

No. 26-13

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**In the Supreme Court of the United States**

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KHALID SHAIKH MOHAMMAD, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

Petitioners are among those accused of perpetrating the terrorist attacks of September 11, 2001, which killed 2976 people. In July 2024, a subordinate military official entered pretrial agreements with petitioners that would have spared them the death penalty. Two days later, the Secretary of Defense withdrew from the agreements. But a military judge refused to honor the Secretary's withdrawal. At the government's request, the United States Court of Appeals for the D.C. Circuit issued writs of mandamus and prohibition giving effect to the Secretary's withdrawal and barring hearings in which petitioners would take any action pursuant to the withdrawn agreements.

The questions presented are:

1. Whether the court of appeals had jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to issue writs of mandamus and prohibition.
2. Whether the court of appeals properly concluded that the government had a clear and indisputable right to relief.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-144a) is reported at 143 F.4th 411. The opinion of the Court of Military Commission Review (Pet. App. 162a-198a) is reported at 762 F. Supp. 3d 1183. The order of the Military Commissions Trial Judiciary (Pet. App. 199a-240a) is unreported.

### JURISDICTION

The court of appeals entered an order granting writs of mandamus and prohibition on July 11, 2025 (Pet. App. 145a-146a). Petitions for rehearing were denied on January 6, 2026 (Pet. App. 1a-2a). On April 1, 2026, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 5, 2026, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

On September 11, 2001, the United States suffered the deadliest terrorist attacks in our Nation's history. The attacks left 2976 people dead; injured numerous civilians, military personnel, and first responders; and destroyed tens of billions of dollars' worth of property. See Pet. App. 3a. Petitioner Khalid Shaikh Mohammad is the "alleged mastermind" of the September 11 attacks, and petitioner Mustafa Ahmed Adam al Hawsawi is his alleged co-conspirator. *Id.* at 53a.<sup>1</sup>

1. In the Military Commissions Act of 2009, 10 U.S.C. 948a *et seq.*, Congress authorized the establishment of "military commissions to try alien unprivileged enemy belligerents for violations of the law of war" and certain other offenses. 10 U.S.C. 948b(a). Military commissions are not standing bodies; they are instead convened to try a particular case. Congress vested the authority to convene a military commission in "the Secretary of Defense or \* \* \* any officer or official of the United States designated by the Secretary for that purpose" (the Convening Authority). 10 U.S.C. 948h. Congress also gave the Secretary broad authority to prescribe "[p]retrial, trial, and post-trial procedures" for military commissions. 10 U.S.C. 949a(a); see U.S. Dep't of Def., *Regulation for Trial by Military Commission* ¶ 1-3(a) (2011) ("The Secretary of Defense is responsible for the overall supervision and administration of military commissions within the [Department of Defense].").

Pursuant to that authority, the Secretary has published the Rules for Military Commissions (R.M.C.).

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<sup>1</sup> Petitioners' co-defendant, Walid bin 'Atash, has filed a separate petition for a writ of certiorari in No. 25-1335. The government is filing a separate response to that petition concurrently with this brief.

Those rules allow the Convening Authority to enter pre-trial agreements with defendants, which may include a promise by the defendant to plead guilty and a promise by the government not to pursue the death penalty. See R.M.C. 705(a), (b)(1), and (2)(B). The rules also allow the Convening Authority to “withdraw from a pretrial agreement” in various circumstances, including “at any time before the accused begins performance of promises contained in the agreement.” R.M.C. 705(d)(4)(B).

Decisions by military commissions are reviewed by the United States Court of Military Commission Review with interlocutory appeals permitted in limited circumstances. 10 U.S.C. 950d, 950f(a). Congress vested “exclusive” appellate jurisdiction over “a final judgment rendered by a military commission” in the United States Court of Appeals for the District of Columbia Circuit. 10 U.S.C. 950g(a).

2. For their roles in perpetrating the September 11 terrorist attacks, petitioners have been charged before a military commission with attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft, terrorism, and conspiracy. Pet. App. 6a; see 10 U.S.C. 950t(2), (3), (15), (16), (23), (24), and (29). Five of those charges carry the death penalty. Pet. App. 6a.

