No. 16-8966

In the
Supreme Court of the United States

ABD AL-RAHIM AL-NASHIRI,
Petitioner,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, 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 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 because

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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.

of its disagreement with the Court of Appeals' ruling affirming the district court's decision to abstain from deciding the merits of Petitioner's habeas petition under *Schlesinger v. Councilman*, 420 U.S. 738 (1975). *See In re Al-Nashiri* (*Al-Nashiri II*),[2] 835 F.3d 110 (D.C. Cir. 2016). As *amicus* explains in this brief, there are compelling reasons why, even if *Councilman* abstention could ever properly be invoked with respect to the commissions established by the MCA, it should not apply here. Petitioner's challenge to the statutory and constitutional jurisdiction of the commissions over pre-September 11 offenses—in a capital case, no less—is the precise type of objection to military jurisdiction the resolution of which this Court has consistently and repeatedly declined to leave to military courts in the first instance.

SUMMARY OF THE ARGUMENT

Petitioner has been in U.S. custody for 15 years, and has been slated for capital trial before a U.S. military commission for more than half of that time. His principal claim in this case is that the United States lacks the statutory and constitutional authority to subject him to such a trial for conduct that pre-dated the September 11 attacks—a substantial argument, given that the text of the MCA limits the commission's jurisdiction to offenses committed during "hostilities," 10 U.S.C. § 950p(c), which the statute defines as "any conflict subject to the laws of war." *Id.* § 948a(9). In the Court of Appeals' view,

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[2] *Amicus* refers to the Court of Appeals' ruling in this case as "*Al-Nashiri II*" to distinguish it from the earlier ruling in Petitioner's case in *In re al-Nashiri* (*Al-Nashiri I*), 791 F.3d 71 (D.C. Cir. 2015).

this jurisdictional challenge should not be resolved until a post-conviction appeal, which, by some estimates, would not return to the Article III courts until at least 2024. *See Al-Nashiri II*, 835 F.3d at 135.

Amicus submits that certiorari is warranted for three reasons: *First*, the Court of Appeals' analysis flies in the face of—and threatens to destabilize—this Court's settled doctrine, which has long recognized the principle that it would be "especially unfair to require exhaustion of military remedies when the complainants raise[] substantial arguments denying the right of the military to try them at all." *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969). This is so because, in such circumstances, even an acquittal or a reversal on post-conviction appeal will not fully remedy the injury the Petitioner will sustain from having been subjected to a void (and not just voidable) trial—especially where, as here, a conviction could come with a potential death sentence. *See*, *e.g.*, *Abney v. United States*, 431 U.S. 651, 659–60 (1977) (noting the inappropriateness of waiting for a post-conviction appeal where the defendant "is contesting the very authority of the Government to hale him into court to face trial *on the charge against him*" (emphasis added)).

Second, although the Court of Appeals acknowledged these cases, it still held that abstention is appropriate under *Schlesinger v. Councilman*, 420 U.S. 738 (1975), unless the defendant is claiming that it is his *status* that bars his military trial, rather than a lack of subject-matter jurisdiction over the offenses with which he has been charged. *See Al-Nashiri II*, 835 F.3d at 134 ("[W]e cannot conclude that the status exception covers *all* non-trivial jurisdictional challenges that a military-

commission defendant might raise."). In the process, the Court of Appeals created an artificial and analytically unsustainable distinction between challenges to the military's assertion of jurisdiction over the *offender* and its jurisdiction over the *offense*. And as problematic as such a holding is in the specific context of the Guantánamo military commissions, certiorari (and reversal) is warranted because it could easily create unnecessary doctrinal confusion in other contexts (including the collateral order doctrine), as well.

