

IN THE
Supreme Court of the United States

KHALID SHAIKH MOHAMMAD, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR PROFESSOR STEPHEN I.
VLADECK AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Stephen I. Vladeck is the Agnes Williams Sesquicentennial Professor of Federal Courts at the Georgetown University Law Center. His teaching and scholarship, which he makes accessible through his Substack *One First*, concern federal courts, constitutional law, national security law, and military justice—all of which intersect in this matter. He has a professional and academic interest in ensuring that the writ of mandamus is properly administered as a narrow, disciplined exception to the final judgment rule, and not an inconsistently applied tool of appellate intervention. This case presents the question of the propriety of mandamus review in a jurisdictional setting where Congress sharply confined appellate review—military commission cases. For the foregoing reasons, *amicus* submits that certiorari is warranted.

**INTRODUCTION AND SUMMARY OF
ARGUMENT**

This case exemplifies a single, recurring institutional failure: the D.C. Circuit’s uneven application of the mandamus standard set forth in *Cheney v. United States District Court*, 542 U.S. 367 (2004). That case reaffirmed that mandamus remains a “drastic and extraordinary”

1. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus* and his counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for the parties were timely notified of *amicus*’s intent to file this brief.

remedy ‘reserved for really extraordinary causes.’” *Id.* at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)). A petitioner can obtain mandamus only if (1) it has “no other adequate means” to obtain relief, *id.* (quoting *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 403 (1976)), (2) it can show that its right to the writ is “clear and indisputable,” *id.* at 381 (quoting *Kerr*, 426 U.S. at 403), and (3) the issuing court is “satisfied that the writ is appropriate under the circumstances.” *Id.* These three elements are “demanding,” *id.*, so that mandamus does not “defeat[] the very policies” of reserving appeals until after final judgment, *Kerr*, 426 U.S. at 403.

The decision below cannot be reconciled with this Court’s mandamus jurisprudence. A divided panel of the D.C. Circuit granted the Government mandamus to undo a military judge’s fact-bound ruling—unanimously affirmed by the Court of Military Commission Review (“CMCR”)—that the Secretary of Defense’s attempt to withdraw from binding pretrial agreements came too late under settled military law. The panel granted mandamus even though the Government generally lacks the right to appeal in a criminal case, and the statute governing military commissions does not provide the Government with the right to file an interlocutory appeal in this context. And the outcome split with precedent of the Court of Appeals for the Armed Forces (“CAAF”), on which the military courts had relied. Pet.App.40a n.10 (rejecting *United States v. Dean*, 67 M.J. 224 (C.A.A.F. 2009)). As Judge Wilkins observed in dissent, the majority granted the writ “without citing a single case, statute, or other authority that requires issuing such extraordinary relief.” Pet.App.60a (Wilkins, J., dissenting).

This *amicus* brief describes four critical principles that call for this Court’s review. First, mandamus must remain a narrow exception to the long-established presumption against interlocutory review; otherwise, it fails to serve the important institutional interests in avoiding piecemeal litigation. Second, fidelity to the exacting mandamus standard is particularly critical in the context of military commissions, where the All Writs Act should not be used to manufacture appellate jurisdiction that Congress specifically (and repeatedly) withheld. Third, the D.C. Circuit has been inconsistent in its adherence to the standard, applying the *Cheney* factors differently across both its commission cases and its broader docket. And fourth, because Congress vested the D.C. Circuit with exclusive jurisdiction over military-commission final judgments, the ordinary percolation on which this Court usually relies is impossible, calling for the Court’s immediate review. This case therefore offers the Court an ideal opportunity to clarify the governing principles of federal appellate jurisdiction. The Court should grant certiorari.

ARGUMENT

I. Mandamus Is a Narrowly Circumscribed Exception to the General Presumption Against Interlocutory Jurisdiction

The starting point—and the baseline against which the D.C. Circuit’s inconsistency must be measured—is that mandamus is a narrow tool reserved for “exceptional circumstances amounting to a ‘judicial usurpation of power.’” *Cheney*, 542 U.S. at 380 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)). It is thus a tightly confined

exception to the final judgment rule, used only to correct certain particularly egregious orders. The Court has repeatedly affirmed the importance of the final judgment rule in the context of the collateral order doctrine. *See, e.g., GEO Grp., Inc. v. Menocal*, 607 U.S. 438, 444 (2026) (describing the “high bar” for exceptions to the final judgment rule); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (stressing that the collateral order doctrine must “never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered”). That doctrine recognizes a small category of district court decisions that operate as a final determination of important claims subject to immediate appellate review. *GEO Grp.*, 607 U.S. at 444. Nor should mandamus, a case-specific remedy, be permitted to accomplish indirectly what the collateral order doctrine’s own limits forbid directly. *See Kerr*, 426 U.S. at 403.

