No. 19-108

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL J. D. BRIGGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 19-108

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL J. D. BRIGGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

The Court of Appeals for the Armed Forces (CAAF) reversed respondent's rape conviction on the theory that the rape was not "punishable by death" for statute-of-limitations purposes, 10 U.S.C. 843(a) (2000), even though military law provided that rape could be "punished by death," 10 U.S.C. 920(a) (2000). Although respondent tries (Br. in Opp. 1) to "question" whether this Court has jurisdiction to correct that manifest error, even he does not actually contend that it is insulated from this Court's review. Nor could he, as it is the very ground on which the CAAF reversed his conviction, after he himself successfully obtained a remand from this Court that required the CAAF to consider the issue. And respondent's merits defense of the CAAF's decision simply repeats the CAAF's own mistakes: its disregard of the plain statutory language that its precedents had correctly interpreted; its assumption that constitutional limits on the punishment of civilian rape

carry over to military rape; and its insistence on giving the narrowest possible scope to a 2006 amendment in which Congress reiterated its position that *all* post-1986 rapes may be prosecuted at any time. The question presented, although not implicated in an extraordinary number of cases, is now presented in three cases currently before this Court, affects future investigations of all-too-common late-discovered rapes, and is of exceptional importance to military discipline and justice. This Court should grant the petition for a writ of certiorari and reverse.

A. This Court Has Jurisdiction To Review The Question Presented

Respondent's principal argument for denying certiorari is his suggestion (Br. in Opp. 1) of "a serious question as to whether" 28 U.S.C. 1259(3) "provides this Court with jurisdiction over the bulk of the [p]etition." As demonstrated by the history of this case—in which this Court has *already* granted certiorari, at respondent's request, and remanded for consideration of the question now presented—that suggestion is insubstantial.

As a threshold matter, even if Section 1259(3) were not a proper basis for certiorari jurisdiction here, 28 U.S.C. 1259(4)—which vests this Court with jurisdiction over CAAF "[d]ecisions" in "[c]ases * * * in which the" CAAF "granted relief"—would independently support review. This Court has explained that "relief" in Section 1259(4) "encompasses any 'redress or benefit' provided by a court," including a remand for reconsideration. *United States* v. *Denedo*, 556 U.S. 904, 909 (2009) (citation omitted). Reversal of respondent's conviction and dismissal of the rape charge certainly qualify as "relief," and the Court accordingly has jurisdiction to review whether

the "[d]ecision[]" to order such relief was proper. 28 U.S.C. 1259(4).

In any event, as stated in the petition (Pet. 1), this Court also has jurisdiction to resolve the question presented under 28 U.S.C. 1259(3), which permits review of CAAF "[d]ecisions" in "[c]ases in which" it "granted a petition for review." Respondent does not dispute that this is a "[c]ase[]" in which the CAAF "granted a petition for review." *Ibid.* And he agrees (Br. in Opp. 9-10) that Section 1259(3) authorizes jurisdiction over at least *part* of the statute-of-limitations issue in this case—namely, the CAAF's rejection of the government's contention that the lifetime statute of limitations for rape enacted in 2006 governs this case. He suggests (*id.* at 4, 6-11) only that the scope of the CAAF's "[d]ecision[]" for Section 1259(3) purposes might not encompass the antecedent issue of whether the pre-2006 statute of limitations for rape was likewise unlimited. That suggestion—which even respondent does not fully endorse—is unsound.

As respondent notes (Br. in Opp. 4, 6-11), the government has previously explained that certiorari jurisdiction under Section 1259(3) is limited "to issues actually decided by the CAAF." Br. in Opp. at 11, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (No. 18-306) (*Larrabee* Opp.). That rule, however, does not create any impediment to reviewing all of the issues identified in the petition here. The CAAF's decision in this case, which reversed respondent's conviction on statute-of-limitations grounds, necessarily "decided" the entire statute-of-limitations issue encompassed by the question presented. Respondent asserts (Br. in Opp. 4, 6-11) that the CAAF did not actually "decide" the pre-2006 issue because it had already addressed that issue in *United States* v. *Mangahas*, 77 M.J. 220 (2018). But the

CAAF expressly sought briefing on, and decided that, respondent could "successfully raise a statute of limitations defense for the first time on appeal," Pet. App. 6a (capitalization omitted)—an issue that necessarily includes the question whether he has a valid statute-of-limitations defense at all.

