No. 16-1307

In the
Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST[1]

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers—several as flag officers.

NIMJ has appeared regularly as an *amicus curiae* in this Court—in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008). NIMJ has also appeared as an amicus before the Court of Military Commission Review and the D.C. Circuit in numerous cases arising out of the Guantánamo military commissions (including the instant appeal).

Although NIMJ has generally avoided taking a position on the legality of the military commissions established by the Military Commissions Acts of 2006 and 2009 ("MCA"), it is impelled to file this brief here for two reasons: *First*, the underlying constitutional

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

question presented by the Petition—whether law-of-war military commissions may constitutionally exercise jurisdiction over domestic crimes—is of exceptional importance (and has been since the inception of the commissions in 2002). *Second*, although the Court of Appeals fractured in its ruling affirming Petitioner's military commission conviction on the charge of conspiracy, *see Al Bahlul v. United States* ("*Al Bahlul III*"), 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), amicus believes that this case is an appropriate vehicle through which to answer that larger constitutional question—and that, indeed, "[i]t is long past time . . . to resolve the issue squarely and definitively." *Id.* at 760 n.1 (Kavanaugh, J., concurring).

SUMMARY OF ARGUMENT

Under this Court's pre-September 11 precedents, non-Article III military commissions may constitutionally exercise jurisdiction in geographic areas lawfully under martial law or belligerent occupation, or elsewhere over "offenses committed by enemy belligerents against the law of war." *Ex parte Quirin*, 317 U.S. 1, 41 (1942). Rather than hew closely to those precedents, however, the U.S. government—through three Administrations—has spent the better part of the past 15 years trying to expand the authority of so-called "law-of-war military commissions" to include the authority to try at least some offenses that are not "against the law of war," including domestic crimes such as standalone conspiracy.

Each of the eight convictions obtained by the Guantánamo military commissions to date has included charges that are not clearly supported by the *Quirin*

precedent. Five of the eight were based exclusively on such charges. Of the three proceedings pending before the commissions, two are based on offenses raising analogous jurisdictional questions. But even as the commissions' jurisdiction over domestic offenses has been recognized as the dominant legal issue surrounding the Guantánamo trials, 15 years of litigation and legislation have failed to actually resolve the matter.

Such lingering uncertainty might have been tolerable if there were no prospect of new military commission trials at Guantánamo. But the current Administration's stated intention to prolong and expand those proceedings underscores the urgency of settling the matter one way or the other—and of confirming the legitimacy (or the invalidity) of the bulk of the commissions' work to date, and their utility and availability (or lack thereof) going forward. This case provides the Court with the opportunity to do precisely that.

The government will no doubt oppose certiorari by pointing to the two narrower, case-specific grounds for affirming Petitioner's conviction offered by two of the concurrences below. But neither theory actually militates against this Court's intervention. First, this Court both should not and need not review Petitioner's Article III objection to his military commission trial solely for "plain error." Second, there is no support in either precedent or the record of this case for treating Petitioner's (constitutionally problematic) conviction for standalone conspiracy as the functional equivalent of a (less-problematic) conviction for conspiracy to commit a completed war crime.

Finally, because of the current law governing collateral pre-trial attacks on the Guantánamo military commissions, if this Court does not resolve the Article III question presented in the Petition in this case, it could be the next decade before it has another opportunity to do so. But "[t]rial by military commission raises separation-of-powers concerns of the highest order." *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J. concurring in part). Even if Congress mitigated some of those concerns when, in response to *Hamdan*, it enacted the MCA, the MCA raises profound separation-of-powers questions all its own. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008). This Court "cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Stern v. Marshall*, 564 U.S. 462, 503 (2011). Whether Petitioner's constitutional challenge is innocuous or not, it is properly presented here—and deserves this Court's plenary consideration.

ARGUMENT

I. Whether U.S. Military Commissions May Constitutionally Exercise Jurisdiction Over Domestic Offenses Is A Question Of Exceptional Importance.

