

THE HONORABLE ROBERT S. LASNIK

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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE
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14 Lieutenant Commander CHARLES SWIFT, a
15 resident of the State of Washington, as next
16 friend for SALIM AHMED HAMDAN,
17 Military Commission Detainee,
18 Camp Echo,
19 Guantanamo Bay Naval Base,
20 Guantanamo Bay, Cuba,
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24 Petitioner,
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26 v.
27

28 DONALD H. RUMSFELD, United States
29 Secretary of Defense; JOHN D.
30 ALTENBURG, Jr., Appointing Authority for
31 Military Commissions, Department of Defense;
32 Brigadier General THOMAS L.
33 HEMINGWAY, Legal Advisor to the
34 Appointing Authority for Military
35 Commissions; Brigadier General JAY HOOD,
36 Commander Joint Task Force, Guantanamo,
37 Camp Echo, Guantanamo Bay, Cuba;
38 GEORGE W. BUSH, President of the United
39 States,
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44 Respondents
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NO. CV04-0777L

**PETITIONER'S OPPOSITION TO
MOTION FOR ORDER HOLDING
PETITION IN ABEYANCE**

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I. PRELIMINARY STATEMENT

This Court should deny Respondents' motion for multiple reasons. First, delay in legal proceedings is generally disfavored, but it is particularly inappropriate when the focus of the entire action is based on illegal and harmful delay. Petitioner's primary claim is that his right to a speedy trial has been violated, and that he is being held without charge under conditions (solitary confinement) that risk serious psychological injury. Respondents have not cited a single case that granted a request for delay under such circumstances. Indeed, in suggesting that the prejudice to Mr. Hamdan would be "minimal" if a stay is granted and that he would "suffer little" from it (Resp. Mot. at 8, 9), Respondents trivialize the gravity of the harm resulting from solitary confinement and the uncertainty Mr. Hamdan endures with each passing day.

Second, Respondents' arguments concerning judicial economy ignore the fundamental jurisdictional differences between this case and those brought by other detainees pending at the Supreme Court. The Petition in this case seeks a writ of mandamus, or, if mandamus is unavailable, a writ of habeas corpus. None of the other cases involve a request for mandamus. The jurisdictional basis for considering a request for mandamus is entirely separate and distinct from the jurisdictional basis for habeas. Thus, a decision by the Supreme Court some months from now on the extent of a district court's habeas jurisdiction will not impact or provide guidance on the primary relief requested by the Petition here. In addition, this case differs from all others in that Petitioner here is facing not simply illegal detention, but prosecution before an illegal military tribunal. The jurisdictional basis for review by an Article III court is different, and significantly stronger, under this set of facts.

1 Third, even if Petitioner's request for mandamus were ignored (as Respondents
2 apparently hope will be the case, based on their failure to even mention mandamus), and this
3 action were to be treated solely as a habeas proceeding, Respondents fail to cite the most
4 relevant habeas case, which establishes that stays in habeas proceedings are almost never
5 justified. *See Yong v. INS*, 208 F.3d 1116, 1119-20 (9th Cir. 2000) (refusing to hold habeas
6 petition in abeyance), attached hereto as Exhibit A. The same case also establishes that
7 district courts are under a duty to obey existing Ninth Circuit authority, and not to stay
8 proceedings to await a potentially contrary decision by the Supreme Court:
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16 [O]nce a federal circuit court issues a decision, the district courts within that
17 circuit are bound to follow it and have no authority to await a ruling by the
18 Supreme Court before applying the circuit court's decision as binding authority.
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21 *Id.* at 1119 n.2. The Ninth Circuit has held, in *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir.
22 2003), that the district courts have jurisdiction to consider habeas petitions from Guantanamo
23 detainees. Accordingly, this Court should proceed on the authority of *Gherebi*. Respondents'
24 request for a stay, to await a Supreme Court decision on a jurisdictional issue already decided
25 by the Ninth Circuit, invites this Court to disregard *Yong*. That invitation should be declined.
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31 II. ARGUMENT

