IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 202400329
Brian J. SUMPTER, Aviation Structural Mechanic First Class (E-6) U.S. Navy Appellant	)	USCA Dkt. No. 26-0179/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Index of Brief

Table of Authorities

Page

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

UNITED STATES CIRCUIT COURTS OF APPEALS CASES

SERVICE COURTS OF CRIMINAL APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE §§ 801–946

OTHER SOURCES

Issue Presented

WHETHER THIS COURT SHOULD OVERTURN ITS DECISION IN *UNITED STATES V. RODRIGUEZ*, 67 M.J. 110 (C.A.A.F. 2009), CONSIDERING THE SUPREME COURT'S DECISION IN *HARROW V. DEPT. OF DEFENSE*, 601 U.S. 480 (2024), AND HOLD THE SIXTY-DAY DEADLINE TO APPEAL A COURT OF CRIMINAL APPEALS DECISION IS NOT JURISDICTIONAL.

Statement of Statutory Jurisdiction

The Entry of Judgment includes a finding of guilty. Appellant timely appealed his case. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). Appellant missed this Court's sixty-day filing deadline and is attempting to invoke this Court's jurisdiction under Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3).

Statement of the Case

A general court-martial with enlisted members convicted Appellant, contrary to his pleas, of violating Article 120, UCMJ, 10 U.S.C. § 920. The members sentenced Appellant to seven years confinement, a reduction to the rank of E-1, and a dishonorable discharge. Appellant requested the Convening Authority defer any automatic forfeitures of his pay and suspend the reduction until the end of his obligated service to allow for his family to receive the full amount of any deferred forfeitures of his E-6 pay. The Convening Authority approved the request to defer automatic forfeitures and adjudged reduction until Entry of Judgment and took no action on the findings or sentence. The lower court affirmed the findings and sentence. Appellant then petitioned this Court for review three days past the statutory filing deadline, which this Court granted for the issue presented.

Statement of Facts

A. Appellant missed his filing deadline with this Court.

Appellant was found guilty by a general court-martial of violating Article 120 on May 10, 2024. (J.A. 4.) The Navy and Marine Corps Court of Criminal Appeals affirmed his findings and sentence on February 6, 2026. *United States v. Sumpter*, No. 202400329, 2026 CCA LEXIS 65 (N-M. Ct. Crim. App. Feb. 6, 2026). The lower court's decision was mailed to Appellant on February 12, 2026. (J.A. 20–22.) Appellant filed his Notice of Appeal to this Court on April 16, 2026, sixty-three days after mailing and three days after the statutory filing deadline of April 13, 2026. (Appellant's Pet. for Grant of Review, Apr. 16, 2026.)

Summary of Argument

This Court lacks jurisdiction to hear Appellant's appeal. Appellant missed the statutory filing deadline that enables this Court's review. His case presents no compelling reason to overturn almost two decades of precedent. *Harrow v. Department of Defense* is inapposite for two reasons. First, *Harrow* did not overturn *Bowles*, but established that statutory timelines for Article I agency appeals to Article III courts are not jurisdictional absent a statutory "clear statement" that they are. Second, dicta in *Harrow* about the scope of *Bowles* has been misconstrued as a "holding," but no court has ruled that the adjudicatory courts of the Uniform Code are administrative "claims processing" bodies, the Court in *Ortiz* has rejected that suggestion, and if federal civilian criminal timelines were statutory, *Bowles,* not *Harrow,* would apply. Nothing supports overturning *Rodriguez* in the military justice system.

Argument

THIS COURT SHOULD DECLINE TO OVERTURN *RODRIGUEZ.* (1) IT IS NOT UNWORKABLE AND CONGRESS HAS NOT CHANGED THE LAW IN ALMOST TWO DECADES TO ADDRESS ITS HOLDING. (2) *HARROW* EXPLICITLY APPLIES TO ADMINISTRATIVE AGENCY APPEALS TO ARTICLE III COURTS AND ITS DICTA DOES NOT APPLY TO DIRECT APPEALS BETWEEN ARTICLE I CRIMINAL APPELLATE COURTS UNDER THE CODE, AND (3) CONGRESS INTENDED FOR THE SIXTY-DAY DEADLINE TO BE JURISDICTIONAL.

A. <u>Appellate courts review requests to overturn precedent through the doctrine of stare decisis</u>.

This Court applies stare decisis when asked to overrule precedent. *United States v. Cardenas*, 80 M.J. 420, 423 (C.A.A.F. 2021). Under the stare decisis doctrine, a "court must follow earlier judicial decisions when the same points arise again." *Id*. (citation omitted). "[A]dherence to precedent is the preferred course" because it promotes predictability and consistency in developing legal principles. *United States v. Tualla*, 52 M.J. 228, 231 (C.A.A.F. 2000) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

This Court "will not overturn precedent . . . [that] has been treated as authoritative for a long time . . . . unless the most cogent reasons and inescapable logic require it." *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (citation omitted). Stare decisis is "most compelling where courts undertake statutory construction." *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003).

