No. 22-636

In the Supreme Court of the United States

S. S., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Armed Forces (CAAF) correctly determined that Military Rule of Evidence 513(a) allows disclosures of records related to a patient's mental health diagnosis or treatment that do not memorialize or otherwise reflect the substance of a communication between the patient and a psychotherapist.

2. Whether the CAAF erred in denying petitioner's motions to intervene.

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OPINIONS BELOW

The order of the Court of Appeals for the Armed Forces (CAAF) denying petitioner's initial motion to intervene (Pet. App. 81-82) is reported at 82 M.J. 108. The CAAF order denying petitioner's renewed motion to intervene (Pet. App. 40-41) is reported at 83 M.J. 36. The prior opinion of the CAAF, addressing the scope of Military Rule of Evidence 513(a) (Pet. App. 1-39), is reported at 82 M.J. 374. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 42-80) is reported at 81 M.J. 681. The order of the military judge (Pet. Supp. App. 1-17) is unreported.

JURISDICTION

The CAAF denied petitioner's initial motion to intervene on November 22, 2021. The CAAF's judgment was entered on July 27, 2022. The CAAF denied petitioner's

renewed motion to intervene and dismissed her petition for reconsideration for lack of jurisdiction on September 13, 2022 (Pet. App. 40-41). The petition for a writ of certiorari was filed on December 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a Navy general court-martial, respondent Wendell Mellette was convicted of sexual abuse of a child on "divers" (multiple) occasions with an intent to gratify his sexual desire, in violation of 10 U.S.C. 920b (2012). Charge Sheet 1; see Judgment 3. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) struck the words "on divers occasions" from the specification and adjusted Mellette's sentence to three years of confinement and a dishonorable discharge, but otherwise affirmed. Pet. App. 80. The Court of Appeals for the Armed Forces (CAAF) reversed and remanded the case for further proceedings. *Id.* at 20.

1. While serving in the Navy, respondent Mellette engaged in sexual touching and intercourse with petitioner S.S., the younger sister of respondent's then-wife. Pet. App. 45-48.

In August 2013, when petitioner was 15 years old, she received a week of inpatient mental health treatment. Pet. App. 44. After petitioner's discharge, Mellette sought opportunities to spend one-on-one time with her and began touching her back, thigh, and buttocks. *Id.* at 44-46; see *id.* at 63-64.

Between February and April 2014, Mellette deployed. Pet. App. 45. During that deployment, he received provocative e-mails from petitioner and also told a colleague that he was contemplating having sexual intercourse with petitioner. *Id.* at 45-46.

Upon his return, respondent Mellette's interactions with petitioner became more overtly sexual, including kissing and touching of her thighs, buttocks, and vaginal area and, on a number of occasions, sexual intercourse. Pet. App. 46. In mid-July 2014, petitioner turned 16. *Id.* at 47.

2. Mellette was charged with one specification of sexual assault of a child and one specification of sexual abuse of a child on divers occasions, in violation of 10 U.S.C. 920b. Pet. App. 2; Charge Sheet 1, 3. Section 920b defines "'child'" as "any person who has not yet attained the age of 16 years." 10 U.S.C. 920b(h)(4).

As part of civil proceedings between respondent Mellette and his ex-wife, petitioner sat for a deposition in which she disclosed information about her 2013 inpatient mental health treatment, including at least part of her mental health diagnoses and treatment plan. Pet. App. 4. Prior to his court-martial, Mellette moved to compel production and for in camera review of S.S.'s mental health records. *Id.* at 5; Pet. Supp. App. 1.

The military judge denied the motion, concluding that the documents were protected by Military Rule of Evidence (M.R.E.) 513(a), which provides that a "patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist * * * if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." See Pet. Supp. App. 8-15. In addition, the military judge determined that the defense "failed to meet its burden to establish that any such evidence is relevant and necessary." *Id.* at 16; see Courts-Martial R. 703(f); Pet. App. 49.

The general court-martial acquitted Mellette on the sexual assault specification; convicted him on the sexual abuse on divers occasions specification; and sentenced him to five years of confinement and a dishonorable discharge. Pet. App. 6; Judgment 3-4.