32 A. Delay in Legal Proceedings is Extraordinary and Disfavored

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34 In moving for delay, Respondents "bear[] the burden of establishing [their] need."
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36 *Clinton v. Jones*, 520 U.S. 681, 708 (1997). As the Supreme Court noted in another case
37 relied upon by Respondents, *Landis v. North Am. Co.*, 299 U.S. 248, 255 (1936):
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41 [T]he suppliant for a stay must make out a clear case of hardship or inequity in
42 being required to go forward, if there is even a fair possibility that the stay for
43 which he prays will work damage to some one else. Only in rare circumstances
44 will a litigant in one cause be compelled to stand aside while a litigant in
45 another settles the rule of law that will define the rights of both.
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1 In this case, Respondents have failed to satisfy their heavy burden in showing a "clear case of
2 hardship or inequity in being required to go forward."
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5 **B. This Is a Petition for a Writ of Mandamus and Is Unaffected by the**
6 **Pending Supreme Court Cases**
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8 Respondents' claim that the Petition in this case concerns "the very same jurisdictional
9 issues" currently before the Supreme Court is vastly overstated. (Resp. Mot. at 8.) Petitioner
10 has not filed, as the Government characterizes it, a simple "next-friend habeas petition."
11 (Resp. Mot. at 4.) The assertion neglects, quite frankly, the very first page of the Petition as
12 well as the claims within it. Rather, the primary relief sought by Petitioner is through
13 mandamus. The only way in which a habeas issue would arise is if this Court were to decide,
14 on the merits, that mandamus is not available. The Supreme Court cases *Rasul* and *Al-Odah*
15 concern habeas corpus and the Administrative Procedure Act, not mandamus.
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18 As Petitioner's Supporting Memorandum shows at pp. 7-10, the jurisdictional analysis
19 for mandamus petitions is fundamentally different from that for habeas petitions, with 28
20 U.S.C. § 1361 governing mandamus and 28 U.S.C. § 2241 governing habeas. Courts have
21 traditionally reached mandamus petitions on the merits even when the petitioner is outside the
22 territorial jurisdiction of the United States. *See, e.g., Ahmed v. Dep't of Homeland Security*,
23 328 F.3d 383 (7th Cir. 2003).
24

25 In addition, the basis for jurisdiction here is different, and far stronger, than in *Rasul*
26 and *Al-Odah* because of the nature of the claim. As explained in Petitioner's Supporting
27 Memorandum, at 12-15, the case for civilian jurisdiction is at its apogee when the challenge
28 concerns not simple detention, but prosecution before a military tribunal. Federal courts have
29 consistently exercised jurisdiction to review claims by individuals that they have been, or are
30 about to be, improperly tried in a military court. *See, e.g., In re Yamashita*, 327 U.S. 1
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1 (1946); *Ex parte Quirin*, 327 U.S. 1 (1942); *United States v. Grimley*, 137 U.S. 147 (1890);
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3 *Ex parte Milligan*, 71 U.S. 2 (1866). Petitioner in this case asserts such a claim, which clearly
4 distinguishes this case from *Rasul* and *Al-Odah*.
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7 The primary relief sought in this lawsuit is to have Mr. Hamdan released from the
8 debilitating solitary confinement of Camp Echo, and returned to general detention at Camp
9 Delta. See Supporting Memorandum at 74. The plaintiffs in the Supreme Court, by contrast,
10 seek complete release from any detention. Were this Court to ultimately order, under its
11 habeas power, that Mr. Hamdan be released not only from Camp Echo, but from Camp Delta
12 as well, that would create similarity with the issues in *Rasul* and *Al-Odah*. But that point in
13 the litigation, when the issues might become similar, would necessarily occur only after this
14 Court decided many antecedent issues, including, of course, the procedural and substantive
15 issues involved in the challenge to the Camp Echo detention. If that moment were to arrive
16 before the Supreme Court decides *Rasul* and *Al-Odah*, then, and only then, should this Court
17 entertain Respondents' motion for a stay. The fact that two lawsuits might conceivably one
18 day possess similar issues is not a good reason to hold one in abeyance now.
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31 *Rumsfeld v. Padilla*, similarly, has no bearing on the Petition. Again, the critical
32 distinction is between actions for mandamus and habeas petitions. Mandamus, under the
33 Mandamus and Venue Act, 28 U.S.C. §§ 1361 and 1391(e), lies whenever a government
34 official owes a non-discretionary duty to the petitioner, regardless of the chain-of-command.
35 This is not a mere technical distinction – the rules that govern writs of mandamus are entirely
36 different and far more permissive than those that apply to habeas petitions. Lest there be any
37 doubt about this fact, Respondents themselves have admitted it: their brief in *Padilla* shows
38 that actions for mandamus are entirely different from habeas actions, and that the enactment
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1 of section 1391(e) was designed only to govern the former. *See* Brief for the Petitioner,
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3 *Rumsfeld v. Padilla*, S. Ct. No. 03-1027, at 25 (Ex. C. to Respondents' Motion).

