No. 16-8966

IN THE

Supreme Court of the United States

ABD AL-RAHIM AL-NASHIRI,

Petitioner,

v.

DONALD J. TRUMP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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May 31, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICUS AMERICAN BAR ASSOCIATION[1]

The American Bar Association ("ABA")[2] respectfully submits this amicus brief pursuant to Court's Rule 37.2, urging this Court to review and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit. Federal abstention in this case undermines the rule of law, and in the name of deference to a military tribunal countenances exceptional pretrial delay preceding even a threshold determination of jurisdiction. A grant of certiorari is warranted here (i) to reaffirm that *Councilman* abstention is inappropriate when a petitioner raises substantial arguments about a military commission's jurisdiction to prosecute him; and (ii) to clarify that exceptional delay satisfies the "extraordinary circumstances" exception permitting habeas review.

The ABA is a voluntary, national membership organization for the legal profession. With over 400,000 members, from each state and territory and the District of Columbia, its membership includes prosecutors, public defenders, private attorneys, legislators,

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[1] Counsel for petitioner and for respondent have each consented to the filing of this brief. Amicus certifies that this brief was authored in whole by counsel for Amicus and no part of the brief was authored by any attorney for a party. No party, nor any other person or entity, made any monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief; nor was it circulated to any member of the Judicial Division Council before filing.

law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer associates in allied fields.

Central to the ABA's mission is advancing the rule of law by "increas[ing] public understanding;" working "for just laws, including human rights, and a fair legal process;" assuring "meaningful access to justice for all persons;" and preserving "the independence of the legal profession and the judiciary."[3]

Preserving the writ of habeas corpus, a cornerstone of the rule of law, has long been of special interest to the ABA. Through its Rule of Law Initiative, the ABA has contributed to fostering principles of habeas corpus around the world. Thanks in part to these efforts, those principles have gained widespread public acceptance—a vital predicate to the rule of law. The ABA has steadfastly promoted its position that absent a meaningful legal mechanism to prevent arbitrary executive detention and punishment, the rule of law cannot long endure.

Following the tragedy and horror of September 11, 2001, the ABA's focus on the United States' adherence to rule-of-law principles gained renewed urgency. In policies adopted by the ABA House of Delegates since 9/11, the ABA has urged the government to avoid indefinite detention of detainees and to guarantee meaningful judicial review, which encompasses the right of detainees to petition for a writ of habeas corpus and the opportunity to challenge their designation as

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[3] ABA MISSION AND GOALS, https://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited May 26, 2017).

enemy combatants. *See* ABA Policies 02M8C, 03M109, and 09M10A.[4]

In addition, the ABA has resolutely opposed the government's attempts to deprive courts of jurisdiction over Guantanamo detainees. *See, e.g.*, Letter from Karen J. Mathis, President, American Bar Association, to United States Senators (Sept. 27, 2006) (opposing the provision in the Military Commissions Act of 2006 that purported to strip courts of jurisdiction to consider certain alien detainees' habeas corpus claims);[5] Letter from Michael S. Greco, President, American Bar Association, to United States Senators (Nov. 14, 2005) (urging the Senate to reject similar jurisdiction-stripping provisions in the Detainee Treatment Act).[6]

Likewise, the ABA has advocated for these principles in cases with far-reaching consequences for the rule of law. The ABA filed briefs amicus curiae in support of detainees before this Court in *Boumediene v. Bush*, 533 U.S. 723 (2008),[7] and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004),[8] and before the United States

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[4] *Available at* https://www.americanbar.org/content/dam/aba/uncategorized/GAO/LEGISSAugust2016.authcheckdam.pdf (last visited May 26, 2017).

[5] *Available at* https://www.americanbar.org/content/dam/aba/migrated/poladv/letters/antiterror/060927letter_senmilcom.authcheckdam.pdf (last visited May 26, 2017).

[6] *Available at* https://www.americanbar.org/content/dam/aba/migrated/poladv/letters/antiterror/051114letter_detainees.authcheckdam.pdf (last visited May 26, 2017).

[7] *Available at* https://www.americanbar.org/content/dam/aba/administrative/amicus/Boumediene_Document.authcheckdam.pdf (last visited May 26, 2017).

