No. 18-1400

# In the Supreme Court of the United States

E. V., PETITIONER

*v.*

EUGENE H. ROBINSON, JR., LIEUTENANT COLONEL, U.S. MARINE CORPS, IN HIS CAPACITY AS MILITARY JUDGE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether sovereign immunity bars petitioner's non-constitutional claims in federal district court collaterally attacking an evidentiary ruling made by a military judge presiding over a court-martial.

2. Whether the Inferior Tribunals Clause, U.S. Const. Art. I, § 8, Cl. 9, requires that petitioner be permitted to collaterally attack an evidentiary ruling made by a military judge presiding over a court-martial.

**ADDITIONAL RELATED PROCEEDINGS**

Navy-Marine Corps Trial Judiciary, General Court-Martial (W. Pac. Judicial Cir.):

*United States* v. *Martinez* (Mar. 31, 2017)

United States Navy-Marine Corps Court of Criminal Appeals:

*E. V.* v. *Robinson*, No. 201600057 (Feb. 25, 2016)

United States Court of Appeals (C.A.A.F.):

*E. V.* v. *United States*, No. 16-0398 (June 21, 2016)

United States District Court (D.D.C.):

*E. V.* v. *Robinson*, No. 16-cv-1419 (Aug. 2, 2016)

United States District Court (E.D. Cal.):

*E. V.* v. *Robinson*, No. 16-cv-1973 (Oct. 5, 2016)

United States Court of Appeals (9th Cir.):

*E. V.* v. *Robinson*, No. 16-16975 (Oct. 17, 2018)

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 906 F.3d 1082. The order of the district court (Pet. App. 38-42) is not published in the Federal Supplement but is available at 2016 WL 5847046. A prior opinion of the district court (Pet. App. 43-53) is reported at 200 F. Supp. 3d 108.

## JURISDICTION

The judgment of the court of appeals was entered on October 17, 2018. A petition for rehearing was denied on January 2, 2019 (Pet. App. 54-55). On March 26, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 2, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. a. The Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14. "In the exercise of its authority over the armed forces, Congress has long provided for specialized military courts to adjudicate charges against service members." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2170 (2018). "Although their jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses." *Id.* at 2174.

The court-martial system includes three levels of specialized tribunals. "That system begins with the court-martial itself, an officer-led tribunal convened to determine guilt or innocence and levy appropriate punishment." *Ortiz*, 138 S. Ct. at 2171. Courts-martial may be summary, special, or general. 10 U.S.C. 816. A general court-martial typically consists of a military judge and a certain number of members. 10 U.S.C. 816(b). A general court-martial has jurisdiction over all offenses under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, and may impose a sentence up to confinement for life without eligibility for parole, or death. 10 U.S.C. 818(a). Summary and special courts-martial have more limited jurisdiction and may impose only lesser punishments. 10 U.S.C. 819-820; see *Weiss* v. *United States*, 510 U.S. 163, 167 (1994).

Courts-martial "are subject to an appellate process * * * that replicates the judicial apparatus found in most States." *Ortiz*, 138 S. Ct. at 2175. The UCMJ establishes four intermediate appellate courts: the Army, Navy-Marine Corps, Air Force, and Coast Guard Courts of Criminal Appeals. 10 U.S.C. 866. Review by those courts, in three-judge panels composed of officers

or civilians, is mandatory in some cases and discretionary in others. 10 U.S.C. 866(a)-(b).

The highest court in the court-martial system is the United States Court of Appeals for the Armed Forces (CAAF). The CAAF consists of five civilian judges appointed to 15-year terms by the President with the advice and consent of the Senate. 10 U.S.C. 942(a)-(b). "The CAAF must review certain weighty cases (including those in which capital punishment was imposed), and may grant petitions for review in any others." *Ortiz*, 138 S. Ct. at 2171 (citing 10 U.S.C. 867).