A. The Guantánamo Military Commissions Have Principally Tried Domestic Offenses.

In *Ex parte Quirin*, 317 U.S. 1 (1942), and *In re Yamashita*, 327 U.S. 1 (1946), this Court settled the constitutionality of "trying, before military tribunals without a jury, offenses committed by enemy

belligerents against the law of war." *Quirin*, 317 U.S. at 41. Although both decisions have met with substantial criticism from courts and commentators alike, *see, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (referring to *Quirin* as "not this Court's finest hour"), this Court has seen "no occasion to revisit" their analytical underpinnings. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006). And Congress largely codified the understanding reflected in those cases in 1950, when it re-enacted Article 15 of the Articles of War as Article 21 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 821.

The precedent set in *Quirin* and *Yamashita*, however, requires that defendants be belligerents who can in fact be charged with violating the international laws of war. For various reasons, most of the individuals who have been charged, tried, and convicted by post-September 11 commissions have *not* been so chargeable. Instead, the U.S. government has spent most of the past 15 years trying to expand the authority of so-called "law-of-war military commissions" to include jurisdiction over some domestic offenses that are not "against the law of war." Standalone conspiracy was the charge against the first defendant scheduled for trial by a post-September 11 military commission (Salim Hamdan), *see Hamdan*, 548 U.S. at 598–600, and domestic offenses continue to be the principal charges tried by the commissions today.

Indeed, each of the eight convictions obtained by the Guantánamo military commissions to date has included charges that are not clearly supported by *Quirin*. *See Al Bahlul v. United States* ("*Al Bahlul II*"), 792 F.3d 1, 27 (D.C. Cir. 2015) (Tatel, J., concurring). Five of those

eight convictions were *solely* for domestic offenses (and three of those five convictions have since been vacated on appeal or dismissed by the government). And each of the three proceedings currently pending before the commissions raise analogous jurisdictional questions.[2] Thus, of the 11 military commission trials that have been completed or that remain pending as of the filing of this brief, only two have exercised subject-matter jurisdiction based solely on the *Quirin* and *Yamashita* precedents. The other nine cases all turn to at least some degree on the United States' power to try domestic offenses before military commissions—cases that, in turn, have raised statutory and constitutional questions of first impression respecting such authority.

B. Fifteen Years of Litigation and Legislation Have Failed To Settle The Constitutionality Of Such Military Jurisdiction.

Even though the commissions' jurisdiction over domestic offenses has been the dominant legal issue confronting them from their inception, 15 years of litigation and legislation have failed to actually resolve the matter.

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[2] *See Al Bahlul II*, 792 F.3d at 27 (Tatel, J., concurring). One case—against Abd al Hadi al Iraqi—involves a lone charge of conspiracy. A second—against Abd al Rahim al Nashiri—involves offenses that may fall outside the armed conflict over which the commissions have jurisdiction, an issue currently before this Court on a petition for a writ of certiorari in *Al-Nashiri v. Trump*, No. 16-8966 (U.S. filed Jan. 17, 2017). There is also pre-trial litigation underway in the third proceeding—the case against the 9/11 defendants—over whether domestic offenses can be included in that prosecution, as well.

In *Hamdan*, for example, four Justices of this Court rejected the government's argument that standalone conspiracy was, at that time, a recognized violation of the laws of war falling within the scope of the *Quirin* precedent. *See* 548 U.S. at 566–613 (opinion of Stevens, J.). *Hamdan*'s holding in this respect was necessarily statutory, however—based on the language of Article 21 of the UCMJ, and its authorization of military commission trials only for "offenders or offenses that by statute or by the law of war may be tried by military commissions." *See id.* at 593. *Hamdan* therefore left open whether Congress could expressly authorize military commission trials for such offenses. *See, e.g.*, *id.* at 636 (Breyer, J., concurring); *see also id.* at 655 (Kennedy, J., concurring) ("Congress may choose to provide further guidance in this area.").

