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,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. Under This Court's Precedents, New Issues Are Precluded but Not New Arguments.

The issues pressed by petitioner Elizabeth and passed upon by the court below were whether Article 6b waives sovereign immunity and whether sovereign immunity bars any claim seeking to enjoin the federal government from violating rights protected by the Constitution and statutes of the United States. Br. of Pet'r-Appellant at 4, E.V. v. Robinson, No. 16-16975 (9th Cir. Feb. 10, 2017). The respondent repeatedly but incorrectly asserts that Elizabeth failed to raise these issues below. Br. in Opp. 12, 16, and 18.

Elizabeth raised not only the issues decided below but used many of the same arguments pressed here. For instance, Elizabeth argued below, "No federal court at any level has ever applied sovereign immunity to dismiss a challenge to the constitutionality of a court-martial ruling. . . . None of these non-habeas corpus cases were dismissed because of sovereign immunity." Br. of Pet'r-Appellant, No. 16-16975, at 30.

The only new argument presented by Elizabeth's petition relies upon the Inferior Tribunals Clause and this Court may properly consider this new argument. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). The cases cited by the

respondent do not preclude new arguments on the same issue.

Even if the Inferior Tribunals argument were a new issue that was not raised below, this Court may decide it. When faced with a constitutional structural integrity challenge that is "neither frivolous nor disingenuous" this Court may hear the claim to protect "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Freytag v. Commissioner*, 501 U.S. 868, 879 (1991) (quoting *Glidden v. Zdanok*, 370 U.S. 530, 536 (1962)). This is the case here.

2. The Respondent Ignores the *Larson* Holding.

The respondent's brief in opposition ignores the holding in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). This Court signaled its *Larson* holding with the words "we hold." "We hold that if the actions of an officer *do not conflict* with the terms of his valid statutory authority, then they are the actions of the sovereign, *whether or not they are tortious* under general law . . ." *Larson*, 337 U.S. at 695 (emphasis added). As explained in Elizabeth's petition, the *Larson* plaintiff did not allege any *conflict* with statutory authority, instead the claim was that *following* the statute would be tortious.[1]

[1] Respondent attempts to characterize his privilege ruling as an "error in the exercise of" rather than a "conflict with" the terms of his statutory authority. Br. in Opp. 13-14. The terms of his authority under Mil. R. Evid. 513 preclude review and disclosure of privileged communications unless specific terms are satisfied. Elizabeth's Complaint alleges those terms were not satisfied and the respondent acted *ultra vires*. Characterizing the respondent's

The respondent quotes *Larson*'s observation that jurisdiction of a court does not disappear because a court makes a wrong decision.[2] Br. in Opp. 14. He ignores the preceding sentence that limits the quoted observation to situations where the challenged decision made by the officer is unrelated to the "terms of his valid statutory authority." *Id.* at 695. In *Larson*, the alleged tortious action was unrelated to the officer's authority, and the plaintiff did not allege any violation of any rule or statute.

In this case, the respondent no had authority to seize, review and distribute Elizabeth's privileged psychotherapy records except in compliance with Mil. R. Evid. 513.[3] The respondent's decision related to the

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ruling as an error in the exercise of this authority would effectively nullify the holding in *Larson*.

[2] Again, the respondent conflates jurisdiction with sovereign immunity. The respondent's jurisdiction is not at issue. Whether his ruling violated the terms of his authority is at issue. A federal district court's ruling within its jurisdiction is still reviewable by the circuit court and this Court. The respondent is using sovereign immunity to preclude any judicial review of rulings that conflict with the terms of his authority.

