IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee/Cross-Appellant,

v.

STEPHEN A. BEGANI,
Chief Petty Officer (E-7),
United States Navy, Retired,
Appellant/Cross-Appellee.

USCA Dkt. Nos. 20-0217/NA and 20-0327/NA

Crim. App. No. 201800082

AMICUS CURIAE PROTECT OUR DEFENDERS' BRIEF IN SUPPORT OF BRIEF FILED BY APPELLEE/CROSS-APPELLANT UNITED STATES

Peter Coote
Pennoni Associates Inc.
1900 Market Street, Third Floor
Philadelphia, PA 19103
(215) 254-7857
pcoote@pennoni.com

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ISSUE PRESENTED BY AMICUS

Whether this Court, constituted under Article I, has the power to strike down a statute on constitutional grounds.

INTEREST OF AMICUS[1]

Amicus Protect Our Defenders is dedicated to ending rape and sexual assault in the military. It gives voice to survivors of military sexual assault and sexual harassment – including service members, veterans, and civilians assaulted by members of the military. Protect Our Defenders works for reform to ensure survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice.

[1] Appellant/Cross-Appellee ("Appellant") takes no position on the filing of this brief, other than to note that it is being filed on the same day as his supplemental reply brief, and so he will have had only a limited opportunity to respond to it.

The Appellee/Cross-Appellant ("Appellee") does not object to the filing of this brief but wants the Court to know that it does not endorse Amicus's arguments.

Amicus states that no counsel for a party authored this brief in whole or in part, and no person made a monetary contribution to its preparation or submission.

STATEMENT REGARDING JURISDICTION

As conceded by the parties, this Court has subject matter jurisdiction over the case under 10 U.S.C. § 867(a)(3) ("Article 67").

Nevertheless, this Court has a special obligation to satisfy itself that it has the jurisdiction and power to decide the granted issues.[2]

Each of the two granted issues is a facial challenge to the constitutionality of 10 U.S.C. § 802**"**(Article 2"). For the reasons discussed in this brief, this Court does not have the power to strike down a statute on constitutional grounds. Article 67(c)(4).

STATEMENT OF THE CASE

Article 2 is unambiguous, and the facts of this case are clear. Article 2 makes members of the fleet reserve subject to the Uniform Code of Military Justice ("UCMJ"), and Appellant is a member of the fleet reserve. There is no room for interpretation. The granted issues are facial challenges to the constitutionality of Article 2.

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[2] Although a court may have jurisdiction over a case, it may not necessarily have the power to decide all issues or to grant all relief. In *Clinton v. Goldsmith*, 526 U.S. 529 (1999), the Supreme Court held that CAAF did not have the power to review an executive action that was not a finding or sentence. The Court explained that it would be "an entirely different matter" if a military authority altered a judgment. *Id.* at 536. CAAF had jurisdiction over the parties and the case but did not have jurisdiction over the specific issue.

SUMMARY OF ARGUMENT

CAAF is a tribunal constituted by Congress as an executive branch entity. It is not an Article III court. Although its constitutional foundation as a judicial body is firmly established, CAAF does not have the judicial Power to rule that laws are unconstitutional. It is emphatically the province and duty of the judicial branch to say what the law is.

CAAF and other military tribunals are without power to judge the constitutionality of validly enacted laws. Congress has the constitutional duty to regulate and govern the armed forces, and the President is the commander in chief. While military tribunals are judicial in character, they cannot exercise the ultimate judicial power by striking down a statute. The Constitution reserves to courts established under Article III the judicial Power of reviewing the constitutionality of laws. Military courts' duty is to apply and interpret the UCMJ and the rules and regulations issued thereunder.

Where the UCMJ is unambiguous, the sole function of this Court is to enforce it according to its terms. If CAAF were to hold a UCMJ provision unconstitutional, CAAF would be usurping the duty constitutionally given to Congress. CAAF may not interfere with the decision made by Congress to make certain retirees subject to the UCMJ.

CAAF may act only with respect to matters of law. As used in Article 67(c)(4), "law" means the laws enacted by Congress and signed by the President. It does not include the power to strike a law down as unconstitutional.