Even on respondent's crabbed view of the issues before the CAAF (Br. in Opp. 4, 6-11), the correctness of *Mangahas* would be an issue "predicate to an intelligent resolution of" them, *United States* v. *Grubbs*, 547 U.S. 90, 94 n.1 (2006) (citation omitted), and thus properly within the scope of the CAAF's decision. Respondent's efforts to equate the government's petition here with the petition in *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019), are misconceived. The CAAF's decision in *United States* v. *Larrabee*, 78 M.J. 107 (2018), cert. denied, 139 S. Ct. 1164 (2019), affirmed a criminal conviction in light of its decision in *United States* v. *Dinger*, 77 M.J. 447 (C.A.A.F.), cert. denied, 139 S. Ct. 492 (2018), which addressed whether a dishonorable discharge was a statutorily permissible sentence for a military retiree, *id.* at 448. The government contested this Court's jurisdiction because the petitioner in *Larrabee* sought review on the wholly separate question of whether the Constitution provided jurisdiction for his court-martial. Pet. at i, *Larrabee*, *supra* (No. 18-306). That question was not "part of" the CAAF's decision. *Larrabee* Opp. at 10; cf. *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 (1993) (per curiam) (declining to review "a threshold inquiry that in no way depends on the merits of the case") (citations and internal quotation marks omitted). Here, in contrast, the CAAF necessarily "decided," *Larrabee*

Opp. at 11, that "a five-year period of limitations" applied to respondent's case, Pet. App. 7a. Indeed, if it did not do so, then it had no basis for reversing respondent's conviction.

The procedural history of this case confirms that the CAAF's decision incorporates its resolution of respondent's claim that the Uniform Code of Military Justice (UCMJ) had only a five-year statute of limitations before 2006. As the petition recounts (Pet. 9-10), this case was pending in this Court on respondent's petition (No. 17-243) raising a separate issue when *Mangahas* was decided. After this Court decided the question presented in respondent's petition adversely to respondent, see *Ortiz* v. *United States*, 138 S. Ct. 2165, 2170 (2018), the Court—at respondent's urging—nonetheless granted his petition, vacated the CAAF's prior decision, and remanded "for further consideration in light of * * * *Mangahas*," 139 S. Ct. 38. In other words, the Court granted respondent's request to remand the case *for the specific purpose* of allowing respondent to argue that his conviction should be overturned on the ground that the statute of limitations had expired after five years. It makes no sense to say—and respondent does not actually contend—that this Court had jurisdiction to remand for consideration of whether a five-year statute of limitations should apply, but no jurisdiction to review whether the resulting application of the five-year statute of limitations was correct. Respondent's current noncommittal suggestion (Br. in Opp. 1) of a jurisdictional "question" accordingly identifies no actual imped-

iment to plenary review of the entire question presented. Cf. *Denedo*, 556 U.S. at 909-910 (reviewing case notwithstanding insubstantial jurisdictional objection).*

B. The CAAF Erred In Reversing Respondent's Conviction

As explained in the petition (Pet. 11-22), the CAAF's decision reversing respondent's conviction for an admitted rape is triply misguided. First, as the CAAF correctly recognized for two decades, Congress's reference to offenses "punishable by death" in the UCMJ limitations provision refers to offenses that *Congress* understood to be punishable by death. 10 U.S.C. 843(a) (2000). Second, even if the CAAF were correct that "punishable by death" means whatever a court may later determine to be not only statutorily, but also constitutionally, punishable by death, rape *is* constitutionally punishable by

* Even if some question existed as to this Court's authority to review the entire question presented in this case, the Court could grant plenary review in one of the other cases currently pending with the same question presented, see *United States* v. *Collins*, No. 19-184 (filed Aug. 9, 2019) (seeking review in two similar cases), and then dispose of this petition in light of the result. If the Court were to agree with the government's position on the pre-2006 statute of limitations in one of those other cases, it could then grant this petition, vacate the decision below, and remand for reconsideration—just as it did at respondent's request before. 139 S. Ct. 38. And if the Court were to disagree with the government's position on the pre-2006 statute of limitations, it could grant certiorari here to consider the effect of the 2006 amendment, an issue that respondent agrees (Br. in Opp. 9-10) this Court has jurisdiction to decide. But the easiest course is simply to grant both this petition and the petition in *Collins*, so that the Court can consider the full range of possible dispositions. See Pet. at 16-17, *Collins*, *supra* (No. 19-184) (proposing this approach). Respondent identifies no meaningful reason to doubt the Court's authority to do so.

