No. 19-

IN THE

Supreme Court of the United States

CEDRIC L. MCDONALD,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

DAVID A. GOLDENBERG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JEFFREY T. GREEN
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-1486

STEVEN J. DRAY *
ELIZABETH G. MAROTTA
JONATHAN F. POTTER
CHRISTOPHER D. CARRIER
ZACHARY A. GRAY
BENJAMIN A. ACCINELLI
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0725
Steven.j.dray.mil@mail.mil

Counsel for Petitioner

* Counsel of Record

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QUESTION PRESENTED

Of the thousands of courts-martial convened each year, a significant percentage—in some years nearly half—involve a charge that the accused sexually assaulted a complaining witness.

The Uniform Code of Military Justice criminalizes any sexual act accomplished by causing bodily harm to another person. 10 U.S.C. § 920(b)(1)(B) (2012). The statute defines "bodily harm" as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact."

This Court has repeatedly emphasized the import of requiring a "vicious will" on the part of an accused—absent a clear legislative intent to do away with one—to support a conviction. Yet, the lower court interpreted congressional silence as to the accused's state of mind to require merely that the prosecution prove that a reasonable person would believe the complaining witness did not consent.

The question presented is:

Whether Congress's omission of a *mens rea* for the offense of sexual assault by bodily harm means mere negligence as to the lack of consent suffices.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Cedric L. McDonald. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from a conviction by a panel with enlisted representation sitting as a general court-martial on May 13, 2016 in *United States* v. *McDonald*, General Court Martial Order No. 3, Department of Army, Headquarters, Joint Readiness Training Center and Fort Polk, Fort Polk, Louisiana 71459, (March 10, 2017), and the following proceedings in the United States Army Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces:

United States v. *McDonald*, 78 M.J. 376 (C.A.A.F. Apr. 17, 2019)

United States v. *McDonald*, No. ARMY 20160339 (A. Ct. Crim. App. May 16, 2018)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Cedric McDonald, respectfully petitions for a writ of certiorari to review the judgement of the Court of Appeals for the Armed Forces (CAAF).

OPINIONS BELOW

The opinion of the CAAF is reported at 78 M.J. 376 (C.A.A.F. 2019) and is reproduced in the appendix to this petition at Pet. App. 1a–10a. The opinion of the Army Court of Criminal Appeals is available at 2018 WL 2273588 and is reproduced at Pet. App. 11a–19a.

JURISDICTION

The CAAF granted a petition for review and issued a final judgment affirming the decision of the Army Court of Criminal Appeals on April 17, 2019. Pet. App. 1a. The CAAF denied a timely petition for reconsideration on May 29, 2019. Pet App. 20a. On August 19, 2019, the Chief Justice extended the time to file this petition until October 26, 2019. Per Supreme Court Rule 30, as October 26, 2019 falls on a Saturday, the petition may be filed on Monday, October 28, 2019. This Court has jurisdiction under 28 U.S.C. § 1259(3).

STATUTORY PROVISIONS INVOLVED

At the time of Private McDonald's court-martial, 10 U.S.C. § 920(b)(1)(B) (2012) provided: "Any person subject to this chapter who . . . commits a sexual act upon another person by . . . causing bodily harm to that other person; . . . is guilty of sexual assault and shall be punished as a court-martial may direct."

§ 920(g)(3) defined bodily harm as: "[A]ny offensive touching of another, however slight, including any

nonconsensual sexual act or nonconsensual sexual contact."

§ 920(g)(8) defined consent as:

> (A) . . . a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.
>
> (B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear . . . .
>
> (C) Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

STATEMENT OF THE CASE

This appeal presents the important and frequently recurring question of whether mere negligence as to lack of consent is enough to find a defendant guilty of sexual assault under the Uniform Code of Military Justice (UCMJ). The CAAF held that the prosecution need prove only that a "reasonable" person would have known that a complaining witness did not con-

sent to sexual activity to find a defendant guilty. The CAAF's decision implicitly rejects this Court's decision in *Elonis* v. *United States*, 135 S. Ct. 2001 (2015). Such a clear conflict with this Court's precedent makes this case well suited for review. Sup. Ct. R. 10(c). Moreover, since this Court's review is conditioned on CAAF having granted discretionary review, this is likely this Court's sole opportunity to review this issue.