This Court considers the following factors in evaluating the application of stare decisis: (1) whether the prior decision is unworkable or poorly reasoned; (2) any intervening events; (3) the reasonable expectations of servicemembers; and (4) the risk of undermining public confidence in the law. *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015). The party requesting that this Court overturn precedent bears "a substantial burden of persuasion." *Andrews*, 77 M.J. at 399 (citation omitted).

B. *Rodriguez* is longstanding precedent that holds that Article 67(b)'s statutory deadline is jurisdictional.

Almost two decades ago, this Court held "that the congressionally-created statutory period within which an accused may file a petition for grant of review is jurisdictional." *United States v. Rodriguez*, 67 M.J. 110, 111 (C.A.A.F. 2009) (citing *Bowles v. Russell*, 551 U.S. 205 (2007)). In *Rodriguez*, this Court found that it had previously "viewed the statutory filing period as nonjurisdictional," but found further that "in 2007 the United States Supreme Court [in *Bowles*] changed the analytical landscape in terms of evaluating the jurisdictional significance of filing deadlines in appellate practice." 67 M.J. at 111–13.

1. <u>In a case involving an appeal from one Article III court to another Article III court, *Bowles* upheld longstanding precedent that congressionally created statutory deadlines, restricting a court's adjudicatory authority, are jurisdictional</u>.

In *Bowles*, the Supreme Court considered statutory-based Federal Rules for Appellate Procedure. 551 U.S. at 207–28. The rules provided that a civil litigant had thirty days to file a notice of appeal after entry of final judgment by a Federal District Court. *Id*. The court could extend the filing period for fourteen days. *Id*. However, the District Court extended the filing period for seventeen days rather than the fourteen days permitted by the rule. *Id*. at 207. Bowles filed his notice of appeal outside the rule's fourteen-day period but within the seventeen days permitted by the District Court's order. *Id*.

Bowles noted "[r]egardless of this Court's past careless use of [the word 'jurisdictional', it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional for well over a century." *Bowles,* 551 U.S. at 209 n.2. The *Bowles* Court noted the longstanding rule "that the ["timely filing of a notice of appeal" from court to court, and] taking of an appeal within the prescribed time [between courts] is mandatory and jurisdictional," citing cases as far back as 1883. 551 U.S. at 209–10.

Given this longstanding rule, the Court concluded that Bowles' untimely notice of appeal "deprived the Court of Appeals of jurisdiction." *Id*. at 213.

In a case considering notices of appeal filed from an Article III district court to an Article III appellate court, the *Bowles* Court held that where a limitation is derived from a statute, the taking of an appeal within the prescribed time is jurisdictional. *Id*. at 214. In so holding, the Court distinguished between statute-based rules of limitation and those having their origin in court-created rules. There is "jurisdictional significance [in] the fact that a time limitation is set forth in a statute . . . [b]ecause '[o]nly Congress may determine a lower federal court's subject-matter jurisdiction.'" *Id*. at 210 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004)).

The *Bowles* Court recognized that "several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules," but the Court noted none of those decisions changed the longstanding rule that the statutory timeline for appeals from district courts to federal appellate courts was jurisdictional. 551 U.S. at 210. The *Bowles* Court stressed that what "classes of cases . . . fall[] within a court's adjudicatory authority" is "obviously" an issue of jurisdiction. *Id.* at 213. And the Court noted "it is no less 'jurisdictional' when Congress prohibits federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final authority." *Id.*

2. In applying *Bowles* to the "narrowly circumscribed" limited statutory grant of jurisdiction to the courts of the Uniform Code, this Court in *Rodriguez* held that Article 67's sixty day time limit is jurisdictional.

The *Rodriguez* court first noted the strictly limited statutory grant of jurisdiction to the system of Article I courts created by Code: "[T]he entire system of military justice [is a] creature[] of statute, enacted by Congress pursuant to the express constitutional grant of power '[t]o make Rules for the Government and Regulation of the land and naval Forces.'" *Rodriguez*, 67 M.J. at 114 (quoting *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007)). This Court's authority or subject matter jurisdiction is wholly confined to the language of Article 67, UCMJ. *Rodriguez*, 67 M.J. at 114 (citing *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999) (this Court's "independent statutory jurisdiction is narrowly circumscribed")).

The *Rodriguez* court then noted that Article 67(a) lists just three categories of cases that Congress permits and requires this Court to review:

> (a) The Court of Appeals for the Armed Forces shall review the record in—
>
> > (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for Review; and
>
> (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

The *Rodriguez* court noted that this Court's jurisdiction is constrained—and required—by Article 67(b), to review a Court of Criminal Appeals case only "where there is a 'petition of the accused' and 'good cause shown.'" *Rodriguez,* 67 M.J. at 114.

> (b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—
>
> (1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or
>
> (2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery . . .

This Court in *Rodriguez* found that while "a plain language [reading of paragraph (b)] clearly reflects that the word 'may' refers only to the act of petitioning this court . . . , after analyzing the plain language of the statute using the canons of statutory construction, so too, "Under the plain language of [paragraph (a)] of the statute, the petition *must* be filed within the sixty-day statutory limit." 67 M.J. at 115–16. That is: "an appellant may file a petition for grant of review and, if he or she chooses to do so, it must be done within the sixty-day time limitation." *Rodriguez*, 67 M.J. at 115–16.

