No. 24-386

IN THE

Supreme Court of the United States

B. M.,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Respondent Bailey essentially concedes that the first question presented—whether the Court of Appeals for the Armed Forces ("CAAF"), an Article I tribunal, may prudentially apply Article III standing requirements—merits this Court's review. His opposition brief does not dispute the elective or prudential nature of Article I tribunals' application of Article III standing. Rather, Respondent Bailey reminds the Court that it has never addressed this issue. Opp. 6. This important question of federal law has not been, but should be, settled by this Court. Regardless of whether other Article I tribunals may electively apply Article III standing, the CAAF cannot because its jurisdictional statute obligates it to review all cases sent to it by a judge advocate general.

On the second question presented—whether victims have standing to assert their privileges—Respondent Bailey concedes Petitioner McFarland[1] suffered an injury. "First, and again, the CAAF did not hold Petitioner lacked an injury to her privilege." Opp. 14. Respondent argues that this injury does not establish standing because the military judge's *abatement order* did not "vitiate" or have any nexus to her privilege. Opp. 10-11. Respondent believes Major McFarland has incorrectly framed the CAAF's decision. Opp. 5.

The CAAF was concerned that challenges to abatement orders would *allow* victims to decide the

1. The petitioner in caption of this case, as in the military courts, is B.M. Petitioner B.M has asked to use her name and be referred to as Major Briana McFarland.

"ultimate question" of whether crimes are prosecuted. Pet. App. 12. However, the practical reality of this holding is it *requires* victims to decide whether crimes are prosecuted. In this case, Major McFarland decided to assert her privilege, abating the proceedings. She can end the abatement at any time by agreeing to waive her privilege. Major McFarland, and not the prosecutor, decides whether Respondent Bailey is prosecuted.

The abatement order has a direct nexus to McFarland's assertion of her privilege. The CAAF is requiring Major McFarland to purchase the continued prosecution with the disclosure of her privileged, intimate communications with her therapist. The abatement order is an injury to Major McFarland's privilege that would be remedied by a favorable decision on either of the issues certified by the Navy Judge Advocate General. Major McFarland has standing.

I. Misstatements of Facts.

Respondent Bailey asserts that Petitioner McFarland wrote a "memoir" detailing her mental health issues. Opp. 2. Respondent ignores the Navy-Marine Corps Court of Criminal Appeals ("NMCCA") footnote stating that McFarland did not seek mental health treatment as outlined in her book. Pet. App. 51 n.44. There were no "memoir" or mental health issues. McFarland used therapists as a literary device to tell a fictionalized story based upon real events.

Respondent Bailey asserts that Petitioner did not object to the judge's stated intent to redact privileged information. Opp. 2-3. However, when the judge discussed her intent, she had already reviewed the privileged

information, an action she "could not do" and which "contravened her authority." Pet. App. 21.

Respondent Bailey misleadingly claims that he sought "production of non-privileged information *included in* her mental health records." Opp. 2 (emphasis added). In fact, Respondent's motion sought mental health records, *including* diagnoses and "*any* records related to mental health treatment she has had following this case." App. 34 (emphasis added). Respondent's motion demanded Petitioner's privileged records.

If Respondent Bailey had truly sought only non-privileged information, the military judge's abatement order would be less defensible because she would have abated the proceedings over records that were not even sought. The military judge would essentially be acting as defense counsel, undermining the impartiality of the military justice system.

II. The CAAF Does Not Consistently Apply Article III Standing Requirements.

Respondent Bailey argues that Article III "case or controversy" requirements are "engrained" in the CAAF's precedents. Opp. 7. However, Article III requirements did not prevent the CAAF from deciding the merits of the three most recent cases Respondent cites: *United States v. Wall*, 79 M.J. 456 (C.A.A.F. 2020), *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008), and *United States v. Chisholm*, 59 M.J. 151 (C.A.A.F. 2003). *Id.*

