Nos. 19-108 and 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

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RESPONDENTS' QUESTIONS PRESENTED

1. Whether, at the time of the offenses for which Respondents were convicted, rape of an adult was an "offense punishable by death" under Article 43(a) of the Uniform Code of Military Justice (UCMJ), so that it could "be tried and punished at any time without limitation." 10 U.S.C. § 843(a).

2. If not, whether the 2006 amendment to Article 43(a) retroactively eliminated the five-year statute of limitations in Respondent Briggs's case.

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INTRODUCTION

These cases each pose the same central question: If Congress has *authorized* the death penalty for a criminal offense for which a death sentence can never lawfully be *imposed*, is the offense still "punishable by death" under Article 43(a) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 843(a)—so that it has no statute of limitations? In light of the ordinary meaning of the term "punishable by death," the history of the relevant statutes, and longstanding principles of statutory interpretation, the clear and unequivocal answer is no.

* * *

In 2006, Congress added rape to the list of offenses that have no statute of limitations under Article 43(a), so that anyone subject to the UCMJ can be tried today for any rape committed on or after January 6, 2006—that statute's effective date. Congress said nothing in 2006, however, about the statute of limitations for old rape offenses—the matter in dispute here.

All parties agree that, at the time of Respondents' offenses (in 1998, 2000, and 2005), the statute of limitations was five years *unless* those offenses were "punishable by death"—in which case they could have been tried without limitation. And all agree that more than five years elapsed between Respondents' offenses and their courts-martial. Whether Respondents' courts-martial were timely therefore turns almost entirely on whether rape was "punishable by death" prior to 2006.

In *Willenbring* v. *Neurater*, 48 M.J. 152 (C.A.A.F. 1998), the Court of Appeals for the Armed Forces (CAAF) held that an offense is "punishable by death" so long as Congress has *authorized* the death penalty

as a potential punishment, without regard to whether any other law bars its imposition. Because the UCMJ at that time authorized the death penalty for rape, the CAAF held that rape carried no statute of limitations under Article 43(a). *Id*. at 179–80.

But in *United States* v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), the CAAF unanimously overruled *Willenbring*. After holding that the death penalty for rape of an adult is unlawful in courts-martial under both the Eighth Amendment, *see Coker* v. *Georgia*, 433 U.S. 584 (1977), and Article 55 of the UCMJ, 10 U.S.C. § 855 (banning "cruel or unusual punishment"), the CAAF concluded 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." *Id*. at 224–25.

As Judge Ryan wrote for the court in *Mangahas*, *Willenbring* could not be reconciled with the ordinary meaning of the term "punishable." *Id*. at 224 ("In its plainest terms, 'punishable' means 'subject to a punishment.'" (quoting BLACK'S LAW DICTIONARY 1428 (10th ed. 2014))); *see also Reino* v. *State*, 352 So.2d 853, 860 (Fla. 1977) ("[T]he phrase 'punishable by death' is susceptible of only a single construction—a crime for which the death penalty may be imposed."). But even if the ordinary meaning of the text was in dispute, this Court's "admonition that statutes of limitations are to be 'liberally interpreted in favor of repose'" compelled the same result. *Mangahas*, 77 M.J. at 224 (quoting *United States* v. *Marion*, 404 U.S. 307, 322 n.14 (1971)).

In *United States* v. *Briggs*, the CAAF then held that Congress's elimination of a statute of limitations for rape in 2006 did not apply retroactively. *Briggs*

Pet. App. 7a–12a. Applying the familiar retroactivity framework of *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), Judge Maggs explained for the unanimous court that there was no indication from either the text or context of the 2006 amendment that Congress meant to change the statute of limitations for *pre*-2006 offenses. *Briggs* Pet. App. 9a–11a. And because Respondent Briggs was prosecuted in 2014 for an offense that occurred in 2005 (a prosecution that would have been time-barred under *Mangahas*), applying the 2006 amendment retroactively in his case would produce an otherwise impermissible "retroactive effect." *Id.* at 12a.

"This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). And yet, that is exactly what the government is asking for here. In urging reversal of the CAAF's decisions in *Mangahas* and *Briggs*, the government's opening brief ignores the plain text of both Article 43(a) and the 2006 amendment thereto in favor of an extended discourse about what Congress "must" have intended to accomplish, both when it first enacted the "punishable by death" language and when it amended Article 43(a) in 2006. *E.g.*, U.S. Br. 23 ("[Congress] would have expected"); *id.* at 27 ("Congress could not have intended"); *id.* at 31 ("Congress's own evident understanding"); *id.* at 43 ("Congress . . . would have perceived"); *id.* ("Congress's . . . evident expectation"). As this Court has made clear time and again, though, it "cannot approve such a casual disregard of the rules of statutory interpretation." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

Even if it were ever appropriate for courts to engage in such "psychoanalysis of Congress," *United States* v. *Pub. Util. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring), the snippets of legislative history on which the government purports to rely cannot be squared with the relevant statutory text—and do not compel the government's reading in any event. *See Milner* v. *Dep't of the Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."). Nothing in the legislative history of the 1986 statute in which Congress added the "punishable by death" language to Article 43(a) demonstrates that Congress intended the term to include offenses that can never be punished by death. And nothing in the legislative history of the 2006 amendment demonstrates that Congress intended to eliminate a statute of limitations for old military rape cases, and not just new ones.

Ultimately, the CAAF's decisions in *Mangahas* and *Briggs* both rest on straightforward and correct applications of well-settled principles of statutory interpretation. The government's brief, in contrast, invites this Court to return to "the bad old days" of statutory interpretation, Transcript of Oral Argument at 46, *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442 (2008) (No. 06-1431), solely so that it can prosecute "a closed set of crimes committed before 2006." *Briggs* Pet. 23.[1] This Court should reject that invitation.

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1. The government has specifically identified one other case raising this issue—and has alluded to ten more. *Briggs* Pet. 23.

JURISDICTION

Under 28 U.S.C. § 1259, this Court has jurisdiction over the CAAF's "[d]ecisions" in four classes of cases, including "[c]ases certified to the [CAAF] by the Judge Advocate General," 28 U.S.C. § 1259(2), "[c]ases in which the [CAAF] granted a petition for review," *id.* § 1259(3), and other "[c]ases . . . in which the [CAAF] granted relief." *Id.* § 1259(4).

The government's brief asserts that jurisdiction rests on § 1259(2) as to Respondents Collins and Daniels, and on § 1259(3) and (4) as to Respondent Briggs. U.S. Br. 2–3. As Respondents have explained, though, that position implicates an unresolved question about § 1259—"whether, once the CAAF grants a petition for review on some issues, the Supreme Court has the power to consider other issues in the case that were not granted review." STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 2.14, at 2-66 n.121 (11th ed. 2019); *see Briggs* BIO 6–11; *Collins* BIO 8–11; *Daniels* BIO 18–20.

In opposing certiorari in prior cases from the CAAF, the government has consistently answered that question in the negative—arguing that, because § 1259 limits this Court to reviewing the CAAF's "*decisions*" in the specified "cases," this Court lacks jurisdiction to go beyond the specific issues the CAAF "actually decided" in the case under review. Brief for the United States in Opposition at 11, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (mem.); *see also, 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,

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The CAAF "actually decided" very little in *Collins* and *Daniels*; both were summary dispositions. And as relevant here, the CAAF in *Briggs* "actually decided" only whether the 2006 amendment to Article 43(a) applies retroactively. The CAAF did not agree to review—and did not decide—the first of Respondents' questions presented here, *see ante* at i, in *any* of these cases. Under the government's previous position, this Court would thus lack jurisdiction as to Respondents Collins and Daniels, *Collins* BIO 11; *Daniels* BIO 19–20; and it would have jurisdiction as to Respondent Briggs only with respect to the second of Respondents' questions presented. *Briggs* BIO 9–11.

Even if this Court agrees with the government that it has jurisdiction, it should expressly hold as much. This Court's "recent cases evince a marked desire to curtail . . . 'drive-by jurisdictional rulings,'" *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 161 (2010) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)), because such implicit rulings "have no precedential effect." *Steel Co.*, 523 U.S. at 91. Resolving whether jurisdiction under § 1259 extends to the entire "case" under review would avoid that concern—and settle the matter going forward.

