IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,
*Appellee/Respondent*,

v.

RAZA BOKHARI,
*Appellant/Petitioner*.

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ON APPEAL FROM, OR ON PETITION FOR A WRIT OF MANDAMUS TO, THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN
(JUDGE RUDOLPH T. RANDA)

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# BRIEF FOR, OR ANSWER TO PETITION FOR A WRIT OF MANDAMUS OF, THE UNITED STATES OF AMERICA

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## STATEMENT OF JURISDICTION

Raza Bokhari's jurisdictional statement is not complete and correct. Bokhari is charged with mail fraud, money laundering, and conspiracy, in violation of 18 U.S.C. §§ 371, 1341, 1956(a) and 1956(h). The district court had jurisdiction pursuant to 18 U.S.C. §3231. It issued an order denying without prejudice Bokhari's Motion to Dismiss the Indictment and Quash the Arrest Warrant on January 6, 2014. Bokhari noticed this appeal on January 16, 2014.

Bokhari incorrectly states that 28 U.S.C. § 1291 provides this Court jurisdiction over an appeal of that order, citing the collateral order doctrine and the doctrine of practical finality; alternatively, he requests his appeal be treated as a petition for mandamus. Section 1291 does not provide appellate jurisdiction because the order is not a final judgment and the cited doctrines do not render it an appealable interlocutory order. *See infra* pp. 12-16. The All Writs Act, 28 U.S.C. § 1651, would provide jurisdiction to issue a writ of mandamus, but Bokhari has not filed a proper petition for one, *see* Fed. R. App. P. 21(a), nor met mandamus' stringent requirements. *See infra* pp. 16-19. Per this Court's Order, the issue of jurisdiction is addressed below.

## STATEMENT OF ISSUES PRESENTED

1. Whether the district court's order denying the motion to dismiss is immediately appealable under 28 U.S.C. §1291, or whether Bokhari must petition for a writ of mandamus.

2. Whether the district court abused its discretion in denying Bokhari's motion under the fugitive disentitlement doctrine.

3. Whether the delay resulting from Bokhari's opposition to extradition and ten-year self-imposed absence violated his Sixth Amendment right to a speedy trial or Federal Rule of Criminal Procedure 48(b).

4. Whether international comity requires dismissing an indictment based on a foreign magistrate's conditional order denying an extradition request for lack of a showing of a prima facie case.

## STATEMENT OF THE CASE

1. In September 2004, a federal grand jury in the Eastern District of Wisconsin returned an eight-count superseding indictment ("indictment") charging Raza Bokhari ("Bokhari") and his brothers, Haider and Qasim Bokhari, with mail fraud, money laundering, and conspiracy in violation of 18 U.S.C. §§ 371, 1341, 1956(a) and (h). USA-1-37.[1] Between 2000 and 2002, the three brothers allegedly schemed to defraud the Universal Service Administrative Company, a non-profit entity overseen by the Federal Communications Commission, and its E-Rate

[1] The prefix "USA" refers to the appendix submitted with this brief, "SA" to the short appendix appended to Bokhari's brief, "A" to his separate appendix, and "Br." to his brief.

Program, which helps economically disadvantaged schools install and upgrade telecommunications infrastructure. USA-1-5. They created a Virginia limited liability company in order to defraud the program and then fraudulently induced Wisconsin and Illinois schools to contract with their company. USA-4-10, 20-36. Bokhari submitted and directed his brothers to submit invoices and other documents falsely claiming work was performed when it was not. USA-4, 6-13, 20, 25-31. Their fraudulent claims exceeded $7 million, and they received at least $1.2 million. USA-7, 25-32.

In late 2001, as the Bokharis were receiving checks for the non-performed work, USA-7-10, Bokhari moved to Pakistan, where he continued to direct his brothers' illegal activities in Wisconsin, USA-25-32. Beginning in November 2001, the Bokharis laundered the fraud's proceeds from a Wisconsin bank account through various U.S.-located bank accounts created in their names and the names of family members, with at least $600,000 wired to Bokhari in Pakistan. USA-16-24, 31-36.

2. In October 2004, Haider and Qasim Bokhari each pleaded guilty and, after successfully appealing their sentences and being resentenced, served over five years in prison. *See United States v. Bokhari*, 430 F.3d 861 (7th Cir. 2005); Minute Entry for Re-Sentencing, No. 2:04-cr-00056 (E.D. Wisc. Sept. 28, 2006), ECF Nos. 137, 138.

3. In 2005, the United States submitted a request to Pakistan for Bokhari's

extradition.[2] The request was supported by documentation establishing that probable cause existed to indict Bokhari for extradition-eligible crimes including the grand jury's indictment, and supporting affidavits from the prosecuting attorney, a Universal Service Administrative Company official, FBI and IRS agents, and Qasim Bokhari.

Bokhari contested his extradition, arguing that: (1) the extradition treaty was invalid; (2) the charged offenses were not extraditable; and (3) the evidence submitted was insufficient because he was entitled to cross-examine the affiants. A-24-27.

In 2007, after consideration of written submissions by Bokhari's attorney and a Pakistani prosecutor, a Pakistani magistrate denied the extradition request as failing to make a prima facie case in its "current form." A-46. The magistrate held that, under Pakistani law, a "conviction" cannot be based "upon the uncorroborated testimony of an accomplice." A-42. The magistrate concluded that the prosecution "has to further consolidate and substantiate its case" with: (1) affidavits from "Bank officials," Bokhari's mother, and his sister-in-law; (2) documentary evidence of all "financial transactions," bank statements, company registrations, and a "list of directors"; and (3) a statement of the "clear cut role of Haider Bokhari and his status in the eye of the law," and the prosecution's leniency plans for Qasim Bokhari "once the case is proven against Raza Bokhari." A-43, 45-46.

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[2] Extraditions between the United States and Pakistan are governed by the terms of the 1931 U.S.-U.K. Extradition Treaty. 47 Stat. 2122.

Pakistan informed the government that an appeal had been filed and that the government would be notified of further developments. Declaration of Dan E. Stigall ("Stigall Decl.") ¶ 5, USA-38-39. Since then, the government has repeatedly requested status updates from Pakistan, but has never received a response, nor any notice that the extradition proceeding is officially concluded. *Id.*

In 2004, the government submitted paperwork to Interpol for the issuance of a red notice. A red notice operates as a request of all Interpol members to arrest the defendant and, if possible, extradite him to the United States if he enters their jurisdiction. When the initial notice was due for renewal in 2009, the government learned it had never been issued and then ensured that a red notice was issued. The red notice has not yet yielded Bokhari's arrest apparently because he has avoided traveling outside Pakistan.

4. In 2013, Bokhari, through counsel, filed a Motion to Dismiss the Superseding Indictment and Quash Arrest Warrant, based on claims that his Sixth Amendment speedy trial right was violated, the government has unnecessarily delayed bringing him to trial under Federal Rule of Criminal Procedure 48(b)(3), and principles of international comity require dismissal. The government opposed, arguing that Bokhari is not entitled to a ruling on the merits under the fugitive disentitlement doctrine and, alternatively, the motion is meritless.

The magistrate judge recommended denying the motion on its merits, finding no violation of Bokhari's speedy trial right because Bokhari (1) caused the delay, (2) is "not truly demanding a speedy trial," and (3) has shown no actual prejudice. SA-17-18. The government has "diligently pursu[ed] all reasonable efforts to secure

the defendant's presence in this district," and "remains, as it has over the entire pendency of the case against Bokhari, ready and willing to provide the defendant the prompt trial he purportedly seeks, if only it could." *Id.* In contrast, Bokhari "has created the stalemate that exi[s]ts in this case and, although he is under no obligation to yield, his persistence rather than any action by the government, perpetuates this delay." SA-18. The magistrate judge rejected Bokhari's Rule 48(b)(3) claim, finding "that the delay [in bringing Bokhari to trial] was very necessary." SA-19.

The magistrate judge further concluded that the Pakistani magistrate's finding of a lack of prima facie case did not, under principles of international comity, require dismissal of the indictment. In his view, "the comparison between the ultimate question of Bokhari's guilt in a federal criminal proceeding in the United States and the Inquiry Magistrate's preliminary decision in the Pakistan extradition proceeding [i]s largely one of apples to oranges." SA-14. Because "[o]nly findings necessary to a decision can plausibly be afforded preclusive effect," the foreign decision could not be "stretch[ed]" to include "any finding necessary to that ruling" that would require dismissal of the indictment. SA-15 (citing *United States v. Kashamu*, 656 F.3d 679, 688 (7th Cir. 2011)). To the contrary, the decision "appears to have depended largely upon the idiosyncrasies of Pakistani evidentiary law. . . rather than an assessment of the facts alleged vis-à-vis the crimes charged." *Id.* Lastly, the magistrate judge "[a]nalogiz[ed] the Pakistani extradition proceeding to a preliminary hearing under Fed. R. [Crim.] P. 5.1 (as the defendant does)" and concluded that the government would have sustained its burden in a preliminary

hearing because "there has been a formal finding of probable cause . . . recognized by the fact of the grand jury returning initial and superseding indictments." *Id.*

Bokhari and the government each objected to parts of the magistrate judge's recommendation.

