Nos. 19-108 & 19-184

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*,
v.
MICHAEL J.D. BRIGGS, *Respondent*.

UNITED STATES, *Petitioner*,
v.
RICHARD D. COLLINS, *Respondent*.

UNITED STATES, *Petitioner*,
v.
HUMPHREY DANIELS III, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association headquartered in Washington, D.C. Founded in 1958, NACDL's mission is to identify and reform flaws and inequities in the criminal justice system. Drawing on the collected expertise of the nation's criminal defense bar, NACDL files amicus briefs in federal and state courts across the nation in those cases that present issues of importance to criminal defendants, criminal defense lawyers, and the criminal-justice system as a whole. NACDL is committed to enhancing the capacity of the criminal defense bar to safeguard fundamental constitutional rights, including those secured by the Eighth Amendment.[1]

INTRODUCTION

Respondents have the constitutional right to be free from cruel and unusual punishment. To that end, they cannot be subject to the death penalty for raping an adult woman. As such, Article 43(a) of the Uniform Code of Military Justice ("UCMJ"), in effect at the time of the alleged offenses, violated Respondents' constitutional rights by categorizing rape as an offense punishable by death to delineate offenses without a limitations term. Applying Supreme Court precedent and the canons of statutory interpretation

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, their members, and their counsel made any monetary contribution to its preparation and submission. Petitioner and Respondents have consented to the filing of this brief.

to the UCMJ, Respondents are not subject to prosecution because the statute of limitations had run before they were charged with rape.

A. *United States* v. *Briggs*

The Court of Appeals for the Armed Forces ("CAAF") set aside Respondent Michael J.D. Briggs' court-martial rape conviction, in violation of Article 120(a) of the UCMJ, 10 U.S.C. § 920(a) (2000), for conduct that occurred in 2005. Briggs Pet. App. 1a–2a. The CAAF, applying *United States* v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), held that the applicable five-year statute of limitations under Article 43(a) of the UCMJ in effect between 1986 and 2006 had expired. In *Mangahas*, the CAAF held "where the death penalty could never be imposed for the offense charged, the offense is not punishable by death for purposes of Article 43." 77 M.J. at 224–25. The CAAF emphasized the importance of overruling *Willenbring* v. *Neurater*, 48 M.J. 152 (C.A.A.F. 1998), because of the "grave risk of undermining public confidence in law" to hold otherwise. *Id.* at 225. In *Briggs*, just as in *Mangahas*, "there is, in fact, no set of circumstances under which anyone could *constitutionally* be punished by death for the rape of an adult woman." Briggs Pet. App. 5a (emphasis added). The CAAF decided the failure to inform Mr. Briggs of the five-year statute of limitations was "clear and obvious error—at least as assessed in hindsight on appeal," warranting review and reversal. *Id.* The CAAF dismissed the case.

B. *United States* v. *Collins* & *United States* v. *Daniels*

Two additional cases present the same issue. First, in *United States* v. *Collins*, the CAAF applied *Mangahas* and held the failure to inform Respondent

Richard D. Collins of the five-year statute of limitations for the 2000 rape was a clear error. Collins Pet. App. 17a–18a. In *United States* v. *Daniels*, the CAAF again applied *Mangahas* and held that Respondent Humphrey Daniels III, could not be convicted for a 1998 rape. *Id.* at 26a.

In all three cases, the CAAF properly applied constitutional protections to servicemembers and should therefore be affirmed.

SUMMARY OF ARGUMENT

First, there must be a specific reason not to apply the Eighth Amendment to the Constitution to servicemembers. As there is no issue of military importance that excludes servicemembers from the protections of the Eighth Amendment, rape of an adult cannot be an "offense punishable by death." 10 U.S.C. § 843(a) (1986). Under the Supreme Court's interpretation of the Cruel and Unusual Punishment Clause of the Eighth Amendment, the crime of rape of an adult cannot be punishable by death. See *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); see also *Mangahas*, 77 M.J. at 223 (applying *Coker* to the military context). Petitioner has not met its burden to provide a military-specific exception for the application of the Eighth Amendment to servicemembers. See *United States* v. *Easton*, 71 M.J. 168, 174–75 (C.A.A.F. 2012). Here, the Petitioner offers policy prescriptions and "national security" reasons, U.S. Br. 34, which are insufficient to deprive a servicemember of his or her constitutional rights.

