No. 19-108

IN THE

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

MICHAEL J.D. BRIGGS,
Respondent.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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August 14, 2019

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1259(3).

2. Whether, at the time of the offense for which Respondent was convicted, rape was an "offense punishable by death" for purposes of Article 43 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 843.

3. Whether the 2006 amendment to Article 43 retroactively extended the statute of limitations in Respondent's case.

RELATED PROCEEDINGS

Respondent is unaware of any related proceedings other than those identified in the Petition. *See* Pet. II.

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INTRODUCTION

The Petition relies upon a view of this Court's jurisdiction over the Court of Appeals for the Armed Forces (CAAF) that the government has consistently rejected. On the merits, its principal objection is that CAAF misinterpreted the Uniform Code of Military Justice (UCMJ). As the government concedes, though, CAAF's putative errors are limited not only to courts-martial, but to "a closed set of crimes committed before 2006." Pet. 23. To explain why this case is nevertheless worthy of certiorari, the Petition invents nonexistent tension between CAAF's rulings and those of the civilian courts, and it argues that the Eighth Amendment does not forbid imposition of the death penalty for rape in the military even though that important issue was not addressed by CAAF below; is not relevant to any forward-looking cases; and is in any event mooted by the UCMJ. Finally, and most importantly, the two CAAF rulings at issue were both correct. The Petition should therefore be denied.

DECISIONS BELOW

CAAF's decision in Respondent's case on remand from this Court is reported at 78 M.J. 289 (C.A.A.F. 2019), and is reprinted in the Petition Appendix at 1a–15a. The original decision of the Air Force Court of Criminal Appeals in Respondent's case is not published, but is available at 2016 WL 3682568, and is reprinted in the Petition Appendix at 16a–40a.

JURISDICTION

The government invokes this Court's jurisdiction under 28 U.S.C. § 1259(3). As noted below, however, there is a serious question as to whether that statute provides this Court with jurisdiction over the bulk of the Petition. *See post* at 6–11.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions identified in the Petition, Pet. 2, Pet. App. 41a–44a, this case involves Article 55 of the UCMJ, which provides in relevant part that "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter." 10 U.S.C. § 855. Also of relevance is the full text of the 2006 amendment to Article 43 of the UCMJ, 10 U.S.C. § 843, which is reprinted as part of CAAF's opinion in this case at Pet. App. 7a–8a.

REASONS FOR DENYING THE PETITION

In *United States* v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), CAAF unanimously held that rape is not an "offense punishable by death" for purposes of Article 43(a) of the UCMJ, 10 U.S.C. § 843(a). *See* 77 M.J. at 222. As a result, instead of carrying *no* statute of limitations, the 1997 rape for which Mangahas was charged carried a statute of limitations of five years. *See* 10 U.S.C. § 843(b) (1994). And although Congress amended Article 43 in 2006 to eliminate a statute of limitations for *all* rape offenses, CAAF nevertheless dismissed the charge in *Mangahas*—because the five-year statute of limitations had expired in 2002, well before that amendment was enacted. 77 M.J. at 225; *see Stogner* v. *California*, 539 U.S. 607, 610–21 (2003) (holding that the retroactive extension of an expired statute of limitations is unconstitutional). *Mangahas* thereby foreclosed *all* courts-martial for rape committed more than five years before the 2006 amendment—a decision the government did not contest in this Court.

Instead, the government nominally seeks review of CAAF's decision in Respondent's case—which raised the narrower question *Mangahas* left open, *i.e.*, whether the 2006 amendment to Article 43 applies retroactively to the far smaller set of cases in which the five-year statute of limitations had *not* yet expired when the 2006 amendment entered into force.[1] Writing for a unanimous court, Judge Maggs held that the answer was "no," because the text and legislative history of the 2006 amendment provided no indication that Congress intended it to apply to offenses preceding its enactment. If anything, the text and context cut the other way. *See* Pet. App. 11a–12a.

Although the Petition briefly nods at CAAF's ruling in Respondent's case, its main objection is to the decision in *Mangahas*. *See, e.g.*, Pet. 11 ("CAAF erred in *United States* v. *Mangahas* . . . ."); *id.* at 26 ("Granting certiorari in this particular case would allow the Court to address . . . the correctness of *Mangahas*."). In the government's view, CAAF not only misread Article 43 in that ruling, but it also misunderstood this Court's Eighth Amendment jurisprudence—which, even if it *applies* to the military (a point the government does not concede), does not prohibit capital punishment for rape of adults by servicemembers. *Id.* at 16–20.