While the CAAF has acknowledged its refusal to provide advisory opinions, it also "has not refused to answer certified questions which would not or did not alter

the position of the parties." *United States v. Russett*, 40 M.J. 184, 185 (C.A.A.F. 1994). Recognizing the importance of answering certified questions where its decisions are being misinterpreted, the CAAF has consistently affirmed its obligation to resolve such matters. *Id.* at 186. In *United States v. Leak*, the CAAF held that even if the judge advocates general abused their authority to certify questions under 10 U.S.C. § 867(a)(2), the CAAF would be "obliged to review all such cases." 61 M.J. 234, 241 n.6 (C.A.A.F. 2005). Unlike Article III courts, the CAAF and other Article I tribunals are not constitutionally bound by "case or controversy" requirements. Instead, the CAAF's jurisdiction is governed by statute. Specifically, 10 U.S.C. § 867(a)(2) provides that the CAAF "shall review" all cases sent to it by a judge advocate. This mandatory language precludes the CAAF from prudentially adopting Article III standing principles.

III. The CAAF Is Not Similarly Situated to Other Article I Courts.

Respondent Bailey argues that the CAAF is similarly situated to other Article I courts.[2] Opp. 8-9. Under the Constitution, Article I "courts" are inferior tribunals constituted by Congress pursuant to Art. I, § 8, cl. 9. While these courts may possess judicial character, *Ortiz v. United States*, 585 U.S. 427, 435 (2018), they do not exercise the judicial power vested solely in Article III courts. *Id.* at 456 (Thomas, J., concurring) (distinguishing between *a* judicial power and *the* judicial power).

2. Respondent also argues the CAAF is similarly situated to state courts. Each state court applies standing requirements based upon that state's constitution, statutes, and governmental structure. State courts are not similarly situated to the CAAF or any other Article I court.

Reported opinions from Article I courts should be cautiously approached as these courts may be prone to self-aggrandizement, equating themselves with Article III courts. *See generally Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015) (quoting *Commodity Futures Trading Com v. Schor*, 478 U.S. 833, 850 (1986)).

Respondent's reliance on other Article I courts to justify the CAAF's application of Article III principles fails to consider differences in the jurisdictional language used by Congress. For example, in *Crow Creek Sioux Tribe v. United States*, the Court of Federal Claims, an Article I tribunal, dismissed the tribe's complaint for lack of standing. 900 U.S. F.3d 1350 (Fed. Cir. 2018). The Federal Circuit Court of Appeals affirmed, noting that the Court of Federal Claims applies the same standing requirements as Article III courts. *Id*. at 1354. The Court of Federal Claims can justify applying Article III requirements because its jurisdictional statute empowers it to decide any "claim, suit, or demand against the United States arising out of the matters involved in the *case or controversy*." 28 U.S.C. § 2519 (emphasis added); *Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003).

Similarly, the Court of Appeals for Veterans Claims, another Article I tribunal, applied Article III standing requirements because its jurisdiction is limited to "person[s] adversely affected." *Zevalkink v. Brown*, 102 F.3d 1236 (Fed. Cir. 1996); *Padgett v. Nicholson*, 473 F.3d 1364, 1370 (Fed. Cir. 2007), *superseded by statute*, 38 U.S.C. § 7266, *as recognized in Reeves v. Shinseki*, 682 F.3d 988, 996-97 (Fed. Cir. 2012). Persons "adversely affected" have standing under Article III analysis.

In *Baranowicz v. Comm'r*, 432 F.3d 972, 975 (9th Cir. 2005), the Article I Tax Court granted "innocent spouse" relief under 26 U.S.C. § 6015. The other spouse appealed the Tax Court's decision to the Ninth Circuit. The Ninth Circuit held that although § 6015 provided a statutory right to intervene in the Tax Court regardless of standing, an intervenor seeking to appeal the Tax Court's decision in a federal appeals court must demonstrate sufficient injury to confer Article III standing. *Id.*

The CAAF is fundamentally different from these Article I courts. Its jurisdictional statute, 10 U.S.C. § 867(a)(2), mandates that the CAAF, regardless of injury or standing, "shall review the record in all cases" sent to it by a judge advocate general. This statutory language precludes the CAAF from exercising the discretion seen in other Article I courts that prudentially adopt Article III principles.