The *Rodriguez* court noted that "Nothing within Article 67(b)'s statute-based time limitation is permissive and there is no indication that the court can waive the limitation for equitable reasons." *Id*. at 115. Rather, the sixty-day period "governs this case [and] is specific and unequivocal." *Id*. Therefore, the *Rodriguez* court concluded "the opportunity to petition this court 'lapses' or 'expires by statute' when the sixty-day statute-based limitation is not met and that the sixty-day limitation is jurisdictional and mandatory." *Id*. at 116.

C. Fifteen years after *Rodriguez*, *Harrow* required a "clear statement" from Congress to make the timeline jurisdictional for a Merit Systems Protection Board appeal to an Article III court, and in dicta commented on the scope of *Bowles*, relying on previous dicta from *Hamer* that the "clear statement" rule applied to "cases not involving timebound transfer of adjudicatory authority" between Article III courts.

Fifteen years after this Court's opinion in *Rodriguez*, the Supreme Court in *Harrow* clarified, and commented, on the scope of *Bowles*, finding that the statutory filing deadline to appeal a case from the Merit Systems Protection Board to an Article III court did not create a jurisdictional bar. *Harrow v. DOD*, 601 U.S. 480, 485 (2024). There, a Department of Defense employee filed a claim at the Merit Systems Protection Board objecting to a six-day furlough, the agency referred the case to an administrative judge who upheld the furlough, and eventually the employee belatedly filed a petition for review, of the Board's final order, at the Article III Federal Circuit court. *Harrow*, 601 U.S. at 482 –83.

The *Harrow* Court rejected that *Bowles* applied to make the filing deadline jurisdictional because unlike *Bowles*, "Harrow appealed to the Federal Circuit not from another court but from an agency." *Harrow*, 601 U.S. at 489. Citing dicta from *Hamer*, *Harrow* broadly commented that "[a]s to all other time bars, we now demand a 'clear statement.'" *Id.* (citing *Hamer v. Neighborhood Housing Servs. of Chicago*, 583 U.S. 17, 25 n.9 (2005)). As examples of the cases requiring a "clear statement," *Harrow* cited five cases—all administrative agency appeals to Article III courts.[1] And in the years since *Harrow*, Appellant cites no cases, and the government is unaware of any cases except administrative agency appeals to Article III courts that apply the *Harrow* "clear statement" rule.[2]

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[1] *Boechler v. Commissioner*, 596 U.S. 199, 203 (2022); *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015); *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 154-155 (2013); *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006).

[2] *Riley v. Bondi*, 606 U.S. 259 (2025) (Appeal of immigration decision to Federal Court); *E.E.V. v. Blanche*, 180 F.4th 954 (7th Cir. 2026) (Appeal of immigration decision to Federal Court); *Nelson v. SEC*, 138 F.4th 514 (D.C. Cir. 2025) (Appeal of Securities and Exchanges Commission decision to Federal Court); *NLRB v. AllService Plumbing & Maint., Inc.*, 138 F.4th 889 (5th Cir. 2025) (Appeal of National Labor Relations Board Administrative Law Judge's decision to Federal Court); *Oquendo v. Commissioner*, 148 F.4th 820 (6th Cir. 2025) (Appeal of Internal Revenue Service decision to Tax Court); *Chambered Custom Firearms LLC v. Babcock*, No. CV-24-0521-PHX-DMF, 2024 LX 34823 (D. Ariz. Oct. 2,

Harrow went further in describing *Bowles*: in dicta it stated that *Bowles* only "governs statutory deadlines to appeal 'from one Article III court to another.'" *Harrow*, 601 U.S. at 489 (quoting *Hamer*, 583 U.S. at 25). Notably, *Hamer* itself, in the footnote *Harrow* cites, states that: "In cases not involving *the timebound transfer of adjudicatory authority* from one Article III court to another, we have additionally applied a clear statement rule." *Hamer*, 583 U.S. at 25 n.9 (emphasis added).

While *Bowles* repeats the longstanding rule "that the ['timely filing of a notice of appeal' between adjudicatory Article III courts and] taking of an appeal within the prescribed time [between courts] is mandatory and jurisdictional," *Harrow*, *Hamer*, and other cases repeat an equally long held rule that statutory time limits from Article I agencies to Article III courts must "clearly state" that they are jurisdictional. *See Bowles*, 551 U.S. at 209–10, n.2 (collecting cases, noting jurisdictional treatment has endured "for well over a century").

But the United States is unaware of any court that has considered the "timebound transfer of adjudicatory authority" from one fully adjudicatory appellate court under the Code to the next adjudicatory court under the Code

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2024) (Appeal of Bureau of Alcohol, Tobacco, Firearms, and Explosives decision to Federal Court).

except for *Rodriguez*—which already resolved this issue according to that longstanding, century-old precedent cited in *Bowles*.

D. Appellant fails to meet the "substantial burden of persuasion" required to overturn precedent.

This Court considers the four *Quick* factors in evaluating the application of stare decisis. *See supra* p. 4.