This question affects hundreds of cases each year. See *Department of Defense Fiscal Year 2018 Annual Report on Sexual Assault in the Military Appendix B: Statistical Data on Sexual Assault* 13 (2018), https://www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf. Although Congress amended the statutory scheme subsequent to Private McDonald's court-martial, the current statute still presents the same interpretive issues.

A. Factual Background and Court-Martial Proceedings.

Cedric McDonald was a Private First Class in the United States Army and subject to the Uniform Code of Military Justice in August 2015. Pet. App. 12a. In the late evening of August 31, 2015, Private McDonald's roommate, Private Thomas, brought a woman, DJ, to their shared room. *Id.* at 3a. Private Thomas and DJ started sexual activity, the mutually consensual nature of which was undisputed. *Id.*

At some point during this sexual encounter, Private Thomas stopped the sexual activity in order to move a chair. *Id.* at 3a. Sometime after he stopped, Private McDonald came behind DJ and began having sexual intercourse with her as she leaned against Private Thomas' bed. *Id.* Private McDonald gave a statement to military law enforcement that Private Thomas told

him that DJ was interested in Private McDonald's participation. *Id.* at 4a, 18a. Private Thomas testified to the same at trial. *Id.* at 18a. DJ eventually determined that someone other than Private Thomas was having sex with her when she felt Private McDonald's watch. *Id.* at 14a. She then indicated her lack of desire to continue, after which Private McDonald backed away and Private Thomas re-approached her and resumed sexual intercourse. *Id.* After their sexual activity was complete, DJ left the room. *Id.*

DJ made a formal complaint of sexual assault to military authorities and a criminal investigation ensued. *Id.* Private McDonald gave a statement to law enforcement that indicated he believed, based upon his conversation with Private Thomas, that DJ consented to sex with him. *Id.* at 3a–4a. The case proceeded to a general court-martial.

At court-martial, the military judge instructed the panel that they could convict Private McDonald if they found that he committed a sexual act upon DJ; that he did so by causing bodily harm to DJ, to wit: penetrating her vulva with his penis; and that Private McDonald did so without DJ's consent. *Id.* at 4a. The military judge also instructed the panel on a mistake of fact defense. *Id.* That instruction informed the panel that a mistake of fact defense did not exist in two circumstances: (1) if it found that Private McDonald was not under the mistaken belief DJ consented; or, (2) that any mistake as to DJ's consent was objectively unreasonable. *Id.* Further, the military judge informed the panel that ignorance or mistake cannot be based on the negligent failure to discover the true facts. *Id.* Private McDonald's trial defense team did not object to these instructions. *Id.* at 16a. The panel convicted Private McDonald of two offenses: (1) conspiracy to sexually assault DJ by con-

cealing his identity; and (2) sexually assaulting DJ by penetrating her vulva without her consent. *Id.* at 12a.

B. Appellate Court Proceedings.

Private McDonald appealed the instruction to the Army Court of Criminal Appeals (Army Court). Private McDonald asserted that a negligent *mens rea* was insufficient to make otherwise lawful conduct criminal. *Id.* Private McDonald relied heavily on this Court's opinion in *Elonis*, which reiterated the longstanding maxim that wrongdoing must be conscious to be criminal. *Id.* The Army Court affirmed the findings and sentence. *Id.* at 19a.