Respondent acknowledges that this Court has never addressed whether an Article I court may apply Article III case or controversy requirements. Opp. 6. The inconsistent treatment of this issue across federal courts underscores the need for this Court's intervention. Certiorari is necessary to resolve whether the mandatory language of 10 U.S.C. § 867(a)(2) prohibits the CAAF from prudentially applying Article III standing requirements.

IV. Petitioner's Standing Cannot Be Defeated by Abatement.

The CAAF held (Pet. App. 10) and Respondent argues (Opp. 10) that the military judge's abatement order did not

vitiate McFarland's privilege.[3] However, both quote but misinterpret the key language in *Linda R.S. v. Richard D.*, 410 U.S. 614, 615-16 (1973), where this Court required a "direct nexus" between the petitioner's interest and the enforcement of the state's criminal laws. This Court found that the petitioner "no doubt suffered an injury," but held she could not further show that her injury was caused by the state's nonenforcement of the criminal statute.

In contrast, this case presents a direct nexus between Major McFarland's assertion of her privilege and the abatement order. The order states, "[I]f Major B.M. elects to assert privilege over [certain privileged communications], the court must abate the proceedings." Supp. App. 2. Unlike in *Linda R.S.*, the injury here is not speculative but is directly tied to an order that essentially sets a purchase price for the continued prosecution. The nexus required by *Linda R.S.* could not be clearer.

If the CAAF's reasoning—that abatement does not vitiate Major McFarland's privilege—is allowed to stand, no victim could ever enforce any right. Under the CAAF's rationale, a military judge could arbitrarily abate proceedings, depriving victims of standing to assert their

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3. Respondent Bailey states, "contrary to Petitioner's argument, [10 U.S.C. § 867(a)(2)] does not create an injury-in-fact." Petitioner McFarland has never and does not allege § 867(a)(2) creates an injury in fact. She argues that § 867(a)(2) does not require Article III standing because the CAAF is an Article I court. Pet. 15-20. Even if standing were required, she argues that the abatement order causes an injury in fact. The Respondent acknowledges that the CAAF did not hold that Major McFarland lacked an injury to her privilege. Opp. 14.

rights. In this case, the military judge determined that "responsibility to ensure a constitutionally fair trial" (the very question sent to the CAAF by the Navy Judge Advocate General) required her to abate the proceedings if Major McFarland refused to waive her privilege. Supp. App. 2. This sets a dangerous precedent: rather than conducting the required motion practice and hearings under M.R.E. 513 or other Rules for Courts-Martial, a judge could require victims[4] to make an impossible choice—waive their rights or see the prosecution halted. Victims facing such a dilemma would never have standing to challenge this arbitrary deprivation of their rights. *See* Pet. 9.

Beyond the direct nexus between Petitioner McFarland's assertion of privilege and the abatement order, the order causes a concrete and immediate injury. The CAAF held (Pet. App. 10) and Respondent argues (Opp. 10) that Major McFarland suffered no injury because the abatement order did not vitiate her M.R.E. 513 rights. They claim she lacks a judicially cognizable interest in whether the government prosecutes the accused. Pet. App. 12, Opp. 11. This reasoning overlooks the obvious injury inflicted upon Major McFarland.

M.R.E. 513 grants victims a privilege—not a choice. The rule is designed to protect victims' confidentiality without compromising their role as witnesses. Forcing victims to choose between asserting their privilege and

4. The concurring opinion encourages judges to require victims to negotiate their rights. "Military judges should not hesitate to require the victim, the accused, and the government to raise—and to resolve—issues regarding mental health records." Pet. App. 24.

continuing the prosecution violates their M.R.E. 513 protections. By requiring Major McFarland to make this decision, the military judge effectively removed her from her role as a witness and placed her at the fulcrum of the prosecutorial decision-making process. Contrary to the CAAF's assertion that victims should not "assume the role of the Government," the court's ruling foists the prosecutorial decision on victims, setting a price for continued prosecution. This price is a burden that victims should not bear.

Major McFarland has standing granted to her by 10 U.S.C. § 806b(e)(1) because she asserts the abatement order violates her procedural and substantive rights under M.R.E. 513(e). The injury inflicted here is neither abstract nor hypothetical. Forcing victims make a choice undermines M.R.E. 513 and fundamentally alters their role in the military justice system. Certiorari is necessary to address this unprecedented infringement on victims' rights and to clarify that abatement orders cannot be used to condition the exercise of privileges.