In August 2023, then-Secretary of Defense Lloyd J. Austin III designated retired Army Brigadier General Susan Escallier as the Convening Authority for petitioners’ military commission. Pet. App. 6a.<sup>2</sup> Escallier

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<sup>2</sup> The current Secretary also holds the title of “Secretary of War.” Exec. Order No. 14,347, § 2(a), 90 Fed. Reg. 43,893, 43,893 (Sept. 5, 2025). Because this case involves the actions of a former Secretary who lacked that title, this brief refers to the “Secretary of Defense.”

authorized negotiations with petitioners and their co-defendants regarding pretrial agreements. *Ibid.*

On July 29 and 30, 2024, petitioners each submitted a signed “Offer for Pretrial Agreement” to Escallier. Pet. App. 6a (citation omitted). Petitioners offered to plead guilty to all charges in exchange for the government’s agreement not to pursue the death penalty. *Id.* at 7a. They attached signed stipulations of fact confessing to their involvement in the September 11 attacks. See *ibid.* They agreed to withdraw all pending motions. *Id.* at 27a-28a. And, upon acceptance of their guilty pleas, they agreed to waive all waivable motions. *Ibid.*

On July 31, 2024, Escallier accepted petitioners’ offers and signed their agreements (and one for their co-defendant bin ‘Atash). Pet. App. 7a. Over the next two days, August 1 and 2, 2024, petitioners’ counsel refrained from questioning a witness at the suppression hearing of a fourth co-defendant who had not entered a pretrial agreement. *Id.* at 7a-8a. The judge explained that, if petitioners’ guilty pleas were not accepted, petitioners could question the witness later. *Id.* at 8a.

On August 2, 2024, Secretary Austin announced that he was reclaiming his role as the Convening Authority over pretrial agreements and withdrawing from the agreements Escallier had entered two days before. Pet. App. 211a-212a. Secretary Austin explained that a decision of such “significance” should rest with him as the superior authority. *Id.* at 212a.

3. Petitioners nevertheless sought to enforce their pretrial agreements and enter guilty pleas, arguing that Secretary Austin’s withdrawal was invalid. Pet. App. 200a-202a. In November 2024, the military judge presiding over the commission agreed with petitioners and planned a hearing to accept their pleas. *Id.* at 240a. The

judge held that the Secretary could not withdraw Escallier's authority over pretrial agreements only, as he had purported to do. *Id.* at 230a. In the alternative, the judge concluded that petitioners had begun performing promises in their pretrial agreements such that the Secretary could no longer withdraw under R.M.C. 705(d)(4)(B). Pet. App. 235a. As acts of performance, the judge pointed to, *inter alia*, petitioners' signed stipulations of fact and their failure to question the witness at the August 1 and 2 hearing. *Id.* at 235a-236a.

4. The government sought a writ of mandamus and prohibition from the Court of Military Commission Review to effectuate the Secretary's withdrawal and prevent the military judge from accepting petitioners' guilty pleas. Pet. App. 163a-164a.

The Court of Military Commission Review denied the writ. Pet. App. 162a-198a. The court agreed with the government that the Secretary could replace Escallier, explaining that the Secretary's "vast authority" over military commissions "includes the authority to act as convening authority to approve or disapprove [pretrial agreements]." *Id.* at 184a. But the court held that the Secretary could not withdraw from the agreements because, in the two days it took him to do so, petitioners had begun performance. *Id.* at 189a-194a. The court relied solely on petitioners' failure to question the witness at the August 1 and 2 suppression hearing, which the court appears to have viewed as performance of petitioners' promise to withdraw all pending motions. *Id.* at 192a-194a.

5. On the government's petition, the court of appeals issued writs of mandamus and prohibition. Pet. App. 145a-146a. The court "vacated" "the military judge's order \* \* \* preventing the Secretary of Defense's with-

drawal from the pretrial agreements.” *Ibid.* And it “prohibited” the judge “from conducting hearings in which [petitioners and their co-defendant] would enter guilty pleas or take any other action pursuant to the withdrawn pretrial agreements.” *Id.* at 146a.

