-called "505 Process," described at pages 31-33 *supra*, military commission prosecutors present extensive *ex parte* briefing and argument upon which the military commission judge makes "fact-specific evidentiary determinations [regarding] whether the defendant could receive a fair trial without the aid of certain evidence." *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990). There have been hundreds of these *ex parte* pleadings and hearings in Petitioner's case to date. Transcripts are not uniformly kept. And, on information and belief, Respondent has argued in these presentations that classified discovery should be withheld based upon evidence obtained by torture.

(U) Respondent has not denied any of this, despite numerous opportunities to do so. To the contrary, in the pleading giving rise to this litigation, Respondent argued that COL Acosta was *required* to credit the "facts" Respondent had obtained by torture in making his decision. AE 353V at 21. Once Petitioner objected, Respondent defended its policy and practice on the ground that evidence obtained by torture was "helpful to the Military Judge … as the Commission continues to regulate discovery," AE 353Y, at 2, including for the purpose of offering "some …

insight into how Government discovery obligations are being carried out." *Id*. at 14. And Respondent all but conceded to regularly relying upon evidence obtained by torture *ex parte* in the 505 Process. *Id*. at 20 n.8.

(U) Given Respondent's policy and practice of construing § 948r as imposing no meaningful restraint on its use of evidence obtained by torture, it is unlikely that any military commission judge would even aware that the evidence upon which Respondent has relied *ex parte* was obtained by torture. Indeed, Respondent's policy and practice only came to light because in briefing a routine discovery dispute, Respondent submitted two statements that Petitioner was able to identify as having been extracted with extraordinary brutality. The lack of self-awareness, let alone compunction, with which Respondent used this evidence shows that this policy and practice will continue largely unseen if this Court fails to act.

(U) C. Respondent's policy and practice of using statements obtained by torture remains in place and ripe for resolution.

(U) When pressed, Respondent has gone to extraordinary lengths to evade meaningful judicial review. That fact, and the military commissions system's willingness to acquiesce to those efforts, shows why Petitioner has no other adequate avenue for relief.

(U) After Petitioner filed a petition in the CMCR challenging the legality of Respondent's policy and practice of using of evidence obtained by torture, Respondent engineered the voluntary withdrawal of the six sentences that had made

its practice known and then moved to dismiss this case as moot. Its voluntary withdrawal of these sentences was nothing more than a litigation maneuver, whose sole and stated purpose was to engineer a mootness argument that would free Respondent of having to defend the legality of its practice on the merits. AE 353EE at 5 (By voluntarily withdrawing the six sentences, Respondent desired to "establish strong grounds to moot the issue before the [CMCR]").

(U) The CMCR's order dismissing the petition below is difficult to parse. It variously states that Respondent's maneuver succeeded in mooting this case and making Respondent's policy and practice of using evidence obtained by torture unripe for review. But neither concept is relevant here.

(U) With respect to mootness, Respondent's maneuver was a textbook case of voluntary cessation. "A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice." *Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). "If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Ibid*. (cleaned up). The standard "for determining whether a case has been mooted by the [Respondent's] voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with

the party asserting mootness." *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 189 (2000) (cleaned up). The same standard governs extraordinary writs directed at a policy or practice that a respondent has not abandoned, "even though petitioners' requests for [specific] relief … are moot." *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986).

(U) Respondent voluntarily withdrew the six sentences that gave rise to this case, not to abandon its practice of using evidence obtained by torture, but to avoid judicial scrutiny. While the CMCR technically vacated COL Acosta's ruling approving of that practice, it did not do so on the merits. And as the CMCR itself appeared to recognize, there remains "some cognizable danger of recurrent violation." *United States v. W.T. Grant*, 345 U.S. 632, 632–633 (1953). That fact alone should have been sufficient to dispose of any mootness argument. That Petitioner may have "obtained relief as to a *specific request*" that gave rise to the controversy "will not moot a claim that an agency *policy or practice*" that is likely to have prospective effect is unlawful. *Payne*, 837 F.2d at 491 (original emphasis).

(U) The more urgent reason to reject any mootness argument is that the most pernicious use of evidence obtained by torture has been *ex parte*. The CMCR paradoxically faulted Petitioner for not coming forward with evidence proving that COL Acosta had, in fact, relied upon evidence obtained by torture *ex parte*, but "the necessary information lies within defendants' control." *Kowal v. MCI*, 16 F.3d 1271,

1279 n.3 (D.C. Cir. 1994) (cleaned up). Petitioner has squarely averred that Respondent has engaged in a policy and practice of using such evidence *ex parte*. Respondent has never disputed that this is its practice, despite numerous opportunities to do so. Respondent's own representations indicate that such use is routine. And Respondent's conduct in this case strongly suggests that such use is pervasive. "[T]he conclusion," therefore, "is inescapable that the merits of petitioners' claims cannot be avoided on grounds of mootness." *In re Center for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986).