STATUTORY BACKGROUND

These cases involve the intersection of three UCMJ provisions, two of which have been amended since 1950. It may therefore be instructive to unpack exactly how (and when) those statutes evolved.

1. Article 43 of the UCMJ, 10 U.S.C. § 843

When the UCMJ was initially enacted in 1950, Article 43 separated military offenses into three categories: Article 43(a) provided that "[a] person charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at any time without limitation." Act of May 5, 1950, ch. 169, § 1, 64 Stat. 107, 121.[2] Article 43(b) created a three-year statute of limitations for an accused charged with "desertion in time of peace or any of the offenses punishable under Articles 119 through 132." *Id.*[3] Under Article 43(c), all other offenses were subject to a two-year statute of limitations. *Id.*

As of 1950, there were more than a dozen distinct capital offenses under the UCMJ—many of which were not exempt from a statute of limitations under Article 43. Of significance here, Article 120(a) authorized death as punishment for "[a]ny person subject to this code who commits an act of sexual intercourse with a female not his wife, by force and without her consent." Because rape was not one of the listed offenses for which there would be no statute of limitations, it was instead covered by Article 43(b)—and subject to a three-year statute of limitations.

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2. Article 43 derived from Article 39 of the Articles of War, which imposed a two-year statute of limitations for all offenses "[e]xcept for desertion committed in time of war, or for mutiny or murder," which had no prescribed limitations period. Act of June 4, 1920, ch. 227, 41 Stat. 759, 794–95.

3. Articles 119 to 132 did not necessarily define more *serious* offenses. Rather, those provisions defined crimes with civilian analogues—as opposed to military-specific offenses such as desertion and mutiny.

Even though "[t]he elimination of a time limit on prosecution and the availability of capital punishment are both hallmarks of serious crimes," U.S. Br. 27–28, Congress did not treat them as coextensive under the UCMJ. Instead, offenses for which the UCMJ authorized the death penalty fell into each of the three categories that the 1950 statute created. Because Congress left Article 43 untouched between 1950 and 1986, this structure left many death-authorized (and other serious) offenses with short limitations periods.

In November 1985, for instance, Congress added a new offense, "Espionage," as new Article 106a of the UCMJ, and provided in certain circumstances that offenders could be punished by death. Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534(a), 99 Stat. 583, 634–35 (1985) (codified as amended at 10 U.S.C. § 906a). But because espionage was not expressly exempt from the statute of limitations under Article 43(a), it carried only a two-year statute of limitations under the then-extent version of Article 43(c).

In response to this dichotomy, Congress amended Article 43 in 1986 to bring it "more in line with" the statutes of limitations in the federal civilian criminal code. S. REP. No. 99-331, at 249 (1986); *see* National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 805, 100 Stat. 3816, 3908 (1986) (the "1986 amendment"). The statute rewrote Article 43 in three respects: First, it amended Article 43(a) to exempt from any statute of limitations "offense[s] punishable by death," and not just those that were specifically enumerated. *Id.* Second, it eliminated the distinction between civilian and military offenses in all other cases. *Id.* Third, it increased the statute of limitations in those cases to five years. *Id.*

After a 2003 revision to Article 43(b) that is of no moment here, Congress next amended Article 43 in the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 552(e), 553, 119 Stat. 3136, 3263–64 (the "2006 amendment"). As relevant here, Congress rewrote Article 43(a) to add murder,[4] rape, and rape of a child to the specified offenses for which there would be no limitations period—in addition to "absence without leave or missing movement in time of war . . . or any other offense punishable by death." *See id*.

Finally, Congress further amended Article 43(a) in 2014 to include sexual assault offenses other than rape among the enumerated offenses exempt from a statute of limitations. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1703(a), 127 Stat. 672, 958. As so amended, Article 43(a) today provides that "[a] person charged with absence without leave or missing movement in time of war, with murder, rape or sexual assault, or rape or sexual assault of a child, or with any other offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. § 843(a) (2018).[5]

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4. From 1950 to 1986, murder was specifically enumerated as one of the offenses exempt from a statute of limitations under Article 43(a). But when Congress added "offense[s] punishable by death" in 1986, it took out the specific reference to murder—even though murder was (and is) not always a death-authorized offense under the UCMJ. *See* 10 U.S.C. § 918(2), (3). Between 1986 and 2006, then, *some* murder offenses under the UCMJ were subject to a five-year statute of limitations. *See post* at 44.

5. For citations to the U.S. Code, Respondents include the proper year when the version may not be clear from the text and the specific date makes a difference.

2. Article 55 of the UCMJ, 10 U.S.C. § 855

Congress enacted Article 55 of the UCMJ in 1950. To this day, it provides:

> 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.[6]

3. Article 120 of the UCMJ, 10 U.S.C. § 920

As noted above, the original version of Article 120(a) of the UCMJ that Congress enacted in 1950 proscribed the offense of "rape" when "[a]ny person subject to this code . . . commits an act of sexual intercourse with a female not his wife, by force and without her consent." Such an offense was subject to punishment "by death or such other punishment as a court-martial may direct." *See Kennedy* v. *Louisiana*, 554 U.S. 945, 946 (2008) (statement of Kennedy, J., respecting the denial of rehearing) (noting the history of the military death penalty for rape).

Congress did not amend Article 120 between 1950 and 1992—including when it overhauled Article 43 in 1986. And the 1992 amendment eliminated only the

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6. Article 55 merged the text of Article 41 of the Articles of War and Article 49 of the Articles for the Government of the Navy. From their inception, both sets of military codes imposed at least some limits on punishment. But the specific ban on "cruel or unusual punishment" was added to the Articles of War in 1920. *See* Act of June 4, 1920, 41 Stat. at 795; *see also post* at 37 n.14 (discussing the 1920 revisions).

requirements from the 1950 text that the victim be "a female not [the accused's] wife." National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1066(c), 106 Stat. 2315, 2506 (1992). Thus, at the time of Respondents' offenses (1998, 2000, and 2005), Article 120(a) was, as relevant here, materially unchanged from the original language of the UCMJ: "Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. § 920(a) (1994 & 2000).

As the government notes, U.S. Br. 8–9, Congress removed the express authorization for the death penalty from Article 120(a) in the same statute containing the 2006 amendment to Article 43. FY2006 NDAA § 552(a)(1), 119 Stat. at 3257. The *Manual for Courts-Martial* has nevertheless continued to authorize capital punishment for rape offenses committed before June 28, 2012. *Briggs* Pet. 8 n.*. The death penalty is not currently authorized for rape offenses committed on or since that date. *Id.*

SUMMARY OF ARGUMENT

"Statutory interpretation, as we always say, begins with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). The relevant text here is Article 43 of the UCMJ—which, at the times of Respondents' offenses (1998, 2000, and 2005), provided a five-year statute of limitations unless those offenses were "punishable by death." 10 U.S.C. § 843(a) (1994 & 2000). The UCMJ does not define "punishable by death," and "[w]hen a term goes undefined in a statute, we give the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012).

The "ordinary meaning" of "punishable" is "any punishment capable of being imposed." *Schrader* v. *Holder*, 704 F.3d 980, 986 (D.C. Cir. 2013) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1993)); BLACK'S LAW DICTIONARY 1490 (11th ed. 2019) ("punishable" means "subject to a punishment"); *see Reino*, 352 So.2d at 860 ("[T]he phrase 'punishable by death' is susceptible of only a single construction—a crime for which the death penalty may be imposed."). Under the ordinary meaning of Article 43(a), then, an offense is "punishable by death" if and only if the death penalty can *actually* be imposed as a punishment for the offense—if Congress has authorized the death penalty *and* if no law forbids its imposition. "Because the plain language of [the statute] is 'unambiguous,' 'our inquiry begins with the statutory text, and ends there as well.'" *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (quoting *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (plurality opinion)).