This Court may review certain decisions of the CAAF by writ of certiorari. 28 U.S.C. 1259; see *Ortiz*, 138 S. Ct. at 2172-2180. Under Section 1259, this Court has jurisdiction to review the CAAF's decisions in cases on the CAAF's mandatory docket, cases in which the CAAF "granted a petition for [discretionary] review," and other cases in which the CAAF "granted relief." 28 U.S.C. 1259.

b. The UCMJ authorizes the President to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof," for use in courts-martial. 10 U.S.C. 836(a). Pursuant to that authority, the President has prescribed a Manual for Courts-Martial, which contains Military Rules of Evidence. See U.S. Dep't of Def., *Manual for Courts-Martial United States* (2012), https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf; see also Exec. Order No. 12,473, 49 Fed. Reg. 17,152, 17,254-17,293 (Apr. 23, 1984).

Military Rule of Evidence 513 codifies a psychotherapist-patient privilege:

> 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 or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Mil. R. Evid. 513(a) (2012); Pet. App. 105. The privilege is subject to various exceptions, including the so-called crime/fraud exception, which is set forth in Military Rule of Evidence 513(d)(5). Pet. App. 107. That exception provides that "[t]here is no privilege" when "the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud." Mil. R. Evid. 513(d)(5) (2012); Pet. App. 107.

Military Rule of Evidence 513 prescribes a procedure for determining the admissibility of patient records or communications. Mil. R. Evid. 513(e) (2012); Pet. App. 108-109. The rule authorizes the military judge to "examine the evidence or a proffer thereof *in camera*" before ruling on the admissibility of the evidence. Mil. R. Evid. 513(e)(3) (2012); Pet. App. 109. The rule further provides that, "[t]o prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence." Mil. R. Evid. 513(e)(4) (2012); Pet. App. 109.

By statute, a victim of an offense under the UCMJ may challenge a military judge's rulings under Military Rule of Evidence 513. 10 U.S.C. 806b(e)(1) and (4). Article 6b(e) of the UCMJ provides that, "[i]f the victim of an offense under [the UCMJ] believes that * * * a court-martial ruling violates the rights of the victim afforded by [Military Rule of Evidence 513], the victim

may petition the Court of Criminal Appeals for a writ of mandamus to require * * * the court-martial to comply with the * * * rule." 10 U.S.C. 806b(e)(1) and (4)(D).

At times relevant to this case, the UCMJ did not provide for review of the Court of Criminal Appeals' decision on a mandamus petition brought by a victim. 10 U.S.C. 806b(e) (Supp. IV 2016). Congress has since amended the statute to provide that "[r]eview of any decision of the Court of Criminal Appeals on [such] a petition for a writ of mandamus * * * shall have priority in the [CAAF]." 10 U.S.C. 806b(e)(3)(C); see National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, Div. A, Tit. V, Subtit. D, § 531(a), 131 Stat. 1384.

2. a. In 2015, Marine Corps Sergeant David Martinez was charged with sexually assaulting petitioner, in violation of the UCMJ. Pet. App. 5-6. "At the time of the alleged assault, [petitioner] was residing on Kadena Air Base in Okinawa, Japan, with her husband, a staff sergeant in the United States Air Force." *Id.* at 5. Martinez "was their neighbor on the base." *Ibid.* Following the alleged assault, petitioner sought psychotherapy counseling at the Kadena Health Clinic, *id.* at 5-6, and her husband "requested a compassionate reassignment from Kadena Air Base to Travis Air Force Base in California so that [petitioner] would be separated from Sgt. Martinez and closer to her family," *id.* at 5. While that reassignment request was pending, petitioner was admitted to the U.S. Naval Hospital Okinawa for suicidal ideations. *Id.* at 6. After she was discharged, her husband submitted her "two-page patient discharge summary in support of his request for compassionate reassignment." *Ibid.*; see C.A. E.R. 109-110. That request was eventually approved. Pet. App. 6.

b. The sexual-assault charges against Martinez were referred to a general court-martial. Pet. App. 6. Respondent was the military judge who presided over the court-martial. *Ibid.* During the court-martial proceedings, Martinez filed a motion to compel the production of petitioner's mental-health records. C.A. E.R. 100-107. Petitioner and the military prosecutor opposed the motion. Pet. App. 68. Petitioner claimed that her mental-health records were covered by the psychotherapist-patient privilege under Military Rule of Evidence 513. *Ibid.* Respondent denied Martinez's motion. C.A. E.R. 87-98.