(U) The CMCR's alternative appeal to ripeness, which Respondent did not assert below, appears based upon a misunderstanding of the law of justiciability. The question of whether Respondent may use evidence obtained by torture to litigate "interlocutory questions" ripened the moment Respondent used evidence obtained by torture for that purpose. Respondent still maintains that it may conduct Petitioner's capital prosecution under a view of the law that permits such use (a view shared by COL Acosta). There is therefore a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" to make this case ripe. *Lake Carriers v. MacMullan*, 406 U.S. 498, 506 (1972). Whether there remains a need to resolve that controversy because of Respondent's voluntary cessation presents a question of mootness, not ripeness. *See Utz v. Cullinane*, 520 F.2d 467, 472 n.9 (D.C. Cir. 1975).

(U) Even if Respondent's voluntary cessation raised a question of ripeness, the CMCR seemed to believe that the possibility that Respondent might not use such evidence again rendered this case unripe. But that is not the law. Ripeness rests on "two factors: (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967). Both factors are satisfied here.

(U) "Among other things, the fitness of an issue for judicial decision depends on whether it is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Atlantic States Legal Foundation v. EPA,* 325 F.3d 281, 284 (D.C. Cir. 2003) (cleaned up). Whether § 948r(a) prohibits the use of evidence obtained by torture only in trial proceedings is a question of law. This case presents that question within the concrete setting of Respondent having used evidence obtained by torture to prevail in a discovery dispute, that use having been approved by a merits decision subject to de novo review, and Respondent's insistence that its use of evidence obtained by torture has been and continues to be lawful.

(U) Withholding this Court's consideration will also cause significant hardship to Petitioner and the reputation of the justice system. It will leave Respondent free to continue to use evidence obtained by torture *ex parte*, and therefore in ways that Petitioner cannot defend against, the public can only suspect,

and this Court will be unable to review. This case also comes to this Court before Petitioner even has a trial date. The next time Respondent uses evidence obtained by torture openly, Petitioner's long-delayed trial may be either approaching or underway, and the costs and disruption resulting from this Court's having deferred review today will be significant.

(U) In short, this issue is "sufficiently sharp for adjudication, nothing would be gained by postponing its resolution[,]" and "there are no significant agency or judicial interests militating in favor of delay." *Payne*, 837 F.2d at 492-93. Given the gravity of the question presented and its pervasiveness in the military commission system, "no balance can be struck against a finding that this case is ripe for judicial review." *Ibid*.

(U) III. THIS COURT'S INTERVENTION IS NECESSARY TO PREVENT TORTURE FROM POISONING THE JUSTICE SYSTEM.

(U) The issuance of the writ is particularly appropriate here because the government's use of torture and its fruits "remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise." *Cheney*, 542 U.S. at 381. Two concrete circumstances demonstrate that fact.

(U) *First,* every defendant in every pending military commission was held in the black sites, where abuse that met the legal definition of torture and cruel,

inhuman, or degrading treatment was rampant. *See*, *e.g.*, *United States v. Ghailani*, 751 F. Supp. 2d 502 (S.D.N.Y. 2010). Respondent's treatment of prisoners in the black sites therefore affects every pending military commission prosecution and has been the primary driver of the extraordinary pre-trial delays these cases have confronted. Carol Rosenberg, *The 9/11 Trial: Why Is It Taking So long?*, N.Y. Times (Apr. 17, 2020); Sacha Pfeiffer, *A Legacy of Torture is Preventing Trials at Guantanamo*, NPR (Nov. 15, 2019).

(U) Interlocutory relief is warranted "when the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." *Colonial Times v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975); *see also LRM*, 72 M.J. at 372. The pervasive relevance of § 948r's interpretation beyond this case, therefore, cries out for the clarity that only this Court can bring.

(U) *Second*, the pervasive error this Court is being asked to prevent is the unlawful use of evidence obtained by torture. In *Papandreou*, this Court issued a writ of mandamus to review a claim of foreign sovereign immunity, reasoning that to allow unlawful discovery against a foreign sovereign would violate "the demands of international comity." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). Here, mandamus is the only means to prevent the United States from violating a *jus cogens* prohibition of international law.

(U) CONCLUSION

(U) Petitioner therefore asks this Court to issue a writ of mandamus and prohibition so that the use of torture and its fruits remains categorically forbidden in any proceeding governed by American law.

Respectfully submitted,

Dated: October 15, 2021

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(U) CERTIFICATE OF SERVICE

(U) I hereby certify that on October 15, 2021, copies of the foregoing were delivered to the Court Security Officer for filing in this Court and service on all necessary parties pursuant to the Amended Protective Order for Habeas Cases Involving Top Secret/Sensitive Compartmented Information and Procedures for Counsel Access to Detainees at the United States Naval Station in Guantanamo Bay, Cuba, in Habeas Cases Involving Top Secret/Sensitive Compartmented Information, Case Nos. 08-MC-442-TFH (Dkt. Nos. 1481 and 1496) & 08-cv-01207-RJR (Dkt. Nos. 79 & 80) (D.D.C. 9 January 2009).

Dated: October 15, 2021

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