Even if this Court were inclined to go further, the ordinary meaning of "punishable by death" is only reinforced by the history of that language. The phrase was initially adopted in a civilian criminal statute of limitations in 1939, when Congress used it to replace a broader term—"capital offense"—in order to refer to "any offense for which the death penalty may be imposed." S. REP. No. 76-215, at 1 (1939). And if any doubt remained as to the meaning of Article 43(a), the same result would follow from settled principles of statutory interpretation—including this Court's repeated "admonition that statutes of limitations are to be 'liberally interpreted in favor of repose,'" *Mangahas*, 77 M.J. at 224 (quoting *Marion*, 404 U.S. at 322 n.14), and the rule of lenity.

Respondents' offenses were not "punishable by death" because the death penalty was not a lawfully available punishment at the time of their commission. As this Court held in *Coker*, the Eighth Amendment categorically forbids imposition of the death penalty for rape of an adult that does not result in the death of the victim. 433 U.S. at 598 (plurality opinion).[7] Although this Court has never expressly held that the Eighth Amendment in general (or *Coker*, specifically) applies to courts-martial, every court in the military justice system has followed *Coker* for the better part of four decades—because there is no "military necessity" justifying a departure from the Eighth Amendment's prohibitions for civilian crimes—even serious offenses like murder and rape. *United States* v. *Matthews*, 16 M.J. 354, 368–69 (C.M.A. 1983).

This Court need not decide whether *Coker* applies of its own force, however, because Article 55 of the UCMJ independently bars courts-martial from imposing "cruel or unusual punishment." Not only was that language intended to incorporate the Eighth Amendment—as interpreted by this Court—into the military justice system, but both the CAAF and its predecessor have long read Article 55 to sweep even more broadly than the Constitution. *See, e.g.*, *United States* v. *Wappler*, 9 C.M.R. 23, 26 (1953); *see also Mangahas*, 77 M.J. at 223 n.4 (invoking Article 55).

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7. Although Justice White wrote for only himself and Justices Stewart, Blackmun, and Stevens in *Coker*, Justices Brennan and Marshall both concurred in the judgment on the broader ground that the death penalty is categorically unconstitutional. 433 U.S. at 600 (Brennan, J., concurring in the judgment); *id.* (Marshall, J., concurring in the judgment). Justice White's opinion therefore provides *Coker*'s controlling rationale under *Marks* v. *United States*, 430 U.S. 188 (1977).

The government nevertheless argues that Article 55 would not have precluded imposition of the death penalty in Respondents' cases. In its view, because Congress had separately authorized the death penalty for their offenses in Article 120(a) of the UCMJ, that provision must be read together with Article 55 "if possible, to form a coherent whole—not to nullify one another." U.S. Br. 38.

Leaving aside that the UCMJ was enacted well before *Coker* (at a time when the Eighth Amendment was not understood to forbid the death penalty for rape of an adult), the government's reading of Article 55 would nullify a statute—since *all* punishments imposed by courts-martial are authorized by the UCMJ, either expressly or through express delegations to the President. 10 U.S.C. §§ 815, 818–20. If that were enough to avoid the "cruel or unusual punishment" bar of Article 55, then Article 55 would serve no purpose whatsoever. The better reading of Article 55, the Eighth Amendment, or both, is that Respondents' offenses were not "punishable by death" at the time of their commission—and were therefore subject to a five-year statute of limitations.

The 2006 amendment to Article 43(a), which added rape to the list of enumerated offenses with no statute of limitations, does not alter that conclusion. With respect to Respondents Collins and Daniels, the government does not—and could not—argue otherwise, because the five-year statute of limitations had already run before that statute was enacted. *See Stogner* v. *California*, 539 U.S. 607 (2003) (holding that the Ex Post Facto Clause bars the retroactive extension of an expired statute of limitations).

With respect to Respondent Briggs, although the five-year statute of limitations had not yet run. neither the text nor structure of the 2006 amendment offers any evidence that Congress meant to apply that statute retroactively. As this Court explained in *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997), "cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 328 n.4. If the 2006 amendment sustains only one interpretation as to Congress's intent, it is that it does *not* apply retroactively.

Nor can there be any question that retroactive application of the 2006 amendment to Respondent Briggs would produce a "retroactive effect." Because the correct statute of limitations at the time of his offense was five years, the difference between applying the 2006 amendment retroactively and not in his case is the difference between whether or not Respondent Briggs could have been prosecuted at all. *See Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006) (retroactive effect analysis focuses on the impact of "applying the statute to the person objecting"). The CAAF correctly held that Respondent Briggs's court-martial was also time-barred.

ARGUMENT

I. AT THE TIME OF THEIR COMMISSION, RESPONDENTS' OFFENSES WERE SUBJECT TO A FIVE-YEAR STATUTE OF LIMITATIONS

At the time of Respondents' offenses (1998, 2000, and 2005), Article 43(b) of the UCMJ imposed a default five-year statute of limitations. But it exempted "[a] person charged with absence without

leave or missing movement in time of war, or with *any offense punishable by death*, [who] may be tried and punished at any time without limitation." 10 U.S.C. § 843(a) (emphasis added). The UCMJ did not then (and does not now) define the term "offense punishable by death."

In arguing that Respondents' offenses were exempt from a statute of limitations because they were "punishable by death," the government's brief rests on two separate—but equally untenable—claims. First, the government argues that an offense is "punishable by death" so long as a statute *authorizes* death as a punishment for the offense, regardless of whether there is any other provision of law that precludes a death sentence. U.S. Br. 24–31. Second, the government contends that even if the death penalty must actually be available for the offense to be "punishable by death," Respondents *could* have been executed for their offenses—notwithstanding *Coker* and Article 55. *Id.* at 31–39.

Neither argument is availing. Settled principles of statutory interpretation compel the conclusion that an offense is only "punishable by death" under Article 43(a) if the death penalty is both legally authorized *and* legally permitted. And it was not in Respondents' cases. The Eighth Amendment—as interpreted by this Court in *Coker*—categorically bars a court-martial from imposing the death penalty for rape of an adult. *See Coker*, 433 U.S. at 598; *see also Kennedy* v. *Louisiana*, 554 U.S. 407, 437 (2008). Even if it is unclear whether *Coker* applies to courts-martial of its own force, Article 55 of the UCMJ independently forecloses such a punishment.

A. An Offense is "Punishable by Death" if the Death Penalty is Both an Authorized and a Legally Available Punishment

As this Court reiterated earlier this Term, "[w]hen interpreting limitations provisions, as always, 'we begin by analyzing the statutory language.'" *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 360 (2019) (quoting *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). And, as always, "[i]f the words of a statute are unambiguous, this first step of the interpretive inquiry is our last." *Id.* (citation omitted); *see Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 631. Article 43(a) is clear that, to be "punishable by death," an offense must be one for which the death penalty "may be imposed" as a punishment. And insofar as they are relevant, the history of Article 43(a) and settled principles of statutory interpretation only reinforce its plain text.

1. The Ordinary Meaning of "Offense Punishable by Death" is that Death *May* Be Imposed as a Punishment

"Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006) (citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)); *see Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). This "ordinary meaning" canon is "the most fundamental semantic rule of interpretation." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012). It is not that Congress's purpose is irrelevant; rather, "[w]e ordinarily assume, 'absent a clearly expressed legislative intention to the contrary,' that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *Jam* v. *Int'l Fin.*

Corp., 139 S. Ct. 759, 769 (2019) (quoting *Am. Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982))).

Here, the "commonsense meaning of the term 'punishable'" is "any punishment *capable of being imposed*." *Schrader*, 704 F.3d 980 (citing WEBSTER'S, *supra*, at 1843 (emphasis added)).[8] As the Florida Supreme Court has explained, "the phrase 'punishable by death' is susceptible of only a single construction—a crime for which the death penalty *may* be imposed." *Reino*, 352 So.2d at 860 (emphasis added). Given this "ordinary meaning" of the term "punishable," the plain text of Article 43(a) exempts from the five-year statute of limitations those offenses that are "capable of" (or "subject to") being punished by death—*i.e.*, offenses for which death is a legally permissible punishment.