Third, the decision below is more than just doctrinally unsound; it is also decidedly counterproductive. In extending *Councilman* abstention to the Guantánamo military commissions in general and Petitioner's case in particular, the Court of Appeals embraced a view of the deference due to those proceedings that is utterly belied by their track record. More fundamentally, the Court of Appeals' abstention holding does no favor to *either* party—since the government will now (or, at least, some day) have to try Al-Nashiri under a lingering cloud of jurisdictional uncertainty (and, thus, illegitimacy), with the very real specter of a potential appellate reversal for lack of jurisdiction looming over the entire capital proceeding. Nothing in this Court's jurisprudence requires such a potentially massive waste of time, energy, and resources, and common sense militates decisively against it.

ARGUMENT

I. *Councilman* Abstention Should Not Apply to the Guantánamo Military Commissions.

In abstaining from reaching the merits of Petitioner's habeas challenge to the jurisdiction of the Guantánamo military commissions over pre-September 11 offenses, the Court of Appeals relied almost exclusively upon *Councilman* and the abstention doctrine to which that decision has given its name. *See Al-Nashiri II*, 835 F.3d at 131–34. Under *Councilman*, "to abstain [the Court] must be assured of both the *adequacy* of the alternative system in protecting the rights of defendants and the *importance* of the interests served by allowing that system to proceed uninterrupted by federal courts." *Id.* at 121. But despite paying lip service to the questions *Councilman* instructs courts to ask, the Court of Appeals missed their point. The dissenting opinion below already highlighted the basic errors in the majority's analysis. *See id.* at 138–39 (Tatel, J. dissenting). But to understand why those errors are sufficiently significant to warrant this Court's attention, it is helpful to unpack the theory behind—and purpose of—*Councilman* abstention.

As Justice Powell explained in *Councilman*, "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." 420 U.S. at 758. The *Councilman* Court's conclusion to this effect traced its origins to "two considerations of comity that together

favor abstention." *Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006).

First, "military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts." *Id.* (citing *Councilman*, 420 U.S. at 752). This was so, *Councilman* explained, because "the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past." *Councilman*, 420 U.S. at 757; *see also Parker v. Levy*, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."); *New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997) ("[T]he doctrine of comity aids the military judiciary in its task of maintaining order and discipline in the armed services.").

In this regard, *Councilman* was not a bolt from the blue, but rather a formalization of what had already been the courts' practice since Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950. Thus, as the second Justice Harlan explained six years before *Councilman*,

> [I]f we were to reach the merits of petitioner's claim for relief pending his military appeal, we would be obliged to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of

> Military Appeals itself. There seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider petitioner's arguments.

Noyd, 395 U.S. at 696; *see also Gusik v. Schilder*, 340 U.S. 128, 131–32 (1950) (deriving an exhaustion requirement from the structure of the UCMJ). *Councilman* abstention was therefore justified in part by the substantive separateness of courts-martial.

Second, *Councilman* abstention was also justified by the structural independence of courts-martial:

> [F]ederal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created "an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges completely removed from all military influence or persuasion. . . ."

Hamdan, 548 U.S. at 586 (quoting *Councilman*, 420 U.S. at 758) (further internal quotation marks omitted). So construed, "abstention in the face of ongoing court-martial proceedings is justified by [this Court's] expectation that the military court system established by Congress—with its substantial procedural protections and provision for appellate review by independent civilian judges—'will vindicate servicemen's constitutional rights.'" *Id.* (quoting *Councilman*, 420 U.S. at 758).

Although both principles of comity appeared necessary to the reasoning and result in *Councilman*,

neither is implicated by collateral pre-trial review of the Guantánamo military commissions. As in *Hamdan*, the first consideration of comity identified in *Councilman* does not apply here, because Petitioner "is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply." *Hamdan*, 548 U.S. at 587; *see also Obaydullah v. Obama*, 609 F.3d 444, 448 (D.C. Cir. 2010) ("The situation in *Councilman* was, of course, quite different from the one here—the ongoing trial of a member of the Armed Forces before a court-martial as opposed to the possible future trial of an alien detainee before a military commission."); *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005) ("*Councilman* and *New* hold only that civilian courts should not interfere with ongoing court-martial proceedings against citizen servicemen. The cases have little to tell us about the proceedings of military commissions against alien prisoners."), *rev'd on other grounds*, 548 U.S. 557 (2006).