The CAAF granted review and ultimately concluded that it could "infer by Congress's silence on the *mens rea* for sexual assault by bodily harm that it impliedly stated a general intent *mens rea* for that offense." *Id.* at 8a. The CAAF's ruling established that the government can prove its case by showing (1) a sex act occurred; and (2) the complaining witness did not consent. *Id.* at 6a. The CAAF circumvented this Court's clear precedent that an accused's *mens rea* is relevant by noting the petitioner had "the ability to raise a mistake of fact defense." *Id.* at 9a. Nevertheless, such a mistake of fact defense is not found on the face of the statute. See 10 U.S.C. § 920 (2012). Rather, the CAAF determined such a defense existed by bootstrapping a generally applicable defense from the Rules for Courts-Martial—promulgated by the President—which identifies reasonableness as the standard for mistakes of fact. See *id.*; Rule for Courts-Martial 916(j)[1]; 10 U.S.C. § 836 (pretrial and trial procedures may be prescribed by the President). The lack of clear congressional intent to do so aside,

[1] https://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf

the impropriety of such a conclusion is misplaced where the President—not Congress—crafts the Rules for Courts-Martial, and can change them at any moment without congressional input. *Id.* In other words, the CAAF used an executive rule, not explicitly referenced within the statute, to circumvent this Court's precedent that requires proof of an accused's *mens rea* above negligence unless Congress clearly states otherwise.

REASONS FOR GRANTING THE PETITION

I. THE CAAF'S DECISION CONFLICTS WITH ESTABLISHED SUPREME COURT PRECEDENT AND AFFECTS HUNDREDS OF DEFENDANTS EACH YEAR

In *Elonis*, this Court held that mere negligence was insufficient to determine whether an individual accused of sending any communication containing any threat possessed a guilty mind. *Elonis*, 135 S. Ct. at 2013. The question in *Elonis* was whether the government had to prove anything more than that a reasonable person would know that the communication sent was threatening. *Id.* at 2011. This Court observed that proving mere negligence did not sufficiently separate those who deserve conviction and those who do not. *Id.* (this Court has "long been reluctant to infer that a negligence standard was intended in criminal statutes"). Simply finding that the defendant was negligent, "is inconsistent with 'the conventional requirement for criminal conduct—awareness of some wrongdoing.'" *Id.* (quoting *Staples* v. *United States*, 511 U.S. 600, 606–07 (1994).

10 U.S.C. § 920(b)(1)(B) (2012) did not specify the *mens rea* that the prosecution must prove as to consent. At the relevant time, the statute simply included as an element of sexual assault by bodily harm

"any nonconsensual sexual act or nonconsensual sexual contact." 10 U.S.C. § 920(g)(3) (2012).

As in *Elonis*, merely proving here that an accused was negligent as to the all-important element of consent is insufficient to separate guilty from innocent conduct.

Time and again this Court has extolled the basic principle that "[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." *Elonis*, 135 S. Ct. at 2012. Of course, Congress can explicitly establish the *mens rea* it believes is sufficient to make conduct criminal. But, where Congress does not specify a mental state in the statute, this Court has explained that courts should not read the omission as dispensing with the mental state requirement. *Id.* at 2009. Instead, courts are to read into the statute "that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter* v. *United States*, 530 U.S. 255, 269 (2000) (quoting *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

This Court has taken particular care "to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Staples* v. *United States*, 511 U.S. 600, 610 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 426 (1985)). There is nothing about sexual activity that is inherently dangerous in such a way that should put a person reasonably on notice of the criminal possibilities of their actions. Sexual activity is usually lawful. But, because nobody has a perfect understanding of what anyone else is thinking, the subtle nuance associated with interpersonal relationships necessarily creates a gray area that is rife with problems. Those problems can manifest in

an imperfect expression of one's desire not to participate in sexual activity, or in an actor's honest failure to pick up on individually specific social cues that indicate the other "just isn't that into them." What this means is that although a "reasonable" person might have known that their partner did not consent, the accused might not have been aware of that lack of consent. But, unless Congress provides otherwise, negligence as to consent is not enough to establish that the accused had a guilty mind.