1. *Rodriguez* was correctly decided and remains "workable" and reasonable.

a. Like in *Andrews*, Appellant wholly fails to argue or show that the twenty-year old *Rodriguez* application of *Bowles* is unworkable.

"Under the doctrine of stare decisis, the question is not whether the interpretation [at issue] is plausible; it is whether the . . . decision is so unworkable or poorly reasoned that it should be overruled." *Andrews*, 77 M.J. at 399 (citing *Tualla*, 52 M.J. at 231).

In *Andrews*, this court declined to overturn past precedent. 77 M.J. at 400. The *Andrews* court found that the Government not only failed to prove that existing precedent was unworkable, but it failed to make that argument at all. *Id*. The *Andrews* court noted that although appellate courts have "from time to time . . . overruled governing decisions that are unworkable or are badly reasoned, [it has] rarely done so on grounds not advanced by the parties" and has declined to do so where the petitioning party has failed to establish unworkability. *Id*. (citing

United States v. International Business Machines Corp., 517 U.S. 843, 856 (1996)).

In *Tualla*, this court declined to overturn precedent or find past precedent unworkable where the President knew of this Court's interpretation of a Rule for Courts-Martial. 52 M.J. 228. The President chose not to act to change this Court's ruling despite having 15 years to do so and overseeing nine other amendments to the manual during that time. *Id.* at 231. This Court interpreted Executive action as a signal that its precedent was workable. *Id.*;*see also United States v. Quick*, 74 M.J. 332, 337 (C.A.A.F. 2015).

Here, as in *Andrews*, Appellant fails to argue that *Rodriguez* is unworkable. Like in *Andrews*, this Court should find the petitioning party has "failed to establish unworkability." 77 M.J. at 399. And as in *Tualla*, where executive inaction was viewed as indicative of workability, here, legislative inaction is an even stronger indicator of the workability of precedent: Congress has revised Articles 57 and 67 multiple times over the past two decades, and despite numerous changes, has done nothing to change the effective and smooth operation of those jurisdictional and finality statutes with regard to Appellant's belated Petition. That Congress has not done so supports their endorsement and acceptance of the workability of *Rodriguez*. *See John R. Sand & Gravel Co. v. United States*, 552

U.S. 130, 139 (2008) (finding "Congress has long acquiesced in the interpretation we have given" as justification to apply stare decisis).

Nor does Appellant point to some fatal flaw in the logic underpinning *Rodriguez*. This Court's decision in *United States v. Dinger*, 77 M.J. 447 (C.A.A.F. 2018), delineates the high standard required to overturn precedent. In *Dinger*, the Court overruled its prior decisions in *Allen* and *Sloan* because it concluded they were "badly reasoned" and inconsistent with the plain language of the UCMJ. *Id.* at 453. The Court meticulously analyzed the statutory text and history to conclude that the prior decisions were fundamentally flawed.

Appellant's challenge to *Rodriguez* falls far short of the standard met in *Dinger*. Unlike the precedent in *Dinger*, *Rodriguez* is not badly reasoned. It is a direct and faithful application of the Supreme Court's then-controlling precedent in *Bowles v. Russell*. *See supra* Section B. While Appellant may disagree with the outcome, he cannot, as was done in *Dinger*, point to a fundamental flaw in the legal reasoning of *Rodriguez* based on the law as it existed at the time.

b. *Rodriguez's* holding is consistent with the strictly limited jurisdiction of each level of direct review in the Code's appellate courts, the sharing of authority with the Judge Advocate General to direct compliance with court orders, and the Code's statutory direction in Article 57 that appellate review is "complete" and constitutes a "final judgment" for sentences if the appellant does not file a petition at this Court within sixty days.

The Supreme Court in *Denedo* cited both *Goldsmith* and *Bowles* in holding that despite the principle that the courts of the Uniform Code have a strictly statutorily limited jurisdiction unlike almost any other courts in the United States given their Article I, Section 8 roots, nonetheless *coram nobis* writs provide an exception and are "properly viewed as a belated extension of the" Court of Criminal Appeals' direct review jurisdiction. *United States v. Denedo*, 556 U.S. 904, 912–13 (2009). The *Denedo* Court noted that the *Bowles* statement that "Congress decides what cases the federal courts have jurisdiction to consider" "applies with added force to Article I tribunals [like] . . . the NMCCA and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Article I, § 8 of the Constitution." *Denedo,* 556 U.S. at 912 (quoting *Bowles*, 551 U.S. at 212, citing *Goldsmith,* 526 U.S. at 533–34)

Congress is presumed to be aware of the background principles against which it legislates. *Cannon v. University of Chicago*, 441 U.S. 677, 696–98 (1979). "It is nearly indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Bowles,* 551 U.S. at 209 n.2. Given the Code's integrated scheme of appellate review, finality, filing deadlines, and Judge Advocate General-directed compliance with appellate decisions, Congress presumably intended a statutory notice-of-appeal deadline to be jurisdictional. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Several principles apply. First, the Article I system of direct review by military appellate courts has statutorily enacted a finality rule to define the points at which a case becomes final at each level of appellate review. *See* Art. 57(c)(2) ("The completion of appellate review shall constitute a final judgment as to the legality of proceedings.").[3] *See also United States v. Adams*, 86 M.J. 292 (C.A.A.F. 2025) (interpreting previous Art. 71, noting the "finality" of judgment precluded Court's jurisdiction); *United States v. Gray*, 77 M.J. 5, 6 (C.A.A.F.