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1. The 2006 amendment was enacted as section 553 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553, 119 Stat. 3136, 3264. That statute entered into force on January 6, 2006. Thus, *Mangahas* bars all courts-martial in which the alleged offense took place on or before January 6, 2001, but at least five years elapsed before charges were referred. *Briggs* involves only those cases in which the alleged offense took place between January 7, 2001, and January 5, 2006, but no charges were referred within five years.

There are three different problems with the government's arguments, each of which provides an independent basis for why certiorari should be denied.

First, the government itself has long argued that this Court lacks jurisdiction to consider most of them. 28 U.S.C. § 1259, which gives this Court appellate jurisdiction over CAAF, limits this Court to review of CAAF's "decisions" in four specific categories of cases. *See, e.g.*, STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE § 2.14, at 130 & n.120 (10th ed. 2013). To that end, for nearly three decades (and as recently as this January), the government has consistently maintained that this Court lacks jurisdiction under § 1259 to review any questions "not resolved by CAAF's decision in *this* case." Brief for the United States in Opposition at 10, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (mem.) (emphasis added).

All CAAF decided in *this* case is that the 2006 amendment to Article 43 does not apply retroactively to past offenses for which the five-year statute of limitations had not yet expired—a materially different question from what was presented and decided in *Mangahas* (and from the question the government formally presents in its petition here, *see* Pet. I).[2] Thus, if the government's longstanding reading of § 1259 is correct, this Court lacks jurisdiction to revisit *Mangahas* here.

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2. The Question Presented in the Petition is "[w]hether [CAAF] erred in concluding—contrary to its own longstanding precedent—that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years." Respondent has reframed the Questions Presented to reflect the different issues this Court is being asked to resolve. *See ante* at i.

Second, and in any event, CAAF's decisions in *Mangahas* and Respondent's case were both *correct*. In *Mangahas*, CAAF correctly interpreted Article 43 of the UCMJ to not treat an offense for which the death penalty is categorically unavailable as an "offense punishable by death." And in *Briggs*, CAAF correctly held that Congress did not intend for the 2006 amendment to Article 43 to apply retroactively. Thus, whether this Court's jurisdiction extends to revisiting *Mangahas* or is limited to CAAF's decision here, neither warrants reversal.

Finally, even if reasonable minds could disagree as to the correctness of CAAF's rulings in *Mangahas* and *Briggs*, the Petition fails to provide a satisfactory explanation for why CAAF's putative errors warrant this Court's review. For instance, the government attempts to manufacture "inconsistency" between how CAAF has interpreted Article 43 and how civilian courts have construed "identical statutory language in a parallel statutory context." *Id.* at 24. But CAAF itself has explained that, as Congress intended, the relevant statutes are *not*, in fact, parallel. *See, e.g.*, *United States* v. *Lopez de Victoria*, 66 M.J. 67, 72 (C.A.A.F. 2008); *United States* v. *McElhaney*, 54 M.J. 120, 124–26 (C.A.A.F. 2000). There is therefore no division of authority that would justify this Court's intervention.

Instead, the closest the government comes to identifying a question worthy of certiorari is its argument that the Constitution allows the military to impose the death penalty for rape—which this Court has never held. It would be one thing if that question had any bearing on future cases, but as the government concedes, it doesn't; the maximum sentence currently available in the military for rape is

life without parole. *See* Pet. 8 n.*. And because Article 55 of the UCMJ incorporates this Court's Eighth Amendment into the military justice system, whether the Constitution's ban on cruel and unusual punishment applies to courts-martial of its own force (and bans imposition of the death penalty for rape) need not actually be resolved here.

So understood, the Petition is an invitation to this Court to resolve a difficult constitutional question that is moot in these cases and entirely academic going forward. That's why, in the government's own words, CAAF's decisions in *Mangahas* and *Briggs* "affect only a closed set of crimes committed before 2006," *id*. at 23, and why any flaws in those rulings do not justify this Court's intervention. *See, e.g.*, *City & County of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) ("[W]e are not, and for well over a century have not been, a court of error correction.").