[8] *Available at* https://www.americanbar.org/content/dam/aba/migrated/irr/hamdibrieffeb04.authcheckdam.pdf (last visited May 26, 2017).

Court of Appeals for the Second Circuit in *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd* 542 U.S. 426 (2004).[9] Also, to understand and make informed recommendations about the military commission system, the ABA has dispatched legal observers to every hearing in Guantanamo Bay since at least 2013.

These principles are also reflected in the ABA's abiding commitment to ensure procedural safeguards in the criminal-justice context. Among its most well-known efforts, the ABA House of Delegates promulgated the latest edition of its Criminal Justice Standards on Speedy Trial and Timely Resolution of Criminal Cases[10] (hereinafter "Speedy Trial Standards"), Treatment of Prisoners[11] (hereinafter "Treatment of Prisoners Standards"), and Pretrial Release[12] (hereinafter "Pretrial Release Standards"), which contain a comprehensive set of guidelines intended to help promote fairness and balance in the criminal justice system. These Standards reflect the consensus of the legal community, and many courts, including this Court, have consistently relied on them. *See* Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 253 (1974) ("[T]he Justices of the Supreme Court and hundreds of other judges . . . consult the Standards and make use

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[9] *Available at* https://www.americanbar.org/content/dam/aba/migrated/irr/padillabriefjuly03.authcheckdam.pdf (last visited May 26, 2017).

[10] American Bar Association, ABA STANDARDS FOR CRIMINAL JUSTICE: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES, 3d ed., 2006.

[11] American Bar Association, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS, 3d ed., 2010.

[12] American Bar Association, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, 139, 3d ed., 2007.

of them whenever they are relevant."). Since the first Standards were published in 1967, federal circuit courts have cited them in well over 700 opinions, and state supreme courts have done so in more than 2,400 opinions.

SUMMARY OF ARGUMENT

Petitioner Al-Nashiri, arrested in 2002, has long argued that he is not properly classified as an enemy combatant and therefore is not subject to the jurisdiction of a military commission that is authorized solely to try belligerents. Today, some 15 years later, that threshold determination has yet to be made. That is because the military commission before which Al-Nashiri is set to be tried will not confirm its own competency to hear the case until trial, which by current estimates will be no less than seventeen years after Petitioner was first arrested. Accordingly, Al-Nashiri has petitioned federal courts seeking habeas review of his position. Despite the pronouncements of this Court in *Boumediene v. Bush* and *Hamdan v. Rumsfeld*—that Guantanamo detainees were entitled to present habeas petitions, particularly in light of the exceptional length of their detention—the District Court declined to hear the case, and the Court of Appeals affirmed.

As amicus curiae, the ABA respectfully submits that this Court's review is warranted in this important case for at least three reasons. First, abstention under these circumstances disregards controlling precedent and threatens to render unreviewable threshold jurisdictional challenges by all Guantanamo detainees, not just Al-Nashiri. Second, the Court of Appeals' decision rewrites abstention doctrine by narrowing the extraordinary circumstances exception that traditionally would permit habeas review. Finally, failing to put an

end to the protracted delay that the Court of Appeals' decision would countenance in this case is incompatible with constitutional guarantees vital to the American system of justice.

This issue is too important to evade the Court's review. By permitting Guantanamo detainees' petitions to be consolidated within the D.C. Circuit, this Court has afforded the government a single forum for those cases. But this also inhibits the emergence of a split in authority that customarily prompts the Supreme Court's review. Thus, until this Court grants certiorari to review and correct the Court of Appeals' decision, that court's departure from precedent will become binding law for every Guantanamo detainee. This is all the more troubling given that, in deviating from this Court's rulings, the D.C. Circuit has set down a rule that condones the decades-long pretrial detention of prisoners who seek to challenge the basis for their incarceration—all the while being held in the most extreme of conditions.

ARGUMENT

I. This Court Should Grant Review and Confirm that Threshold Challenges to the Jurisdiction of a Military Commission Are Not Subject to *Councilman* Abstention

In *Schlesinger v. Councilman*, the Supreme Court announced the principle that federal habeas review is generally not appropriate before a military proceeding reaches its conclusion. *See* 420 U.S. 738, 759 (1975). *Councilman* abstention does not apply, however, when the jurisdiction of the military commission is itself the subject of a *bona fide* unresolved dispute. In 2006, the Court in *Hamdan* confirmed the viability of the *Councilman* doctrine, but held that *Councilman*

abstention is inapplicable to habeas petitions of Guantanamo detainees who sought to challenge the legality of the military commission convened to try them. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 585-89 (2006). The Court of Appeals' decision in this case departs from this Court's clear pronouncements and their underlying principles.