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[3] Although Article 57's "final judgment" rule has been moved from Article 71 to the "effective date of sentences" statute, the language and impact on related concepts like collateral review, commented briefly on here, is largely identical. That statutory language has long been held by this Court to—akin to similar rules in Article III litigation, but statutorily enacted for the Code—"establish[] the point of completion of the direct legal review" in the Uniform Code, which thus marks the point when All Writs Act jurisdiction begins: "These concepts also invite a continuation of discretionary . . . judicial deference to this Court by Article III courts, as seen in judicial doctrines of abstention and exhaustion, and *reaffirm* this Court's jurisdiction thereby supporting this Court's exercise of powers under the All Writs Act." *See, e.g., Loving v. United States*, 62 M.J. 235, 240 (C.A.A.F. 2005).

2017) ("Direct review . . . is done . . . Therefore, there is a final judgment as to the legality of the proceedings under Article 71(c)(1) . . . and the case is final under Article 76"); *see also* R.C.M. 1209 (conviction final when review completed by Court of Criminal Appeals and "the accused does not file a timely petition for review by the Court of Appeals for the Armed Forces . . .").

Second, the military justice system is unlike other systems in that it is a hybrid executive-"judicial" system created under Article I, § 8 of the Constitution. And the Code's appellate courts do not issue their own mandates requiring compliance with their rulings, but military appellate courts depend on the Judge Advocates General to direct compliance with their rulings. *See* Art. 66(g), Art. 67(e). Indeed, although this Court has a "mandate" rule, it is dissimilar to mandates issued by Article III courts, which themselves direct compliance with their orders. *See, e.g., United States v. Miller*, 47 M.J. 352, 361 (C.A.A.F. 1997) (decisions of this Court and lower courts "not self-executing" but "depend[] on the Judge Advocate General and lower officials to execute [their] orders") (citations omitted).

Third, the discrete jurisdiction of each actor in the military justice system and the fact that cases on direct review pass through these actors at defined times, has been accurately described by Judge Sullivan in the famous *Boudreaux* concurrence, cited by the majority in *Dawson,* as a "tunnel of power" dynamic "to illustrate how the UCMJ was wisely constructed by Congress to give jurisdiction to various authorities during a case's progress through the judicial system." *United States v. Boudreaux*, 35 M.J. 291, 296 (C.A.A.F. 1992) (Sullivan, C.J., concurring); *see United States v. Dawson*, 51 M.J. 411, 413 n.* (C.A.A.F. 1999). Here, despite notification by both email and mail of the lower court's opinion, this Court did not receive a petition enabling review under Article 67(a), and as for this Court's part in the "tunnel of power," judgment as to the legality of proceedings at this Court was complete under the current Article 57, and the case—under the "tunnel of power"—passed to the Judge Advocate General under Article 67(e), pending appeal to the Supreme Court.

And fourth, like "notices of appeal" that are "mandatory and jurisdictional," Congress has enacted no "good cause" exception to the sixty-day time window in which a petition may be filed by an appellant to give this Court direct appellate review jurisdiction over a lower court decision.[4] While there may be valid policy

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[4] *See Hohn v. United States*, 524 U.S. 236, 247 (1988) ("filing of proper notice of appeal is mandatory and jurisdictional"); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943) ("purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made"). As Judge Posner observed, "[t]he emergent distinction . . . is between those deadlines that govern the transition from one court . . . to another, which are jurisdictional, and other deadlines, which are not." *Joshi v. Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004); *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("'notice of appeal . . of jurisdictional

reasons in favor of granting exceptions to the filing period for good cause, Congress has enacted no exceptions, and the Supreme Court has indicated that courts may not consider policy concerns when appellants attempt to file outside the statutory filing period. *See Bowles*, 551 U.S. at 214. Accepting petitions outside the statutory filing period upsets the delicate balance struck by Congress and frustrates the military's need for finality. *Solario v. United States*, 483 U.S. 435, 447 (1987) (Congress has "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.").

Given these four principles, Congress' consistent language in Articles 57 and 67, the lack of any exception to the sixty day limit for this Court assuming direct appellate review adjudicatory authority over a lower court case, and the "other" finality statute, Article 76, these principles operate as a means to ensure finality to cases and allow passage of authority over the case back to the Judge Advocate General when a petition has not been filed within sixty days of notification to the accused under Article 67. *Rodriguez*, 67 M.J. at 115; *see infra* Section D.2.b.ii. If untimely notices of appeal were permitted or intended by Congress or the President, mention of "timely" filings would be unnecessary. This Court should decline to construe Congress' statutory language as surplusage.

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significance' because 'it *confers jurisdiction* on the court of appeals and *divests the district court*") (emphasis added).