Martinez thereafter moved for reconsideration. C.A. E.R. 69-85. In support of that motion, Martinez cited the Naval Hospital's two-page patient discharge summary, which Martinez had recently obtained during discovery. *Id.* at 71, 76. It was undisputed that any privilege with respect to those two pages had been "waived" as a result of their "prior disclosure to support [petitioner's] husband's reassignment request." Pet. App. 7. Based on "new information" contained in those two pages, Martinez argued that reconsideration was warranted. *Id.* at 68.

Respondent granted reconsideration in light of the "new evidence" presented by Martinez. Pet. App. 92; see *id.* at 84-93. Respondent ordered "an *in camera* inspection of the psychiatric records of [petitioner]" for the purpose of identifying "material that meets a standard under Mil. R. Evid. 513." *Id.* at 92. Respondent explained that the "credibility of any witness is always material," *id.* at 90, and that he would review petitioner's mental-health records "with particular emphasis on bias/motive to fabricate," *id.* at 92.

After examining the records in camera, respondent determined that "some of the material * * * is discoverable to the defense and should be disclosed to the parties for possible use during the trial on the issue of credibility of [petitioner]." Pet. App. 80; see *id.* at 78-83. Respondent therefore released portions of petitioner's mental-health records to the parties and their attorneys, *id.* at 80-81, subject to a protective order that prohibited further disclosure, *id.* at 81-82, and required Martinez's counsel to return or destroy all but one copy of the records following the conclusion of all litigation, *id.* at 82.

Respondent subsequently issued a supplemental ruling explaining his order to disclose portions of petitioner's mental-health records. Pet. App. 67-74. Respondent noted Martinez's contention that the "timing" of petitioner's mental-health treatment showed her "tactical use (i.e., fraud) of the process" to obtain a transfer to California. *Id.* at 71; see C.A. E.R. 80-81. Respondent agreed that petitioner's mental-health records "cast[] doubts on the validity of any suicidal ideations in this case," Pet. App. 71, and "call[ed] into question [petitioner's] bias/motive to fabricate," *id.* at 72. Respondent therefore concluded that portions of the records should be disclosed under the crime/fraud exception to the psychotherapist-patient privilege. *Ibid.* Respondent also concluded that disclosure of such portions was "constitutionally required as potentially exculpatory material favorable to the defense." *Ibid.*

Petitioner filed a petition for a writ of mandamus in the Navy-Marine Corps Court of Criminal Appeals under Article 6b(e) of the UCMJ, 10 U.S.C. 806b(e) (Supp. IV 2016), challenging respondent's decision to disclose portions of petitioner's mental-health records.

Pet. App. 9. Citing the crime-fraud exception to the psychotherapist-patient privilege, the court denied the petition, finding that petitioner's "right to an issuance of a writ is not 'clear and indisputable.'" *Id.* at 65 (citation omitted); see *id.* at 64-66.

Petitioner petitioned the CAAF for a writ of mandamus. Pet. App. 9. The CAAF dismissed the petition for lack of jurisdiction. *Id.* at 56-63. The court explained that Article 6b(e) of the UCMJ "is a clear and unambiguous grant of limited jurisdiction to the Courts of Criminal Appeals to consider petitions by alleged victims for mandamus as set out therein." *Id.* at 62. The CAAF concluded that, although "Congress certainly could have provided for further judicial review in this novel situation," "[i]t did not." *Ibid.*

3. a. Following the CAAF's dismissal of her petition for a writ of mandamus, petitioner brought suit in the United States District Court for the District of Columbia against respondent in his official capacity as a military judge. Compl. 1. Petitioner alleged that respondent had violated Military Rule of Evidence 513 in reviewing in camera, and then ordering disclosure of, her mental-health records. Compl. ¶¶ 36-66. Petitioner also alleged that, by ordering the release of her records "without authority," respondent had violated her "right to be treated with fairness and with respect for her dignity and privacy" under Article 6b(a)(8) of the UCMJ, 10 U.S.C. 806b(a)(8). Compl. ¶¶ 67-69. In addition, petitioner asserted two constitutional claims: (1) that respondent had searched and seized her confidential records, in violation of the Fourth Amendment, *id.* ¶¶ 70-72; and (2) that by "declar[ing] that disclosure of [petitioner's] psychotherapy records was 'constitutionally required,'" *id.* ¶ 75, respondent, "an Article I judge," *id.*