Further, canons of statutory interpretation require that Article 43 must be read to protect applicable constitutional rights. Specifically, sections in the same statutory scheme should be read *in pari materia*, or interpreted together. Article 43, at the time of

Respondents' alleged offenses, had no statute of limitations for crimes punishable by death, including rape, but established a five-year limitation otherwise, see 10 U.S.C. § 843(a) (1986); however, Article 55 prohibits cruel and unusual punishment, mirroring the Eighth Amendment. Applying Supreme Court precedent that precludes death as a punishment for rape of an adult, Article 43 read in conjunction with Article 55 requires that rape was subject to a five-year statute of limitations at the time of the alleged offenses.

Lastly, civilian law must inform the interpretation of the UCMJ. The CAAF may not freely disregard Supreme Court precedent without a "legitimate military necessity or distinction." *United States* v. *Cary*, 62 M.J. 277, 280 (C.A.A.F. 2006) (Crawford, J., concurring). Therefore, the CAAF's decision to reverse Respondents' convictions should be affirmed.

ARGUMENT

I. THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT APPLIES TO SERVICEMEMBERS

At the time of the alleged offenses, Article 43 of the UCMJ provided, in relevant part, that a person charged with any "offense punishable by death" may be tried without time limitation, and all other offenses, unless otherwise specified, are subject to a five-year statute of limitation. 10 U.S.C. § 843 (1986). Although Article 120 provided that a person guilty of rape "shall be punished by death or other punishment as a court-martial may direct," 10 U.S.C. § 920 (1994), the Eighth Amendment to the Constitution precludes death as an available punishment for rape of an adult, *Coker*, 433 U.S. at 592. In *Coker*, this

Court held that the death penalty for the rape of an adult is prohibited by the Eighth Amendment. *Id.* ("[A] sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.").

Following *Coker*, military courts have consistently assumed that the Eighth Amendment applies to servicemembers. See *Loving* v. *United States*, 517 U.S. 748 (1996); *United States* v. *Pena*, 64 M.J. 259 (C.A.A.F. 2007) (quoting *United States* v. *Lovett*, 63 M.J. 211 (2006)); *United States* v. *Avila*, 53 M.J. 99 (C.A.A.F. 2000); *United States* v. *Martinez*, 19 M.J. 744, 748 (C.M.R. 1984); *United States* v. *Matthews*, 16 M.J. 354 (C.M.A. 1983). Indeed, the CAAF's decision in *Mangahas* is directly on point, holding "that where the death penalty could *never* be imposed for the offense charged, the offense is *not* punishable by death for purposes of Article 43, UCMJ." *Mangahas*, 77 M.J. at 224–25 (applying *Coker* and holding that the statute of limitations for rape is five years).

Similarly, the Navy-Marine Corps Court of Military Review ("NMCMR") held that Article 120 is invalid under the Eighth Amendment because rape is not a capital offense. *United States* v. *Clark*, 18 M.J. 775, 776 (N-M.C.M.R. 1984). In *Clark*, the NMCMR deferred to the Supreme Court in its interpretation of the Constitution and held that "the capital aspect of punishment purportedly authorized under Article 120 has been effectively invalidated." *Id.* Thus, military courts have been properly preserving servicemembers constitutional right to be free from cruel and unusual punishment for decades. Holding otherwise, as urged by Petitioner, would upset settled military law.

II. PETITIONER'S POLICY ARGUMENTS DO NOT OVERRIDE RESPONDENTS' CONSTITUTIONAL RIGHTS

Servicemembers do not leave their constitutional rights at the recruitment-office door. *United States* v. *Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004) ("Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable."). Petitioner has the burden to prove that Respondents' constitutional rights should not apply. *Easton*, 71 M.J. at 174–75 ("[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." (quoting *Courtney* v. *Williams*, 1 M.J. 267, 270 (C.M.A. 1976))). It cannot do so.