3. On appeal, the NMCCA set aside a part of the specification and correspondingly adjusted the sentence to a dishonorable discharge and three years of confinement, but otherwise affirmed. Pet. App. 42-80.

Before the NMCCA, both Mellette and the government argued that the military judge erred in concluding that medical records revealing petitioner's diagnoses and treatments were protected under M.R.E. 513. Pet. App. 6. The NMCCA rejected that argument, agreeing with the military judge that the information was covered by M.R.E. 513(a)'s psychotherapist-patient privilege. Pet. App. 53-57.

The NMCCA found, however, that petitioner had waived the privilege by "openly discuss[ing] her mental health matters with multiple people on multiple occasions," Pet. App. 58 (citing M.R.E. 510(a)), which provides that waiver occurs when a privilege-holder "voluntarily discloses * * * any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege." See Pet. App. 57-60 (citation and emphases omitted). In the alternative, the NMCCA determined that in the circumstances of this case, Mellette's "weighty interests of due process and confrontation" required the military judge to "override[]" any privilege. *Id.* at 60-62 (describing "key areas of concern" including the "centrality" of S.S.'s testimony, the circumstances under which the allegations were reported, and the "plethora of

issues posed by her mental health diagnoses and treatment").

The NMCCA concluded that the military judge should therefore have followed the procedures in M.R.E. 513(e)(3) to review the requested documents in camera, and, if warranted, to narrowly tailor any production or disclosure with appropriate protective orders. Pet. App. 60-62. But it found the error "'unimportant'" with respect to the finding that at least one instance of sexual contact occurred before S.S. turned 16, *id.* at 64-65 (noting "strong corroboration") (citation omitted), and accordingly limited the remedy to striking the "on divers occasions" language in the specification and adjusting Mellette's sentence to three years of confinement and a dishonorable discharge. *Id.* at 65, 75, 80.[1]

4. The CAAF reversed and remanded the case for further proceedings. Pet. App. 1-39.

a. After the CAAF granted Mellette's petition for review of the NMCCA decision, 82 M.J. 13, petitioner moved, for the first time, to intervene in the proceedings. Pet. C.A. Mot. to Intervene (Oct. 27, 2021).

The CAAF denied her motion to intervene, 82 M.J. 108, but granted her permission to file an amicus brief and to examine sealed materials, 82 M.J. 187.

Before the CAAF, the government changed positions as to the scope of M.R.E. 513(a), defending the NMCCA's view that diagnoses and treatments are covered. See Pet. App. 10-11. Petitioner filed an amicus

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[1] The NMCCA identified three other errors in the court-martial proceedings, but determined that in light of the evidence of guilt and its reassessed sentence, the errors did not "affect[] the outcome of this case." Pet. App. 79.

brief in support of the government. Pet. C.A. Amicus Br. (Dec. 30, 2021).

b. The CAAF rejected the government's argument, determining that the psychotherapist-patient privilege under M.R.E. 513(a) extends only to "communications between a patient and a psychotherapist," but not to "other evidence that does not qualify as a communication between a patient and a psychotherapist—such as a patient's routine medical records" where those records do not, for example, "transcribe a communication." Pet. App. 10 (emphasis omitted). The court observed that, unlike more capaciously worded rules in other jurisdictions, the plain text of M.R.E. 513(a) includes only "communications" between a patient and psychotherapist, not "broader nouns such as 'documents,' 'information,' or 'evidence.'" Pet. App. 10-18. And the court emphasized that its analysis "rest[ed] solely" on the text of M.R.E. 513(a), noting that "[a]s the promulgator of the Military Rules of Evidence, the President has both the authority and the responsibility to balance a defendant's right to access information that may be relevant to his defense with a witness's right to privacy." Pet. App. 17-18.

Turning to remedy, the CAAF then declined to decide whether the error was prejudicial, reasoning that it had no way "of knowing whether any [relevant and material] evidence existed" or "how important that evidence might have been to [Mellette's] defense." Pet. App. 19. It therefore remanded the case for the military judge to determine whether "any records that were responsive to [Mellette's] original motion" exist that "should have been provided to [Mellette] prior to his court-martial," and, if so, whether the "original denial" of the motion to compel "materially prejudiced

[Mellette's] defense." *Ibid.* The court noted that the hearing "may require the * * * military judge to conduct an in camera review, issue appropriate protective orders, and place portions of the record under seal." *Id.* at 19 n.4.

