No. 15-1257

IN THE
Supreme Court of the United States

HASAN K. AKBAR,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Armed Forces

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers—several as flag officers.

NIMJ appears regularly as *amicus curiae* before the U.S. Court of Appeals for the Armed Forces ("CAAF"), and appeared in the U.S. Supreme Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008).

As relates to the issue before the Court in this case, NIMJ has an interest in ensuring that an Article

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1. The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

III court, rather than the military justice system, has the final say on such an important constitutional question of criminal law.

SUMMARY OF ARGUMENT

The Petition raises a substantial constitutional challenge to a death sentence; the Court of Appeals held that only *this* Court could properly resolve the question presented; and if this Court answers that question in Petitioner's favor, it would raise doubt about the entire scheme by which the military justice system currently imposes capital punishment. It is hard to imagine how a servicemember could ever present a more compelling petition for certiorari than the Petitioner in this case.

These imperatives notwithstanding, this Court has not granted a servicemember's request for plenary review of a court-martial in two decades. *See Edmond v. United States*, 519 U.S. 977 (1996) (mem.); *see also post* at 18 n.5. That trend may have a lot to do with two broader developments that, over the past 75 years, have dramatically reduced this Court's focus on direct appeals from civilian criminal convictions: the expansion of collateral review via habeas corpus, and Congress's transformation of the Court's docket from one featuring a high number of mandatory appeals to one in which almost all of the Court's jurisdiction is discretionary. As a result, it is now the rare case in which this Court grants certiorari in a direct criminal appeal—especially where the question presented has

not divided the lower courts, or is unlikely to be of surpassing national importance.

But whatever the merits of these developments with respect to *civilian* criminal convictions, these same trends should both militate in the opposite direction with respect to this Court's review of criminal convictions in *military* courts. In the military context, collateral review of criminal convictions is severely limited to whether the military court gave "full and fair consideration" to the defendant's constitutional claims. And unlike what's true for civilian criminal convictions, Congress has clearly and explicitly indicated its desire for this Court to exercise a more aggressive supervisory role over military convictions—even though few, if any, will give rise to divisions of authority among the lower courts.

Accordingly, while the Supreme Court is certainly not bound to exercise certiorari jurisdiction over military appeals in any or even most cases, the Court is meant to—and should—play a different and more active role in reviewing direct appeals from the military justice system. And whatever force that argument carries in the ordinary military criminal case, it should have especial significance here.

The question presented is based squarely upon Petitioner's claim that this Court's decision in *Loving v. United States*, 517 U.S. 748 (1996), which upheld Congress's power to delegate to the President the authority to promulgate aggravating factors for capital

sentences in courts-martial, has been overtaken by its later ruling in *Ring v. Arizona*, 536 U.S. 584 (2002). Whatever the merits of that argument (on which this brief takes no position), it is unquestionably an issue that only *this* Court can settle—as the Court of Appeals for the Armed Forces (CAAF) expressly held in rejecting it. *See* Pet. App. 81a ("[W]e will continue to adhere to the holding in *Loving* unless the Supreme Court decides at some point in the future that there is a basis to overrule that precedent.").

Thus, Petitioner presents a substantial constitutional challenge to a death sentence—and to the current regime for capital sentencing in the military justice system, writ large—that can be resolved only by this Court on a direct appeal. If this Court is ever going to grant a servicemember's request for plenary review of a conviction by court-martial, it should grant the Petition.

ARGUMENT

I. CONGRESS AND THIS COURT HAVE INCREASINGLY PREFERRED COLLATERAL REVIEW, RATHER THAN DIRECT APPEALS, FOR SUPERVISING CIVILIAN CRIMINAL CONVICTIONS

As a series of statutes and the Supreme Court's jurisprudence underscore, both Congress and this Court have increasingly disfavored direct appeals as

the principal mechanism for supervising—and correcting errors in—criminal convictions in civilian courts. Instead, collateral review in state and federal court has come to serve much the same function, reducing both the size and significance of this Court's civilian criminal docket.

a. Post-Conviction Habeas Corpus Came To Serve Similar Functions As Those Served By Direct Appellate Review

Ever since the Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, cemented the ability of federal courts to entertain habeas petitions from criminal defendants convicted in state courts, a dual track has existed pursuant to which those convicted in state and federal civilian courts can mount challenges to their trials: direct appeals culminating in this Court, and petitions for writs of habeas corpus in the appropriate Article III district court. Even as the functions served by these tracks of review have varied, case law arising from the 1867 Act reflected a series of interrelated propositions usefully summarized by Professors Hertz and Liebman:

> All prisoners deserve one federal-court appeal as of right of their federal constitutional claims, if not on direct review in the Supreme Court, then on habeas corpus in the lower federal courts. As in other appeals, the scope of review was to be *de novo* on the law, deferential on the facts. In the federal prisoner

> context, the appeal generally would be a direct appeal to a United States Court of Appeals, unless the prisoner could not reasonably be expected to raise his claims in the immediate wake of trial. In the state-prisoner context, with direct Supreme Court review on the merits as of right having been limited to but a few cases each year, the bulk of the review responsibility would fall to the lower federal courts (and, at times, the Supreme Court) on habeas corpus.