A government predicated on checks and balances "serves not only to make Government accountable but also to secure individual liberty." *Boumediene v. Bush*, 533 U.S. 723, 742 (2008). In this context, this Court has underscored the vital role of the writ of habeas corpus, supplying a means by which the judicial branch contributes to "this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion). And because it is "an essential mechanism in the separation-of-powers scheme," *Boumediene*, 553 U.S. at 743-44, "[t]he writ of habeas corpus has always been available to review the legality of executive detention." *INS v. St. Cyr*, 533 U.S. 289, 304-305 (2001).

In fact, "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent." *Boumediene*, 553 U.S. at 783. *See also St. Cyr*, 533 U.S. at 301 ("At its historical core, the writ of habeas corpus has served as a means of

reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

At the same time, the Court has long been skeptical of the military's authority to try individuals other than active service personnel. *See, e.g.*, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (trial by court martial of an ex-serviceman is unconstitutional); *Reid v. Covert*, 354 U.S. 1 (1957) (in peacetime, the military cannot constitutionally subject civilian defendants accompanying service members overseas to trial by court martial); *Kinsella v. Singleton*, 361 U.S. 234 (1960) (same). More recently, the Court explained that "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure." *Hamdan*, 548 U.S. at 567.

Given that the urgency of federal habeas review is at its greatest in the case of executive detention, and deference to the executive is most diminished with respect to the prosecution of civilians by the military, abstention is inappropriate when a defendant "raise[s] substantial arguments that a military tribunal lacks personal jurisdiction over him." *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 & n.20 (2006). "The theory is that setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." *Hamdan v. Rumsfeld*, 415 F.3d 33, 36-37 (D.C. Cir. 2005).

Addressing a challenge by a Guantanamo detainee to the legality of a military commission, this Court refused to abstain from hearing the case, finding that none of the comity considerations that justified abstention in *Councilman* applied to commission trials of putative enemy combatants. *Hamdan*, 548 U.S. at

585-89. Furthermore, the Court noted that the detainee and the government had "a compelling interest in knowing in advance whether [the petitioner] may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial." *Hamdan*, 548 U.S. at 589-90. The *Hamdan* Court acknowledged that abstention with regard to such challenges might occasionally be permissible, but suggested that it would only be appropriate in circumstances akin to "military commissions convened on the battlefield." *Id.* at 590.

Al-Nashiri seeks to argue that the crimes of which he is accused allegedly took place before the United States went to war.[13] Because military commissions may try an individual only for crimes "committed in the context of and associated with hostilities," 10 U.S.C. § 950p(c), Petitioner's claim, if valid, would likely deprive the commission of its statutory jurisdiction to try him. Similarly, he contends that "the military commission has jurisdiction under Article I to try only war crimes, which by definition must have a nexus to hostilities." *In re Al-Nashiri*, 835 F.3d 110, 132 (D.C. Cir. 2016). In essence, Al-Nashiri's position is that the military commission lacks a statutory or constitutional basis for asserting jurisdiction over him. *See In re Al-Nashiri*, 835 F.3d at 116. This is precisely the kind of threshold allegation that this

[13] He is accused of conspiring to bomb the USS The Sullivans, and of organizing the bombings of the USS Cole and a French oil tanker off the coast of Yemen, in 2000 and 2002 respectively. See *In re Al-Nashiri*, 835 F.3d 110, 133-14 (D.C. Cir. 2016). Petitioner claims that "the first recognition of any hostilities in Yemen [was] in September 2003." Unclassified Petition for Writ of Certiorari at 16.

Court has expected lower courts to address, without resort to *Councilman* abstention. *See Hamdan,* 548 U.S. at 589 & n.20, 590.