Congress did exactly that in the Military Commissions Act (MCA), as first enacted in 2006 and as revised in 2009. In addition to providing express authorization for the Guantánamo military commissions, the MCA also specifically delineated over two dozen substantive offenses, including "conspiracy," "providing material support for terrorism," and "solicitation." *See* 10 U.S.C. § 950t(25), (29), (30). Thus, once the government began obtaining convictions under these charges, those cases presented the constitutional question this Court was able to sidestep in *Hamdan*.

But because the MCA was, at least initially, being applied to pre-enactment conduct, when the first round

of post-conviction appeals (finally)[3] reached the D.C. Circuit, the focus was at first on the necessarily narrower question of whether such retroactive trials were even authorized by the MCA, *see Hamdan v. United States* ("*Hamdan II*"), 696 F.3d 1238, 1253 (D.C. Cir. 2012) (holding that the answer was no). In *Al Bahlul I*, the en banc D.C. Circuit reversed *Hamdan II*, and held that the MCA did indeed authorize trials of these domestic offenses, even for pre-enactment conduct. *See Al Bahlul v. United States* ("*Al Bahlul I*"), 767 F.3d 1, 12–17 (D.C. Cir. 2014) (en banc).

The court then unanimously concluded, however, not only that it violated the Ex Post Facto Clause, art. I, § 9, cl. 3, for the commissions to exercise jurisdiction over material support and solicitation offenses that pre-dated the MCA's enactment, but that the violation was so egregious as to constitute "plain error." *Id.* at 27–31. As to Al Bahlul's conspiracy conviction, though, the en banc court divided, with a 4-3 majority holding that it did not give rise to a plain error under the Ex Post Facto Clause, and effectively remanding Al Bahlul's remaining objections to the original three-judge panel. *See id.* at 63

[3] The trials in both Hamdan's and al Bahlul's cases concluded in 2008. For several reasons, however, it was not until 2011 that the Court of Military Commission Review ruled on (and unanimously affirmed) the convictions, at which point they were appealed to the D.C. Circuit. *See* Robert Chesney, *The Court of Military Commission Review Finally Begins to Move on the* Hamdan *and* Al Bahlul *Appeals*, Lawfare, (Jan. 24, 2011), https://www.lawfareblog.com/court-military-commission-review-finally-begins-move-hamdan-and-al-bahlul-appeals.

(Kavanaugh, J., concurring in the judgment in part and dissenting in part).

In the process, the Court of Appeals' ruling in *Al Bahlul I* cleared away the obstacles to resolution of the forward-looking constitutional question presented here, *i.e.*, whether Congress has the power, even prospectively, to authorize non-Article III military commissions to try domestic offenses. In *Al Bahlul II*, a divided three-judge panel answered that question in the negative. *See* 792 F.3d 1. And although that decision would have squarely presented the question of the commissions' constitutional jurisdiction over domestic offenses, the government instead successfully sought rehearing en banc, which led to the fractured ruling that is the subject of the current Petition. As Judge Kavanaugh complained in his concurring opinion in *Al Bahlul III*,

> The question of whether conspiracy may constitutionally be tried by military commission is extraordinarily important and deserves a "definitive answer." The question implicates an important part of the U.S. Government's war strategy. And other cases in the pipeline require a clear answer to the question. This case unfortunately has been pending in this Court *for more than five years*. It is long past time for us to resolve the issue squarely and definitively.