The court of appeals explained its reasoning in a joint opinion by Judges Millett and Rao. Pet. App. 3a-58a. The court first assured itself of its own jurisdiction. *Id.* at 12a-13a. Given the D.C. Circuit’s “exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission,” 10 U.S.C. 950g(a), the court concluded that it had jurisdiction under the All Writs Act to issue the writs in aid of that jurisdiction. Pet. App. 12a-13a.

On the merits, the court of appeals acknowledged that extraordinary writs “will be granted only in exceptional circumstances.” Pet. App. 13a. The party seeking the writ must demonstrate (1) a “clear and indisputable” right to relief; (2) the absence of another “adequate means to obtain the relief”; and (3) that “the writ is appropriate under the circumstances” in the court’s “discretion.” *Id.* at 14a. (citation omitted). The court concluded that this is the “rare case in which that exacting standard has been met.” *Ibid.*

First, the court of appeals held that the government had a clear and indisputable right to relief. Pet. App. 14a-46a. The court agreed with the Court of Military Commission Review that Secretary Austin had the authority to withdraw Escallier’s authority over pretrial agreements and that “[t]he military judge clearly erred in holding otherwise.” *Id.* at 16a. The court held that the “military judge also clearly erred in his determination that [petitioners] had begun performance of promises contained in the pretrial agreements, including by

not questioning a witness.” *Id.* at 14a. A promise “not to question witnesses appears nowhere in the agreements’ text.” *Id.* at 27a. Instead, petitioners pledged only to withdraw all pending motions. *Id.* at 29a. Yet they made “no formal or even informal request” to start the withdrawal process and left their pending motions “preserved for future action.” *Id.* at 29a-30a.

Next, the court of appeals concluded that the government lacked an “alternative ‘adequate means’ of enforcing its right to withdraw from these plea agreements.” Pet. App. 47a; see *id.* at 46a-52a. The court held that the Military Commissions Act did not permit an interlocutory appeal under these circumstances. *Id.* at 47a-48a. And the court deemed any relief after final judgment inadequate because, assuming the Act would permit a government appeal, petitioners would likely argue that the prejudice of their public confessions and sentencing should bar retrial. *Id.* at 50a; see *id.* at 50a-52a.

Finally, the court of appeals found mandamus relief appropriate under the circumstances, emphasizing that the prosecutions of petitioners “implicate a national interest of the highest degree.” Pet. App. 53a. The court recognized that whether petitioners should face the death penalty is a “grave” question “that requires political accountability.” *Id.* at 54a. Yet the military judge’s “clear and indisputable errors” deprived the politically accountable Secretary of Defense of his lawful authority to make that decision. *Id.* at 57a.

Judge Wilkins concurred in part and dissented in part. Pet. App. 59a-144a. He agreed that the Secretary could withdraw Escallier’s authority over pretrial agreements and that the government lacked an adequate alternative means of relief. *Id.* at 60a-61a. But in his view, petitioners had begun performance of the

promises in their pretrial agreements, so the government had not clearly and indisputably shown that it was entitled to the writs. *Id.* at 85a-144a.

The court of appeals denied petitions for rehearing en banc, with only Judge Wilkins noting that he would have granted the petitions. Pet. App. 1a-2a & n.\*\*.

#### ARGUMENT

Petitioners contend (Pet. 16-29) that the court of appeals lacked jurisdiction to issue writs of mandamus and prohibition preventing the military judge from accepting their guilty pleas and enforcing the pretrial agreements from which the Secretary had withdrawn. Petitioners further contend (Pet. 30-38) that the court misapplied the standard for issuing such writs to the facts of this case. Those contentions lack merit and do not warrant this Court's review. The court of appeals correctly exercised jurisdiction to reject the military judge's extraordinary disregard for the Secretary's authority over these military-commission prosecutions of paramount national significance. The jurisdictional question that is the focus of the petition was not meaningfully raised below, and neither question implicates any conflict in the circuits over the general availability of mandamus relief. This Court should deny the petition.

