No. _____

In the

Supreme Court of the United States

ALI HAMZA SULIMAN AL BAHLUL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an agency head, who is statutorily given the "sole discretion and prerogative" to make "final and conclusive" decisions in adjudications that are case-dispositive, unreviewable, and "binding upon all departments, courts, agencies, and officers of the United States," a principal officer under the Appointments Clause?

2. When, if ever, may a statute be construed to implicitly establish an office that a Department Head may fill under the Excepting Clause?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

For two decades, the Department of Defense has operated a system of military tribunals, known as "military commissions," to prosecute capital and other serious crimes. Since 2006, these tribunals have been governed by the Military Commissions Act, 10 U.S.C., ch. 47A ("MCA"). A defining feature of these tribunals is that they are ad hoc. Each military commission is created (or "convened") for the single prosecution of the accused for specified crimes and disbands once a verdict is reached. The power to convene, direct, and enter a final judgment in these proceedings is vested in the Secretary of Defense or his delegee, 10 U.S.C. § 948h, who by regulation is given the title, "Convening Authority for Military Commissions," or "Convening Authority," for short. This case presents two questions under the Appointments Clause arising from the Department's practice of hiring federal employees to serve as the Convening Authority.

1. The first question presented is answered by *United States v. Arthrex*, 141 S. Ct. 1970 (2021). Petitioner argued below that anyone designated as the Convening Authority must be a principal officer under the Appointments Clause (*i.e.*, appointed by the President and confirmed by the Senate). The Convening Authority is an agency head and has the discretion to initiate, direct, and make final decisions in the adjudication of capital and other serious crimes. Most of the Convening Authority's most consequential decisions are governed by no legally reviewable standard. They are by law unreviewable, even in the courts. And all other Executive Branch

officials do not simply lack any "means of countermanding the final decision[s] already on the books," *id*. at 1982, they are statutorily forbidden from attempting to influence the Convening Authority's discretion when making those decisions. 10 U.S.C. § 949b(a)(2)(B).

The panel below ruled that the Convening Authority could be an inferior officer based upon the same three-factor balancing test the Federal Circuit applied in *Arthrex*. App. 20a-21a; *see also Arthrex v. Smith & Nephew*, 941 F.3d 1320, 1329 (Fed. Cir. 2019). Though the panel recognized the Convening Authority could make case-dispositive final decisions, "which are effectively unreviewable" and statutorily insulated from supervisory influence, App. 22a, it held that an inferior officer need only be subject to "'some level' of direction and supervision by a principal officer, not necessarily total control." *Ibid*. (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)).

Following the panel's decision, but before Petitioner's deadline to file a petition for certiorari, this Court eschewed the very balancing test the panel relied upon and held that in the adjudicatory context, an Executive official's "unreviewable authority … is incompatible with their appointment by the Secretary to an inferior office." *Arthrex*, 141 S. Ct. at 1985.

This Court should summarily grant, vacate, and remand this case for further consideration in light of *Arthrex*. Rule 16.1. Relying on a since-abrogated balancing test, the panel held that an inferior officer can wield significant "unreviewable" authority.

Arthrex clarified that only principal officers can wield significant "unreviewable" authority. There is at least a "reasonable probability," therefore, the panel would now conclude that the Convening Authority must be a principal officer and that such a holding is case-dispositive. *Wellons v. Hall*, 558 U.S. 220, 225 (2010). A GVR will allow this issue to be resolved promptly and is also likely to moot the second question presented.

2. The second question presented asks whether Chief Justice Marshall's foundational opinion in *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (Marshall, C.J.) remains good law. Under *Maurice*, a Department Head may delegate significant statutory authorities only to existing officers and may appoint new inferior officers to exercise those authorities only if Congress has "directly and expressly" established a new office "by Law" and "by Law" vested the Department Head with the power to appoint officers under the Excepting Clause. *Id.* at 1216.

This rule has been regularly described over the past two centuries as the plain import of the Appointments Clause's text and a corollary of its animating values of accountability and transparency. But this Court has never squarely affirmed this rule or otherwise clarified the standard for determining when a statute has established an office and vested appointment power under the Excepting Clause.

Prior to *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the impact of this uncertainty was minimal because the D.C. Circuit, whose administrative law decisions

typically guide the nation, had adopted a broad view of what authorities could be delegated to government employees. *See*, *e.g.*, *Tucker v. CIR*, 676 F.3d 1129, 1133 (D.C. Cir. 2012). Since *Lucia*, however, previously ignored Appointments Clause problems have led to litigation over what a statute must say to satisfy the Excepting Clause. *See*, *e.g.*, *Jooce v. FDA*, 981 F.3d 26 (D.C. Cir. 2020); *In re Grand Jury Investigation*, 916 F.3d 1047 (D.C. Cir. 2019).

Contrary to *Maurice*, the D.C. Circuit has adopted a broad standard that readily implies into otherwise silent statutes both the establishment of offices and the vesting of appointment powers under the Excepting Clause. App. 26a-27a. "[O]ur court," the panel below noted, "has held that Congress need not use explicit language to vest an appointment in someone other than the President." *Ibid*. Instead, the Circuit "read[s] the statute as a whole" to determine whether it implicitly "accommodate[s] the delegation." *Ibid*. (quoting *In re Sealed Case*, 829 F.2d 50, 55 (D.C. Cir. 1987)).

Here, once the panel concluded that the Convening Authority could be an inferior officer, it held that Congress had implicitly established the freestanding office of "Convening Authority" because several sections of the MCA referred to "*the* convening authority." App. 28a. It further held that § 948h satisfied the Excepting Clause because it made the power to convene military commissions delegable, thereby permitting the Secretary to "designate as the Convening Authority an individual who, at the time of the designation, was a mere employee." *Id*. 29a.

There are several problems with this broad standard for implying the establishment of offices and the vesting of appointment power that this Court needs to address.