Although the *Hamdan* Court's analysis of *Councilman*'s first consideration of comity stopped there, this conclusion is buttressed by the nature of the charges against Petitioner here—which, whatever their merits, could hardly be claimed to implicate "good order and discipline," 10 U.S.C. § 934, within the ranks of the U.S. military. *See Al-Nashiri II*, 835 F.3d at 139 (Tatel, J., dissenting) ("[J]udicial consideration of habeas claims related to ongoing military commission proceedings against alien unprivileged enemy belligerents for alleged violations of the laws of war threatens no similar relationship and implicates no similar expertise.").

And unlike many (if not most) offenses under the UCMJ, there is hardly any argument that the substantive law at issue in Petitioner's case (to say nothing of the merits question at issue here) is uniquely within the purview and expertise of military judges, since Congress has expressly authorized trial of such offenses in civilian courts, as well—through, *inter alia*, the War Crimes Act, 18 U.S.C. § 2441. *See Al-Nashiri II*, 835 F.3d at 139 (Tatel, J., dissenting) ("[M]ilitary commissions are primarily called upon to address questions about the laws of war, a body of international law hardly foreign to federal courts, and questions about the constitutional constraints on military commissions, an area in which Article III courts, *not* military courts, are especially expert." (citations omitted)). Simply put, the Guantánamo military commissions are in no better a position to answer the questions raised by Petitioner than the civilian courts.[3]

The Court of Appeals nevertheless held that abstention was warranted, focusing primarily on Congress's post-*Hamdan* enactment of the MCA, and how that factored into *Councilman*'s second consideration of comity. *Id.* at 125 ("Heeding the political branches' instruction as to the timing of Article III review qualifies as an 'important countervailing interest'

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[3] In addition, and in contrast to the court-martial system, legal rulings by the military commissions are subject to mandatory de novo review by Article III courts. *See* 10 U.S.C. § 950g(d). Thus, even if the legal questions presented in cases like Petitioner's *were* within the substantive expertise of the military judges adjudicating them, their resolution of those questions would receive no deference. *See post* at 10–11.

warranting abstention, at least where that instruction is based on those branches' assessment of national security needs.").

It was certainly *relevant* in *Hamdan* that, prior to the enactment of the MCA, "the tribunal convened to try Hamdan [was] not part of the integrated system of military courts, complete with independent review panels, that Congress has established." 548 U.S. at 587. But while the Court of Appeals viewed the enactment of the MCA as tilting the scales decisively in *favor* of abstention, there are three powerful reasons why the commissions created by the MCA still do not meet the considerations upon which *Councilman* relied.

First, and most importantly, Congress in the MCA gave the D.C. Circuit supervisory (and mandatory) appellate jurisdiction over the commissions—including the power to review all questions of law arising out of military commission findings and sentences on appeal from the Court of Military Commission Review. *See* 10 U.S.C. § 950g(d). In *Councilman*, by contrast, the court-martial at issue was subject only to direct review by the intermediate Army Court of Criminal Appeals and then the Article I Court of Military Appeals (today, the Court of Appeals for the Armed Forces, or CAAF), and *not* the Supreme Court.[4]

[4] Congress did not invest this Court with appellate jurisdiction over CAAF until eight years after *Councilman* was decided. *See* Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405–06 (codified as amended at 10 U.S.C. § 867a, 28 U.S.C. § 1259). Even today, that jurisdiction does not extend to all—or even most—

Thus, the civilian courts in *Councilman* were abstaining in favor of the hermetically separate trial and appellate structure that Congress had created expressly to preside over military appeals—a structure in which collateral challenges were the only avenue for judicial review outside the military justice system. *See* 420 U.S. at 746 ("Nor has Congress conferred on any Art. III court jurisdiction directly to review court-martial determinations. The valid, final judgments of military courts, like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have res judicata effect and preclude further litigation of the merits.").

