No. 18-454

In The Supreme Court of the United States

DEREK L. DINGER, PETITIONER,

v.

UNITED STATES, RESPONDENT.

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

BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AND ITS VICE PRESIDENT, RACHEL VANLANDINGHAM, AND SOUTHWESTERN LAW STUDENT OLGA KUZMINA, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

After petitioner's offenses, the Court of Appeals for the Armed Forces overruled two precedents without fair warning and held that a court-martial can sentence retired Navy and Marine Corps personnel to a dishonorable discharge. Did it violate due process to apply the new rule to him? *See Bouie v. City of Columbia,* 378 U.S. 347 (1964).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

Miscellaneous

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioner.
The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers.

Professor Rachel E. VanLandingham, Lt Col, USAF (ret.), who served as a judge advocate while in uniform, is the current Vice President of NIMJ, and teaches criminal law and national security law at Southwestern Law School.

Amicus Olga Kuzmina is an upper-division J.D. candidate at Southwestern Law School with extensive academic interest in national security legal matters.

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[1] All parties have received timely notice and have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel have made a monetary contribution intended to fund the preparation or submission of this brief.

Amici have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in an appropriate and consistent interpretation of the fair warning requirement implicit in the Due Process Clause. This brief serves to underscore the principle that military tribunals cannot retroactively apply new and expansive interpretations of the criminal law without providing the minimum fair warning required by the Due Process Clause.

SUMMARY OF THE ARGUMENT

Due process, a pillar of U.S. criminal law, was missing in action in Petitioner's case. The extant facts involve imposition of a uniquely military punishment on a long-retired member of the armed forces without anything resembling reasonable notice that he was subject to such special punishment. While this Court has long recognized the U.S. military as a "specialized society separate from civilian society," *Parker v. Levy,* 471 U.S. 733, 743 (1974) thus allowing due process to operate differently in the military, *Weiss v. United States,* 510 U.S. 163, 177 (1994), such deference does not justify the stark due process violation committed by the lower court in Petitioner's case.

First, this brief elucidates why the Court of Appeals for the Armed Forces (CAAF) decision to subject Petitioner to punishment in the form of a dishonorable discharge clearly violated his right to due process under the Fifth Amendment. As this Court explained in *Bouie*, a legislature cannot, without running afoul of the Ex Post Facto clause, enact a new crime and also try to apply that new

crime to past behavior. *Bouie v. City of Columbia,* 378 U.S. 347, 352-353 (1964). Similarly, applying the Fifth Amendment's guarantee of Due Process Clause, the *Bouie* Court held that an appellate court cannot interpret existing criminal law in ways that upend the settled understanding and then turn around and apply that new interpretation to misconduct that occurred under the previously-settled state law. *Id.* at 353 ("Unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids.")

Through its retroactive application of its new judicial interpretation of 10 U.S.C. § 6332 to Petitioner's past misconduct, CAAF did just that. At the time Petitioner committed the subject offenses, he was not subject to punishment in the form of a dishonorable discharge under then existing military precedent that CAAF itself recognized as settled law. *United States v. Dinger*, 77 M.J. 447, 452-453 (2018). Yet in Petitioner's own case, CAAF upended its almost three-decade-old understanding of 10 U.S.C. § 6332, one that comported with the plain text of the statute and applied its new about-face interpretation to Petitioner's misconduct. *Id.* at 453-454.

If CAAF can so easily side-step the Fifth Amendment, what prevents civilian appellate courts from doing the same in analogous situations? That is, CAAF's error in Petitioner's case is not simply a military law problem. The appellate court's error goes to the fundamental nature of due process, a right so axiomatic that this Court should zealously shield it from the blatant deterioration CAAF's decision wreaks, so that other appellate courts across

the country do not follow suit.[2]

Second, this brief demonstrates that context matters. Petitioner's misconduct occurred many years after his separation from the U.S. Marine Corps, long after he had become a civilian, accustomed to civilian law. As a civilian, he was no longer receiving the regular educational briefings about military criminal law that Congress has long mandated. This training is borne out of historical Congressional recognition that military criminal law is so special that those enlisted members subject to it must receive regular notice regarding its contents s*ee* 10 U.S.C. § 937 (2012). Any claim that Petitioner, long a civilian no longer accustomed to unique military law, was on reasonable notice that the military law governing his exposure to the most unique military punishment available could someday change and retroactively apply to him strains the concept of reasonableness past its breaking point. Foreseeability simply cannot be met by mere chance that a future court may decide to ignore *stare decisis* and upend decades of settled law, particularly in the context of military criminal law applying to civilians long retired from the military.