The most obvious problem is that the panel's opinion conflicts not just with *Maurice*, but also with several decisions from the Court of Appeals for the Armed Forces ("CAAF"), whose interpretations of military law are "normally entitled to great deference." *Middendorf v. Henry*, 425 U.S. 25, 43 (1976). CAAF has squarely held that the Secretary's appointment powers are narrowly confined under Title 10 and has identified only three instances where Congress vested the Secretary with the power to appoint subordinates under the Excepting Clause, none of which were the "Convening Authority." *United States v. Janssen*, 73 M.J. 221, 225 (C.A.A.F. 2014). The panel's holding also conflicts with centuries of military law precedents, which have relied upon the settled understanding of convening authority as a duty incident to command, not a distinct office. *See*, *e.g.*, *United States v. Ryan*, 5 M.J. 97, 101 (C.M.A. 1978).

The overriding problem this Court needs to address is the indeterminacy of the panel's broad standard and the perverse incentives it creates. If courts have a duty to divine the establishment of offices and appointment authorities from otherwise silent statutes whenever the delegation of significant authority to an employee is challenged, the government has every incentive to define lines of accountability vaguely. In this case, no one ever claimed or behaved as if the Convening Authority

was an appointive office until this litigation. But that did not matter because under the panel's broad standard, offices and appointments may be implied *nunc pro tunc* from almost any statutory scheme.

Should this Court not GVR this case under *Arthrex*, it should grant certiorari to resolve the standard for ascertaining when Congress has created offices that Department Heads may fill under the Excepting Clause. The panel's standard under which broad implications are drawn from the "statute as a whole" is at odds with *Maurice* (which the panel does not cite or distinguish) and it undermines the transparency and accountability the Appointments Clause requires. Given the D.C. Circuit's preeminence on questions of administrative law, this case presents an opportune vehicle for bringing the same rigor to the Excepting Clause that this Court brought to the other elements of the Appointments Clause in *Lucia* and *Arthrex*.

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A definitive answer to both questions presented is urgently important. The defective appointment of the Convening Authority vitiates the subject-matter jurisdiction of any affected military commission. App. 53a-61a. For the military commissions still in the pre-trial stages of litigation, which include the capital trial of the alleged perpetrators of the September 11th attacks, the viability of any conviction depends upon the correction of this error before final judgment. Granting certiorari, either for the purpose of summarily remanding to the D.C. Circuit or full review, will ensure that remedial action can and will be taken promptly.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-35a) is published at 967 F.3d 858. The opinion of the United States Court of Military Commission Review (App. 42a-86a) is published at 374 F. Supp. 3d 1250.

CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED

Relevant provisions of the U.S. Constitution, the U.S. Code, the Regulation for Trial by Military Commission (2007 ed.), and the Manual for Military Commissions (2007 ed.), are reproduced in Petitioner's appendix. App. 97a-147a. Unless otherwise noted, all references are to the editions that governed the relevant proceedings in this case.

JURISDICTION

This Court has jurisdiction over this criminal case pursuant to 10 U.S.C. § 950g(e) and 28 U.S.C. § 1254(1). The D.C. Circuit issued its judgment on August 4, 2020, App. 36a, denied a timely petition for rehearing on January 21, 2021, *id*. 38a, and denied a timely motion for reconsideration of its denial of rehearing on March 29, 2021. *Id*. 40a.

This petition is timely under Rules 13.1 & 13.3 as extended by this Court's Order of March 19, 2020, because it was filed within 150-days of the Circuit's final denial of rehearing on March 29, 2021. Finality for this Court's purposes runs from when review below is complete, not when a petition for rehearing is first denied. *Hibbs v. Winn*, 542 U.S. 88, 98-99 (2004); *see*, *e.g.*, *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016); *Mississippi Power & Light v. Moore*, 487

U.S. 354, 364 n.8 (1988). A pleading suspends finality, whatever its form, if granting it would materially modify the judgment. *Communist Party v. Whitcomb*, 414 U.S. 441 (1974) (motion for reconsideration); *United States v. Adams*, 383 U.S. 39 (1966) (motion to amend); *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247 (1953) ("motion to vacate the order denying rehearing and to reinstate petition for rehearing en banc"). Here, granting Petitioner's motion for reconsideration would have automatically vacated the judgment below. Rule 35(d) (CADC 2020).

Had Petitioner filed this petition before that motion was resolved, it would have been fatally premature. *Continental Oil v. United States*, 299 U.S. 510 (1936). Because "only 'a genuinely final judgment' will trigger … the period for filing a petition for certiorari in this Court," where there is a "question whether the court below will modify the judgment and alter the parties' rights, … so long as that question remains open, there is no 'judgment' to be reviewed." *Limtiaco v. Camacho*, 549 U.S. 483, 487 (2007) (cleaned up).

Timely motions for reconsideration presumptively render underlying judgments non-final until they are resolved. *United States v. Ibarra*, 502 U.S. 1, 6-7 (1991). The Circuit both "interpreted and actually treated" Petitioner's motion as suspending finality by, *inter alia*, withholding the mandate *sua sponte* for over two months while it deliberated on the parties' briefing. *Missouri v. Jenkins*, 495 U.S. 33, 48 (1990); *see also Young v. Harper*, 520 U.S. 143, 147 n.1 (1997). And during that time, it remained an open question whether the Circuit would vacate the panel's judgment and rehear this case en banc.

STATEMENT OF THE CASE

The Military Commissions System. Following *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Congress enacted the Military Commissions Act of 2006, 120 Stat. 2600 ("MCA").[1] The MCA established a legal framework for the prosecution of law-of-war detainees before military commissions, modeled on the structures, rules, and procedures governing courts-martial under the Uniform Code of Military Justice ("UCMJ"). 10 U.S.C. § 948b(c).

Like courts-martial, military commissions are convened ad hoc to prosecute specified defendants for specified crimes. *See* Regulation for Trial by Military Commission ("RTMC") § 5-3 (2007 ed.); Manual for Military Commissions, Rule for Military Commission ("RMC") 504(b) (2007 ed.). The power to convene a military tribunal is generically called "convening authority."

Under the UCMJ, convening authority is given to senior military officers in the chain-of-command and other specified officials. 10 U.S.C. §§ 822-24. Nearly all – if not all – are Senate-confirmed presidential appointees. Under the MCA, military commissions "may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose." *Id.* § 948h. *See*

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[1] In 2009, Congress superseded the 2006 MCA with the Military Commissions Act of 2009, 123 Stat. 2190. Unless otherwise noted, all references are to the version of the MCA that governed the relevant proceedings in this case.

