No. 19-184

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD D. COLLINS

UNITED STATES OF AMERICA, PETITIONER

v.

HUMPHREY DANIELS III

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

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Respondents' rape convictions were vacated because, during the pendency of their appellate proceedings, the Court of Appeals for the Armed Forces (CAAF) abandoned its longstanding interpretation of the statute of limitations for that crime. See *United States* v. *Mangahas*, 77 M.J. 220, 222 (2018). Overruling two decades of precedent, the CAAF held (*ibid.*) that rapes committed when the Uniform Code of Military Justice (UCMJ) provided that rape could be "punished by death," 10 U.S.C. 920(a) (1994), were nevertheless not "punishable by death" for purposes of the UCMJ's statute of limitations, 10 U.S.C. 843(a) (1994). As in *United States* v. *Briggs*, 78 M.J. 289 (C.A.A.F. 2019), petition for cert.

pending, No. 19-108 (filed July 22, 2019), that manifest error warrants this Court's review.

Like the respondent in *United States* v. *Briggs*, No. 19-108 (filed July 22, 2019), respondents in these cases offer no meaningful merits defense of the CAAF's newly minted view. Their opposition to certiorari instead focuses primarily on asserted jurisdictional "questions" and their view that prosecutions of earlier rapes like theirs are unimportant. But as respondents effectively recognize, this Court would have jurisdiction over all the relevant issues if it granted both this petition and the pending petition in *Briggs*. And as all three cases illustrate, military rapes from the relevant time period continue to be reported, and the military continues to have a strong interest in prosecuting them. Allowing the perpetrators to escape justice flouts the judgment of Congress, deals a serious blow to the military's efforts to address sexual assault in its ranks, and denies the victims the closure that they deserve. See, *e.g.*, Harmony Allen & Tonja Schulz (Military Rape Victims) Amicus Br. 1, 3, 19-20. The petition for a writ of certiorari should be granted along with the petition in *Briggs*, and the cases should be consolidated for briefing and argument.

A. This Court Has Jurisdiction To Review The Question Presented

Respondents each suggest (see Collins Br. in Opp. 8-11; Daniels Br. in Opp. 18-20) that "questions" exist about whether this Court has jurisdiction to address the question presented. Those suggestions are mistaken. And this Court's jurisdiction would be especially clear if the Court were to grant both this petition and the pending petition in *Briggs*.

1. This Court plainly has jurisdiction in Daniels's case to review the question presented. Pursuant to 28 U.S.C. 1259(2), this Court may review "[d]ecisions of the" CAAF in "[c]ases certified to the [CAAF] by the Judge Advocate General" (JAG) of one of the service branches. In *Daniels*, the Air Force JAG certified to the CAAF the issue of "whether the Air Force's prosecution of" Daniels for the rape he committed in 1998 "is barred by the applicable limitations provision of the [UCMJ]." Certificate for Review 2 (capitalization altered). The CAAF stated that "the certified issue is answered in the affirmative." Pet. App. 19a. Under any plausible understanding of 28 U.S.C. 1259(2), the CAAF's "[d]ecision[]" on that certified issue allows this Court to review the same issue through the question presented here.

Daniels suggests (Br. in Opp. 18-19) that this Court may lack jurisdiction because the petition "is, in reality, an untimely attack on" *United States* v. *Mangahas*, *supra*, the case in which the CAAF first announced its changed position on the limitations period for rape. But nothing limits this Court's ability to review a legal issue, or requires a party to seek certiorari on a legal issue, only in the very first case that presents it. And Daniels errs in asserting (Br. in Opp. 19) that the "only 'decision' that this Court has jurisdiction to review is whether *Mangahas* applies to [his] case." The CAAF's "'decision'" in his case was not that "*Mangahas* applies" in some abstract sense, *ibid.*, but that the rule announced in *Mangahas* required reversal of his conviction—the relief that he sought and received from the Air Force Court of Criminal Appeals (AFCCA) in the decision that the JAG certified to the CAAF, see Pet. App. 26a ("[Daniels] asserts that * * * his conviction for a rape in 1998 must

be set aside under * * * *Mangahas*. We agree.") (citation omitted). This Court accordingly has jurisdiction under 28 U.S.C. 1259(2) to review the legal basis for setting Daniels's conviction aside—namely, the CAAF's interpretation of the UCMJ's statute of limitations for pre-2006 rapes.[1]