ARGUMENT

A. CAAF Must Independently Determine Whether It Has Jurisdiction to Decide the Granted Issues.

Although the parties concede jurisdiction, this Court must assure itself it has jurisdiction, including the power to determine the constitutionality of Article 2. *Randolph v. H.V.*, 76 M.J. 27, 29 (C.A.A.F. 2017) quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

In *United States v. Matthews*, 16 M.J. 354 (C.A.A.F. 1983), this Court's predecessor decided it had the power to rule on constitutional issues, but it did not hold that it could judge a statute unconstitutional and refuse to enforce it.. *Id.* at 364-68. The continued viability of *Matthews* is questionable because of subsequent Supreme Court decisions concerning differences between Article I tribunals and Article III courts. *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018); *Stern v. Marshall*, 564 U.S. 462, 484 (2011). These cases and *Matthews* will be discussed below.

Amicus presents a serious jurisdictional argument that deserves sustained consideration by CAAF. *Ortiz*, 138 S. Ct. at 2173.

B. Article 67(c)(4) Limits CAAF's Jurisdiction to Matters of Law.

Article 67(c)(4) confines CAAF's power to acting only with respect to matters of law. *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). This statutory jurisdiction is "narrowly circumscribed." *Id.* at 535; *Loving v. United States*, 63 M.J. 235, 239, 244 n.60 (C.A.A.F. 2005) (jurisdiction cannot be granted or assumed by implication, particularly in the case of an Article I court whose jurisdiction must be strictly construed); *Randolph v. H.V*. 76 M.J. 27, 32 (C.A.A.F. 2017) (Ryan, J. concurring) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

Article 67(c)(4) authorizes CAAF to "take action only with respect to the matters of law." When analyzing Article 67(c)(4), CAAF must construe "law" strictly and narrowly. If "law" were interpreted expansively, then orders, rules, regulations, statutes, and the Constitution could be within the reach of the grant, and CAAF would have the power (to the extent constitutionally permissible) to decide constitutional issues. An expansive interpretation is not justified because jurisdiction cannot be granted by Congress or assumed by CAAF by implication. *Loving*, 63 M.J. at 244 n.60. Jurisdiction must be expressly granted, and "matters of law" does not include "constitutional matters."

The "natural referent" for the meaning of "law" within the UCMJ is the UCMJ itself. *Briggs v. United States*, 141 S. Ct. 467, 470 (2020). Articles 16

through 21 relate to court-martial jurisdiction. 10 U.S.C. §§ 16 through 21. The word "Constitution" (in any form) is not mentioned in these Articles. Article 17 permits courts-martial of persons subject to the UCMJ. Articles 18 through 20 in varying ways permit courts-martial to try persons (1) subject to the UCMJ; (2) committing any offense punishable by the UCMJ; and (3) who may receive any punishment not forbidden by the UCMJ. The entire jurisdiction is limited to within the UCMJ such that the UCMJ is a self-contained code.

Of course, CAAF is not a court-martial and its jurisdiction is defined in Article 67. Article 67 does not explicitly refer to the UCMJ, but instead uses the term "matter of law." Although "matter of law" could be interpreted more expansively than "UCMJ," it is not. "Matter of law," like "punishable by death," is a term of art that is limited to the laws within the UCMJ. *Briggs*, 141 S. Ct. at 473.

Where Congress intends to grant jurisdiction to interpret the Constitution, it does so explicitly. It has not granted such jurisdiction to CAAF. *See, e.g.*, 28 U.S.C. § 1331, Federal Question ("district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

Congress has explicitly granted other Article I courts the power to interpret the Constitution, but it has not given them the power to declare laws

unconstitutional. The United States Court of Appeals for Veterans Claims ("Veterans Claims Court"), an Article I court, is granted the power to "interpret constitutional, statutory, and regulatory provisions," and may set aside decisions, findings, conclusions, rules, and regulations found to be "contrary to constitutional right, power, privilege, or immunity." 38 U.S.C. § 7261. This language gives the Veterans Claims Court has the power to interpret the Constitution, but it does not grant it the power to set aside a law as contrary to the Constitution. Review of the Veterans Claims Court's decisions lies with the United States Court of Appeals for the Federal Circuit ("Federal Circuit Court"), an Article III court. 38 U.S.C. § 7292.

