

No. 25-

In the Supreme Court of the United States

WALID BIN 'ATASH,
PETITIONER,
v.
UNITED STATES,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 705(d)(4)(B) of the Rules for Military Commissions provides that the government “may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement.” The question presented is:

Whether, consistent with the standard for mandamus relief, it is clear and indisputable that an accused has not begun performance under Rule 705(d)(4)(B) when the accused and the government have signed a pretrial agreement, the accused has entered into a detailed stipulation of fact with the prosecution admitting to the basis behind the charges, and the accused has taken additional actions that the government itself treated as required by the agreement.

PARTIES TO THE PROCEEDING

Walid bin ‘Atash was an accused in proceedings before the Military Commissions Trial Judiciary and a respondent in proceedings before the Court of Military Commission Review and the D.C. Circuit.

Khalid Sheikh Mohammad and Mustafa al Hawsawi were co-accused in proceedings before the Military Commissions Trial Judiciary and respondents in proceedings before the Court of Military Commission Review and the D.C. Circuit. They intend to file a separate petition for a writ of certiorari before this Court. *See Mohammad v. United States* (25A1072).

The United States was the petitioner in proceedings before the Court of Military Commission Review and the D.C. Circuit.

RELATED PROCEEDINGS

United States Military Commissions Trial Judiciary:

United States of America v. Mohammad, AE 956J
(RUL) (November 6, 2024).

United States Court of Military Commission Review:

In re Mohammad, CMCR 24-001, 762 F. Supp. 3d
1183 (C.M.C.R. 2024).

United States Court of Appeals (D.C. Cir.):

In re United States of America, 143 F.4th 411
(D.C. Cir. 2025).

In re United States of America, No. 25-1009 (D.C.
Cir. Jan. 6, 2026). Rehearing denied January 6,
2026.

TABLE OF CONTENTS

Question presented	i
Parties to the proceeding	ii
Related proceedings	iii
Petition for writ of certiorari	1
Opinions below.....	1
Jurisdiction	1
Statutory and regulatory provisions involved.....	2
Introduction	3
Statement of the case.....	7
A. Factual background.	7
B. Proceedings below.....	11
Reasons for granting the petition	17
I. The D.C. Circuit’s decision conflicts with a ruling from the nation’s highest military court.	17
II. The D.C. Circuit’s decision is incorrect.	21
A. The decision below exceeded the proper limits of mandamus.....	21
B. The decision below did not properly interpret the regulatory language when construing Petitioner’s stipulation.....	24
C. The decision below misapplied contract interpretation to the parties’ actions at the suppression hearing.	30
III. The D.C. Circuit’s decision raises an important question warranting review.	34
Conclusion	36

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>In re Al Baluchi</i> , 952 F.3d 363 (D.C. Cir. 2020)	21, 22
<i>Bode & Grenier, LLP v. Knight</i> , 808 F.3d 852 (D.C. Cir. 2015)	31
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	3, 7, 35
<i>Bragdon v. Abbott</i> , 524 U.S. 624 (1998)	28
<i>Cheney v. U.S. District Court for the District of Columbia</i> , 542 U.S. 367 (2004)	21
<i>In re Grice</i> , 974 F.3d 950 (9th Cir. 2020)	21
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006)	3, 35
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	35
<i>In re HTC Corp.</i> , 889 F.3d 1349 (Fed. Cir. 2018)	21

<i>In re Khadr</i> , 823 F.3d 92 (D.C. Cir. 2016)	15, 22
<i>Kisor v. Wilkie</i> , 588 U.S. 558 (2019)	20, 24
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	28
<i>McGirt v. Oklahoma</i> , 591 U.S. 894 (2020)	35
<i>Middendorf v. Henry</i> , 425 U.S. 25 (1976)	22, 23
<i>Niz-Chavez v. Garland</i> , 593 U.S. 155 (2021)	36
<i>Noyd v. Bond</i> , 395 U.S. 683 (1969)	22, 23
<i>Old Colony Tr. Co. v. City of Omaha</i> , 230 U.S. 100 (1913)	31, 32
<i>Ortiz v. United States</i> , 585 U.S. 427 (2018)	23
<i>Puckett v. United States</i> , 556 U.S. 129 (2009)	33, 34
<i>Schlesinger v. Councilman</i> , 420 U.S. 738 (1975)	6

<i>Shepardson v. Roberts</i> , 14 M.J. 354 (C.M.A. 1983).....	33
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.</i> , 559 U.S. 662 (2010)	31
<i>U.S. ex rel. Chicago Great Western R. Co. v. I.C.C.</i> , 294 U.S. 50 (1935)	21
<i>Union Pacific R.R. Co. v. Mason City & Ft. Dodge R.R. Co.</i> , 199 U.S. 160 (1905)	19
<i>United States v. Dean</i> , 67 M.J. 224 (C.A.A.F. 2009).. 4–6, 11–13, 17–20, 27, 28	
<i>United States v. Title Ins. & Tr. Co.</i> , 265 U.S. 472 (1924)	19
<i>United States v. Toy</i> , 65 M.J. 405 (C.A.A.F. 2008).....	20

STATUTES AND RULES

10 U.S.C.	
§ 948b	3, 27
§ 948h	8
§ 949a	2, 3, 7, 8, 27, 28
§ 950f	7
Fed. R. Crim. P.	
Rule 11	23

Rules for Courts-Martial	
Rule 705 (2008 ed.)	4, 8, 19, 23, 28
Rules for Military Commissions	
Rule 102	29, 30
Rule 705	2, 3, 4, 8, 11, 12, 19, 21, 23–29, 33
Sup. Ct. R.	
Rule 10	20

OTHER AUTHORITIES

ARMY TRIAL DEF. SERV., Defense Counsel 101 Deskbook (14th ed. July 2024)	26, 27
DEPT OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSION (2011)	27
The Judge Advocate Gen.’s Legal Ctr. & Sch., Criminal Law Online Deskbook (2025)	27
<i>Manual for Courts-Martial</i> , Analysis of the Rules for Courts-Martial (2008 ed.)	20, 26, 27, 28
MERRIAM-WEBSTER DICTIONARY, Begins (2026)	25
RESTATEMENT (SECOND) OF CONTRACTS § 202	31
Stephen M. Shapiro, et al., <i>Supreme Court Practice</i> § 4.7 (11TH ED. 2019)	6, 20
4 WILLISTON ON CONTRACTS § 8:13	33

PETITION FOR WRIT OF CERTIORARI

Petitioner Walid bin ‘Atash respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is published at 143 F.4th 411 and is reproduced in the appendix to this petition at App. 2a–129a. The opinion of the Court of Military Commission Review is published at 762 F. Supp. 3d 1183 and is reproduced in the appendix at App. 130a–163a. The order of the Military Commissions Trial Judiciary granting the motion to enforce the pretrial agreement is unpublished and is reproduced in the appendix at App. 164a–200a.