As the CAAF noted in *Mangahas*, 77 M.J. at 223, no military-specific exception existed to impose a more severe punishment to servicemembers found guilty of rape than for similarly-situated civilians, so it was "thus no surprise that, recognizing the import of *Coker*, [the] predecessor court noted that while the UCMJ authorized the death sentences for rape, in the absence of aggravating circumstances, such punishment cannot be constitutionally inflicted." *Id.* Similarly, for Respondents, no military-specific exception exists.

Petitioner attempts to distinguish sexual assault in the military from sexual assault in the general population; however, there is no evidence that Congress intended for servicemembers to be punished differently for the same crime as civilians. U.S. Br. 34. Rape is not a military-specific offense; it is an abhorrent crime that exists both in and out of the military. In recent years, public outcry has highlighted the overwhelming prevalence of sexual assault in count-

less institutions, including schools, churches, social clubs, and workplaces. Within only the first three months of the "Me Too" movement in 2017, reports of sex crimes increased 7%. Ro'ee Levy & Martin Mattsson, *The Effects of Social Movements: Evidence from #MeToo* 3 (Dec. 2, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3496903. In fact, between 2017 and 2018, self-reported incidents of completed, attempted, or threatened rape or sexual assault more than doubled in the general population. See Dep't of Justice, *Bureau of Justice Statistics Releases Results From 2018 National Crime Victimization Survey* 2 (Sept. 10, 2019), https://www.bjs.gov/content/pub/press/cv18pr.pdf. The military is no different than the countless other institutions in which sexual assault is perpetrated.

Petitioner relies on policy arguments and cites the numerous effects sexual assault in the military has on national security to support its proposition that servicemembers do not enjoy the protections of the Eighth Amendment. U.S. Br. 5–7, 34. However, "noble goals and notable policy concerns" are insufficient to override constitutional rights of servicemembers. *J.M.* v. *Payton-O'Brien*, 76 M.J. 782, 789 (N-M. Ct. Crim. App. 2017). Although sexual assault is a destructive force that must be eliminated from the military and civilian life alike, this policy goal is relegated to Congress. See *Pena*, 64 M.J. at 265 ("In our evaluation of both constitutional and statutory allegations of cruel or unusual punishment, we apply the Supreme Court's Eighth Amendment jurisprudence 'in the absence of legislative intent to create greater protections in the UCMJ.'") (quoting *United States* v. *Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006)). Notably, Congress acted accordingly and amended the UCMJ

in 2006 to allow a person charged with rape to be tried without any time limitation. 10 U.S.C. § 843(a) (2006).

The applicability of capital punishment has been narrowed over time, and Petitioner's policy arguments cannot justify why it should be expanded here. Since *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), this Court has restricted the availability of the death penalty, citing constitutional protections for the accused. Petitioner emphasizes that "judicial deference is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged," U.S. Br. 32 (quoting *Solorio* v. *United States*, 483 U.S. 435, 447 (1987)), but there is a critical balance "between the deference due Congress and [the Court's] own constitutional responsibility." *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981). Capital punishment is irreversible; it is the ultimate punishment delivered at the hands of the government. In consideration of the death penalty, the balance weighs heavily towards constitutional responsibility. Thus, Petitioner's policy arguments are insufficient to meet its burden to prove that an exception exists that warrants nullifying Respondents' constitutional rights.

Further, Petitioner cannot cite to evidence of legislative intent that suggests Article 43 should bypass the Constitution. In *Pena*, 64 M.J. at 259, the court evaluated "both constitutional and statutory allegations of cruel or unusual punishment" by applying "the Supreme Court's Eighth Amendment jurisprudence 'in absence of legislative intent to create greater protections in the UCMJ.'" (quoting *Lovett*, 63 M.J. at 215). Far from it. What legislative intent can be gleaned cuts against Petitioner. In 2003, Congress