[3] The inapplicability of characterizing respondent's ruling as an error in the exercise of authority is best illustrated by an example. The respondent argues that since he had authority to order review and distribution of Elizabeth's privileged records, he may exercise that authority even though the terms of Mil. R. Evid. 513 limits review and distribution to certain specified circumstances that are not present in this case. Using the respondent's logic, since a military judge has authority to impose a life sentence for certain UCMJ offenses (murder, rape, espionage, mutiny and others), a military judge has authority to impose a life sentence for absence without leave (for less than three days) even though the maximum punishment for that offense is limited to one month.

terms of authority granted by Mil. R. Evid. 513. Elizabeth did not allege the respondent military officer tortiously invaded her privacy, she alleged he violated Mil. R. Evid. 513. Elizabeth has alleged violations that fit within *Larson*'s exception to sovereign immunity.

This Court recognized that the applicability of sovereign immunity depends "upon the decision [the court] ultimately reaches on the merits." *Larson*, 337 U.S. at 690. The respondent argues that circuit courts' application of this principal in *Washington Legal Foundation v. U.S. Sentencing Commission*, 89 F.3d 897 (D.C. Cir. 1996) (opinion by J. Ginsburg) and *Mashiri v. Dep't of Educ.*, 724 F.3d 1028 (9th Cir. 2013) is not relevant to this case because neither involved the Uniform Code of Military Justice ("UCMJ") or Military Rules of Evidence. Br. in Opp. 14, 15 n.*. The respondent fails to provide any reason the UCMJ or the Military Rules of Evidence should be treated differently than any other statute or rule.

This Court recognized limits on sovereign immunity. *Larson*, 337 U.S. at 703 ("Under our constitutional system, certain rights are protected against government action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions."). In *Larson*, the plaintiff was not denied all relief because he could still obtain money damages. *Id.* at 704. Unlike the *Larson*

The respondent's order to review and distribute Elizabeth's therapy records is no mere error in the exercise of his authority, it exceeds his authority because it exceeds the limits of Mil. R. Evid. 513.

plaintiff, Elizabeth cannot recover damages and she has exhausted her rights within the military justice system. Applying sovereign immunity to Elizabeth, unlike the *Larson* plaintiff, would deny her all relief.

3. The Respondent Misinterprets and Misapplies *Councilman.*

The respondent's analysis of *Schlesinger v. Councilman*, 420 U.S. 738 (1975) indicates a misunderstanding of this Court's ruling. In *Councilman*, the district court had jurisdiction under 28 U.S.C. § 1331, the same statute that grants Elizabeth's district court jurisdiction. The *Councilman* Court rejected the government's argument that 10 U.S.C. § 876 ("Article 76") removed jurisdiction. The Court found Article 76's language did not remove jurisdiction because repeals by implication are disfavored when repeal would remove an available remedy. *Id.* at 752. Article 6b's grant of jurisdiction to the military courts of criminal appeals has no language indicating any intent to preclude judicial review or to repeal its waiver of sovereign immunity. Applying Article 6b as a limited waiver of sovereign immunity would be a disfavored repeal by implication.

As discussed in Elizabeth's brief before the Ninth Circuit, no federal court at any level has ever applied sovereign immunity to dismiss a collateral challenge to a court-martial ruling. Br. of Pet'r-Appellant, No. 16-16975, at 29-31 (citing *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981); *Center for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389, 396 (D. Md. 2013); *Councilman*, 420 U.S. at 753). None of these non-habeas corpus cases were dismissed because

of sovereign immunity. In *Councilman*, the Court created the doctrine of "equitable jurisdiction" to preclude Capt. Councilman's collateral challenge to his court-martial. If sovereign immunity were applicable to courts-martial, the Court could have more easily applied sovereign immunity instead of creating and applying a new doctrine. Sovereign immunity did not and does not apply.

Further, applying the *Councilman* "equitable jurisdiction" doctrine to this case requires judicial review of Elizabeth's claims. In *Councilman*, the Court found that although jurisdiction existed it would be inequitable to exercise jurisdiction because (1) Capt. Councilman did not exhaust his remedies within the military justice system,[4] and (2) Capt. Councilman was an accused servicemember on active duty and not a civilian.[5] This Court concluded that nothing in Capt. Councilman's case outweighed the importance of exhausting his remedies within the courts-martial system. *Id.* at 761. In this case, Elizabeth has fully exhausted her remedies within the courts-martial system, and she is a civilian witness/victim and not an accused in the military.