JURISDICTION

The D.C. Circuit issued its opinion on July 11, 2025. It denied a petition for rehearing on January 6, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Chief Justice Roberts granted Petitioner’s application for extension of time to file a petition for writ of certiorari, from April 6 to May 21, 2026.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

10 U.S.C. § 949a(a) provides:

Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense. Such procedures may not be contrary to or inconsistent with this chapter. Except as otherwise provided in this chapter or chapter 47 of this title, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission under this chapter.

Rule 705(d)(4)(B) of the Rules for Military Commissions provides:

The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of

guilty entered pursuant to the agreement is held improvident on appellate review.

INTRODUCTION

Twenty years ago, this Court invalidated the military commissions framework that was initially established to try individuals detained as part of the war on terror. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). In so ruling, the Court stressed that “the procedures governing trials by military commission historically have been the same as those governing courts-martial.” *Id.* at 617. These procedures are “intended to safeguard the accused and ensure the reliability of any conviction.” *Id.* at 590. And although the government need not adopt courts-martial processes wholesale when convening a military commission, “any departure must be tailored to the exigency that necessitates it.” *Id.* at 620. The commissions in *Hamdan* failed to satisfy this requirement, because they “operate[d] free from many of the procedural rules prescribed by Congress for courts-martial” without “demonstrat[ing] that it would be impracticable” for them to do so. *Id.* at 589–90, 623.

Congress responded by passing the Military Commissions Act. *See Boumediene v. Bush*, 553 U.S. 723, 735 (2008). Consistent with *Hamdan*, that Act specifies that “[t]he procedures for military commissions” to try enemy combatants shall be “based upon the procedures for trial by general courts-martial,” unless “otherwise provided” by Congress or by the Secretary of Defense. 10 U.S.C. §§ 948b(c), 949a(a).

In this case, the rule at issue was not only “based upon” but was in fact “identical to” its corresponding courts-martial counterpart. App. 184a. Under both the military commission rule and its courts-martial analogue, the government may “withdraw from a pretrial agreement” with an accused, but only if it does so “before the accused begins performance of the promises contained in the agreement.” R.M.C. 705(d)(4)(B); *accord* R.C.M. 705(d)(4)(B) (2008 ed.). In interpreting that language, the nation’s highest military court has determined that an accused facing court-martial “perform[s] or be[gins] to perform” on an agreement when they “submit[] an Offer to Plead Guilty and stipulation of fact” to the government, the government countersigns, and the accused takes actions consistent with the agreement. *United States v. Dean*, 67 M.J. 224, 225–28 (C.A.A.F. 2009).

Given this settled understanding, answering the question at the heart of this case—whether Petitioner Walid bin ‘Atash began performance of his pretrial agreement—should have been straightforward. And indeed it was for both the Military Commissions Trial Judiciary and the Court of Military Commission Review.

As the military trial judge explained, Petitioner began performance of his pretrial agreement in several ways. Following twenty-seven months of negotiation, Petitioner “agreed to enter, and did in fact enter, into a Stipulation of Fact,” App. 173a (footnotes omitted), which the government characterized as one of the “most important aspects” of the agreement, App. 55a (Wilkins, J., concurring in part and dissenting in part). That stipulation, subsequently countersigned by the prosecution, “could be used to establish guilt” for

Petitioner’s alleged participation in the September 11 terrorist attacks. App. 173a. Petitioner also “submitted” an “Offer[] for Pretrial Agreement[],” which the government countersigned two days later. App. 172a. The week after that, Petitioner “abstained from questioning [a] witness” at a hearing because—as the government itself insisted at the time—Petitioner could not “actively continue to participate in any of the contested litigation based on [his] pretrial agreement.” App. 174a & n.41.

For the military judge, such circumstances presented an uncomplicated picture. “Per *Dean*, these acts, or intentional failures to act, qualify as ‘beginning performance.’” App. 196a. On appeal, the Court of Military Commission Review agreed: Petitioner “clearly began performance” of his pretrial agreement. App. 158a.

A sharply divided panel of the D.C. Circuit overturned that understanding. The panel majority acknowledged that “*Dean* involved a then-identical withdrawal regulation in the court-martial context.” App. 37a n.10. But it deemed *Dean*’s facts “distinguishable” and its reasoning “unpersuasive.” *Id.* It held that the Secretary of Defense “indisputably had legal authority to withdraw” and that the “plain and unambiguous text of the pretrial agreements” foreclosed any finding that Petitioner had begun performance. App. 5a.

Judge Wilkins dissented. “The factual scenario presented in *Dean* is,” he explained, “in all relevant respects, identical to this case.” App. 76a (Wilkins, J., concurring in part and dissenting in part). The real dispute was over the regulation’s meaning—specifically, what it meant to begin performance. On that issue, Judge Wilkins described the majority as “undermin[ing] the

reasoned judgment and settled law of the highest military court.” App. 77a. In the Court of Appeals for the Armed Forces, entering into a stipulation of fact with the prosecution, signing the pretrial agreement itself, and taking other actions consistent with the agreement constitute beginning performance. In the D.C. Circuit, they do not. This result—“a direct conflict between a decision of one of the 12 regional courts of appeals and a decision of . . . the Court of Appeals for the Armed Forces”—supplies a textbook basis for this Court’s review. Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.7 (11th ed. 2019).

The decision below also distorts the law on mandamus. Mandamus is an “extraordinary form[] of relief” that is to “be granted only in exceptional circumstances” and which requires a petitioner to show that their “right to immediate relief is ‘clear and indisputable.’” App. 13a. That requirement is not met here. A right cannot be clear and indisputable when it is recognized by one federal appellate court but not by another.

The D.C. Circuit’s decision is all the more inappropriate given the deference that Article III courts extend to “the judgments of the carefully designed military justice system established by Congress.” *Schlesinger v. Councilman*, 420 U.S. 738, 753 (1975). The nation’s highest military court has determined what it means to begin performance. *See Dean*, 67 M.J. at 226. Every military judge to address that question in this case has held that Petitioner began performance. In the face of those decisions, the panel majority did not merely “upend the application of a military rule by two military courts that conformed with squarely applicable precedent from the highest court of appeals in the military justice

system.” App. 75a (Wilkins, J., concurring in part and dissenting in part). It said all of those courts had gotten the law “clearly and indisputably” wrong.

Such a ruling “dilute[s] the mandamus standard beyond recognition and warp[s] longstanding principles of judicial review.” App. 74a (Wilkins, J., concurring in part and dissenting in part). It does so in a case involving “unique and important national security interests.” App. 14a. This Court should grant review and reverse.

STATEMENT OF THE CASE

A. Factual background.

1. Petitioner is “accused of participating in the planning and execution of the terrorist attacks on September 11, 2001,” and has been detained in Guantanamo Bay, Cuba for the past two decades. App. 4a. He is facing trial along with three co-accused: Khalid Sheikh Mohammad, Mustafa al Hawsawi, and Ali Abdul Aziz Ali. App. 6a–7a. All are being tried pursuant to the Military Commissions Act.