A. The Final Judgment Rule Reflects a Deliberate Statutory and Structural Allocation of Appellate Authority

Congress has generally conferred appellate courts with jurisdiction only over “final decisions.” 28 U.S.C. § 1291. Absent some exception, a party cannot appeal an interlocutory order until the district court enters a final judgment disposing of all claims as to all parties. Indeed, 28 U.S.C. § 1292 specifically enumerates the narrow categories of interlocutory orders subject to immediate appellate review.² This final judgment rule reflects a

2. *See* 28 U.S.C. § 1292(a)(1) (orders granting or denying injunctions), § 1292(a)(2) (orders appointing receivers), § 1292(a)(3)

considered congressional judgment that premature and piecemeal appellate intervention is disfavored. It “preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice.” *Microsoft Corp. v. Baker*, 582 U.S. 23, 36–37 (2017). Indeed, this Court has made clear that “[p]ermitt[ing] piecemeal appeals would undermine the independence of the district judge” and thereby obstruct “efficient judicial administration.” *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

Moreover, “th[e] general policy against piecemeal appeals takes on added weight in criminal cases,” particularly when the Government is the appellant. *Will*, 389 U.S. at 96. “[A]ppeals by the Government in criminal cases are something unusual, exceptional, not favored.” *Carroll v. United States*, 354 U.S. 394, 400 (1957). The Government “has no right of appeal in a criminal case, absent explicit statutory authority.” *United States v. Scott*, 437 U.S. 82, 84–85 (1978). This is in part because interlocutory prosecution appeals implicate speedy-trial and double-jeopardy interests. *See Will*, 389 U.S. at 96. They also disregard the “special competence” and “relative institutional advantages enjoyed by the district court” in assessing “factual nuance” and “understanding . . . the significance of case-specific details.” *Buford v. United States*, 532 U.S. 59, 64–65 (2001). Those reasons for deference apply with full force here, where the military judge engaged in a “predominantly factual”

(certain admiralty decrees), and § 1292(b) (certified questions of controlling law).

inquiry, Pet.App.76a (Wilkins, J., dissenting), and the CMCR unanimously affirmed the judge’s finding that “the respondents had started performance of” the plea agreements, Pet.App.164a.

B. The Governing Standard Confines Mandamus to Clear, Non-Remediable Error

In *Cheney*, this Court reaffirmed the controlling three-part test for mandamus. First, the petitioner must have “no other adequate means” to attain the relief it desires; second, it must show that its right to the writ is “clear and indisputable”; and third, “even if the first two prerequisites have been met, the issuing court . . . must be satisfied that the writ is appropriate under the circumstances.” *Cheney*, 542 U.S. at 380–81 (citation modified). This three-part test is exacting, requiring a reviewing court to exercise its discretion to issue the writ sparingly.

Indeed, the “no other adequate means” requirement exists to ensure that the writ “will not be used as a substitute for the regular appeals process.” *Id.* It is not enough that “inconvenience and hardship” result from the challenged decision. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953). Otherwise, the writ would override Congress’s reasoned judgment “in providing that only final judgments should be reviewable.” *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 30 (1943). Accordingly, this Court has “never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal.” *Will*, 389 U.S. at 98.

The “clear and indisputable” prong is equally demanding. The threshold necessary to secure a writ of mandamus is higher than mere error, even error that might lead to reversal on a direct appeal. *See Bankers Life*, 346 U.S. at 383. This Court has thus recognized that mandamus “does not run the gauntlet of reversible errors,” and its role is not to “control the decision of the trial court” but “merely to confine the lower court to the sphere of its discretionary power.” *Will*, 389 U.S. at 104 (quoting *Bankers Life*, 346 U.S. at 382–83).