Here, Congress did not make the military commissions *separate* from the civilian courts, but rather directly subservient thereto, in conscious and intentional distinction from courts-martial. Insofar as the commissions are therefore bound by the D.C. Circuit's case law, abstention would not accomplish anything, since the commission and the CMCR are both ultimately answerable to the same authority as the district court—the D.C. Circuit, reviewing questions of law de novo. Otherwise, abstention would have the effect of requiring the D.C. Circuit to defer to its own inferior courts.

Accordingly, although a lower Article III court's legal analysis may not bind a court-martial, *see, e.g.*, *Ctr. for Const. Rights v. United States*, 72 M.J. 126, 132 (C.A.A.F. 2013) (Baker, C.J., dissenting), there is no

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courts-martial. *See United States v. Denedo*, 556 U.S. 904, 909–10 (2009).

danger of inconsistent judgments under the MCA. By providing the D.C. Circuit with supervisory authority over the commissions, Congress expressly provided that that court's resolution of Petitioner's claims (through whatever vehicle) will bind the Guantánamo proceedings.

Second, the Court of Appeals also pointed to the MCA as proof that, "[b]y providing for direct Article III review of Al-Nashiri's jurisdictional challenge on appeal from any conviction in the military system, Congress and the President *implicitly* instructed that judicial review should not take place before that system has completed its work." *Al-Nashiri II*, 835 F.3d at 124 (emphasis added). This analysis completely overlooks the fact that "Congress and the President" in the 2009 revision to the MCA excised from the 2006 MCA a provision that *expressly* so instructed the courts by stripping federal jurisdiction over collateral challenges to military commissions.[5] As between a general

[5] As enacted in the 2006 MCA, 10 U.S.C. § 950j(b) provided that:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action. . . relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2623–24 (formerly codified at 10 U.S.C. § 950j(b)). When

provision authorizing post-conviction appeals and the repeal of a specific provision barring collateral pre-trial challenges, the latter certainly seems far more probative of the political branches' intent with respect to the timing of judicial review.

Third, separate from the unique structure of the MCA, there are serious questions about how well Congress in the MCA struck a "balance . . . between military preparedness and fairness." *Hamdan*, 548 U.S. at 586. Among other things, it remains unclear whether and to what extent the Bill of Rights even applies to defendants in the military commissions, *cf. Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009) (holding that the Due Process Clause does not apply to Guantánamo detainees), *judgment reinstated as amended by* 605 F.3d 1046 (D.C. Cir. 2010) (per curiam). And the D.C. Circuit, sitting en banc, has unanimously held that military commission convictions for material support and solicitation—which were unanimously upheld under de novo review by nearly a dozen trial and appellate judges within the military commission system—could not be sustained against an Ex Post Facto Clause challenge *even* under the highly deferential "plain error" standard. *See Al Bahlul v. United States*, 767 F.3d 1, 27–31 (D.C. Cir. 2014) (en banc).

Notably, in rejecting this argument below, the Court of Appeals did not defend the track record of the commissions or express confidence that the commissions *are* in a position to vindicate adequately the rights of

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Congress in 2009 replaced the 2006 version with a substitute, this provision was omitted.

defendants before them. It simply asserted that respect is due to *Congress*'s decision to create the military commissions, and that the commissions' track record is irrelevant to the abstention question unless it can be demonstrated that the underlying "scheme [is] unlawful or will prevent Al-Nashiri from fully defending himself." *Al-Nashiri II*, 835 F.3d at 123.

This Court has never suggested that the bar for deferring to the processes of non-Article III judicial systems is that low—and for good reason. Comity in this context is not about the respect due to the *legislature* that created the relevant judicial institution, but rather the respect due to fellow courts of record once they have demonstrated their ability to vindicate the rights of litigants before them. *See Hamdan*, 548 U.S. at 586. To hold otherwise is to convert comity into a doctrine that can be triggered by nothing more than legislative *ipse dixit*.

