No. 11-1395

In the Supreme Court of the United States

JOSHUA D. FRY, PETITIONER

v.

UNITED STATES OF AMERICA

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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QUESTION PRESENTED

Whether petitioner was subject to court-martial jurisdiction under Article 2(c), Uniform Code of Military Justice, 10 U.S.C. 802(c), notwithstanding a state court order that established a limited conservatorship over him at the time he enlisted.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-35a) is reported at 70 M.J. 465. The opinion of the United States Navy-Marine Corps Court of Criminal Appeals (Pet. App. 36a-49a) is unreported but is available at 2011 WL 240809.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on February 21, 2012. The petition for a writ of certiorari was filed on May 21, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, pleaded guilty before a general court-martial to fraudulent enlistment, in violation of Article 83, Uniform

Code of Military Justice (UCMJ), 10 U.S.C. 883; two specifications of being absent without leave, in violation of Article 86, 10 U.S.C. 886; and four specifications of possessing child pornography, in violation of Article 134, 10 U.S.C. 934. He was sentenced to a bad conduct discharge, confinement for four years, and forfeiture of all pay and allowances. The Convening Authority approved the sentence, but suspended confinement in excess of 12 months. The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. Pet. App. 36a-49a. The United States Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 1a-35a.

1. In 2006, when petitioner reached the age of 18, his grandmother petitioned a California probate court to establish a limited conservatorship over him. That petition cited, *inter alia*, petitioner's previously diagnosed autism, arrest record, and impulsivity. Pet. App. 3a-4a, 38a. The record indicates that petitioner has a "high functioning variety of autism." *Id.* at 4a n.2. After an uncontested hearing, the probate court entered an order that restricted petitioner's ability to, and gave the grandmother the power to, choose a residence, access confidential papers and records, contract, give or withhold medical treatment, and make all decisions concerning petitioner's education. *Id.* at 4a.

Shortly thereafter, petitioner left California to attend a Colorado school for adolescents with psychiatric, emotional, or behavioral problems. Pet. App. 3a. When petitioner was 20 years old, he returned to California from the Colorado school. *Id.* at 4a.

Petitioner then contacted a Marine Corps recruiter, whom he had first met when he was 16 years old, and enlisted in the Marines. Pet. App. 3a-4a. Petitioner passed the Armed Services Vocational Aptitude Battery,

certified that he understood the terms of his enlistment, and obtained his social security card and his birth certificate from his grandmother. *Id.* at 4a. Although petitioner was still under the limited conservatorship, and although his grandmother voiced reservations, she did not take action to stop or nullify petitioner's enlistment; indeed, she attended his graduation ceremony. *Id.* at 5a, 17a n.9.

Petitioner underwent basic training and received pay and allowances. Petitioner initially had behavioral problems in basic training: for example, he stole peanut butter packets and hid them in his sock, he urinated in his canteen (apparently because he did not understand that he could seek permission to use the restroom), and he refused to eat. Pet. App. 4a-5a, 40a. During these struggles, petitioner visited the medical staff and disclosed that he had autism. A medical officer confirmed the diagnosis with petitioner's grandmother and told her that petitioner would be sent home. But petitioner requested to return to training and was found medically fit to do so. *Id.* at 5a. Petitioner completed basic training without further incident. *Ibid.*

Petitioner was assigned to the School of Infantry at Camp Pendleton, California. Between May and June 2008, petitioner was absent twice without authority from his unit. He also downloaded images of child pornography to two cell phones and two laptop computers. Pet. App. 5a; Gov't CAAF Br. 4.

2. a. Military authorities initiated court-martial proceedings against petitioner. Petitioner filed a pretrial motion to dismiss the charges for lack of personal jurisdiction on the ground that his enlistment was void because he lacked the capacity to enlist. Gov't CAAF Br. 4. At a hearing, a government psychologist testified

that petitioner more likely than not understood the significance of his enlistment, whereas a defense psychologist testified that petitioner lacked the capacity to understand the significance of enlisting. Pet. App. 15a.