The Court of Appeals, however, took the view that neither *Hamdan* nor any other precedent required "an Article III court to determine in the first instance whether the military system has jurisdiction to try his offenses." *In re Al-Nashiri*, 835 F.3d at 133. This ruling, which will impact all Guantanamo detainees seeking to challenge executive determinations that they are enemy combatants subject to a military commission's jurisdiction,[14] warrants prompt review. In granting broad deference to the military, the Court of Appeals has undermined this Court's clear precedent, as well as the indispensable role federal habeas review has performed to prevent executive overreach.

II. This Court's Review is Required Because the Court of Appeals has Departed from the "Exceptional Circumstances" Doctrine Articulated by this Court.

A. The Court of Appeals' Decision Has Materially Altered Exceptions to Abstention.

The Court of Appeals not only erroneously applied *Councilman* abstention in an area to which it does not apply, but the court also fundamentally rewrote the *Councilman* abstention doctrine by excising important, longstanding exceptions to it. The importance of

[14] All habeas corpus petitions from Guantanamo detainees are consolidated in the United States Court for the District of Columbia. *See Boumediene*, 553 U.S. at 796.

clarifying the scope of habeas review and abstention doctrine now requires this Court's review.

This Court has previously explained that *Councilman* abstention is inappropriate when "the harm sought to be averted is both great and immediate, of a kind that cannot be eliminated by . . . defense against a single criminal prosecution." *Schlesinger v. Councilman*, 420 U.S. 738, 756 (1975) (internal quotations omitted). Thus, petitioners must show something more than the usual "cost, anxiety, and inconvenience" incidental to criminal proceedings. *Id.* at 755. Beyond that guidance, however, the *Councilman* Court declined to "define those circumstances, if any, in which equitable intervention into pending court-martial proceedings might be justified." *Id.* at 761.

Moreover, in other abstention cases, the Court has "left room for federal equitable intervention" through habeas relief "where there is a showing of bad faith or harassment by . . . officials responsible for the prosecution, where the . . . law to be applied in the criminal proceeding is flagrantly and patently violative of express constitutional prohibitions, *or where there exist other extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.*" *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) (emphasis in the original) (internal quotation marks and citations omitted). These "extraordinary circumstances" are dependent on the facts of individual cases, such that it is "impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irreparable injury as to warrant intervention. . . " *Id.* at 124-25. In *Younger v. Harris*, which gave rise to abstention doctrine and its "exceptional circumstances" exception, the Court expressly

stated that, "[o]ther unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be." 401 U.S. 37, 54 (1971).

Despite this Court's guidance, the Court of Appeals narrowed when extraordinary circumstances would counsel against abstention. Under the Court of Appeals' newly minted position, the situation must now "*both* present the threat of great and immediate injury and render the alternative tribunal incapable of fairly and fully adjudicating the federal issues before it." *In re Al-Nashiri*, 835 F.3d 110, 128 (D.C. Cir. 2016) (emphasis in the original). On the basis of this revised test, the Court of Appeals refused to apply the exceptional circumstances exception to Al-Nashiri's petition. *See id.* at 128-130.

The Court of Appeals purported to find support for its fresh approach in this Court's rulings in *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Kugler v. Helfant*, 421 U.S. 117 (1975); and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). *See Al-Nashiri*, 835 F.3d at 128, 129. Yet the Court of Appeals' test cannot be reconciled with the approach taken in any of those cases. In *Trainor*, the Court explained that federal restraint should be exercised "unless extraordinary circumstances were present warranting federal interference *or unless* [appellees'] state remedies were inadequate to litigate their federal . . . claim." *Trainor*, 431 U.S. at 446 (emphasis added). Under *Trainor*, extraordinary circumstances alone would permit review; the Court of Appeals for the D.C. Circuit has abandoned that disjunctive doctrine and replaced it with a test that requires a petitioner to establish both extraordinary circumstances *and* the unavailability of relief from the original tribunal. If left uncorrected, because

of the D.C. Circuit's role in reviewing cases involving Guantanamo detainees, this departure from precedent will govern—and likely defeat—the pretrial habeas petition of every detainee. *See Boumediene v. Bush*, 553 U.S. 723, 796 (2008) (permitting review of detainee habeas petitions to be consolidated in the United States District Court for the District of Columbia).[15]

To be sure, triggering an exception to *Councilman* abstention requires a legitimate showing of extraordinary circumstances, which is no small feat. But nothing in this Court's prior rulings justifies transforming that stringent requirement into an impossible one. The traditional rule demanding extraordinary circumstances ensures by itself that federal courts do not disrupt ongoing proceedings in state or military tribunals while at the same time accommodating rare, fact-specific scenarios where habeas review is justified. *See Boumediene*, 553 U.S., at 780 ("Habeas is not a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.").