amended Article 43(b) to extend the statute of limitations for certain "child abuse offenses" from five years to the victim's 25th birthday. National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 108-136, § 551, 117 Stat. 1392, 1481 (codified as amended at 10 U.S.C. § 843(b)). Among other things, the 2003 amendment defined "child abuse offenses" as "an act that involves sexual or physical abuse of a person who has not attained the age of 16 years and constitutes any of [five enumerated] offenses." *Id*. One of the enumerated offenses was "[r]ape or carnal knowledge in violation of section 920 of this title (article 120)." *Id*. Congress therefore spoke specifically and unambiguously in the 2003 amendment to the statute of limitations for rape, at least where the victim was a minor—and "extended" it from five years to the victim's 25th birthday. See *United States* v. *Lopez de Victoria*, 66 M.J. 67, 71–72 (C.A.A.F. 2008) (summarizing the 2003 amendment and holding that it did not apply retroactively). Congress did not extend the statute of limitations for the rape of an adult.

Congress' omission calls into significant question Petitioner's contention that it was clear to Congress, from the 1986 amendment to Article 43 onward that rape was subject to no statute of limitations. Had that been true, there would have been no need to "extend" the statute of limitations for rape of a minor; that offense would already have been exempted from a statute of limitations by Article 43(a). On the Petitioner's reading, the 2003 amendment is either irrelevant surplusage, or it reduced the statute of limitations for cases in which the victim was a minor—an action that makes no sense in the broader context of the statute. In addition, when Congress added rape to the list of offenses with no statute of limitations in

2006, it was not merely codifying the status quo, see U.S. Br. 43, but was in fact resolving a significant tension between the 2003 amendment and CAAF's decision in *Willenbring*. Congress no doubt had the authority to adopt *Willenbring* going forward, but Petitioner's argument that Congress' "evident expectation" was that pre-2006 rapes would be subject to no statute of limitations, see *id.*, is belied by what Congress actually provided in the 2003 amendment. See also National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553(b)(2), 119 Stat. 3136, 3264 (codified as amended at 10 U.S.C. § 843(b)(2)(B)) (removing rape from the list of "child abuse offenses" under Article 43(b)(2)(B)).

The only other clue from the legislature history is the passing of the 2006 amendment to Article 43, but the 2006 formulation is not applied retroactively. Petitioner suggests that a commissioned Department of Defense report by Congress in consideration of the 2006 amendment offers evidence of intent. U.S. Br. 42. This report offers no guidance on the applicability of the Eighth Amendment to the UCMJ. Rather, the report speaks to Congress' intent to amend the UCMJ such that rape is not subject to a limitation term. *Id.*

Moreover, it is not enough that the rape be "service-connected" for a servicemember to be subject to the death penalty when a civilian would be protected by the Eighth Amendment. *Matthews*, 16 M.J. at 369. Even when the crime is "service-connected and subject to trial by court-martial," a servicemember's crimes are indistinguishable from those tried in civilian courts for the purpose of applying the constitutional protection against cruel and unusual punishment. *Id.* (holding that the death penalty was not available for a murder and rape conviction and rea-

soning that "[t]here is no military necessity" to distinguish between sentencing procedures in courts-martial and those in capital cases in civilian courts).

Constitutional exceptions do exist for the military, but these are specific and well-reasoned. *Id.* at 368; see also *Hennis* v. *Hemlick*, 666 F.3d 270, 276 (4th Cir. 2012) (justifying the doctrine of abstention, and deference to ongoing court-martial proceedings, under *Councilman*); *Lawrence* v. *McCarthy*, 344 F.3d 467, 473 (5th Cir. 2003) ("Most of the significant constitutional rights available to the defendant in a civil proceeding are also available to the accused in a court-martial." (citing *Wickham* v. *Hall*, 706 F.2d 713, 717 & n.5 (5th Cir. 1983))). The interests of national security are not a military-specific exception. *Mangahas*, 77 M.J. at 223. Petitioner does not point to specific reasons why this Court should find a military-specific exception, but instead lists general harms. In so doing, Petitioner has not, and cannot, reach its burden to produce an exception justifying withholding a servicemember's constitutional right to be free from cruel and unusual punishment.