The district court issued an order that declined to adjudicate the motion's merits under the fugitive disentitlement doctrine and denied it without prejudice. SA-1. The court emphasized Bokhari's substantial U.S. connections, including his U.S. citizenship, his many years attending school and working here, his purchases of businesses located in Wisconsin, and his marriage to and divorce from a U.S. citizen. SA-1, 5. The court also recognized that Bokhari allegedly committed his crimes in the district and continued to direct his brothers' criminal activities in the United States after returning to Pakistan, where he "ultimately receiv[ed] a large portion of the fraudulently-obtained funds." SA-5. The court believed "that Bokhari went to Pakistan in an effort to insulate himself from the possibility of a criminal prosecution." SA-6. Because Bokhari "fought extradition" and thus "constructively fled, and is fleeing," from prosecution by refusing to return to the United States, the court concluded that Bokhari was a fugitive not entitled to an adjudication. *Id.* He "should not be allowed to set a criminal plan in motion, leave the country, then attempt to gain a favorable ruling from the security of a foreign country once the U.S. government discovers the fraud." *Id.* The court explained, "[l]itigation entails reciprocal obligations: an appellant (or petitioner) who demands that the United States respect a favorable outcome must ensure that an adverse decision can also be carried out." *Id.*, *quoting Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728 (7th Cir. 2004).

5. Bokhari noticed an appeal from the district court's order, but requested that, if the order is not appealable, it "be treated as a petition for a writ of mandamus seeking to compel the District Court to adjudicate the merits of Defendant's motion to dismiss and to grant that motion." Notice of Appeal at 2, No. 2:04-cr-00056 (E.D. Wisc. Jan. 16, 2014), ECF No. 160. Bokhari's docketing statement repeated this request. The government's docketing statement stated that Bokhari had appealed a non-appealable order and had not properly petitioned for a writ of mandamus by failing to meet the requirements of Federal Rule of Appellate Procedure 21(a). On February 10, 2014, this Court ordered the parties to address the issue of appellate jurisdiction in their briefs.

## SUMMARY OF ARGUMENT

Bokhari's sense of entitlement is breathtaking. He believes his conduct – departing the United States during his fraud and money-laundering scheme but before indictment, his heretofore successful opposition to extradition, and doing everything he can to avoid trial in the United States – gives him special privileges. He feels entitled to a decision on the merits of his motion to dismiss, but promises not to abide by an adverse decision. He feels entitled to an interlocutory appeal of the motion's denial, believing his deliberate absence provides finality. And if not an appeal, he feels entitled to a writ of mandamus without petitioning for one or showing that such extraordinary relief is warranted. On the merits, he feels entitled to a dismissal because he has so far prevented a trial and obtained a favorable, though contingent, extradition ruling by a foreign magistrate.

Bokhari's sense of entitlement is also unfounded. Not even a present defendant can appeal denial of a pretrial motion to dismiss an indictment based on alleged trial delay or on alleged deference owed a foreign ruling that there is no probable cause. Bokhari's absence does not entitle him to greater appellate access through the creation of a new category of interlocutory appeal. Nor does his absence create special circumstances justifying issuance of a writ of mandamus; indeed, his absence counsels against the writ. In any event, he has shown no clear and indisputable right to the dismissal he seeks.

Likewise, Bokhari was not entitled to an adjudication of the merits of his motion to dismiss. The district court appropriately exercised its discretion to deny his motion under the fugitive disentitlement doctrine. Bokhari's presence in Pakistan at the moment of indictment, and his successful opposition to extradition, do not make the fugitive disentitlement doctrine inapplicable. In declining to rule on the motion's merits, the district court furthered the doctrine's underlying rationales by ensuring that the court's rulings are enforceable, preserving its dignity and resources, and deterring other would-be fugitives.

Even assuming the district court must adjudicate his motion on the merits, Bokhari would not be entitled to this Court's views on the merits before the district court's consideration of them.

Nonetheless, Bokhari is not entitled to a dismissal because his Sixth Amendment, Rule 48, and international comity claims are meritless. There has been no impermissible delay in Bokhari's trial. The government has acted with reasonable diligence to secure Bokhari's presence by, among other things,

requesting his extradition from Pakistan and seeking a red notice to facilitate extradition from another country if he leaves Pakistan. Bokhari's actions – resisting extradition and deliberately remaining in Pakistan – have caused the delay. And his actions, whether lawful or not, demonstrate the inauthenticity of his purported assertion of his speedy trial right and undermine his claim of prejudice.

As for international comity, even if deference were owed in some circumstances to foreign extradition rulings, the ruling here provides no basis for dismissing the indictment. If any deference were owed, it is the foreign magistrate who should have deferred (like federal judges must) to the grand jury's conclusive finding of probable cause. Moreover, the foreign ruling does not warrant deference because it is conditional and makes no finding necessary to its ruling that would require acquittal and thus justify dismissing the indictment.

## STANDARD OF REVIEW

In an ordinary appeal under 28 U.S.C. § 1291 of a district court's ruling on a motion to dismiss an indictment, legal questions are reviewed de novo and factual findings for clear error. *United States v. Greve*, 490 F.3d 566, 570 (7th Cir. 2010). A decision to decline to adjudicate a motion's merits under the fugitive disentitlement doctrine is reviewed for abuse of discretion. *United States v. Morgan*, 254 F.3d 424, 426 (2d Cir. 2001).

As explained below, Section 1291 does not provide this Court jurisdiction, though the All Writs Act, 28 U.S.C. § 1651, would allow this Court to issue a writ of mandamus. *See infra* pp. 11-19. A writ of mandamus is a "discretionary writ" subject to a "standard of review [that] is narrower than in an ordinary appeal." *In re*

*Sandahl*, 980 F.2d 1118, 1119-20 (7th Cir. 1992). And its "traditional use" has been "to compel [an inferior court] to exercise its authority when it is its duty to do so." *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 308 (1989) (internal quotation omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). A petitioner must show he has (1) "no other adequate means to attain the relief he desires"; and (2) a "clear and indisputable" right to issuance of the writ. *Id.* at 380-81. Because it is a discretionary writ, even if the petitioner has shown he is "clear[ly] and indisputabl[y]" entitled to it, the court may still decline to issue the writ if it would not be "appropriate under the circumstances." *Id.* at 381.

## ARGUMENT

### I. This Court does not have jurisdiction over an appeal of the order and should not issue a writ of mandamus

The district court's order is not a "final" judgment nor is it an appealable interlocutory decision under 28 U.S.C. § 1291. Bokhari asks this Court to treat his notice of appeal as a petition for a writ of mandamus, but mandamus is no casual substitute for appellate jurisdiction. It is an extraordinary and discretionary remedy, and Bokhari has not met the stringent requirements for its granting. In any event, "this appeal [should be] dismissed on the basis of the fugitive-disentitlement doctrine." *Sarlund v. Anderson*, 205 F.3d 973, 976 (7th Cir. 2000).

### A. Section 1291 does not provide this Court jurisdiction

Section 1291 provides jurisdiction for "appeals from all final decisions" of district courts. 28 U.S.C. § 1291. Bokhari argues that the district court's order should be considered "final" and thus appealable. But "a final judgment is normally deemed not to have occurred until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (internal quotations and citations omitted). Because Bokhari has "not yet even been tried, much less convicted or sentenced, it is plain that the District Court's order denying [his] motion to dismiss falls within this prohibition." *Id.* at 798. Bokhari cannot evade the final order rule by miscategorizing his appeal as reviewable under the collateral order doctrine or the doctrine of practical finality.

#### 1. The order is not an appealable collateral order

Bokhari asserts that the collateral order doctrine renders the interlocutory order final and thus appealable based on his claims regarding the fugitive disentitlement doctrine, his speedy trial rights, and international comity. But the collateral order doctrine is "an exception that is to be interpreted particularly narrowly in criminal cases," *United States v. J.J.K.*, 76 F.3d 870, 872 (7th Cir. 1996), and it does not apply to the order or his claims.

In analyzing whether the collateral order exception applies, courts must focus on "the entire category to which a claim belongs, without regard to the chance that . . . a particular injustice [might be] averted by a prompt appellate court decision." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (internal

quotation and citation omitted); *see also Abelesz v. OTP Bank*, 692 F.3d 638, 649 (7th Cir. 2012). And although "[t]he line between those orders that are and are not appealable as collateral orders probably owes more to history than to precise logical consistency, [ ] the line has been drawn in precedents that we must respect and follow as best we can." *Abelesz*, 692 F3d. at 650.

In the criminal context, the Supreme Court has approved only four types of orders as immediately appealable: denials of motions to (1) reduce bail, *Stack v. Boyle*, 342 U.S. 1 (1951), (2) dismiss based on double jeopardy, *Abney v. United States*, 431 U.S. 651 (1977), (3) dismiss based on the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500 (1979), and (4) avoid forced medication, *Sell v. United States*, 539 U.S. 166 (2003). This Court has approved interlocutory appeal in criminal cases for a small number of additional categories of orders. *See, e.g.*, *J.J.K.*, 76 F.3d at 872 (order transferring juvenile case to adult adjudication); *United States v. Corbitt*, 879 F.2d 224, 227 n.1 (7th Cir. 1989) (order releasing presentence report to media). The order here does not fit any of these categories. Indeed the Supreme Court has rejected interlocutory appeals when speedy trial rights are at issue. *United States v. MacDonald*, 435 U.S. 850, 857, 860-61 (1978).