1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.4d, at 71 (5th ed. 2005).

Two important jurisprudential developments helped to accelerate this trend: First, in *Waley v. Johnston*, 316 U.S. 101 (1942) (per curiam), the Court expanded the scope of post-conviction habeas corpus from challenges to the "jurisdiction" of the trial court to all constitutional challenges to the conviction. *See id.* at 104-05; *see also Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) ("[I]n *Waley v. Johnston*, the Court openly discarded the concept of jurisdiction . . . as a touchstone of the availability of federal habeas review, and acknowledged that such review is available for claims of disregard of the constitutional rights of the accused." (citations omitted) (internal quotation mark omitted)); *see generally* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*,

38 U. Chi. L. Rev. 142, 151-54 (1970) (describing the evolution of the scope of post-conviction habeas review).

Eleven years later, in *Brown v. Allen*, 344 U.S. 443 (1953), the Court held that such expansive post-conviction review extended even to those claims that had been fully litigated at trial, opening the door to sweeping federal relitigation of alleged trial-court errors. Between them, *Waley* and *Brown* necessarily presupposed that the principal federal post-conviction review of state trial-court errors would not take place on direct appeal, but rather collaterally via habeas corpus. And although federal post-conviction review of *federal* convictions was already available on direct appeal, this Court soon made clear that similar considerations applied to collateral review via 28 U.S.C. § 2255 of federal convictions, as well. *See generally Hill v. United States*, 368 U.S. 424, 427-28 & n.5 (1962).

To be sure, both this Court and Congress have since narrowed the scope of federal post-conviction habeas review for state prisoners, especially in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. But even as AEDPA eliminated *de novo* habeas review for "any claim that was adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d)(1); *see Williams v. Taylor*, 529 U.S. 362 (2000), it preserved such review for claims that were *not* so adjudicated, and it continues to allow federal courts to set aside state-court merits adjudications if they are "contrary to, or involved an

unreasonable application of, clearly established Federal law," as determined by this Court. 28 U.S.C. § 2254(d)(1). And for federal convictions, the post-conviction review provided for by § 2255 continues to be *de novo*. *See id.* § 2255(a).

b. Congress Has Consistently Expanded This Court's Discretion Over Its Appellate Jurisdiction, Especially In Criminal Cases

At the same time, Congress has consistently expanded this Court's discretion over its appellate jurisdiction, beginning in the Evarts Act, *see* Act of Mar. 3, 1891, ch. 517, 26 Stat. 826, and the "Judges' Bill," *see* Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936, and culminating in the near-abolition of mandatory appellate review in 1988, *see* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662. Indeed, this general story has been well- and often-told. *See, e.g.*, Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1447-50 (6th ed. 2009) [hereinafter "*Hart & Wechsler*"]; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643 (2000).

Nevertheless, it bears emphasizing that one of the areas where the expansion of appellate discretion has been the most pronounced has been in direct criminal appeals. For example, although the Judges' Bill had already heavily circumscribed the Court's mandatory

appellate jurisdiction over federal convictions, the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1880, went further, eliminating direct appeals from district courts in specific criminal cases in which such authority had been provided by the Criminal Appeals Act of 1907, ch. 2564, Pub. L. No. 59-223, 34 Stat. 1246. *See Hart & Wechsler*, *supra*, at 1449 & n.19. With regard to state-court convictions, the Judiciary Act of 1914 had already made such appeals discretionary with respect to state-court decisions upholding federal rights. *See* Act of Dec. 23, 1914, ch. 2, Pub. L. No. 63-224, 38 Stat. 790. In 1988, certiorari was extended to encompass all remaining state-court decisions subject to the Court's appellate jurisdiction. *See Hart & Wechsler*, *supra*, at 432-33. Thus, while this Court's discretion to set its docket has expanded as a general matter, such expansions have, at least in some cases, been specifically focused on increasing the Court's discretion to not hear direct criminal appeals.

c. This Court Has Increasingly Declined To Exercise Direct Supervisory Powers Over Civilian Criminal Appeals