I. ON THE GOVERNMENT'S LONGSTANDING VIEW, THIS COURT'S JURISDICTION DOES NOT EXTEND TO THE PETITION'S CENTRAL CLAIMS

In opposing certiorari in *Larrabee* earlier this year, the Solicitor General argued that "Section 1259 grants this Court authority to review by writ of certiorari only '*[d]ecisions* of the [CAAF]' in specified categories of cases." U.S. *Larrabee* Br., *supra*, at 10 (alterations in original). This language stands in marked contrast to the other statutes regulating this Court certiorari jurisdiction, including 28 U.S.C. § 1254 (all "[c]ases *in* the courts of appeals" (emphasis added)) and §§ 1257, 1258, and 1260 ("Final judgments or decrees rendered by the highest court of [a State or federal territory] in which a decision could be had.").

In the government's view, Congress in § 1259 deliberately limited this Court's review to the four corners of CAAF's underlying "decision":

> Congress followed the Department of Justice's recommendation to authorize this Court's discretionary review in circumstances in which "*a decision* of [CAAF] affected military jurisprudence" by enacting legislation "[t]o limit" the new authorization for direct review in such a way as to "permit the Supreme Court to consider issues of public importance" while otherwise "preserv[ing] the role of [CAAF]" as the primary "interpreter of the [UCMJ]."

U.S. *Larrabee* Br., *supra*, at 11–12 (quoting S. REP. No. 98-53, at 9 (1983) (second, third, and fifth alterations in original)).[3]

To drive the point home, a separate provision further specifies that "[t]he Supreme Court may *not* review by a writ of certiorari under this section any

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3. *Larrabee* was only the most recent petition to which the government objected on the ground that CAAF had not agreed to decide the questions for which certiorari was sought. It has similarly interpreted § 1259(3) to foreclose certiorari on at least five other occasions dating back nearly three decades. *See, e.g.*, Brief for the United States in Opposition at 7 n.2, *Wiechmann* v. *United States*, 559 U.S. 904 (2010) (mem.); Brief for the United States in Opposition at 7–8, *Stevenson* v. *United States*, 555 U.S. 816 (2008) (mem.); Brief for the United States in Opposition at 6, *McKeel* v. *United States*, 549 U.S. 1019 (2006) (mem.); Brief for the United States in Opposition at 4 n.6, *Andrews* v. *United States*, 513 U.S. 1057 (1994) (mem.); Brief for the United States in Opposition at 7 n.8, *Colon* v. *United States*, 502 U.S. 821 (1991) (mem.).

This Court has not granted certiorari in any case in which the government has raised this specific jurisdictional objection.

action of the United States Court of Appeals for the Armed Forces in *refusing* to grant a petition for review." 10 U.S.C. § 867a(a) (emphases added). Thus, as the government has consistently argued, when CAAF grants a discretionary petition for review, "and the CAAF's 'decision' thus resolves only [the] granted issue[s], this Court lacks authority to resolve different issues that were not part of that decision." U.S. *Larrabee* Br., *supra*, at 10 (internal quotation marks omitted); *see also id.* ("Section 1259's grant of authority to review 'decisions' of the CAAF by writ of certiorari in certain military cases precludes this Court's adjudication of other issues not resolved in such 'decisions.'").[4]

In this case, CAAF initially granted Respondent's petition for discretionary review only on the dual-officeholding questions that this Court ultimately resolved in the government's favor in *Ortiz* v. *United States*, 138 S. Ct. 2165 (2018). *See United States* v. *Briggs*, 75 M.J. 466 (C.A.A.F. 2016) (mem.). Because *Mangahas* was decided while Respondent's petition for certiorari was pending, this Court ultimately granted Respondent's petition for certiorari, vacated CAAF's decision, and remanded in light of *Mangahas*. *See Abdirahman* v. *United States*, 139 S. Ct. 38 (2018) (mem.). On remand, CAAF specified two additional issues:

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4. In *Larrabee*, the government opposed this Court's jurisdiction to review CAAF's decision even though the petition raised a jurisdictional objection to the decisions below, *i.e.*, that the military lacked the constitutional authority to try him by court-martial. *See* Petition for a Writ of Certiorari at i, *Larrabee*, 139 S. Ct. 1164.