¶ 77, had "unlawfully usurped power that the Constitution explicitly reserves for Article III courts," *id.* ¶ 78.

Petitioner invoked the district court's jurisdiction under 28 U.S.C. 1331, the federal-question statute. Compl. ¶ 7. She also invoked 28 U.S.C. 1361, which provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. 1361; see Compl. ¶ 7. Petitioner sought an injunction barring disclosure of her mental-health records and ordering respondent to destroy or return all privileged information in his possession. Compl. 14.

The district court determined that venue was improper in the District of Columbia and transferred the case to the Eastern District of California, where petitioner resides. Pet. App. 43-53. The district court in the Eastern District of California then granted respondent's motion to dismiss, concluding that the suit was barred by sovereign immunity. *Id.* at 38-42. The court explained that petitioner had "sued [respondent] in his official capacity, which constitutes a suit against the United States." *Id.* at 40-41. The court further explained that neither Section 1331 nor Section 1361—the jurisdictional statutes that petitioner had invoked—"waives sovereign immunity." *Id.* at 41. The court also rejected petitioner's reliance on Article 6b(e) "as a statutory waiver" because "that law grants mandamus jurisdiction only to 'the Court of Criminal Appeals.'" *Ibid.* (quoting 10 U.S.C. 806b(e)(1) (Supp. IV 2016)). The court therefore concluded that dismissal was warranted because "the United States has not waived its sovereign immunity." *Id.* at 40.

b. The district court denied petitioner's request for an injunction pending appeal. 16-cv-1973 Docket entry No. 43 (E.D. Cal. Oct. 13, 2016). Respondent then disclosed the pertinent portions of petitioner's mental-health records to the military prosecutor and Martinez, Pet. App. 12 n.7, and the court-martial proceeded to trial, C.A. S.E.R. 15. The military prosecutor and Martinez entered into a stipulation of facts, which contained a number of facts derived from petitioner's mental-health records. *Id.* at 15, 23-27. That stipulation was admitted into evidence, along with the two-page patient discharge summary with respect to which petitioner had waived any psychotherapist-patient privilege. *Id.* at 16. No other mental-health records were admitted into evidence. *Ibid.* Martinez was found not guilty of all charges. Pet. App. 10 n.3.

4. The court of appeals affirmed the dismissal of petitioner's suit. Pet. App. 1-35. The court observed that, "[a]fter the district court dismissed the complaint, [respondent] released [petitioner's] redacted mental health records to the court-martial parties." *Id.* at 12 n.7. The court concluded, however, that "this case is not moot," because "a federal court could still provide [petitioner] a concrete and real remedy by ordering [respondent] to destroy all copies of the mental health records in his possession and to order trial and defense counsel to do likewise." *Ibid.*

The court of appeals then determined that the framework set forth in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), governs whether sovereign immunity bars petitioner's claims. Pet. App. 5, 13. The court explained that, under *Larson*, suits against a federal official for specific relief are considered suits against the sovereign, unless they fall into

one of two categories: "(1) suits alleging that a federal official acted ultra vires of statutorily delegated authority, and (2) suits alleging that a federal official violated the Constitution." *Id.* at 14-15.

The court of appeals determined that petitioner's non-constitutional claims—namely, her claims alleging violations of Military Rule of Evidence 513 and Article 6b(a)(8) of the UCMJ—do not fall within the ultra vires category because they "allege 'errors in the exercise of delegated power' rather than a 'lack of delegated power.'" Pet. App. 29 (brackets and citation omitted). The court therefore concluded that those claims "are barred by sovereign immunity unless such immunity has been waived." *Id.* at 31. The court rejected petitioner's contention that such a waiver could be found in Article 6b(e) of the UCMJ, explaining that Article 6b(e) "provides only a limited waiver of sovereign immunity to allow victims to petition for mandamus relief in the military Court of Criminal Appeals, not a general waiver that applies in Article III courts." *Ibid.* The court thus held that sovereign immunity bars petitioner's non-constitutional claims. *Id.* at 32.