1. Petitioners first ask (Pet. 16-29) this Court to review whether the court of appeals had jurisdiction to issue the extraordinary writs. No further review on that question is warranted.

a. The court of appeals correctly concluded it had jurisdiction under the All Writs Act, which authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a).

The power of a court of appeals to issue an extraordinary writ “is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal.” *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25 (1943). Instead, the power “extends to those cases which are within [a court’s] appellate jurisdiction although no appeal has been perfected,” lest the “unauthorized action” of a lower court “thwart[]” that jurisdiction. *Ibid.* Where a court of appeals “could at some stage \* \* \* entertain appeals” from a proceeding, “it has power in proper circumstances \* \* \* to issue writs of mandamus reaching” that proceeding. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957). That is so even without a showing that “review of the case on appeal after final judgment would be frustrated.” *Id.* at 254. While such writs should not be commonplace, the courts of appeals’ “naked power” to issue such a writ “has long been settled by this Court.” *Id.* at 255.

Under a straightforward application of those well-settled principles, the court of appeals properly held that it had jurisdiction. Pet. App. 12a-13a. As the court explained, the Military Commissions Act vests the D.C. Circuit “with ‘exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission.’” *Id.* at 13a (quoting 10 U.S.C. 950g(a)). The D.C. Circuit therefore has appellate jurisdiction over military-commission proceedings. And that court may “issue a writ of mandamus *now* to protect the exercise of [its] appellate jurisdiction *later*.” *In re al-Nashiri*, 791 F.3d 71, 76 (D.C. Cir. 2015).

Here, the military judge’s decision risks just the kind of jurisdiction-thwarting that mandamus is designed to avoid. While the D.C. Circuit undisputedly has jurisdiction over a final judgment of the military commission, if

the judge accepts petitioners' guilty pleas, it is uncertain whether *the government* would be able to appeal that judgment.<sup>3</sup> Even assuming the government could appeal, petitioners would presumably argue that their sentencing hearings produced "irredeemable prejudice" that should bar any retrial. Pet. App. 51a. Absent mandamus, the military judge's decision may therefore preclude any future D.C. Circuit decision about whether the Secretary lawfully withdrew from these pretrial agreements, consistent with his politically accountable "best judgment." *Id.* at 54a.

b. Petitioners' primary contention before this Court is that, under *Will v. United States*, 389 U.S. 90 (1967), the court of appeals lacked jurisdiction to entertain the government's petition for writs of mandamus and prohibition. See Pet. 16-29. Petitioners appear to read *Will* to establish a bright-line rule that extraordinary writs are unavailable to the government in criminal cases unless a trial-court order has the practical effect of dismissal. See Pet. i, 3, 17; but see Pet. 27 (describing an order that has the effect of dismissal as the "paradigmatic case" for mandamus without identifying other potential cases).

As an initial matter, petitioners raised that argument in only a cursory fashion before the panel, which is itself a sufficient basis to deny review. Petitioners' opposition to the government's petition below never cited *Will*. It merely stated (at 8) that jurisdiction is

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<sup>3</sup> Petitioners repeatedly suggest (Pet. 3, 17, 18) that the court of appeals concluded that the government may not appeal from a military-commission final judgment under 10 U.S.C. 950g. That is incorrect. The court expressly "d[id] not \* \* \* decide whether Section 950g would permit the government to appeal a military commission's final judgment directly to this court." Pet. App. 50a.

“doubtful,” cross-referencing petitioners’ stay briefing. Incorporation-by-reference is generally not a proper means of preserving arguments in the D.C. Circuit. See *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (2019). Regardless, the stay briefing failed to develop petitioners’ current argument that the D.C. Circuit lacked jurisdiction and equivocally described that court’s jurisdiction over a government appeal from a military-commission final judgment as “an open question.” Pet. C.A. Stay Opp. 22.

