No. 21-339

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

REPLY BRIEF

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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?

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REPLY

I. The petition was timely.

This Court has jurisdiction over petitions for certiorari from "the final judgment of the United States Court of Appeals for the District of Columbia Circuit." 10 U.S.C. § 950g(e). A judgment remains non-final while the prospect of rehearing remains. *Missouri v. Jenkins*, 495 U.S. 33, 47-48 (1990). And when a timely petition for rehearing is submitted, the time to file "runs from the date rehearing is denied." Rule 13.3.

Here, Petitioner timely petitioned for rehearing and renewed that request the day after it was initially denied via a motion for reconsideration. That motion raised intervening facts bearing upon the parties' central disagreement over whether rehearing was warranted. Respondent briefed the motion on the merits. The Circuit accepted the parties' briefing, withheld the mandate *sua sponte*, and deliberated for two months before ruling.

No one disputes that the petition here is timely if that ruling finalized the judgment. Respondent also does not dispute that a petition filed before that ruling would have been fatally premature. But it maintains that a judgment becomes inexorably final when rehearing is initially denied unless the record indicates "the court in fact agreed to reconsider the merits of that earlier denial of rehearing." BIO.13.

If that is the test, it is met here. The order denying reconsideration did so "upon consideration" of the parties' merits briefing. App. 40a. And the Circuit also "interpreted and actually treated"

Petitioner's motion as suspending finality by, *inter alia*, withholding the mandate while it deliberated. *Jenkins*, 495 U.S. at 48; *see also Young v. Harper*, 520 U.S. 143, 147 n.1 (1997).

But Respondent misstates the test. A judgment is final when "the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review." *Dept. of Banking v. Pink*, 317 U.S. 264, 268 (1942). If "the actions of a party or a lower court … raise the 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).

Several of this Court's precedents have followed successive denials of rehearing. *See*, *e.g.*, *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016); *Darden v. Wainwright*, 477 U.S. 168, 171 (1986). In *Nabisco*, the appellee filed a combined petition for rehearing/rehearing en banc. After the panel denied its petition, the appellee filed a second petition for rehearing en banc, which the Circuit denied without ordering responsive briefing or taking other action, save withholding the mandate. *European Community v. RJR Nabisco*, 783 F.3d 123 (2d Cir. 2015).

Some circuits prohibit successive applications for rehearing. *See*, *e.g.*, Rule 27-3 (CA11 2021); Rule 35.1 (CA10 2021). Others, including the D.C. Circuit, often deny rehearing with instructions prohibiting further filings. *Cf. Morse v. United States*, 270 U.S. 151, 154 (1926). But here, Petitioner's motion was

timely, permissible, accepted, and briefed on the merits. *See Bowman v. Lopereno*, 311 U.S. 262, 265–66 (1940). And granting it would have vacated the judgment automatically. Rule 35(d) (CADC 2020).

Respondent's timeliness arguments are also opportunistic. It has known since May that Petitioner calculated August 26, 2021, as his certiorari deadline, and forwent seeking additional time because he believed none was required. *Cf. Durham v. United States*, 401 U.S. 481, 481-82 (1971). In May, the parties conferred on whether Petitioner needed to seek additional time to address the Court's still pending decision in *Arthrex*. Email Correspondence (May 5, 2021).[1] Counsel for Respondent noted his inability to make "any official representation that … August 26 is the correct date," but indicated no disagreement when Petitioner stated that this Court's blanket extension extended the deadline to "August 26, which is 150 days." *Ibid.* Then in July, after the Court of Military Commission Review ("CMCR") issued a briefing schedule on remand, Respondent consented to Petitioner's request to extend deadlines because "Appellant presently has until August 26, 2021, to file a petition for a writ of certiorari." *United States v. Bahlul*, Case No. 21-003, Motion, at 2 (CMCR, Jul 23, 2021). Respondent never suggested that it believed the certiorari deadline had already passed.

