Nos. 16-961, 16-1017, and 16-1423

In the Supreme Court of the United States

NICOLE A. DALMAZZI, *Petitioner*,

v.

UNITED STATES, *Respondent*.

LAITH G. COX, *ET AL.*, *Petitioners*,

v.

UNITED STATES, *Respondent*.

KEANU D.W. ORTIZ, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Armed Forces

MOTION OF PROFESSOR ADITYA BAMZAI FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE* AND FOR DIVIDED ARGUMENT

ADAM J. WHITE
1399 New York Ave., NW
Suite 500
Washington, DC 20005
(202) 760-3213
ajwhite@stanford.edu

ADITYA BAMZAI
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
(434) 243-0698
abamzai@law.virginia.edu

Counsel for Amicus Curiae

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

Professor Aditya Bamzai respectfully seeks leave to participate in oral argument under Rule 28.7, as *amicus curiae* in support of neither party, for 10 minutes (or for such time as the Court deems proper) in addition to the time allocated to the parties. Granting this motion would materially assist the Court by providing adversary presentation of a significant jurisdictional issue on which the parties likely agree. Both the government and the petitioners take no position on this motion, except that both would oppose the motion insofar as it results in any reduction in their argument time.

1. As described in *amicus*' brief, there is a significant question whether this Court has Article III jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Armed Forces ("CAAF") under 28 U.S.C. § 1259. Article III limits this Court's original jurisdiction to enumerated categories of "Cases" and grants this Court appellate jurisdiction "[i]n all other cases." U.S. Const. art. III, § 2. As the government acknowledges, "[i]t has been settled since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), that Congress may not expand the original jurisdiction conferred by Article III," such as, for example, by authorizing this Court "to issue a writ of mandamus" directly to "an Executive Branch officer." Gov't Br. 46. That principle is at stake in these cases because the CAAF, though called a "court" by statute, is an "Executive Branch entity," rather than an Article III court with the Constitution's structural protections for judges. *Edmond* v. *United States*, 520 U.S. 651, 664 & n.2 (1997). Leading treatises have recognized the problem posed by *Marbury* and this Court's direct review of the Executive Branch, including the CAAF. *See* Richard H. Fallon, Jr. *et al.*, *Hart and Wechsler's The Federal Courts and the Federal System* 294 (7th ed. 2015) (observing that a "question about the Supreme Court's jurisdiction to review a criminal conviction before a military tribunal is raised by 28 U.S.C.

§ 1259"); 16B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4005, p. 149 & n.16 (3d ed. 2012) (acknowledging "a major theoretical uncertainty as to the nature of the tribunals whose action is so far judicial that initial revisory jurisdiction [in the Supreme Court] qualifies as 'appellate'"); Louis L. Jaffe, *Judicial Control of Administrative Action* 263 n.5 (1965) (noting that "it would appear that the Supreme Court of the United States cannot be made the first reviewing court" of agency action).

2. This Court must address this threshold question in these cases. Although the Court directed the parties to address a separate jurisdictional question (which relates to the proper interpretation of section 1259) in the *Dalmazzi* and *Cox* cases, that *statutory* jurisdictional ground is not relevant to the *Ortiz* case. *See* Gov't Br. 15-16, 41-51. Accordingly, in at least *Ortiz*, this Court must address the Article III issue that *amicus* has raised before reaching petitioner's claims.

3. When the Court addresses that threshold Article III question, it will likely find the parties in agreement. The government believes that this Court has jurisdiction in *Ortiz* and, consistent with the Department of Justice's longstanding view of its legal obligations, contends at length in its brief that section 1259 is constitutional. Gov't Br. 2, 45-51; *see id.* at 45 ("Section 1259 is a valid grant of appellate jurisdiction, and this Court therefore has jurisdiction in *Ortiz*."); *cf. The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 55 (1980) ("[I]t is almost always the case that [the Attorney General] can best discharge the responsibilities of his office by defending and enforcing the Act of Congress."). Although petitioners have yet to address *amicus*' argument, they have invoked the jurisdiction of this Court (Pet. Br. 3-4) and can be expected to agree with the government's

position, if not all of the government's reasoning, on this issue. As a result — and contrary to *amicus*' argument that section 1259 is an unconstitutional enlargement of this Court's original jurisdiction — the parties likely agree that the Court has Article III jurisdiction to resolve *Ortiz*.