2. The Military Commissions Act was first passed in 2006, following *Hamdan*. It was later amended in 2009, after this Court declared a part of the 2006 Act unconstitutional. See *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

The Act in its current form authorizes the Secretary of Defense to prescribe “[p]retrial, trial, and post-trial procedures” for these commissions. 10 U.S.C. §§ 949a(a), 950f(a). It adds that, in exercising that authority, “the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in

trials by military commission” unless the Secretary of Defense determines that “the unique circumstances of the conduct of military and intelligence operations during hostilities” or “other practical need” requires a departure. *Id.* § 949a(a), (b)(1).

Pursuant to this authority, the Secretary issued the Rules for Military Commissions in April 2010. Many of these rules tracked verbatim provisions in the Rules for Courts-Martial, including Rule 705(d)(4)(B), which allowed the government to “withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement.” R.M.C. 705(d)(4)(B); *accord* R.C.M. 705(d)(4)(B) (2008 ed.).

The Act also “authorizes the Secretary to serve as the convening authority” for these military commissions. App. 15a (citing 10 U.S.C. § 948h). The Secretary “may exercise th[at] power directly or delegate it to an inferior ‘officer or official.’” *Id.* From April 2020 to August 2023, Colonel Jeffrey Wood served as Convening Authority. In August 2023, the Secretary appointed retired Brigadier General Susan Escallier as Convening Authority. App. 170a.

3. In 2022, the government “expressed interest” in reaching a pretrial agreement with Petitioner. App. 55a (Wilkins, J., concurring in part and dissenting in part). The government made clear that one of the “most important aspects of the Prosecution’s willingness to endorse any pre-trial agreement[]” would be “the stipulation[] of fact” that Petitioner “would be required to enter.” *Id.*

Consistent with that understanding, “[t]he government initially drafted [a] stipulation[],” and

Petitioner then “rigorously bargained over [its] contents,” during many sessions and over many months. *Id.* After more than two years of negotiation, the parties finalized an agreement and an accompanying stipulation of fact. Mohammad and al Hawsawi reached substantially similar agreements and stipulations; Ali did not enter into an agreement or stipulation. App. 7a.

4. On July 29, 2024, Petitioner “first signed” his pretrial agreement, and “next signed the Stipulation of Fact at Attachment A to the” pretrial agreement. App. 35a, 86a n.7 (Wilkins, J., concurring in part and dissenting in part). These two documents are expressly intertwined. The pretrial agreement required Petitioner “to enter into the Stipulation of Fact” with the prosecution that is “included” with the Agreement. D.C. Cir. Dkt. #2092986 Exh. E (“PTA”) at 2. “[F]ailure to enter into” the stipulation constitutes “a breach of a material term of th[e] Agreement.” *Id.*

The pretrial agreement also required Petitioner to “waive[] all waivable motions,” “not to make any future motions,” and “to move to withdraw all pending motions.” *Id.* at 9. In addition, Petitioner “agree[d] not to seek or receive any direct or indirect financial or other material benefit in relation to any of the charged offenses,” “not to initiate or join any monetary claim against the United States Government,” and “not to engage in, or materially support, directly or indirectly, hostilities against the United States.” *Id.* at 10–11. Two days after Petitioner signed the pretrial agreement, on July 31, 2024, General Escallier signed and accepted Petitioner’s offer. App. 7a. She did the same for Mohammad and al Hawsawi. *Id.*

Then, on August 1 and 2, 2024, the military judge held a previously scheduled suppression hearing for Petitioner and his three co-accused. App. 8a. At the start of this

hearing, “all parties agreed that” the hearing should “go forward only for Al Baluchi” (Ali), the co-accused who had not entered into a pretrial agreement or stipulation. *Id.* Counsel for the government stated that “with the waiver of all motions from three of the four accused, they can’t actively continue to participate in any of the contested litigation based on the pretrial agreement[s].” App. 29a. Counsel for co-accused al Hawsawi stated that he would not “engag[e] in any examination of the witness,” because this course of action was necessary for “specific performance on th[e] plea agreement.” App. 8a. And neither Petitioner nor Petitioner’s counsel spoke during the hearing, other than noting their appearance and stating that Ali should be able to review Petitioner’s pretrial agreement. At the end of the hearing, the government requested that the military judge “schedul[e] the plea hearings as soon as possible,” to “insulate the proceedings from any unlawful influence.” *Id.* ¹

5. On August 2, 2024, the Secretary of Defense wrote to General Escallier to announce his intent to withdraw from Petitioner’s, al Hawsawi’s, and Mohammad’s pretrial agreements. App. 9a. “[I]n light of the significance of the decision to enter into pre-trial agreements with the accused,” the Secretary explained, he had “determined” that “responsibility for such a decision should rest with me as the superior convening authority.” App. 175a. Consequently, the Secretary “withdr[ew]” Escallier’s authority “to enter into a pre-trial agreement,” “withdr[ew] from the three pre-trial agreements that [Escallier] signed on July 31, 2024,” and

¹ In April 2025, the military trial judge granted in part Ali’s motion to suppress. *United States v. Mohammad*, AE 942SSSS (Mil. Comm’n Trial Judiciary Apr. 11, 2025), at 107–09.

“reserve[d] such authority” to himself. App. 175a–76a (cleaned up).

B. Proceedings below.

1. Petitioner challenged the Secretary’s decision by moving to enforce the pretrial agreement. He asserted that he had begun performance under Rule 705(d)(4)(B), and that the Secretary lacked authority to withdraw. App. 9a.

The Military Commissions Trial Judiciary granted Petitioner’s motion. In reaching that conclusion, the military judge explained that *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009), was “the most direct case law provided by the Parties,” App. 196a, since Rule 705(d)(4)(B) was “identical to the” corresponding courts-martial rule “in effect when Congress created the military commissions system in 2009,” App. 184a. And in *Dean*, the Court of Appeals for the Armed Forces determined that “the convening authority was not permitted to withdraw” when the “accused began performance by requesting a military judge alone forum, entering a confessional stipulation of fact, and waiving the live appearance of several witnesses.” *Id.*

“Here,” “[j]ust as in *Dean*,” “[a]ll three Accused signed lengthy confessional stipulations of fact.” App. 195a–97a. All three, too, “refrained from examining the witness(es) for pretrial motions.” App. 196a. The government’s counsel “himself insisted upon that course of action so that the Defense teams did not violate a material term of their agreements.” *Id.*

The military judge acknowledged that the courts-martial rule in *Dean* was amended in 2018 to permit withdrawal at “any time before substantial performance.” App. 197a n.116 (cleaned up). “No

comparable change was made to R.M.C. 705(d)(4)(B).” *Id.* “From this,” the judge reasoned, “the President intended to swing the pendulum” toward easier government withdrawal in courts-martial cases, but “chose not to do this” for military commissions, instead leaving government withdrawal subject to the more exacting *Dean* analysis. *Id.*

The military judge added that the Secretary’s attempt to withdraw was “wholly inconsistent with the delegation of independence in the performance of [the Convening Authority’s] duties,” since it would “give the Secretary an absolute veto over any discretionary act of the Convening Authority with which he disagrees.” App. 189a. “[T]he idea that each of the Convening Authority’s actions and decisions are immediately reversible if the Secretary of Defense disagrees,” the judge asserted, “potentially raises the specter of unlawful influence.” *Id.*

2. The government sought writs of mandamus and prohibition from the Court of Military Commission Review.² App. 132a. The Court of Military Commission Review declined to issue either writ. App. 133a. Instead, it “agree[d] with the military judge that the Secretary did not have authority to revoke” Petitioner’s pretrial agreement because he “had started performance.” *Id.* Petitioner “clearly began performance of a promise contained in the PTA.” App. 158a.