Proof that an accused merely knows he is committing the otherwise legal act does not necessarily indicate a guilty mind. In *Elonis*, this Court rejected the Government's position that it is enough for a person to "'comprehended [the] contents and context' of the communication." *Elonis*, 135 S. Ct. at 2011 (alterations in original). It was not enough that the prosecution prove that Elonis knew the content of the messages he posted. This Court explained that a critical element of the statute was that there be a threat. The prosecution, therefore, had to prove Elonis's state of mind with regards to the threat. Similarly, most people who are participating in sexual activity with another are aware that they are so participating. It is not the knowledge of the sexual activity alone, but the mind-state of the accused with respect to the lack of consent that makes that activity wrongful. As in *Elonis*, requiring that the prosecution prove only that the accused knew he was participating in sexual activity simply does not reveal whether the accused had a guilty mind.

This Court has, at times, declined to read a scienter requirement into criminal statutes. Those cases, however, usually involved "statutory provisions that form part of a 'regulatory' or 'public welfare' program." *Rehaif* v. *United States*, 139 S. Ct. 2191, 2197

(2019) (citation omitted). These statutes typically "regulate potentially harmful or injurious items" like "dangerous or deleterious devices or products or obnoxious waste materials." *Staples*, 511 U.S. at 606–07. The idea being that a defendant who knows he is dealing with a dangerous device that places him in a responsible relation to a public danger, should also be alerted to the probability of strict regulation. *Id.* at 607. Similarly, where the elements of the crime require proving that the accused's actions "fall[] outside the realm of . . . otherwise innocent conduct" then "the concerns underlying the presumption in favor of scienter are fully satisfied." *Elonis*, 135 S. Ct. at 2010 (quoting *Carter*, 530 U.S. at 269–70 (internal quotation marks omitted)).

Sexual activity does not involve dangerous or deleterious devices or products, nor is it governed by a comprehensive regulatory regime. Nor does it inherently fall outside the realm of otherwise innocent conduct.

Further, this Court has noted that public welfare offenses typically "carry only minor penalties." *Rehaif*, 139 S. Ct. at 2197. This Court has explained that, while not dispositive of the inquiry, a statute's potential penalty is a "significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Staples*, 511 U.S. at 616. Small penalties "logically complemented the absence of *mens rea*" and "imposing severe punishments for offenses that require no *mens rea* would seem incongruous." *Id.* at 616–17. (citations omitted). This Court acknowledged that punishments for public welfare offenses are typically relatively small, and the conviction does no "grave damage to an offender's reputation." *Id.* at 617–18. In *Staples*, this Court used the "severe penalty" attached to a violation of 18 U.S.C.

§ 5861(d) (making it unlawful for a person to receive or possess a firearm not registered to him) as a "further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." 511 U.S. at 618. That severe penalty was up to ten years' imprisonment.

A violation of § 920(b)(1)(B) carries a far more significant potential penalty. The maximum punishment for a violation is thirty years in prison. But, that is not all: it is also one of only five offenses under the UCMJ that mandates a dishonorable discharge from the service. See 10 U.S.C. § 856(b)(2)(B). To put that in perspective, aiding the enemy, 10 U.S.C. § 903(b), does not. *Manual for Courts-Martial, United States* (2016 ed.), App. 12, at A12-2. Neither does premeditated murder. *Id.* at A12-3. Further, this Court has asserted that "'felony' is . . . 'as bad a word as you can give to man or thing.'" *Staples*, 511 U.S. at 618 (citation omitted). Respectfully, "sex offender" is worse. And a conviction under § 920 includes mandatory reporting requirements at both the federal and state level. See 34 U.S.C. § 20931; see also Dep't of Def. Inst. 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (April 10, 2018).[2]

The severity of the punishment for violation of § 920(b)(1)(B) is yet another indication that the CAAF's decision runs contrary to this Court's precedent.