The military judge denied the motion, holding that the court-martial had personal jurisdiction over petitioner under UCMJ Article 2(c), 10 U.S.C. 802(c).[1] Pet. App. 14a. The military judge found that petitioner was mentally competent when he enlisted and that he had the capacity to understand the significance of his enlistment. *Ibid.* Although acknowledging that petitioner had been diagnosed as suffering from obsessive compulsive symptoms and impulsivity problems, the court relied on the evidence that petitioner passed the entrance battery test, largely and ultimately conformed his conduct to the requirements of training, and overcame initial difficulties to complete training successfully without further incident. *Id.* at 14a-17a. The military judge further found that the state court conservatorship order did not create a presumption that petitioner was incom-

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[1] Article 2(c) states:

> Notwithstanding any other provision of law, a person serving with an armed force who—
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
>
> (3) received military pay or allowances; and
>
> (4) performed military duties;
>
> is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

petent or lacked the capacity to understand his enlistment. *Id.* at 17a.

b. The NMCCA affirmed. Pet. App. 36a-49a. It ruled that the state conservatorship order did not adjudicate petitioner to be incompetent, extinguish his right to contract, or mean that he lacked the capacity to understand the significance of his enlistment. *Id.* at 46a-48a. Based on the record as a whole, the NMCCA concluded that petitioner was legally competent and had the capacity to understand his enlistment, and that the court-martial therefore had jurisdiction over him pursuant to Article 2(b) and 2(c). *Id.* at 48a-49a.

c. On discretionary review, the CAAF affirmed by a 3-2 decision. Pet. App. 1a-35a.

The CAAF first held that federal law, not state law, determines whether a court-martial has jurisdiction over a person. Pet. App. 6a-7a (citations omitted). The CAAF expressed doubt that the full-faith-and-credit statute, 28 U.S.C. 1738,[2] was intended to import state law to determine the validity of a military enlistment contract. Although the CAAF believed that question to be relevant for purposes of Article 2(b), the CAAF found it "unnecessary" to resolve here because it considered only whether petitioner was subject to court-martial jurisdiction under Article 2(c). Pet. App. 7a.

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[2] Section 1738 provides, in pertinent part, that the "[a]cts, records and judicial proceedings" of any State "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Section 1738 generally requires a federal court to "give the same preclusive effect to a state-court judgment as another court of that State would give." *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 282 (2005) (citation omitted).

The CAAF explained that the "notwithstanding" clause in Article 2(c) indicates that Article 2(c) supersedes all other laws, state or federal, with respect to the enlistment inquiry. Pet. App. 9a. In light of the "distinctively federal character" of the servicemember-military relationship, the CAAF held that the military judge was not bound by the California court order of limited conservatorship, "even assuming it was directly on point." *Ibid.* Rather, it held, the military judge was required to review all of the evidence, including the conservatorship order, to determine whether the requirements of Article 2(c) were satisfied. *Ibid.*

The CAAF then stated that the "only seriously contested issue" was whether petitioner was mentally competent within the meaning of prong (2) of Article 2(c). Pet. App. 10a. The CAAF noted that it was undisputed that petitioner performed military duties and accepted pay and allowances, thereby satisfying prongs (3) and (4) of Article 2(c). *Id.* at 10a n.7. The CAAF recognized that the voluntariness requirement in prong (1) of Article 2(c) was distinct from the "mental competence" requirement in prong (2), but it further recognized that mental-competence evidence showing that petitioner could understand the significance of enlisting could also show that he "submitted voluntarily to military authority." *Id.* at 11a-12a. The CAAF also found no evidence that petitioner enlisted due to coercion or duress. *Id.* at 11a.