The Court of Military Commission Review added that “although the Secretary had authority to replace BG (Ret.) Escallier with himself as the convening authority

² All references in this brief to the government’s request for mandamus also encompass its request for prohibition, as these two “ancient common law prerogative writs” are “virtually identical” in purpose and effect. App. 13a n.1.

for *future* PTAs, the Secretary has not taken any actions on future PTAs.” App. 133a. The Secretary had sought to act retroactively, not prospectively.

3. The government petitioned the D.C. Circuit for an emergency stay and renewed its request for mandamus and prohibition. App. 11a. The D.C. Circuit granted a stay in January 2025 and, in July 2025, granted mandamus and prohibition to the government. App. 52a.

In reaching that decision, the panel majority recognized that “the prosecutions of” Petitioner and his two co-accused “implicate a national interest of the highest degree,” and that there is a “significant public interest in the resolution of these proceedings.” App. 14a, 48a. It also acknowledged that mandamus was an “extraordinary form[] of relief that will be granted only in exceptional circumstances.” App. 13a. It determined that this was the “rare case” in which that “exacting standard” had been met. *Id.*

That is so, the panel majority concluded, because Petitioner had “entered into the stipulation[] of fact *before*” submitting that stipulation to the Convening Authority with their “proposed pretrial agreement.” App. 35a. In the panel’s view, “[t]he timing of these events is fatal to” Petitioner’s claim that he had “beg[un] performance.” App. 36a. “Because the executed stipulations were attachments to the proffered pretrial agreements, they were part of the offer to the Convening Authority rather than something promised in the future under the executed agreements.” *Id.* In a footnote, the panel conceded that the Court of Appeals for the Armed Forces had held otherwise in *Dean*, on a then-identically worded regulation. App. 36a–37a n.10 (citing 67 M.J. at 227–28). But it dismissed “*Dean*’s reasoning [as] unpersuasive and its facts distinguishable.” *Id.*

The panel majority also rejected the claim that Petitioner had begun performance when he “refrained from examining the witness(es)” at the August 1 and 2 hearings. App. 24a. According to the panel, “a commitment not to question witnesses appears nowhere in the [pretrial] agreement[’s] text.” *Id.* Although the agreement does contain a “promise to waive all waivable motions,” the panel held that “the waiver of motions . . . requires some express, affirmative action.” App. 30a–31a. But Petitioner did not “file[] papers or orally request[] to withdraw any motions on August 1st or 2nd.” App. 27a. He stayed silent—and, in the panel’s view, “silent inaction is not performance of that promise.” App. 30a.³

As to unlawful influence, the panel ruled that the Secretary of Defense “did not direct Escallier or seek to govern how she performed her delegated duties.” App. 18a. “Instead, the Secretary withdrew Escallier’s authority over the pretrial agreements, assumed that authority for himself, and independently exercised the authority to withdraw from the pretrial agreements”—all before Petitioner and his co-accused had begun performance. *Id.* These actions, the panel determined, “were consistent with” the relevant “statutory and regulatory authority” governing assignment and delegation. *Id.*

4. Judge Wilkins dissented in part. In his view, “[t]he government ha[d] not come within a country mile of proving clearly and indisputably that the Military Judge erred, much less committed clear error when he applied

³ The panel observed that co-accused Mohammad and al Hawsawi had not “argued to this court that they performed by waiving any motions,” and so had “forfeited this argument as a basis for precluding the Secretary’s withdrawal.” App. 30a.

the withdrawal regulation.” App. 54a (Wilkins, J., concurring in part and dissenting in part).⁴

“As then-Judge Kavanaugh explained, we deny mandamus petitions when [1] neither this Court nor any other court of appeals has answered the question presented and [2] there is a ‘substantial argument’ cutting against the petitioner.” App. 72a (citing *In re Khadr*, 823 F.3d 92, 100 (D.C. Cir. 2016)) (cleaned up). “Here,” Judge Wilkins observed, the government “not only has failed to identify any binding precedent supporting its interpretation,” but “the most apt precedent, *Dean*” “cuts squarely against it”—“and yet the majority nonetheless grants the writ.” App. 78a. That result “has the test upside down.” *Id.*

In addition, there were also several substantial arguments weighing against the government’s position. As Judge Wilkins observed, Petitioner and the government had “negotiated for years over the contents” of the pretrial agreement, and “[t]he factual stipulations were, as all are in a criminal case, bargaining chips in the hands of the accused.” App. 89a (internal quotation marks and alteration omitted). Petitioner here “admitted to planning and implementing the 9/11 terrorist attack in exchange for eliminating the death penalty as a possible sentence.” *Id.* “And for the government, obtaining confessions from the accused was a top priority, so much so that the prosecution willingly agreed to forebear seeking capital punishment if it received the stipulations and guilty pleas.” *Id.* This understanding of the parties’ intent was reinforced by the relevant guidance. As Judge

⁴ As to unlawful influence, Judge Wilkins agreed with the panel majority “that the Secretary of Defense had authority to withdraw Convening Authority Escallier’s ability to enter into plea agreements.” App. 54a.

Wilkins noted, Department of Defense regulations recognize that “stipulations of fact may be executed at the time the agreement is formed.” App. 81a. Both the Manual for Courts-Martial and the military practitioners’ handbook corroborate that view. App. 80a, 82a.

Judge Wilkins also reasoned that Petitioner and his co-accused “began performance of their promise to waive all waivable motions” and “to withdraw all pending motions” when “they refrained from cross-examining the witness at the suppression hearing.” App. 116a, 126a. As he put it, “the prosecutor’s representation that cross-examination was foreclosed by the agreements”—“followed by” Petitioner’s decision to in fact “declin[e] to cross-examine the available witness”—reflected the parties’ shared understanding. App. 119a.