Unlike the language used in describing the Veterans Claims Court's powers, Congress granted the Federal Circuit Court the "exclusive jurisdiction to review and decide any challenge to the **validity of any statute** or regulation or any interpretation thereof . . ., and to interpret constitutional and statutory provisions." 38 U.S.C. § 7292 (emphasis added). When Congress intends to grant a court the power of judicial review, it does so. It did not do so in Article 67.

Nowhere in the text of the entire UCMJ is there any authority for CAAF to judge another UCMJ provision unconstitutional. In fact, the UCMJ mentions "Constitution" only once, and that is to state that CAAF is an Article I court. 10 U.S.C. § 941. When interpreting the UCMJ, CAAF looks to the Manual for

Courts-Martial ("MCM"), including its Preamble. *United States v. Wiesen*, 56 M.J. 172, 175-76 (C.A.A.F. 2001). The Preamble states:

> "Military **law** consists of the **statutes** governing the military establishment and regulations issued thereunder, the c**onstitutional powers of the President** and regulations issued thereunder, and the inherent authority of military commanders."

MCM, Preamble § 3, Nature and Purpose of Military Law (emphasis added).

Military "law" consists of the statutes but not the Constitution, except to the extent the Constitution grants the President powers.

"Law" in Article 67 limits CAAF to interpreting and applying statutes. It may use the Constitution when interpreting a statute, but it may not declare any statute unconstitutional.

C. "Law" Must Be Interpreted So That Article 67 Is Constitutional.

"When the validity of an act of the Congress is drawn in question, . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), quoting *Crowell v. Benson*, 285 U.S. 22, 72 (1932); *see also Johnson v. Robison*, 415 U.S. 361, 366-67 (1974).[3] and *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019).

[3] *Robison* is the mirror image of the issue argued in this brief. In *Robison*, the Supreme Court held that the Constitution required an ambiguous statute to be interpreted so that an Article III has court the power to review the constitutionality of statute that appeared to prohibit judicial review. Here, the Constitution requires

"Law" is ambiguous because it does not expressly grant or deny CAAF authority to review the constitutionality of laws. CAAF must interpret Article 67's "law" so that it will not violate the Constitution that vests "the judicial Power" of the United States in Article III Courts.

D. Declaring Laws Unconstitutional Is the Ultimate Exercise of the Judicial Power.

The Constitution assigns resolution of constitutional issues to the Judiciary. *Stern v. Marshall*, 564 U.S. 462, 484 (2011). "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). If a law conflicts with the Constitution, then Article III courts must determine which governs the case. "This is of the *very essence of judicial duty*." *Id.* at 178 (emphasis added).

Judging the constitutionality of an Act of Congress is the "gravest and most delicate duty" the Supreme Court is called on to perform. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Congress is a branch of government that is equal to [the Supreme] Court, and its elected members take the same oath to uphold the Constitution as the members of this Court. *Id.* The Supreme Court accords more than the customary deference accorded the judgments of Congress where the case

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Article 67 to be interpreted so that constitutional review of statutes by CAAF is prohibited. *See also Traynor v. Turnage*, 485 U.S. 535 (1988).

arises in the context of national defense and military affairs. *Rostker*, 453 U.S. at 486.

A basic principle of our constitutional scheme is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion). The judicial Power cannot be shared with another branch of the government. *Stern v. Marshall*, 564 U.S. at 483. "There is no liberty if the power of judging be not separated from the legislative and executive powers." *Id.* (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

As discussed in the next section, the judicial character of military tribunals gives them significant powers to adjudicate rights to life, liberty, and property. Nevertheless, Article III imposes limits that cannot be transgressed. *Stern*, 564 U.S. at 483. Article III cannot preserve the system of checks and balances or the integrity of judicial decision making if entities outside of Article III exercised the judicial Power. *Id.* at 484.