Even if the two mandatory conditions are met, the third “appropriateness” prong of the test cabins the court’s discretion to issue the writ. *See Roche*, 319 U.S. at 25–26 (holding that the Ninth Circuit abused its discretion in granting mandamus). The power to issue writs of mandamus “is meant to be used only in the exceptional case,” *Bankers Life*, 346 U.S. at 383, and should be “sparingly exercised,” *Parr v. United States*, 351 U.S. 513, 520 (1956). The Court has thus approved writs of mandamus to prevent intrusions into the separation of powers, *see Cheney*, 542 U.S. at 381 (citing *Ex parte Peru*, 318 U.S. 578, 588 (1943)), and “delicate area[s] of federal-state relations,” *Will*, 389 U.S. at 95 (citing *Maryland v. Soper*, 270 U.S. 9 (1926)).

C. Strict Adherence to the Standard Preserves Both Appellate Legitimacy and District Court Autonomy

Predictable, disciplined application of the *Cheney* factors is necessary to give meaning to the “extraordinary nature” of the mandamus remedy. By contrast, inconsistent application of the exacting *Cheney* standard inflicts an institutional injury distinct from ordinary legal error.

This Court has warned that any “readiness to issue the writ of mandamus in anything less than an extraordinary situation” would risk “defeating the very policies” underlying Congress’s determination to confine appellate jurisdiction to final judgments. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (quoting *Kerr*, 426 U.S. at 403). When a court applies the *Cheney* factors rigorously in one case and loosely in the next, it converts a confined remedy into a discretionary appellate override. The harm is not that a single ruling may be wrong; it is that the writ loses the constraints that ensure that it “remains an extraordinary remedy.” *Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 309 (1989). Of course, the same is true of a standard that purports to be rigorous but is actually applied loosely, rendering it functionally no standard at all: it leaves the issuing court free to intervene whenever it disagrees strongly enough with a trial ruling, which is precisely what this Court’s cases forbid. *Bankers Life*, 346 U.S. at 383 (rejecting use of mandamus merely to review “every interlocutory order which is wrong”). In sum, inconsistent application of the writ of mandamus runs the risk of subverting the necessary goals of the final judgment rule by “undermin[ing] the independence of the district judge,” *Firestone*, 449 U.S. at 374; “threaten[ing] th[e] proceedings with delay,” *Johnson v. Jones*, 515 U.S. 304, 309 (1995); and undercutting “the efficient administration of justice,” *Microsoft*, 582 U.S. at 36–37.

II. The Need for Strict Adherence to Mandamus Standards Is Especially Acute in the Guantánamo Military Commission Context

Although appellate courts must always carefully respect the limits on their mandamus jurisdiction, that

responsibility is heightened in the context of this case, where Congress specifically and repeatedly cabined the D.C. Circuit’s appellate role over military commissions. Disciplined mandamus practice is thus especially essential to assure adherence to the applicable statutory design.

A. The Statutory Architecture of Military Commission Appellate Review

Congress created the review hierarchy for military commissions—trial-level commissions, intermediate review by the CMCR, and appellate review in the D.C. Circuit—across three legislative stages: the Detainee Treatment Act of 2005 (“DTA”), the Military Commissions Act of 2006 (“2006 MCA”), and the Military Commissions Act of 2009 (“2009 MCA”). At each stage, Congress precisely circumscribed appellate jurisdiction, thus insulating commission proceedings from piecemeal appellate intervention.

The DTA established a two-tier structure—trial-level military commissions followed by limited review in the D.C. Circuit. Section 1005(e) of the DTA, which added a new 28 U.S.C. § 2241(e), stripped federal courts of general habeas jurisdiction over Guantánamo detainees and mandated that they instead go through the military commissions and then seek appeal in the D.C. Circuit. Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680.

In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Court held that the existing military commissions lacked sufficient congressional authorization. Congress responded with the 2006 MCA, comprehensive legislation that expanded, but also explicitly restricted, judicial

review of the military commissions. Pub. L. No. 109-366, 120 Stat. 2600. The 2006 MCA established the CMCR as a mandatory intermediate appellate body. *Id.* § 3 (codified at 10 U.S.C. § 950f). The D.C. Circuit’s review was confined to final judgments of the CMCR. *Id.* (codified at 10 U.S.C. § 950g). Congress amended 28 U.S.C. § 2241(e), which had been added by the DTA, to deny federal jurisdiction over habeas actions by detained enemy combatants and over “any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, or trial of such persons.” *Id.* § 7(a).