2. Section 1259(2) likewise provides the Court with jurisdiction to review the question presented in Collins's case. It is undisputed that Collins's case, like Daniels's, was "certified" to the CAAF "by the" JAG, Pet. App. 1a, after the AFCCA vacated his conviction in light of the CAAF's "holding in * * * *Mangahas*," *id.* at 3a. The only difference between *Collins* and *Daniels* is the precise wording of the issues that were certified. But to the extent that this Court's jurisdiction under Section 1259(2) is limited to the issues actually decided by the CAAF, see Collins Br. in Opp. 8, such jurisdiction would include the question presented here.

The issues certified in Collins's case, and as to which the CAAF summarily affirmed the AFCCA's vacatur of his conviction, included whether he could "successfully raise the statute of limitations defense for the first time on appeal." C.A. App. 13 (capitalization omitted); see

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[1] Daniels suggests in a footnote (Br. in Opp. 19 n.12) that the government did not ask the CAAF to overrule *Mangahas*. That is mistaken. In its motion for summary affirmance in *Daniels*, the government (at 1-2) "maintain[ed] that" *Mangahas* was "incorrectly decided," but recognized that *Mangahas* was controlling precedent "[u]nless the [CAAF] were to reconsider its" decision. When the CAAF did not rule on the government's motion in *Daniels* before the filing deadline for its opening brief, the government filed a brief stating explicitly and repeatedly that the CAAF "should overrule its prior decision in *Mangahas*." Gov't C.A. Br. 6; see *id.* at 10, 20. The CAAF then summarily affirmed in *Daniels* "[o]n consideration of * * * [the government's] brief," among other filings. Pet. App. 19a.

Pet. App. 1a. The CAAF's affirmance on that issue necessarily encompasses—both by its terms and as a logical antecedent—the merits of Collins's statute-of-limitations defense. See Reply Br. at 2-6, *Briggs*, *supra* (No. 19-108) (*Briggs* Reply Br.) (addressing similar objections in the context of 28 U.S.C. 1259(3)). In no way is the government attempting to inject into this case at the certiorari stage an issue that was not central to the appellate proceedings and the CAAF decision affirming them.

3. This Court's jurisdiction to resolve the question presented would be particularly clear if the Court accepts the government's suggestion (Pet. 16-17) to grant both this petition and the petition in *Briggs*. As the government has previously explained (*ibid.*), granting both petitions would facilitate this Court's consideration of the merits, which could be resolved in the government's favor in one of two ways. More broadly, the Court could hold that pre-2006 rapes were "punishable by death" for purposes of the then-existing statute of limitations. 10 U.S.C. 843(a) (1994). Such a holding would repudiate the CAAF's reasoning in *Mangahas* and would mean that all of respondents' prosecutions were timely. More narrowly, the Court could hold that at least some prosecutions for pre-2006 rapes may proceed under the 2006 amendment to the UCMJ expressly providing that "rape * * * may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (2006). A narrower holding of that sort would repudiate the CAAF's reasoning in *Briggs*, and would clearly apply to Briggs himself, who does not dispute that the 2006 amendment was enacted before the statute of limitations on his 2005 rape had expired. See *Briggs*, 78 M.J. at 292. A decision on that ground, however, might not apply to Collins and

Daniels, who committed their rapes earlier than Briggs committed his. See Pet. 15.