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[1] *Available at* https://perma.cc/7C5E-SXZB

Assuming Respondent was not intentionally inviting error, all concerned have pegged Petitioner's certiorari deadline to the Circuit's denial of reconsideration. Even if the date on which the judgment below became final is ambiguous, therefore, resolving that ambiguity in favor of timeliness serves the ends of justice. *See Schacht v. United States*, 398 U.S. 58, 63-64 (1970).

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

Arthrex held that when an officer's decision-making authority is what makes them an "officer[] exercising 'significant authority' in the first place," those decisions must be under the control of a principal officer. *United States v. Arthrex*, 141 S. Ct. 1970, 1980 (2021). An inferior officer cannot make consequential decisions that are "unreviewable." *Id.* at 1986.

The panel below held that military commission convening authorities can be inferior officers even though "several of the Convening Authority's consequential powers" – the very powers that make them officers in the first place – are "unreviewable." App. 20a. This Court should therefore GVR as it routinely does when intervening decisions clarify the standard governing a question decided below.

Respondent does not agree. But Respondent did not agree with *Arthrex*. And its merits arguments for denying certiorari are identical to its unsuccessful arguments in *Arthrex*.

In *Arthrex*, Respondent argued for a "context-specific inquiry" that weighs "the *cumulative* effect of

the various control mechanisms," without "ascrib[ing] undue weight to the perceived absence of specific control mechanisms." *United States v. Arthrex*, Nos. 19-1434, 19-1452 & 19-1458, Brief for the United States, at 17 (U.S., Nov. 25, 2020) (original emphasis). It asserted that this balancing was consistent with *Edmond* because "Complete control of every action that an inferior officer takes has never been required, as long as such officers' work remains 'supervised at some level.'" *Id.* at 13 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). And it hammered the phrase "some level" throughout its briefing to suggest that inferior officers need only be supervised to some "extent" or "degree" by a principal officer. *Id*. at 9, 13, 20, 21, 35.

This panel below echoed Respondent's premise that the principal/inferior officer distinction was a "highly contextual inquiry." App. 20a-21a. And weighing the same factors Respondent advanced in *Arthrex*, the panel concluded that, while a convening authority made "unreviewable" decisions about how to exercise Executive power, she too could be an inferior officer because *Edmond* required only "'some level' of direction and supervision by a principal officer, not necessarily total control." App. 22a.

Respondent understandably likes the panel's decision because it adopts – verbatim at times – its arguments in *Arthrex*. But this Court rejected Respondent's arguments (and *a fortiori* the panel's opinion) because when *Edmond* referred to the need for direction and supervision at "some level," it was not qualifying the extent or degree of control, it was referring to the inferior officer's subordinate

relationship to a principal officer who could review any decision that bound the United States. *Arthrex*, 141 S. Ct. at 1981.

As the panel recognized, a convening authority has the "sole discretion and prerogative" to initiate a prosecution, dismiss charges, make plea agreements, reverse, affirm, or reduce convictions and sentences, and make scores of other case-dispositive decisions. Pet.9-14. Respondent dismisses these as "subsidiary determination[s]." BIO.17-18. But all are unreviewable, policy-driven "final decision[s] on how to exercise executive power." *Arthrex*, 141 S. Ct. at 1984; *see*, *e.g.*, Carol Rosenberg, U.S. Military Jury Condemns Terrorist's Torture and Urges Clemency, N.Y. Times, Oct. 31, 2021, A1.

As in *Arthrex*, Respondent "assemble[s] a catalog of steps the [Secretary] might take to affect [a convening authority's] decisionmaking process." *Arthrex*, 141 S. Ct. at 1981. It highlights the Secretary's ostensible ability to "act as the convening authority," "replace the convening authority," and remove a convening authority's designation under § 948h. BIO.18-19. In *Arthrex*, Respondent highlighted the PTO Director's ability to initiate review, manipulate the PTAB's composition, and remove APJs from judicial assignments. *Arthrex*, 141 S. Ct. at 1981-82. But as in *Arthrex*, "That is not the solution. It is the problem." 141 S. Ct. at 1981.