840 F.3d at 760 n.1 (Kavanaugh, J., concurring) (citation omitted).

C. The Commissions' Legitimacy and Future Utility Likely Turn On Their Authority to Try Such Offenses.

Judge Kavanaugh's concern about resolution of this question is more than just a backward-looking problem. Although the Chief Prosecutor had signaled in 2015 that he envisioned prosecutions of no more than seven additional Guantánamo detainees, *see* Carol Rosenberg, *Pentagon Envisions Up to 7 More Guantánamo Trials*, Miami Herald (Mar. 26, 2015), https://perma.cc/6P9G-THMX, that assessment was based on the detainee population as it then stood. *See id.* The current Administration has been clear that it intends to increase detentions at Guantánamo, and, where possible, to reinvigorate the military commissions—and has received pressure from Congress to move more quickly on the subject. *See* Phil Mattingly & Kevin Liptak, *First on CNN: GOP Senators Push Trump on 'Expansion' of Guantanamo Bay*, CNN.com (Feb. 13, 2017), http://www.cnn.com/2017/02/13/politics/guantanamo-bay-senator-letter/. Perhaps with that in mind, Attorney General Sessions recently suggested that "it is time for us in the months to come to get this thing figured out and start using [the military commissions] in an effective way." *Attorney General Jeff Sessions*, The Hugh Hewitt Show (Mar. 9, 2017), www.hughhewitt.com/attorney-general-jeff-sessions/ (transcript of radio interview).

Needless to say, the utility of the commissions as a viable option for prosecuting terrorism suspects in future cases will turn to a large extent on resolution of the questions presented here. Just as it has not been possible thus far to tie more than a handful of detainees

to specific acts constituting clearly established international war crimes, the same is likely to be true going forward. Thus, the Petition presents this Court with an opportunity not only to settle the validity (or lack thereof) of a substantial majority of the work of the Guantánamo military commissions to date, but also to clarify, one way or the other, the circumstances in which they can and should be available to the government going forward.

More than just resolving the *utility* of the commissions, settling the constitutionality of their jurisdiction over domestic offenses will also go a long way toward resolving the seemingly endless debate over their legitimacy. After all, whether military commissions can try offenses other than international war crimes has been the central constitutional question surrounding the Guantánamo trials since shortly after their inception. The longer that question remains unanswered, the more uncertainty will pervade not only the trials themselves, but also the strategic and tactical assessments undertaken by the government when considering the disposition of newly captured terrorism suspects. *See, e.g.*, Lawrence Douglas, *Nashiri in Gitmo: The Wages of Legitimacy in Trials Before the Guantanamo Military Commissions*, *in* Political Trials in Theory and History 394 (Jens Meierhenrich & Devin O. Pendas eds., 2017). This is exactly why "[i]t can be irresponsible for a court to unduly delay ruling on such a fundamental and ultimately unavoidable structural challenge, given the systemic ramifications of such an issue." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839

F.3d 1, 9 n.1 (D.C. Cir. 2016) (rehearing en banc granted, order vacated Feb 16, 2017).

II. That Question Is Properly Presented—And Should Be Answered—Here.

Notwithstanding this analysis, the government will likely argue that certiorari is not warranted here. Presumably, its opposition will invoke the absence of division of authority among the lower courts and the two ostensibly "narrower" opinions concurring in the decision below—which provide reasons why, even if certiorari is granted, this Court might not need to reach and resolve Congress's constitutional authority to invest the commissions with jurisdiction over domestic offenses.

Neither of these arguments is persuasive. Congress in the MCA gave the D.C. Circuit "exclusive jurisdiction" over appeals arising from the Guantánamo military commissions. *See* 10 U.S.C. § 950g(a). And the D.C. Circuit, together with the D.C. district court, have come to exercise a form of de facto exclusive jurisdiction over Guantánamo habeas cases. *See Boumediene*, 553 U.S. at 795–96. Whether the issue arises in a collateral attack or a direct appeal, then, challenges to the jurisdiction of a Guantánamo military commission cannot produce circuit splits—so the absence of such a division below is hardly instructive.

As for whether this case is an appropriate vehicle through which to reach the question presented, the answer is an unequivocal yes. This Court can and should apply de novo review to whether military commissions may try domestic offenses; the Petitioner was indeed

convicted of such an offense, and a denial of certiorari here will likely leave the matter unsettled well into the next decade.