In Title 10 of the U.S. Code and elsewhere, Congress has demonstrated that it knows how to refer to offenses for which it has merely *authorized* a particular penalty when it wishes to do so. *See, e.g.*, 10 U.S.C. § 853(c)(2) ("punishments authorized under this chapter"); *see also, e.g.*, 21 U.S.C. §§ 849, 859–61 ("twice the maximum punishment authorized by" a different provision). Instead of using one of these formulations, however, Congress used the quite

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8. As noted below, Congress first adopted the term "offense punishable by death" in 1939. *Post* at 20; *see also Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018) ("[O]ur job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" (quoting *Perrin*, 444 U.S. at 42) (omission in original)). But the ordinary meaning of the term "punishable" has not materially changed since then. *See, e.g.*, BLACK'S LAW DICTIONARY 1466 (3d ed. 1933) ("Liable to punishment, whether absolutely or in the exercise of judicial discretion.").

different term "punishable by death." *See Mangahas*, 77 M.J. at 224 (emphasizing "the distinction between 'punishable,' which is what the statute of limitations requires, and 'authorized,' which serves another purpose, in another statute").

The government's brief nowhere discusses the ordinary meaning of the word "punishable." That omission is telling, because its ordinary meaning is clear. As this Court recently reiterated, "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself. Where, as here, that examination yields a clear answer, judges must stop." *Food Mktg. Inst.*, 139 S. Ct. at 2364. Because the text of Article 43(a) yields such a "clear answer" as to which offenses are "punishable by death," no further analysis is required—or appropriate.

2. The Context in Which the "Offense Punishable by Death" Language Was Adopted Reinforces its Plain Meaning

Even if it were appropriate to look beyond the plain text of Article 43(a), further analysis only reinforces its ordinary meaning—beginning with the origins of the phrase "punishable by death" and tracing it through. As the government notes, when Congress added that clause to Article 43(a) in 1986, it borrowed it from a civilian statute-of-limitations provision—18 U.S.C. § 3281—to "bring the UCMJ limitations provision 'more in line'" with civilian rules. U.S. Br. 29 (quoting S. REP. No. 99-331, at 249 (1986)); *see also* H.R. REP. No. 99-718, at 228 (1986) (the amendment "adapt[s] the Federal statute of limitations to the UCMJ"). But the government's brief does not attempt to further trace the origins of that phrase in § 3281.

In fact, the "offense punishable by death" language first appeared in the statute of limitations for federal civilian crimes—the precursor to § 3281—in 1939. *See* Act of Aug. 4, 1939, ch. 419, § 1, 53 Stat. 1198, 1198. Prior to 1939, the provisions setting forth criminal statutes of limitations in federal civilian courts referred not to an "offense punishable by death," but to a "capital offense." Crimes Act of 1790, ch. 9, § 32, 1 Stat. 112, 119. Such offenses carried a three-year statute of limitations from the Founding well into the twentieth century. *See Bridges* v. *United States*, 346 U.S. 209, 216 & n.12 (1953) (describing this history).

As then-Attorney General Murphy wrote to Congress in March 1939, "[t]he experience of [the Justice] Department has been that the time allowed by this statute is too short, especially as to the more serious offenses. I therefore recommend that, as to any offense for which the death penalty *may be imposed*, no statute of limitations shall apply." S. REP. No. 76-215, at 1 (emphasis added); H.R. REP. No. 76-1337, at 1–2 (1939) (same).

Congress adopted the government's proposal, replacing the broader "capital offense" language that dated back to 1790 with the more specific "offense punishable by death" phrase. *Id.* To whatever extent legislative history is relevant, *see Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1631 (2018) ("[L]egislative history is not the law."), it thus reinforces that Congress intended to adopt the "ordinary meaning" of the phrase "punishable by death"—to encompass offenses for which, as then-Attorney General Murphy put it, the death penalty "may be imposed."

The government's brief ignores this history. Instead, it argues that "it makes little sense" to interpret Article 43(a) so that its meaning depends upon "judicial application of the Eighth Amendment." U.S. Br. 27. Leaving aside that the ordinary meaning of the term is to the contrary, it is axiomatic that "some statutory terms refer to defined legal qualifications whose definitions are, and are understood to be, subject to change." SCALIA & GARNER, *supra*, at 89.

For instance, this Court has repeatedly explained that, when legislatures proscribe conduct that is "obscene," it is assumed that they mean to incorporate this Court's constitutional standard for obscenity—a standard that has developed extensively over the years. *E.g.*, *Hamling* v. *United States*, 418 U.S. 87, 105 (1974) ("[W]e hold that 18 U.S.C. § 1461 incorporates [*Miller* v. *California*, 413 U.S. 15 (1973)] in defining obscenity."); *see Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 505 n.13 (1985) (listing different statutes that had been interpreted to incorporate this Court's obscenity jurisprudence).

Likewise, Congress has often incorporated state-law rules into federal law that were also responsive to subsequent judicial and legislative developments. *See, e.g.*, *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1891 (2019) (noting that Congress in the Outer Continental Shelf Lands Act chose to "adopt state law on an ongoing basis"); *United States* v. *Sharpnack*, 355 U.S. 286, 292–93 (1958) (reaching the same conclusion with respect to the Assimilative Crimes Act); *cf. Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377–80 (2004) (summarizing the pre-1990 practice in which federal statutes of limitations were often "borrowed" from evolving state-law rules).

Against this backdrop, it hardly "makes little sense" to conclude that Congress intended to incorporate judicially interpreted limits on judicially imposed punishments when it adopted the word "punishable." If any claim "makes little sense," U.S. Br. 27, it is the government's argument that Congress used the term "offense punishable by death" to include offenses that were not then—and could never be—punished by death. As the CAAF correctly concluded in *Mangahas*, an "offense punishable by death" under Article 43(a) is one that may *in fact* be punished with the death penalty—which requires both that the UCMJ authorizes the death penalty *and* that no law forbids imposing it for that offense. 77 M.J. at 224–25.

3. The 1986 Amendment Did Not "Incorporate" the Government's Interpretation into Article 43(a)

As noted above, Congress incorporated § 3281's "punishable by death" language into Article 43(a) in 1986. The government argues that, when it did so, Congress did not thereby adopt the phrase's ordinary meaning, but rather codified an "understanding" of that phrase that civilian courts of appeals had "settled" upon before 1986—that the statute was satisfied so long as Congress had *authorized* the death penalty for the offense at issue. U.S. Br. 29–30. The government's legislative ratification theory, however, is not supported by the two cases on which it rests.

In the first of those cases, *Coon* v. *United States*, 411 F.2d 422 (8th Cir. 1969), the defendant argued via 28 U.S.C. § 2255 that his offense—kidnapping—was not "punishable by death" under § 3281. *Id*. at 423–24. After his conviction became final, this Court had held that the federal kidnapping statute unconstitutionally

discouraged defendants from vindicating their right to a jury trial—because only a jury could return a death sentence. *See United States* v. *Pope*, 392 U.S. 651 (1968) (per curiam). The Eighth Circuit held that the defendant's offense was still "punishable by death." As it explained, "[t]he clear and ordinary meaning of the words unquestionably encompasses any offense for which the death penalty may be imposed." 411 F.2d at 424 (internal quotation marks omitted). And although the Constitution barred the *procedures* governing capital sentencing under the federal kidnapping statute, it did not bar imposition of the death penalty for the *substantive* offense. *See id.*

The second case the government cites did not even involve § 3281—and suffers from the same flaw. In *United States* v. *Kennedy*, 618 F.2d 557 (9th Cir. 1980) (per curiam), the defendant challenged whether his bail was governed by 18 U.S.C. § 3148, which covers cases in which the defendant "is charged with an offense punishable by death." The Ninth Circuit held that § 3148 applied even though the defendants' offenses could not have been punished with death under *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam). *See* 618 F.2d at 558–59. As in *Coon*, though, *Kennedy* involved offenses for which the death penalty could lawfully be imposed—so long as the sentencing followed constitutionally appropriate procedures.[9]

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9. The government also cites *United States* v. *Payne*, 591 F.3d 46 (2d Cir. 2010), as evidence that civilian courts since 1986 have continued to interpret § 3281 to focus only on whether the death penalty is authorized. Leaving aside that a 2010 ruling is hardly instructive of what Congress intended in 1986, *Payne*, too, involved a case in which the *offense*—murder in aid of racketeering—could lawfully and constitutionally be punished by death. *See id.* at 59.