*United States v. Kashamu*, 656 F.3d 679 (7th Cir. 2011), does not help Bokhari. Kashamu argued that a foreign ruling provided him a collateral estoppel or double jeopardy defense, and thus interlocutory review was appropriate through analogy to *Abney*. 656 F.3d at 682. Bokhari does not argue that the Pakistani extradition ruling provides him with such a collateral estoppel or double jeopardy defense. He does not set out the requirements for those defenses, let alone establish

their applicability. *Haxhiu v. Mukasey*, 519 F.3d 685, 692 (7th Cir. 2008) (court will only "review issues not adequately briefed in this court if failure to do so would result in manifest injustice"). Instead, he opted to make a generalized assertion of international comity, which is not a claim eligible for collateral appeal.

Nor does Bokhari have a basis to argue a collateral estoppel defense. Collateral estoppel only applies to "final" and "not avowedly tentative" judgments, *Amcast Industrial Corp. v. Detrex Corp.*, 45 F.3d 155, 158 (7th Cir. 1995), and extradition hearings are not "final" because double jeopardy does not prevent successive extradition requests, *DeSilva v. DiLeonardi*, 181 F.3d 865, 868 (7th Cir. 1999). Moreover, the Pakistani magistrate's 2007 decision was framed in conditional terms, and the record does not indicate that the extradition process has been concluded. *See supra* pp. 4-5.

Bokhari cannot justify creation of a new category of collateral orders here because the court's order does not (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) become "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Denial of a pretrial motion without prejudice can be revisited at any time. And the court's application of the fugitive disentitlement doctrine is not completely separate from the merits of the action. The nature and circumstances of Bokhari's underlying criminal activities, the extradition proceedings, and consideration of Bokhari's status as a fugitive are all interconnected. *See* SA-5-6.

Finally, the fact that Bokhari has thus far successfully avoided capture, opposed extradition, and refuses to "voluntarily travel from [Pakistan] to the United States to stand trial," Br. 1, 11, 13-14, 29, cannot create the condition of finality required by the collateral order doctrine. A contrary conclusion would produce perverse results: fugitive defendants unwilling to face adverse rulings could appeal denials of motions to dismiss before trial, while defendants who have submitted to the court's jurisdiction could not.

In any event, Bokhari may yet be extradited from Pakistan, as the Pakistani magistrate's order was framed in conditional language and remains pending on appeal. Moreover, Bokhari may be apprehended and extradited if he leaves Pakistan by virtue of the red notice. *See, e.g.*, *United States v. Homaune*, 898 F. Supp. 2d 153, 158 (D.D.C. 2012). And Bokhari, as a U.S. citizen with many ties to this country, may voluntarily return. In any such instance, Bokhari can renew his motion to dismiss and be entitled to a ruling on the merits. If it is denied at that time, he can appeal the denial on direct appeal if he is convicted at trial.

**2. The practical finality doctrine does not apply to the order**

The practical finality doctrine, "a close cousin of the collateral order exception," *Travis v. Sullivan*, 985 F.2d 919, 922 (7th Cir. 1993), applies only in *civil* cases, *see* Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, Section VI ("Appealability in *Civil* Cases"), Subsection E.(VII) at 41 (2012 ed.) (emphasis added). The government is not aware of, and Bokhari has not cited, a criminal case applying this doctrine. This makes sense, given that the final

order rule is followed "with the utmost strictness" in criminal cases. *Flanagan v. United States*, 465 U.S. 259, 265 (1984).

Bokhari cites two cases which apply the doctrine in different circumstances: (1) when an agency, upon remand, is faced with the choice of complying with an order and mooting appeal or refusing to comply risking contempt, *Travis*, 985 F.2d at 923; *see also Crowder v. Sullivan*, 897 F.2d 252, 253 (7th Cir. 1990), and (2) when an order requires immediate payment that may not remain to be recovered upon final appellate review, *Richardson v. Penfold*, 900 F.2d 116, 118-19 (7th Cir. 1990). Bokhari's circumstances are not analogous to either case.

### B. The Court should not treat Bokhari's appeal as a petition for a writ of mandamus and, in any event, should not issue a writ

If the order is not appealable, Bokhari requests that his notice of appeal be treated as a petition for a writ of mandamus compelling the district court to dismiss his indictment. Br. 16. But "appellate courts are not in the business of reviewing routine denials of motions to dismiss – not by using pendant appellate jurisdiction, not by using the collateral order doctrine, and certainly not by issuing a writ of mandamus." *Abelesz*, 692 F.3d at 651.

Where appellate jurisdiction is uncertain, litigants typically file a notice of appeal and a mandamus petition. *See, e.g., id.* at 645. Bokhari's counsel did so when he represented the petitioner in *Hijazi*. Brief for the United States in Opposition, *Hijazi v. United States* (No. 11-788), 2012 U.S. S. Ct. Briefs LEXIS 1498 at *6 (Apr. 9, 2012). By only noticing an appeal, Bokhari seeks to avoid "the special limitations that dog the writ of mandamus." *Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 782

(7th Cir. 1999). Defending his casual approach, he cites two inapposite cases. In *Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific Railroad Co.*, 707 F.3d 791 (7th Cir. 2013), the Court treated an appeal as mandamus when the jurisdictional issue became apparent after all briefs were filed and oral argument held. And in *United States v. White*, 582 F.3d 787, 807 (7th Cir. 2009), the Court simply followed Circuit precedent in re-classifying a *pro se* criminal petitioner's "appeal of a denial of recusal" because a "challenge to a district court's refusal to recuse may only be made by a petition for a writ of mandamus." These cases provide him no excuse. Bokhari "has not complied with Appellate Rule 21 in seeking a writ" as "the record includes no Petition for Writ of Mandamus, and no evidence that [Bokhari] has served such a petition on the district judge"; "[w]ithout more," this Court "should not consider mandamus relief." *Travis*, 985 F.2d at 926 (Manion, J., dissenting).

In any event, Bokhari has not established his right to the "drastic remedy" of mandamus, having failed to show that the district court exceeded "the lawful exercise of its jurisdiction" or failed to "exercise its authority when it ha[d] a duty to do so." *United States v. Lapi*, 458 F.3d 555, 560-61 (7th Cir. 2006).

Nor has Bokhari shown that he has "no other adequate means to attain the relief he desires." *Cheney*, 542 U.S. at 380-81. If Bokhari submits to the district court's jurisdiction, he will get what he seeks: an adjudication of the merits of his motion and, if merited, a dismissal of the indictment. But Bokhari has chosen instead to stay outside the court's reach by remaining in Pakistan.

Likewise, Bokhari has not shown a "clear and indisputable" right to the writ. *Id.* at 381. Even a "colorable argument supporting the district court's" decision precludes a writ. *Abelesz*, 692 F.3d at 654. Not only is the district court's application of the fugitive disentitlement doctrine colorable, *see infra* pp. 19-34, but Bokhari's Sixth Amendment, Rule 48, and international comity claims in support of dismissing the indictment – the relief he seeks through mandamus – are meritless, *see infra* pp. 35-49.

Lastly, the writ is not "appropriate" as there are no "exceptional circumstances" warranting appellate intervention. *Cheney*, 542 U.S. at 380-81. While Bokhari may perceive his interest in avoiding trial as "exceptional," numerous courts have applied the fugitive disentitlement doctrine to defendants like Bokhari, *see infra* pp. 29-30, and courts routinely hold that defendants resisting extradition forego their right to a speedy trial, *see infra* pp. 38-39. Bokhari's garden variety resistance to extradition and fugitive status do not merit issuance of a writ.

Bokhari attempts to liken his plight to the extraordinary circumstances present in *In re Hijazi*, 589 F.3d 401 (7th Cir. 2009), but he misreads that opinion. Bokhari claims that the Court granted the writ in *Hijazi* for three reasons that "also apply here": (1) its analysis of Hijazi's fugitive status; (2) the existence of the Interpol red notice; and (3) "the principles underlying" the constitutional right to a speedy trial. Br. 16, 20-21. Bokhari's description of *Hijazi* is at odds with the opinion's language and omits the very circumstances that were so extraordinary that they warranted a writ of mandamus.

Throughout its opinion, the Court emphasized the fundamental jurisdictional concerns raised by the question presented – whether Hijazi was entitled to "a pre-appearance adjudication of the question whether the statutes in question apply extraterritorially to his situation, as well as the question whether his actions were enough to draw him within the personal jurisdiction of the court." 589 F.3d at 408, 411; *see also id.* at 403, 405, 407, 410, 412. The pressing nature of the jurisdictional questions, coupled with the "delicate foreign relations issues" presented by Kuwait's formal objections to the extraterritorial application of the statute, so predominated the analysis that Hijazi's request "to dismiss the indictment on the merits" was made "almost in passing." *Id.* at 411, 406.

The Court acknowledged, but "express[ed] no view about," Hijazi's speedy trial right and the harm posed by an outstanding red notice that was possibly predicated on an unauthorized exercise of jurisdiction. *Id.* at 410, 413. There is no basis to believe that these concerns were "the reasons this Court gave in *Hijazi* for granting the writ." Br. 16. Bokhari has raised no fundamental or novel jurisdictional questions, delicate foreign relations issues, nor anything else "analogous to the separation-of-powers concern that motivated the [Supreme] Court to support mandamus in *Cheney*." 589 F.3d at 408, 411.

## II. The district court properly exercised its discretion under the fugitive disentitlement doctrine to not adjudicate the motion's merits

The district court did not abuse its discretion in declining to rule on the merits of Bokhari's motion pursuant to the century-old equitable fugitive disentitlement doctrine. *See Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970). This doctrine

prevents courts and other parties to the litigation from wasting time and resources on obtaining "unenforceable" rulings, and also "serves an important deterrent function and advances an interest in efficient, dignified appellate practice." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 242 (1993) (citations omitted). While the doctrine was originally developed in the context of criminal appeals, "District Court[s] ha[ve] the authority to defend [their] own dignity, by sanctioning an act of defiance that occurred solely within [their] domain." *Id.* at 246.