RMC 103(8). By convention, an individual with this power is referred to as "a convening authority" and the individual wielding this power in a specific case as "the Convening Authority." By regulation, someone designated under § 948h bears the title, "Convening Authority for Military Commissions." *See*, *e.g.*, RTMC §§ 1-5, 2-1, 2-3(b).

The Convening Authority is the administrative head of the military commission system and reports directly to the Secretary and the Deputy Secretary as appropriate. RTMC § 2-1, 2-3(b). The Convening Authority initiates and directs the entirety of the military commissions trial process and retains broad discretion over the post-trial process. Except for wholly administrative decisions, the exercise of these powers is statutorily protected from coercion or influence by anyone else in the Executive Branch. 10 U.S.C. § 949b(a)(2)(B); RMC 104(a)(2).

Before trial, the Convening Authority decides which individuals should be tried for which charges. 10 U.S.C. § 948a; RTMC §§ 2-3(a)(1); 4-1(b); RMC 407; 601(a); 601(b). She determines whether the case is capital. 10 U.S.C. § 948d(d); RTMC §§ 4-1(b); 4-3(a); 4-3(c). She appoints and supervises the "members" (*i.e.,* the military officers who serve as jurors), whom she can also remove, albeit only for "good cause" once trial on the merits has begun. 10 U.S.C. §§ 948i; 948m; RTMC §§ 2-3(a)(3); 5-2(h); RMC 502(a)(1); 503(a); 505(c). She appoints and supervises the Chief Judge of the Military Commissions Trial Judiciary, who in turn selects a military judge to preside over the case. 10 U.S.C. § 948j(a); RTMC §§ 1-5(b); 6-1(b); RMC 503(b)(2). She

appoints the court security officer, who determines what parts of the proceedings may be closed to the public. RTMC § 7-4. She appoints, supervises, and approves funding for all other personnel needed to administer the proceedings. RTMC §§ 2-3(a)(5)-(6); 7-7; 8-6(b)(4). She can order depositions, RTMC § 14-2; RMC 702(b), issue warrants of attachment to compel testimony or document production, RMC 703(e)(2)(G)(i), and convene inquiries into the mental capacity of the accused. RMC 706(b). She can issue protective orders. RTMC 17-3. She can decide motions. RMC 905(j). She determines when trial proceedings must begin, RTMC § 2-3(a)(2); RMC 707, and where they will take place. RTMC § 5-3(a); RMC 504(e).

During trial, the Convening Authority retains the power to dismiss charges with or without prejudice "for any reason" before the findings are announced "in the exercise of that authority's independent judgment." RMC 604(a). She has the "sole discretion" to enter into binding plea agreements. RTMC §§ 2-3(a)(8); 12-1; RMC 705(a); 705(d)(3). She has the exclusive power to grant immunity from military commission prosecution. RTMC §§ 2-3(a)(1); 15-1(b)(1); RMC 704(c)(1). She responds to invocations of the state secrets privilege. RMC 506(f). She has the exclusive power to fund experts and travel expenses for witnesses. RTMC §§ 2-3(a)(10); 13-1, 13-7(b); RMC 703(d). She determines what non-military personnel and resources are available to defense counsel. RTMC §§ 2-3(a)(9); 9-1(a)(4). She acts as a supervisor of the prosecution, RTMC §§ 8-4(d)(3)-(4); 8-6(b)(1); RMC 501(1), to include counsel

for the prosecution's communications with the media. RTMC §§ 2-3(a)(7); 8-7. She is authorized to conduct formal communications with other federal agencies, Congress, the public, and foreign governments. RTMC § 2-3(b)(4). She can bar individuals, including attorneys, from participating in military commission proceedings. RTMC § 10-1(b). She has the final power to find someone in contempt under 10 U.S.C. § 950w; a decision that is "not subject to further review or appeal." RMC 809(d).

After trial, the Convening Authority has the "sole discretion and prerogative" over the verdict and sentence and the entry of a final judgment. 10 U.S.C. § 950b(c); RTMC § 23-7; RMC 1101(c)(2)(A); 1107. She is bound by no deadline in issuing the order that finalizes (or "approves") the findings and sentence. 10 U.S.C. § 950b(c)(3); RMC 1107(b)(2). She has the "sole discretion" to "approve, disapprove, commute, or suspend the sentence in whole or in part," to include whether a sentence of death should be imposed, *id*. § 949b(c)(2)(C), to "dismiss any charge or specification," *id*. § 949b(c)(3)(A), or to reduce any finding of guilty to a lesser included offense. *Id*. § 949b(c)(3)(B); RTMC § 2-3(a)(13); 27-3(d); RMC 1107. She can reopen the proceedings and order the reconsideration of any legal ruling (other than those that pertain to a finding of not guilty). 10 U.S.C. § 949b(d); RTMC §§ 27-2; 27-3; RMC 810(a)(4); 1009(d); 1102(a); 1107(e).

During the appellate phase, the Convening Authority controls the timing of when the appeals process begins. 10 U.S.C. § 950c(a); 950f(c) (2006/2009); RTMC § 2-3(a)(14). The Court of

Military Commission Review ("CMCR") and the D.C. Circuit may review only "the findings and sentence as approved by the convening authority." 10 U.S.C. §§ 950f(d); 950g(a); 950g(d) (2009). Irrespective of the case's appellate litigation posture, she can grant requests for a new trial for two years after issuing the order approving the findings and sentence (a period she can extend indefinitely). RTMC § 27-4(a); RMC 1210(e). Once appellate review is complete, she has the sole power to issue the "final orders" to close the case, which are "final and conclusive" and "binding upon all departments, courts, agencies, and officers of the United States, except as otherwise provided by the President." 10 U.S.C. § 950j(a) (2006/2009); RTMC 26-4(b). As long as a defendant is under a military commission sentence, other than death, she retains the unreviewable discretion to suspend and remit the remainder of that sentence for any reason. 10 U.S.C. § 950i(d) (2006/2009); RMC 1108(b). If she or her predecessor Convening Authority previously approved a sentence of death, the execution of the sentence is solely committed to the President. 10 U.S.C. § 950i(b) (2006/2009).