death in the military-justice system in light of its distinctive harms to military morale and effectiveness. *Ibid.* Third, Congress in 2006 expressly codified the CAAF's longstanding position that "rape * * * may be tried and punished at any time without limitation," 10 U.S.C. 843(a) (2006), and intended that provision to apply to offenses—like respondent's—committed shortly before its passage. Respondent offers no substantial response to any of these points.

1. On the meaning of "punishable by death" in 10 U.S.C. 843(a) (2000), respondent largely repeats (Br. in Opp. 12-13) the CAAF's assertion that the plain language of that phrase incorporates the judiciary's constitutional capital-punishment jurisprudence. But that interpretation is one that the CAAF itself unanimously rejected for 20 years. See *United States* v. *Stebbins*, 61 M.J. 366, 369 (2005); *Willenbring* v. *Neurauter*, 48 M.J. 152, 178-180 (1998). And the plain language of the statute supports that longstanding construction over the new reading.

A statute of limitations "reflects a policy judgment *by the legislature* that the lapse of time may render criminal acts ill suited for prosecution." *Smith* v. *United States*, 568 U.S. 106, 112 (2013) (emphasis added). Here, the legislature expressly specified that rape could be "punished by death." 10 U.S.C. 920(a) (2000). The natural inference is that Congress understood rape to be a crime "punishable by death" for statute-of-limitations purposes. 10 U.S.C. 843(a) (2000); see S. Rep. No. 331, 99th Cong., 2d Sess. 249 (1986) (reflecting that understanding). Respondent offers no basis to conclude that Congress, rather than cross-referencing its own determination of the crimes "punishable by death," instead rendered the statute of limitations dependent on an

evolving body of constitutional law explicated by a different branch of government. In particular, respondent identifies no reason for Congress to divest itself of the control and certainty that a straightforward application of the UCMJ's own terms would provide.

2. Even if respondent were correct (Br. in Opp. 13-14) that the limitations statute's reference to "punishable by death" meant *constitutionally* punishable by death, it would still have included rape, which was constitutionally punishable by death in the military-justice system. See Pet. 16-20.

Respondent asserts (Br. in Opp. 13) that the CAAF "follow[ed] this Court's precedent" by transposing *Coker* v. *Georgia*, 433 U.S. 584 (1977), from the civilian system to the military system. That is incorrect. This Court has "not decide[d] whether certain considerations might justify differences in the application of the [Eighth Amendment] to military cases." *Kennedy* v. *Louisiana*, 554 U.S. 945, 947-948 (2008) (statement of Kennedy, J., respecting the denial of rehearing); accord *Loving* v. *United States*, 517 U.S. 748, 752-755 (1996) (reserving same question). It is thus an open question whether *Coker* applies to military rape; for the reasons explained in the petition, it does not.

Respondent also contends (Br. in Opp. 13-14) that the death penalty for military rape is barred by the UCMJ's own prohibition on "cruel or unusual punishment" in Article 55, 10 U.S.C. 855. That contention is likewise mistaken. To whatever extent Article 55 might "generally incorporate[] this Court's civilian Eighth Amendment jurisprudence by statute," Br. in Opp. 13-14, Congress clearly did *not* intend it to bar the death penalty for military rape. When Congress enacted Article

55 as part of the UCMJ in 1950, 64 Stat. 126, it also enacted Article 120, which provided that rape may be "punished by death," 64 Stat. 140. Article 120 codified a "rule" allowing a "military death penalty for rape" that stretched back to "at least 1863." *Kennedy*, 554 U.S. at 946 (statement of Kennedy, J., respecting the denial of rehearing). And Article 120's codification of a military death penalty for rape remained unchanged until 2006—nearly three decades after *Coker*. See *id.* at 947.