4. The Court has regularly appointed an *amicus* to argue in support of a significant jurisdictional position that neither party advances. *See, e.g.*, *United States* v. *Windsor*, 133 S. Ct. 2675, 2685 (2013); *Sebelius* v. *Auburn Regional Medical Center*, 568 U.S. 145, 155-56 (2013); *NFIB* v. *Sebelius*, 567 U.S. 519, 543-46 (2012); *Kucana* v. *Holder*, 558 U.S. 233, 243-49 (2010); *Forney* v. *Apfel*, 524 U.S. 266, 268, 272 (1998); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 207-08, 210 n.9 (1968). More broadly, the Court has also granted leave to private *amici* to participate in oral argument when doing so promises to enhance this Court's consideration of the issues. *See, e.g.*, *Pac. Bell. Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 447 (2009); *Alabama* v. *Shelton*, 535 U.S. 654, 660-61 (2002); *Hohn* v. *United States*, 524 U.S. 236, 240-41 (1998). In this instance, adversarial testing before this Court is particularly necessary because no other Court can consider the scope of this Court's original and appellate jurisdiction.

5. The government's brief in this case highlights the need for adversarial testing of the arguments on the jurisdictional issue. The government observes (as did *amicus*, *Amicus* Br. 23-26) that this Court may exercise "appellate jurisdiction" directly from non-Article III courts in the federal territories (U.S. Const. art. IV, § 3, cl. 2) and the District of Columbia (U.S. Const. art. I, § 8, cl. 17). Gov't Br. 16, 48-51. According to the government, "*[f]or the same reason*, Section 1259 is a valid grant of appellate jurisdiction over the decisions of the CAAF." Gov't Br. 16 (emphasis added); *see id.* at 49 ("The system of courts-martial Congress has established . . . stands

on similar footing."); *cf. id.* at 50 (leaving open the possibility that "Congress could confer jurisdiction on the Court to review directly the decisions of other non-Article III tribunals" in the federal agencies). The government's argument appears to rest on the premise that Congress's authority to legislate for the court-martial system is coterminous with Congress's authority to legislate in the territories and the District of Columbia.

If accepted by this Court, that premise would have dramatic implications for the military court system, in light of the United States' view that ordinary separation-of-powers principles do not apply within the territories and the District of Columbia. For example, the United States is currently contending in other pending litigation that the Appointments Clause, which prescribes the method of appointment for all "officers of the United States" whose appointments are not otherwise provided for in the Constitution (U.S. Const. art. II, § 2, cl. 2), "does not govern the appointment of territorial officers." United States' Mem. of Law in Support of the Constitutionality of PROMESA, at pp. 1, 7, *In re The Financial Oversight & Management Board for Puerto Rico*, No. 17 BK 3283-LTS (D. Puerto Rico filed Dec. 6, 2017). In that context, the United States has argued, "Congress's authority over the territories is plenary and not subject to the complex distribution of powers that regulate the Federal Government." *Id.* at 8 (emphasis removed); *see id.* at 2 (reasoning that the "structural constitutional constraints similar to those imposed by the Appointments Clause are inapplicable to Congress's governance of the territories and the District of Columbia"), quoting *Puerto Rico* v. *Sanchez-Valle*, 136 S. Ct. 1863, 1876 (2016) (noting Congress's "broad latitude to develop innovative approaches to territorial governance"), and *Palmore* v. *United States*, 411 U.S. 389, 398 (1973) (Congress may legislate

for the territories "in a manner . . . that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it"). If, as the government argues here, the departures from the Constitution's "complex distribution of powers" that are acceptable in the territories are also acceptable, *a fortiorari*, when Congress establishes military tribunals, then there would be a serious question whether the Appointments Clause applies to the judges of the CAAF.

Amicus understands that leave is rarely granted, as the Court can usually rely on the parties' presentation of the issues. Here, however, the parties agree on a vital jurisdictional question, with implications for the correct interpretation of Article III, for the proper place of the federal territories in the constitutional scheme, and for the scope of *Marbury* v. *Madison*. *Amicus* respectfully submits that, under these circumstances, the Court would benefit from adversarial oral argument.

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Respectfully submitted,

ADAM J. WHITE
1399 New York Ave., NW
Suite 500
Washington, DC 20005
(202) 760-3213
ajwhite@stanford.edu

ADITYA BAMZAI
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
(434) 243-0698
abamzai@law.virginia.edu