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The considerations of comity upon which *Councilman* relied simply are not present in the context of the Guantánamo military commissions—courts that are trying non-servicemember offenders for non-military offenses; that are subservient to (and not separate from) the civilian Article III courts; and that, to put it charitably, have not instilled confidence in their ability to vindicate adequately (or efficiently) the rights of defendants. *See, e.g.*, *Al-Nashiri II*, 835 F.3d at 138 (Tatel, J., dissenting). Certiorari is therefore warranted because the Court of Appeals' application of *Councilman* is clearly flawed. But far more significantly, certiorari is warranted because leaving the

Court of Appeals' analysis intact would threaten longer-term damage to broader understandings of an array of comity-based abstention doctrines, all of which are predicated on a proper understanding of when otherwise premature federal judicial intervention is appropriate.

II. Even if it Applies, *Councilman* Abstention Recognizes an Exception for Challenges to the Military's Jurisdiction.

Even if abstention in favor of the commissions might be appropriate in the abstract, this case falls into a recognized exception to *Councilman* abstention for challenges to the jurisdiction of the military tribunal. As *Councilman* itself noted, this Court has long refused to abstain from entertaining pre-trial challenges to the jurisdiction of military tribunals where the Court "did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented," and where "it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all." *Noyd*, 395 U.S. at 696 n.8; *see also New*, 129 F.3d at 644 ("[A] person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him."). *See generally Councilman*, 420 U.S. at 758–60 (discussing the exception).

Here, there can be little question that Petitioner raises a "substantial argument[] denying the right of the military to try [him] at all," one that, if true, would mean that "the military court has no jurisdiction over him." After all, the gravamen of his complaint is that the charges against him arose out of conduct that is not

triable by the MCA, which provides that "[a]n offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. § 950p(c); *see also id.* § 948a(9) (defining "hostilities" as "any conflict subject to the laws of war").[6]

Whether or not Petitioner is correct that the charged offenses all arose out of conduct that took place outside of "any conflict subject to the laws of war" (on which *amicus* takes no view), it is certainly the case that his argument to that effect is "substantial," that it goes to the military commission's subject-matter jurisdiction, and that it would, if proven, deny the military the right to try him for such conduct at all. *See, e.g.*, *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) (noting that a constitutional right not to be tried arises from "fundamental" defects in criminal proceedings).

Nor is it any response to conclude, as the Court of Appeals did, that the exception to abstention identified in *Noyd* is limited to circumstances in which a Petitioner is challenging his *status* as a basis for military jurisdiction, as opposed to whether the commission has

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[6] Petitioner's challenge is principally to the statutory subject-matter jurisdiction of the military commission. But if, contra his argument (and the statute's plain text), the MCA authorizes trials by military commission for offenses committed outside of the context of an "armed conflict," that conclusion (and Petitioner's challenge) would also raise constitutional questions, akin to those currently pending on certiorari before this Court in *Al Bahlul v. United States*, 85 U.S.L.W. 3544 (U.S. Mar. 28, 2017) (No. 16-1307), about Congress's power to depart from the laws of war.

subject-matter jurisdiction over the offenses with which he is charged. The abstention exception includes challenges to the subject-matter jurisdiction of military courts even in cases in which the military's jurisdiction over the offender is not in question. *See, e.g.*, *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 81 (1857) ("Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial. . . . In such cases, everything which may be done is void—not voidable, but void.").