Following the MCA's enactment, the Secretary designated the Deputy Secretary as the Convening Authority for Military Commissions. App. 87a. On January 5, 2007, the Deputy administratively created the position of "Director, Office of Military Commissions," a three-year, non-renewable, limited-term general employee position in the Senior Executive Service, pursuant to the Deputy's delegated authority to hire miscellaneous employees in the Office of the Secretary of Defense. 5 U.S.C. §

3132(a)(9); 10 U.S.C. § 131(b)(9); DoDD 5105.02 (Jan. 9, 2006). On January 31, 2007, the Deputy hired Susan Crawford ("Crawford") into that position. On February 6, 2007, the Secretary issued a two-sentence memorandum designating Crawford as the Convening Authority for Military Commissions and rescinding his previous designation of the Deputy. App. 90a. The Deputy subsequently established the Office of the Convening Authority by regulation. RTMC § 2-1. Crawford left government employment when her employee position expired on January 30, 2010.

Since the MCA's enactment, the Secretary has served as the Convening Authority for some or all of the military commission cases for a cumulative year. App. 87a-89a. He has also designated eleven individuals as the Convening Authority for some or all of the cases pursuant to § 948h. *Ibid*. Five of these individuals were employed as the Director, Office of Convening Authority. *Ibid*. Six served in other civilian positions, two of which were Senate-confirmed Presidential appointments. *Ibid*.

Military Commission Proceedings Against Petitioner. Petitioner is a Yemeni national, who has been detained at the U.S. Naval Station at Guantanamo Bay, Cuba, as a so-called "Low Value Detainee" since January 2002. In 2004, he was charged with conspiracy before a military commission pursuant to 10 U.S.C. § 821. App. 91a. The prosecutor later described Petitioner as a "Little Fish" and the gravamen of the allegations against him as being al Qaeda's "public affairs guy." The Rule of Law Oral History Project, The Reminiscences of V. Stuart

Couch, Columbia University Center for Oral History 68, 165 (May 12, 2011).[2]

On February 26, 2008, Crawford convened a second military commission to try Petitioner for three inchoate offenses under the MCA: conspiracy, solicitation, and providing material support to a terrorist organization. App. 92a-96a. Petitioner was not charged with any substantive crime or with complicity in any completed crime. The commission sentenced Petitioner to life after finding him guilty on all charges and, on June 3, 2009, Crawford issued an order approving the findings and sentence without exception. *Ibid*. She then referred the case to the CMCR, which affirmed. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (C.M.C.R. 2011).

Petitioner filed a timely petition for review in the D.C. Circuit, which vacated Petitioner's convictions twice in their entirety, *Al Bahlul v. United States*, No. 11-1324, 2013 WL 297726 (D.C. Cir., Jan 25, 2013) (*per curiam*); *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015), and reheard his case *en banc* twice on issues not now before this Court.[3] *Al Bahlul*

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[2] *Available at* https://perma.cc/6WSN-AERN.

[3] Though Justice Kavanaugh participated in both en banc proceedings as a circuit judge, this case arises from a petition for review filed after his elevation and addresses law and facts unrelated to the previous case in controversy. Given that prior judicial service is not a mandatory basis for recusal under 28 U.S.C. § 455(b), Petitioner believes recusal is unwarranted and would impair this Court's ability "to resolve the significant legal issue presented by the case." *Cheney v. U.S. District Court*, 541 U.S. 913, 915-16 (2004) (Scalia, J.).

v. United States, 767 F.3d 1 (D.C. Cir. 2014) (en banc); *Al Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) cert. denied, 138 S.Ct. 313 (2017). The result was the unanimous vacatur of Petitioner's convictions for solicitation and material support, the affirmance of his conspiracy conviction, and remand to the CMCR.

While on remand, this Court decided *Lucia*. Petitioner raised a timely jurisdictional challenge in the CMCR asserting that under *Lucia*, Crawford had not been appointed in conformity with the Appointments Clause.[4] Petitioner argued that only principal officers may be designated as the Convening Authority and, even if the Convening Authority could be an inferior officer, nothing in the MCA vested the Secretary with the power to appoint convening authorities as freestanding officers under the Excepting Clause and nothing in the administrative record showed Crawford being appointed to any office as the Convening Authority.

The CMCR agreed that under *Lucia*, a convening authority must be an officer and that if Crawford's appointment was defective under the Appointments Clause, Petitioner's conviction would have to be vacated for lack of jurisdiction. App. 53a-61a. But it concluded that the Convening Authority could be an

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[4] Petitioner asserted other grounds for relief on remand not presented here, including one ground on which the panel below reversed and remanded. App. 36a-37a. On July 26, 2021, the CMCR granted a two-month continuance of deadlines on remand pending action by this Court.

inferior officer because she was "supervised at some level" by the Secretary, who could "control [her] substantive conduct in certain respects ... [and] supersede certain of her actions," *id.* 79a, and because she was impliedly removable at-will. *Id.* 78a. The CMCR held that § 948h impliedly vested the Secretary with the power to appoint Crawford to a "continuing position established by law," *id.* 74a, and concluded that "the Secretary of Defense did appoint Ms. Crawford," because he had designated her under § 948h. *Id*. 80a.

Petitioner filed a timely petition for review in the D.C. Circuit. On August 4, 2020, a panel of the D.C. Circuit agreed that Crawford "acted as an officer of the United States for purposes of the Appointments Clause." App. 20a-21a. But it held that she was an inferior officer under circuit precedent, which had distilled this Court's decision in *Edmond* into a three-factor balancing test that weighed the extent of an officer's (1) final decision-making authority; (2) oversight; and (3) removability. *Ibid*.

The panel acknowledged that the Convening Authority could render final judgments that were binding on the Executive Branch, including "the power to modify charges, overturn a verdict, or commute a sentence, all of which are effectively unreviewable." *Id*. 22a. Nevertheless, it concluded that an inferior officer need only be subject to "'some level' of direction and supervision by a principal officer, not necessarily total control," *id*. 25a (quoting *Edmond*, 520 U.S. at 663), and held that the Convening Authority's final decision-making power was counter-balanced by the Secretary's

promulgation of rules, the CMCR's power to review some of her decisions on appeal, and her implied removability, notwithstanding the MCA's prohibition on unauthorized influence. App. 22a-25a.