Particularly in light of that history, Article 55's ban on "cruel or unusual punishment" cannot be understood to implicitly invalidate Article 120's more specific authorization of the death penalty for military rape. 10 U.S.C. 855; see *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). If anything, Congress's explicit authorization of the death penalty for military rape, irrespective of Article 55, reinforces that it viewed such a punishment not to be "cruel or unusual" as either a statutory *or* a constitutional matter. See Pet. 15 (noting post-*Coker* repeal of death penalty only for civilian rape).

3. Finally, even assuming for argument's sake that a five-year statute of limitations applied at the time of respondent's 2005 rape offense, Congress's specific 2006 directive that "rape * * * may be tried and punished at any time without limitation," 10 U.S.C. 843(a) (2006), would authorize his 2014 prosecution for that crime. Congress understood its 2006 enactment to codify existing CAAF precedent and eliminate any doubt that past or future rapes could be punished whenever they were discovered. See Pet. 21-22. It makes little sense to conclude, as respondent would, that Congress did *not* intend an unlimited limitations period for a rape committed the previous year.

For reasons explained in the petition (Pet. 21-22), respondent's reliance on a "presumption against statutory retroactivity," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994), is misguided. The application of that rebuttable presumption rests on the understanding that Congress generally does not want to disturb settled expectations. *Id.* at 265. But at the time of respondent's 2005 rape offense, the CAAF's binding precedent would have led everyone—including respondent, the government (had it discovered the rape), and Congress (in considering rapes that occurred in 2005)—to expect that the rape could be prosecuted at any time. See *Stebbins*, 61 M.J. at 369; *Willenbring*, 48 M.J. at 178. No sound reason exists to force-fit the presumption against retroactivity onto this situation simply because, more than a decade later, the CAAF itself upset everyone's expectations by overturning its interpretation of the pre-2006 law. That reversal of course does not in any way suggest that Congress's intent to expressly codify an unlimited statute of limitations for all post-1986 rapes was in fact restricted to post-2006 rapes.

C. This Court's Review Is Warranted

Sexual assault is one of the most serious problems facing the United States military. By applying to rape the same default five-year limitations period that applies to offenses like intentionally bouncing a check, 10 U.S.C. 923a(2), or wrongfully opening mail, 10 U.S.C. 909a(b) (Supp. V 2017), the CAAF's decision would make it impossible to prosecute military rapes like respondent's that were committed between 1986 and 2006. That result not only disregards Congress's commonsense classification of rape in the highest tier of criminal offenses under the UCMJ, but allows the frequent impediments to the swift discovery and investigation of rapes in the

military context (see Pet. 3-4) to insulate rapists from punishment altogether. It is thus a considerable setback to the military's concerted effort to punish rapists, deliver justice for victims, and show that the country's Armed Forces have zero tolerance for sexual assault.

Respondent does not dispute the exceptional importance of those objectives. He nevertheless characterizes (Br. in Opp. 22) the case for certiorari as "weak[]." He first suggests (*id.* at 18-20) that the case does not warrant review because it focuses on military law. But all CAAF cases involve military law, and the statutory and constitutional issues underlying the question presented are highly consequential. Indeed, the case bears similarities to *Loving*, which likewise raised "constitutional questions about the military death penalty." *Id.* at 19. The case also involves an inconsistency between the CAAF's interpretation of the former UCMJ language and civilian courts' uniform interpretation of identical language in a similar statute-of-limitations context. Pet. 24-25. Although that inconsistency does not strictly amount to a conflict, see Br. in Opp. 20, it is the kind of inconsistency that this Court has cited in granting review of CAAF cases, see Pet. 25.

Respondent also asserts (Br. in Opp. 22) that the issue does not warrant review because it affects only rapes that occurred before 2006. But respondent is not a class of one. Three cases pending in this Court present the same question, see *United States* v. *Collins*, No. 19-184 (filed Aug. 9, 2019) (seeking review in two similar cases); other prosecutions have been dismissed or forgone because of the CAAF's decision, see Pet. 24; and military authorities continue to receive reports of alleged pre-2006 rapes. And although the question presented does not affect an outsized number of cases, it

has exceptional importance to the military, to victims, and to Congress in the cases it does affect. It accordingly warrants this Court's review.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

AUGUST 2019