I. DOES THE 2006 AMENDMENT TO ARTICLE 43, UCMJ, CLARIFYING THAT RAPE IS AN OFFENSE WITH NO STATUTE OF LIMITATIONS, APPLY RETROACTIVELY TO OFFENSES COMMITTED BEFORE ENACTMENT OF THE AMENDMENT BUT FOR WHICH THE THEN EXTANT STATUTE OF LIMITATIONS HAD NOT EXPIRED?

II. CAN APPELLANT SUCCESSFULLY RAISE A STATUTE OF LIMITATIONS DEFENSE FOR THE FIRST TIME ON APPEAL?

United States v. *Briggs*, 78 M.J. 106, 106 (C.A.A.F. 2018) (mem.); *see also* Pet. App. 6a–7a.

CAAF's ultimate decision on remand only resolved those two issues. Pet. App. 7a–15a. Thus, if the government's previously consistent reading of § 1259(3) is correct, this Court lacks jurisdiction to review anything in this case other than what CAAF decided on remand from this Court.

In its Petition here, however, the government asks this Court to review far more than CAAF's decision in Respondent's case. The Question Presented, for instance, asks this Court to decide whether the UCMJ "allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years." Pet. I. That framing necessarily conflates the two very different holdings in *Mangahas* and *Briggs* by merging the distinct time periods to which those two decisions apply. *See ante* at 3 n.1.

If this Court's jurisdiction is limited to reviewing CAAF's decision in this case, all it can decide is the far narrower question whether the 2006 amendment to Article 43 retroactively extended the statute of limitations in Respondent's case—without reaching

whether the proper statute of limitations *was* five years at the time of Respondent's alleged offense.

Moreover, such a jurisdictional defect could easily have been avoided. Nothing would have prevented the Judge Advocate General (TJAG) of the Air Force from adding the questions the government now presents to this Court to the scope of CAAF's review below. Although CAAF has discretionary jurisdiction over non-capital appeals from servicemembers, 10 U.S.C. § 867(a)(3), it has *mandatory* jurisdiction over issues certified to that court by each service branch's TJAG. *Id*. § 867(a)(2). And after CAAF specified the two issues it decided on remand from this Court, CAAF's rules gave the government 30 days to cross-certify *additional* issues to be considered as part of the same appeal. *See* C.A.A.F. R. 19(b)(3); *see also United States* v. *Clifton*, 71 M.J. 489, 493–95 (C.A.A.F. 2013) (Erdmann, J., concurring) (describing the purpose and implications of Rule 19(b)(3)).[5] Thus, the Air Force TJAG *could* have required CAAF to revisit *Mangahas* below—even summarily—in order to preserve this Court's appellate jurisdiction. But he didn't.[6]

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5. In this regard, the government is far better situated for purposes of this Court's jurisdiction than a servicemember, for it has the ability in any individual case to compel CAAF to decide specific issues—and to thereby trigger this Court's jurisdiction. *See* 28 U.S.C. § 1259(2). By contrast, servicemembers in non-capital cases are left entirely to CAAF's discretion.

6. The government concedes that, in this case, it "did not expressly ask the CAAF to overrule its recent decision in *Mangahas*." Pet. 25. It nevertheless suggests that it preserved its objection through a single line in its brief, which argued that "'Congress intended for rape[s]' of the kind at issue here 'to have an unlimited statute of limitations.'" Pet. 25–26 (alteration in original; citation omitted).

On the government's own prior understanding, then, this Court lacks jurisdiction to review anything beyond CAAF's "decision" in *Briggs*—to which the Petition devotes two scant pages of objections. Pet. 20–22. Those objections are without merit in any event, as CAAF's unanimous decision in Respondent's case was correct. *See post* at 15–18. But either way, certiorari is hardly appropriate if this Court cannot consider the heart of the government's objections.[7]

II. CAAF'S DECISIONS IN *MANGAHAS* AND *BRIGGS* WERE BOTH CORRECT

Separate from whether this Court has jurisdiction to review CAAF's decision in *Mangahas* (in addition to *Briggs*), there is no need for this Court to review either ruling, because both are correct on the merits.

A. *Mangahas*

In *Mangahas*, the defendant was charged in 2015 for a rape that allegedly took place in 1997. In concluding that the statute of limitations for the charged offense was five years, CAAF held that, for purposes of Article 43, an offense is "punishable by death" if—and only if—the death penalty is a legally

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The suggestion that this vague sentence somehow added an additional issue to be resolved by CAAF—whether *Mangahas* was rightly decided—defies common sense. And contra the Petition, *id*. at 26, it is not remotely supported by the inapposite discussion in *United States* v. *Vonn*, 535 U.S. 55, 58 n.1 (2002).