Bokhari is a fugitive from justice because he: (1) committed crimes in the United States and preyed upon U.S. victims; (2) left the jurisdiction during the commission of his crimes, albeit before indictment; (3) has notice of the charges pending against him; (4) has refused to return to face those charges and instead fought extradition; and (5) has amply documented his intended refusal to return to the United States so long as the charges are pending or to leave Pakistan so long as the red notice is pending. Under the fugitive disentitlement doctrine, courts are not required to expend resources ruling on motions filed by fugitives who will not abide by any unfavorable rulings. To hold otherwise would create perverse incentives for defendants.

### A. Being abroad at the time of indictment and prevailing in a foreign extradition proceeding does not render the fugitive disentitlement doctrine inapplicable

Bokhari's attempt to remotely litigate his case implicates all of the rationales underlying the fugitive disentitlement doctrine – enforceability, judicial dignity and deterrence. Bokhari argues that the doctrine does not apply to defendants who leave the jurisdiction before indictment, or who successfully resist extradition, and thus

have no "duty" to return to the United States to answer the charges. Br. 14, 27-28. But it is well-established that foreign-located defendants who "learn that they are under indictment and make no effort to return to the United States to face charges" *are* fugitives. *United States v. Blanco*, 861 F.2d 773, 779 (2d Cir. 1988); *see infra* pp. 25-29.

Bokhari claims, however, that *Hijazi* drew a firm line barring fugitive status merely because a defendant was in a foreign jurisdiction when charged and remained in that jurisdiction. 589 F.3d 401 (7th Cir. 2009).[3] But *Hijazi* simply does not hold that someone who was abroad when they were indicted is not a fugitive. Rather, the Court found that particular circumstances – including Hijazi's lack of contacts with the United States, serious jurisdictional questions, and certain pragmatic concerns – weighed against application of the fugitive disentitlement doctrine. *Hijazi* was, by its own terms, limited to the "unusual circumstances of this case." *Id.* at 403. None of those circumstances are present here.

First, as this Court emphasized, Hijazi was a non-citizen who committed his offense outside the United States. "With the exception of one brief visit to the United States in 1993, which all agree was unrelated to this case, Hijazi has never been in the country, he has never set foot in Illinois, and he owns no property in the United States." *Id.* at 412. Hijazi's only alleged contacts with the United States were his three emails sent from Kuwait to his co-conspirator's email address "based in the United States," though not apparently opened in the United States. *Id.* at

[3] He relies secondarily on *United States v. Kashamu*, 656 F.3d 679 (7th Cir. 2011), Br. 21-22, but application of the doctrine was not at issue in that appeal.

411. And when Hijazi surrendered, it was to authorities in Kuwait, the country "in which his relevant conduct physically occurred." *Id.* at 410.

Bokhari, in contrast, has significant contacts with the United States. He is a U.S. citizen who lived and studied in the United States for years. He committed the alleged offenses in this country before departing to Pakistan where he continued to direct the fraud and money-laundering schemes and collect their proceeds. SA5-6. From these circumstances, the district court reasonably inferred "that Bokhari went to Pakistan in an effort to insulate himself from the possibility of a criminal prosecution." SA-6. And when Bokhari "allowed himself to be taken into custody" in Pakistan, Br. 10, it was not by authorities in the United States, where the schemes were devised and executed.

Second, *Hijazi's* fugitive disentitlement decision reflected the case's serious jurisdictional challenges. So attenuated was Hijazi's connection to the United States, and so unclear was the relevant statute's application to "crimes [that] have been committed in a transaction . . . between two private companies operating in Kuwait" (leading Kuwait to claim that "criminal jurisdiction [ ] lies in Kuwait" alone), that Hijazi's motion raised "serious questions about the reach of U.S. law." 589 F.3d at 405, 411; *see id.* at 408 ("fundamental questions" about the fraud statutes at issue go "to the court's very power to act"). The Court likened these fundamental questions to the separation-of-powers concern in *Cheney*, 542 U.S. at 382, and concluded that they (along with Kuwait's formal protests) made mandamus appropriate. 589 F.3d at 411-12. Applying the fugitive disentitlement doctrine was inappropriate where the court faced such fundamental jurisdictional

questions. Here, however, the statutes plainly reach the charged conduct, the district court has subject-matter jurisdiction, and the exercise of personal jurisdiction over Bokhari is consistent with due process.

Lastly, pragmatic concerns – entirely absent here – made application of the doctrine inappropriate in *Hijazi*. Acknowledging the "delicate foreign relations issues" at stake, the Court pragmatically concluded that a ruling on the merits might not only help resolve those concerns, but lead to Hijazi's extradition. *Id.* at 411, 413. Objecting to infringement on its "sovereignty," Kuwait sent "[n]merous letters" to, and held meetings with, Department of Justice officials, and refused to turn over Hijazi because it did "not believe the United States ha[d] any basis for asserting legal jurisdiction over Mr. Hijazi for acts alleged to have taken place in Kuwait." *Id.* at 405. But Kuwait left open the possibility of reconsidering its position, asking "that the Department of Justice consent to the Court's ruling on the motion even though Mr. Hijazi remains in Kuwait." *Id.* Thus, application of the fugitive disentitlement doctrine not only distressed relations with Kuwait, but also made it less likely that Kuwait or another country would someday exercise its "discretion to extradite Hijazi if it so chooses." *Id.* at 413. This Court recognized that a "federal court decision upholding the indictment against Hijazi may make those governments more likely to exercise that discretion and less confident in resisting diplomatic pressure from the United States if they are no longer able to protest that the indictment is legally flawed as a matter of U.S. law." *Id.*

Pakistan has not protested Bokhari's prosecution or supported his motion or his arguments, and an adjudication on the merits of his speedy trial and comity

claims will not, as a pragmatic matter, ease international tensions or increase the likelihood of Bokhari's extradition.

Other courts have rejected the expansive reading of *Hijazi* urged by Bokhari, recognizing, as *Hijazi* did, the "unusual circumstances of th[at] case." *Id.* at 403. For example, in *United States v. Orah*, the court applied the fugitive disentitlement doctrine, distinguishing *Hijazi*, because the defendant traveled to the United States to partake of the activity that gave rise to the indictment. 2011 U.S. Dist. LEXIS 47859 at *2 (E.D. Mich. May 4, 2011). In contrast, *Hijazi* was "an unusual case in which the Lebanese defendant could not be extradited to the United States, the alleged criminal conduct took place outside the United States, and the moving defendant had 'never been in the country, he [had] never set foot in Illinois, and he own[ed] no property in the United States.'" *Id.*; *see also United States v. Yeh*, 2013 U.S. Dist. LEXIS 69284 at *6 (N.D. Cal. May 15, 2013) (applying fugitive disentitlement doctrine even though foreign defendant was abroad when indicted because no "deadlock requiring the determination of fundamental jurisdiction matters" exists, unlike *Hijazi*, which involved "primarily legal issues regarding the extraterritorial application of the statute in question and whether the court had personal jurisdiction over the defendant"); *cf. United States v. Kashamu*, 2010 U.S. Dist. LEXIS 72859 at *10 (N.D. Ill. July 15, 2010) (declining to apply doctrine and denying the motion to dismiss on the merits because Nigerian-located defendant "directed the [criminal] operation from his residence in Benin, and there is no suggestion by any party that [defendant] has been in the United States since the government brought charges against him"), *aff'd on other grounds*, 656 F.3d 679.

Just as *Hijazi* does not support Bokhari's cramped view of the fugitive disentitlement doctrine, other authorities make clear that Bokhari readily qualifies for fugitive status as that term is properly understood. As used in extradition treaties, even a "person who is not evading the judicial processes of a requesting state will [ ] be deemed a fugitive from the moment that he is sought for extradition, even though he neither knows that he is sought nor seeks to evade legal process." M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 828 (5th ed. 2007) (footnote omitted). Thus, "fugitive" as used in federal extradition statutes "has been held consistently to require only proof of absence from the indicting jurisdiction, regardless of the defendant's intent" to avoid prosecution. *United States v. Marshall*, 856 F.2d 896, 898 (7th Cir. 1988), *citing Appleyard v. Massachusetts*, 203 U.S. 222, 227 (1906). This universal understanding of the term "fugitive" is reflected in the Pakistani magistrate decision's repeated referral to Bokhari as the "fugitive offender." A-33, 36, 39, 45.

Likewise, Bokhari is a fugitive for statute of limitations purposes. In relevant part, 18 U.S.C. § 3290, tolls the statute of limitations for "any person fleeing from justice." A defendant is a fugitive if he intends to remain outside the jurisdiction in which he is charged, and such intent "may be inferred where the defendant fails to surrender to authorities after learning of the charges against him." *Marshall*, 856 F.2d at 897-98, 900, *citing United States v. Catino*, 735 F.2d 718, 722 (2d Cir. 1984). No inference is necessary here, however, because Bokhari says he "will not voluntarily travel from his home to the United States to stand trial." Br. 13.