As the CAAF explained in *Mangahas*, in each of these cases (and in the others on which *Willenbring* had relied), "the death penalty was, in fact, at least a potentially available punishment for the respective charges at the time the offenses were committed." 77 M.J. at 224. Indeed, the government has not identified a *single* case—before 1986 or since—in which a court of appeals interpreted "punishable by death" in § 3281 to include a specific offense for which the death penalty had been *substantively* foreclosed. Even assuming *arguendo* that Congress in 1986 meant to incorporate these specific judicial interpretations of § 3281 into Article 43, such incorporation would have done nothing to unsettle the ordinary meaning of the term—or to support the government's position here.

4. Any Ambiguity in Article 43(a) Should Be Resolved in Favor of Respondents

Even if any ambiguity remained as to what Article 43(a) means by an "offense punishable by death," such ambiguity militates in favor of the CAAF's analysis in *Mangahas*—not the government's position here.

First, it is a long-settled principle of statutory interpretation that statutes of limitations are to be "'narrowly construed' and 'interpreted in favor of repose.'" *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (quoting *Bridges*, 346 U.S. at 219). That principle has even greater force as applied to *criminal* statutes of limitations. *See, e.g.*, *Toussie* v. *United States*, 397 U.S. 112, 114–15 (1970); *see also Marion*, 404 U.S. at 322 n.14 ("Criminal statutes of limitation are to be liberally interpreted in favor of repose." (citing *United States* v. *Habig*, 390 U.S. 222, 227 (1968))); *United States* v. *Scharton*, 285 U.S. 518, 522 (1932) (same).

As this Court explained in *Toussie*, ambiguities should be resolved in favor of repose "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." 397 U.S. at 114–15; *see also id.* ("Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."). Here, that would mean interpreting "punishable by death" the same way that the CAAF did in *Mangahas*.

Second, even if "recourse to traditional tools of statutory construction leaves . . . doubt about the meaning of" a statutory term, *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion), this Court should "invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Id.* (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)); *see also United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019) ("That rule is 'perhaps not much less old than' the task of statutory 'construction itself.'" (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820))).

"[I]t is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). Thus, if doubt remains as to the meaning of the phrase "offense punishable by death," the rule of lenity further settles that the CAAF's reading of Article 43(a) must prevail over the government's.

5. The Legislative History of the 1986 Amendment Is Not to the Contrary

Finding no refuge in the traditional tools of statutory construction—text, statutory history, and the canons of interpretation—the government falls back on a single sentence from the Senate Armed Services Committee's report accompanying the 1986 amendment. Whoever drafted the report wrote that, under the revised Article 43(a), "'no statute of limitation would exist in prosecution of offenses for which the death penalty is a punishment prescribed by or pursuant to the UCMJ.'" U.S. Br. 10 (quoting S. REP. No. 99-331, *supra*, at 249). In the government's view, this sentence demonstrates that the 1986 amendment overrode the ordinary meaning of "punishable by death," and that Congress meant the term simply as a proxy for "serious offenses" under the UCMJ, regardless of whether the death penalty could actually be imposed. *See id*. at 29.

Of course, a stray sentence in a committee report can hardly overcome either the plain language Congress used in Article 43(a) or the settled principles of statutory interpretation that would compel the same reading even if the meaning of the text were not plain. *See, e.g.*, *Shannon* v. *United States*, 512 U.S. 573, 583 (1994) ("We are not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute."). This disconnect is especially glaring here, where the purpose the government purports to derive from the legislative history (offenses for which death is "*prescribed by* . . . the UCMJ") doesn't even track the language Congress actually used (offenses "*punishable* by death").

But even if legislative history could be relevant to the meaning of Article 43(a), there are three separate flaws in how the government attempts to use it here: It is subsequent legislative history; it is cherry-picked from the subsequent legislative history of the 1986 amendment; and, even read for all it is worth, it doesn't actually bear out the government's reading.

a. The Government's Reading of "Punishable by Death" Relies Upon Subsequent Legislative History

As noted above, the 1986 amendment did not introduce into federal law the language "offense punishable by death." Instead, it was introduced into the statute of limitations for federal civilian courts in 1939—as a replacement for the broader term, "capital offense." The legislative history surrounding that change in 1939 only reinforces that Congress intended to adopt the ordinary meaning of "punishable." *See ante* at 20.

In 1986, moreover, Congress's goal was to *harmonize* Article 43(a) with the federal civilian statute of limitations, not put them at loggerheads. U.S. Br. 29. In other words, the best reading of the 1986 amendment is that it meant to do no more and no less than bring Article 43(a) into line with 18 U.S.C. § 3281. And the meaning of the federal civilian statute of limitations is illuminated, if at all, by the full legislative history of the 1939 statute—not a lone remark in a 1986 committee report. The legislative history on which the government relies is, thus, immaterial *subsequent* legislative history on the critical point in dispute—the meaning of the term "offense punishable by death." *See Sullivan* v. *Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J.,

concurring in part) ("[T]he views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed.").[10]

b. The Complete Legislative History of the 1986 Amendment Does Not Support the Government's Reading

Even if the 1986 amendment's legislative history *could* illuminate the meaning of "punishable by death" in Article 43(a), the government's reading rests on a cherry-picked statement taken out of context. As noted above, the 1986 amendment was motivated by the volume of serious offenses under the UCMJ that, as late as 1985, carried either a two- or three-year statute of limitations. *See ante* at 8. But none of the amendment's legislative history suggests that Congress or the government at that time understood rape to be one of the offenses for which the 1986 amendment changed the statute of limitations.

If, as the government now asserts, Congress meant to include rape—and to allow servicemembers to be prosecuted for that offense years, even decades, after the fact, that would have been a major development, one that would have overshadowed any other modification made by the 1986 amendment. Yet, while those other modifications all received at least brief mention in the legislative history of the 1986 amendment, *see, e.g.*, S. REP. No. 99-331, at 249–50, not a word was said about this purportedly seismic shift in military law. *Cf. Church of Scientology of Cal.* v. *IRS*, 484 U.S. 9, 17–18 (1987) ("[T]his is a case

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10. The same can be said of the *amicus* brief filed on behalf of 13 members of Congress—none of whom were *in* Congress at the time of the 1986 amendment to Article 43(a), let alone in 1939.

where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect [the government] ascribes to it would have been differently described.").

The silence of the 1986 amendment's legislative history as to rape is even more instructive because of contemporaneous legislation cutting in the opposite direction. On the same day that Congress enacted the 1986 amendment to Article 43(a), it eliminated the federal death penalty for civilian rape offenses (which federal law defines as "sexual abuse"). *See* U.S. Br. 30 (citing Sexual Abuse Act of 1986, Pub. L. No. 99-654, § 3(a)(1), 100 Stat. 3660, 3663).

If the government is correct about the meaning of "punishable by death," the effect of that change was to move federal civilian rape cases from 18 U.S.C. § 3281 to § 3282, which then imposed a three-year statute of limitations for other offenses.[11] It beggars belief that, on the very day Congress would thus have brought civilian rape offenses under a three-year civilian statute of limitations, it would intentionally do the exact *opposite* with regard to rape in the military.

Put another way, on the government's reading, rape should have remained exempt from a statute of limitations in civilian courts until Congress formally repealed the death penalty in 1986—nine years after *Coker*—entirely because it continued to be authorized by statute. On Respondents' reading, in contrast, *Coker* itself compelled a three-year statute of limitations for civilian adult rape offenses—which

11. Congress did not eliminate a statute of limitations for civilian rape offenses until July 2006. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 211(1), 120 Stat. 587, 616 (codified at 18 U.S.C. § 3299).

were no longer "punishable by death" under § 3281. It is more than a little telling, in that respect, that the government has not been able to identify a single federal civilian rape case brought between *Coker* and the 1986 repeal of the civilian death penalty for rape in which more than three years elapsed between the offense and the prosecution.

c. The Government's Cherry-Picked Legislative History Does Not Support Its Reading of Article 43(a)

Finally, even ignoring the text, statutory history, and canons of statutory interpretation, and taking the selective, subsequent legislative history out of context, it *still* does not vindicate the government's reading of "punishable by death." Read for all that it is worth, the Senate Committee Report suggests that an offense "punishable by death" is an offense "for which the death penalty is a punishment prescribed by or pursuant to the UCMJ." S. REP. No. 99-331, at 249.