At bottom, the government’s “effort to upend the military courts’ interpretation of a military procedural rule disturbs principles of comity and separation of powers that inform how civilian courts ought to act on issues particular to the military context.” App. 73a. And given “the deference owed to military courts on issues concerning the application of military rules” and the arguments against the government’s position, it was “impossible” for Judge Wilkins “to conclude that the government has shown [that] it [was] clearly and indisputably entitled to relief.” App. 75a, 129a.

On January 6, 2026, the D.C. Circuit denied a petition for rehearing en banc. App. 202a.

REASONS FOR GRANTING THE PETITION

I. THE D.C. CIRCUIT’S DECISION CONFLICTS WITH A RULING FROM THE NATION’S HIGHEST MILITARY COURT.

In *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009), the Court of Appeals for the Armed Forces interpreted “a then-identical withdrawal regulation in the court-martial context.” App. 37a n.10. And in *Dean*—as the panel majority below acknowledged—the court “held that the convening authority could not withdraw from a pretrial agreement because the accused had begun performance of a promise by entering into a stipulation of fact before the pretrial agreement was executed.” *Id.* When confronted with that same fact pattern, the D.C. Circuit reached the opposite conclusion.

The panel majority tries to downplay this conflict by insisting that *Dean* (1) was “fact[ually] distinguishable,” (2) “did not explain how its holding was consistent with the text of the withdrawal regulation,” and (3) contravened “basic principles of contract law.” *Id.* Each of those arguments is unavailing.

1. *First*, claiming that a case is distinguishable does not make it so, and the parallels between this case and *Dean* demonstrate that *Dean* is, in fact, “identical to this case” in “all relevant aspects.” App. 76a (Wilkins, J., concurring in part and dissenting in part).

As in this case, the accused in *Dean* “submitted an Offer to Plead Guilty and [a] stipulation of fact to the convening authority” at the same time. 67 M.J. at 225–26; *see* App. 7a (Petitioner “submitted a signed ‘Offer for Pretrial Agreement’ to the Convening Authority,” and included with his offer “a lengthy and signed stipulation

of fact.”). Like this case, “[t]he convening authority accepted and signed [Dean’s] Offer to Plead Guilty” after the accused submitted it for the government’s review. 67 M.J. at 226; *see* App. 7a (“[T]he Convening Authority, on behalf of the United States, accepted [Petitioner’s] offer[] and signed . . . the pretrial agreement[.]”). And, as here, the accused in *Dean* refrained from questioning certain witnesses, consistent with the agreement. In *Dean*, the accused filed “an amended witness list” that excluded various witnesses; here, Petitioner refrained from questioning a witness at a motions hearing. 67 M.J. at 228; App. 8a.

The decision below disputes none of this. Instead, it says only that *Dean* “identified several actions that counted as beginning performance, and one of those actions occurred after the pretrial agreement was finalized.” App. 37a n.10. “The pre-agreement entry into the stipulation of fact was therefore,” the panel insists, “not necessary to the court’s disposition.” *Id.*

But that is not what *Dean* held. To the contrary, *Dean* said explicitly that the accused in that case “either performed or began to perform several of the promises listed in the agreement.” 67 M.J. at 228. He did so, the court explained, when he (i) “elected [to proceed by] trial by military judge” before the agreement was signed, (ii) “entered into a stipulation of fact” with the prosecution before the agreement was countersigned by the convening authority, and (iii) “filed an amended witness list” after the agreement was signed. *Id.*

In other words, the Court of Appeals for the Armed Forces did not conclude (as the panel majority claims) that an accused’s entry into a stipulation of fact was “not necessary to the court’s disposition.” App. 37a n.10. Instead, as the military judge here put it, *Dean* ruled that

“[p]erformance may begin before the PTA is signed.” App. 184a (citing 67 M.J. at 228). The Court of Appeals for the Armed Forces then identified several different actions that separately and independently satisfy Rule 705(d)(4)(B), including—just like this case—entering into a stipulation of fact with the prosecution before an agreement is fully executed by the convening authority. And “where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, ‘the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.’” *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486 (1924) (quoting *Union Pacific R.R. Co. v. Mason City & Ft. Dodge R.R. Co.*, 199 U.S. 160, 166 (1905)). The law bars exactly the course of action the panel majority took here: cherry-picking the parts of *Dean* it liked and casting aside as “not necessary” the parts it did not. App. 37a n. 10.

2. *Next*, the panel states that *Dean* “did not explain how its holding was consistent with the text of the withdrawal regulation.” *Id.* Not so.

The Court of Appeals for the Armed Forces began by noting that, “[i]n military practice, the convening authority’s rights to withdraw are set out in R.C.M. 705(d)(4)(B).” 67 M.J. at 227. It then recited the text of the Rule. *Id.* And it held that “[i]n light of the plain language of R.C.M. 705(d)(4)(B), the Government’s position is untenable.” *Id.* That is because “[t]he rule does not state, as it easily could have, that the convening authority may withdraw from a pretrial agreement at any time before the accused enters a guilty plea.” *Id.* It says that “the convening authority may withdraw from the agreement at any time before the accused ‘begins

performance of promises contained in the agreement.” *Id.* (quoting R.C.M. 705(d)(4)(B) (2008 ed.)).

Additionally, the Court of Appeals for the Armed Forces noted that “[t]he drafters chose the plural of ‘promise,’ so while a promise to plead guilty is certainly a relevant consideration, it is not the only promise which can trigger the ‘begins performance’ criteria.” *Id.* *Dean* drew finally on “persuasive guidance” from the Manual for Courts-Martial and prior precedent from the Court of Appeals for the Armed Forces. *Id.* at 227–28 (citing *Manual for Courts-Martial*, Analysis of the Rules for Courts-Martial app. 21 at A21–41 (2008 ed.); *United States v. Toy*, 65 M.J. 405, 410 n.3 (C.A.A.F. 2008)).

Contrary to the D.C. Circuit’s contention, then, *Dean*’s analysis—including its examination of the regulation’s plain language, the drafters’ structural choices, and the relevant guidance and case law, *id.* at 227—faithfully applied the “traditional tools” of construction, *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019).

3. *Third*, the panel majority claims that *Dean* got the law wrong, and marshals Judge Baker’s dissent in that case as support for its argument. App. 37a n.10. No other judge from the Court of Appeals for the Armed Forces joined Judge Baker in that dissent. And in any event, a dispute between two courts of appeals (both in divided opinions) over the meaning of an identically worded regulation does not counsel against certiorari. It establishes a core criteria for this Court’s review. *See* S. Ct. R. 10; Shapiro, et al., *Supreme Court Practice* § 4.7.

II. THE D.C. CIRCUIT'S DECISION IS INCORRECT.

The panel below erred in three ways. First, it should not have issued a writ of mandamus because the government's right to relief here was neither clear nor indisputable. Second, its interpretation and application of Rule 705(d)(4)(B) to Petitioner's stipulation of fact contravenes the regulation's text, structure, history, and purpose. And third, it failed to properly apply relevant contract law principles when evaluating Petitioner's pretrial agreement and the parties' subsequent course of performance.