A. As Seven Of The Nine Judges Below Agreed, Petitioner's Article III Claim Is Subject To De Novo Review.

In her concurring opinion below, Judge Millett suggested that, as with Petitioner's ex post facto challenge to his conspiracy conviction, his Article III objection had been forfeited through his failure to raise it, and so it should be reviewed only for "plain error." *Al Bahlul III*, 840 F.3d at 778–88 (Millett, J., concurring). Judge Henderson agreed, but every other judge on the en banc court did not. *See id.* at 758 (per curiam). As Judge Kavanaugh explained in his concurrence:

- *First*, before the military judge, Bahlul objected to the military commission's authority to try him for the charged offenses. Bahlul did not forfeit this claim. *Id.* at 760 n.1 (Kavanaugh, J., concurring).
- *Second*, even if Bahlul had not objected, the question of whether the Constitution requires Article III courts to try conspiracy offenses is a structural question of subject matter jurisdiction, and cannot be forfeited or waived. *Id.*
- *Third*, in any event, Rules 905 and 907 of the Rules for Military Commissions require de novo judicial review of the question whether a charged offense may be tried by military commission. *Id.*

- *Fourth*, even if all of those points are incorrect, the Government has repeatedly forfeited any forfeiture argument during the course of this litigation. For example, before the U.S. Court of Military Commission Review, the Government expressly acknowledged that Bahlul's argument was *not* forfeited or waived. Only at the 11th hour has the Government belatedly claimed that Bahlul forfeited his constitutional argument.[4] *Id.*

And even if Judge Millett did *not* err in applying plain error review (and amicus agrees with her eight colleagues that she did), this Court in any event retains the authority to consider Al Bahlul's jurisdictional objection de novo. As Justice O'Connor explained in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), "[w]hen . . . Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 851; *see also Freytag v. Commissioner*, 501 U.S. 868, 879 (1991) ("[T]his is one of those rare cases in which we should exercise our discretion to hear petitioners'

[4] Judge Kavanaugh also expressed a fifth reason for applying de novo review—that, "even if Bahlul forfeited his argument and plain error review applied here, the Court when applying plain error often holds that there was no error, rather than merely holding that any possible error was not plain." *Al Bahlul III*, 840 F.3d at 760 n.1 (Kavanaugh, J., concurring). This argument depends upon taking a particular view of the merits of the Article III objection, which amicus has not done in this brief.

[waived] challenge to the constitutional authority of the [non-Article III judge]."). Thus, the argument that Al Bahlul forfeited his Article III objection is no obstacle to this Court's de novo resolution of the merits of that claim.

B. As Seven Of The Nine Judges Below Agreed, Petitioner's Conviction Is For A Non-International War Crime.

The other, narrower ground for affirmance offered below came in Judge Wilkins's concurrence (in the relevant portions in which Judge Millett joined), which construed the record to conclude that "Bahlul was really convicted of an offense tantamount to substantive war crimes under a *Pinkerton* theory of liability." *Al Bahlul III*, 840 F.3d at 798 (Wilkins, J., concurring). Put otherwise, Judge Wilkins concluded that Al Bahlul's conviction could be transmogrified on appeal into a conviction for a completed international war crime (the 9/11 attacks) in which conspiracy was not the underlying offense, but rather the theory of liability—a theory recognized (as "joint criminal enterprise") under the laws of war. *See id.*

The joint dissent below identified the most obvious problems with this approach, including, most significantly, that "it would violate basic principles of criminal justice, including that an accused know the charge against him and that a conviction match the charge." *Id.* at 831 (Rogers, Tatel, & Pillard, JJ., dissenting). As the joint dissent explained, it would also violate the MCA itself, under which any change in the prosecution's theory (including any change in charges) requires statutorily prescribed notice, and probably also

requires re-charging and the approval of the new charges by the Convening Authority. *See id.* at 833–34; *see also* 10 U.S.C. § 948q.[5]

As Justice White explained in *McCormick v. United States*, 500 U.S. 257 (1991), "[a]ppellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *Id.* at 270 n.8. This is so for an array of reasons, most of which sound in a criminal defendant's rights under the Due Process or Ex Post Facto Clauses. *See Al Bahlul III*, 840 F.3d 830–33 (Rogers, Tatel, & Pillard, JJ., dissenting).