7. If this Court is nevertheless inclined to grant certiorari, it should, at the very least, add the jurisdictional issue to the questions presented—so that it can receive the benefit of plenary briefing and argument. *See, e.g.*, *Dalmazzi* v. *United States*, 138 S. Ct. 53, 53 (2017) (mem.) (directing the parties to brief and argue a different question concerning this Court's jurisdiction under 28 U.S.C. § 1259(3)).

available punishment for the crime. As Judge Ryan wrote for the unanimous court, "[w]here . . . there is *no* set of circumstances under which the death penalty could constitutionally be imposed for the rape of an adult woman, that offense is simply not 'punishable by death' for purposes of the exception to the ordinary five-year statute of limitations." *Mangahas*, 77 M.J. at 224; *see also id.* at 224–25 ("[W]here the death penalty could never be imposed for the offense charged, the offense is not punishable by death for purposes of Article 43."). In so holding, CAAF overruled two of its prior decisions—*Willenbring* v. *Neurater*, 48 M.J. 52 (C.A.A.F. 1998), and *United States* v. *Stebbins*, 61 M.J. 366 (C.A.A.F. 2005)—insofar as they had held to the contrary. *See Mangahas*, 77 M.J. at 222.

The Petition offers two objections to *Mangahas*'s reasoning. First, it argues that rape *was* an offense "punishable by death" at the relevant time because Article 120 of the UCMJ, 10 U.S.C. § 920, expressly authorized the death penalty for rape. *See* Pet. 12–16. In the government's view, whether an offense is "punishable by death" for purposes of Article 43 should turn on whether the death penalty was formally *authorized* by statute, not whether it was actually available as a punishment. *See id.* Second, and in any event, the Petition asserts that rape *was* "punishable by death" at the relevant time because the Eighth Amendment, insofar as it even *applies* to the military, *id.* at 17–18, does not forbid the death penalty for adult rape committed by a servicemember. Neither argument succeeds.

As Judge Ryan explained in *Mangahas*, the government's statutory argument blurs the plain-language distinction between whether an offense is "punishable" by death and whether the death penalty

is "authorized." *See* 77 M.J. at 224. "In its plainest terms," she explained, "'punishable' means 'subject to a punishment,' or 'to inflict punishment.'" *Id.* (citations omitted). That Article 120 *authorized* the death penalty for rape does not mean that rape was thus "punishable by death"; if, as CAAF concluded, the Constitution forbade the imposition of the death penalty for a specific offense, then the offense was, on the ordinary meaning of the terms, not "punishable by death." *See id.*

As for the government's suggestion that, insofar as the Eighth Amendment even *applies* to the military, it does not bar the death penalty for rape, CAAF read this Court's decision in *Coker* v. *Georgia*, 433 U.S. 584 (1977), as "unequivocally [holding] that the death penalty was a constitutionally impermissible penalty in violation of the cruel and unusual punishment clause of the Eighth Amendment for the crime of rape of an adult woman." *Mangahas*, 77 M.J. at 223. The government argued that the five-Justice statement respecting the denial of rehearing in *Kennedy* v. *Louisiana*, 554 U.S. 945 (2008) (mem.), called into question whether *Coker* applies to the military. But CAAF disagreed—pointing to those Justices' own assertion that whether the Eighth Amendment applied differently to courts-martial was "a matter not presented here for our decision." *Mangahas*, 77 M.J. at 223 n.3 (quoting *Kennedy*, 554 U.S. at 948 (statement of Kennedy, J.)).