See Yates v. United States, 574 U.S. 528, 543 (2015) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.") (internal quotation marks omitted) (citation omitted).

In sum, this Court was correct in *Rodriguez*. Article 67(b), and (a), are framed as a limitation on the review authority of this Court and was amended against the longstanding precedent that "time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Bowles*, 551 U.S. at 209 n.2. Article 67(b)'s sixty-day time limit is jurisdictional.

2. *Harrow* was not an intervening event. *Harrow*'s dicta about *Bowles*' applicability to other courts did nothing to negate the statutory, jurisdictional time limit of *Rodriguez*. Instead it developed law with regard to "clear statement" language from *Hamer* and earlier cases, required for appeals from administrative agencies to Federal Courts.

a. This Court should decline to overturn *Rodriguez* based on dicta in *Harrow* and *Hamer* about *Bowles'* applicability to other situations—like appeals between two fully adjudicatory courts of the Uniform Code.

The *Harrow* Court ruled that the sixty-day deadline to appeal a decision from the Merit Systems Protection Board to the Federal Circuit was non-jurisdictional. 601 U.S. at 483. Its holding, and matter in controversy, was limited to appeals from Executive Agencies to Article III Courts; "[t]his case falls out of the *Bowles* exception because Harrow appealed . . . from an Agency." 601 U.S. at

489. That is, *Harrow* did not rule on whether statutory deadlines in appeals within an appellate court system like the Code—that is, appeals from Article I courts to another Article I court—were jurisdictional or also required a "clear statement" to make that statutory deadline jurisdictional.

The Supreme Court has long held that only those words that are necessary to support the court's ultimate judgment are binding; surplusage, or dicta, used to support a court's reasoning is not. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."); *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012) ("We resist reading a single sentence unnecessary to the decision as having done so much work.").

The statement cited by Appellant, "as to all other time bars, we now demand a clear statement" of a jurisdictional bar, is nonbinding dicta. (Appellant's Br. at 5.) This is so both because Article I to Article I adjudicatory court appeals was not under consideration by *Harrow*, but also because military appeals under Article I, § 8, are different, as repeatedly noted by the Supreme Court in cases like *Goldsmith* and *Ortiz*—and because for well over a hundred years, statutory Article

III to Article III time limits have been held to be jurisdictional, and that analog is the closest to appeals under the Uniform Code. *See also, e.g., United States v. Collins,* 162 F.4th 832 (7th Cir. 2025) (holding, as seemingly all federal circuits do, that Fed. R. Crim. P. 35(a)'s "fourteen day 'time limit is jurisdictional" to correct "clear errors" made by the judge in criminal cases).

Appellant argues that this Court should nonetheless extend *Harrow*'s dicta to his case and grant him relief for his Appellate Defense Counsel's failure to file a timely petition. (Appellant Br. at 9). Appellant claims that "because military courts are derived from Article I; military courts can no longer rely on *Bowles* to conclude that the statutory period within which an appellant may file a petition for grant of review is jurisdictional." (Appellant's Br. at 9.)

But the appellate process in *Harrow* is entirely unlike the military justice system, which despite being an "Article I" court system, is a fully adjudicatory system of trial and appellate courts, and appeals between military courts should be treated similarly to appeals from Article III Courts for purposes of *Bowles* and not require *Harrow*'s heightened "clear statement" rule required for appeals from administrative agencies. *Cf. Ortiz v. United States*, 585 U.S. 427, 435 (2018). The Supreme Court in *Ortiz* considered the military justice system and closely examined its *sui generis* nature as a fully fleshed-out system of Article I criminal trial and appellate courts:

> The jurisdiction and structure of the court-martial system likewise resemble those of other courts . . . Although their jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service. As a result, the jurisdiction of those tribunals overlaps significantly with the criminal jurisdiction of federal and state courts . . . And just as important, the constitutional foundation of courts-martial—as judicial bodies responsible for 'the trial and punishment' of service members—is not in the least insecure. The court-martial is in fact "older than the Constitution. When it came time to draft a new charter, the Framers "recogni[zed] and sanction[ed] existing military jurisdiction" . . . [a]nd by granting legislative power "[t]o make Rules for the Government and Regulation of the land and naval Forces," the Framers also authorized Congress to carry forward courts-martial.

Id. at 438–40 (Internal citations omitted.)

Therefore, just as *Harrow* was silent on Appeals between adjudicatory Article I criminal courts under the Uniform Code, let alone considered the *sui generis* nature of the Code's Article I, § 8 court system, this Court should decline to be the first to hold that *Harrow* extends beyond agency appeals to Article III courts, or use that as a basis to overturn *Rodriguez* and its implementation of *Bowles'* application of "longstanding" precedent.

b. <u>The "clear statement" rule in *Harrow* is a product of inter-branch separation of powers and does not apply to the internal, intra-branch structure of the military justice system.</u>

Appellant's argument that *Harrow* should save his petition from its untimely filing is based on a flawed premise: that every statutory deadline must now have the same "clear statement" required of agency to Article III appeals. But the

Supreme Court in *Harrow* explicitly distinguished that case situation from the *Bowles* situation, which governed appeals moving from one court to the next. *Harrow*, 601 U.S. at 489.