After *Boumediene v. Bush* held that section 7 of the 2006 MCA unconstitutionally suspended the writ of habeas corpus, 553 U.S. 723, 792 (2008), Congress enacted the 2009 MCA and locked the three-tier structure—trial commission, CMCR, D.C. Circuit—into its current, restrictive form. Pub. L. No. 111-84, 123 Stat. 2574. The statute grants the D.C. Circuit “exclusive jurisdiction to determine the validity of a final judgment” only. 10 U.S.C. § 950g(a). It provides that the court “may not review” any judgment “until all other appeals under this chapter have been waived or exhausted”—mandating prior CMCR action. *Id.* § 950g(b). And the law confines the D.C. Circuit to acting “only with respect to matters of law,” *id.* § 950g(d), reserving factual review to the CMCR, *id.* § 950f(d). The statute declares all proceedings, findings, and sentences “final and conclusive” and “binding upon all departments, courts, agencies, and officers of the United States.” *Id.* § 950j. Where Congress permitted any interlocutory appellate review, it reserved such review to the CMCR alone, for the Government alone, and only for enumerated categories of rulings—orders terminating proceedings, excluding evidence constituting substantial proof of a

material fact, or implicating classified information. *Id.* § 950d(a). No corresponding interlocutory path to the D.C. Circuit exists for the Government or any other party.

The progression from the DTA through the 2006 MCA and 2009 MCA thus reveals a deliberate legislative pattern: with each enactment, Congress more carefully defined and more tightly circumscribed the conditions under which appellate review of military commission trial-court rulings could occur—all to ensure that ongoing commission proceedings would not be disrupted by piecemeal appellate intervention.

B. Congress Intended to Channel and Limit Appellate Review

The operative language of § 950g(a) is precise and intentionally restrictive: the D.C. Circuit “shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review).” 10 U.S.C. § 950g(a). Every element does independent limiting work: “exclusive” forecloses any alternative Article III forum; “final” ensures the court may act only after the commission has rendered its verdict and internal review has run its course; and the parenthetical makes explicit that the judgment must have resulted from convening authority action under § 950b and, where applicable, the CMCR’s review under § 950f before D.C. Circuit jurisdiction attaches. This is not a general grant of supervisory authority—it is a narrowly delineated power to assess legal validity at the end of a process prescribed

by Congress. The subsequent provisions reinforce this design: § 950g(b) independently bars review “until all other appeals under this chapter have been waived or exhausted”; § 950g(d) confines the court to “matters of law”—presupposing a completed trial record, not an evolving pretrial proceeding; and § 950g(c)’s 20-day filing deadline, running from the CMCR’s final decision, ensures that D.C. Circuit review is a discrete event rather than an ongoing supervisory relationship.

Indeed, the choice to vest this power in the D.C. Circuit at all, rather than in the U.S. Court of Appeals for the Armed Forces, underscores Congress’s intent to channel and limit appellate review. Under the Uniform Code of Military Justice, courts-martial are reviewed by service-branch Courts of Criminal Appeals and then by the CAAF—Article I courts with deep institutional ties to the military justice system and a tradition of ongoing supervisory engagement. *See* 10 U.S.C. §§ 866, 867. But Congress deliberately bypassed that model, routing commission appeals instead to a generalist Article III court with no organic relationship to military adjudications. That decision signals Congress’s view that military commission review is a specific, bounded exercise of civilian judicial oversight—a one-time, high-level review at the end of the road—not an extension of the military appellate system’s supervisory role.

C. Mandamus as a Workaround to Statutory Limits Is Especially Problematic Here

The 2009 MCA provides no path for interlocutory appellate review, and this case does not involve a final judgment. The Government therefore invoked the All

Writs Act, 28 U.S.C. § 1651(a), seeking mandamus relief in lieu of an appeal. This effort to circumvent the careful statutory limits on military commission appeals is particularly problematic, warranting this Court’s review.