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5 The history of the 1962 Mandamus and Venue Act clearly reveals that Congress
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7 wanted to enable suits just like this one. *See* Petitioner's Supporting Memorandum at 7-10,
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9 24-25; *Stafford v. Briggs*, 444 U.S. 527, 534 (1980); *Gilbert v. DaGrossa*, 756 F.2d 1455,
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11 1460 (9th Cir. 1985); *Jarrett v. Resor*, 426 F.2d 213, 216 (9th Cir. 1970); *Strait v. Laird*, 445
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13 F.2d 843, 845 n.2 (9th Cir. 1971) ("The territorial restraints which obtain in habeas do not
14
15 preclude mandamus jurisdiction."), *rev'd on other grounds*, 406 U.S. 341 (1972).

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17 Respondents can point to no case in which a court has rejected a mandamus petition
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19 on the habeas grounds present in *Padilla*. If sustained, Respondents' argument would restrict
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21 mandamus to a point where it could only be filed in the district in which the government
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23 official was located, which is not only incompatible with judicial precedents, *see, e.g., Laird*,
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25 445 F.2d at 845 n.2, but also does violence to the plain language of 28 U.S.C. § 1391(e), from
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27 which habeas petitions are exempted, *see Schlanger v. Seamans*, 401 U.S. 487, 490 n.4
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29 (1971), but mandamus petitions are not. *See United States ex rel. Rahman v. Oncology*
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31 *Assocs., P.C.*, 198 F.3d 502, 509 (4th Cir. 1999). Congress' rationale for this liberalization of
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33 mandamus was precisely to avoid having plaintiffs suffer the inconvenience of having to file
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35 each mandamus suit in Washington, D.C. *See Resor*, 426 F.2d at 216.

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37 Finally, to the extent this Court reaches the habeas issues in this case, they are quite
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39 different than those in *Padilla*. Even if *Padilla* loses his claim in the Supreme Court, he still
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41 has the ability to file a habeas action *somewhere*, e.g., in South Carolina (where he is
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43 currently being detained). The habeas issue in this case, to the extent one were to arise, is
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45 completely different. It concerns whether Respondents, sitting in the continental United
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47 States, can organize a deliberate campaign to contrive a physical location for a defendant

1 beyond the reach of the United States courts altogether. It is one thing to rule against Padilla,
2 knowing that he can simply refile his action somewhere else, but quite another to rule against
3 Petitioner and bar his access to the courts entirely. The gravamen of the argument against
4 Padilla is that if he can sue in New York, then he can engage in forum shopping in any other
5 district as well. But here, a jurisdictional ruling against Petitioner would give Respondents
6 the ability to "shop" for no forum at all by converting Guantanamo Bay, and any other place
7 without a sitting district court, into a legal black hole for purposes of the Great Writ. *See*
8 *Armentero v. INS*, 340 F.3d 1058, 1064-69 (9th Cir. 2003) (permitting habeas jurisdiction
9 against ultimate custodians); *Gherebi*, 352 F.3d at 1300-02 (same).

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19 The Government has routinely opposed similar motions to hold cases in abeyance
20 when even slight differences in the legal issues presented exist.¹ If reasons exist to depart
21 from the Government's position in these other cases, Respondents have not offered them.