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[2] https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/132507p.pdf?ver=2019-02-19-075650-100

II. THE CAAF'S DECISION IS INCORRECT

Had it properly applied *Elonis*, the CAAF would have reversed the lower court.[3] In Elonis's case, the prosecution had to prove more than just that a reasonable person would know that their communication was threatening. Similarly, the CAAF should have held that the prosecution in Private McDonald's case had to prove more than just that a reasonable person would know that their partner did not consent. But, instead of acknowledging the obvious application of *Elonis* here, the lower court interpreted § 920 (b)(1)(B) as more akin to bank robbery or forcible rape. See *Carter*, 530 U.S. at 270. That was error.

The CAAF's misguided reliance on the Rules for Courts-Martial accentuates its deviation from *Elonis*. Rather than reading in a *mens rea* requirement to the consent element as directed by this Court in *Elonis*, the CAAF relied on the Rules for Courts-Martial to provide a mistake of fact defense with the associated negligence *mens rea*. The President, not Congress, promulgates the Rules for Courts-Martial. Rules promulgated by the executive branch are not an appropriate means of circumventing this Court's instruction that unless *Congress* clearly directs otherwise, each element of a crime presumptively includes a *mens rea* requirement sufficient to separate guilty from innocent conduct. Under the CAAF's decision,

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[3] After the Army Court panel decided Private McDonald's appeal, but prior to the CAAF's affirmance, another Army Court panel addressed the same issue. That panel concluded that *Elonis* clearly required the prosecution to prove that the accused possessed a *mens rea* above negligence as to lack of consent to find guilt under § 920(b)(1)(B). *United States* v. *Peebles*, 78 M.J. 658, 666 (A. Ct. Crim. App. 2019), *vacated*, 78 M.J. 830 (A. Ct. Crim. App. 2019). The Army Court *sua sponte* vacated its opinion in *Peebles* in light of the CAAF's opinion here.

were the President to remove the "mistake of fact" defense from the Rules for Courts-Martial, the prosecution would need not prove *any mens rea* as to consent. The CAAF's approach strips Congress of its lawmaking power, jeopardizes the judiciary's' interpretive power, and provides undue power to the executive branch to fill cavernous gaps in deficient legislation.

Relying on the mistake of fact defense in the Rules for Courts-Martial also implicates Fifth Amendment and Due Process concerns. As the CAAF and several lower military courts of appeal have recognized, as a practical matter an accused must often testify to receive a mistake of fact panel instruction. See, *e.g.*, *United States* v. *Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998); *United States* v. *Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995); *United States* v. *Greaves*, 40 M.J. 432 (C.M.A. 1994); *United States* v. *Baxter*, 72 M.J. 507, 514 (A. Ct. Crim. App. 2013). Applied to § 920(b), this means that in order to place the burden of proof on the prosecution for an element of the crime—lack of consent—the accused would have to testify. By allowing only a mistake of fact defense as to consent, the CAAF effectively eliminates the prosecution's burden of proving each element of the crime.

Not only did the CAAF erroneously rely on the Rules for Courts-Martial to guide its statutory interpretation, the CAAF incorrectly applied the interpretive presumption this Court articulated in *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). The CAAF held

that the fact that Congress had provided an explicit *mens rea* of "knows or reasonably should know" for other provisions of § 920, meant that Congress did not intend for the prosecution to prove anything more than "the intent to do the wrongful act itself." Pet. App. 9a. The CAAF's opinion turns *Russello* on its head. The CAAF held that the prosecution needed to prove only that a reasonable person would have believed the complaining witness did not consent. That is *precisely* the *mens rea* expressly articulated in other provisions in the statute. Proper application of *Russello*, coupled with the presumption in *Elonis,* inexorably leads to the conclusion that Congress intended that the prosecution prove some *mens rea* exceeding negligence as to consent.