A. The decision below exceeded the proper limits of mandamus.

1. Mandamus is a “drastic and extraordinary remedy,” reserved only “for really extraordinary cases.” *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380 (2004). The challenged action must be “plainly and palpably wrong as [a] matter of law” such that the right to immediate relief is “clear and indisputable.” *U.S. ex rel. Chicago Great Western R. Co. v. I.C.C.*, 294 U.S. 50, 61 (1935); *Cheney*, 542 U.S. at 381 (internal quotation marks omitted).

If a party cannot “cite a single case that has adopted its interpretation,” then it “has not met [the] burden of showing a clear and indisputable right to issuance of the writ.” *In re HTC Corp.*, 889 F.3d 1349, 1361 (Fed. Cir. 2018); *In re Grice*, 974 F.3d 950, 959 (9th Cir. 2020). Put differently, for an error to be clear, a petitioner must “point to cases in which a federal court has held that relief is warranted in a matter involving like issues and

comparable circumstances.” *In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020) (cleaned up).

In re Khadr, 823 F.3d 92 (D.C. Cir. 2016), which similarly involved review of a decision by the Court of Military Commission Review, is instructive. After summarizing the relevant issues at play, the *Khadr* court acknowledged that the petitioner’s legal arguments “pack[ed] substantial force.” *Id.* at 99. But it nevertheless held that the petitioner did not have a “clear and indisputable” right to relief, because no “court of appeals ha[d] analyzed” the question presented, and the government had itself “raise[d] a substantial argument” in response to petitioner’s request. *Id.* at 100.

The case against granting mandamus is even stronger here than in *Khadr*. After all, there is no dispute here that another court—the Court of Appeals for the Armed Forces—has analyzed the question presented. App. 36a–37a n.10. All agree, moreover, that the Court of Appeals for the Armed Forces did not embrace the government’s interpretation of what it means to begin performance of a pretrial agreement. *Id.* It rejected it, and it did so by drawing on the regulation’s text, structure, and history. And if mandamus is unavailable when no federal court has answered the question and there is a “substantial argument” against relief, *Khadr*, 823 F.3d at 100, it cannot be available when another federal court has answered the question and its answer supplies the “substantial argument” against mandamus.

2. The setting and nature of this case make the panel’s decision all the more “stunning.” App. 54a (Wilkins, J., concurring in part and dissenting in part).

As this Court has emphasized, judgments by military tribunals “are normally entitled to great deference,”

because they involve “a legal tradition which is radically different from that which is common in civil courts.” *Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *Noyd v. Bond*, 395 U.S. 683, 694 (1969). The question here falls squarely within that tradition.

Only two regulations—Rule 705(d)(4)(B) of the Rules for Military Commissions and, from 1984 to 2018, Rule 705(d)(4)(B) of the Rules for Courts-Martial—state that the government may withdraw from a plea agreement “before the accused begins performance.” Based on Petitioner’s review, no other state or federal regulation uses that language. Nor is it part of the many civilian plea agreements that are offered and accepted every day in the federal district courts. Those agreements are governed by Rule 11 of the Federal Rules of Criminal Procedure, and that Rule examines only when a “defendant may withdraw a plea of guilty.” Fed. R. Crim. P. 11(d). Rule 11 does not contemplate withdrawal by the government.

The regulation at issue is, in short, a quintessential military rule. And it is one that the highest military court has interpreted and that the two military courts here have applied to this case. Indeed, “[b]y the time” the question presented had “arrive[d] on [the D.C. Circuit’s] doorstep,” “it ha[d] passed through not one or two but three military courts.” *Ortiz v. United States*, 585 U.S. 427, 438–39 (2018). Each of these courts had come to the same conclusion. Yet according to the D.C. Circuit, all of them were not just wrong. They were clearly and indisputably wrong. The panel did not identify, and Petitioner has not found, any other instance where a civilian court has granted mandamus in like circumstances.

B. The decision below did not properly interpret the regulatory language when construing Petitioner’s stipulation.

In addressing Petitioner’s stipulation, the panel majority reasoned that “[b]ecause pretrial agreements are interpreted in accordance with contract law, we draw on those principles to interpret the withdrawal regulation.” App. 34a. And “[i]n contract law,” “a promise is a forward-looking commitment to engage in certain conduct in the future.” *Id.* Consequently, an accused can only “begin[] performance of a promise within the meaning of the withdrawal regulation when he starts to complete a forward-looking commitment contained in an executed pretrial agreement.” App. 35a. Because Petitioner “entered into the stipulation[] of fact *before* [his] pretrial agreement[] [was] fully executed,” Petitioner had not—according to the D.C. Circuit—begun performance. *Id.*

The panel’s conclusion rests on a flawed premise. Rule 705(d)(4)(B) governs withdrawal from pretrial agreements. And although an individual pretrial agreement may resemble a contract, Rule 705(d)(4)(B) is not itself a contract. It is a regulation—and there is no need or reason for a court to draw on contract law to interpret it. Instead, just like with any other regulation, a court must apply “the ‘traditional tools’ of construction”: “text, structure, history, and purpose.” *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019). None of these tools favor the government.

1. Start with the text. By its plain language, the convening authority may “withdraw” from a pretrial agreement “before the accused begins performance of promises contained in the agreement.” An accused

therefore does not need to complete performance. They need only “take the first step in (a process or course of action).” MERRIAM-WEBSTER DICTIONARY, Begins (2026). And by any reasonable measure, there are few clearer “first step[s]” to pleading guilty than stipulating to the facts that would prove one’s guilt. *Id.*

In holding otherwise, the panel majority argues that Rule 705(d)(4)(B) concerns only “forward-looking commitments” and covers only those actions taken after a pretrial agreement is “fully executed.” App. 35a. That assertion misses the mark for three reasons.

First, as a straightforward textual matter, Rule 705(d)(4)(B) does not say that it applies only to certain types of commitments or that it kicks in only after an agreement’s execution. Those are constraints that the panel majority grafted onto the regulation’s plain language.

Second, these constraints improperly elevate form over substance. Under the panel’s theory, a factual stipulation signed by Petitioner on July 31 would have begun performance, since that is when General Escallier countersigned and the pretrial agreement became “fully executed.” App. 36a. But since Petitioner signed his stipulation on July 29, it was reduced to only “part of [Petitioner’s] offer to the Convening Authority.” *Id.* That is so even though the language in the stipulation is the same, the years it took to negotiate the stipulation are the same, and the stipulation’s status as one of the “most important aspects of” the plea agreement is the same. App. 55a (Wilkins, J., concurring in part and dissenting in part). Rule 705(d)(4)(B) cannot possibly turn on such an arbitrary and wooden distinction.