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25 **C. To the Extent a Habeas Issue Exists, It Requires This Court to Deny the**
26 **Request for a Stay**

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28 The law of the Ninth Circuit is clear: requests to delay consideration of a habeas
29 petition are almost always impermissible. In *Yong*, 208 F. 3d at 1120, the Ninth Circuit
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35 ¹ *See, e.g.*, Brief of the United States in *Manges v. United States*, No. 97-315 (1997), available at
36 <http://www.usdoj.gov/osg/briefs/1996/w97315w.txt> (arguing that case should not be held pending Supreme
37 Court's resolution of *Edwards*); Brief of the United States in *Spallone v. United States*, No. 88-854 (1988),
38 available at <http://www.usdoj.gov/osg/briefs/1988/sg880228.txt> (similar); Brief of the United States in *Couch v.*
39 *United States*, No. 95-662 (1995), available at <http://www.usdoj.gov/osg/briefs/1995/w95662w.txt> (similar);
40 Brief of the United States in *Crossfield v. United States*, No. 90-6803 (1991), available at [http://www.usdoj.gov/](http://www.usdoj.gov/osg/briefs/1990/sg900265.txt)
41 [osg/briefs/1990/sg900265.txt](http://www.usdoj.gov/osg/briefs/1990/sg900265.txt) (similar). These briefs were filed in Supreme Court cases, where the case for
42 abeyance is stronger since the Justices themselves can easily determine whether a given case raises the same
43 issue as one in which certiorari has been granted. The United States has also previously opposed requests for
44 abeyances even when a case raises the exact same issue as another pending matter, on the ground that there are
45 alternative issues in the case that permit its disposition without reaching the issue common to the two cases. *See,*
46 *e.g.*, Brief of the United States in *Verala v. Ashcroft*, No. 02-74222 (9th Cir. 2003), available at 2003 WL
47 22716527, at 12 n.1. *See also* Brief for the United States in *Bhatti v. INS*, No. 00-60224 (5th Cir. 2000)
available at 2000 WL 34029664.

1 quoted the exact language from *Leyva* cited by the Respondents at pages 7-8 of its brief, and
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3 cited *Landis* as well. What Respondents fail to mention, however, is that the Ninth Circuit
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5 has found this generic *Leyva/Landis* principle *inapplicable to habeas corpus cases*.

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7 In *Yong*, the United States made the same argument that it does here, that the issues in
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9 the district court were already being heard by the Ninth Circuit in another pending matter.

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11 The Ninth Circuit reversed the district court's decision to grant the stay as an abuse of
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13 discretion. In making this determination, the court distinguished between habeas actions and
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15 other types of cases, and observed that "habeas proceedings implicate special considerations
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17 that place unique limits on a district court's authority to stay a case in the interests of judicial
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19 economy Special solicitude is required because the writ is intended to be a 'swift and
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21 imperative remedy in all cases of illegal restraint or confinement.'" 208 F.3d at 1119-20
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23 (citations omitted). *See also Aguirre v. Clark*, 109 F. Supp.2d 1228, 1233 (C.D. Cal. 2000).

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25 As noted above, *Yong* also requires district courts to obey existing Ninth Circuit precedent,
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27 and not await a potentially contrary Supreme Court decision. 208 F.3d at 1119 n.2.

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29 To be sure, the length of the stay in *Yong* was five months (and could have been
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31 longer). However, even one additional month in confinement at Camp Echo is particularly
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33 damaging. Unlike Mr. Hamdan, Mr. Yong was not subject to incarceration during the period
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35 of delay in his case—he was in a halfway house. *See id.* at 1118 & n.1.²

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37 Furthermore, *Gherebi v. Bush* stands for the proposition that lower courts should not
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39 delay their decisionmaking just because the Supreme Court has granted certiorari, and stands
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45 ² There are also reasons to doubt that the abeyance sought by the Government will be confined to three
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47 months. The Supreme Court might not fully decide the jurisdictional issues, remand the case to the lower courts
for additional determinations, reschedule the cases for additional oral argument, or grant certiorari in other cases
that the government might claim are related to this one.

1 for that proposition when the lower court is deciding the very same issue about Guantanamo.
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3 352 F.3d at 1304 (explicitly deciding to rule on whether Guantanamo detainees have access to
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5 writs of habeas corpus despite the fact that the Supreme Court had granted certiorari on that
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7 exact issue); *id.* at 1312-13 (Graber, J., dissenting) (arguing that the case should be held in
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9 abeyance). If the Ninth Circuit refused to hold its decision in abeyance when presented with
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11 the exact issues to be considered by the Supreme Court, then *a fortiori* this Court should
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13 decide this case without additional delay. After all, this Petition raises issues that are, at best,
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15 at the periphery of the pending high Court cases.