Perhaps for that reason, the panel opinion devotes two paragraphs (Pet. App. 12a-13a) to the question that is now the centerpiece of the petition. While the question is jurisdictional and not subject to forfeiture, this is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see *Financial Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 345-346 (2023). Consistent with its usual practice, this Court should decline review “without the benefit of thorough lower court opinions to guide [its] analysis.” *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

In any event, petitioners’ position is incorrect. *Will* did not impose a bright-line rule that the government may never obtain mandamus in a criminal case unless a trial court effectively orders dismissal. *Will* observed that this Court’s previous cases had “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.” 389 U.S. at 98. But the Court did “not decide under what circumstances, if any, such a use of mandamus would be appropriate.” *Ibid.* It then acknowledged that a “possible future appeal in th[e] case” might support jurisdiction. *Id.* at 95 n.4. The Court deemed it “unnecessary” to answer that question because the

court of appeals' decision to issue mandamus was "an abuse of discretion \* \* \* in the circumstances of this case." *Ibid.* By its terms, *Will* does not resolve whether mandamus might be appropriate from a district-court order in a criminal case that does not have the effect of dismissal.

Since *Will*, however, this Court has held that courts of appeals have jurisdiction to issue mandamus in those circumstances. In *United States v. United States District Court*, 407 U.S. 297 (1972), this Court affirmed a court-of-appeals decision declining to issue a writ of mandamus from an order requiring the government to disclose surveilled conversations. *Id.* at 324. In doing so, the Court held that the court of appeals was "correct[]" to conclude that it had jurisdiction under the All Writs Act. *Id.* at 301 n.3. Although the government had argued below that the disclosure order would lead it to dismiss charges against one defendant, the court of appeals did not treat that as a prerequisite for jurisdiction, and this Court's affirmance did not either. See *United States v. United States Dist. Court*, 444 F.2d 651, 655 (6th Cir. 1971).

For their part, courts of appeals have often granted the government's request for writs over many types of unappealable orders in criminal cases, without regard to whether those orders had the effect of dismissal. For example, the government has obtained mandamus where a district court refused to quash subpoenas directing the Attorney General and the Deputy Attorney General to testify about the decision to pursue the death penalty in a particular case. *In re United States*, 197 F.3d 310, 311, 316 (8th Cir. 1999). The government has obtained mandamus where a district court appointed a private prosecutor to pursue a charge that the govern-

ment had decided to drop. *In re United States*, 345 F.3d 450, 452-454 (7th Cir. 2003). And the government has obtained mandamus to order the recusal of a district judge whose impartiality was subject to serious question. *In re United States*, 441 F.3d 44, 68 (1st Cir.), cert. denied, 549 U.S. 888 (2006). Similar cases abound.<sup>4</sup> Petitioners’ categorical rule would upend that settled practice.

c. Petitioners are incorrect to assert that the First, Second, Ninth, and Tenth Circuits hold otherwise and treat the lack of interlocutory appeal as “withdraw[ing] the availability of mandamus” in criminal cases. Pet. 18 (capitalization omitted); see Pet. 20-23.

To the contrary, all four circuits have granted mandamus to the government in criminal cases where an interlocutory appeal was unavailable. See p. 13 & n.4, *supra*. Accordingly, some of petitioners’ cited cases (Pet. 21-22) expressly *affirm* the courts of appeals’ jurisdiction to issue extraordinary writs in those circumstances

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<sup>4</sup> See, e.g., *In re United States*, 945 F.3d 616, 632 (2d Cir. 2019) (granting government’s petition for a writ of mandamus directing the district court to deny defense counsel’s request for leave to argue jury nullification), cert. denied, 141 S. Ct. 658 (2020); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009) (granting government’s petition for a writ of mandamus to forbid district court from giving improper jury instruction); *United States v. Fei Ye*, 436 F.3d 1117, 1124 (9th Cir. 2006) (granting government’s petition for a writ of mandamus directing district court to rescind its order permitting pre-trial deposition of the government’s expert witnesses); *In re United States*, 273 F.3d 380, 390 (3d Cir. 2001) (granting government’s petition for a writ of mandamus requiring the district court to reconsider motion to transfer a criminal action); see also 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3936.2 & nn.6-28 (Apr. 2026 update) (collecting dozens of cases in which mandamus has been deemed available “[o]n petition by the government before trial” in criminal cases).