Turning to petitioner's constitutional claims, the court of appeals determined that they fall within *Larson*'s second category and therefore are not barred by sovereign immunity. Pet. App. 32. The court, however, affirmed the dismissal of those claims on alternative grounds. *Ibid.* The court determined that, even assuming that petitioner "has a cognizable Fourth Amendment interest in her mental health records," her "conclusory allegations are insufficient to state a [Fourth Amendment] claim." *Id.* at 33. The court also determined that petitioner lacked standing to assert that respondent "'unlawfully usurped' Article III judicial

power." *Id.* at 34. The court reasoned that, even if petitioner succeeded in challenging respondent's determination that disclosure of petitioner's mental-health records was constitutionally required, the disclosure was independently supported by respondent's determination that the records fell within the crime/fraud exception to Military Rule of Evidence 513—a determination that sovereign immunity shielded from challenge. *Ibid.* The court therefore concluded that petitioner could not establish that her Article III claim would redress her alleged injury. *Ibid.*

The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 54-55.

## ARGUMENT

Petitioner contends (Pet. 13-27) that her non-constitutional claims fall within the category of ultra vires claims recognized in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and that in any event, Article 6b(e) of the UCMJ, 10 U.S.C. 806b(e), effectuates a waiver of sovereign immunity in federal district court. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioner alternatively contends (Pet. 11-12) that no waiver of sovereign immunity is necessary because sovereign immunity is not applicable to her non-constitutional claims in the first place. That contention is not properly before this Court, because it was not pressed or passed upon below.

Petitioner further contends (Pet. 27-38) that the Constitution requires that she be permitted to collaterally attack the evidentiary ruling of a court-martial in district court. That contention was likewise not pressed or passed upon below, and in any event, it lacks merit.

Notably, Congress has since amended the UCMJ to provide that "[r]eview of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus" like the one petitioner filed here "shall have priority in the [CAAF]." 10 U.S.C. 806b(e)(3)(C). The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 10-27) that sovereign immunity does not bar the non-constitutional claims she brought against respondent in his official capacity as a military judge. That contention does not warrant this Court's review.

a. The court of appeals correctly rejected petitioner's contention (Pet. 13-16) that her non-constitutional claims fall within the category of ultra vires claims recognized in *Larson*. Pet. App. 26-31. "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963) (per curiam). In *Larson*, the Court recognized an exception to that general rule when "the action of an officer of the sovereign * * * is not within the officer's statutory powers." 337 U.S. at 701-702. The Court emphasized that, to fall within that exception, it is "not sufficient" to allege "error in the exercise" of the officer's statutorily delegated powers. *Id.* at 690. Rather, a claim must allege that the officer "is not exercising [such] powers" at all. *Id.* at 693.

Here, respondent was exercising the powers conferred on him under the UCMJ when he ordered the disclosure of portions of petitioner's mental-health records. See 10 U.S.C. 826(a) ("A military judge shall be detailed to each general and special court-martial."); 10 U.S.C. 851(b) ("The military judge shall rule upon all questions of law and all interlocutory questions arising

during the proceedings."). Petitioner argues (Pet. 15) that respondent's evidentiary ruling violated Military Rule of Evidence 513. But the Military Rules of Evidence are prescribed by Executive Order, not by statute. See, *e.g.*, Exec. Order No. 12,473, 49 Fed. Reg. at 17,254-17,293; see also p. 3, *supra*. Alleged violations of Rule 513 thus "do[] not relate to the terms of [respondent's] statutory authority." *Larson*, 337 U.S. at 695. And although petitioner also alleges that respondent violated her "right to be treated with fairness and with respect for [her] dignity and privacy" under Article 6b(a)(8) of the UCMJ, 10 U.S.C. 806b(a)(8), that claim is entirely derivative of her claim that disclosure of her mental-health records violated Rule 513. See Compl. ¶¶ 67-69. It likewise alleges no more than "error in the exercise" of delegated power. *Larson*, 337 U.S. at 690; see *id.* at 695 ("Certainly the jurisdiction of a court to decide a case does not disappear if its decision on the merits is wrong."). The court of appeals therefore correctly concluded that petitioner failed to establish that her non-constitutional claims fall within "*Larson*'s ultra vires exception." Pet. App. 30.