Not surprisingly, these jurisdictional and jurisprudential trends have produced a corresponding decline in this Court's docket, from a peak of well over 300 cases per Term in the early part of the twentieth century, *see* Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 295 tbl.I (1928), to the roughly 75 cases per Term the Court currently hears. The actual decline

has been particularly sharp, however, with regard to direct criminal appeals—especially from state courts. Indeed, even in 1989 (the year after the 1988 Act virtually abolished the Court's mandatory appellate jurisdiction), the Court still heard 41 appeals from state courts. During the October 2014 Term, in contrast, the Court heard *five* such cases, *see The Supreme Court, 2014 Term—The Statistics*, 129 Harv. L. Rev. 381, 391 tbl.II(E) (2015), only *two* of which were direct criminal appeals, *see id.* at 394 tbl.III; *see also Ohio v. Clark*, 135 S. Ct. 2173 (2015); *Heien v. North Carolina*, 135 S. Ct. 530 (2014). *See generally* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211 (2008) (studying the shift in the composition of the Court's criminal docket).

The natural consequence of both the expansion of post-conviction habeas and the contraction of the Supreme Court's mandatory appellate jurisdiction has been to sharpen this Court's focus on those cases of national importance and/or cases raising divisions of authority among the lower courts, at the expense of ordinary appellate supervision of ordinary lower-court errors. Thus, although it is now accepted as axiomatic that "error correction . . . is outside the mainstream of the Court's functions," Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at 352 (10th ed. 2013); *see also* S. Ct. R. 10, it has been described as especially inappropriate in circumstances in which the

errors petitioners seek to correct may be resolved in subsequent or collateral proceedings in the lower courts, *see, e.g.*, *Tory v. Cochran*, 544 U.S. 734, 739-40 (2005) (Thomas, J., dissenting), or in cases in which the likely impact of the lower court's error is limited to the specific controversy at bar, *see, e.g.*, *Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting).

In other words, the gradual but near-complete evaporation of this Court's appellate docket in criminal cases can be traced at least in some respects to a combination of its increasingly discretionary jurisdiction and the greater opportunities for meaningful post-conviction review via collateral post-conviction remedies in the lower state and federal courts.

II. ARTICLE III POST-CONVICTION REVIEW OF MILITARY CONVICTIONS HAS FOLLOWED THE OPPOSITE PATTERN

a. This Court Has Carefully Circumscribed The Scope Of Collateral Post-Conviction Review Of Military Convictions

Even as this Court was expanding the scope of post-conviction habeas review of civilian criminal convictions as documented above, it took a far more modest approach to post-conviction habeas review of military convictions. Prior to 1942, habeas review of

military courts, like that of civilian courts, extended only to claims that the trial court lacked "jurisdiction." *See, e.g.*, *United States v. Grimley*, 137 U.S. 147, 150 (1890) ("[T]he civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . . The single inquiry, the test, is jurisdiction."). But whereas *Waley v. Johnston*, 316 U.S. 101 (1942) (per curiam), dramatically expanded the scope of civilian post-conviction habeas, *see ante* at 6, no comparable expansion immediately followed for collateral review of courts-martial, *see*, *e.g.*, *Hiatt v. Brown*, 339 U.S. 103, 110-11 (1950) (reaffirming *Grimley*).

Instead, four months after *Brown v. Allen*, 344 U.S. 443 (1953), opened the door to *de novo* relitigation in civilian post-conviction habeas, the Court in *Burns v. Wilson*, 346 U.S. 137 (1953) (plurality opinion), took a far-more-modest step in that direction for military convictions. Specifically, *Burns* held that collateral review of courts-martial would extend only to whether the trial court gave full and fair consideration to the defendant's claims. *See* 346 U.S. at 142 ("[W]hen a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ . . . .").

Burns was heavily criticized when it was decided. *See, e.g.*, *id.* at 153-54 (Douglas, J., dissenting); *see also Burns v. Wilson*, 346 U.S. 844, 844-51 (1953) (Frankfurter, J., dissenting from the denial of rehearing). In particular, as Justice Frankfurter

explained, it was difficult to understand why the justifications for more expansive collateral post-conviction review of *civilian* criminal courts did not apply *a fortiori* to military courts. *See* 346 U.S. at 848-49 (Frankfurter, J., dissenting from the denial of rehearing). If anything, there may be even stronger arguments for *de novo* collateral review of *military* convictions, because, as Justice Kennedy explained in *Boumediene v. Bush*, 553 U.S. 723 (2008), "where relief is sought from a sentence that resulted from the judgment of a court of record, . . . considerable deference is owed to the court that ordered confinement," *id.* at 782, but "[m]ilitary courts are not courts of record," *id.* at 786.

