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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

INTRODUCTION

Respondent's Brief in Opposition ("Opp'n") implicitly concedes that if this Court's decision in *Loving* v. *United States*, 517 U.S. 748 (1996) was premised on the understanding of aggravating factors this Court adopted in *Walton* v. *Arizona*, 497 U.S. 639 (1990), then *Loving* has been "vitiate[d]" by *Ring* v. *Arizona*, 536 U.S. 584 (2002). See Opp'n at 11 (acknowledging that *Ring* "vitiate[d]" the Court of Military Appeals' decision relying on *Walton*). *Loving* was based on *Walton*'s view of aggravating factors, and respondent fails to demonstrate otherwise.

ARGUMENT

I. THIS COURT SHOULD TAKE THIS OPPORTUNITY TO REVISIT *LOVING*'S CONSTITUTIONAL HOLDING IN LIGHT OF *RING*.

Respondent contends that *Loving*'s decision upholding executive authority to prescribe aggravating factors was not premised on *Walton* and its now-obsolete holding that aggravating factors are not elements. Opp'n at 10. Respondent is mistaken.

1. In *Walton*, this Court drew a sharp distinction between "substantive limitation[s] on sentencing" and "element[s] of the offense," and classified aggravating factors as *limitations*, rather than *elements*. See *Walton*, 497 U.S. at 649. The Court of Military Appeals expressly adopted *Walton*'s distinction between limitations and elements as its reason for sustaining R.C.M. 1004. See *United States* v. *Curtis*, 32 M.J. 252, 260 (C.M.A. 1991) ("[T]he Supreme Court has made clear that "aggravating factors" are not "elements" of a crime."). With *Ring*, this Court changed

course and held that, contrary to *Walton*, aggravating factors were the "functional equivalent of [] element[s]." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). Respondent is therefore quite right to concede that *Ring* "vitiate[s]" *Curtis*. Opp'n at 11.

Respondent is incorrect, however, in arguing that *Loving* itself did not rely on *Walton*. Although *Loving* does not cite *Walton*, it described the authority to prescribe aggravating factors in line with *Walton*'s view: "determin[ing] what *limitations* and *conditions* on punishments are best suited to preserve [the military's] special discipline." *Loving*, 517 U.S. at 773 (emphasis added). *Loving* repeatedly uses similar language to describe aggravating factors—*not* as elements—but as "narrowing" or "restrict[ing]" the death penalty. *Id.* at 768, 769. That is the very premise that *Ring* "vitiate[d]." Opp'n at 11. Thus, *Loving*, no less than *Curtis*, is based on *Walton*'s obsolete holding.

Ring's recognition that aggravating factors are elements requires reconsidering *Loving*'s ultimate conclusion. This Court upheld the delegation to the President the power to prescribe aggravating elements because such delegation was thought to be within "the traditional authority of the President." *Loving*, 517 U.S. at 772; see also *id.* at 769 ("There is nothing in the constitutional scheme *or our traditions* to prohibit" delegation of the power to prescribe aggravating factors.) (emphasis added). But it is *not* within American traditions for the President to prescribe elements of an offense—even in the courts-martial. See Pet. at 10-12 (citing *Liparota* v. *United States*, 471 U.S. 419, 424 (1985); *United States* v. *Hudson*, 11 U.S. 32 (1812), *Reid* v. *Covert*, 354 U.S. 1, 39 (1957); *Wayman* v. *Southard*, 10 Wheat. 1, 16-17

(1825)). None of the cases *Loving* cited for the proposition that Congress may delegate authority to the Executive to define what conduct will be criminal involves the application of the death penalty. See *Loving*, 517 U.S. at 769 (citing *United States* v. *Grimaud*, 220 U.S. 506, 518 (1911); *Touby* v. *United States*, 500 U.S. 160 (1991)). Rather, in capital cases, this Court favors heightened scrutiny for the rights of the accused. See *Gardner* v. *Florida*, 430 U.S. 349, 359-60 (1977) (plurality opinion); see also *Williams* v. *Florida*, 465 U.S. 1109, 1110-11 (1984) (Marshall, J., dissenting) (noting this Court's longstanding policy of requiring "heightened sensitivity to fairness and accuracy where imposition of the death penalty is at issue").