Councilman itself proves the point: There, the Respondent sought to enjoin his pending court-martial on the ground that the charged offenses were not "service-connected," and therefore fell outside the military's constitutional subject-matter jurisdiction under *O'Callahan v. Parker*, 395 U.S. 258 (1969).[7] *See Councilman*, 420 U.S. at 759–60. Although the Court held that abstention was appropriate in Respondent's case, its conclusion was specific to the nature of the service-connection test, which "turn[ed] in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts." *Id.* at 760; *see also id.* ("These are matters of judgment that often will turn on the precise

[7] There will be few such challenges to contemporary courts-martial, since this Court overruled *O'Callahan* in *Solorio v. United States*, 483 U.S. 435 (1987), and held that servicemembers may constitutionally be subjected to military jurisdiction for any offense committed while part of the armed forces.

set of facts in which the offense has occurred. More importantly, they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts." (citation omitted)). If challenges to the subject-matter jurisdiction of a military court were more generally subject to abstention, there would have been no need for the Court to explain why abstention was especially appropriate there.

Even if challenges to the subject-matter jurisdiction of a court-martial were, contra *Councilman*, generally subject to abstention, similar challenges to military commissions present materially distinct considerations. As both the Court of Appeals and this Court explained in *Hamdan*, an array of Supreme Court decisions, especially *Ex parte Quirin*, 317 U.S. 1 (1942), provide "compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan*, 415 F.3d at 36; *see also Hamdan*, 548 U.S. at 588 ("[T]his Court's decision in *Quirin* is the most relevant precedent."). Although the government prevailed on the merits in *Quirin*, this Court saw no reason to wait for the military commission to finish their work, given that the petitioners challenged whether "the military tribunals have lawful authority to hear, decide and condemn." *In re Yamashita*, 327 U.S. 1, 8 (1946) (discussing *Quirin*); *see also Hamdan*, 548 U.S. at 588–89 (explaining how *Quirin* militates against abstention).

To be sure, most of the exemplar cases cited by the *Councilman* Court in support of the exception to abstention for jurisdictional challenges to military

tribunals *did* involve suits by civilians seeking to challenge Congress's constitutional authority to subject them to trial by court-martial, regardless of their offense. *See, e.g.*, *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *see also Councilman*, 420 U.S. at 759 ("The constitutional question presented turned on the status of the persons as to whom the military asserted its power.").

But as *Councilman* itself suggests, nothing in any of those decisions suggests that different considerations would apply when a military defendant seeks to challenge the military's authority to try the charged *offenses*. In both cases, the claim is that the military lacks lawful authority to try the case at hand—and so any resulting proceedings are not just voidable, but void. *See, e.g.*, *Dynes*, 61 U.S. (20 How.) at 81; *see also Councilman*, 420 U.S. at 748 & n.18; *cf. Parisi v. Davidson*, 405 U.S. 34, 41 (1972) ("Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks . . . would also be available to him *with reasonable promptness and certainty* through the machinery of the military judicial system . . . ." (emphasis added)).

The same logic explains why *Councilman* does not apply to a claim by a servicemember (who is otherwise subject to military jurisdiction) that his impending trial by court-martial would violate the Fifth Amendment's Double Jeopardy Clause. *See, e.g.*, *Watada v. Head*, 530 F. Supp. 2d 1136, 1147–49 (W.D. Wash. 2007) (citing *Abney v. United States*, 431 U.S. 651, 659 (1977)). So too,

here, where "allowing the [military trial] to go forward would not aid the military in developing the facts, applying the law, or correcting their own errors." *Id.* at 1147–48.

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All of the above explains why no Supreme Court decision has ever required abstention in the face of such a jurisdictional challenge to a military commission prosecution. By demanding that result here, the Court of Appeals not only misunderstood and misapplied this understanding, but it created a new precedent under which Article III courts should abstain from *all* pre-trial challenges to the subject-matter jurisdiction of all military courts. The importance of such a holding obviously goes well beyond this case—and warrants this Court's attention.

III. The Court of Appeals' Unjustified Expansion of *Councilman* Warrants Certiorari—and Reversal.

The Court of Appeals' analytically unsustainable expansion of *Councilman* abstention also makes little practical sense in this context—where, if left intact, it will likely only delay (for many years) the inevitable, *i.e.*, Article III consideration of the merits of Petitioner's jurisdictional objections. *See Al-Nashiri II*, 835 F.3d at 139 (Tatel, J., dissenting) ("The notion that federal courts should delay exercising their habeas jurisdiction out of respect for a system of rarely used and temporary tribunals strikes me as rather odd."); *see also PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 9 n.1 (D.C. Cir. 2016) ("It 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.") (rehearing en banc granted, order vacated Feb 16, 2017).