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17 Respondents assert that a stay would conserve judicial resources. However, even if
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19 the jurisdictional issue in this case were "the very same" as that presently before the Supreme
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21 Court (and it is not), no judicial resources will be wasted by proceeding because that issue has
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23 been resolved in this circuit and does not require extensive litigation. *Gherebi v. Bush*
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25 provides a clear rule of decision for this Court—habeas jurisdiction exists to contest
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27 detentions at Guantanamo Bay. The Supreme Court's stay of the mandate in *Gherebi*, *see*
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29 *Bush v. Gherebi*, 124 S. Ct. 1197 (2004), does not alter the crucial fact that *Gherebi* remains
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31 the binding law of this Circuit. *See* Petitioner's Supporting Memorandum at 11; *Wedbush*,
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33 *Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983).³ In any event, considerations
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35 of judicial economy do not weigh heavily when balanced against not only a man's liberty, but
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37 also his ability to assist in his own defense with all of his mental resources intact.

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42 ³ *See also Havens Protected "C" Clamps, Inc. v. Pilkington PLC*, 2000 WL 382027 (D. Kan. 2000) at
43 *5 ("[T]his court is bound by Tenth Circuit precedent That the United States Supreme Court has granted
44 *certiorari* on the issue . . . does not change that fact."); *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970)
45 (finding that a district court was without authority to defer habeas corpus actions pending before it to await a
46 ruling by the Supreme Court when the court could have ruled by following circuit precedent); *Presson v.*
47 *Slayden*, 570 F. Supp. 842, 848 (N.D. Ga. 1983) ("[T]he court has concluded that there is no reason to await the
Supreme Court's decision . . .").

1 *Gherebi* illustrates the proper response by courts in this circuit when presented with
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3 issues that might be raised in a pending Supreme Court case. Instead of trying to divine
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5 whether that issue will indeed be resolved by higher authority, the proper course is to decide
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7 the matter and then permit the Supreme Court to stay the mandate if appropriate.⁴ The
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9 Justices of the Supreme Court stand in the best position to decide whether a lower court
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11 proceeding raises the same issues that they are reviewing. This course of action prevents
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13 every problem alluded to by the Government, and also protects Mr. Hamdan's strong interest
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15 in avoiding further delay.⁵

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17 **D. Petitioner Would Be Gravely Harmed by a Stay**

18 The gravity of this Petition, which involves not only habeas but one in which illegal
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20 delay is its centerpiece, distinguishes it from the cases cited by Respondents. This is not the
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22 typical matter in which the impact of delay can be mitigated through adjustments of money or
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24 other entitlements after judgment. As the accompanying Declaration of Lt. Commander Swift
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26 establishes, Mr. Hamdan's condition is deteriorating. In April, he initiated a hunger strike in
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28 response to the conditions of his confinement. (Swift Decl. ¶ 9.) Without prompt
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30 intervention by this Court, Mr. Hamdan's condition and ability to defend himself at trial may
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36 ⁴ The recent district court decision in *Gherebi*, of course, is different from the situation here since it
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38 concerns, as the district court said, "the same threshold jurisdictional issue" as that pending in the Supreme
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40 Court. (Order at 2, Resp. Mot., Ex. B.) And it is also one in which the Supreme Court had stayed the mandate
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42 of the Ninth Circuit in that very case. It is also significant that the decision was made ex parte, evidently without
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44 briefing by Mr. Gherebi's lawyers as to possible argument on the other side.

45 ⁵ Contrary to Respondents' unsupported assertion, there are no significant "inter-branch comity and
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47 separation-of-powers concerns" if this case moves forward. (Resp. Mot. at 9.) Respondents provide no
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49 authority or argument to justify that claim. Indeed, it is ironic that Respondents invoke Separation of Powers as
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51 a reason for delay; for it is their own conduct in promulgating the Military Order, detaining Mr. Hamdan to face
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53 a military tribunal not authorized by statute, and attempting to deny any review by an Article III court that poses
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55 the far greater risk to the Separation of Powers.