The All Writs Act does not itself confer jurisdiction; it operates only “in aid of” existing appellate jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999) (citing 28 U.S.C. § 1651(a)). A writ of mandamus thus cannot be used to manufacture interlocutory review that Congress withheld. *See Will*, 389 U.S. at 95. But the panel below inverted this principle: it treated the very absence of statutory appellate jurisdiction as a reason to grant the writ, reasoning that because “no interlocutory appeal is available” and the statute “does not expressly authorize *the government* to bring an appeal after entry of final judgment,” mandamus was warranted. Pet.App.47a, 50a.

That is the opposite of what *Will* instructs. There, this Court made clear that the federal courts “cannot and will not grant the Government a right of review which Congress has chosen to withhold.” 389 U.S. at 96 n.5. Indeed, it has long been established that a reviewing court’s power to issue such writs extends only so far as the petitioner has a statutory right to appeal that the writ will protect. *United States v. Mayer*, 235 U.S. 55, 65–66 (1914) (an appellate court’s “authority to issue writs is only that which may properly be deemed to be auxiliary to their appellate power”). If the petitioner has no statutory right to appeal a particular question to a particular court, it cannot create that jurisdiction by filing a mandamus petition. *Cf. Tidewater Oil Co. v. United States*, 409 U.S. 151, 160 (1972) (explaining that where statute provides appellate jurisdiction directly from district court to

Supreme Court, the court of appeals cannot entertain a petition for a writ of mandamus).

Here, the Government sought mandamus to vindicate the Secretary's objection to the prosecutors' bargain forgoing the death penalty. But Congress provided the Government limited authority to seek interlocutory review of the military commission's rulings from the CMCR, 10 U.S.C. § 950d(a)—which denied relief here—and no authority to seek interlocutory review in the D.C. Circuit, *id.* § 950g. Invoking the writ to ask an appellate court to claim jurisdiction that Congress withheld is an improper use of extraordinary mandamus relief.

Loose mandamus practice in this setting risks displacing a finely calibrated statutory scheme and drawing Article III courts prematurely into sensitive national-security adjudication. Where Congress has “committed” vindication of a prosecutorial interest—such as the decision to seek the death penalty—to the trial court and the CMCR rather than to interlocutory review in the D.C. Circuit, using mandamus to override that allocation does not merely function “in aid of [a court’s] jurisdiction[,]” as permitted by the All Writs Act. 28 U.S.C. § 1651(a). Instead, it expands it—in violation of Congress’s express design.

III. The D.C. Circuit Has Been Inconsistent in Its Fidelity to the Governing Mandamus Standard

Beyond the question of the applicability of the mandamus standard at all, the D.C. Circuit has applied the *Cheney* factors in materially different ways—both within its line of military commission cases and across its

broader docket. Particularly in the military commission context, where the D.C. Circuit has exclusive appellate jurisdiction, this Court's intervention to resolve the intra-circuit conflict is warranted.

A. The D.C. Circuit's Divergent Treatment Within the Guantánamo Line of Cases Reflects Doctrinal Inconsistencies

The D.C. Circuit has applied the *Cheney* factors across a line of Guantánamo cases in a manner that appears to reflect inconsistent applications of the standard—sometimes restrictive, and other times permissive. *See, e.g., In re Al-Nashiri (Al-Nashiri I)*, 791 F.3d 71 (D.C. Cir. 2015) (rejecting mandamus over Appointments Clause challenge to CMCR judges); *In re Al-Nashiri (Al-Nashiri II)*, 835 F.3d 110 (D.C. Cir. 2016) (rejecting mandamus over challenge regarding existence of hostilities); *In re Al Baluchi*, 952 F.3d 363 (D.C. Cir. 2020) (rejecting mandamus in dispute about preservation of evidence); Pet.App.3a–58a (granting mandamus to withdraw from plea agreement). The D.C. Circuit has been particularly inconsistent when it comes to mandamus petitions seeking to disqualify judges. *Compare In re Khadr*, 823 F.3d 92 (D.C. Cir. 2016) (Kavanaugh, J.) (rejecting mandamus over request to disqualify military commission judge), *and In re Al-Tamir*, 993 F.3d 906 (D.C. Cir. 2021) (same), *with In re Mohammad*, 866 F.3d 473 (D.C. Cir. 2017) (granting mandamus to disqualify CMCR judge), *and In re Al-Nashiri (Al-Nashiri III)*, 921 F.3d 224 (D.C. Cir. 2019) (granting mandamus to disqualify military commission judge).