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[15] Nor is there support for the Court of Appeals' position in this Court's earlier cases. *Kugler* attempted to reconcile prior case law, but ultimately recognized that "[t]he scope of the exception . . . for 'other extraordinary circumstances' has been left largely undefined by this Court." 421 U.S. at 125 & n.4. And the portion of *Huffman* cited by the Court of Appeals holds only that, in order to demonstrate exceptional circumstances, "a movant must show not merely the irreparable injury which is a normal prerequisite for an injunction, but also must show that the injury would be great and immediate." *Huffman*, 420 U.S. at 601 (internal quotation marks removed).

B. To Deny that Exceptional Delay Constitutes Extraordinary Circumstances Undermines the Rule of Law.

To hold that judicial review is unavailable here, despite the extraordinary pretrial delay present in this case, undermines the Constitution's fundamental commitment to rendering justice in a timely manner. That outcome is contrary to vital principles reinforcing the rule of law that have been affirmed by this Court in a broad range of contexts.

For fifteen years, Al-Nashiri has been held in captivity without a determination of whether the military commission that intends to preside over his trial has jurisdiction to do so. Because of Al-Nashiri's designation as a "high-value detainee," he is kept in Camp 7, a solitary confinement facility. *See* Department of Defense, JTF-GTMO Detainee Assessment: Al-Nashiri at 2 (December 8, 2006);[16] Government Accountability Office, Guantanamo Bay Detainees: Facilities and Factors for Consideration if Detainees were Brought to the United States, at 15 (November 2012). Nevertheless, the military commission "will not fully determine its own jurisdiction, in the first instance, until trial." *Al-Nashiri*, 835 F.3d at 146. That trial is unlikely to take place until at least 2019. See AE 203Q Scheduling Order, *United States v. Al-Nashiri* (Military Comm'n April 11, 2017) (setting hearing dates for calendar year 2018 but not setting a trial date for that year).[17] Thus, based on conservative estimates, if

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[16] *Available at* https://www.nytimes.com/interactive/projects/guantanamo/detainees/10015-abd-al-rahim-al-nashiri (last visited May 29, 2017).

[17] *Available at* http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE203Q(SCHEDULING%20ORDER)).pdf (last visited May 26, 2017).

federal habeas review is unavailable to him now, Al-Nashiri will not be in a position to challenge adverse judgments against him until 2024. *See* Petition for Panel Rehearing at 3-6, *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. Oct. 7, 2016) (No. 15-1023).[18] At that point, he will have been in the custody of the United States—largely in solitary confinement—for 22 years. If this Court refused to "impose a *de facto* suspension by abstaining" from hearing the *Boumediene* challengers after a six-year delay, *see Boumediene*, 553 U.S. at 771, the 22-year *de facto* suspension of the privilege of habeas corpus produced by the decision below is no less indefensible. Indeed, it would amount to the longest known suspension of the writ in American history.

The staggering delay presented by this case naturally follows from a military commission regime established by statute that imposes no obligation on the executive branch to act promptly or efficiently in the prosecution of its cases and carries no legal consequences or risk of dismissal for idle or otherwise unwarranted delay. At the time when *Councilman* was decided, military case law provided that pretrial confinement of a member of the military in excess of three months resulted in a strong presumption that the charges should be dismissed. *See United States v. Burton*, 44 C.M.R. 166, 172 (C.M.A. 1971). At present, the Rules for Courts-Martial require that the "accused [] be brought to trial within 120 days after the earlier of" preferral of charges or confinement. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707(a) (2016)

[18] Although the Court of Appeals refused to credit this estimate (*see Al-Nashiri*, 835 F.3d at 135), it was not questioned by the government in the course of the proceedings. Petitioner has since explained the basis for the estimate. *See* Petition for Panel Rehearing.