E. The Supreme Court's Decision in *Ortiz* Does Not Support CAAF Exercising the Judicial Power of the United States.

The Supreme Court's decision in *Ortiz v. United States*, 138 S. Ct. 2165 (2018) does not support the ability of CAAF to strike down a statute as unconstitutional. In *Ortiz*, the Supreme Court confirms CAAF's importance atop the court-martial system. *Id.* at 2171. More importantly, *Ortiz* holds that "the judicial character and constitutional pedigree of the court-martial system enable [the Supreme] Court, in exercising its appellate jurisdiction, to review the decisions [of CAAF]." *Id.* at 2173. The Supreme Court recognized that the military justice system's essential character is judicial. *Id.* at 2174. Military courts "decide questions of the most momentous description, affecting even life itself." *Id.* at 2175, (quoting Thomas, J. concurring, at 2186-87, quotation marks and ellipses omitted).

The Supreme Court in *Ortiz* unequivocally affirms that military courts are fundamentally judicial, and that the Supreme Court can, without violating the Constitution, exercise appellate review over CAAF decisions. The decisions the Supreme Court reviews may come from Article III courts, but they need not. *Id.* at 2176.

Ortiz also affirms that Congress constituted CAAF as an Article I court and located it within the executive branch rather than the judicial branch. *Id*. The Supreme Court in *Ortiz* never states or implies that military courts or any other

Article I court may exercise "the judicial Power" vested in Article III courts. The Court is careful to say only that its appellate jurisdiction "rest[s] on the judicial character, as well as the constitutional foundations and history, of the court-martial system." *Id.* at 2180. The Court repeatedly states that CAAF has "judicial character" but never says CAAF has "the judicial Power." *Id.*

In concurrence, Justice Thomas distinguishes "the judicial Power" from "a judicial power," explaining that appellate jurisdiction requires the exercise of a judicial power and not necessarily the judicial Power that Article III vests exclusively in federal courts. *Id.* at 2185 (Thomas, J. concurring). Justice Thomas explains that CAAF exercises a judicial power capable of adjudicating core private rights to life, liberty, and property, but he reiterates that only federal courts established under Article III may exercise the judicial Power of the United States. *Id.* at 2186.

Declaring a law unconstitutional is the ultimate judicial Power.

F. Article III Courts Have Expertise in Constitutional Law.

The "experts" in constitutional law are the Article III courts. Judging the constitutionality of congressional acts is the prototypical exercise of the judicial Power, and if this right is given to military tribunals then "Article III would be transformed from the guardian of individual liberty and separation of powers [this Court] has long recognized into mere wishful thinking." *Stern*, 564 U.S. at 495.

Although military tribunals have developed expertise in military law, they do not have expertise in constitutional law**.** *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969), *overruled on other grounds by Solorio v. United States*, 483 U.S. 435 (1987) ("courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law").

The Supreme Court has explicitly stated that military courts do not have the expertise to consider constitutional claims related to whether or not the Constitution bars "court-martial jurisdiction over various classes of civilians connected with the military." *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969) (explaining why the Supreme Court did not require exhaustion of remedies within the military courts before seeking Article III review of constitutional issues); *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975). This is the very issue presented in the two granted issues in this case.

The Supreme Court reversed every case it reviewed where CAAF had decided a statute or rule was unconstitutional. The Supreme Court affirmed every case it reviewed where CAAF upheld the constitutionality of a statute or rule.[4]

[4] The Supreme Court has reviewed eleven cases decided by CAAF since it was granted jurisdiction to directly review CAAF decisions. 28 U.S.C. § 1259. The Supreme Court has affirmed CAAF's decisions in every case where a convicted service member's petition for certiorari was granted. *Ortiz v. United States, 138 S. Ct. 2165 (2018)*; *Edmond v. United States*, 520 U. S. 651 (1997); *Loving v. United States*, 517 U. S. 748 (1996); *Ryder v. United States*, 515 U. S. 177 (1995); *Davis v. United States*, 512 U. S. 452 (1994); *Weiss v. United States*, 510 U. S. 163

To be clear, the Amicus does not suggest that CAAF and other Article I tribunals must or should ignore the Constitution. When interpreting statutes and rules, tribunals should interpret any ambiguity or gap in accordance with the Constitution. Where there is no ambiguity, CAAF and other tribunals must apply the laws or rules as written and are forbidden from overruling Congress.