The *Harrow* Court's actual limited holding was clear, even if its dicta made that holding less clear—the holding as to *Bowles* was that: "This case falls outside the *Bowles* exception because Harrow appealed to the Federal Circuit not from another court but from an agency." *Harrow*, 601 U.S. 489. The Supreme Court's reluctance to treat such a deadline as jurisdictional without a "clear statement"—as made clear by its citation to dicta from *Hamer*—was focused on protecting against inadvertent statutory time limitations on the Article III Judiciary's review of administrative executive actions. *See Harrow*, 601 U.S. at 489 (citing to Footnote 9 of *Hamer* to support its dicta about the scope of *Bowles*, to contrast the "clear statement" rule require for agency appeals). This cautious approach is most salient when the judicial branch is asked to close its own doors to a case originating outside the judiciary.

But Appellant's case is not an agency appeal to an Article III court. Appellant's case is an appeal from one adjudicatory court of the Uniform Code to the next—that is, "passing the potato" for the next level of direct appellate review. That is, it is not an inter-branch conflict from an Article I court to an Article III court—but instead a wholly-contained direct appellate review matter moving from one Article I court to the next on routine, direct appellate review. Congress, acting under its plenary constitutional authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," created the entire military justice system. U.S. Const. art. I, § 8, cl. 14. This includes the Courts of Criminal Appeals and this Court, all of which are Article I tribunals.

Article 67(b) is not a statute where one branch of government limits the power of a co-equal branch. Instead, it—alongside Articles 57 and 76—is Congress setting the rules of procedure for the courts of the Uniform Code. In this context, the separation-of-powers concerns that animate the *Harrow* decision are not present. The deference owed is not to the judiciary's inherent authority, but to Congress's constitutional power to regulate the military.

Where Congress legislates for its own Article I tribunals under Article I, § 8, the "clear statement" rule of *Harrow* does not apply. Appellate courts should not apply judicially-created "heightened tests" to protect Article III courts' ability to review agency action. Instead, appellate courts look just to the plain language and apply congressional intent. This Court undertook that analysis already in *Rodriguez*. *See supra* Section B. That precedent should remain intact.

c. Even if this Court applies *Harrow*, Congress' language in Article 67 and 57 provide a "clear statement" that the sixty-day deadline is jurisdictional.

Even if *Harrow*, as applied to this Court, now requires a "clear statement," the *Harrow* Court noted that Congress does not need to incant "magic words" to create a jurisdiction requirement. 601 U.S. at 484. Rather, the Supreme Court has found that "clear statement" can be derived from a plain showing that "Congress imbued [the rule] with jurisdictional consequences." *Id*.

i. This Court's consistent judicial interpretation since *Rodriguez* and subsequent Congressional silence supports a clear statement that the sixty-day deadline is jurisdictional.

Congressional inaction in the face of longstanding jurisprudence has "special force" as "Congress remains free to alter what [the court has] done." *John R. Sand & Gravel Co*, 552 U.S. at 139 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73, (1989)).

In *John R. Sand & Gravel Co.*, the Supreme Court declined to overrule past cases regarding statutory jurisdictional bars in cases that gave the Government additional protections instead of treating the Government as any other litigant. 552 U.S. at 139. The Supreme Court specifically noted "Congress has long acquiesced in the interpretation we have given." *Id*.

This Court should find here that nearly twenty years of congressional acquiescence to *Rodriguez* stands as a "clear statement" of congressional intent for the statutory filing limit to be jurisdictional. As in *John R. Sand & Gravel Co.*, Congress has "remain[ed] free to alter" what this court has done, and "has long acquiesced in the interpretation" this Court has given.

ii. Legislative history supports that the sixty-day filing deadline is jurisdictional

When Congress enacts a jurisdictional requirement, it "mark[s] the bounds" of a court's power: A litigant's failure to follow the rule "deprives a court of all authority to hear a case." *Boechler, P.C. v. Commissioner*, 596 U.S. 199, 203 (2022). This Court already found in *Rodriguez* that the legislative history of Article 67(b) provides a clear picture of congressional intent to create a jurisdictional requirement, and public confidence will be served by applying Article 67 in line with legislative intent. *Rodriguez*, 67 M.J. at 113–16.

Congress amended Article 67 in 1981, extending the period for this Court to receive petitions from thirty to sixty days and providing a method for constructive service of a Court of Criminal Appeals' decision. Military Justice Amendments of 1981, Pub. L. No. 97-81, § 5, 95 Stat. 1085, 1088–89 (1981) (Article 67(c)). A primary motivation for the 1981 amendments to Article 67, UCMJ, was to provide a means of ensuring finality to cases. *Rodriguez*, 67 M.J. at 115.