Third, the panel’s interpretation is at odds with how Rule 705(d) as a whole is meant to work. Rule 705(d)(1) recognizes that either the accused or the government may initiate pretrial negotiations. Under Rule 705(d)(2), however, only the accused may “submit a written offer” to the Convening Authority; the Convening Authority cannot initiate that process. As a result, a “signed stipulation of fact” by the accused will generally “accompany the offer to plead guilty.” U.S. ARMY TRIAL DEF. SERV., Defense Counsel 101 Deskbook at 20-18 (14th ed. July 2024). Both are then packaged and “presented to the convening authority for review.” *Id.*

Under such conditions, no rational accused would stipulate to their guilt merely as part of an offer that the government may then freely accept, reject, or even modify through several additional rounds of negotiation. Instead, an accused’s commitments are presented to the Convening Authority when the deal is all but done in the practical sense, following negotiation under Rule 705(d)(1) and after discussion of the relevant terms under Rule 705(d)(2). The parties understand and presume at this point that the agreement will go forward. The Convening Authority’s acceptance is treated as a final step rather than a springboard for renegotiation. The accused’s signed stipulation is thus not an exercise in preliminary arm’s-length bargaining, but a necessary and paradigmatic aspect of performance.

2. Relevant military guidance confirms this point. The Drafters’ Analysis for the Manual for Courts-Martial, for instance, states that “the beginning of performance” includes “providing information to Government agents”—and, in a prosecution, there are few pieces of information more valuable to the government than a detailed

stipulation establishing an accused's guilt. *Manual for Courts–Martial*, Analysis of the Rules for Courts–Martial app. 21 at A21–41 (2008 ed.). The regulations for trial by military commission likewise describe “enter[ing] into stipulations of fact as part of the PTA”; in other words, the stipulation is part of the agreement, not part of the offer for the agreement. DEPT OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSION, at 1, ch. 12-4 (2011). The Judge Advocate General's Criminal Law Deskbook explains that “[p]erformance will often take the form of entry into a stipulation of fact” because doing so “protect[s] an accused who is in the midst of performing in reliance on the convening authority's” representations. The Judge Advocate Gen.'s Legal Ctr. & Sch., Criminal Law Online Deskbook ch. 15, ¶ V.D.1.a (2025). And the Army Trial Defense Service's training manual—a manual provided to every lawyer in the military—is most explicit: “[S]igning the stipulation of fact is performance.” Defense Counsel 101 Deskbook at 20-13.

3. The structure of Rule 705(d)(4)(B) and the history surrounding its promulgation similarly undermine the panel's interpretation. Recall that the Secretary of Defense promulgated Rule 705(d)(4)(B) in 2010. He did so pursuant to the Military Commissions Act, which provides that the procedures governing military commissions shall be “based upon the procedures for trial by general courts-martial,” but also allows the Secretary to depart from courts-martial processes when “the conduct of military and intelligence operations” or any “other practical need” so requires. 10 U.S.C. §§ 948b(c), 949a(b)(1).

The Secretary made no such departure for Rule 705(d)(4)(B). He lifted wholesale the language from the

withdrawal regulation applicable to general courts-martial. When he did so, that regulation had already been examined by the Manual for Courts-Martial and interpreted by the Court of Appeals for the Armed Forces. And both sources embraced the same understanding: An accused “either perform[s] or beg[ins] to perform” when they “enter[] into a stipulation of fact with trial counsel as to the circumstances of the offense.” *Dean*, 67 M.J. at 228 (discussing Manual for Courts-Martial).

Put another way, the Secretary was not writing on a blank slate when he issued Rule 705(d)(4)(B). Instead, relevant “administrative and judicial interpretations ha[d] settled [on] the meaning of” what it meant to begin performance. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). And just as “Congress is presumed to be aware of an administrative or judicial interpretation of a statute,” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), the Executive Branch is presumed to have known of the rule from and reasoning in *Dean*, especially since the government was the losing party in that case.

Had the Secretary wanted to depart from *Dean* and the rule outlined by the Court of Appeals for the Armed Forces, the Military Commissions Act expressly allowed him to do so. 10 U.S.C. § 949a(b)(1). Indeed, he could have done so when he first promulgated the Rules for Military Commissions in 2010, when the corresponding courts-martial rule was changed in 2018, when the government began pretrial negotiations with Petitioner in 2022, or even when the government was concluding those negotiations in 2024. He did none of those things. He instead imported the language from the courts-martial

context verbatim when promulgating the Rule, and that language has stayed the same ever since.

4. Purpose drives home the point. The Rules for Military Commissions “are intended to provide for the just determination of every proceeding related to trial by military commission.” R.M.C. 102(a).

The panel’s reading flouts that goal. By the panel’s own admission, it takes a regulation that meant one thing in the courts-martial system and gives it an altogether different meaning in the commissions system to which it was transplanted. Worse, it forces Petitioner to bear the cost of that divergence, by setting the groundwork for Petitioner to stipulate to his guilt only to inform Petitioner after the fact that his stipulation—despite years of negotiation—meant nothing because it came two days too early.

Were that not enough, the panel’s construction of Rule 705(d)(4)(B) also fails on its own terms. Consider that under its test, an accused begins performance on (1) “an executed pretrial agreement” when he (2) “starts to complete” a (3) “forward-looking commitment.” App. 37a–38a. Even setting aside the factual stipulation, Petitioner’s agreement is full of such commitments. Petitioner agreed, for example, “not to initiate or join any monetary claim against the United States Government,” “not to engage in, or materially support, directly or indirectly, hostilities against the United States,” and “not to seek or receive any direct or indirect financial or other material benefit in relation to any of the charged offenses.” PTA at 10–11. Those are all forward-looking commitments. Each is contained in Petitioner’s pretrial agreement. And Petitioner began performing on them—by not suing the government, not supporting hostilities

against the United States, and not receiving a material benefit from his charged offenses—when the executed agreement was in force after General Escallier’s signature and before the Secretary’s attempted withdrawal.

In short, the panel’s approach is both too broad and too arbitrary. Its decision penalizes an accused for when his stipulation was signed rather than what the stipulation says. The panel’s sequencing distinction bears no relationship to how pretrial negotiations work. And in so ruling, the D.C. Circuit ignored the forward-looking commitments that Petitioner did begin to perform. None of that reflects a “just determination.” R.M.C. 102(a).

The more appropriate construction of Rule 705(d)(4)(B) embraces the language of its courts-martial counterpart, applies the interpretation of the nation’s highest military court, and tracks relevant military guidance. Such an approach honors the Secretary’s drafting decisions, provides shared expectations of what pretrial agreements mean and what they encompass, and ensures that all parties negotiate against a settled understanding of the law.

C. The decision below misapplied contract interpretation to the parties’ actions at the suppression hearing.

The panel also determined that Petitioner did not begin performance by staying silent at the August 1 and 2 hearing because “[n]o such promise appears anywhere in the text of the pretrial agreements.” App. 14a. Although the agreement requires Petitioner to “waive all waivable motions” and to “withdraw all pending motions,” such “contract language promises affirmative action” and

in the panel majority’s view “silent inaction is not performance of th[e] promise,” App. 25a–26a, 30a.