Having concluded that Crawford was an inferior officer, the panel presupposed that the Secretary's designation memorandum effectuated her appointment. It then ruled that because several sections of the MCA referred to "*the* convening authority," the statute impliedly made "the Convening Authority … a distinct office and not simply a duty to be performed by existing officers." App. 28a. And it held that § 948h's "conferral of the power to designate the Convening Authority [was] sufficient to vest the Secretary with the constitutional power to appoint an inferior officer." App. 26a.

Petitioner filed a timely petition for rehearing en banc, highlighting the separate question of military commissions' jurisdiction over conspiracy (the issue on which the circuit had twice previously granted rehearing en banc). The Circuit ordered briefing and Respondent contended that the question was of "diminishing importance," in part, because future conspiracy prosecutions were unlikely. On January 21, 2021, the Circuit denied rehearing. App. 38a. Later that day, the Convening Authority convened a military commission to try three more detainees for conspiracy. The following day, Petitioner moved the Circuit to reconsider rehearing his case en banc. On March 29, 2021, after full briefing, the Circuit denied the motion and the mandate issued thereafter. *Id.* 40a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. This Court should summarily grant, vacate, and remand this case for further consideration in light of *Arthrex*.

In *Arthrex*, this Court brought rigor to the standard for distinguishing between principal and inferior officers under the Appointments Clause. Previously, that distinction depended upon what the panel below described as a "highly contextual inquiry requiring a close examination of the specific statutory framework in question." App. 20a (cleaned up). The D.C. Circuit reduced this inquiry to a three-factor balancing test – which the Federal Circuit followed in *Arthrex* and the panel applied below – that weighed an officer's: 1) oversight; 2) final decision-making authority; and 3) removability. *Id.* 20a; *see also Arthrex*, 941 F.3d at 1329.

In *Arthrex*, this Court eschewed this balancing test and held that officers must be Senate-confirmed whenever they have "the 'power to render a final decision on behalf of the United States' without any such review by their nominal superior or any other principal officer in the Executive Branch." *Arthrex*, 141 S. Ct. at 1981 (quoting *Edmond*, 520 U.S. at 665). This was necessary, the Court reasoned, to preserve the transparent "chain of dependence" from government decisionmakers to the President, and the President to the people. *Id.* at 1979. For an officer responsible for "adjudicating the public rights of private parties," this Court held, "unreviewable authority … is incompatible with their appointment by the Secretary to an inferior office." *Id.* at 1986.

This holding answers the first question presented. The panel below applied the wrong standard to reach the wrong conclusion. For reasons explained further in § III, *infra*, this error warrants a summary grant, vacatur, and remand of this case for reconsideration in light of *Arthrex*.

As the panel recognized, no Executive Branch official (not even the President) has the power to review "several of the Convening Authority's consequential powers." App. 22a. This includes "the power to modify charges, overturn a verdict, or commute a sentence, all of which are effectively unreviewable." *Ibid*. It also includes the unreviewable discretion to initiate a prosecution, to decide for what charges jeopardy should attach, to dismiss charges, to enter into plea agreements, and to make scores of other discretionary choices that are "binding upon all departments, courts, agencies, and officers of the United States." 10 U.S.C. § 950j(a); RTMC 26-4(b). The "power [the Convening Authority] exercises free from control by a superior" extends to "matters of law as well as policy." *Arthrex*, 141 S. Ct. at 1982-83. In fact, many of the Convening Authority's most significant final decisions are, by statute, committed to her "sole discretion and prerogative." 10 U.S.C. § 950b(c); 949(b)(2)(C).

For example, when Petitioner's trial was underway, Crawford dismissed capital charges levied against Mohammed Al-Qahtani, the so-called "20th Hijacker," whose alleged role in the September 11th attacks has been cited by lawmakers as one of the principal reasons Guantanamo exists. *See*, *e.g.*, 159 Cong. Rec. H3594 (statement of Rep. Cotton).

Crawford's stated reason was evidence that Qahtani's pre-trial "treatment met the legal definition of torture." Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, Washington Post, Jan. 14, 2009. But evidence that Petitioner was tortured in U.S. custody was publicly disclosed by prosecution whistleblowers in 2005. Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, Wall Street Journal, Aug. 1, 2005. And there was similar evidence of torture in the case of another detainee whose military commission Crawford convened *after* she dismissed in *Qahtani*. *In re Al-Nashiri*, 835 F.3d 110, 140-41 (D.C. Cir. 2016) (Tatel, J., dissenting). There is nothing in the public record to distinguish these three cases other than Crawford's judgment that they should be treated differently for reasons all her own.

Military commission convening authorities not only have the sole discretion and prerogative to render final decisions, but every other official in the Executive Branch is statutorily forbidden from attempting to influence their discretion, including with the threat of removal. 10 U.S.C. § 949b(a)(2)(B). Contrary to the panel's misimpression, App. 24a-25a, removing or threatening to remove a convening authority for their handling of either a particular case *or* a category of cases is forbidden. *See*, *e.g.*, *United States v. Boyce*, 76 M.J. 242, 250 (C.A.A.F. 2017); *United States v. Gerlich*, 45 M.J. 309, 314 (C.A.A.F. 1996).

The panel reasoned that this degree of insulated and unreviewable discretion was permissible because *Edmond* only "requires that inferior officers

have 'some level' of direction and supervision by a principal officer … not necessarily total control." App. 25a (quoting *Edmond*, 520 U.S. at 663). The Convening Authority's power to make "unreviewable" decisions, the panel concluded, could be offset by indirect means of supervision, such as rulemaking and removability. *Ibid.*

Arthrex clarified, however, that this kind of balancing misreads *Edmond*. "What was 'significant' to the outcome there—review by a superior executive officer—is absent here." *Arthrex*, 141 S. Ct. at 1981. For the appellate military judges under review in *Edmond*, every decision they make is governed by "a legal standard subject to appellate review." *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010). The Convening Authority, by contrast, can act "for any reason or no reason," *ibid.*, and has "the 'power to render a final decision on behalf of the United States' without any such review by their nominal superior or any other principal officer in the Executive Branch." *Arthrex*, 141 S. Ct. at 1981 (quoting *Edmond*, 520 U.S. at 665).