V. The Abatement Order Does Not Make This Case Moot.

The CAAF held (Pet. App. 13) and Respondent Bailey argues (Opp. 13-15) that this case is moot because Major McFarland lacks a stake in this dispute. The CAAF reasoned that her psychotherapy records remained sealed and that the judge's in camera review of privileged communications, even if erroneous, did not diminish her privilege. Pet. App. 13-14. The CAAF ignored this Court's holding in *Church of Scientology of Cal. v. United* States, 506 U.S. 9, 13 (1992), which established that even where

a fully satisfactory remedy is not possible, a court still has the power to effectuate a partial remedy by ordering the destruction or return of privileged records. In this case, the CAAF can provide relief by ordering the return or destruction of the erroneously produced privileged records.

Respondent attempts to distinguish the cases cited by Petitioner on the grounds that those cases involved parties challenging an order, whereas Major McFarland is not a party here. Opp. 14-15. This distinction is without merit and does not undermine the cited cases. Many of the cited cases involved nonparties who subsequently intervened or filed an action specifically to protect a privilege. *Church of Scientology*, 506 U.S. at 11 (church intervened); *United States v. Nixon*, 418 U.S. 683 (1974) (president was not a party but moved to quash third-party subpoena); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 519 U.S. 197 (2020) (Bureau filed action to enforce subpoena of records); *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (law firm asserted privilege of dead client). One does not need to be a party to challenge disclosure of privileged records.

VI. The Court Should Grant Certiorari Because Thousands of Victims Are Affected by the CAAF's Decision.

The legal questions presented by this case extend beyond Major McFarland. They reflect systemic issues that affect thousands of military sexual assault victims each year. According to Department of Defense data, approximately 29,000 service members experience sexual assault annually. Pet. 6 n.4. Many of these victims, like Major McFarland, face procedural barriers that prevent

them from challenging decisions that undermine their rights. Certiorari is necessary to address these recurring issues and to restore victims' confidence in the military justice system.

The amicus brief submitted by R.R. underscores the broad impact of this issue. While sexual assault may be considered an "incident of service" that precludes suits by military members, *Doe v. United States*, 141 S. Ct. 1498 (2021) (Thomas, J., dissenting), neither military nor civilian victims should expect that they cannot challenge the denial of their privileges in military courts. R.R. was a thirteen-year-old sexual assault victim. Amicus Br. 1. Yet, the CAAF's denial of Major McFarland's standing applies equally to R.R. and other victims, leaving them powerless to protect their privileges.

Victims will be powerless to challenge abatement orders that result from their assertion of privileges or other rights. While the CAAF suggests abatement orders could be reviewed if the government files an interlocutory appeal under 10 U.S.C. § 862(a) (Pet. App. 12), victims cannot compel the government to appeal. In cases where victims reluctantly waive their privileges, there is no basis for appeal. Even when the government does appeal, victims are excluded from participating in the appellate process. For example, in *United States v. Jacinto*, 2024 CAAF LEXIS 584 * (C.A.A.F. Oct. 2, 2024), the CAAF denied a victim—who had successfully intervened at the NMCCA—the ability to participate as a party at the CAAF to protect her M.R.E. 513 privilege. The CAAF relied on its recently enacted rule prohibiting victims, but not others asserting privilege, from intervening in its proceedings. *Id.* This new rule, applied retroactively,

precluded the victim from asserting her rights. Such procedural barriers deny victims the ability to defend their rights and erode the integrity of the military justice system.

The United States' decision to waive its right to respond to this petition does not indicate opposition to Major McFarland's arguments. Rather, it suggests the United States may have overlooked the significance of the questions presented. Before the CAAF, the United States supported Petitioner McFarland by opposing the abatement order. Pet. App. 12. The CAAF's refusal to review issues sent to it by the judge advocates general affects the United States in broader contexts beyond victims' rights. The United States fails to appreciate the impact the denial of victims' standing will have on their willingness to participate in court-martial proceedings. Military sexual assault will continue destroying the good order and discipline of the armed forces.

The Court needs to address the questions presented now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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