"'[I]f there is a principle in our Constitution . . . more sacred than another,' James Madison said on the floor of the First Congress, 'it is that which separates the Legislative, Executive, and Judicial powers.'" *Wellness Int'l Network, Ltd. V. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J. dissenting) (quoting 1 Annals of Cong. 581 (1789)).

G. *Matthews* Does Not Allow Striking Down a Statute.

Matthews did not facially invalidate or overrule any statute. It only interpreted the capital punishment provisions of 10 U.S.C. §§ 918 and 920 ("Article 118" (murder) and "Article 120" (rape)), and held that these Articles required the same capital punishment standards that are applied by the Supreme

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(1994); *Solorio v. United States*, 483 U. S. 435 (1987). The Supreme Court also affirmed a CAAF decision that did not overrule any statute, but merely interpreted statutory provisions. *United States v. Denedo*, 556 U.S. 904 (2009).

In the remaining three cases, CAAF determined that a statute or rule was unconstitutional, and the Supreme Court reversed each on the merits of the constitutional question presented in each case. *United States v. Briggs*, 141 S. Ct. 467 (2020); *Clinton v. Goldsmith*, 526 U. S. 529 (1999); *United States v. Scheffer*, 523 U. S. 303 (1998).

Court in civilian cases.[5] Although it upheld the constitutionality of the death penalty provisions of these Articles, it determined the rules and regulations did not comply with the Articles as interpreted. [6]

Although the CMA in *Matthews* did not hold any statute unconstitutional, in dictum it stated that if it did not have "unfettered power to decide constitutional issues," a constitutional question would arise whether an Article I judge could be "required by oath to support the Constitution . . ., but at the same time be forced to make decisions and render judgments based on statutes which he concluded were contrary to the Constitution." *Matthews*, 16 M.J. at 366. This statement implies

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[5] This interpretation was later questioned (but not decided) by the Supreme Court in *Loving v. United States*, 517 U.S. 748, 755 (1996). The Supreme Court declined to address whether its civilian death penalty jurisprudence applied to courts-martial because the government did not contest the issue. When deciding *Loving*, the Supreme Court assumed its civilian standards applied to the military. *Id.*

*T*he *Matthews* decision was final and could not be reviewed because the Supreme Court did not have jurisdiction to directly review CMA decisions. *Matthews*, at 368.

[6] Amicus has not found any Article III court case law squarely addressing whether an Article I court can strike down as statute. No military court has squarely addressed this issue. The only opinions by military judges that have addressed Article I courts review of constitutional issues are *Matthews* and *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) (Latimer, J. dissenting). *Matthews* used the Constitution to interpret the UCMJ, and cited *Jacoby* for the proposition that the CMA would have to consider constitutional issues since a statute must be interpreted in a manner to avoid constitutional defects. *Matthews*, 16 M.J. at 368. The *Jacoby* majority decided the statute at issue was constitutional and did not address whether the CMA had the power to declare a statute unconstitutional. In dissent, Judge Latimer scolded the CMA for assuming without demonstrating that the court possessed such power. *Jacoby*, 29 C.M.R. at 249-50. Judge Latimer did not believe the CMA should have reached the merits.

that judges, members of Congress, officers of the executive branch, and citizens of the United States are free to act on their conclusions as to the constitutionality of any law or the Constitution itself. The Constitution assigns to Article I the obligation to make laws, to Article II the duty to execute laws, and to Article III the power to determine the law. By the CMA's reasoning, the CMA would be free to ignore the Supreme Court if its judges concluded the Supreme Court's determinations were contrary to the Constitution.

Before and since *Matthews*, the Supreme Court repeatedly observed that the Constitution assigns to Congress the delicate task of balancing the rights of service members against the needs of the military**.** *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (the Constitution entrusts Congress with the task of defining service members rights and providing a complete system of review to secure those rights); *Solorio v. United States*, 483 U.S. 435, 447-48 (1987); *Weiss v United States*, 510 U.S. 163, 177 (1994); *Loving v. United States*, 517 U.S. 748, 767 (1996).