But the government ignores that sentencing under the UCMJ is constrained by Article 55, which bars courts-martial from imposing any "cruel or unusual punishment." 10 U.S.C. § 855. As noted below, Article 55 has consistently been interpreted to incorporate this Court's Eighth Amendment jurisprudence—including *Coker*. *See post* at 36–40. Even if this single sentence of legislative history was conclusive, such that an offense is "punishable by death" under Article 43(a) so long as it is one "for which the death penalty is a punishment prescribed by or pursuant to the UCMJ," Respondents' offenses would *still* not qualify because the UCMJ itself forecloses the death penalty.

* * *

The ordinary meaning of Article 43(a), the history of the term "offense punishable by death," and settled principles of statutory interpretation all lead to the same result: As *Mangahas* correctly held, to be "punishable by death" under Article 43(a), an offense must be one for which death "may be imposed," *i.e.*, an offense for which death is *both* an authorized *and* a legally available punishment.

B. The Eighth Amendment Bars Imposition of the Death Penalty for Adult Rape

The government's alternative argument is that it *could* lawfully have subjected Respondents to the death penalty for their offenses. *Coker* forecloses that argument. So does nearly four decades of Eighth Amendment precedent in the military justice system. And, at the very least, so does Article 55 of the UCMJ.

This Court has long held "that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems* v. *United States*, 217 U.S. 349, 367 (1910). This Court has thus interpreted the Eighth Amendment to "proscribe[] 'all excessive punishments, as well as cruel or unusual punishments that may or may not be excessive.'" *Kennedy*, 554 U.S. at 419 (quoting *Atkins* v. *Virginia*, 536 U.S. 304, 311 n.7 (2002)). And "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005). As such, "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* (quoting *Atkins*, 536 U.S. at 319).

Consistent with these principles, this Court held in *Coker* that the Eighth Amendment categorically forbids imposition of the death penalty for a particular offense—rape of an adult that does not result in the death of the victim. 433 U.S. at 598 (plurality opinion) ("[D]eath is . . . a disproportionate penalty for the crime of raping an adult woman."); *see also id.* ("We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life." (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion))). Those conclusions did not turn on any considerations unique to civilian—as opposed to military—criminal justice.[12] *See, e.g.*, *Kennedy*, 554 U.S. at 437 ("As it relates to crimes against individuals, . . . the death penalty should not be expanded to instances where the victim's life was not taken.").

Perhaps for that reason, *every* military court to consider the question since *Coker* has held that *Coker* itself applies to courts-martial. As the CAAF's predecessor explained in 1986, "[t]he [UCMJ] and many state penal codes authorize death sentences for rape; but in the absence of aggravating circumstances, such punishment cannot be constitutionally inflicted." *United States* v. *Hickson*, 22 M.J. 146, 154 n.10 (C.M.A. 1986) (citing *Coker*, 433 U.S. 584); *see also*

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12. Just as the infrequency of capital rape cases was relevant to the plurality's analysis in *Coker*, 433 U.S. at 596–97 (plurality opinion), it also bears mentioning here: Even though the UCMJ formally authorized the death penalty for *all* rape offenses committed on or before June 28, 2012, no servicemember has been sentenced to death based solely upon a conviction for rape of an adult since World War II—*before* Congress enacted the UCMJ.

United States v. *McReynolds*, 9 M.J. 881, 882 (A.F.C.M.R. 1980) (*Coker* "is binding upon us" under the Eighth Amendment); *United States* v. *Clark*, 18 M.J. 775, 776 (N-M.C.M.R. 1984) ("A sentence of death for the crime of rape of an adult woman is prohibited by the Eighth Amendment to the U.S. Constitution."). From the unbroken perspective of the entire military justice system, then, *Coker* settled the matter. *See Mangahas*, 77 M.J. at 223 & n.3.[13]

Instead of grappling with this jurisprudence, the government's opening brief relies upon policy arguments and overgeneralizations. Taking the latter first, although the government's brief correctly points out that "[t]his Court has long recognized that many constitutional rights apply differently in the context of the military," U.S. Br. 31, it indirectly concedes that no decision of this Court has suggested that the Eighth Amendment is one of them. *Id*. at 32.

To the contrary, In *Loving* v. *United States*, 517 U.S. 748 (1996), this Court assumed without deciding that the Eighth Amendment applies to courts-martial. *Id*. at 755; *see also id*. at 777 (Thomas, J., concurring in the judgment). And five Justices pointedly declined to address whether the Eighth Amendment bars courts-martial from imposing capital punishment for *child* rape in *Kennedy*, 554 U.S. at 947–48 (statement of Kennedy, J., respecting the denial of rehearing) ("[W]e need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military

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13. The CAAF's decision in *Willenbring* is not to the contrary, for it said nothing about *Coker*. Instead, all it (wrongly) held was that rape of an adult was "punishable by death" solely because the death penalty had been authorized. 48 M.J. at 179–80.

cases (a matter not presented here for our decision).”). That this Court has not squarely addressed whether the Eighth Amendment applies to courts-martial is not, of itself, an argument that it doesn’t.

Instead, the government’s main argument against directly applying *Coker* to courts-martial is that it would be inconsistent with Congress’s provision of the death penalty in Article 120(a)—a decision to which it claims this Court owes deference. U.S. Br. 31–33. But the only case the government cites to support the proposition that Congress is entitled to deference in the specific context of military *punishment* is *Chappell* v. *Wallace*, 462 U.S. 296 (1983)—a case about whether courts could fashion judge-made damages remedies for servicemembers under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See* U.S. Br. 32–33, 35–36. Deferring to Congress on the availability of civil remedies for servicemembers hardly stands as precedent for deferring to Congress on the applicability and contours of the Eighth Amendment in cases in which servicemembers are criminal defendants.

Nor does the government offer any evidence that the inclusion of the death penalty in Article 120(a) reflected any “judgment” on Congress’s part to adopt a *different* rule for courts-martial as compared to civilian courts. U.S. Br. 34. At the time Article 120(a) was enacted, the death penalty was available for rape in federal civilian court, as well. *See* 18 U.S.C. § 2031 (1948). And Congress never specifically reenacted the death penalty in Article 120(a) after *Coker*—including in 1986 when it revised Article 43(a). Even if deference to Congress’s judgment *could* ever be appropriate in this context, the government has failed to identify any intentional legislative decision in 1950 or in 1986 to

treat military rape differently for Eighth Amendment (or any other) purposes. *See, e.g.*, U.S. Br. 5–7, 34–35 (citing six government reports and memoranda on rape in the military—the oldest of which is from 2010).

In any event, whereas the government frames the question as whether there is a "sound reason" to *extend* the Eighth Amendment to courts-martial, the CAAF and its predecessor—the "Supreme Court of the military justice system," *United States* v. *Armbruster*, 29 C.M.R. 412, 414 (1960)—have unflinchingly applied the Eighth Amendment to courts-martial for decades. As the Court of Military Appeals explained in *Matthews*, the only possible exception would be in cases of "military necessity," which it dismissed as a concern for civilian offenses such as murder and rape:

> [T]he murder and rape committed by Matthews *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*. Although appellant's offenses were service-connected and subject to trial by court-martial, we see no reason why Matthews should be executed for his murder and rape of [the victim] if the sentencing procedures used by the court-martial failed to meet the standards established by the Supreme Court for sentencing in capital cases in civilian courts. *There is no military necessity for such a distinction*; and we do not believe that applying lower standards in this case would conform to the intent of Article 55 or of the Eighth Amendment.