If a military appellate judge, for example, determined that the perpetrators of the September 11th attacks should be spared the death penalty as good public policy, that would be reversible error. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998). If the Convening Authority made that same decision, whether before trial, during trial, after trial, or as part of a plea agreement, it would be "final and conclusive" and thereafter "binding upon all departments, courts, agencies, and officers of the United States." Neither the Secretary,

nor the President, could reverse that decision. If they received public criticism, they could rightly claim their hands were tied. And if they got wind that the Convening Authority intended to make such a decision, they would be statutorily forbidden from intervening to prevent it.

This is not a hypothetical concern. A previous Convening Authority, who had been selected at the end of the Obama Administration (though formally designated in April 2017), began negotiating plea deals for non-capital sentences in the September 11th case. When word reached Attorney General Sessions, he voiced objections to Secretary Mattis, who fired the Convening Authority and his senior legal advisor before any deals were finalized. When the affected defendants objected, the Secretary was forced to offer alternative explanations for the firings, which were widely seen as pretextual. *See*, *e.g.*, Savage, *Fired Pentagon Official Was Exploring Plea Deals for 9/11 Suspects at Guantánamo*, N.Y. Times, Feb. 10, 2018; Rosenberg, *Fired War Court Overseer Was Exploring 9/11 Plea Agreement*, Miami Herald, Mar. 22, 2018; Gerstein, *Mattis: Aerial Photo Request Triggered Firing of Gitmo Tribunal Overseer*, POLITICO, Mar. 22, 2018. And whether those alternative explanations were, in fact, pretextual remains the subject of litigation. *See, e.g., Connell v. SOUTHCOM*, No. 18-1813, 2020 WL 6287467 (D.D.C., Oct. 27, 2020).

People of good faith can disagree over the death penalty or whether the torture of the accused should preclude prosecution. But that is precisely the point. The Appointments Clause ensures "democratic

accountability for executive action." *Arthrex*, 141 S. Ct. at 1988 (Gorsuch, J., concurring). If an officer is truly inferior, their superiors cannot be legally forced to dissemble on what policies those inferiors should carry out, nor can they "escape responsibility for [their inferiors'] choices by pretending that they are not [their] own." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 497 (2010).

In *Arthrex*, this Court held "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch." *Arthrex*, 141 S. Ct. at 1985. That is precisely what the Convening Authority can do and does. This Court should, therefore, GVR this case because if a single person is to wield the Executive Branch's "sole discretion and prerogative" over life and death, the least the Constitution requires is that they undergo Senate confirmation.

II. This Court should grant certiorari to resolve the standard for determining when a statute vests a Department Head with the power to appoint inferior officers under the Excepting Clause.

Assuming convening authority can be wielded by inferior officers, the Appointments Clause still requires the Convening Authority to have been appointed to an office "established by Law," either by the President with Senate-confirmation or by a Department Head, who has been vested with the power "by Law" to make appointments under the Excepting Clause. Nothing in the text of the MCA, however, either establishes "the Convening Authority" as a freestanding office or vests

appointing power in the Secretary of Defense. Should this Court not GVR this case for reconsideration in light of *Arthrex*, it should grant certiorari to resolve the standard for determining when statutes satisfy the Excepting Clause.

In *Maurice*, Chief Justice Marshall, riding circuit, wrote the foundational opinion on when a statute does, and does not, establish an office "by Law" and vest a Department Head with appointment power. Marshall explained that the Appointments Clause:

> directs that all offices of the United States shall be established by law; and I do not think that the mere direction that a thing shall be done, without prescribing the mode of doing it, can be fairly construed into the establishment of an office for the purpose, if the object can be effected without one. It is not necessary, or even a fair inference from such an act, that congress intended it should be executed through the medium of offices, since there are other ample means by which it may be executed, and since the practice of the government has been for the legislature, wherever this mode of executing an act was intended, to organize a system by law, and either to create the several laws expressly, or to authorize the president in terms, to employ such persons as he might think proper, for the performance of particular services.

Maurice, 26 F. Cas. at 1214.

The question presented was whether the Secretary of War had validly appointed the

defendant as an "agent of fortifications" to carry out Congressional statutes authorizing construction. Because there was "no statute which directly and expressly confer[red] the power" to appoint an agent of fortifications on the Secretary, Marshall concluded, the defendant "cannot be considered as a regularly appointed agent of fortifications." *Maurice*, 26 F. Cas. at 1216.

The rigor of *Maurice*'s standard reflects the Founders' view that Congressional accountability for the establishment of offices, their authorities and features, and their mode of appointment was one of the Constitution's most significant safeguards for republican government. *See*, *e.g.*, *Declaration of Independence*, 1 Stat. 1; *The Federalist* 69 (Hamilton); *see also* Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 492-93 (2018); McConnell, *The Logical Structure of Article Two*, 63-64 (Nov. 14, 2016).[5] And it was seen as an especially important safeguard in the military context with one Framer warning, "If the Executive can model the army, he may set up an absolute Government." 2 M. Farrand, Records of the Federal Convention, 405-06 (1911 ed.).

Over the intervening two centuries, this Court has regularly cited *Maurice* as authoritative on various legal questions, including its description of "the essential elements of a public station." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 520 (1926); *see also Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring).

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[5] *Available at* https://perma.cc/8FU5-UNW3

But it has never squarely endorsed *Maurice*'s holding on the standard for determining when a statute satisfies the Excepting Clause.

Despite this Court's silence, the Office of Legal Counsel has embraced *Maurice*. *See*, *e.g.*, *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 115-19 (2007); *Limitations on Presidential Power to Create A New Exec. Branch Entity to Receive & Administer Funds Under Foreign Aid Legislation*, 9 Op. O.L.C. 76 (1985) (a statute granting the power to "designate" responsible subordinates does not empower "the President [to] create a wholly new administrative entity, outside structures within the Executive Branch, to fulfill those statutory responsibilities.").