Judge Maggs, joined by Judge Sparks, dissented. Pet. App. 20-39. He would have interpreted M.R.E. 513(a) to cover medical records to the extent that they "provide[] some evidence about what the psychotherapist confidentially told the patient for the purpose of treating the patient's mental condition," Pet. App. 31; found that petitioner had waived the privilege as to the two conditions that she had disclosed during the deposition, see *id.* at 34-36; and denied relief because defense counsel did not raise the disclosed conditions during cross-examination of petitioner, *id.* at 38.

c. After the CAAF issued its judgment, petitioner filed a renewed motion to intervene and petitions for clarification and reconsideration of the CAAF's decision. Pet. C.A. Renewed Mot. to Intervene (Aug. 8, 2022). On September 13, 2022, the CAAF denied petitioner's renewed motion to intervene and dismissed for lack of jurisdiction her petitions for clarification and reconsideration of the judgment. Pet. App. 40-41.

5. On remand from the CAAF, the NMCCA ordered that a military judge "conduct a fact-finding hearing * * * for the purpose of obtaining any records that would be responsive to [respondent Mellette's] original motion to compel" and, "if such records are obtained, to then determine whether those records should have been provided to [respondent Mellette]." NMCCA Order (Nov. 18, 2022) (emphases omitted).

The military judge orally denied petitioner's motion to stay proceedings pending a resolution of this petition,

and ordered the relevant medical providers to produce S.S.'s records for in camera review. N-M Corps Trial Judiciary (NMCTJ) Orders (Feb. 15, 2023). The government subsequently issued subpoenas to the medical providers. NMCTJ Subpoenas (Mar. 8, 2023). Petitioner then filed a civil complaint and petition for injunctive relief against those providers in Florida state court asserting that Florida state law prohibits disclosure of her records. Compl./Pet. for Inj. Relief, *S.S.* v. *University of Fla. Health Psychiatric Hosp.*, No. 23-CA-899 (Fla. 8th Cir. Ct. Mar. 10, 2023).

ARGUMENT

Petitioner contends (Pet. 7-26) that the CAAF erred in interpreting the psychotherapist-patient privilege in M.R.E. 513(a). Petitioner, who participated as an amicus in the court of appeals, cannot seek further review of that decision; her petition for a writ of certiorari with respect to that issue is untimely; and the issue does not satisfy this Court's criteria for review. Petitioner also contends (Pet. 26-30) that the CAAF erred in denying her motions to intervene, but the CAAF's decision was correct and does not conflict with any decision of this Court or a federal court of appeals.

1. Petitioner contends (Pet. 7-26) that this Court should grant a writ of certiorari to review the CAAF's decision remanding Mellette's criminal case. That contention is unfounded for at least three reasons.

a. First, petitioner cannot file a petition for a writ of certiorari to review the CAAF's merits judgment because she was not a party to the case in the court of appeals. It is well-established that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); see, *e.g.*, *Karcher* v. *May*, 484

U.S. 72, 77 (1987); *United States ex rel. State of Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917). Consistent with that principle, this Court's rules only "entitle[] "parties"—namely, the "parties to the proceeding in the court whose judgment is sought to be reviewed"—"to file documents in this Court." Sup. Ct. R. 12.6; see Sup. Ct. R. 13.3 (describing the time period for "parties" to file a petition for a writ of certiorari). Because the CAAF denied petitioner's motions for intervention, she was not a party to the proceedings below. *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 933 (2009) (defining "party" and explaining that "intervention is the requisite method for a nonparty to become a party to a lawsuit").