("R.C.M."). And non-compliance with this requirement may still result in dismissal. *See* R.C.M. 707(d). These protections, however, are expressly withdrawn from trials by military commission by 10 U.S.C. 948b(d)(1)(A) (2012). If left undisturbed, the judgment of the Court of Appeals permits the military to achieve precisely what was denied by this Court in *Boumediene*: the authority to detain a person for a prolonged and potentially limitless period of time without fear of judicial scrutiny. The D.C. Circuit's decision essentially allows the executive branch to keep captive an individual for two decades in the harshest of conditions without providing them a trial and without judicial review of the executive's power to detain. That is anathema to the rule of law and our Nation's core values of separation of powers and due process.

Delays of this magnitude are antithetical to constitutional guarantees significant to a wide range of contexts. In capital cases, awaiting execution can itself be "especially cruel because it subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement." *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (internal quotations omitted).

And solitary confinement, as Al-Nashiri endures, only compounds the impact of the delay. *See Davis v. Ayala*, 576 U.S. ___, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("Years on end of near-total isolation exact a terrible price."); *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) ("[I]t is well documented that . . . prolonged solitary confinement produces numerous deleterious harms."); *Ruiz v. Texas*, No. 16A841, 580 U.S. __, at 2-3 (2017) (Breyer, J., dissenting from denial of stay of execution) ("If

extended solitary confinement alone raises serious constitutional questions, then 20 years of solitary confinement, all the while under threat of execution, must raise similar questions, and to a rare degree, and with particular intensity.").

But the corrosive effects of exceptional delay are not limited to cases carrying the gravest punishments. The ABA has emphasized the costs of delay in more routine criminal cases as well: "Unnecessary delay in the processing of criminal cases undermines defendants' rights to a speedy trial, prolongs periods of tension and anxiety for victims and witnesses, adversely affects public confidence in the justice system, and often causes unnecessary expense to taxpayers. . . . Protection of the right to a speedy trial is especially important for defendants who are detained prior to trial, since protracted delays mean de facto indeterminate imprisonment without a determination of guilt." Speedy Trial Standards at 28.

As this Court has repeatedly acknowledged, statutory and constitutional commitments to prompt resolution of criminal charges operate, in part, "to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, 383 U.S. 116, 120 (1966). "[E]vidence and witnesses disappear, memories fade, and events lose their perspective. . . ." *Smith v. Hooey*, 393 U.S. 374, 380 (1969) (internal quotation market omitted). The prejudice is "markedly increased when the accused is incarcerated in another jurisdiction . . . perhaps far from the place where the offense . . . allegedly took place, [because] his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired." *Smith*, 393 U.S. at 379-80. Moreover, the effect of the passage of time

on the quality of evidence does not just harm the defendant—should prosecution witnesses become unavailable, "[the prosecution's] case will be weakened, sometimes seriously so." *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

The writ of habeas corpus has long stood as a bulwark against this kind of unwarranted delay. In fact, the Habeas Corpus Act of 1679 itself decried that "great delays ha[d] been used" to avoid habeas writs and accordingly imposed strict time limits on the jailer's response to a writ. *See* 31 Car. 2, ch. 2 (1679) 5 Statutes of the Realm 935. "This history was known to the Framers," *Boumediene*, 553 U.S. at 742, and, in adopting the Suspension Clause, it was understood by them that prompt judicial review was a fundamental feature of the writ. *See, e.g.*, Resolution of the New York Ratifying Convention (July 26, 1788), in 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 328 (J. Elliot 2d ed. 1876) (noting that, absent the invocation of the Suspension Clause, "every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and . . . such inquiry or removal ought not to be denied, *or delayed*. . . .") (emphasis added). *See also Parisi v. Davidson*, 405 U.S. 34, 41-42 (1972) (finding that a federal court should abstain from review where relief "would also be available . . . with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge").

This Court has faithfully held that exceptional delay in judicial proceedings, in both common and capital cases, is incompatible with the Constitution's due process guarantees. Consonant with that tradition,

this Court should review the Court of Appeals' decision to confirm that exceptional delay before trial remains of central concern on habeas review and is indeed one of the very dangers the writ of habeas corpus was designed to avoid.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, review the decision on appeal, and reverse the judgment of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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May 31, 2017