1. The problem with this approach is that it fails to give full “effect to the contractual rights and expectations of the parties.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010). To be sure, “the plain meaning of the language in a contract” is—as the panel correctly notes—the primary indicator of those rights and expectations. App. 22a (citing *Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 862 (D.C. Cir. 2015) (internal quotation marks omitted)). But “the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is [also] deemed of great, if not controlling, influence.” *Old Colony Tr. Co. v. City of Omaha*, 230 U.S. 100, 118 (1913). Contractual obligations arise from both the contract’s terms and the parties’ performance. And so the law instructs courts to consider both the contractual language and the parties’ course of performance together—and, “[w]herever reasonable,” to interpret them “as consistent” with one another. RESTATEMENT (SECOND) OF CONTRACTS § 202.

That principle favors Petitioner, not the government. Consider again the pretrial agreement’s promises to waive all waivable motions and to withdraw from all pending motions. One plausible way to read this language is that an accused must, to satisfy these conditions, stop litigating the contested parts of his case. After all, the entire point of a plea agreement is to bring an end to litigation—and continuing to contest pending motions or bringing new motions to the court’s attention obviously runs counter to that objective.

Importantly, this reading of the pretrial agreement’s terms is reinforced and corroborated by the parties’ “practical interpretation of [the] contract.” *Old Colony Tr.*, 230 U.S. at 118. At the outset of the August 1 and 2 hearing, for instance, counsel for the government declared that “with the waiver of all motions from three of the four accused, they can’t actively continue to participate in any of the contested litigation based on the pretrial agreement.” App. 29a. Counsel for al Hawsawi confirmed that view, noting that he was “not ‘engaging in any examination of the witness’” as a matter of “specific performance” of the pretrial agreement. App. 28a. And consistent with this shared intent, Petitioner, al Hawsawi, and Mohammad declined to contest their suppression motion during the hearing. On the other hand, Ali—the co-accused who did not reach an agreement with the government—did not stay silent. His motion to suppress was later granted in part. *United States v. Mohammad*, AE 942SSSS (Mil. Comm’n Trial Judiciary Apr. 11, 2025), at 107–09.

2. The decision below advances two responses to this argument. Neither is persuasive.

First, the panel claims that the prosecutor’s understanding was “atextual.” App. 29a. It was not. The prosecutor here examined provisions of the pretrial agreement requiring that an accused waive and withdraw all motions. He took those provisions to mean that an accused must, to perform on the agreement, stop contesting a pending motion—and so he demanded that Petitioner refrain from participating at the August 1 and 2 hearing. Petitioner shared that same understanding and did so.

Second, the panel insists that, notwithstanding the parties' mutual actions, the agreement's plain language requires more. "The promise to waive all waivable motions," it notes, "does not even attach until [Petitioner's] guilty plea[] [is] entered by the military judge." App. 30a. And, in any event, "withdraw[ing] a motion is an affirmative action" that a party must undertake. App. 26a. The judge had entered no such plea, and neither Petitioner nor his counsel uttered the words "motion" or "withdraw" at the hearing. App. 29a.

The panel's argument might have held water *if* the relevant regulation required Petitioner to complete performance. But Rule 705(d)(4)(B) requires only that he "begin performance," which is—as the panel acknowledges—to "start upon" or "[s]et about doing" something. App. 35a. And the government's trial counsel, Petitioner, the Military Commissions Trial Judiciary, and the Court of Military Commission Review all reached the same sensible conclusion: An accused can "start upon" the promise to waive and withdraw motions when he stops contesting motions he brought earlier in the case. *Id.*

3. Finally, aside from the contractual language, the text of the withdrawal regulation, and the parties' course of performance, military courts have long recognized that "detrimental reliance by an accused will give him a basis for judicial relief, just as under conventional contract law." *Shepardson v. Roberts*, 14 M.J. 354, 358 (C.M.A. 1983). Doing so "avoid[s] injustice on the basis of the promisee's reliance." 4 WILLISTON ON CONTRACTS § 8:13.

The case for applying that principle here is plain. Petitioner would not have come to the negotiating table if he did not believe the government would "take[] on certain obligations." *Puckett v. United States*, 556 U.S.

129, 137 (2009). He would not have entered into a stipulation of fact admitting his guilt if he did not believe that the government would “uphold its side of the bargain.” *Id.* at 138. And he certainly would not have stayed silent at the August 1 and 2 hearing—foregoing examination of a critical witness in support of his suppression motion—when the co-accused who did not stay silent ultimately obtained suppression of key evidence. The reason Petitioner acted the way he did is because he relied on the government’s representations. The government should not now be allowed to walk away from the deal it signed.

III. THE D.C. CIRCUIT’S DECISION RAISES AN IMPORTANT QUESTION WARRANTING REVIEW.

The importance of this case is not in dispute. As the D.C. Circuit observed, there is “significant public interest in the resolution of these proceedings” given the “unique and important national security interests” at stake. App. 14a.

The question is also squarely presented. The military courts here held that Petitioner had begun performance. The D.C. Circuit majority ruled that he had not. And in reaching that contrary conclusion, it emphasized that “[t]he relevant facts” were “not in question.” App. 20a. “What the parties disagree[d] about” was instead whether Petitioner’s “conduct constituted performance” as a matter of law. *Id.* There are thus no fact-bound disputes or vehicle problems here that preclude review. The question is cleanly presented and its resolution is dispositive.

Review is also warranted because our system rests on the principle that the law extends and applies equally to all. Although that principle may be tested in many matters, it is particularly salient in cases like this one, where “there is the greatest temptation [for the government] to dispense” with legal protections because the “price of keeping them” may seem too great. *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality op.); *McGirt v. Oklahoma*, 591 U.S. 894, 937 (2020).

It has been during these “most challenging and uncertain moments” that this Court has made clear, time and again, that “[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law.” *Hamdi*, 542 U.S. at 532; *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). Indeed, the Court’s modern military-commission jurisprudence has confirmed exactly this point.

In *Hamdan*, for instance, the Court rejected the Executive’s effort to conduct military commissions based on a framework unmoored from law and tradition. 548 U.S. at 635. After Congress responded with the Military Commissions Act, the Court stepped in again to ensure that the resulting statute passed constitutional muster. *Boumediene*, 553 U.S. at 735, 792. This matter presents the next—and natural—question in that sequence: whether the government must comply with the legal framework it invoked and that Congress prescribed when these proceedings reach the point of resolution.

Stated differently, *Hamdan* and *Boumediene* underscore that even the most consequential military-commission proceedings must be governed by law. And having required the government to proceed within a lawful system, the Court should not now leave unresolved

whether the government must honor that system or may disregard the relevant legal constraints when they become inconvenient.

* * *

“If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.” *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021). This case asks whether that understanding applies not just in the mine run, but in a prosecution that “implicates the interest of the entire nation.” App. 48a. The answer is yes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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