The House Report on the Military Justice Amendments of 1981 noted the "concrete evidence. . . that in some instances appellate review of cases could not be completed" and that such cases could be "held in limbo for up to five years with no finality in sight." H.R. Rep. No. 97-306, at 7 (1981). Concerning the purpose of the amendment, the House Report states: [t]his amendment would continue to allow the opportunity to petition for a further review to expire by statute upon passage of time after the accused is notified of the adverse decision of the lower court, but in contrast, the current proposal would permit the period to commence running on either actual notice or constructive notice by mail. *Id*. at 8.

The Senate Report expresses a similar concern for finality, stating that Article 67, UCMJ, allows "the opportunity to petition for further review to expire by statute." S. Rep. No. 97-146, at 35–36 (1981). It states further, "Once again, however, one must note that the right to appeal is not affected [sic]. Instead, the result is that the opportunity lapses. Furthermore, the opportunity lapses only when a variety of factors—all in the control of the accused—compound." *Id*.

This legislative history reflects that Congress intended the sixty-day period to be a statute-based limitation and mandatory. *Rodriguez*, 67 M.J. at 115–16. The reports from Congress highlight that an appellant is in sole control of the decision to appeal: "Only the opportunity to petition for review is permissive; the time within which to do so is not." *Id*. Any other construction of the relationship between opportunity to petition and the time within which to file is inconsistent with the expressed congressional desire to achieve finality. "If the time limitation is triggered and an accused does not act, Congress intended the matter to end." *Id*.

This is reflected also in Congress' "final judgment" statute created to mirror Article III final judgment precedent but also relevant for the execution of military sentences—initially present in Article 71 and now moved to Article 57—which states "appellate review is complete . . . when . . . the time for an accused to file a petition [at this Court] . . . has expired and the accused has not filed a timely petition for review." Art. 57(c), UCMJ.

In sum, this Court has clear statements from Congress that the sixty-day filing deadline is jurisdictional. Even if this Court applies *Harrow*, it should decline to overturn *Rodriguez*.

3. Servicemembers can reasonably rely on a known filing deadline.

That a decision of the Court of Appeals for the Armed Forces stands as governing law for almost two decades indicates servicemembers can reasonably expect to rely on that ruling. *United States v. Quick*, 74 M.J. 332, 337 (C.A.A.F. 2015). In *Quick*, this Court found that stare decisis did not warrant overturning decades-long precedent granting Courts of Criminal Review the authority to order "sentence only re-hearings." *Id*. The *Quick* court recognized that when precedent stands for an extended period, service members can rely on that precedent. *Id*.

Here, for almost twenty years servicemembers have relied on the requirement to file petitions within sixty-days of their service court's decision to this Court. And servicemembers rely on the *coram nobis* exception to the otherwise strictly defined jurisdictional system of Article I appellate courts, which permits a "belated exception" in exceptional cases. *Denedo,* 556 U.S. at 912–13 (one of the sole exceptions to the otherwise strictly construed system delimited by Congress, *Goldsmith*'s principles, and *Bowles*, is the "belated extension" of Article 66 power granted by *coram nobis* and the All Writs Act). That is, servicemembers rely on this interplay of precedent, and it provides a clear and predictable path for both direct appellate review, and extraordinary interlocutory relief. Nothing Appellant cites in dicta from *Harrow* supports altering how this system has smoothly operated for the past two decades. During this time appellants routinely meet the jurisdictional requisites Congress has prescribed for this Court, or otherwise seeking alternative remedies in those rare cases when they fail to do so.

Thousands of servicemembers have done so knowing the clear and consistent bounds. Just because Appellate Defense Counsel failed to file in time does not mean that the rules should be changed for the entire system under the Uniform Code.

4. <u>Public confidence in the law will be served by a filing deadline that follows congressional intent</u>.

Just as overturning precedent can undermine confidence in the military justice system, upholding precedent tends to bolster servicemembers' confidence in the law. *Andrews*, 77 M.J. at 401. The *Andrews* court cited how overturning longstanding precedent would damage the public's confidence in the law: "[i]f courts are viewed as unbound by precedent, and the law as no more than what the last Court said, considerable efforts would be expended to get control of such an institution—with judicial independence and public confidence greatly weakened." *Id*. (internal citations omitted.)

And the *Quick* court pointed out how overturning precedent would undermine public trust, and noted that executive and legislature inaction after the establishment of that precedent—the power to order sentence rehearing—further provided proof that the public should expect consistent application of the law as it stood, unchanged by Congress. 74 M.J. at 338.

Here, as in *Andrews* and *Quick*, this Court should find that affirming the law as it has applied to the thousands of appellants since 2009 that filed petitions at this Court within sixty days of being mailed the lower courts' opinions, thus providing this Court jurisdiction to act and avoiding operation of the "final judgment" rule and accretion of incremental Article 76 finality, upholds public confidence in the law.

Conclusion

For almost twenty years, this Court has clearly and consistently applied the sixty-day statutory deadline of Article 67 as a jurisdictional bar, in line with congressional intent. During those twenty years, Congress has agreed to the jurisdictional bar of Article 67 and *Rodriguez,* declining to amend the statute despite numerous changes to that statute and the Code in that time. This Court should decline to expand *Harrow* past its narrow holding to upend consistent precedent and Congressional intent. The United States respectfully requests that this Court decline to overturn *Rodriguez*.

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