but conclude only that the exercise of that authority was unwarranted under case-specific circumstances. For example, in *United States v. Kane*, 646 F.2d 4 (1981), the First Circuit deemed it “clear that [the court had] jurisdiction to entertain the government’s petition” for mandamus from a pretrial disclosure order because “an appeal could lie at some later stage of the proceedings.” *Id.* at 9. The court simply found any error insufficiently grave to warrant mandamus. *Id.* at 10. Similarly, in *United States v. Dior*, 671 F.2d 351 (1982), the Ninth Circuit expressly stated that it “ha[d] the authority to issue a writ of mandamus under” the All Writs Act when a district court ordered a new criminal trial. *Id.* at 357. The court just “decline[d] to issue the writ” in the circumstances of that case. *Ibid.*

The Second and Tenth Circuit cases petitioners invoke (Pet. 20-23) also do not support any per se limitation on government mandamus petitions in criminal cases. As petitioners acknowledge (Pet. 23), the cited Second Circuit cases “assumed jurisdiction and denied [mandamus] on other grounds.” And in *United States v. McVeigh*, 106 F.3d 325 (1997) (per curiam), the Tenth Circuit declined to use mandamus to review a sequestration order in the trial of the Oklahoma City Bomber. *Id.* at 333. But the court did “not categorically rule out the possibility of mandamus relief for the government” from a sequestration order. *Id.* at 328. It was simply “unpersuaded” that mandamus was “appropriate” under the circumstances. *Id.* at 333 (citation omitted).

Those decisions are in full accord with the decision below. Mandamus is a “drastic and extraordinary” remedy that cannot be used to circumvent the ordinary limits on interlocutory appeal for mine-run legal errors. Pet. App. 14a (citation omitted). But when a trial court

steps so outside the ordinary bounds as to meet the demanding standard for mandamus, the All Writs Act allows a court of appeals to correct that deviation.

In any event, this case would be a manifestly unsuitable vehicle to resolve any circuit conflict over the availability of mandamus in criminal cases. As petitioners acknowledge (Pet. 19), military-commission cases are covered by a unique statutory regime that differs from the one governing appeals in civilian criminal cases. Were this Court inclined to address the first question presented, it should await a more typical fact pattern in the civilian criminal-justice system.

2. Petitioners also seek (Pet. 30-38) this Court's review of whether the court of appeals properly concluded that the government had a clear and indisputable right to relief. That contention too does not warrant review.

a. The court of appeals correctly concluded that "[t]he government ha[d] demonstrated a clear and indisputable right to relief" from the military judge's "straightforward error given the plain text of the pre-trial agreements and the undisputed facts in this case." Pet. App. 15a, 26a. The court recognized that mandamus and prohibition are "extraordinary forms of relief," available in only "rare case[s]," under an "exacting standard." *Id.* at 13a-14a. But as the court explained at length, the seriousness and obviousness of the military judge's errors met that high bar. See *id.* at 15a-46a.

Petitioners do not meaningfully engage with the court of appeals' analysis. They instead claim, somewhat tautologically, that the government cannot *indisputably* be right because the issues are "contested" and there is a "substantial argument" on their side. Pet. 36, 38 (citation omitted). In places, petitioners appear to argue (Pet. 36-37) that mandamus should *never* be

available when an appellate court disagrees with other courts' conclusions. But in every case in which a court of appeals issues a writ of mandamus to a lower court, the lower court will have necessarily reached a contrary conclusion and the party opposing mandamus will presumably contend that the decision below was correct. Were that enough to defeat mandamus, mandamus would never be available.

At bottom, petitioners merely quarrel with the court of appeals' application of the clear-and-indisputable standard to the facts of this case. Petitioners, however, do not develop any sustained challenge to the court's analysis. Indeed, they affirmatively disclaim (Pet. 40) any need for this Court to address "the underlying questions below." It is hard to see how that would be the case when petitioners do not identify any error in the court's unexceptionable recitation of the settled mandamus standard. See Pet. App. 13a-14a. Regardless, the case-specific application of that settled standard does not warrant review.

b. Petitioners are also incorrect (Pet. 30) that there is "widespread confusion" over the mandamus standard—much less confusion relevant to the outcome of this case.