The CAAF concluded that the military judge's mental competency ruling was not clearly erroneous. Pet. App. 12a-18a. Although the CAAF acknowledged that the military judge may have overstated things by saying that all of the evidence pointed to the same result, it determined that, "when reviewed as a whole, the military

judge's ruling indicates that he considered contrary evidence and ultimately found in the face of conflicting views that the evidence better supported a finding that [petitioner] was mentally competent and acted voluntarily." *Id.* at 17a-18a. In rejecting the claim of impulsivity, the CAAF pointed to the fact that petitioner "largely (and ultimately) managed to conform his conduct to the requirements of the law (and orders and directives) throughout recruit training," and the fact that petitioner passed the entrance battery test and "overcame his initial struggles and successfully completed training without further negative reviews." *Id.* at 16a-17a. The CAAF also agreed with the military judge that the California probate court order did not support "a presumption, much less a finding, that for the purposes of Article 2, UCMJ, [petitioner] did not have the capacity to understand the significance of his enlistment." *Id.* at 17a (citing Cal. Prob. Code § 1801(d) (West 2011)).

Judge Baker, joined by Judge Erdmann, dissented. They agreed with the majority that the enlistment issue was a matter of federal law alone, so they did not address the application of Section 1738. Pet. App. 24a-26a & n.4. But they also believed that the military judge's ruling that petitioner's enlistment was voluntary was erroneous, arguing, *inter alia*, that the military judge "abused his discretion in analyzing the facts." *Id.* at 33a; see *id.* at 26a-35a.

ARGUMENT

Petitioner contends (Pet. 12-20) that the military courts erred in concluding that the court-martial had personal jurisdiction over him pursuant to UCMJ Article 2(c). In particular, he claims that those courts failed to give the state court conservatorship order, which he claims showed that he lacked the capacity to contract

and thus to enlist in the military, "full faith and credit" pursuant to 28 U.S.C. 1738. The CAAF correctly concluded that the state court order was not binding on the military judge and that the military judge did not err in making the factbound determination that petitioner was subject to court-martial jurisdiction under UCMJ Article 2(c). This Court should not disturb the CAAF's decision, which involves a question "peculiar to the military branches." *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976). The CAAF's decision does not conflict with any decision of this Court or of any court of appeals. Further review of the CAAF's decision is therefore unwarranted.

1. a. The CAAF correctly held that a military court is not bound by a state court order of limited conservatorship for purposes of the Article 2(c) inquiry. The Constitution grants Congress authority to "raise and support Armies" and to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 12, 14. That includes the authority to regulate the conduct of members of the armed forces under the UCMJ. See *Solorio* v. *United States*, 483 U.S. 435, 441 (1987).

Article 2 sets forth the requirements for making a person subject to the UCMJ, such that a court-martial may exercise personal jurisdiction over that person. Article 2(b) provides that "[t]he voluntary enlistment of any person who has the capacity to understand the significance of enlisting" subjects that person to court-martial jurisdiction. 10 U.S.C. 802(b). Article 2(c) states that "[n]otwithstanding any other provision of law, a person serving with an armed force" is subject to court-martial jurisdiction if he:

> (1) submitted voluntarily to military authority;
>
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;[3]
>
> (3) received military pay or allowances; and
>
> (4) performed military duties.

10 U.S.C. 802(c). Where its conditions are met, Article 2(c) provides for court-martial jurisdiction "regardless of other regulatory or statutory disqualification." *United States* v. *Phillips*, 58 M.J. 217, 220 (C.A.A.F.) (quoting S. Rep. No. 197, 96th Cong., 1st Sess. 122-123 (1979)), cert. denied, 540 U.S. 880 (2003).

Governed by the Constitution and the UCMJ, the relationship between a servicemember and the military is fundamentally a federal question. See, *e.g.*, *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305 (1947) ("Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces."). State mental competency law or orders therefore do not bind a military court when it conducts the Article 2(c) enlistment inquiry. As the CAAF explained, the validity of a military enlistment should not depend on the State where the enlistment occurred or state laws regarding

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[3] Section 504(a) of Title 10 of the United States Code states that "[n]o person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force." The statutory term "insane" refers to an "idiot, lunatic, insane person, and person non compos mentis." 1 U.S.C. 1.