Legal scholars have treated *Maurice* as an authoritative statement of the original understanding of the Appointments Clause. Durling & West, *Appointments Without Law*, 105 Va. L. Rev. 1281 (2019); Calabresi & Lawson, *Why Robert Mueller's Appointment As Special Counsel Was Unlawful*, 95 Notre Dame L. Rev. 87 (2019); West, *Congressional Power over Office Creation*, 128 Yale L.J. 166 (2018); Sholette, *The American Czars*, 20 Cornell J.L. & Pub. Pol'y 219 (2010); *cf.* O'Connell, *Actings*, 120 Colum. L. Rev. 613, 683 (2020) ("Constitutionally, Congress must have created the specific position in which the delegatee serves or delegated the authority to create the job to the agency head under the Appointments Clause.").

Relevant to military law, CAAF reached the same holding as *Maurice* in 2014, though without citing it:

"[W]e interpret *Edmond* to require statutory language specifically granting the head of a department the power to appoint inferior officers." *Janssen*, 73 M.J. at 224. CAAF held this general rule was particularly stringent in the military context where "Congress ha[d] legislated with great specificity on the powers of the Secretary of Defense and the structure of the department." *Ibid.* Surveying Title 10, it observed that Congress had only "established three positions within the Office of the Secretary and explicitly provided that the Secretary alone shall appoint them." *Id.* at 225. The "Convening Authority" was not among them.

Notably, in dicta, panels of the Tax Court and the D.C. Circuit reached the same basic conclusion as *Maurice* when reviewing the Appointments Clause's application to Title 26. *Tucker*, 676 F.3d at 1132-1133; *Tucker v. CIR*, 135 T.C. 114, 152 (2010). The issue was ultimately deemed irrelevant, however, because before *Lucia,* the Circuit took a broad view of what powers could be delegated to employees.

Since *Lucia*, the D.C. Circuit has forged a path contrary to *Maurice* without ever citing or distinguishing it. *See*, *e.g.*, *In re Grand Jury*, 916 F.3d at 1053. As the panel described the standard the circuit applies, statutory silence is irrelevant because "reading the statute as a whole, we consider whether Congress in fact authorized a department head to appoint an inferior officer" and whether the statute "accommodate[s] the delegation." App. 27a (quoting *Sealed Case*, 829 F.2d at 55).

Seeking to divine whether Congress has implicitly invoked the Excepting Clause inverts

Maurice. Rather than looking for "the degree of statutory specificity" required in *Janssen*, or text that "directly and expressly confers the power" to appoint required in *Maurice*, the Circuit's broad standard treats the "direction that a thing shall be done, without prescribing the mode of doing it" as necessarily authorizing "the establishment of an office for the purpose."

Where *Maurice* held that a statute cannot be construed to implicitly establish an office when "the object [of the statute] can be effected without one," the panel did not even inquire into whether convening authority could be exercised without a freestanding office of "Convening Authority." Had it looked to military history, it would have seen that there has never previously been a freestanding Convening Authority for any type of military tribunal because convening authority has always been understood as a duty incident to certain command positions. *See*, *e.g.*, *In re Yamashita*, 327 U.S. 1, 10 (1946); *Ryan*, 5 M.J. at 101.

In fact, had the panel looked only to the history of the MCA, it would have seen that the Secretary has routinely treated convening authority as "a duty to be performed by existing officers." App. 28a. Half of those designated under § 948h served in pre-existing positions unrelated to military commissions. App. 87a-89a. The first designated convening authority under the MCA was the Deputy Secretary. The longest serving was the Navy General Counsel. And the Secretary has designated concurrent convening authorities to handle different cases. *Id*. 89a n.1.

Ignoring *Maurice* and reading the "statute as a whole," the panel concluded that the establishment of an office and the vesting of appointment power could be implied from the fact that the MCA sporadically "refer[ed] to the Convening Authority by name and use[d] the definite article 'the.'" App. 28a-29a. This, the panel claimed, was in "stark contrast to the UCMJ, which specifically lists existing officers who are permitted to perform the function of convening courts-martial." *Ibid.*

There are several case-specific problems with this reasoning. For one, the use of the definite article "the" before "convening authority" is as prevalent in the UCMJ as the MCA.[6] For another, the Secretary's regulations define "Convening Authority," not as a freestanding office, but as "the Secretary of Defense or any officer or official of the United States designated by the Secretary of Defense for that purpose." RMC 103(8). And as both the panel and CMCR recognized, § 948h requires the Secretary to designate an existing "officer or official" as a convening authority, which is why Crawford had to be first hired as an employee. App. 19a; 73a. The statute, in other words, makes convening authority a "duty to be performed by existing officers." It is just, in the panel's view, a duty that also can also be performed by existing employees.

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[6] The phrase "the convening authority" occurs 43 times in the MCA and 119 times in the UCMJ, which is three times longer.

The general problem, though, and a problem of sweeping significance for federal administrative law, is that the panel's standard can always be met. If § 948h, which nowhere uses the phrase "convening authority," is sufficient to vest "the Secretary the power to designate any officer or official to be 'the convening authority,' a new office created by the statute," App. 28a-29a, then the only administratively established offices that run afoul of the Excepting Clause are those created to implement statutes that directly and expressly forbid the delegation of the powers conferred.

As this case shows, the panel's standard allows entire offices and appointments to be implied *nunc pro tunc* a decade into the past whenever litigants challenge the improper delegation of substantial authority to federal employees. The Secretary never purported to "appoint" Crawford to any office, never gave her a commission, never required her to resign once the term of her employee position expired, and never reported her in the Plum Book as anything other than a SES employee. Senate Committee on Homeland Security and Governmental Affairs, United States Government Policy and Supporting Positions 27 (2008).

If this case yields a permissible result under the Excepting Clause, the panel's standard "is in truth no standard at all." *Fox v. Vice*, 563 U.S. 826, 835 (2011). Perhaps that is desirable given the complexity of the modern administrative state. Perhaps *Maurice* is obsolete. But if it is, this Court should clearly hold that it is.

III. This case offers an ideal vehicle to answer the questions presented promptly and definitively.

While Petitioner is a "Low Value Detainee" and "Little Fish" in the grand scheme of the military commissions system, both questions presented are systemically important. Any defect in the appointment of a convening authority is fatal to a military tribunal's subject-matter jurisdiction. App. 53a-61a. The currently pending prosecutions of the so-called "High Value Detainees," such as those charged in connection with the September 11th attacks, need definitive answers. If the Convening Authority in these cases was improperly appointed, and no superseding convening orders are promulgated by a properly appointed convening authority before the entry of a final judgment, any verdict or sentence those trials yield will be a nullity. Allowing such a defect to go uncorrected until these cases are on post-trial appeal will guarantee decades are wasted and will delay justice, perhaps forever.