Burns nevertheless remains good law. *See, e.g.*, *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 671 (10th Cir. 2010); *Sanford v. United States*, 586 F.3d 28, 31-33 (D.C. Cir. 2009); *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 407-08 (D.C. Cir. 2006); *see also Schlesinger v. Councilman*, 420 U.S. 738, 748-53 (1975). Moreover, as the Tenth Circuit's decision in *Thomas* indicates, courts have understood "full and fair consideration" to encompass even those claims that receive *no* formal adjudication whatsoever by the military justice system. Instead,

> [w]hen an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of

> the issue with the mere statement that it did not consider the issue meritorious or requiring discussion.

625 F.3d at 671 (quoting *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986)) (alteration in original); *see also id.* (noting that the Tenth Circuit "give[s] *greater deference* to the military than we do to state courts in relation to [constitutional] claims" (emphasis added)); *cf. Harrington v. Richter*, 562 U.S. 86, 98-99 (2011) (summarizing the broad deference that federal courts must give to summary state-court dispositions under AEDPA).

Although there is some variation at the margins in how other circuits apply *Burns*, *see, e.g.*, *Armann v. McKean*, 549 F.3d 279, 289 n.10 (3d Cir. 2008) ("The case law interpreting the full and fair consideration test lacks uniformity."), every circuit's approach reflects the basic proposition that the only military court errors that will typically be reviewable via post-conviction habeas in the civilian courts are those that reflect gross constitutional error or that implicate the trial court's jurisdiction.[2]

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2. One of the strongest indications of the difficulty military defendants face in seeking collateral review in the civilian courts is their increasing resort to collateral post-conviction review within the military justice system, as endorsed by this Court in *United States v. Denedo*, 556 U.S. 904 (2009). *See, e.g.*, *Loving v. United States*, 68 M.J. 1 (C.A.A.F. 2009). Just as collateral post-conviction review within state courts does not obviate the importance of independent Article III oversight of state court convictions,

So understood, a claim such as that presented by the Petitioner—that a sentencing scheme specifically upheld against a constitutional challenge by the Supreme Court might nevertheless be called into question by a *later* Supreme Court ruling—is simply not the kind of claim that is cognizable via contemporary collateral post-conviction review.

b. Congress Has Expanded This Court's Direct Appellate Jurisdiction Over The Military Justice System—And Thereby Underscored The Need For More Direct Supervision

Whether as a cause or an effect of this narrow scope of collateral review, Congress has only *expanded* civilian appellate supervision of the military justice system. Thus, as part of the Uniform Code of Military Justice (UCMJ) in 1950, Congress created the Court of Military Appeals (the forerunner to CAAF), a single civilian appellate court to supervise direct appeals from each of the service departments. Congress went one critical step further in the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, investing this Court with certiorari jurisdiction in four classes of appeals from CAAF, *see* 28 U.S.C. § 1259, and thereby giving the Supreme Court for the first time direct supervisory

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however, the same can be said for military convictions, as well—all the more so where, as here, the lower courts lack the authority to resolve Petitioner's constitutional claim.

responsibility over the military justice system.[3] *See generally* Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction over Military Appeals*, 102 F.R.D. 329 (1984).

Although part of the impulse behind the 1983 Act was to empower the military departments to appeal adverse decisions by CAAF, the relevant legislative history is replete with concerns over the extent to which pursuing collateral review had become "a difficult and costly endeavor" for servicemembers as well, especially given that (1) many of them could not afford to retain counsel in such cases; and (2) in any event, there were "limited grounds for collateral review." *See, e.g.*, S. Rep. No. 98-53, at 8-9 (1983); *see also* H.R. Rep. No. 98-549, at 16 (1983), *reprinted in*

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3. To similar effect, the Military Commissions Acts of 2006 and 2009 also invest the Supreme Court for the first time with certiorari jurisdiction to review direct appeals of final judgments by military commissions (after they have been heard by the intermediate Court of Military Commission Review and the D.C. Circuit). *See* 10 U.S.C. § 950g(e); *cf. Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863) (holding that civilian courts lack the authority to entertain appeals from military commissions). And although it has since been repealed, a different provision of the 2006 MCA would have made such a direct appeal the *exclusive* post-conviction remedy available under the Act. *See* 10 U.S.C. § 950j(b) (2006). *See generally* Stephen I. Vladeck, *Exceptional Courts and the Structure of American Military Justice*, *in Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative and Policy Perspective* 163 (Fionnuala D. Ní Aoláin & Oren Gross eds., Cambridge Univ. Press 2013) (summarizing the evolution of appellate and collateral review of military courts), http://perma.cc/DQ98-UK9H.