16 M.J. at 369 (emphases added; citations omitted).

In other words, the Eighth Amendment applies to courts-martial *unless* "military necessity" justifies a departure from its prohibitions. And the only examples of such justification that the *Matthews* court identified were "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." *Id*. at 368. Even for serious offenses like the rape and murder at issue in *Matthews*, the Eighth Amendment still applied.

The government's opening brief quotes *Matthews*, *see* U.S. Br. 39, but misses its point. The question military courts have consistently asked for decades is not whether there is "sound reason" to *extend* the Eighth Amendment to courts-martial; it is whether there is any "military necessity" that justifies *non*-application. Again, all the government offers in response is open-ended invocation of the deference to which Congress is generally entitled in legislating military affairs—rather than any specific legislative judgment about military necessity in this context. If it is sufficient under *Matthews* that Congress long ago authorized a punishment that the Eighth Amendment was later interpreted to forbid, then the exception for "military necessity" would swallow the rule.

C. Article 55 of the UCMJ Bars Imposition of the Death Penalty for Adult Rape

This Court does not actually need to decide in these cases whether the Eighth Amendment in general—or *Coker*, in particular—applies to courts-martial. As the CAAF recognized in *Mangahas*, Article 55 of the UCMJ, which bars courts-martial from imposing any "cruel or unusual punishment," compels the same result. 77 M.J. at 223 n.4.

Shortly after the UCMJ was enacted, the CAAF's predecessor held that, through Article 55, "Congress intended to confer as much protection as that afforded by the Eighth Amendment." *Wappler*, 9 C.M.R. at 26.[14] Ever since *Wappler*, both the Court of Military Appeals and the CAAF have consistently understood Article 55 to mean what it says—and to incorporate this Court's Eighth Amendment jurisprudence into courts-martial. *E.g.*, *United States* v. *Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000); *see United States* v. *Martinez*, 19 M.J. 744, 748 (C.M.R. 1984) (absent an argument for greater protection under Article 55, "resolution of an [E]ighth [A]mendment issue will perforce resolve the alleged violation of Article 55"). Even if *Coker* does not apply to courts-martial of its own force, Article 55 thus forecloses a court-martial from imposing the death penalty for the crime of adult rape.

In nevertheless suggesting that Article 55 "has no bearing on the ultimate question here." U.S. Br. 39, the government drains Article 55 of any meaning, since *any* punishment authorized by the UCMJ would

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14. The origins of the "cruel or unusual punishment" language reinforce the conclusion that Article 55 incorporates the Eighth Amendment. Into the twentieth century, the only bar on specific punishment in the Articles of War was Article 41, which provided that "[p]unishment by flogging, or by branding, marking, or tattooing the body, is prohibited." Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 657. As part of a broader effort after the First World War to improve procedural protections in courts-martial, Congress in 1920 revised Article 41 to ban "[c]ruel and unusual punishments of every kind." Act of June 4, 1920, 41 Stat. at 795. As the Judge Advocate General of the Army testified before Congress, that revision was intended to "enact[] the general language of the Constitution." *Establishment of Military Justice: Hearings Before the S. Subcomm. on Mil. Affairs*, 66th Cong. 1140 (1919) (statement of Maj. Gen. Enoch H. Crowder).

not be "cruel or unusual" on the government's reading. *Id*. at 38 ("Article 55's bar on 'cruel or unusual punishment' . . . cannot reasonably be understood to implicitly invalidate Article 120's more specific authorization of the death penalty for military rape.").

Of course, at the time the UCMJ was enacted, this Court's decision in *Coker* was still 27 years away. There was therefore no inconsistency *then* between Article 55's ban on cruel or unusual punishment and Article 120(a)'s authorization of the death penalty for rape. Moreover, as noted above, Congress never specifically *re*-authorized the death penalty for rape after *Coker*; it amended Article 120 only once between 1950 and the time of Respondents' offenses—and that amendment is immaterial here. *See ante* at 10–11. Thus, even if Articles 55 and 120(a) ought to be read "if possible, to form a coherent whole—not to nullify one another," U.S. Br. 38, that reading is certainly "fairly possible" here.

The government's reading, in contrast, would turn seven decades of settled military case law on its head.[15] It also fails to account for the rest of the UCMJ. After all, *all* punishments imposed by courts-martial are authorized by the UCMJ—either expressly or through authority that is expressly delegated to the President. *See id*. §§ 815, 818–20; *see also id*. § 940. On the government's view, Article 55 would do no work at all, because the "cruel or unusual

15. As the government has argued in other cases, when Congress gave this Court appellate jurisdiction over the CAAF in 1983, that grant "was 'not intend[ed] to displace [the CAAF] 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, at 10 (1983) (alterations in original)).

punishment[s]" it forbids are all "authorized" by Congress. If Congress were, for instance, to expressly authorize flogging or death by dismemberment as punishments in courts-martial, such a statute would, under the government's logic, offend neither Article 55 nor the Eighth Amendment.

"Absent clear evidence that Congress intended this surplusage, [this] Court rejects an interpretation of the statute that would render an entire subparagraph meaningless." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 632. That reasoning necessarily applies with even greater force to an interpretation that would render an entire *section* meaningless.

But if any doubt remained as to whether Article 55 incorporates *Coker*'s understanding that the death penalty is a "cruel and unusual punishment" for adult rape, another fundamental principle of statutory interpretation—constitutional avoidance—settles the matter. After all, "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond* v. *United States*, 572 U.S. 844, 855 (2012) (citation omitted); *see also Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Reading Article 55 as the CAAF does (and did below) obviates the need for this Court to settle the unanswered question of whether the Eighth Amendment applies of its own force. Respondents certainly do not believe that a statute that bars courts-martial from imposing "cruel or unusual punishment" is ambiguous as to whether it necessarily bars a punishment this Court has deemed foreclosed by the

Eighth Amendment's ban on "cruel and unusual punishments." But any ambiguity militates only in favor of the decisions below, not against them.

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Respondents' offenses were not "punishable by death" because the death penalty was categorically foreclosed as an available punishment for those offenses by the Eighth Amendment, Article 55, or both. As such, *Mangahas* was rightly decided, and the applicable statute of limitations for Respondents' offenses at the time of their commission was five years. That limitations period expired for Respondent Daniels in 2003; for Respondent Collins in 2005; and for Respondent Briggs in 2010—before any of the charges at issue in these cases were received.

II. THE 2006 AMENDMENT TO ARTICLE 43(a) DOES NOT APPLY RETROACTIVELY TO RESPONDENT BRIGGS

As Part I establishes, the CAAF correctly held in *Mangahas* that, from 1986 to 2006, adult rape carried a five-year statute of limitations under Article 43 of the UCMJ. In 2006, however, Congress amended Article 43(a) to add rape to the list of enumerated offenses that have no statute of limitations. FY2006 NDAA § 553(a), 119 Stat. at 3264.

The remaining question here is whether the 2006 amendment applies *retroactively* to Respondents. That question is easily answered as to Respondents Collins and Daniels. In both of their cases, the five-year statute of limitations had expired *before* the 2006 amendment was enacted, and the Ex Post Facto Clause bars Congress from retroactively extending an expired statute of limitations. *Stogner*, 539 U.S. 607. The government does not argue otherwise.

But the government *does* argue that Respondent Briggs is differently situated, because the five-year statute of limitations had not yet run in his case when Congress enacted the 2006 amendment. Whether that statute retroactively eliminated the statute of limitations in his case is a question of statutory interpretation, not constitutional law. But in arguing that the 2006 amendment applies retroactively, the government again ignores the text and history of the relevant statute in favor of its own speculation about what Congress might have intended. As the CAAF correctly held in *Briggs*, the text and context of the 2006 amendment make clear that its changes to Article 43(a) are prospective only—so that, as with Respondents Collins and Daniels, Respondent Briggs's prosecution was also time-barred.