The potential costs of failing to resolve Petitioner's challenge at this stage are immense. If undisturbed, the Court of Appeals' decision will mean that Petitioner will face a (potentially *ultra vires*) capital trial, and the government, the defense, and the commissions will expend substantial resources on the pre-trial and trial-related proceedings, all while a cloud of jurisdictional uncertainty looms over the litigation. That specter, in its own right, would be enough to militate in favor of granting certiorari here, especially given the projection that such an appeal would not return to the Article III courts until at least 2024—22 years after Petitioner's initial capture by the United States. *See Al-Nashiri II*, 835 F.3d at 134.

Leaving the decision below intact will also have ramifications transcending the military commissions. Most obviously, as Part II explained, the expansion of *Councilman* will make it more difficult to raise pre-trial jurisdictional challenges in the court-martial system, where, for example, it is still unclear whether capital offenses must be service-connected, *see Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., concurring); *United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999), or for which offenses private military contractors may lawfully be tried under Article 2(a)(10) of the UCMJ, 10 U.S.C. § 802(a)(10). *See United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012). On the D.C. Circuit's view, those claims, too, no matter how serious (or even meritorious) could be raised only on a post-conviction appeal.

But as the Court of Appeals' own analysis in this case suggests, the proper understanding of a "right not to be tried" has implications far beyond pre-trial collateral attacks on military jurisdiction. Among other things, it is at the core of the collateral order doctrine under 28 U.S.C. § 1291, which recognizes that certain interlocutory trial-court rulings (such as the denial of an immunity defense) are effectively "final" for their own purposes (even if the litigation is continuing), and so should be subject to immediate, interlocutory appeal. *See, e.g.*, *Midland Asphalt*, 489 U.S. at 801–02; *see also Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106–07 (2009). Claims that implicate a defendant's "right not to be tried" typically fall within the collateral order doctrine, in both civil and criminal litigation. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 880 n.8 (1994) (explaining the relationship between the collateral order doctrine and a "right not to be tried," and noting that the relationship "operates '[s]imilarly' in civil cases").

If the Court of Appeals is correct, some "jurisdictional" challenges (such as whether a defendant's status renders him beyond the jurisdiction of a non-Article III military court) implicate a right not to be tried to a greater degree than others (such as whether a non-Article III military court lacks subject-matter jurisdiction over the charged offense). *See Al-Nashiri II*, 835 F.3d at 134. As Justice Scalia explained in *Midland Asphalt*, "[o]ne must be careful. . . not to play word games with the concept of a 'right not to be tried,'" 489 U.S. at 801, largely because of the doctrinal headaches such hair-splitting could produce. Given these

considerations, it is not difficult to see how the novel and artificial distinction created by the Court of Appeals in this case could cause mischief in cases geographically and substantively far removed from Guantánamo.

* *

This last point is why this Court's intervention at this stage is so vital. Unlike in *Al Bahlul*, the substantive question about the assertion of military commission jurisdiction in this case may only directly affect one defendant. But the Court of Appeals' unwarranted expansion of *Councilman* abstention will have far greater repercussions both within and without the unique context of military commissions—and, indeed, would also preclude this Court from resolving the major constitutional questions presented in *Al Bahlul* in any *other* case until another defendant is convicted for a post-MCA offense that is not a violation of the international laws of war.

Thus, although *amicus* is of the view that the Court of Appeals erred in abstaining from reaching the merits of Petitioner's challenge, we respectfully submit that, if this Court nevertheless agrees with the Court of Appeals' novel and potentially radical shift in abstention doctrine, it ought to grant certiorari and say so.

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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