Contrary to petitioner's contention (Pet. 14), that conclusion does not conflict with the D.C. Circuit's decision in *Washington Legal Foundation* v. *United States Sentencing Commission*, 89 F.3d 897 (1996). *Washington Legal Foundation* did not involve a military judge's authority under the UCMJ or application of the Military Rules of Evidence. Rather, it involved a claim that an advisory committee established by the United States Sentencing Commission had a federal common-law duty to give the public access to certain documents. See *id.* at 898-900. Because the government disputed whether the committee had any such duty at all, *id.* at 901-902,

the D.C. Circuit concluded that whether the claim fell within *Larson*'s ultra vires exception "merge[d] with the question on the merits," *id.* at 902, and held that the committee had no such duty, *id.* at 907. There is no conflict between that decision and the court of appeals' "case-specific" application of *Larson*'s ultra vires exception here. Pet. App. 29.[*]

b. The court of appeals also correctly rejected petitioner's contention (Pet. 16-27) that Article 6b(e) of the UCMJ, 10 U.S.C. 806b(e), effectuates a waiver of sovereign immunity in federal district court. Pet. App. 31-32. This Court has "said on many occasions that a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text." *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012) (citation omitted). The Court has emphasized that "[a]ny ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *Ibid.* (citation omitted).

Article 6b(e) of the UCMJ provides that "the victim of an offense under [the UCMJ] * * * may petition the Court of Criminal Appeals for a writ of mandamus" to challenge a court-martial's ruling under Military Rule of Evidence 513. 10 U.S.C. 806b(e)(1); see 10 U.S.C. 806b(e)(4)(D). Today, Article 6b(e) also provides that

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[*] Petitioner likewise errs in contending (Pet. 14) that the court of appeals' decision in this case conflicts with *Mashiri* v. *Department of Education*, 724 F.3d 1028 (9th Cir. 2013) (per curiam). *Mashiri* involved a federal statute governing eligibility for student loans, not the UCMJ or the Military Rules of Evidence. See *id.* at 1032-1033; Pet. App. 28-29. In any event, any intracircuit inconsistency would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

"[r]eview of any decision of the Court of Criminal Appeals on [such] a petition for a writ of mandamus * * * shall have priority in the [CAAF]." 10 U.S.C. 806b(e)(3)(C). But the text of Article 6b(e) makes no mention of challenging a court-martial's ruling in federal district court. The court of appeals therefore correctly concluded that Article 6b(e) does not provide for such a suit with respect to petitioner's non-constitutional claims here. Pet. App. 31-32. That conclusion does not conflict with any decision of this Court or another court of appeals.

c. Petitioner contends (Pet. 11-12) that no waiver of sovereign immunity is necessary because sovereign immunity is not applicable to her non-constitutional claims in the first place. Petitioner, however, did not press that contention in the court of appeals. With respect to her non-constitutional claims, she challenged the district court's decision only on the ground that Article 6b(e) waives sovereign immunity. See Pet. C.A. Br. 17-23. Petitioner therefore has forfeited any contention that a waiver of sovereign immunity is unnecessary because sovereign immunity is not applicable to her non-constitutional claims in the first place. See *United States* v. *Jones*, 565 U.S. 400, 413 (2012). For that reason alone, review of any such contention is unwarranted. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citation omitted).