But even if, contrary to some of the most fundamental principles of our criminal justice system, appellate courts *could* so act, Judge Wilkins's theory still assumes that the facts necessary to support such a theory of liability were presented to—and found by—the members in Petitioner's case. They were not. The charge sheet did not allege a completed war crime, and the trial judge's instruction on conspiracy expressly permitted the members to find the Petitioner guilty of conspiracy based on mere agreement, and without finding evidence of a completed war crime. *See id.* at 832; *see also id.* at 833 ("Tellingly, too, the government has never argued that the Findings Worksheet shows that the commission

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[5] In addition to the procedural arguments marshaled by the joint dissent, it also bears emphasizing that the MCA does not appear even to *allow* the substantive theory of liability expounded by Judge Wilkins, because the provision of the statute that authorizes forms of accessorial liability does not mention joint criminal enterprise (or any other variant of *Pinkerton* liability). *See* 10 U.S.C. § 950q.

members actually found al Bahlul guilty of substantive offenses."). Thus, "[t]he Article III problem lying at the heart of this case . . . cannot be solved by reimagining the statute under which al Bahlul was convicted or the crimes for which he was charged, as doing so only raises other fundamental legal problems." *Id.* at 835.

The upshot of the above analysis is that neither "plain error" review nor Judge Wilkins's re-conceptualization of Petitioner's conspiracy conviction provides an analytically defensible ground on which to affirm the decision below. Nor do they present vehicle problems militating against a grant of certiorari. Whether the Guantánamo military commissions may constitutionally exercise jurisdiction over truly domestic offenses is properly presented by the Petition—and can (and should) be fully addressed if this Court grants certiorari.

C. It Could Be Years Before This Court Has Another Opportunity To Answer This Question.

Finally, it is worth emphasizing that this may be the Court's last opportunity for quite some time to resolve the momentous constitutional question presented by the Petition. In *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016), *petition for cert. filed*, No. 16-8966 (U.S. filed Jan. 17, 2017), the Court of Appeals held that federal courts must abstain from entertaining collateral pre-trial challenges to the subject-matter jurisdiction of a military commission convened under the MCA. Instead,

Article III resolution of such a challenge must wait until a post-conviction appeal.[6]

Unless this Court grants certiorari in *Al-Nashiri* and reverses, the constitutional question presented here cannot return to the Article III courts until (1) a new defendant has been convicted of a domestic offense; (2) he appeals that conviction to the CMCR; (3) the CMCR decides that appeal; and (4) the losing party before the CMCR appeals that decision to the D.C. Circuit. Given how long these cases have already taken, and given that the projection in *Al-Nashiri* itself is that such an appeal would not reach the D.C. Circuit until 2024, *see Al-Nashiri*, 835 F.3d at 134, it stands to reason that it would be at least that long (and probably longer) before this Court would have another opportunity to settle the question presented here—no matter how many new prosecutions for such offenses are initiated between now and then.

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Amicus takes no position on the ultimate answer to the Article III question presented by the Petition. But its urgency cannot be gainsaid. More fundamentally, it is impossible to have a meaningful debate over whether a civilian court or a military commission is a more

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[6] In addition to filing this brief, amicus has also filed a brief in support of the Petition in *Al-Nashiri*, arguing that the Court of Appeals' abstention decision is not only irreconcilable with this Court's precedents, but could have significant—and deleterious—ramifications in cases both geographically and substantively removed from Guantánamo. *See* Brief of the National Institute of Military Justice as Amicus Curiae in Support of the Petitioner, *Al-Nashiri v. Trump*, No. 16-8966 (U.S. filed May 31, 2017).

appropriate forum for trying terrorism suspects while serious questions remain over whether a commission may constitutionally exercise jurisdiction over the very offenses that have comprised most of their work. Judge Kavanaugh had it exactly right in his concurring opinion below: 15 years after the commissions' inception, the time has come to settle the matter.

CONCLUSION

For the foregoing reasons, *amicus* respectfully suggests that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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