The CAAF also disregarded another interpretive principle that this Court often articulates: where Congress "amend[s] a statute, [courts] presume it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U.S. 386, 397 (1995). A prior version of § 920 explicitly made mistake of fact as to consent an affirmative defense to aggravated sexual assault, which included engaging in a sexual act causing bodily harm. 10 U.S.C. § 920(c)(1)(B) & (r) (2007). Congress defined mistake of fact as to consent to include only mistakes that were "reasonable under all the circumstances." 10 U.S.C. § 920(t)(15) (2007). Congress, however, repealed subsection (r), removed the definition of mistake of fact, and amended the definition of bodily harm to include lack of consent as an element. See 10 U.S.C. § 920 (2012). Congress not only demonstrated that it was capable of writing a statute making mistake of fact an affirmative defense and requiring that the mistake be reasonable, but it removed those provisions so requiring. The presumption articulated in *Stone* should have led the CAAF to

give meaning to Congress's amendment of the statute. Instead, the CAAF effectively held that Congress's significant changes were entirely without effect.

In the court-martial, Private McDonald put forth evidence that he thought that DJ consented. An instruction to the factfinder requiring that Private McDonald have been more than negligent could very well have resulted in a different outcome. Instead, the instruction to the panel informed them merely to judge Private McDonald's actions from the perspective of a reasonable person. This Court should grant certiorari to determine if the military judge's instruction was in error and resolve whether similar instructions affecting hundreds of other courts-martial each year are also erroneous.[4]

III. THIS CASE IS AN IDEAL VEHICLE

Private McDonald preserved his arguments throughout his appeals and the CAAF squarely addressed the question of *mens rea* in its decision. The CAAF did not make any holdings in the alternative. Further, the relevant record is minimal.

In addition to being a good vehicle, this case could be the Court's only opportunity to remedy the CAAF's error. In contrast to other statutes providing for this Court's certiorari jurisdiction, 28 U.S.C. § 1259 grants this Court authority to review decisions of the CAAF only in very limited circumstances. Under 28

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[4] By correcting the CAAF's error, this Court would also provide guidance to the courts of appeal in interpreting similarly vague statutes criminalizing certain sexual acts. For example, the Eight Circuit and Ninth Circuit have taken opposite analytical approaches to interpreting 18 U.S.C. §§ 2242(3), 2244(b). *See United States* v. *Price*, 921 F.3d 777 (9th Cir. 2019); *United States* v. *Bruguier*, 735 F.3d 754 (8th Cir. 2013) (en banc).

U.S.C. § 1259, the vast majority of military appellants are categorically precluded from petitioning this Court for certiorari.

This Court's narrow jurisdiction is further constrained by the CAAF's unfettered discretion to deny review except in capital cases and those certified by the Judge Advocate General. 10 U.S.C. § 867(a). The CAAF does not often exercise this discretion. The CAAF issued only 32 opinions for the term beginning October 2018. United States Court of Appeals for the Armed Forces, *Opinions: October 2018 Term of Court* (Oct. 2, 2019), https://www.armfor.uscourts.gov/opinions/2018OctTerm.htm.

Additionally, for nearly three decades, the Government has consistently maintained that this Court lacks jurisdiction under § 1259 to review any questions "not resolved by CAAF's decision in th[e] case." See, *e.g.,* Brief for the United States in Opposition at 10, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (mem.), *cert. denied*. The Government's position is that Congress limited this Court's authority to review, via § 1259, to "preserv[e] the role of the [CAAF]" as the primary "interpreter of the [UCMJ]." *Id.* at 11–12.

As such, even if the CAAF granted review of an issue in a case involving a § 920(b)(1)(B) conviction, unless the issue granted was the one presented here, the Government would argue that this Court would not have jurisdiction to take up this issue on certiorari.

The CAAF is unlikely to take up this issue again anytime soon, having so recently decided it. Given the CAAF's near unlimited discretion to deny review, and the jurisdictional bar to those denied review by the

CAAF, this Court may not get another opportunity to correct the CAAF's mistake.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DAVID A. GOLDENBERG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

JEFFREY T. GREEN
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-1486

STEVEN J. DRAY *
ELIZABETH G. MAROTTA
JONATHAN F. POTTER
CHRISTOPHER D. CARRIER
ZACHARY A. GRAY
BENJAMIN A. ACCINELLI
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0725
Steven.j.dray.mil@mail.mil

Counsel for Petitioner

* Counsel of Record

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