Section 505(a) of Title 10 of the United States Code authorizes the enlistment of persons "who are not less than seventeen years of age nor more than forty-two years of age."

competency to contract. Pet. App. 6a-9a. Indeed, the two dissenting judges agreed on that fundamental point of law. *Id.* at 24a-25a ("It would make little sense for the interpretation of an enlistment contract to depend on the fortuity of where the soldier happened to be when the enlistment contract was signed."). Nothing in the statutory scheme of military justice suggests that Section 1738, the full-faith-and-credit statute, requires that state court orders govern the Article 2(c) inquiry.

At the same time, the CAAF's ruling that the state court conservatorship order was not binding for purposes of the Article 2(c) inquiry was not tantamount to a ruling that the order was irrelevant. To the contrary, the CAAF expressly recognized that the military judge was "required to review the relevant evidence, including the [conservatorship] order," to determine whether petitioner was subject to court-martial jurisdiction under Article 2(c). Pet. App. 9a.[4]

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[4] Even if Section 1738 applied here, the state court order establishing a limited conservatorship did not render petitioner ineligible to enlist under Article 2(c)(2) as a matter of law. Under California Probate Code Section 1801(d), "[t]he conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator." Pet. App. 47a (quoting Cal. Prob. Code § 1801(d)). Because petitioner is not presumed to be incompetent under California law, the state court order itself does not establish petitioner as *non compos mentis*—the relevant standard here (see pp. 12-13, *infra*). And it does not appear that the state court order completely extinguished petitioner's right to contract, but rather made it subject to his grandmother's right of rescission. See Pet. App. 39a ("[Petitioner's] right to contract was not extinguished under California law."); *id.* at 46a ("California did not determine that [petitioner] was incapable of managing his own affairs, incompetent, or insane. [Petitioner] retained the right to contract even under Cali-

b. The CAAF's treatment of the state court conservatorship order does not conflict with any decision of this Court or any court of appeals. Petitioner notes that some courts have considered a State's mental competency ruling on the question whether a person is disqualified from possessing a firearm under 18 U.S.C. 922(g)(4). Pet. 17 (citing *United States* v. *Whiton*, 48 F.3d 356, 358 (8th Cir.), cert. denied, 516 U.S. 886 (1995); *United States* v. *Giardina*, 861 F.2d 1334, 1335 (5th Cir. 1988); *United States* v. *B.H.*, 466 F. Supp. 2d 1139 (N.D. Iowa 2006)). But even those courts have concluded that the Section 922(g)(4) determination, though informed by the state court order, is ultimately a federal question. *E.g.*, *Whiton*, 48 F.3d at 358 ("[W]e may seek guidance from state law in resolving that federal question.") (quoting *Giardina*, 861 F.2d at 1335). Petitioner, citing two cases, also contends that "the CAAF is the only circuit known to have held it is unfettered by the conservatorship judgments of California's courts." Pet. 19. But the CAAF is also the only court to consider such state orders in the context of Article 2(c), which governs the special relationship between a servicemember and the armed forces. In any event, as noted above (p. 10, *supra*), the CAAF's decision does not permit military courts to ignore a state court conservatorship order for purposes of the Article 2(c) inquiry; a state court order is entitled to appropriate evidentiary weight. Pet. App.

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fornia law, even if the conservator's right to seek revision or rescission of (e.g., void) such contract in the Probate Court stood to possibly limit his right."). Because the order did not otherwise preclude petitioner's enlistment into the military, and because his conservator did not act to stop or undo petitioner's enlistment (see p. 3, *supra*), the order itself does not resolve the Article 2(c) question even if it were entitled to full faith and credit in the military enlistment context.

9a. Thus, no conflict exists between the decision below and any of the cases cited by petitioner.