III. CANONS OF STATUTORY INTERPRETATION FAVOR RESPONDENTS

The Eighth Amendment itself, and the incorporation of the Eighth Amendment into the UCMJ through Article 55, prohibits rape as an "offense punishable by death." A punishment that cannot be constitutionally effectuated is not an "offense punishable by death." *Id.* at 224–25. Applying the canons of statutory interpretation, including *in pari materia*, the hierarchical order of military legal authorities, and the rule of lenity, Article 43 must be construed consistently with the Eighth Amendment and Article 55. Article 43 was not enacted in isolation, but rather, it was part of a larger schema of military law

that included the prohibition against cruel and unusual punishment required by Article 55. Petitioner argues that it would be implausible that Article 55 would forbid a punishment that Article 120 authorizes. U.S. Br. 38. However, the incongruency must be resolved in favor of the Constitution and Article 55, which supersede Article 120. Furthermore, if there are any ambiguities caused by Articles 55 and 120, the UCMJ should be interpreted with civilian law and the rule of lenity in favor of Respondents.

A. Reading Articles 43 and 55 together, as required, invalidates the provision extending the statute of limitations for rape.

When a statute is part of a larger act, legislative intent should first be deciphered by reading other sections of the same act *in pari materia*. *United States* v. *McPherson*, 73 M.J. 393, 396 (C.A.A.F. 2014) (reading Article 55, which prohibits cruel and unusual punishment in the military, into Article 12 to answer whether a military member must exhaust administrative remedies before judicial remedy may be considered). Construing statutes in the same act is essential when the statutes were passed at the same time and do not conflict when read *in pari materia*. *Id.* "Statutes *in pari materia* are to be interpreted together, as though they were one law." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012). The statutory interpretation canon *in pari materia* requires statutes to be read consistently if they are part of the same statutory scheme.

Military courts will defer to as-applied challenges over facial challenges to account for the nuance of military justice, but "[c]onstitutional rights identified by the Supreme Court generally apply to members of

the military unless by text or scope they are plainly inapplicable." *Easton*, 71 M.J. at 174. There is nothing in the text or scope of Articles 43 and 55 that negate the application of the constitutional right to be free from cruel and unusual punishment.

At the time of the alleged offenses, Article 43 read:

> (a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.
>
> (b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

10 U.S.C. § 843 (1994). Article 55, at the time of the alleged offenses and currently, reads:

> Punishment 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. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

10 U.S.C. § 855 (1956). Article 43 has been amended several times, but both Articles 43 and 55 were originally enacted in 1956, underscoring the intent that they should be read cohesively. When construed together, Article 43 can only be interpreted up to the limits of Article 55. Thus, with respect to rape, the import of Article 43(a) must be read as "[a] person charged . . . with any offense punishable by death,

may be tried and punished at any time with limitation" so long as it is not "any . . . cruel or unusual punishment," which "may not be adjudged by any court-martial or inflicted upon any person." 10 U.S.C. § 843(a) (1994); 10 U.S.C. § 855 (1956). Reading Article 43 *in pari materia* with Article 55, invalidates the unlimited statute of limitations provision as applied to rape. Thus, the CAAF properly held that the five-year statute of limitations had run in all of Respondents' cases.

B. The Constitution and Article 55 supersede Article 120.

The military has hierarchical sources of rights, including the Constitution, the UCMJ, the Manual for Courts-Martial, and Executive Orders, among others. *United States* v. *Lopez*, 35 M.J. 35, 39 (C.M.A. 1992) ("Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual[.]"). In that hierarchy, the Constitution is paramount. The CAAF is not "'generally free to "digress" from applicable Supreme Court precedent' on matters of constitutional law." *Mangahas,* 77 M.J. at 223 (quoting *United States* v. *Witham,* 47 M.J. 297, 300 (C.A.A.F. 1997)). As discussed *infra*, policy cannot supersede the Constitution without a clear, military-specific exception. See *Pena,* 64 M.J. at 265 ("In our evaluation of both constitutional and statutory allegations of cruel or unusual punishment, we apply the Supreme Court's Eighth Amendment jurisprudence 'in the absence of legislative intent to create greater protections in the UCMJ.'" (quoting *Lovett*, 63 M.J. at 215)); see also *Cary,* 62 M.J. at 280 (Crawford, J., concurring) ("Failure to follow Supreme Court precedent not only places the jurisprudence of this Court