Although the cases have differing facts, at their core, they also reflect the court's inconsistent treatment of the

mandatory prongs of the *Cheney* test. With respect to the adequate alternative means prong, the D.C. Circuit has held that “[m]andamus is inappropriate in the presence of an obvious means of review: direct appeal from final judgment.” *Al-Nashiri I*, 791 F.3d at 78. Applying this principle, the court denied Al-Nashiri’s mandamus application because vacatur on appeal would “fully vindicate” his rights. *Id.* at 80. It denied mandamus on the same ground when Al-Nashiri challenged the use of torture-derived evidence in pretrial proceedings—“Al-Nashiri again has adequate means to attain the relief he desires.” *In re Al-Nashiri (Al-Nashiri IV)*, 47 F.4th 820, 827 (D.C. Cir. 2022); *see also In re Nurjaman*, No. 23-1294, 2024 WL 3219292, at *4 (D.C. Cir. June 28, 2024) (same). Yet in *Al-Nashiri III*, the court held that mandamus was the “sole means for adequate relief” from judicial bias because the CMCR’s prior rulings would “significantly constrain and maybe even bar” a later remedy. 921 F.3d at 238–39. And in *Al Baluchi*, the court found that destruction of evidence was a “quintessential type of ‘irreparable’ injury” because second-best remedies would not provide “the same benefits as access to that evidence in the first instance.” 952 F.3d at 369. But mere irreparability does not provide a principled explanation for these divergent outcomes. An Appointments Clause defect infects every subsequent ruling, and torture-derived evidence cannot be unheard; yet both drew the response that vacatur would “fully vindicate” the petitioner’s rights. The court did not—and could not—distinguish those injuries from the ones it deemed irreparable.

With respect to the “clear and indisputable right” prong, the D.C. Circuit has said that it requires petitioners to “point to ‘cases in which a federal court has held that’

relief is warranted ‘in a matter involving like issues and comparable circumstances.’” *Al Baluchi*, 952 F.3d at 369 (quoting *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 355 (D.C. Cir. 2007)). It denies mandamus “even if a petitioner’s argument, though ‘pack[ing] substantial force,’ is not clearly mandated by statutory authority or case law.” *Id.* (quoting *Khadr*, 823 F.3d at 99–100). In *Khadr*, the court denied the writ because “[n]either this Court nor any other court of appeals ha[d] analyzed” the relevant question. 823 F.3d at 100–01. But in *Al-Nashiri III*, the court required no comparable-case authority at all; instead, it applied the disqualification standard based on an “intolerable cloud of partiality,” and declared the right “clear and indisputable” without identifying any prior military-commission disqualification on similar facts. 921 F.3d at 237. Likewise, the D.C. Circuit decided this case without any comparable case authority. Pet.App.60a (Wilkins, J., dissenting).

B. Inconsistency Beyond the Guantánamo Context

Nor is this inconsistent application of the *Cheney* factors limited to military commission cases. In cases implicating the separation of powers, the D.C. Circuit has applied *Cheney* without identifying comparable-case authority. Thus, in *In re Trump*, 172 F.4th 44, 52 (D.C. Cir. 2026), the court held that it “must also ask . . . whether the District Court’s actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties,” *id.* (quoting *Cheney*, 542 U.S. at 390), thereby treating “the paramount necessity of protecting the Executive Branch from vexatious litigation” as rendering the ordinary appellate process inadequate.

Id. at 53. Likewise, the D.C. Circuit also granted the Government’s application for mandamus against criminal contempt proceedings in *J.G.G. v. Trump*, 147 F.4th 1044 (D.C. Cir. 2025), although the court could not agree on a rationale for granting the writ: Judge Katsas believed that the order the Government had violated was “clearly ambiguous” and would “ensure multiple further constitutional conflicts between the Executive and Judicial Branches,” *id.* at 1058–59 (Katsas, J., concurring), while Judge Rao focused on the Supreme Court’s later decision vacating the district court’s order, reasoning that the district court “force[d] a coequal branch to choose between capitulating to an unlawful judicial order and subjecting itself to a dubious prosecution.” *Id.* at 1070 (Rao, J., concurring). Then, in denying rehearing en banc, a majority of the full court “agree[d] that the writ of mandamus was issued in error.” *J.G.G. v. Trump*, No. 25-5124, 2025 WL 3198891, at *5 (D.C. Cir. Nov. 14, 2025) (Pan, J., dissenting from denial of rehearing en banc).