2. Respondent takes issue more generally with petitioner's reliance on *Ring* and *Apprendi*, contending that the Fifth and Sixth Amendment concerns underlying *Ring* and *Apprendi* are not applicable to courts-martial at all, and thus have no effect on this Court's decision in *Loving*. Opp'n at 11-13.

As an initial matter, respondent's argument contradicts its concession that *Ring* "viatiate[d]" *Curtis* (which, like this case, did not involve the right to trial by jury in a civilian court). Moreover, the extent to which Fifth and Sixth Amendment precedent apply in the military context is not a question this Court has decided, but the Court of Appeals for the Armed Forces ("C.A.A.F.") follows that precedent. See*, e.g.*, *United States* v. *Akbar*, 74 M.J. 364, 404 (C.A.A.F. 2015) ("The Supreme Court has determined that the Fifth Amendment's due process clause and the Sixth Amendment's notice and jury trial guarantees require any fact 'that increases the maximum penalty for a crime [to be] charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'"

(citing *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)); *Loving* v. *United States*, 64 M.J. 132, 140 (C.A.A.F. 2006); see also *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) ("The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."). And to the extent respondent wishes to put into question the application of Fifth and Sixth Amendment precedent to courts-martial, that effort only serves to demonstrate the importance of this case and the necessity of review.[1] Any challenge to the applicability of these precedents is fairly included with the question presented.

But to be clear, petitioner's argument does not hinge on the Sixth Amendment right to trial by jury or the Fifth Amendment requirement of proof beyond

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[1] Similarly, the unusual amicus in support of the opposition and challenging this Court's appellate jurisdiction to review cases from C.A.A.F. by characterizing the court as an "Executive Branch entity" only serves to underscore the importance of the separation of powers question at issue. *See Amicus* Br. Professor Aditya Bamzai at 3, *Akbar* v. *United States*, No. 15-1257 (S. Ct. Aug. 3, 2016) (citation omitted). However, the jurisdictional argument is incorrect for the fundamental reason that C.A.A.F. is a court created by Congress, and is therefore included within this Court's appellate jurisdiction. *United States* v. *Denedo*, 556 U.S. 904, 912 (2009) (noting that C.A.A.F. "owes [its] existence to Congress' authority to enact legislation"). Indeed, it has been recognized since at least *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65 (1857) that courts created pursuant to Congress' power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, are, in fact, courts—and it is far from unusual for this Court to issue writs of certiorari to other non-Article III courts created by Congress. *See*, *e.g.*, *United States* v. *Dixon*, 509 U.S. 688 (1993) (appeal from the D.C. Court of Appeals). Thus, this Court has the power to grant a writ of certiorari. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

a reasonable doubt. See Pet. at 12 ("Moreover, the 'functional element' label affixed to capital sentencing aggravating factors in *Ring* does not turn solely on the Sixth Amendment right to a jury trial, but is based instead on whether the finding increases the defendant's maximum punishment."). As set forth above, *Ring*'s holding that aggravating factors are the functional equivalent of elements involves a separation of powers question that is separate from, though involved by, the rights at issue in *Ring* and *Apprendi*.

II. ALTERNATIVELY, THIS COURT SHOULD REVISIT *LOVING*'S STATUTORY HOLDING IN LIGHT OF *RING*.

The constitutional questions above can be avoided if this Court takes the opportunity to revisit its statutory holding in *Loving* that Articles 18, 36 and 56 of the Uniform Code of Military Justice delegate a power to prescribe aggravating factors. Pet. at 14. Respondent urges this Court to apply *stare decisis* to *Loving*'s statutory holding. Opp'n at 14-15. But "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Hurst* v. *Florida*, 136 S. Ct. 616, 623-34 (2016) (citation omitted). The "underpinnings" of this Court's statutory holding in *Loving* (like those of its constitutional holding) were "eroded" by *Ring*. For instance, respondent does not explain how—given that this Court overruled *Walton*—the President's power to promulgate "limitations" or "limits" under Articles 18 or 56, see 10 U.S.C. §§ 818(a), 856(a), can include a power to promulgate aggravating factors. Because aggravating factors are "the functional equivalent of [] element[s]," *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19), not "limitation[s]" on sentencing, see *Walton*, 497 U.S. at 649 (quoting *Cabana* v.

Bullock, 474 U.S. 376, 386 (1986), this Court should revisit its holding that these statutes delegate a power to promulgate aggravating factors.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Akbar's petition for a writ of certiorari.

Respectfully submitted,

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