Rather than inquiring into where the criminal activity took place or its effects on U.S. victims, Bokhari suggests that the determination of whether a defendant is a fugitive should be made by looking to see where the defendant is located when an indictment is issued. Courts have not indulged such gamesmanship. The Supreme Court has rejected the contention that defendants are not fugitives if they leave a jurisdiction before an indictment is issued, as "it is not necessary that the course of justice should have been put in operation." *Streep v. United States*, 160 U.S. 128, 133 (1895). In fact, even "physical absence from the jurisdiction is not essential" if a defendant has "knowledge [ ] that he was wanted" and "fail[s] to submit to arrest." *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976).

Bokhari next contends that the "most crucial fact bearing on [his] non-fugitive status is that he went through the treaty-based extradition process" and prevailed. Br. 19. Courts have indeed considered defendants' resistance to extradition in determining their fugitive status, but have come to the opposite conclusion. *Catino*, relied upon by this Court in *Marshall*, concluded that a defendant who was imprisoned in a foreign jurisdiction, but "actively resisted [an] extradition request" had thereby "constructive[ly] fl[ed] from justice." *Id.* at 722-23. It was irrelevant, the court held, whether the defendant had left the indicting jurisdiction with the purpose of avoiding prosecution, as a non-fugitive can "*become* a fugitive by virtue of his resistance to extradition." *Id.* at 722 (emphasis in original); *see also Schuster v. United States*, 765 F.2d 1047, 1050 (11th Cir. 1985) (defendant "established her status as a fugitive from this nation's criminal process, particularly as of the moment she chose to resist extradition"); *United States v. One Lot of U.S. Currency*

*Totaling $506,537.00*, 628 F. Supp. 1473, 1476 (S.D. Fla. 1986) (Section 3290 "encompasses the concept of 'constructive flight' because there is no meaningful distinction between those who leave a country and those persons . . . who refuse to return after learning of criminal charges pending against them").

Bokhari's reliance on *Degen v. United States*, 517 U.S. 820 (1996) is misplaced. First, *Degen* is no longer good law. Partly in response to *Degen*, Congress enacted the Civil Asset Forfeiture Reform Act of 2000 to clarify that fugitives in criminal cases would not be allowed to defend their property in civil asset forfeiture proceedings. *See United States v. $6,976,934.65*, 554 F.3d 123, 127 (D.C. Cir. 2009) (observing that, post-*Degen*, Congress "seized" the opportunity to create "the fugitive disentitlement statute"). Thus, in the civil asset forfeiture context, a "fugitive" is any individual who:

> (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution –
> (A) purposely leaves the jurisdiction of the United States;
> (B) declines to enter or reenter the United States or submit to its jurisdiction; or
> (C) otherwise evades the jurisdiction of the court in which a criminal case is pending against [him]; and
> (2) is not confined or held in custody or in any other jurisdiction for commission of criminal conduct in that jurisdiction.

28 U.S.C. § 2466(a). Congress thus reinforced the definition of fugitive long employed by a number of Circuits. *See, e.g., United States v. Eng*, 951 F.2d 461, 462, 464 (2d Cir. 1991) (defendant was a fugitive "so long as he continue[d] to fight extradition" because "[w]hen a person purposely leaves the jurisdiction or decides not to return to it, in order to avoid prosecution, he is a fugitive").

Furthermore, far from "reject[ing] [a] proposed expansion of the doctrine beyond the core" context of direct criminal appeals, as Bokhari claims, Br. 26, the *Degen* Court implicitly approved of the application of the fugitive disentitlement doctrine outside the criminal appeals context. Instead of forbidding application of the fugitive disentitlement doctrine in the context of civil asset forfeiture proceedings, the Court issued a very circumscribed ruling. The Court held only that the doctrine was "too blunt" an instrument in the particular circumstances of the case because: (1) the property at issue was secure despite defendant's absence and thus "there [wa]s no danger the court in the forfeiture suit will waste its time rendering a judgment unenforceable in practice," and (2) defendant's "absence entitle[d] him to no advantage" because the court had extensive "alternative means of protecting the Government's interest." 517 U.S. at 827-28. Neither of these justifications for declining to apply the doctrine is relevant to Bokhari.

In any event, Bokhari's argument that he is entitled to stay in Pakistan is beside the point, as a defendant "may elect to oppose extradition, but that choice has negative consequences that he may not evade." *Eng*, 951 F.2d at 462; *see also*, *United States v. $129,374 in U.S. Currency*, 769 F.2d 587, 583 (9th Cir. 1986); *United States v. All Funds on Deposit at: Citigroup Smith Barney Account No. 600-00338*, 617 F. Supp. 2d 103, 128, 130 (E.D.N.Y. 2007) (defendant may "be exercising a right under a foreign country's law to remain in that country," but court was unwilling to undertake analysis of "what substantive rights" defendant has to remain in that foreign jurisdiction, nor "what procedures or criteria [the foreign

jurisdiction] uses to determine whether it will extradite an individual that has been charged by the United States with very serious crimes").

Although Bokhari claims that he "simply does not meet the definition of a fugitive," Br. 18, he is a fugitive as Congress and the courts understand that term. Accordingly, the fugitive disentitlement doctrine can apply.

### B. The fugitive disentitlement doctrine provided the district court with discretion to decline to adjudicate the motion's merits

Bokhari also contends that "even if [he] were a 'fugitive' in some very broad sense of the word," the district court abused its discretion in applying the fugitive disentitlement doctrine because his case is outside the "core" context of criminal appeals in which the doctrine was developed. Br. 25-26. This contention is baseless. Courts at all levels of the state and federal judiciary have relied upon the doctrine in a variety of contexts outside of the core context in which it was first applied.

To the extent Bokhari objects to the application of the doctrine by a *district court*, the Supreme Court has already acknowledged district courts' authority to do so. *See Ortega-Rodriguez*, 507 U.S. at 246. In the present case, the district court's exercise of discretion is in line with the accepted practice of district courts declining to "waste time and resources exercising jurisdiction over litigants who will only comply with favorable rulings of the court." *United States v. Oliveri*, 190 F. Supp. 2d 933, 935-36 (S.D. Tex. 2001); *see also, Sarlund v. Anderson*, 205 F.3d 973, 976 (7th Cir. 2000) (directing district court to dismiss fugitive's suit on basis of the doctrine); *Magluta v. Samples*, 162 F.3d 662, 664 (11th Cir. 1998) ("Although traditionally applied by the courts of appeal to dismiss the appeals of fugitives, the

district courts may sanction . . . parties on the basis of their fugitive status"); *United States v. Stanzione*, 391 F. Supp. 1201, 1202 (S.D.N.Y. 1975).

In fact, district courts have invoked the doctrine to decline to adjudicate pretrial motions where the defendant, like Bokhari, was in a foreign country at the time of indictment and afterwards. *Yeh*, 2013 U.S. Dist. LEXIS 69284 at *6; *Oliveri*, 190 F. Supp. 2d at 934-36; *United States v. Nabepanha*, 200 F.R.D. 480, 482-84 (S.D. Fla. 2001); *United States v. Eagleson*, 874 F. Supp. 27, 29-31 (D. Mass. 1994). Bokhari's observation that, per *Hijazi*, this Court is "well aware of the fugitive disentitlement doctrine," Br. 23, indicates that if this Court viewed district courts as prohibited from applying the doctrine, there was a much more straightforward way to dispose of *Hijazi* than the extended analysis it undertook.

Alternatively, if Bokhari's objection is that the district court applied the doctrine outside of the "core" criminal appellate context, this extension has also been approved by the Supreme Court in *Degen*. *See supra* p. 28. The application of the doctrine in a variety of contexts is not surprising because concerns about the enforceability of judicial decisions, the integrity of legal proceedings, and the deterrence of fugitivity are not limited to federal circuit courts considering criminal appeals. *See, e.g.*, *Conforte v. Commissioner*, 692 F.2d 587, 589-90 (9th Cir. 1982), *stay denied*, 459 U.S. 1309 (1983) (Rehnquist, J., in chambers) (denying certiorari for application of doctrine to civil tax appeal, observing that Court has not objected to extension of doctrine outside of criminal appeals context); *Sarlund*, 205 F.3d 973 (7th Cir. 2000) (applying doctrine in context of civil § 1983 claim, noting that "district judge should have invoked the doctrine and dismissed the suit without

further ado" because defendant was a fugitive in a criminal matter); *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728 (7th Cir. 2004) ("[e]very circuit that has considered the issue has concluded that the fugitive-disentitlement doctrine applies to immigration cases"); *Daccarett-Ghia v. Commissioner*, 70 F.3d 621, 625 (D.C. Cir. 1995) (recognizing "Tax Court's power, as an Article I court, to apply the fugitive disentitlement doctrine"); *Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d 584, 595-96 (4th Cir. 2002) (collecting state and federal cases and describing state statutes).

Bokhari claims that the Supreme Court has rejected proposed expansions of the doctrine, but the cases he cites do nothing of the sort. *See e.g.*, *United States v. Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971) (noting inapplicability of doctrine to "respondent [who] has not fled from the restraints imposed by the District Court" but rather, unlike Bokhari, "is living under those restraints today"); *Ortega-Rodriguez*, 507 U.S. at 246 (holding it was an abuse of discretion for appellate court to apply doctrine to a fugitive: (a) who had been recaptured; (b) whose absence had not prejudiced the government; and (c) when it was the district court whose authority he had "flouted" and the "District Court has the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain").