In essence, then, the government's principal objection to CAAF's decision in *Mangahas* is that CAAF erred by . . . following this Court's precedent. That objection is empty enough in its own right. But it also fails to account for Article 55 of the UCMJ—which not only generally incorporates this Court's

civilian Eighth Amendment jurisprudence by statute, *see United States* v. *Matthews*, 16 M.J. 354, 368 (C.M.A. 1983), but was "intended to grant protection covering even wider limits." *United States* v. *Wappler*, 9 C.M.R. 23, 26 (C.M.A. 1953); *see also Mangahas*, 77 M.J. at 223 n.4 (citing Article 55).[8]

In other words, the government's argument that rape was "punishable by death" turns not only on concluding that *Coker* does not apply to the military, but *also* that Article 55, which otherwise incorporates this Court's Eighth Amendment jurisprudence into the military, doesn't incorporate *Coker*. It would be one thing if the government explained how Article 55 could brook such a distinction (or why CAAF's settled understanding that Article 55 has that effect is wrong), but the Petition does not so much as mention that provision. Thus, even if the Eighth Amendment itself does not forbid the imposition of the death penalty for adult rape by a servicemember, Article 55 does. Either way, *Mangahas* was rightly decided.

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8. As CAAF's predecessor explained in *Matthews*, "there may be circumstances under which the rules governing capital punishment of servicemembers will differ from those applicable to civilians." 16 M.J. at 368; *see also id.* ("This possibility is especially great with respect to offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment, or in violation of the law of war, e.g., spying.").

But *Matthews* rejected the suggestion that those circumstances were implicated for the offenses at issue in that case (murder and rape), because those offenses "have no characteristics which, for purposes of applying the prohibition against 'cruel and unusual punishments,' distinguish them from similar crimes tried regularly in State and Federal courts." *Id.* at 369. So too, here.

B. *Briggs*

When it finally turns to a critique of CAAF's decision in Respondent's case, the Petition fares little better. Citing nothing more than legislative history, the government argues that, when it enacted the 2006 amendment to Article 43, Congress "would have expected" that there would be no statute of limitations for rape offenses predating the 2006 amendment. Pet. 21–22. As CAAF explained in detail, however, that's the wrong answer to the wrong question.

Courts generally apply the statute of limitations in place at the time of the alleged offense. *See Toussie* v. *United States*, 397 U.S. 112, 115 (1970). And appellate courts apply the law at the time of a direct appeal, not the time of the trial. *See Griffith* v. *Kentucky*, 479 U.S. 314 (1987). Thus, once *Mangahas* interpreted Article 43 to provide that the statute of limitations for rape prior to the 2006 amendment was five years, the question in *Briggs* reduced to whether Congress intended the 2006 amendment to apply *retroactively*; because Respondent's direct appeal was still pending, there was no question that *Mangahas* applied.

As Judge Maggs explained below, however, not only is there no indication of such intent in either the text or the legislative history of the 2006 amendment, but there is significant evidence that Congress did *not* have that intent. In his words, "the 2006 amendment to Article 43(a), UCMJ, was not limited to rape; it also eliminated the previous five-year period of limitations for unpremeditated murder. Congress therefore did not intend the 2006 amendment simply to maintain the status quo." Pet. App. 11a (footnote omitted). And yet, there is no suggestion in the text or legislative history that Congress intended the 2006 amendment

to apply retroactively to cases of unpremeditated murder—and the government has not argued to the contrary. Thus, for the government to be correct, the 2006 amendment to Article 43 would have to apply retroactively to rape but *not* to unpremeditated murder—a distinction that finds exactly zero support in that statute's text or legislative history. *See id.* at 11a & n.6.

As for the idea that Congress *thought* it was codifying the status quo with regard to the statute of limitations for rape, "that belief alone would not imply that Congress intended for the amendment to apply retroactively. In such circumstances, Congress would have had no reason to consider the issue of retroactivity. And if Congress did not actually decide to make the statute apply retroactively, then the presumption of non-retroactivity should control." *Id.* at 11a–12a; *see also United States* v. *Habig*, 390 U.S. 222, 227 (1968) ("[C]riminal limitations statutes are 'to be liberally interpreted in favor of repose.'" (quoting *United States* v. *Scharton*, 285 U.S. 518, 522 (1932))).[9]

Rather than engage with CAAF's analysis on these points, the Petition sidesteps it—suggesting that the

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9. The absence of any discussion of retroactive application in the text or legislative history of the 2006 amendment to Article 43 is all the more telling in this specific context. Not only had Congress already considered similar questions about retroactive application in enacting a 2003 amendment to Article 43, but this Court's ruling in *Stogner* had discussed in considerable detail the difficulties that could arise from legislatures seeking to retroactively apply extended statutes of limitations for sexual assault and child abuse offenses. *See, e.g.*, 539 U.S. at 609–21. That Congress was well aware of these concerns and *still* included no discussion of retroactivity in the 2006 amendment to Article 43 only further supports CAAF's reasoning in *Briggs*.

presumption against retroactivity should not apply in the first place. As the government argues, because CAAF's precedent at the time of the 2006 amendment *did* treat rape as an offense "punishable by death," "no settled expectations were disrupted" when Congress expressly provided that rape offenses would have no statute of limitations going forward. *See* Pet. 21.