Petitioners assert (Pet. 31) that the Fourth and Fifth Circuits require parties seeking mandamus to "marshal either on-point, binding authority or unambiguous statutory text to establish a 'clear and indisputable' entitlement to relief." As an initial matter, the court of appeals below held that the military judge's decision flouted "the plain and unambiguous text of the pretrial agreements," Pet. App. 5a, so unless petitioners would somehow limit mandamus to statutory errors, any requirement for unambiguous text is met. Regardless, the

cited decisions (one of which has been vacated) do not support any such rigid rule.

In *In re Trump*, 958 F.3d 274 (2020) (en banc), vacated, 141 S. Ct. 1262 (2021), the Fourth Circuit declined to issue a writ of mandamus to compel a district court to certify a decision denying a motion to dismiss for interlocutory appeal. *Id.* at 282-285. In the court’s view, the district court’s “detailed written opinion that applied the correct legal standards” did not meet the high bar for mandamus. *Id.* at 285. But the court recognized that an “arbitrary” or “bad faith” decision might warrant mandamus. *Ibid.* It did not demand a specific on-point case or unambiguous text.

Likewise, the Fifth Circuit has recognized that various “types of errors”—including “erroneous conclusions of law”—can justify mandamus when they “produce a patently erroneous result.” *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (2008) (en banc), cert. denied, 555 U.S. 1172 (2009). That court found that standard met when a district court misapplied the factors relevant to a motion to transfer venue. See *id.* at 315-318. Again, the court did not adopt a categorical rule requiring an on-point precedent or unambiguous text.

Any such categorical rule would make little sense. Mandamus is “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes.’” *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004) (citation omitted). By its nature, those errors may be novel. The D.C. Circuit has therefore “never required the existence of a prior opinion addressing the precise factual circumstances or statutory provision at issue in order to find clear error justifying mandamus relief.” *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 749-750 (2016). Other circuits too do not require “binding

authority directly on point.” *In re United States*, 945 F.3d at 625; see *In re Office of the Utah Att’y Gen.*, 56 F.4th 1254, 1263 n.6 (10th Cir. 2022) (per curiam). Mandamus can be an important tool for “issues of first impression” so that appellate courts can “settle new and important problems.” *Schalgenhauf v. Holder*, 379 U.S. 104, 111 (1964). While that does not mean that mandamus should be commonplace or easily obtained, petitioners offer no authority suggesting that parties seeking mandamus *always* need an on-point case or unambiguous text.

Beyond the Fourth and Fifth Circuits, petitioners catalog (Pet. 33-36) courts-of-appeals decisions using various verbal formulations to describe the kind of errors that can justify mandamus relief. But petitioners do not identify any meaningful variation in the outcomes of those cases. Whether an error is described as “clear[],” “patent[],” “palpable,” “plain[],” or “gross,” *ibid.* (citations omitted), mandamus is available only when a party has a “clear and indisputable” right to relief, *Cheney*, 542 U.S. at 381 (citation omitted). The court of appeals faithfully applied that “exacting standard.” Pet. App. 14a. While petitioners may disagree with that conclusion, they have not identified any conflict over the proper legal standard that might warrant this Court’s review.

3. This case does not otherwise warrant further review. Petitioners urge this Court to intervene based on the “immense national importance” of this case. Pet. 40 (citation omitted). The prosecution of petitioners for the deadliest terrorist attacks on American soil is undoubtedly a matter of national significance. But the court of appeals’ issuance of writs of mandamus and prohibition properly cleared the way for those prosecu-

tions to continue. Far from warranting this Court’s intervention, the decision below ensured that the “grave” “judgment about whether [petitioners] should face the death penalty” lies in politically accountable hands. Pet. App. 54a.

The government recognizes that these prosecutions have been lengthy and that the families of petitioners’ victims are divided about whether the continued pursuit of the death penalty is appropriate. See Pet. 39-40. But precisely because “this case implicates the interests of the entire nation,” that decision should be made by an official who answers to the American people. Pet. App. 54a. The court of appeals properly corrected the military judge’s egregious legal errors in this undoubtably important case. There is accordingly no need for this Court’s intervention at this juncture.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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