In any event, petitioner errs in asserting (Pet. 12) that "[s]overeign immunity is inapplicable because [her] complaint in federal district court is not truly an original action," but rather a request for appellate review of

a "decision[]" of "a military officer." That assertion contradicts petitioner's own complaint, which invoked the district court's original jurisdiction under 28 U.S.C. 1331 and 1361. Compl. ¶ 7; see also Pet. C.A. Br. 2 ("The District Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1361.").

Petitioner also errs in asserting (Pet. 11-12) that her suit falls within a tradition of permitting collateral attacks on court-martial rulings in federal district court. In *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), this Court permitted a serviceman charged with offenses under the UCMJ to invoke the subject-matter jurisdiction of a federal district court to seek collateral relief from an "impending court-martial" on the ground that "any judgment entered by the court-martial would be void." *Id.* at 748-749. The Court explained that "[a] judgment * * * is not rendered void merely by error"; rather, a judgment is rendered void by a "lack of jurisdiction or some other equally fundamental defect." *Id.* at 747; see *ibid.* (discussing *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806), as an example of a collateral attack on the "jurisdiction" of a court-martial). Unlike the serviceman in *Councilman*, however, petitioner does not allege any such defect here. As explained above, petitioner alleges only that respondent erred in ruling on an evidentiary issue in the course of presiding over the court-martial. See pp. 13-14, *supra*. Petitioner's suit therefore goes beyond the grounds this Court has recognized for collaterally attacking a prejudgment ruling of a court-martial. See *Councilman*, 420 U.S. at 749 & n.19 (explaining that, if the serviceman's suit in *Councilman* had "go[ne] beyond recognized grounds for col-

lateral attack," it "would have been a species of prejudgment direct attack, in which case the District Court would have had no jurisdiction whatever").

2. Petitioner argues (Pet. 27-38) that the Constitution requires that she be permitted to collaterally attack the evidentiary ruling of a court-martial in district court. Her argument rests on the Inferior Tribunals Clause of Article I, Section 8, which empowers Congress "[t]o constitute Tribunals inferior to the supreme Court." U.S. Const. Art. I, § 8, Cl. 9. Petitioner contends (Pet. 33) that the Inferior Tribunals Clause prohibits Congress "from placing Article I tribunals beyond the oversight and control of [this] Court." And she asserts (Pet. 37) that, unless she is permitted to collaterally attack the court-martial ruling in district court—and then seek review of the district court's decision in the court of appeals and in this Court—"the court-martial would not be 'inferior' to this Court," as the Inferior Tribunals Clause requires.

Petitioner did not raise below, and the court of appeals did not address, any argument based on the Inferior Tribunals Clause. That argument therefore has been forfeited, see *Jones*, 565 U.S. at 413, and does not warrant this Court's review, see *Zobrest*, 509 U.S. at 8.

In any event, petitioner's reliance on the Inferior Tribunals Clause is misplaced. To begin, Congress's authority to create courts-martial rests on its Article I power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14; see *Ortiz* v. *United States*, 138 S. Ct. 2165, 2175 (2018), not on the Inferior Tribunals Clause.

Even if the Inferior Tribunals Clause were implicated here, petitioner identifies no precedent constru-

ing that Clause to require that certain decisions be reviewable by this Court. Indeed, even with respect to lower courts that plainly do fall within the Clause—namely, federal district courts and federal courts of appeals—the Clause has never been construed to require that every one of those courts' decisions be subject to this Court's appellate jurisdiction. To the contrary, Article III expressly provides that the Court's "appellate Jurisdiction" shall be subject to "such Exceptions * * * as the Congress shall make." U.S. Const. Art. III, § 2. Thus, "it is for Congress to determine how far * * * appellate jurisdiction shall be given." *Daniels* v. *Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1866); see, *e.g.*, *United States* v. *Dickinson*, 213 U.S. 92, 98 (1909) (observing that, in 1891, "the only existing method by which a decision of [this] Court could be obtained on a question of law arising in a criminal case not capital was upon certificate of difference of opinion by the judges of the Circuit Court"). There is no sound basis for construing the Inferior Tribunals Clause as a constraint on that power of Congress—let alone as requiring that petitioner be permitted to proceed in district court with her collateral attack on an evidentiary ruling of a court-martial.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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