By contrast, in FOIA and discovery cases, the court demands more. In *In re Clinton*, 973 F.3d 106 (D.C. Cir. 2020), the court granted mandamus only after finding multiple independent legal errors—misapplication of Rule 26, misstatement of the FOIA search standard, and disregard of binding circuit precedent—and denied the writ as to one petitioner who had adequate alternative relief through contempt-and-appeal. *Id.* at 112–18. In *In re United States DOGE Service*, No. 25-5130, 2025 WL 1393222 (D.C. Cir. May 14, 2025), *vacated*, 145 S. Ct. 1981 (2025) (mem.), the court denied mandamus where discovery was “modest in scope,” and “[o]pen legal questions do not present a clear and indisputable right to mandamus relief.” *Id.* at *2. In that case, the court held

the Government to a stringent standard, requiring it to “point to ‘cases in which a federal court has held that’ relief is warranted ‘in a matter involving like issues and comparable circumstances.’” *Id.* (quoting *Doe*, 473 F.3d at 355). But this Court summarily vacated that ruling—which itself suggests a recognition that the D.C. Circuit’s application of the mandamus standard warrants the Court’s intervention.

Fact-intensive doctrines will always produce some variation in case outcomes. But where the threshold legal standard itself is applied inconsistently, that variability becomes systemic, undermining the integrity of the standard. *See* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 999 (1978) (“[I]t is vital that courts assure not only litigants but all those concerned with the integrity of the judicial process that decisions are grounded on sound bases.”). In this way, the D.C. Circuit’s intra-circuit incoherence undermines mandamus’s “extraordinary” character, because litigants and trial courts cannot know, *ex ante*, how the standard will be applied. The need to clarify the D.C. Circuit’s absence of a stable governing methodology and inconsistent application of the mandamus standard counsels in favor of granting certiorari in this case.

IV. The Inconsistency Warrants Certiorari Because the Conflict Cannot Resolve Itself

A. The Circuits Are Divided on the Standard for Mandamus

The D.C. Circuit’s internal inconsistency only compounds an inter-circuit split. The courts of appeals

have divided into distinct camps over two questions: first, whether mandamus may circumvent statutory limits on appellate jurisdiction, particularly with respect to prosecutorial appeals; and second, what a petitioner must show to establish a “clear and indisputable” right, with some demanding on-point binding authority or unambiguous statutory text, others applying ordinary standards of review, and still others falling somewhere between.

In *United States v. McVeigh*, the Tenth Circuit refused to let the government use mandamus to overturn a pretrial order because its “right of appeal in this context has been ‘carefully circumscribed by Congress,’” and the writ may not “expand[] the government’s right to bring interlocutory criminal appeals beyond the terms of” the governing statute. 106 F.3d 325, 333 (10th Cir. 1997). The First, Second, and Ninth Circuits agree. *See United States v. U.S. Dist. Ct.*, 671 F.2d 351, 357 (9th Cir. 1982); *In re United States*, 646 F.2d 4, 9 (1st Cir. 1981); *United States v. DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972) (Friendly, J.). But the decision below splits with these circuits by treating the absence of any appeal as a reason to grant the writ. Pet.App.50a.

On the distinct question of what a petitioner must show to meet the “clear and indisputable” standard, the alignment shifts, with the courts of appeals divided into three camps. The Fourth and Fifth Circuits demand on-point binding authority or its equivalent and hold that even a “naked error of law” will not warrant the writ. *In re Trump*, 958 F.3d 274, 284 (4th Cir. 2020) (en banc), *vacated sub nom. as moot*, *Trump v. Dist. of Columbia*, 141 S. Ct. 1262 (2021); accord *In re JPMorgan Chase & Co.*,