As this Court has recognized, even Article III courts will not interfere with the other branches of government when they are exercising the powers assigned to them by the Constitution. *United States v. New*, 55 M.J. 95, 109 (C.A.A.F. 2001); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). When the President acts pursuant to the express authorization of Congress his authority is at its maximum, and he is said to "personify the federal sovereignty." *Youngstown*,

343 U.S. at 635-36. The President acting pursuant to an act of Congress is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Id.* at 637. When Article I acts in solidarity with Article II pursuant to powers and duties assigned to them by the Constitution, Article III does not interfere.

While the CMA in *Matthews* held that it had the power to decide constitutional issues, the constitutional issues it decided merely aided the court in interpreting the statutes. In this case, the Appellant is a member of the fleet reserve. Article 2 is clear and unambiguous – fleet reserve members are subject to the UCMJ. "[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *E.V. v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016); quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000).

If Article 2 violates the Constitution, only an Article III court can make that determination. CAAF should not boldly perform the delicate task assigned to the Supreme Court.

H. Appellant Begani and Others Challenging the Constitutionality of UCMJ Articles Have Multiple Alternative Means to Obtain Review in an Article III Court.

First, Appellant may petition the Supreme Court for certiorari after CAAF's decision. 10 U.S.C. § 867a; and 28 U.S.C. § 1259. The Supreme Court has jurisdiction to decide the constitutionality of Article 2.

Second, because Appellant argues he is a civilian and not subject to the UCMJ, he had the ability to go directly to a federal district court to enjoin the court-martial proceedings. *See Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); and *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Cf. Noyd v. Bond*, 395 U.S. 683 (1969).

Finally, Appellant may seek collateral review of the constitutionality of Article 2 in federal district court. *Larrabee v. Braithwaite*, No. 19-654 (RJL), 2020 U.S. Dist. LEXIS 219457, at *11 (D.D.C. Nov. 20, 2020). The *Larrabee* decision is not final, and it is not binding on this court. It demonstrates that the Appellant has constitutionally valid means to obtain review of Article 2. *Chappell v. Wallace*, 462 U.S. 296 (1983) (although military tribunals cannot provide relief, service members may seek redress in civilian courts for constitutional wrongs suffered in the course of military service).

CONCLUSION

Chief Judge Stucky, quoting Chief Justice Chase, observed:

> "[J]udicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

E.V., 75 M.J. at 334; quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

Amicus Protect Our Defenders respectfully requests this Court to decline ungranted jurisdiction and to affirm the decision of the Navy-Marine Corps Court of Criminal Appeals.

Respectfully submitted,

Peter Coote, Esq.
Attorney for Amicus Curiae
Protect Our Defenders
Court Bar No. 35957

Pennoni Associates Inc.
1900 Market Street, Suite 300
Philadelphia, PA 19104

pcoote@pennoni.com
Phone: (215) 254-7857

CERTIFICATE OF FILING AND SERVICE

I certify that on February 8, 2021, a copy of the foregoing was transmitted by electronic means to the following:

(1) This Court: efiling@armfor.uscourts.gov

(2) Counsel for Appellant: Stephen I. Vladeck

(4) Navy-Marine Corps Appellate Review Activity: Major Clayton L. Wiggins

Respectfully submitted,

Peter Coote, Esq.
Attorney for Amicus Curiae
Protect Our Defenders
Court Bar No. 35957

Pennoni Associates Inc.
1900 Market Street, Suite 300
Philadelphia, PA 19104

pcoote@pennoni.com
Phone: (215) 254-7857

CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief contains is 4,366 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Times New Roman 14-point font, a monospaced font.

Peter J. Coote, Esq.
Attorney for Amicus Curiae

Protect Our Defenders
Court Bar No. 35957

Pennoni Associates Inc.
1900 Market Street, Suite 300
Philadelphia, PA 19103

pcoote@pennoni.com
Phone: (215) 222-3000