1 be irretrievably damaged. The Ninth Circuit has already explained that delays do not carry
2 "minimal" harm in which individuals "suffer little." *See, e.g., McNeely v. Blanas*, 336 F.3d
3 822, 832 (9th Cir. 2003) (finding speedy trial violation because of the "oppressive pretrial
4 incarceration" during which "the defense has been hindered by the passage of time" and "the
5 vagueness of the charges, which . . . compounds the difficulty of proving a defense after the
6 passage of much time"). All of the factors identified by the court in *McNeely* are present here
7 in aggravated form. *See also Maxwell v. Mason*, 668 F.2d 361, 363 (8th Cir. 1981) (finding
8 imposition of solitary confinement for even a few days to impose severe burdens). To
9 compound the preexisting illegal delay in this case by imposing even further delay is
10 tantamount to prejudging Petitioner's centerpiece claim before it is considered on the merits.
11

12 Respondents do not offer a single case granting a stay that bears any similarities to this
13 one. The Government offers, as its first case, *Clinton v. Jones*, 520 U.S. 681 (1997). The
14 citation speaks volumes, for the cornerstone of the *Jones* holding was the concern that
15 delaying a proceeding for money damages can risk irreparable harm to a party. In *denying* the
16 defendant's request for a stay, the Court stated that "a lengthy and categorical stay takes no
17 account whatever of the respondent's interest in bringing the case to trial," and that "delaying
18 trial would increase the danger of prejudice." *Id.* at 707-08.
19

20 The government's case is certainly not strengthened by its next case cited, *Landis v.*
21 *North Am. Co.*, 299 U.S. 248 (1936). In that case, the Supreme Court held that the district
22 court abused its discretion in granting a stay to await the outcome of the Supreme Court's
23 decision on a particular issue. *Id.* at 256. They arrived at that holding *despite the*
24 *government's agreement to stay enforcement of the statute being challenged* in parallel suits,
25 so that the plaintiffs suffered little. *Id.* at 251 (stating that the Attorney General would not
26 enforce the statute while the matter was pending). In this case, by contrast, the Government
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1 makes no attempt to mitigate the consequences of its request for delay. In addition, it should
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3 be noted that the language cited by Respondents from *Landis* concerned horizontal deferral
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5 (when one district court stays an action until a second district court decides a parallel case),
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7 rather than vertical deferral (when a district court stays a case until a higher court has resolved
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9 a parallel legal issue in a different case). Indeed, *Landis* explicitly decided that, on the facts
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11 before it, a vertical deferral was an abuse of discretion. *Id.* at 256.⁶

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13 The other cases cited by Respondents, *United States v. Toliver*, 351 F.3d 423 (9th Cir.
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15 2003) and *Hensala v. Dep't of Air Force*, 343 F.3d 951 (9th Cir. 2003) are readily
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17 distinguished. These cases, which do not involve habeas or mandamus, are from the Court of
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19 Appeals, occurring after the district court had already built a factual record. Delay in
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21 consideration of the legal issues resulted in minimal prejudice to the parties. In this case, by
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23 contrast, abeyance would delay discovery proceedings, thereby prejudicing (and, due to
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25 mental deterioration, perhaps eviscerating) the defendant's ability to make his case. In
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27 addition, both *Hensala* and *Toliver* were cases of first impression, where there was no binding
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29 Ninth Circuit law on the particular issues being addressed. *See Toliver*, 351 F.3d at 426;
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31 *Hensala*, 343 F.3d at 955-57. In this case, by contrast, the jurisdictional law is clear.⁷

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33 This lack of support for the Government's motion is the logical outcome of the fact
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35 that, unlike other claims, rights of speedy trial are centered on the harm of delay. Mr.
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39 ⁶ Like *Landis*, *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857 (9th Cir. 1979), does not address
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41 the question of whether district courts should stay proceedings when the Supreme Court settles a background
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43 question. Rather, *Leyva* concerns the efficiency of staying duplicative factfinding proceedings (in that case, in
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45 arbitration). In this case, by contrast, there is no indication that the facts necessary to resolve this Petition will
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47 be found by the Supreme Court, and the Supreme Court is not a factfinding body in any event.

⁷ The Government also cites *Majors v. Abell*, 361 F.3d 349, 352 (7th Cir. 2004) and *Marshel v. AFW
Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977) (per curiam). These cases are distinguishable for reasons
similar to those stated, and do not govern courts in this circuit in any event.