2. a. The CAAF properly concluded that the military judge did not clearly err in finding petitioner mentally competent at the time of his voluntary enlistment, and thus subject to court-martial jurisdiction, within the meaning of Article 2(c).[5] Article 2(c)(2) refers to the mental competency requirements of 10 U.S.C. 504. Section 504(a), in turn, bars the enlistment of a person who is "insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony." The statutory term "insane" refers to an "idiot, lunatic, insane person, and person non compos mentis." 1 U.S.C. 1. A person *non compos mentis* is "incapable of handling her own affairs or unable to function [in] society." *Smith-Haynie* v. *District of Columbia*, 155 F.3d 575, 580 (D.C. Cir. 1998) (alteration in original); see also *Webster's Third New Int'l Dictionary* 1536 (1993) (defining *non compos mentis* as "wholly lacking mental capacity to understand the nature, consequences, and effect of a situation or transaction").

Competency is a question of fact subject to clearly erroneous review. See, *e.g.*, *Demosthenes* v. *Baal*, 495 U.S. 731, 735 (1990) (describing competency ruling as factual finding); *United States* v. *Barreto*, 57 M.J. 127, 130 (C.A.A.F. 2002) (competency to stand trial is fact

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[5] As the CAAF determined (Pet. App. 11a), with respect to petitioner's enlistment, "[t]here is no evidence of duress or coercion in this case." Accordingly, if petitioner is deemed to have been mentally competent, so as to possess the mental capacity to understand the significance of his enlistment, that also tends to establish that he "submitted voluntarily to military authority" as required under Article 2(c)(1). *Id.* at 12a. The other elements of Article 2(c) were not in dispute below.

question); see also *Anderson* v. *City of Bessemer*, 470 U.S. 564, 573-574 (1985) (fact questions subject to clearly erroneous review).

At the court-martial, the government presented expert testimony that petitioner was mentally competent when he enlisted. The government also presented other evidence showing that he was capable of understanding and performing military duties, including that petitioner passed the entrance battery test, ultimately conformed his conduct to the requirements of training, and overcame initial difficulties to complete training successfully. See Pet. App. 14a-17a. Although petitioner presented contrary evidence, including his own expert's testimony and the state conservatorship order, the military judge's acceptance of the government's evidence over petitioner's evidence was not clearly erroneous. See *Anderson*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

In any event, that factbound evidentiary determination does not warrant this Court's review. That is particularly true where, as here, three courts—the court martial and two military appeals courts—have concluded that petitioner was mentally competent at the time of his enlistment. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts.") (quoting *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)).

b. Petitioner contends (Pet. 14-16) that the CAAF's conclusion that he was subject to court-martial jurisdiction under Article 2(c) conflicts with dictum in this Court's decision in *In re Grimley*, 137 U.S. 147 (1890). Although it upheld court-martial jurisdiction over a

servicemember who contended that his enlistment was void because he had misrepresented that he was within the statutory age limits, the *Grimley* Court stated such jurisdiction may not apply "where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations." *Id.* at 152-153. Petitioner specifically argues that the decision below, in conflict with that proviso, "effectively distills mental disqualification for enlistment to criminal insanity alone." Pet. 15. To the contrary, the CAAF expressly acknowledged the relevant passage from *Grimley* and recognizes that Article 2(c)(2)'s mental-competence requirement excludes persons *non compos mentis* and persons lacking the capacity to understand the significance of enlistment. Pet. App. 13a-14a. Nowhere in its opinion does the CAAF mention, let alone apply, a criminal-insanity standard.

3. Finally, the question presented is unlikely to recur with any frequency with respect to individuals such as petitioner. By recent regulation (post-dating petitioner's enlistment), the Department of Defense's medical standards for enlistment exclude individuals with serious learning, psychiatric, and behavioral problems, including autism spectrum disorders. See *Department of Def. Instruction No. 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, Enclosure 4, para. 29(c) (Sept. 13, 2011), http://www.dtic.mil/whs/directives/corres/pdf/613003p.pdf. That regulation should help to prevent the future enlistment of individuals who, like petitioner, suffer from autism and related disorders.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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