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[4] Capt. Councilman may have been acquitted at courts-martial or have any conviction reversed on appeal within the courts-martial system. *Id.* at 754.

[5] *Id.* at 759 (discussing whether under Article I Congress could allow the military to interfere with civilians' liberties, calling depravation of civilians' liberties "especially unfair.").

4. The Respondent Argues the Inferior Tribunals Clause Does Not Require This Court's Supervision But Fails to Offer Any Alternative Interpretation of the Clause.

The respondent argues that the Inferior Tribunals Clause does not require this Court's ultimate supervision over Article I tribunals because the Constitution gives Congress the power to except and regulate Supreme Court jurisdiction. Br. in Opp. 18-19. The respondent's argument fails for several reasons.

The respondent does not offer any interpretation of the Inferior Tribunals Clause. He simply argues that it applies only to Article III courts[6] and that even to Article III courts this Court has permitted restrictions on this Court's jurisdiction.[7] Elizabeth has acknowledged this Court has never interpreted or applied the meaning of "inferior" in the Inferior Tribunals Clause.[8] Respondent has offered no reason why or how the phrase "such Exceptions . . . as the Congress shall make" erases the requirement of inferiority.

The respondent also relies upon unused cases although more recent case law is available. The cases cited by the respondent, *Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1866) and *United States v. Dickinson*, 213 U.S. 92, 98 (1909), were not cited by this Court in its recent decisions concerning

[6] Br. in Opp. 18-19.

[7] *Id.* 19.

[8] Pet. 9, 30-32.

jurisdiction stripping. The language from *Dickinson* quoted by the respondent was not the Court's holding. It was simply an explanation of the statutory scheme that was put into effect two years prior to the 1891 law that was being interpreted by the Court. The language quoted by the respondent describes the significant jurisdictional restrictions enacted to reduce this Court's caseload. Before such language was challenged, Congress changed the law and expanded the Court's jurisdiction so that constitutional challenges were no longer excepted. The Court never ruled upon the constitutionality of the quoted language.

The Court's more recent cases considering the extent to which the Constitution permits Congress to limit this Court's jurisdiction are more nuanced. *See generally Patchak v. Zinke*, 138 S. Ct. 897 (2018) (plurality opinion).[9] Although the Court has not expressly banned Congress from removing certain claims from judicial review, the Court has indicated a "serious constitutional question" would arise if statutes were construed to deny all judicial review. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (citing *Johnson v. Robison*, 415 U.S. 361, 366-367 (1974)); *Yakus v. United States*, 321 U.S. 414, 433-44 (1944); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). Congress may withhold or restrict

[9] *Patchak* also discusses and implicates sovereign immunity. The concurring opinion would have held that Congress withdrew the waiver previously granted and would have avoided ruling upon jurisdiction. Sovereign immunity and jurisdiction are not the same concept and do not have the same underpinnings. The respondent's arguments treat the two as interchangeable.

jurisdiction at its discretion, "provided it be not extended beyond the boundaries fixed by the Constitution." *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922).

As discussed in Elizabeth's petition (Pet. 18-27), the Court has avoided this serious constitutional question by applying the Presumption of Judicial Review Canon and the Constitutional Avoidance Canon. The respondent does not address or even acknowledge these canons. The Court should apply these canons to find that Elizabeth has a right to judicial review.