Granting both petitions would not only ensure that the Court could address both arguments, but would also eliminate any doubt about its jurisdiction to do so. Even Briggs and Collins agree that this Court has jurisdiction to address the broader argument in the context of Daniels's case. As they both recognize, "certifying to CAAF the question whether *Mangahas* was rightly decided * * * would have eliminated any doubt as to this Court's jurisdiction." Collins Br. in Opp. 8-9; see Br. in Opp. at 10, *Briggs*, *supra* (No. 19-108) (similar). That is precisely what the JAG did in Daniels's case. See p. 3, *supra*. Likewise, Briggs himself acknowledges (Br. in Opp. at 9-10) that the Court has jurisdiction to address the narrower question in the context of his case. See Collins Br. in Opp. 8 (agreeing that the Court has jurisdiction to review that issue in *Briggs*); Daniels Br. in Opp. 20-21 (same). Thus, by granting both this petition and the petition in *Briggs*, the Court can consider the full range of possible dispositions without any serious question about its jurisdiction under Section 1259.[2]

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[2] As the government's reply in support of the petition in *Briggs* explains (at 2-3), the Court has jurisdiction over the entire question presented in that case under either 28 U.S.C. 1259(3) or 28 U.S.C. 1259(4). Collins suggests (Br. in Opp. 10-11) that Section 1259(4) does not support jurisdiction in *Briggs* because it applies only where the other subsections of Section 1259 do not. But Collins cannot have it both ways. Either *Briggs* is a case "described in" Section 1259(3), which would mean that the Court has jurisdiction under Section 1259(3), or it is not, which would mean that the Court has jurisdiction under Section 1259(4). 28 U.S.C. 1259(4).

B. The CAAF Erred In Affirming The Reversal Of Respondents' Convictions

For reasons that the government has previously explained (see Pet. 14-15; Pet. at 11-22, *Briggs*, *supra* (No. 19-108) (*Briggs* Pet.); *Briggs* Reply Br. at 6-10), the CAAF's conclusion that respondents cannot be prosecuted for rapes committed before 2006 is wrong. At bottom, the CAAF's position is that Congress, in enacting the UCMJ statute of limitations, used the phrase "offense punishable by death" to refer not to offenses that Congress itself thought were punishable by death, but instead to offenses that courts applying an evolving understanding of the Eighth Amendment would consider punishable by death. 10 U.S.C. 843(a) (1994). But it is implausible that Congress would surrender its authority to make a "legislative judgment" about the permissible timeline for prosecuting military rape, *Stogner* v. *California*, 539 U.S. 607, 615 (2003), to the uncertain evolution of Eighth Amendment jurisprudence. And it is especially implausible that Congress would have wanted a future judicial decision on the constitutionality of the death penalty for civilian rape not only to override its own determination that capital punishment is appropriate for military rape, 10 U.S.C. 920(a) (1994), but also to limit the set of rapes that military authorities could prosecute at all.

Respondents do not even attempt to address that central flaw in the CAAF's reasoning. They instead rely (see Collins Br. in Opp. 5; Daniels Br. in Opp. 17) primarily on the contention that Article 55 of the UCMJ, 10 U.S.C. 855, adopts this Court's decision in *Coker* v. *Georgia*, 433 U.S. 584 (1977)—that rape of an adult woman is not punishable by death in the civilian system—as a statutory limitation on the punishment of military

rape. As an initial matter, it was the UCMJ's specific directive that rape may be "punished by death," 10 U.S.C. 920(a) (1994), not anything in Article 55, that answers whether rape was "punishable by death" for purposes of the UCMJ's statute of limitations, 10 U.S.C. 843(a) (1994). See p. 7, *supra*; *Briggs* Reply Br. at 8-9. In any event, nothing in Article 55 suggests that Congress imported constitutional limitations on civilian punishment into the military context *when they would not otherwise apply*. Even if Article 55 "incorporate[s] into courts-martial this Court's Eighth Amendment jurisprudence as a matter of statute," Collins Br. in Opp. 5, this Court has never held that—and, indeed, has reserved decision on whether—rape is constitutionally punishable by death in the military-justice system. *Kennedy* v. *Louisiana*, 554 U.S. 945, 946-947 (2008) (statement of Kennedy, J., respecting the denial of rehearing); see *Loving* v. *United States*, 517 U.S. 748, 755 (1996).

C. This Court's Review Is Warranted

The CAAF's erroneous restriction on prosecutions for military rape warrants this Court's review. It is important that the military be permitted to prosecute rape to the full extent of its statutory authority to do so.