Of course, the fugitive disentitlement doctrine is a discretionary one. And so, in a proper exercise of discretion, there are circumstances where courts may decline to apply it. For example, in *United States v. Sharpe*, the Court decided the merits of an appeal at the government's request, despite defendant's status as a fugitive. 470 U.S. 675, 681 n.2 (1985). This Court has followed the same approach. *See Nash v.*

*Hepp*, 740 F.3d 1075, 1078 (7th Cir. 2014) (opting to "not exercise our discretion to dismiss this appeal under the fugitive-disentitlement doctrine" where government "prefers that we reach the merits, notwithstanding [defendant's] fugitive status"). Similarly, courts have declined to apply the doctrine in the face of exceptional circumstances which favor the court ruling in a defendant's absence. *See, e.g., United States v. Noriega*, 683 F. Supp. 1373, 1374-75 (S.D. Fl. 1988) (noting defendant's "unique status" as the leader of a sovereign state and the significant "political overtones" of the case); *Oliveri*, 190 F. Supp. 2d at 936 ("refus[ing] to bestow [the] benefit" of ruling on defendant's pretrial motions "absent some special circumstance, or overriding policy concern"). No exceptional circumstances so heavily favor adjudication that the court's declination to rule on the merits here constitutes an abuse of discretion. To the contrary, the court acted appropriately given the defendant's deliberate actions to avoid going to trial and his stated intent to never return to the United States.

### C. The doctrine's underlying rationales support its application here

A ruling on the merits here would frustrate the policies underlying the fugitive disentitlement doctrine. Such a ruling would be unenforceable, thereby undermining the dignity of the court, while rewarding Bokhari for his strategic approach. *See Yeh*, 2013 U.S. Dist. LEXIS 69284 at *6 (refusing to reach the pretrial motion's merits because it would "essentially [ ] give [the fugitive] defendant an advisory opinion on whether a statute of limitations defense would fly").

In addition, such a ruling may have ramifications beyond this case. "[R]eaching the merits of [pretrial] motions" by fugitive defendants "may encourage others in the same position to take flight from justice" or discourage others from voluntarily submitting to the court's jurisdiction. *Oliveri*, 190 F. Supp. at 936; *cf. Estelle v. Dorrough*, 420 U.S. 534, 537 (1975) (state fugitive disentitlement statute "encourages voluntary surrenders" and "promotes the efficient, dignified operation" of the courts).

Requiring courts to adjudicate pretrial motions by foreign-located defendants because they are prejudiced by the existence of a red notice may also undermine one of the only levers the government has to secure such defendants' presence and deter voluntary surrender. In the Antitrust Division's experience, for example, "use of red notices clearly raises the stakes for foreign executives who hope to avoid prosecution by simply remaining outside of the United States." Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, 14 (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.pdf. Over the last four years, in Antitrust Division prosecutions alone, thirty-six foreign nationals who were charged when they were outside the United States voluntarily came to the United States to resolve those charges either by pleading or going to trial. Or to take an individual – yet quite apt – example, in *United States v. Chaudhry*, a defendant who was a Pakistani and (naturalized) U.S. citizen returned to Pakistan to care for his ill father before being indicted for health care fraud; although the government

determined that an extradition request would be futile, Chaudhry voluntarily returned to the United States to answer the charges. 2010 U.S. Dist. LEXIS 111565 at *3-8 (S.D.N.Y. Oct. 19, 2010). To reward defendants, like Bokhari, who target the United States with their criminal activities and then attempt to avoid U.S. justice in foreign refuges, with unique opportunities to litigate remotely and without consequence would only discourage voluntary surrenders like these to the detriment of U.S. victims and U.S. law enforcement.

## III. If Bokhari is entitled to an adjudication of the merits of his claims, this Court should permit the district court to do so in the first instance or, alternatively, deny relief because his claims are meritless

### A. Any merits adjudication should be done first by the district court

While the magistrate judge recommended an outcome on the merits, the district court declined to consider them. If this Court concludes, in the case of an ordinary appeal, that this declination was an abuse of discretion or, in the case of petition for writ of mandamus, that the declination "amount[s] to . . . a clear abuse of discretion, [that] will justify the invocation of this extraordinary remedy," then this Court should permit the district court to consider the merits in the first instance. *Cheney*, 542 U.S. at 380 (internal quotation marks and citations omitted). As the discussion below demonstrates, ruling on the merits potentially requires a factual assessment, which is best conducted first by the district court. Accordingly, the prudent course is either a remand order or a writ of mandamus directing the court to rule on the motion's merits. *See*, *e.g.*, *Parker v. Franklin County Community School Corp.*, 667 F.3d 910, 929 (7th Cir. 2012) (remanding for district court to consider the merits of equal protection claims not previously considered

because court had erroneously found defendants immune); *In re Hijazi*, 589 F.3d at 403, 412, 414 (granting writ ordering district court, which "is in a better position to address the merits in the first instance" and may "need[] to explore" the facts to "rule on his motions to dismiss").

### B. Bokhari's claims do not warrant relief

If this Court considers the merits in the first instance, then it should affirm the order or deny the mandamus petition because Bokhari's Sixth Amendment, Rule 48, and international comity claims are meritless.

#### 1. Bokhari's constitutional right to a speedy trial has not been violated

Bokhari demands that this Court order dismissal of the indictment, claiming that his lengthy self-imposed exile and heretofore successful opposition to extradition have yielded a violation of his Sixth Amendment speedy trial right. Acceding to this demand, however, would create a "fugitive entitlement doctrine": if a defendant successfully resists extradition for a sufficient amount of time or otherwise avoids capture, he becomes entitled to a ruling that his speedy trial right has been violated. Such a doctrine would contravene existing precedent and undermine the public interest by creating the incentive and means for defendants not only to delay justice, but to avoid it entirely by hiding within the United States or decamping to foreign jurisdictions to wait out the clock. The Sixth Amendment does not, however, supply such a loophole from justice for defendants, like Bokhari, who have done everything they can to avoid trial.

The Sixth Amendment provides that "the accused shall enjoy the right to a speedy trial." U.S. Const. Amend. VI. The Supreme Court has cautioned that this

right is not "so unqualified and absolute" that it must prevail over "the demands of public justice," but rather is "consistent with delays and depends upon circumstances . . . [and] does not preclude the rights of public justice." *Beavers v. Haubert*, 198 U.S. 77, 86-87 (1905).

Courts must undertake an "ad hoc" balancing test that looks to four factors: "length of delay, reason for the delay, timeliness of defendant's assertion of his right, and resultant prejudice to the defendant." *Terry v. Duckworth,* 715 F.2d 1217, 1219 (7th Cir. 1983), citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972). "No one factor is dispositive of a finding of [a] violation," and the factors "must be considered together with [the] circumstances of each case." *Id.*; *see also United States v. Otero*, 848 F.2d 835, 840 (7th Cir. 1988). Given the lengthy delay here, cf. *United States v. Oriedo*, 498 F.3d 593, 597 (7th Cir. 2007), Bokhari's claim hinges on an analysis of the remaining three factors – all of which weigh against him.

**a. Bokhari is responsible for the delay**

The critical "second factor – who is more to blame for the delay – often dictates the outcome of cases," *United States v. Fernandes*, 618 F. Supp. 2d 62, 67 (D.D.C. 2009), and is thus "the flag all litigants seek to capture," *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). Here it belongs to the government because, as the magistrate judge found, the government has "diligently pursu[ed] all reasonable efforts to secure the defendant's presence in this district" and therefore "is not to blame for the delay." SA-17. Bokhari's departure from the United States, opposition to extradition, and refusal to return, whether or not lawful, has produced the delay, which is thus attributable to him. *Id; see also, United States v. Steinberg*, 478 F.

Supp. 29, 32 (N.D. Ill. 1979) (rejecting speedy trial claim by defendant who left United States before indictment and voluntarily returned seven years later because it "is settled American law that if after the commission of a crime within a state the person who allegedly committed it leaves the state, no matter for what purpose, with what motive, or under what belief, he becomes, from the time of such leaving, within the constitution and laws of the United States, a fugitive from justice").

While the government has a "constitutional duty to make a diligent good faith effort" to bring defendant to trial, *Smith v. Hooey*, 393 U.S. 374, 383 (1969), the Supreme Court has cautioned that "if delay is attributable to the defendant, then his waiver [of a speedy trial] may be given effect under standard waiver doctrine," *Barker*, 407 U.S. at 529. Furthermore, even if the government simply has "a reasonable explanation for a delay, its negative implications will be vitiated." *Garcia Montalvo v. United States*, 862 F.2d 425 (2d Cir. 1988). As this Court has noted, "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Duckworth*, 715 F.2d at 1220, quoting *Barker*, 407 U.S. at 531. Here, where "the government had not just a missing witness but a missing defendant," this factor cuts against Bokhari. *Otero*, 848 F.2d at 840, 839.