Although the Constitution gives Congress the authority to grant and regulate jurisdiction, Congress cannot grant jurisdiction beyond the limits set by the Constitution. *Marbury v. Madison*, 5 U.S. 137 (1803). Likewise, although the Constitution gives Congress the authority to make exceptions to this Court's jurisdiction, Congress may not except jurisdiction in violation of constitutional limits such as the Inferior Tribunals Clause or the inferior courts requirement in Article III.[10]

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[10] On August 12, 2019, five senators filed a brief amici curiae in the case of *New York Rifle & Pistol Association v. City of New York*, No. 18-280, docketed September 6, 2018, *available at* https://www.supremecourt.gov/DocketPDF/18/18-280/112010/20190812151259076_18-280bsacSenatorSheldonWhitehouse.pdf. In their brief, the five senators threatened to "restructure[ ] [the Court] in order reduce the influence of politics." Br. Amici Cur. at 18 (link to brief at. Many assumed the senators intended to threaten to "pack" the Court; however, there are other ways to accomplish congressional interference with the judicial department. Hypothetically, Congress could make exceptions to this Court's jurisdiction to review decisions of the circuit courts of appeals and could create a "Superior Court of Appeals" that could

The respondent argues that Congress *could have* limited this Court's jurisdiction to review Article I courts-martial. Br. in Opp. 19. In this case, Congress did not limit jurisdiction. The jurisdiction of this Court and the lower federal courts over Elizabeth's claims has not and cannot be questioned. The issue here is whether sovereign immunity precludes review of the Article I military tribunals.

5. Civilian Distrust Of and Control Over the Military.

Implicit in the respondent's arguments is that this Court's precedents do not apply, or at least apply with less force, to courts-martial. He argues that *Larson* and the circuit court cases applying *Larson* are not applicable because they do not apply the UCMJ or Military Rules of Evidence. Br. in Opp. 14, 15 n.*. This implicit argument ignores this Court's precedents and the history of our nation and Constitution.

Our nation's tradition is to strongly resist any military intrusion into civilian affairs. *Laird v. Tatum*, 406 U.S. 1, 15-16 (1972). This tradition has deep roots in our history and was expressed in the Third Amendment's explicit prohibition against quartering soldiers in private homes. *Id.* The Constitution

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grant *certiorari* to the circuit courts' decisions. It could further provide that this Court has no jurisdiction to review the Superior Court of Appeals' decisions. Surely such an arrangement would violate the Constitution's requirement that the inferior courts ordained and established by Congress remain inferior to this Court.

The same is true if Congress were to put inferior Article I tribunals beyond review and supervision of this Court.

requires civilian control of the military. *Id.* These provisions' philosophical underpinnings explain the traditional insistence on limitations on the military. *Id.* This Court held that federal courts are fully empowered to consider claims of military intrusions, and "there is nothing in our Nation's history or in this Court's decided cases . . . that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied. *Id.*; *see also Id.* at 16-30 (Douglass, J. dissenting) (detailing the history of and arguing for civilian supremacy over military power); Br. of Pet'r-Appellant, No. 16-16975, at 42-44; Reply Br. of Pet'r-Appellant, No. 16-16975, at 20-21.

Historically, one of the most important roles of civil courts has been to protect people from military discipline or punishment who have been placed beyond its reach by the Constitution or laws enacted by Congress. *Winters v. United States*, 89 S. Ct. 57, 59 (1968) (Douglass, J., in chambers). Service members often challenge military decisions in the civil courts. *Id.* It is the function of the courts to make sure that service members are "treated as honored members of society whose rights to not turn on the charity of a military commander." *Id.* at 60.

Elizabeth is a civilian not subject to military discipline or jurisdiction. The UCMJ is not intended to punish or discipline witnesses. Elizabeth's Article 6b right to be treated with respect and dignity cannot turn on the charity of a military officer. The respondent military officer, detailed as a judge, ordered the review and distribution of psychotherapy records that are

protected by a privilege recognized by this Court and Mil. R. Evid. 513. The respondent's unlawful order was reviewed only by other military officers. If Elizabeth cannot get judicial review of her rights, the military would be free to continue ignoring the statutory rights of military sexual assault victims. Article 6b would be a cruel and illusory promise, and the sovereign immunity canon of construction would condone the irresponsible and arrogant use of military force.

CONCLUSION

For the foregoing reasons and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted.

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