1 Hamdan has languished for more than two years in U.S. military custody without a hearing or
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3 even a charge against him. Further delay not only inflicts additional harm⁸ caused by solitary
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5 confinement, it also unfairly prejudices the merits of the central claim raised by his Petition.
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7 If the Government is truly concerned about avoiding an adjudication in this case for
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9 the next three months, then it is duty-bound, as the cases it relies upon demonstrate, to
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11 mitigate the harm Mr. Hamdan will suffer in the interim.⁹ At the very least, therefore, no stay
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13 should be granted unless Respondents agree to release Mr. Hamdan from oppressive pre-trial
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15 solitary confinement and return him to Camp Delta until this Court ultimately resolves the
16
17 Petition. In addition, discovery should proceed and Respondents should move forward to
18
19 brief the issues raised by the Petition.
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21 Instead of delaying proceedings per the Government's request, Petitioner respectfully
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23 asks this Court to expedite them. Mr. Hamdan has waited long enough for his day in court.
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35 ⁸ In fact, the United States has previously opposed requests for abeyances on precisely this ground.
36 *See, e.g.*, Brief of the United States in *Palacios v. Ashcroft*, No. A70 781 394 (9th Cir. 2003), *available at* 2003
37 WL 22752677 (arguing that abeyance is improper because of the harm of delay). It also opposed abeyance in a
38 case in which the petitioner made a very similar argument: that resolution of other pending cases "may be
39 dispositive of the issues in the instant petition for review. To the extent additional or different issues are
40 presented in this petition for review, the parties will be better able to address those issues in light of the court's
41 decision." Brief of Huerta-Ponce in *Huerta-Ponce v. United States*, No. 02-73157 (2003), at 19, *available at*
42 2003 WL 22752789. *See* Brief of United States in *Huerta-Ponce v. United States*, No. 02-73157 (2003), at 19,
43 *available at* 2003 WL 22752794, at 25 ("the Court should not hold this case in abeyance").
44

45 ⁹ In fact, Petitioner's counsel has informed the Government that Petitioner will not oppose the requested
46 stay if the Government agrees to take steps necessary to mitigate the damage certain to arise from delay. *See*
47 letter from counsel, attached as Ex. A to the Declaration of Harry H. Schneider, Jr., submitted herewith.

1 Respectfully submitted this 3rd day of May, 2004.
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4 **NEAL KATYAL**

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6
7 By /s/
8 Neal Katyal, D.C. Bar #462071
9 600 New Jersey Avenue, NW
10 Washington, D.C. 20001
11 (202) 662-9000
12 Attorney for Petitioner
13
14

15
16 **LIEUTENANT COMMANDER CHARLES SWIFT**

17
18
19 By /s/
20 Lieutenant Commander Charles Swift
21 N.C. Bar #21084
22 Petitioner, as Next Friend for Salim Ahmed Hamdan
23
24
25

26
27 **PERKINS COIE LLP**

28
29
30 By /s/ Harry H. Schneider, Jr.
31 Harry H. Schneider, Jr., WSBA #9404
32 Joseph M. McMillan, WSBA # 26527
33 David R. East, WSBA #31481
34 Charles C. Sipos, WSBA #32825
35 Attorneys for Petitioner
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this 3rd day of May, 2004, I caused to be served a true and correct copy of **Petitioner's Opposition to Motion for Order Holding Petition in Abeyance** upon the following, at the addresses stated below, via the method of service indicated:

Mr. John McKay	<u> X </u>	Via hand delivery
Brian C. Kipnis	—	Via Certified Mail, Return Receipt Requested
U.S. Attorney's Office	—	Via Overnight Delivery
601 Union Street, Suite 5100	—	Via Facsimile
Seattle, WA 98101	—	Via E-filing
Jonathan L. Marcus	—	Via hand delivery
Appellate Section, Criminal Division	—	Via Certified Mail, Return Receipt Requested
U.S. Department of Justice	—	Via Overnight Delivery
601 D Street, N.W., Suite 6206	—	Via Facsimile
Washington, D.C. 20530	—	Via E-filing

DATED at Seattle, Washington, this 3rd day of May, 2004.

PERKINS COIE LLP

By /s/ Harry H. Schneider, Jr.
Harry H. Schneider, Jr., WSBA #9404
Joseph M. McMillan, WSBA # 26527
David R. East, WSBA #31481
Charles C. Sipos, WSBA #32825
Attorneys for Petitioner