The government satisfied its obligation of due diligence by requesting Bokhari's extradition, requesting updates on the status of that request from the Pakistani government, and causing a red notice to issue. This is enough, and no case cited by Bokhari is to the contrary. Rather, those cases address situations where: (1) the defendant had no knowledge that charges were pending against him; (2) the government took few, if any, steps to locate the defendant; (3) the

government refused attempts by the defendant to stand trial; or (4) some combination of the above.[4]

With the extradition request alone, the government met its obligations. Indeed, "the hallmark of government diligence is extradition." *Fernandes*, 618 F. Supp. 2d at 69. Thus, when the defendant "is located abroad for much of the delay . . . courts routinely hold that the government has satisfied its diligence obligation" when "prosecutors formally seek extradition." *Id.*

Bokhari claims that "responsibility for delay resulting from the extradition process 'must rest with the government,'" because the extradition proceeding was "a neutral process in which either the prosecution or defense may prevail." Br. 26. But the cases cited by Bokhari refer to delay in U.S. courts as a neutral reason that may be attributed to the U.S. government; he has not offered any support for attributing to the U.S. government the delay resulting from the political and judicial processes of a foreign government. Here, once the government requested extradition, the request was prosecuted by Pakistan. Moreover, Bokhari's "affirmative resistance of the government's efforts to secure his presence in the United States constitutes an

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[4] *See, e.g.*, *Doggett v. United States*, 505 U.S. 647, 649-50 (1992) (defendant had no knowledge of indictment and government did not follow up on attempts to locate defendant, who lived openly in the United States for six years); *United States v. Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008) (government made no effort to inform defendant of indictment); *United States v. Macino*, 486 F.2d 750, 752-53 (7th Cir. 1973) (government did not explain two-and-a-half year delay between arrest and return of indictment); *Dickey v. Florida*, 398 U.S. 30, 32-35 (1970) (state made no effort to bring defendant to trial for eight years, though defendant had repeatedly tried to obtain trial or dismissal); *United States v. Heshelman*, 521 F. App'x 501, 507 (6th Cir. 2013) (government intentionally did not inform defendant of pending indictment and did not seek extradition).

intentional relinquishment of his right to a constitutional speedy trial." *United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir. 1995). Bokhari cannot "forc[e] the government to run the gauntlet of obtaining formal extradition and then complain about the delay he has caused by refusing to return voluntarily to the United States." *Id.*; *see also United States v. Estremera*, 531 F.2d 1103, 1108 (2d Cir. 1976); *United States v. Reumayr*, 530 F. Supp. 2d 1200, 1206 (D.N.M. 2007) ("[C]ourts have uniformly held the defendant, rather than the government, liable for delay caused by extradition proceedings or by other attempts to remain outside the United States."). Bokhari fails to cite a single case, nor is the government aware of one, that holds that a defendant who resisted extradition proceedings is entitled to dismissal on speedy trial grounds.

Bokhari attempts to place blame on the government by repeating the prosecutor's statement in the district court that "[a]t this point, there is nothing further the government can reasonably do to secure the Defendant's presence in the United States." Br. 8, 13, 29. Though apparently crediting the statement, Bokhari misunderstands its significance. The prosecutor explained that the government has, and will do, what it reasonably can, including making an extradition request, periodically requesting status updates from Pakistan, and issuing and renewing a red notice. "[N]othing further" than this, however, is reasonable under the circumstances. *Cf.* MJ Rec. SA16-17 ("While the United States may have been able to renew its extradition request, perhaps ad infinitum . . . the court has little reason to believe that such repeated efforts would have done anything other than harass the defendant and strain the United States' relationship with Pakistan.").

Bokhari claims that the government must, but has not, demonstrated the futility of further efforts to extract him from Pakistan. Br. 29. A futility inquiry, however, is relevant only where the government has not made a good-faith request for extradition. *See e.g.*, *United States v. Walton*, 814 F.2d 376, 379-80 (7th Cir. 1987); *United States v. Mitchell*, 957 F.2d 465, 469 (7th Cir. 1992) (the government "is not duty-bound to pursue futile legal gestures to return the defendant for trial"); *United States v. Corona-Verbera*, 509 F.3d 1105 (9th Cir. 2007); *United States v. Tchibassa*, 452 F.3d 918 (D.C. Cir. 2006); *United States v. Diacolios*, 837 F.2d 79, 83-84 (2d Cir. 1988); *United States v. Blanco*, 861 F.2d 773 (2d Cir. 1988). For example, in *United States v. McConahy*, the court found that the government did not exercise due diligence in bringing to trial a defendant who was incarcerated for three years in England, where: (1) he repeatedly requested extradition to the United States; (2) the British authorities said they would approve his extradition; and (3) the U.S. prosecutors did nothing. 505 F.2d 770, 773-74 (7th Cir. 1974); *see also United States v. Rowbotham*, 430 F. Supp. 1254 (D. Mass. 1977). But here the government has shown reasonable diligence with its extradition request and red notice.

Bokhari suggests the government could have acted "to renew and improve its extradition request" by simply "fill[ing] the holes in the evidence to the satisfaction of the Pakistani court." Br. 31. But the Pakistani magistrate did not identify "holes" in the extradition request; he demanded a trial's worth of documentary evidence, as well as written testimony from government witnesses and an explanation of the U.S. government's prosecution strategy. *See supra* p. 4. Furthermore, the

magistrate's directions were issued not to the U.S. government, but to a Pakistani barrister appointed by the Pakistani government. Pakistan relayed that the ruling would be appealed, and despite requests for status updates, has not communicated any additional information. *See supra* p. 5.

Moreover, additional efforts appear futile. Pakistan has not extradited anyone to the United States on a fraud-related charge since 1988, and has not extradited anyone for any reason since 2008. Stigall Decl. ¶ 4, USA-38-39; *see also Chaudhry*, 2010 U.S. Dist. LEXIS 111565 at *3-8 (Pakistani defendant, who moved to Pakistan pre-indictment and did not voluntarily return to face charges for ten years, did not suffer a speedy trial violation, even though the government declined to seek his extradition because Pakistan had not extradited anyone on fraud charges for 22 years); *cf. International Narcotics Control Strategy Report – Moldova through Singapore*, U.S. Dep't of State, Pakistan Section at B.1. (March 5, 2013), *available at* http://www.state.gov/j/inl/rls/nrcrpt/2013/vol1/204051.htm#Pakistan (noting extradition enforcement with Pakistan has "become problematic" and that "[n]o suspected narcotics traffickers have been directly extradited to the United States in recent years").

Lastly, the fact that Bokhari has a right to fight extradition does not absolve him of responsibility for the delay for the purpose of his speedy trial right. Br. 28. Bokhari chose the litigation strategy of resisting extradition – challenging the validity of the extradition treaty, the classification of his charges as extraditable offenses, and his inability to cross-examine witnesses who submitted affidavits. His subsequent "conten[tion] [that] he should not be forced to choose between his lawful

right to resist extradition and his right to a speedy trial" is baseless, however, as "the two rights are incompatible, and therefore a defendant can indeed be forced to choose between the two." *Reumayr*, 530 F. Supp. 2d at 1207; cf. *Catino*, 735 F.2d at 722-23 ("[T]he defendant faced a choice whether to exercise his right to oppose extradition, or gain the benefit of the statute of limitations by fulfilling his duty to do all in his power to return to the United States. In the case where a defendant chooses the former course, the price for that choice is loss of the benefit of the statute of limitations. Nor is there any merit to the argument that it is unconstitutional to require a defendant to make such a choice.").

**b. Bokhari has not truly asserted his speedy trial right**

The "quality of the defendant's assertion of the right [is] not just a factor in the analysis, but one entitled to significant weight and one without which the claim will be difficult to prove." *Oriedo*, 498 F.3d at 597. Bokhari has "made no attempt to demand a trial, to waive extradition, or to otherwise seek return to the United States for trial," and thus he "is in trouble here as well." *Mitchell*, 957 F.2d at 469. If a claim of violation "[c]oming from a former fugitive . . . carries almost no weight," a claim from a still-absent defendant, who has done everything he can to avoid trial, should be entirely disregarded. *Blanco*, 861 F.2d at 780; *see also Loud Hawk*, 474 U.S. at 314-15; *Doggett*, 505 U.S. at 653 (third factor weighs heavily against defendant who "knew of his indictment years before he was arrested"); *United States v. Taylor*, 196 F.3d 854, 862 (7th Cir. 1999) (simultaneous assertion of the right and requests for delay makes any demand for a speedy trial "entitled to little, if any weight").

In addition, Bokhari's waiting ten years to "assert" his right to be brought to trial further counsels against weighing this factor in his favor. *Barker*, 407 U.S. at 532 (three-year delay in asserting right weighed heavily against defendant because frequent, forceful objections receive greater weight than objections that are merely pro forma or opportunistic); *United States v. Parker*, 505 F.3d 323, 329-30 (5th Cir. 2007) ("If he waits too long, his pre-assertion silence will be weighed against him."). Bokhari's belated assertion of his demand for a speedy trial rings hollow, given his simultaneous assertion that he "will not voluntarily travel [ ] to the United States to stand trial." Br. 13.

**c. Bokhari has not shown actual prejudice**

"[C]ourts generally have been reluctant to find a speedy trial violation in the absence of genuine prejudice." *United States v. Jones*, 129 F.3d 718, 724 (2d Cir. 1997) (citation and internal quotation marks omitted). Bokhari has shown no actual prejudice to the kind of interests "the speedy trial right was designed to protect[:] (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired," with the latter being the most serious. *Barker*, 407 U.S. at 532. As the party responsible for the delay, Bokhari bears the burden of demonstrating prejudice, as merely "the possibility of prejudice is not sufficient to support [the] position that . . . speedy trial rights [have been] violated." *Loud Hawk*, 474 U.S. at 315.

Although Bokhari asserts that the delay has prejudiced his "ability to present a defense," Br. 32, he has not pointed to a single way in which his defense would actually be prejudiced. *United States v. McGrath*, 622 F.2d 36, 41 (2d Cir. 1980)

(general and unsubstantiated assertions of prejudice cannot tip this factor in defendant's favor). Bokhari has not argued that witnesses have become unavailable whose "testimony would have been helpful to him," *Otero*, 848 F.2d at 841, nor has he pointed to the loss of particular evidence that would have supported his defense.