The *only* decision a convening authority makes that is statutorily subject to review is her approval of a conviction that she has referred to the CMCR. 10 U.S.C. § 950f(c). If she declines to refer a conviction, even that review appears pretermitted. *United*

States v. Khadr, No. 13-005, Order (CMCR, Oct. 21, 2021) (dismissing a post-trial appeal because the Convening Authority had not referred it). And CMCR review is always contingent upon the defendant's election. 10 U.S.C. § 950c(b). Unlike the appellate review scheme approved in *Edmond*, no one in the Executive Branch can seek review of a convening authority's final decisions. *Edmond*, 520 U.S. at 665.

Respondent asserts that *Edmond* permits this "'narrow[],' deferential form of review." BIO.18. But its quote is misleadingly edited. In *Edmond*, the petitioner argued that the services' Courts of Criminal Appeal ("CCA") had unreviewable authority because they applied a broader standard of review to sufficiency of the evidence claims than did the Court of Appeals for the Armed Forces ("CAAF"). All this Court held was that it was immaterial whether CAAF's "scope of review is narrower than that exercised" by the CCAs on such claims, because the CCAs decisions did not bind the United States. *Edmond*, 520 U.S. at 665.

Convening authorities have the "unfettered discretion" to bind the United States "for any reason or no reason." *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010). In courts-martial, nearly all – if not all – convening authorities are Senate-confirmed presidential appointees. 10 U.S.C. § 822. Permitting anything less is irreconcilable with *Arthrex*.

III. 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.

Respondent contends that the "text and structure" of the MCA both establish the office of Convening Authority for Military Commissions and vest the Secretary with appointment power under the Excepting Clause. BIO.20. But like the panel, Respondent does not point to any statutory text that does either, even though the MCA establishes other appointive offices unambiguously. 10 U.S.C. § 950f(a)-(b).

The panel held that under the D.C. Circuit's broad "statute as a whole" approach to the Excepting Clause, the MCA's occasional use of the word "the" before the phrase "convening authority" demonstrated that "the Convening Authority is a distinct office and not simply a duty to be performed by existing officers." App. 28a. As Respondent appears to recognize, this overlooks the Secretary's ability to serve as a convening authority himself or to designate other existing officers as convening authorities without creating dual-officeholding problems. BIO.18-19. Respondent therefore takes a subtly different tack, arguing that with 10 U.S.C. § 948h, "Congress identified a duty and explicitly empowered the Secretary to designate the person who shall perform the role of convening authority—*i.e.*, to appoint that officer." BIO.22.

For a variety of reasons, Respondent's approach fairs no better than the panels'. It conflicts with

CAAF decisions on both the Secretary's appointment power and the meaning of "convening authority." Pet.5 Respondent insists that CAAF's decisions are irrelevant because they have not "addressed the 2006 MCA." BIO.22. But the MCA is "based upon the procedures for trial by general courts-martial," 10 U.S.C. § 948b(c), and Respondent never explains why Congress wanted fundamental military justice concepts to have quixotic meanings in the MCA. Nor does it explain why such quixotic meanings should be inferred from § 948h, whose title and operative text are taken *in haec verba* from the parallel section of the UCMJ. 10 U.S.C. § 822(a) ("General courts-martial *may be convened by*" specified officials and "any other commanding officer *designated by the Secretary* concerned.") (emphasis added).

Respondent argues that reading § 948h to both establish an office and vest appointment power is compelled by constitutional avoidance. Otherwise, "it would suggest that Congress failed to provide the Secretary with constitutionally sufficient authorization to carry out a task that the statute assigns to him." BIO.20-21.

Respondent claims this argument is taken from the panel's decision. But the panel made a different constitutional avoidance claim. It asserted the need to avoid reading "the 2006 MCA in a manner that would render Crawford's appointment unconstitutional when another interpretation is readily available." App. 29a. The panel's conclusion was wrong, since constitutional avoidance is rooted in respect for Congress, not the Executive's assertion of authorities Congress did not grant. *See F.C.C. v.*

Fox, 556 U.S. 502, 516 (2009). But even had the panel agreed that the MCA would be unworkable if the Secretary cannot designate civilian employees as convening authorities, that conclusion is belied by over a decade of experience. The Secretary complies – and has complied – with both the MCA and the Constitution whenever he exercises convening authority himself or delegates that duty to the thousands of Senate-confirmed military and civilian officers in the Defense Department. Pet. 32-33.