CAAF rejected this argument as well, and for good reason: In considering whether a statute produces an impermissible "retroactive effect," courts do not ask whether it produced that effect on its face, but rather whether it produced that effect *as applied* to the party claiming that it is impermissibly retroactive. *See, e.g.*, *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006) ("[W]e ask whether applying the statute *to the person objecting* would have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 278 (1994) (alterations in original; emphasis added)). And "[i]f the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the 'absen[ce of] a clear indication from Congress that it intended such a result.'" *Id.* at 37–38 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001) (second alteration in original)).

Where, as here, "the person objecting" is a criminal defendant on direct appeal, the "retroactive effect" analysis necessarily focuses on the law at the time of appeal—including, in this case, *Mangahas*. In other words, because of *Mangahas*, the statute of limitations in Respondent's case was five years *unless* the 2006 amendment applied retroactively—and whether that amendment produced an impermissible

retroactive effect is considered in light of *Mangahas*. CAAF was therefore correct in holding that the 2006 amendment to Article 43 lacks sufficient (which is to say any) indication of legislative intent to overcome the presumption against retroactive application.

III. THE ARGUMENTS PRESENTED IN THE PETITION DO NOT JUSTIFY THIS COURT'S INTERVENTION

The Petition's principal objections are to CAAF's interpretations of Article 43 of the UCMJ in *Mangahas* and of the 2006 amendment thereto in *Briggs*. Both of those decisions were correct. But even if this Court is inclined to disagree, the errors identified by the government are hardly worthy of this Court's review.

A. CAAF's Rulings Are Limited to the UCMJ

The Petition begins by invoking four prior examples of petitions this Court granted because the questions presented were "'of central importance for military courts.'" Pet. 24 (quoting *United States* v. *Denedo*, 556 U.S. 904, 917 (2009)), and argues that the same is true here. This argument misses the central distinction between those cases and this one—the presence (*vel non*) of legal questions transcending the unique context of courts-martial.

As the government has previously noted, when Congress first gave this Court appellate jurisdiction over CAAF's predecessor in 1983, that statutory grant "was 'not intend[ed] to displace [that court] as the primary interpreter of military law.'" Brief for the United States in Opposition at 16, *Sullivan* v. *United States*, 137 S. Ct. 31 (2016) (mem.) (quoting S. REP. No. 98-53, *supra*, at 10 (alterations in original)); *see also United States* v. *Armbruster*, 29 C.M.R. 412, 414 (C.M.A. 1960) ("[CAAF] was created by Congress to sit

in review of courts-martial on matters of law. In essence, it is the Supreme Court of the military justice system."). To that end, in 36 years, this Court has reviewed CAAF's decisions in only 10 cases, *Ortiz*, 138 S. Ct. at 2173 n.3—and *never* when the only issue in dispute was how CAAF had interpreted the UCMJ.

The four examples the government cites prove the point. In *Denedo*, for example, the government's petition raised the applicability of the All Writs Act, 28 U.S.C. § 1651, to military courts—and whether military appellate courts had the authority, under that statute of general applicability, to issue writs of error *coram nobis*. *See Denedo*, 556 U.S. at 910–17. The Petition also cites *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), which presented two questions—one about CAAF's power under the All Writs Act, and one about whether a specific exercise of authority by the President was unconstitutional. *See id*. at 533 & n.4.

In the third example the Petition cites, *United States* v. *Scheffer*, 523 U.S. 303 (1998), the government's petition asked whether Military Rule of Evidence 707 (which provides that evidence of a polygraph examination is not admissible in court-martial proceedings) "is an unconstitutional abridgment of military defendants' right to present a defense." Petition for a Writ of Certiorari at I, *United States* v. *Scheffer*, 520 U.S. 1227 (1997) (mem.). And the final example, *Loving* v. *United States*, 517 U.S. 748 (1996), raised a series of constitutional questions about the military death penalty. *See id*. at 751–52.