1983 U.S.C.C.A.N. 2177, 2182. *See generally The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the S. Comm. on Armed Services*, 97th Cong., 136 (1982) (testimony of Hon. Robinson O. Everett, Chief Judge, U.S. Court of Military Appeals).

To be sure, the incompleteness of the expansion of the Court's certiorari jurisdiction over the military has not escaped criticism—especially to the extent that § 1259 does *not* confer certiorari jurisdiction over court-martial appeals that CAAF itself declines to hear. *See, e.g.*, Eugene R. Fidell, *Review of Decisions of the United States Courts of Appeals for the Armed Forces by the Supreme Court of the United States*, *in Evolving Military Justice* 149, 155-60 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002). But the perceived underinclusiveness of the 1983 Act in no way undermines the more important point for present purposes—that one of its central goals was radically to expand this Court's supervisory authority over the military justice system.[4]

4. This Court's lack of supervisory authority over the military justice system prior to 1983 was not only a frequent rhetorical flourish deployed to underscore the *independence* of military courts vis-à-vis their civilian brethren, *see, e.g.*, *Burns*, 346 U.S. at 140 (plurality opinion); it had major doctrinal consequences, as well. For example, Justice Harlan invoked the structural independence of the military justice system as the basis for the "substantial degree of civilian deference to military tribunals." *Noyd v. Bond*, 395 U.S. 683, 694 (1969). And Justice Powell relied upon it to support an abstention rule precluding

Indeed, it is particularly telling that Congress so intended, given that decisions by the military courts are often of limited importance or precedential value outside the military justice system—or even within it. *See, e.g.*, 10 U.S.C. § 948b(c) (2006) ("The judicial construction and application of [the UCMJ] are not binding on military commissions established under [the MCA]."). The natural conclusion to draw from this development is that, in contrast to the example of civilian criminal convictions, Congress specifically intended for this Court to take a more active role in supervising military convictions on direct appeal.[5]

To be clear, *amicus* does not suggest that, by dint of *Burns* and the Military Justice Act, this Court is bound to exercise certiorari jurisdiction over CAAF in any case (or even in most cases) in which it is permissibly sought. Quite to the contrary. But the lesson to be divined from the developments discussed above is the different (and far more active) role that

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civilian courts from entertaining pre-trial challenges to anything other than the jurisdiction of a military court. *See Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975).

5. Notwithstanding these developments, the last time this Court granted plenary review of a servicemember's petition for certiorari to CAAF was on November 8, 1996. *See Edmond v. United States*, 519 U.S. 977 (1996) (mem.). In the ensuing 19 and one-half years, this Court has exercised plenary review over only three appeals from CAAF—granting the *government*'s petitions for certiorari in *United States v. Denedo*, 556 U.S. 904 (2009); *Clinton v. Goldsmith*, 526 U.S. 529 (1999); and *United States v. Scheffer*, 523 U.S. 303 (1998).

this Court is meant to—and should—play in reviewing direct appeals from the military justice system as compared to that which it plays on direct appeal of civilian criminal convictions.

III. THIS CASE IS A UNIQUELY COMPELLING CANDIDATE FOR APPELLATE SUPERVISION

With that lesson in mind, Petitioner's case for certiorari is especially compelling. Not only is Petitioner offering a substantial constitutional challenge to a death sentence, but his challenge, if affirmed, would invalidate the *entire* scheme by which the military justice system currently imposes capital punishment. Thus, this is hardly a case in which Petitioner seeks only the correction of ordinary errors by the military courts.

But what makes Petitioner's entitlement to a writ of certiorari unique is that CAAF expressly concluded that only *this* Court could resolve the central question presented by his Petition, *i.e.*, whether *Loving* survives *Ring*. *See Akbar*, 74 M.J. at 404 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). This brief takes no position on the *answer* to that question, but *amicus* certainly *does* believe that, if CAAF is not in a position to resolve that issue, then this Court must.

Given these circumstances—where habeas would be fruitless;[6] where the constitutional challenge is unquestionably substantial; where its potential implications go well beyond Petitioner's case; and where the Petitioner himself faces a death sentence—*amicus* believes that a writ of certiorari is imperative. Indeed, it may be difficult to identify circumstances in which a servicemember would ever present a *more* compelling case for certiorari to review a conviction by court-martial.

CONCLUSION

For the foregoing reasons, *amicus* respectfully suggests that the Court grant the petition for a writ of certiorari.

Respectfully Submitted,

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6. The military court certainly gave "full and fair consideration" to Petitioner's *Ring* argument, and, in any event, a district court can no more overrule *Loving* than CAAF could.