916 F.3d 494, 500 (5th Cir. 2019) (mandamus “require[s] more than showing that the district court misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion” (alteration in original) (quoting *In re Lloyd’s Reg. N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015))). The Second and Eighth Circuits apply something close to ordinary abuse-of-discretion review, never requiring “binding authority directly on point.” *In re United States*, 945 F.3d 616, 625 (2d Cir. 2019); *see also In re Apple, Inc.*, 602 F.3d 909, 911–12 (8th Cir. 2010). In the middle, the First Circuit requires “palpabl[e]” error. *Da Graca v. Souza*, 991 F.3d 60, 64 (1st Cir. 2021) (quoting *In re Grand Jury Subpoena*, 909 F.3d 26, 28 (1st Cir. 2018)). The decision below places the D.C. Circuit at the most permissive extreme, granting the writ not merely without on-point authority but even in the face of contrary authority. Pet.App.40a n.10.

The D.C. Circuit’s own intra-circuit inconsistency makes this conflict uniquely troubling. When circuits divide, each ordinarily supplies a coherent rule of its own. Accordingly, litigants in those circuits can follow the approach adopted by that circuit until this Court chooses to restore uniformity among the circuits. Here, in the military commission context, that cannot happen, because the D.C. Circuit—the single court that reviews military commission cases—has applied the *Cheney* factors inconsistently, so that there is no coherent approach on which litigants can rely. That absence is intolerable in any context, and particularly in capital proceedings of such national importance.

B. Exclusive D.C. Circuit Jurisdiction Prevents Resolution Through Ordinary Percolation

This Court often allows a question to percolate among multiple circuits before granting review. That mechanism is unavailable here. Congress vested the D.C. Circuit with exclusive jurisdiction over military-commission final judgments under 10 U.S.C. § 950g, so no other circuit can ever confront the commission-specific question and supply a competing view. In a similar context, this Court has had to superintend the Federal Circuit’s development of patent doctrine precisely because Congress channeled all patent appeals to a single forum, eliminating the inter-circuit dialogue that ordinarily surfaces and tests competing approaches before this Court intervenes. *See* John F. Duffy, *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 318–19 (discussing Supreme Court’s review of intra-circuit dispute in patent litigation). The military-commission scheme suffers from the same defect: whatever methodology the D.C. Circuit settles on—or fails to settle on—will govern every commission case, without correction from any other circuit. In that structural posture, this Court is the only meaningful avenue for resolution.

C. This Court’s Intervention Is Necessary and Appropriate

Where a recognized split coincides with exclusive jurisdiction, only this Court can restore uniformity. And the recurring, high-stakes nature of the commission and national-security context reinforces the case for certiorari.

Two other features also make this the right case for this Court to act. First, the decision below did not merely misapply an appellate remedy; it did so in a way that overrode the considered judgments of two military tribunals on a question of military law. This Court has long recognized “the deference that should be accorded the judgments of the carefully designed military justice system established by Congress,” *Schlesinger v. Councilman*, 420 U.S. 738, 753 (1975), and the D.C. Circuit itself has acknowledged that decisions of the military’s highest court are “almost always to be accorded ‘great deference’ by Article III courts,” *Walters v. Sec’y of Def.*, 725 F.2d 107, 109 n.3 (D.C. Cir. 1983) (quoting *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)). Here, the military judge and a unanimous CMCR applied the CAAF’s on-point decision in *Dean*—precedent the D.C. Circuit panel majority admitted its result contradicted. Pet.App.40a n.10.

Second, the stakes and posture are especially costly in this case. These proceedings have been ongoing since June 2008—over eighteen years. Pet.App.275a. The prosecutors who negotiated the plea agreements expressed their “collective, reasoned, and good-faith judgment that this resolution is the best path to finality and justice in this case.” Pet.App.244a. All concerned—including the Government—agree the case is one of “immense national importance.” Pet.App.58a. And particularly when it comes to military trials, courts should “decide . . . justiciable disputes . . . ‘with as much clarity and expedition as possible.’” *Al Bahlul v. United States*, 767 F.3d 1, 80 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring) (quoting *Kiyemba v. Obama*, 561 F.3d 509, 522 (D.C. Cir. 2009) (Kavanaugh, J., concurring)). That principle applies with

full force to the recurring mandamus question presented here. Because the issue will continue to arise in the one forum Congress designated, the Court should address it now.

CONCLUSION

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

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Respectfully submitted,

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