All of these cases were unquestionably "'of central importance for military courts.'" Pet. 24 (quoting *Denedo*, 556 U.S. at 917). But they were also each about something *more* than the UCMJ—either the

construction of the All Writs Act, the Constitution, or, as in *Clinton* v. *Goldsmith*, both. In those contexts, resolution of the questions presented would have gone—and went—well beyond correcting any errors CAAF made in interpreting statutory language that applies only to the military. Resolution of the Question Presented here, in contrast, does not.

B. Article 43 is Not "Parallel" to Civilian Statutes of Limitations

The Petition tries to paint CAAF's rulings as having a broader impact by playing up the "inconsistency between the CAAF's interpretation of the phrase 'punishable by death' and the civilian courts of appeals' interpretation of identical statutory language in a parallel statutory context." *Id.* The central problem with this argument is that the statutory contexts are not actually parallel—as CAAF has expressly and repeatedly held.

For instance, in *McElhaney*, CAAF squarely refused to apply the civilian statute of limitations for child abuse to the military. As CAAF explained, "[c]ongressional intent to separate military justice from the federal criminal system, evidenced by our distinct and comprehensive criminal code, requires us to 'exercise great caution in overlaying a generally applicable statute specifically onto the military system.'" 54 M.J. at 124 (quoting *United States* v. *Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1999)).

And as CAAF noted in *Lopez de Victoria*, although legislation was introduced after *McElhaney* to conform Article 43 to § 3283, Congress instead took a different tack—writing into Article 43 a new statute of limitations for child abuse offenses (and one that, as CAAF held in that case, did not apply

retroactively). 66 M.J. at 72–73. Thus, not only has CAAF unequivocally held that Article 43 is *not* to be read in parallel to civilian statutes of limitations, but Congress, in the 2003 amendment at issue in *Lopez de Victoria*, rejected a proposal that *would* have created parallelism between those statutes of limitations. *See id.* (discussing Congress's rejection of such proposed legislation). Any "inconsistency" between *Mangahas* and "the civilian courts of appeals' interpretation of identical statutory language," Pet. 24, is therefore irrelevant, because the contexts are not actually parallel.

C. The Eighth Amendment Issue Raised by the Petition is Academic

Instead, the only issue to which the Petition even alludes that might warrant this Court's consideration is the extent to which the Eighth Amendment in general (and *Coker*, in particular) applies to courts-martial. But even if that question might warrant this Court's attention at some point, the instant Petition is a decidedly poor vehicle for considering it here.

First, as noted above, the extent to which the Eighth Amendment applies to courts-martial on its own has largely been mooted by Article 55 of the UCMJ—which CAAF has read to incorporate this Court's Eighth Amendment jurisprudence into the military context. *See ante* at 13–14 & n.8. Unless CAAF's well-established construction of Article 55 is wrong (and the government has not argued that it is), then Article 55 would prohibit the imposition of the death penalty for a servicemember's rape of an adult even if the Eighth Amendment does not. *See Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (noting "the strong presumption of

continued validity that adheres in the judicial interpretation of a statute"). Either way, the offenses at issue in *Mangahas* and *Briggs* would still *not* have been "punishable by death" for purposes of Article 43.

Second, even if the constitutional question *is* properly presented (and even if this Court has jurisdiction to reach it), its implications here are necessarily modest. Since the 2006 amendment to Article 43, there has been no statute of limitations for rape in the military—which vitiates the forward-looking significance of *Mangahas*'s interpretation of the phrase "punishable by death." Indeed, the government is free under current law to prosecute any servicemember for any rape committed on or after January 6, 2006—regardless of when the offense is reported or when the charges are brought.

Finally, as the government concedes, the current version of the *Manual for Courts-Martial* provides that the maximum possible sentence for rape is "life without eligibility for parole." Pet. 8 n.*. Thus, in addition to having no bearing on the statute of limitations for offenses committed on or after January 6, 2006, for offenses committed on or after June 28, 2012 (when the current *Manual* entered into force), the constitutional question cannot otherwise arise.

* * *

At most, then, the constitutional question that isn't actually implicated in this case, that needn't be resolved to decide this case, and over which this Court may in any event lack jurisdiction, "affect[s] only a closed set of crimes committed before 2006." *Id*. at 23. There have certainly been weaker cases for certiorari, but seldom from the government's pen.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August 14, 2019