A. Congress Did Not "Expressly Prescribe[]" that the 2006 Amendment to Article 43(a) Applies Retroactively

When it comes to the temporal application of statutes, "prospectivity remains the appropriate default rule," and retroactive application remains the exception. *Landgraf*, 511 U.S. at 272; *see also INS* v. *St. Cyr*, 533 U.S. 289, 315 (2001) ("Retroactive statutes raise special concerns."). Congress, of course, can overcome the "presumption against retroactivity," *Landgraf*, 511 U.S. at 272, but only if it has "expressly prescribed the statute's proper reach," *id*. at 280, or if "normal rules of construction" unambiguously reveal the same intent. *Lindh*, 521 U.S. at 326. Absent such evidence, a statute will not apply to any conduct occurring before its enactment with respect to which it produces a "retroactive effect." *Fernandez-Vargas*, 548 U.S. at 37–38.

Here, Congress did not "expressly prescribe[]" that the 2006 amendment was to reach backwards to offenses committed prior to the statute's effective date. The operative provision of the 2006 amendment provides, in its entirety, that Article 43(a) "is amended by striking 'or with any offense punishable by death' and inserting 'with murder or rape, or with any other offense punishable by death.'" FY2006 NDAA § 553(a), 119 Stat. at 3264.

As the CAAF explained below, this text is (obviously) silent as to whether it applies to offenses predating its enactment. *Briggs* Pet. App. 9a. As importantly, it does not even specify an effective date. *See Johnson* v. *United States*, 529 U.S. 694, 702 (2000) ("[W]hen a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment.").

Mindful of both the presumption in favor of repose and the presumption against retroactivity, Congress uses unambiguous language when it intends to apply amendments to criminal limitations provisions to prior cases—including with respect to Article 43 itself. *See, e.g.*, Military Justice Act of 2016, Pub. L. No. 114-328, § 5225(f), 130 Stat. 2000, 2910 ("The amendments made [to Article 43(b)] shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this subsection if the applicable limitation period has not yet expired."); Crime Control Act of 1990, Pub L. No. 101-647, § 2505(b), 104 Stat. 4789, 4861 ("The amendments . . . shall apply to any offense committed before the date of the enactment of this section, if the statute of limitations applicable to that offense had not run as of such date.").

Even in the FY2006 NDAA (the statute that the government argues applies Article 43(a) retroactively to Respondent Briggs), Congress expressly provided that numerous *other* provisions would apply retroactively. *E.g.*, FY2006 NDAA §§ 514(d), 516(d), 609(c), 664(c), 715(b), 743(b), 921(b), 119 Stat. at 3233, 3237, 3290, 3316, 3345, 3360, 3411 (codified as amended in scattered sections of 10 and 50 U.S.C.); *see Vartelas* v. *Holder*, 566 U.S. 257, 266–67 (2012) (contrasting a provision that was silent as to its temporal reach with other provisions of the same statute that were expressly retroactive). Congress's silence as to the retroactive applicability of Article 43, then, is conclusive: as the CAAF held below, the 2006 amendment did not "expressly prescribe[]" retroactive application. *Briggs* Pet. App. 9a–10a.

B. "Normal Rules of Construction" Reinforce that the 2006 Amendment to Article 43(a) is Only Prospective

In its opening brief, the government does not argue that the 2006 amendment "expressly prescribe[d]" retroactive application. Instead, it purports to resort to "normal rules of construction" to divine unambiguous indication of legislative intent to apply the statute retroactively. Relying once more on snippets of legislative history, the government's claim is that the 2006 amendment was meant to "codify" the CAAF's decision in *Willenbring* (which had held that rape had no statute of limitations because it was "punishable by death"). *See* U.S. Br. 43; *see also id*. at 42 (quoting H.R. REP. No. 109-360, at 703 (2005)).

There is no dispute that one of the goals of the 2006 amendment was to eliminate a statute of limitations for rape *going forward*. But the government's

argument that Congress also intended to apply that amendment to *prior* cases rests entirely on its claim that, "as to rape, Congress believed that it was simply preserving preexisting law." *Id.* at 43. Maybe so, but as Judge Maggs correctly concluded in *Briggs*, "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." *Briggs* Pet. App. 12a.

As the CAAF explained below, this reading of the 2006 amendment is underscored by how Congress treated the *other* offense for which the 2006 amendment eliminated a statute of limitations—what the CAAF calls "unpremeditated" murder under Articles 118(2) and 118(3) of the UCMJ, 10 U.S.C. § 918(2)–(3), which are not capital offenses. *See ante* at 9 n.4. On any reading of Article 43(a), then, unpremeditated murder was *not* "punishable by death" prior to the 2006 amendment—and was instead subject to a five-year statute of limitations.

The parties therefore agree that, at least with respect to unpremeditated murder, Congress knew that the 2006 amendment was changing the status quo. Even then, it chose to *not* apply that change to prior offenses. There is thus no need to speculate as to what Congress would have intended had it known *Willenbring* would later be overruled; even with respect to a class of serious offenses for which it knew it was eliminating a statute of limitations, the 2006 amendment applied only prospectively. *See Briggs* Pet. App. 10a ("No version of this bill as it worked its way through the House and Senate contained any

provision indicating that the amendment would apply retroactively. The discussions of the amendment in the House Report and the Conference Report also say nothing about retroactivity."). Nor is there any indication that Congress meant for the 2006 amendment to treat unpremeditated murder and rape differently.

"[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Lindh*, 521 U.S. at 328 n.4. But if the 2006 amendment sustains only one interpretation as to Congress's intent, it is that it does *not* apply retroactively. And if it is ambiguous, not only does it fail to overcome the presumption against retroactivity, but it also fails to overcome the presumption in favor of repose. *See ante* at 24–25; *see also Briggs* Pet. App. 8a–9a.

C. Application of the 2006 Amendment to Respondent Briggs Would Produce an Impermissible "Retroactive Effect"

Ultimately, the government's principal argument that the 2006 amendment applies to Respondent Briggs is that it does not produce a "retroactive effect" in his case because "the [future] application of a lifetime statute of limitations in the 2006 NDAA should not have surprised Briggs; it was instead exactly what he would have expected" under *Willenbring*. U.S. Br. 41.

The problem with this analysis is that it asks—and answers—the wrong question. "The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe* v. *Housing Auth. of Durham*, 393 U.S. 268, 281 (1969); *see also*

United States v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *cf. Griffith* v. *Kentucky*, 479 U.S. 314 (1987) (in criminal cases, courts apply new law so long as the direct appeal is pending).

Applying the 2006 amendment to Respondent Briggs therefore requires applying it to him in a context in which the statute of limitations in his case, as Part I demonstrates, would *otherwise* have been five years. Such an application would not produce a retroactive effect if his prosecution had been initiated before the five-year statute of limitations had run. But it wasn't; charges were not received until 2014, nine years after the offense for which he was convicted. The difference between applying the 2006 amendment retroactively and not in Briggs's case is the difference between whether or not he could be prosecuted at all. *See Fernandez-Vargas*, 548 U.S. at 37 (retroactive effect analysis focuses on the impact of "applying the statute to the person objecting").

Clearly, such a result "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.'" *Fernandez-Vargas*, 548 U.S. at 37 (quoting *Landgraf*, 511 U.S. at 278) (alterations in original); *see Briggs* Pet. App. 12a; *see also Vartelas*, 566 U.S. at 272 ("That new disability rested not on any continuing criminal activity, but on a single crime committed years before [the statute's] enactment."). Because the 2006 amendment produces a retroactive effect as applied to Respondent Briggs, and because there is no indication that Congress intended such a result, it cannot—and does not—apply retroactively to his case. His court-martial was also time-barred by Article 43(b) of the UCMJ.

*   *   *

The plain text of Article 43(a) at the time of Respondents' offenses, Article 55, and the 2006 amendment settle these cases. The history of those provisions, along with time-honored principles of statutory interpretation, only reinforce their ordinary meaning. And insofar as they are relevant, even the scraps of legislative history on which the government purports to rely do not actually cut against the CAAF's unanimous analyses in *Mangahas* and *Briggs* and its summary dispositions in *Collins* and *Daniels*. Respondents previously suggested that these were weak cases for certiorari. They haven't gotten any stronger on the merits.

CONCLUSION

The judgments of the U.S. Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted,

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