1. Although respondents view the need to prosecute late-reported pre-2006 rapes as "not exactly compelling," Collins Br. in Opp. 7; see Daniels Br. in Opp. 6-9, experience shows otherwise. Even if their overall number is limited, prosecutions of service members like Collins—who in 2000 violently raped a junior service member beneath a family portrait in his on-base residence, see Pet. 6-10—have both case-specific and military-wide significance. See Pet. 4 (citing report explaining that military victims of sexual assault are reluctant to report when

they believe that "nothing will happen to the perpetrator") (brackets and citation omitted).

As the government and others have explained, sexual assault—which is devastating to victims and destructive to discipline and effectiveness—is one of the most serious problems facing the United States military. See Pet. 4-5, 16-17; *Briggs* Pet. at 3-4, 22-26; Military Rape Victims Amicus Br. 14, 16. It is an unfortunate reality that sexual assaults are difficult to uncover and are often reported or discovered only years after the fact. See Pet. 4-5. Holding perpetrators of sexual assault accountable is a top priority for the military, and prosecutions like the ones at issue here and in *Briggs* are part of that effort. See *ibid.*

As the three cases now pending before this Court illustrate, the military continues to receive reports of rapes that occurred before 2006, and it will prosecute based on those reports where possible. See Daniels Br. in Opp. 8 (citing other prosecutions of pre-2006 rapes). The CAAF's decision, however, forecloses such prosecutions, no matter how strong the evidence. See, *e.g.*, Pet. 6-8; see also *Briggs*, 78 M.J. at 290 (describing recorded call in which Briggs admitted, "I will always be sorry for raping you").

Respondents are therefore wrong to speculate that "the Court's denial of certiorari in this case would have little or no adverse effect on the government's commendable efforts to crack down on sexual abuse in the military." Daniels Br. in Opp. 7. To the contrary, leaving the CAAF's erroneous decision in place would significantly undermine the military's efforts to seek justice for sexual-assault victims, punish rapists and remove them from the military, preserve good order and

morale, and show that the country's armed forces have zero tolerance for sexual assault.

2. Although it would not independently provide a basis for certiorari, the CAAF's departure from civilian courts of appeals' uniform interpretation of the phrase "punishable by death" underscores the need for this Court's review. As the government has previously explained (*Briggs* Pet. at 5-6, 24-25), multiple courts of appeals have construed that phrase in the parallel context of 18 U.S.C. 3281's statute of limitations, which was the source of the phrase in the UCMJ. In contrast to the CAAF, none of those courts has interpreted the phrase to make a legislative time limit contingent on future developments in Eighth Amendment jurisprudence.

Respondents attempt to reconcile the CAAF's interpretation of "punishable by death" with the contrary decisions by the civilian courts of appeals by noting that the civilian cases all involved murder instead of rape, Daniels Br. in Opp. 12-14, and "did not involve a crime that could not, under *any* circumstance, be punished by the death penalty," *id.* at 14. But that circumstance was not relevant to the reasoning of any of the circuit courts' decisions, which instead fundamentally differed from the CAAF in their approach to the statutory language. See *Briggs* Pet. at 25. While the CAAF inquired whether a defendant theoretically could, consistent with the Eighth Amendment, be sentenced to death for his crime (a question this Court has not resolved, see p. 8, *supra*), the civilian courts of appeals all looked to whether the statute defining the offense authorizes that death penalty. See, *e.g.*, *United States* v. *Gallaher*, 624 F.3d 934, 940 (9th Cir. 2010) (explaining that "whether a crime is 'punishable by death' under § 3281 * * * depends on whether the death penalty may be imposed for the crime

under the enabling statute") (quoting *United States* v. *Ealy*, 363 F.3d 292, 296 (4th Cir.), cert. denied, 543 U.S. 862 (2004)), cert. denied, 564 U.S. 1005 (2011). The CAAF's reasoning is thus irreconcilable with the reasoning of every other court of appeals that has interpreted the phrase "punishable by death" in a statute of limitations. That inconsistency highlights the CAAF's mistake on an important legal issue, which warrants correction by this Court.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted, along with the petition for a writ of certiorari in *United States* v. *Briggs*, No. 19-108 (filed July 22, 2019), and consolidated for briefing and argument. In the alternative, this petition should be held pending the Court's resolution of the petition in *Briggs* and then disposed of as appropriate.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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