Solving either problem requires no change to the MCA or its implementing regulations. If this Court, or the D.C. Circuit on remand, holds that a military commission convening authority must be a principal officer under *Arthrex*, all the Secretary must do is serve as the Convening Authority himself or designate a Senate-confirmed officer under § 948h. He has done both in the past. App. 87a-89a. If this Court, or the D.C. Circuit on remand, holds that only existing officers may be designated as convening authorities under *Maurice*, all the Secretary must do is designate a properly appointed officer from the

thousands of principal and inferior officers, military and civilian, already in the Defense Department.

Given the panel's reliance on a since-abrogated balancing test, given the urgent need for clarity, and given the "reasonable probability" that *Arthrex* will be case-dispositive, this Court should summarily grant, vacate, and remand under Rule 16.1. *Wellons*, 558 U.S. at 225.

At the time of this filing, this Court has already GVR'd at least four cases under *Arthrex*. *See*, *e.g.*, *Iancu v. Luoma*, No. 20-74 (U.S., June 28, 2021); *Polaris Innovations v. Kingston Technology*, No. 19-1459 (U.S., June 28, 2021); *RPM Int'l v. Stuart*, No. 20-314 (U.S., June 28, 2021); *Iancu v. Fall Line Patents.*, No. 20-853 (U.S., June 28, 2021). While all arose from PTAB litigation, the litigation posture differed across the cases, making *Arthrex* less likely to be case-dispositive than it is here. And assuming the panel on remand decides that *Arthrex* is case-dispositive, the constitutional questions of first impression in this case, such as whether *Maurice* remains good law, will become moot. *See Leroy v. Great W. United.*, 443 U.S. 173, 181 (1979).

Alternatively, full review should be granted because of the growing need for this Court's guidance on when significant governmental authority may be delegated to administratively established offices under the Appointments Clause. The increasing tendency to govern through the regulatory process has, in turn, led to the creation of administratively established offices of systemic importance and questionable constitutionality. *See*, *e.g.*, McConnell, Flaherty, & Schwinn, *The Pay Czar*

and the Appointments Clause: A Forum, Federalist Soc'y, Jan. 4, 2010.[7]

There is also a growing call to "start combing through the federal government to pare down its ludicrous list of political appointees." Rubin, *Yet Another Reason We Need Fewer Political Appointees*, Washington Post, Aug. 1, 2021; *see also* Stier, *Senate Confirmation for 1,200 Jobs Is Holding Biden Back*, Bloomberg, May 4, 2021. A widely anticipated study recently recommended "converting political appointments to career roles" for as many as "three-quarters of Senate-confirmed positions on the Executive Schedule." Partnership for Public Service, Center for Presidential Transition, *Unconfirmed: Why Reducing the Number Of Senate-confirmed Positions Can Make Government More Effective*, Aug. 9, 2021.[8] And a bill introduced this past May would direct the President to "take such actions as necessary to ensure that the total number of political appointees shall not exceed 2,000." S.1619, 117th Cong., 1st Sess. § 3(b) (2021).

This case is an ideal vehicle to answer the questions presented, particularly given the features of administratively established offices that make them apt to evade this Court's review. The often-transient nature of these offices and the time-sensitive fact-patterns most likely to provoke litigation often allow mootness to overcome any case

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[7] *Available at* https://perma.cc/QU2E-AQLM.

[8] *Available at* https://perma.cc/24SD-W43V.

before it reaches this Court. *See*, *e.g.*, *In re Grand Jury*, No. 18-3052, Order (D.C. Cir., May 21, 2019) (effectively mooting a challenge to the appointment of the Special Counsel by declining to stay the enforcement of a subpoena); *Guedes v. ATFE*, 920 F.3d 1 (D.C. Cir. 2019) (controversy over acting appointment rendered moot by confirmation of Attorney General); *cf. L.M.-M. v. Cuccinelli*, No. 20-5141, 2020 WL 5358686 (D.C. Cir., Aug. 25, 2020) (dismissing by stipulation). Parties rarely have standing to challenge administratively established offices whose significant authorities are non-adjudicatory, such as rulemaking, diplomacy, oversight, and appropriations. *See*, *e.g.*, *Jefferson v. Harris*, 285 F. Supp. 3d 173, 186 (D.D.C. 2018). And even when a claim is otherwise justiciable, doctrines such as ratification often permit agencies to take case-specific actions in response to litigation that render it judicially unreviewable. *See*, *e.g.*, *Jooce*, 981 F.3d at 29.

The preeminence of the D.C. Circuit on questions of administrative law will also discourage litigants from raising legal challenges that the panel's opinion forecloses. *See Verizon California v. Peevey*, 413 F.3d 1069, 1084 (9th Cir. 2005) (Bea, J., concurring); *Springdale Memorial Hospital v. Bowen*, 828 F.2d 491, 492 (8th Cir. 1987) (Heaney, Lay, and McMillian, JJ., dissenting from the denial of reh'g en banc); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court,* 1978 Sup.Ct. Rev. 345, 371 (1979) ("As a practical matter, the D.C. Circuit is something of a resident manager [in administrative law], and the Supreme Court an absentee landlord.").

As a vehicle, this case presents its questions squarely on the merits unencumbered by justiciability issues. The panel's holdings apply circuit precedent that is in clear conflict with not only *Arthrex* and *Maurice*, but also CAAF's caselaw on comparable issues. And the parties agree that vacatur is required if Petitioner is correct on the merits of either claim, thereby avoiding the remedial questions that often complicate Appointments Clause cases.

CONCLUSION

Leaving the panel's opinion in place means at least a decade of legal uncertainty. It makes it likely that a generation after the September 11th attacks, the verdicts against those responsible will be vulnerable to a jurisdictional defect that this Court could have fixed today. The reasons for granting certiorari are therefore compelling.

Respectfully submitted,

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