Petitioner's accompanying request for review of the denial of her intervention motions does not solve that problem. This Court has stated that "[o]ne who has been denied the right to intervene in a case in a court of appeals may petition for certiorari *to review that ruling*"—*i.e.*, the intervention ruling. *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.*, 510 U.S. 27, 30 (1993) (per curiam) (citing *International Union* v. *Scofield*, 382 U.S. 205, 208-209 (1965)) (emphasis added). But the Court has made clear that "such a putative intervenor cannot petition for review of any other aspect of the judgment below." Stephen M. Shapiro et al., *Supreme Court Practice* § 6.16(c), at 6-62 (11th ed. 2019) (collecting cases); see, *e.g.*, *Scofield*, 382 U.S. at 209 (observing that while the Court could review "the orders denying intervention," the unsuccessful intervenor "would not have been entitled to file a petition to review a judgment on the merits"); cf. *Arizona* v. *City & County of San Francisco*, 142 S. Ct. 417 (2022) (granting a writ of certiorari on the question whether

intervention should have been allowed, but not on the questions whether the court of appeals' judgment on the merits should be reversed or vacated); *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 141 S. Ct. 1734 (2021) (same). That principle squarely precludes a grant of a writ of certiorari to address the first question presented in the petition.

Petitioner is mistaken in contending (Pet. 26) that the party requirement is inapplicable to this Court's review of CAAF decisions. Although 28 U.S.C. 1259, the statute governing this Court's review of CAAF decisions, does not itself refer to "parties," neither does the statute governing this Court's review of state-court judgments. See 28 U.S.C. 1257. But Congress did not thereby expand this Court's ability to review state-court decisions to extend well beyond its ability to review federal-court decisions. Instead, it is well-established that, pursuant to "'[t]he general rule * * * that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom,'" non-parties to a state-court proceeding cannot "'ask this Court to review the state court's judgment,'" *Lance* v. *Dennis*, 546 U.S. 459, 465 (2006) (per curiam) (quoting *Karcher*, 484 U.S. at 77, and *Johnson* v. *De Grandy*, 512 U.S. 997, 1006 (1994)).

The limitation to "parties" in this Court's rules likewise does not vary based on the court whose judgment a petitioner seeks to review. See Sup. Ct. R. 12.6, 13.3. And a contrary approach would make little sense, as it would allow certiorari petitions by persons or entities who did not participate in the proceedings the petition seeks to challenge. Indeed, petitioner herself urged the CAAF to grant her petition to intervene in part because "[i]ntervention will * * * provide [petitioner] with the

ability to petition the Supreme Court for certiorari," while failing to intervene would "preclude[] appeal." Pet. C.A. Renewed Mot. to Intervene 6 (citing *Marino*, *supra*).

b. Second, even if petitioner could have sought review of the CAAF's judgment, she delayed too long in doing so. The time to file a petition for a writ of certiorari "runs from the date of entry of the judgment or order sought to be reviewed." Sup. Ct. R. 13.3. The CAAF entered its judgment on July 27, 2022, and a petition for a writ of certiorari was accordingly due 90 days later on October 25, 2022. See Sup. Ct. R. 13.1; see also 28 U.S.C. 2101(g) ("The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court."). Petitioner did not file a petition or an application for an extension of time before that date. Instead, she waited until December 12, 2022, 48 days after the 90-day period had concluded.[2]

Although this Court has discretion to consider an untimely petition for a writ of certiorari in a case arising from the CAAF, see *Schacht* v. *United States*, 398 U.S. 58, 63-65 (1970), petitioner (who is represented by counsel) offers no explanation or justification for her untimeliness, and none is apparent from the record. To the

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[2] None of the circumstances set out in Rule 13.3, which provide a later date at which the time for filing a petition for writ of certiorari begins to run, apply here: petitioner, a non-party, filed a motion for reconsideration in the CAAF, which the CAAF "dismissed for lack of jurisdiction." Pet. App. 41. Accordingly, there was no "petition for rehearing * * * timely filed in the lower court *by any party*"; nor did any party (or even petitioner) file an "untimely petition for rehearing" that the lower court "appropriately *entertain[ed]*." Sup. Ct. R. 13.3 (emphases added).

extent that petitioner was waiting for CAAF's decision on her motion to intervene to determine whether she was permitted to file a petition for certiorari, the CAAF issued that order on September 13, 2022, well before the original deadline. Pet. App. 40. This Court therefore should not exercise its discretion to entertain the petition as to the first question presented.

c. Third, the M.R.E. 513 issue does not otherwise satisfy the criteria for review. See Sup. Ct. R. 10. The CAAF's analysis "rest[ed] solely on the specific text" of M.R.E. 513. Pet. App. 17; see *id.* at 9-18. And the CAAF's decision allows the President to amend that rule to address any undesired consequences of the CAAF's interpretation of the current text. See *id.* at 17-18.