In any event, even if delay is somehow attributable to the government, the government is easily able to rebut any presumption of prejudice. As in *United States v. Wanigasinghe*, 545 F.3d 595, 599 (7th Cir. 2008), most of "the evidence in the case [will] in all likelihood be documentary," and thus is not subject to time-related degradation (e.g., fraudulent applications submitted to the E-Rate program; bank records documenting the rapid opening and closing of various accounts; the electronic communications from Bokhari in Pakistan to his brothers in Wisconsin, as well as the electronic trail of the illegally obtained proceeds leading to Pakistan; the lack of services provided to the disadvantaged schools). Therefore, Bokhari's expressed concern that the ten-year delay he has incurred will impair his defense due to "dimming memories" and loss of evidence is unwarranted, Br. 32-33, and he and the court should be reassured that the vast majority of the evidence of the Bokharis' activities awaits Bokhari's trial.

Lastly, Bokhari claims prejudice based on the red notice. Br. 34. To the extent this claim is premised on the potential that the red notice may result in his standing trial, that harm is not cognizable because "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick v. United States*, 309 U.S.323, 325 (1940). To the extent Bokhari's claim of prejudice is just that the red notice "restricts [his]

freedom to travel and operates as a restraint on his liberty," Br. 34, Bokhari relies exclusively on *Hijazi's* discussion of the red notice. But that discussion had nothing to do with the Sixth Amendment. 589 F.3d at 407, 410, 413. And, unlike Hijazi, a Lebanese national in Kuwait, Bokhari is not threatened with arrest if he travels from his present residence to his native land because he is already in his native land, Pakistan. In any event, "Bokhari is not actually barred from traveling outside of Pakistan," but faces "merely a possibility that he will be arrested and subjected to extradition proceedings in the country of his arrest." MJ Rec. SA-18. Doubtless purposely absenting himself from the United States, his adopted country, "carries a price of its own: uncertainty hangs over the [defendant's] head"; but that circumscribed freedom "must be superior (in [Bokhari's] eyes)" than returning to face trial, "or [Bokhari] would turn himself in. So the gain from postponing (or avoiding) time in prison is not offset by the fact that [Bokhari] cannot lead a full life." *United States v. Elliott*, 467 F.3d 688, 692 (7th Cir. 2006).

**2. *Klopfer* provides no basis to dismiss because Bokhari has the power to ensure that the indictment is not left pending indefinitely**

Bokhari also argues that "[k]eeping a non-fugitive under indictment indefinitely is unconstitutional" because "'an indictment left pending indefinitely constitutes a Sixth Amendment violation.'" Br. 34-35, quoting *Hijazi*, 589 F.3d at 411. But this Court could hardly have intended with the quoted dictum, a parenthetical explanation of *Klopfer v. North Carolina*, 386 U.S. 213 (1967), to announce a new rule that the Sixth Amendment is violated whenever defendants delay their trials by avoiding capture and appear committed to, and capable of,

avoiding capture for some indefinite period, despite the government being "ready and willing to provide the defendant [a] prompt trial," SA-18. The Court's statement that it "express[ed] no view about the arguments . . . presented based on the Sixth Amendment's guarantee of a speedy trial," 589 F.3d at 410, belies any such interpretation.

Moreover, *Klopfer* makes clear it offered no such rule or any other rule that would benefit Bokhari. The Supreme Court considered whether a state prosecutor "may indefinitely postpone prosecution on an indictment without stated justification over the objection of an accused who has been discharged from custody." 386 U.S. at 214. *Klopfer* set forth "two major principles": (1) "the Speedy Trial provision of the Sixth Amendment applies to the states through the Fourteenth Amendment"; and (2) a criminal procedure that allows for "no means by which the accused could compel the state to try him" violates the Sixth Amendment. *United States v. Buonos*, 730 F.2d 468, 471 (7th Cir. 1984), citing *Klopfer*, 386 U.S. at 219. In contrast, Bokhari has foolproof means to obtain the trial he purportedly seeks: simply show up for it.

### 3. Rule 48 provides no basis for dismissal because Bokhari has not been arrested and there has been no unnecessary delay in bringing him to trial

Federal Rule of Criminal Procedure 48(b)(3) provides that a "court may dismiss an indictment . . . if unnecessary delay occurs in . . . bringing a defendant to trial." The rule "is limited to post-arrest situations." *United States v. Marion*, 404 U.S. 307, 319 (1971); *United States v. Deleon*, 710 F.2d 1218, 1223 (7th Cir. 1983). Thus, it "only applies to delays following arrest" and is "inapposite" to any

complaint that "concerns the delay which occurred before [a defendant's] arrest." *Blanco*, 861 F.2d at 780. Because Bokhari "was not arrested in this case [ ] his reliance on Rule 48(b) is misplaced"; it provides him no relief. *United States v. Rein*, 848 F.2d 777, 780, n.2 (7th Cir. 1988). Even if 48(b) were not so limited, while "not circumscribed by the Sixth Amendment," it is driven "by the same general considerations." *United States v. Ward*, 211 F.3d 356, 362 (7th Cir. 2000) (citations and internal quotations omitted). Because "there was no evidence of purposeful delay by the prosecution," *id.*, and – as the magistrate judge found – the "delay was very necessary" due to the "stalemate" Bokhari created, SA-19, Rule 48(b)(3) provides no basis for dismissing the indictment.

**4. International comity provides no basis to dismiss the indictment**

Bokhari argues principles of international comity require dismissal because deference is owed the Pakistani magistrate's ruling that the evidence did not establish a prima facie case, which is akin to a failure to establish probable cause at a preliminary hearing under Federal Rule of Criminal Procedure 5.1. Br. 36. To be sure, "[i]nternational comity (the mutual respect of sovereigns) requires the courts of one nation to avoid, where possible, interfering with the courts of another." *H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 848 (7th Cir. 2012). It is therefore "sensibl[e]" for a court to "generally give preclusive effect to the foreign court's finding as a matter of comity" when "the foreign judiciary is respected . . . and the rule on which the finding sought to be given preclusive effect is based doesn't offend a strong U.S. policy." *Kashamu*, 656 F.3d at 683. On the facts

of this case Bokhari's comity argument is nonetheless meritless for at least three independent reasons.

First, the federal grand jury that indicted Bokhari found probable cause, and that finding cannot be overruled by a federal judge or a foreign magistrate. The "grand jury gets to say – without any review, oversight or second-guessing – whether probable cause exists to think that a person committed a crime." *Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014). In fact, "the whole history of the grand jury institution demonstrates that a challenge to the reliability or competence of the evidence supporting a grand jury's finding of probable cause will not be heard." *Id.* (internal quotations and citations omitted). Accordingly, Rule 5.1(a) recognizes that a preliminary hearing is unnecessary if "the defendant is indicted." Thus, contrary to Bokhari's assertions, there can never be a "dismissal of an indictment under 5.1." Br. 36. Indeed, assuming Bokhari is correct that the Pakistani extradition proceeding and a federal probable cause hearing are equivalent, if any deference were owed under principles of international comity, it was owed by the Pakistani magistrate to the grand jury's earlier and conclusive probable cause finding.

Second, the Pakistani magistrate's ruling does not warrant deference because the proceeding was summary and the decision insufficiently final. *See Kashamu,* 656 F.3d at 685-86; *supra* pp. 4-5. For this reason, Bokhari does not argue that the Pakistani magistrate's decision is actually entitled to collateral estoppel effect. *See supra* pp. 13-14.

Third, assuming that some general principle of international comity requires deference to a non-final declination on an extradition request, "[o]nly findings that

are necessary to a court's decision . . . [would be] entitled to preclusive effect." *Kashamu*, 656 F.3d at 688. As the magistrate judge below recognized, nothing in the Pakistani magistrate's decision can be "stretch[ed]" to include "any finding necessary to that ruling" that would require dismissal of the indictment. SA-15. Rather, it merely found insufficient evidence to establish a prima facie case based "largely upon the idiosyncrasies of Pakistani evidentiary law." SA-14-15; *cf.* *Kashamu*, 656 F.3d at 687 (foreign magistrate found insufficient evidence that Kashamu was the accused, but did not find that Kashamu was in fact not the accused). Thus, as in *Kashamu*, even assuming deference were owed, the finding of insufficient evidence in an extradition proceeding "would not require an acquittal, and thus would not require dismissal of the indictment" because "the prosecution would be entitled to put in more and different evidence" at trial. 656 F.3d at 687-88. And even if there were a finding in the extradition proceeding that Bokhari was in fact innocent, "it would have no preclusive effect because it would have been unnecessary to the ruling" that there was insufficient evidence to establish a prima facie case. *Id.* at 688.

## CONCLUSION

This Court should dismiss the appeal for lack of jurisdiction and not consider it a petition for writ of mandamus. Otherwise, it should affirm the order or deny the petition based on the district court's declining to adjudicate the merits. If the Court concludes a merits adjudication is needed, it should permit the district court to conduct it in the first instance. Lastly, if the Court reaches the merits, it should affirm the order or deny the petition.

Respectfully submitted.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,634 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 12-point New Century Schoolbook font.

March 27, 2014 /s/ Shana M. Wallace

*Attorney*

## CERTIFICATE OF SERVICE

I, Shana M. Wallace, hereby certify that on March 27, 2014, I electronically filed the foregoing Brief for, or Answer to Petition for a Writ of Mandamus of, the United States of America with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. I also sent 15 copies to the Clerk of the Court by FedEx.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

March 27, 2014 /s/ Shana M. Wallace

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