Respondent's interpretation of § 948h also amplifies, rather than avoids, Appointments Clause problems. According to Respondent, § 948h makes convening authority a statutory duty when the Secretary performs it, BIO.18, a delegable duty when he designates an existing officer, BIO.19, and a freestanding appointive office that he can fill *sub silento* by designating an employee, who must be an existing employee to be eligible. BIO.22. And it can be any or all these things at the same time, as when convening authorities have been disqualified from cases or the Secretary has designated multiple convening authorities simultaneously. App. 87a-89a.

Preventing this kind of unaccountable bureaucratic morass is one of the many reasons Chief Justice Marshall ruled that Congress must "directly and expressly" establish an office and vest the power to appoint, and that statutory silence cannot "be construed into the establishment of an office for the purpose, if the [statute's] object can be effected without one." *United States v. Maurice*, 26 F. Cas. 1211, 1214-16 (C.C.D. Va. 1823). Otherwise, the Executive Branch becomes riddled with ostensible

officers who disappear and reappear ad hoc and "blur the lines of accountability demanded by the Appointments Clause." *Arthrex*, 141 S. Ct. at 1972.

Respondent argues that any conflict between *Maurice* and the D.C. Circuit's "statute as a whole" approach is immaterial because *Maurice* is "not a decision of this Court" and is just "a decision of a single Justice riding circuit." BIO.21. Fair enough. Though ordinarily, Marshall's constitutional opinions bear a little more weight than the usual "single Justice riding circuit," particularly where they are widely relied upon as authoritative, Pet.26-28, and "successive Presidents have accepted Marshall's ruling." *Trump v. Vance*, 140 S. Ct. 2412, 2423 (2020).

The panel did not consider, let alone distinguish, *Maruice*, and Respondent understandably prefers the flexibility that the D.C. Circuit's "statute as a whole" approach affords it. But such an approach compromises accountability and the Founders' "double-barreled repudiation of any presidential prerogative power to create offices." M. McConnell, The President Who Would Not Be King (2020). It therefore warrants this Court's review.

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

Respondent does not dispute any of the reasons Petitioner advanced for why this case is an ideal vehicle for resolving the questions presented and why it is systemically important for this Court to do so. Pet.32-36. Instead, it asserts an alternative ground to affirm that has never been addressed or endorsed by any court and is predicated upon the contention that the Convening Authority in Petitioner's case, unbeknownst to anyone, was a principal officer because she had previously served on CAAF and is therefore statutorily eligible to sit by designation as a "Senior Judge" for the remainder of her life. BIO.23.

Respondent acknowledges that this argument conflicts with the relevant statutes and that the panel declined to address it altogether. App. 15a n.5. But it fails to mention that it also forfeited this argument below and that, even if accepted, it cannot cure the jurisdictional defect that hangs over all but one of the now-pending military commissions, including all the capital cases, which were convened by civilian employees and whose current Convening Authority is a civilian employee. Assuming, however, that Respondent has an alternative argument for affirming, that simply strengthens the case for a GVR. *Henry v. Rock Hill*, 376 U.S. 776 (1964).

A GVR is also in the interests of judicial economy. As Respondent noted, "proceedings below have not yet concluded." BIO.14. Because *Arthrex* abrogated the law of the case, denial of certiorari simply returns Petitioner to the CMCR and then to the D.C. Circuit, where the questions presented will be again litigated *de novo* and, as Respondent acknowledges, again presented to this Court after several more years of wasteful appellate litigation to achieve the same practical end as a GVR.

CONCLUSION

The jurisdictional defect in Petitioner's case can be fixed today in every pending military commission without any statutory or regulatory change. The military commission system needs clarity. Granting certiorari will ensure that nearly two decades of human effort and billions of dollars are not wasted.

Respectfully submitted,

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