Petitioner does not allege a conflict with any decision of a federal court of appeals. See Pet. 7-15. Petitioner instead asserts (*e.g.*, Pet. 6-8) that the CAAF's interpretation conflicts with this Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), which recognized a common-law psychotherapist-patient privilege under Federal Rule of Evidence 501, and decisions of federal district courts interpreting that privilege. But unlike the Federal Rules of Evidence, which provide that privileges are governed by "[t]he common law," Fed. R. Evid. 501, the Military Rules of Evidence codify a defined psychiatrist-patient privilege applicable only in military proceedings. Any textual divergence of the military-specific approach from the common law's would thus presumably be by design, rather than suggestive of a conflict among courts relying on the same source of law.

2. Certiorari is also unwarranted with respect to the CAAF's denial of petitioner's intervention motions. As

an initial matter, the petition was also untimely as to the November 22, 2021 order denying intervention, Pet. App. 81, because petitioner waited more than 90 days after "the date of entry of the * * * order." Sup. Ct. R. 13.3; see Sup. Ct. R. 13.1; p. 11, *supra*.

In any event, the CAAF's case-specific resolution of petitioner's original and renewed intervention requests was not an abuse of discretion and does not require this Court's review. No statute specifically provides for appellate intervention in the military system. And petitioner's invocation (Pet. 27-28) of intervention practices in Article III appellate courts is misplaced. As an Article I court, the CAAF narrowly construes its authority in the absence of a specific statutory authorization for a particular action. See *Center for Constitutional Rights* v. *United States*, 72 M.J. 126, 128 (2013) ("this Court, and courts-martial in general, being creatures of Congress created under the Article I power to regulate the armed forces, must exercise their jurisdiction in strict compliance with authorizing statutes"). The CAAF has been particularly careful to adhere to the contours of its statutory authority since this Court explained that "the CAAF is not given authority * * * to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed." See *Clinton* v. *Goldsmith*, 526 U.S. 529, 536 (1999). The CAAF permissibly did so here in denying petitioner's intervention requests.

3. In any event, this case is not a suitable one for further review because of its interlocutory posture. The CAAF has remanded for further proceedings, including to determine whether any responsive records exist, and if so whether Mellette's motion for the records caused him prejudice. See Pet. App. 19. Even then, the remedy

may be a modification of petitioner's specification and sentence rather than production of the records. See *id.* at 64-65, 80. And to the extent that any records are produced, the military judge has broad discretion to "issue appropriate protective orders, and place portions of the record under seal as necessary." *Id.* at 19 n.4.

The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to the district court "is not yet ripe for review by this Court"); see also, *e.g.*, *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari); *Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944, 945 (2012) (statement of Alito, J., respecting the denial of the petitions for writs of certiorari). That approach promotes judicial efficiency, because the proceedings on remand may render the issues presented in the petition moot.

The ongoing proceedings are particularly salient here. It remains to be determined whether, during *in camera* review, the military judge will identify any responsive, relevant, and admissible records as to which privilege has not been waived. The ongoing proceedings also mean that petitioner may be able to move to limit the production or disclosure, or otherwise assert her rights under the specific procedure for enforcing a victim's rights under M.R.E. 513 that is prescribed in the Uniform Code of Military Justice. See 10 U.S.C. 806b(e)(1)-(4)(D) (providing that a victim can enforce her rights, including any "protections afforded by * * * Military Rule of Evidence 513, relating to the

psychotherapist-patient privilege" by "petition[ing] the Court of Criminal Appeals" "for a writ of mandamus"); 10 U.S.C. 806b(e)(3)(B) and (C) (specifying that a writ by a victim "ha[s] priority over all other proceedings before the Court of Criminal Appeals" and that review of the Court of Criminal Appeals decision "ha[s] priority in the Court of Appeals for the Armed Forces").

In these circumstances, petitioner identifies no sound reason to depart from this Court's usual practice of awaiting final judgment. And the case is moreover an unsuitable candidate for further review because petitioner has filed suit in Florida state court to block the medical providers from producing her records to the military judge, see p. 8, *supra*, and the outcome of such further proceedings may have bearing on the proper disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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