outside the judicial mainstream, but also undermines that specialized society's respect for, and confidence in, the military justice system."). When military regulation clashes with a constitutional right, the regulation must be examined to determine "whether 'legitimate military ends are sought to be achieved,' and whether it is 'designed to accommodate the individual right to an appropriate degree.'" *Goldman* v. *Weinberger*, 475 U.S. 503, 506 (1986) (citation omitted). Without a specific, legitimate military necessity, or a legislative or executive mandate to the contrary, the CAAF has a duty to follow Supreme Court precedent. *Cary,* 62 M.J. at 280 (Crawford, J., concurring).

Article 55 incorporates Supreme Court precedent decided in *Coker*, protecting the constitutional rights of servicemembers against the cruel and unusual punishment of the death penalty for rape of an adult. Article 120 is a clashing military regulation with no articulation of a legitimate military distinction or necessity; thus, Article 55, as an incorporation of the Eighth Amendment and Supreme Court precedent, cannot be overridden by Article 120. See *United States* v. *Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) ("[A] rule or other provision of the *Manual for Courts-Martial* cannot sanction a violation of Appellant's constitutional rights.").

Petitioner argues that Article 55 and Article 120 were enacted together as part of the UCMJ in 1956, and because statutory provisions should not be read to nullify the other, Article 55 cannot be reasonably read to invalidate Article 120, U.S. Br. 38; however, at the time Articles 55 and Article 120 were enacted, the Supreme Court had not yet interpreted the Constitution to preclude the death penalty as a permissible punishment for rape of an adult, and thus one did not invalidate the other. The Supreme Court decided

Coker two decades later, in 1977, and military courts applied this precedent to subsequent cases. Application of Supreme Court precedent, as is the duty of military courts absent a specific military exception or an express directive from Congress, nullifies Article 120 as unconstitutional.

C. If an ambiguity arises, the UCMJ should be interpreted with civilian law.

Respondents correctly posit that the plain language of "offense punishable by death" unambiguously excludes rape from Article 43 for the purpose of the statute of limitations, Resps. Br. 17–19; however, even if Articles 55 and 120 are ambiguous, the UCMJ must be interpreted consistent with civilian law, warranting an affirmance of the dismissal of Respondents' cases.

First, if there is ambiguity between whether Article 43 should be read with Article 55 or 120, the rule of lenity requires that Article 55 prevail, as it would limit the statute of limitations for rape to five years, and preclude the military from imposing the death penalty. *Whitman* v. *United States*, 574 U.S. 1003 (2014) (statement of Scalia, J., joined by Thomas, J., respecting the denial of certiorari) ("The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants.").

Additionally, military courts have regularly applied the Supreme Court Eighth Amendment precedent to courts-martial for decades since the holding in *Coker*. See *Mangahas,* 77 M.J at 223; *Clark*, 18 M.J. at 776; *United States* v. *McReynolds*, 9 M.J. 881, 882 (A.F.C.M.R. 1980) (per curiam). By relying upon civilian law to interpret the UCMJ, military courts have established that any ambiguity must be decided in accordance with "civilian law." See *Mangahas*, 77

M.J at 223 (in deciding to follow the Supreme Court's ruling in *Coker*); see also *United States* v. *Witham*, 47 M.J. 297, 300–01 (C.A.A.F. 1997) ("[These] differences between [the] military justice system and the various civilian criminal justice systems . . . do not necessarily dictate that constitutional decisions on civilian criminal justice be found *per se* inapplicable to the military justice system."). Congress' intent to bring the UCMJ more in line with federal civilian criminal law is evidence in its alignment of the UCMJ statute of limitations provisions with corresponding federal criminal code in 1986. Thus, even if the Court finds that ambiguity arises between the relevant UCMJ articles, civilian law, including Eighth Amendment jurisprudence, must be applied.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals for the Armed Forces.

Respectfully submitted,

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