Finally, this brief draws this Court's attention to the fact that Congress knew that the highest military appellate court had taken dishonorable discharges off the table for retirees such as Petitioner. Though on notice of CAAF's earlier

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[2] This Court reaffirmed its jurisdiction to review CAAF's decisions and held that "the military justice system's essential character is judicial." *Ortiz v. United States,* 138 S. Ct. 2165, 2168 (2018). "They are bound, like any court, by the fundamental principles of law and the duty to adjudicate cases without partiality." *Id.*

precedents, Congress took no action to change or modify CAAF's interpretation of 10 U.S.C. § 6332, underscoring that no one, particular those sharing Petitioner's long-retired status, had fair warning of this sudden CAAF change of heart. The twenty-seven-year Congressional silence on the matter ratified CAAF's interpretation of 10 U.S.C. § 6332; this ratification confirms that the highest military appellate court's 1991 and 1992 decisions constituted straight-forward, settled law. A retiree such as Petitioner surely lacked fair warning that such settled law would abruptly change and retroactively apply to his conduct, conduct that had occurred under the pre-existing legal regime under which he was not exposed to the most stigmatizing military punishment under military law.

ARGUMENT

I. CAAF DEPRIVED PETITIONER OF DUE PROCESS BY OVERRULING ITS PRECEDENTS AND RETROACTIVELY SUBJECTING PETITIONER TO SPECIAL PUNISHMENT THAT HE WAS NOT SUBJECT TO AT THE TIME HE COMMITTED WRONGFUL ACTS.

In *Bouie*, this Court held that "due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue." 378 U.S. at 353-354. The test of whether or not judicial interpretations of criminal law run afoul of due process in this regard remains foreseeability. *Rogers*

v. Tennessee, 535 U.S. 451, 462 (2001). This court has stated that in determining whether there is such fair disclosure, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997).

For example, this Court in *Rogers* rejected a defendant's claim that the Due Process Clause prohibited retroactive application of the Tennessee Supreme Court's decision to abolish the common law "year and a day rule" in prosecutions for homicide. 32 U.S. at 456-45. There, the court held that "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Id*. at 462 (*quoting Bouie* 378 U.S. at 354). This Court determined that the Tennessee Supreme Court's change to the law was not unexpected because the year and a day rule was "widely viewed as an outdated relic of the common law." *Id*. at 462-63. With regard to foreseeability, the *Rogers* Court noted that "existence of conflicting cases from other courts of appeals made review of [the] issue by [the] Court reasonably foreseeable." *Id*. at 484.

Unlike in *Rogers*, Petitioner did not receive anything close to the Court's requirement of fair warning that at the time he committed his offenses, his conduct could subject him to a dishonorable discharge. In 2003, long before he committed the subject offenses, Petitioner was honorably discharged and transferred to the Fleet Marine Corps Reserve. *See* 10 U.S.C. § 6330(b). Ten years later he was

further transferred to the retired list in accordance with 10 U.S.C. § 6331(a)(1). At the time he committed his offenses, 10 U.S.C. § 6332 provided (and still provides) in pertinent part "[w]hen a member of the naval service is transferred by the Secretary of the Navy to Fleet Marine Corps Reserve or from the Fleet Reserve to the retired list of the Regular Navy or the Retired Reserve; or [f]rom the Fleet Marine Corps Reserve to the retired list of the Regular Marine Corps or the Retired Reserve, *the transfer is conclusive for all purposes.* Each member so transferred is entitled, when not on active duty, to retainer pay or retired pay from the date of transfer in accordance with his grade and number of years of creditable service as determined by Secretary." (Emphasis added).

The highest military appellate court had already long decided, by the time Petitioner left active duty, that 10 U.S.C. § 6332 meant Petitioner was not subject to a dishonorable discharge. *United States v. Dinger*, 77 M.J. 447, 452 (2018). Specifically, in 1991, Allen, a retired Navy officer was convicted of violating the Federal Espionage Act, 18 U.S.C. §793(d), which subjected his retirement pay to forfeiture under 5 U.S.C. §8312. *United States v. Allen*, 33 M.J. 209, 215 (C.A.A.F. 1991). After Navy officials acted to reduce his pay grade, Allen appealed. The Court of Military Appeals (CMA)[3] (CAAF's previous name) found that because Allen was tried as a retired member, 10 U.S.C. § 6332 precluded the Navy from reducing his pay grade for his offences either by the court-martial or by operation of Article 58a, 10 U.S.C. § 858a. *Id.*

[3] Hereinafter referred to as CAAF.

at 217. In arriving at its holding, CAAF cited 10 U.S.C. § 6332 for the "long-standing proposition that a transfer of a servicemember to the retired list is conclusive in all aspects as to grade and rate of pay based on his years of service." *Id.* at 216. CAAF crystalized its interpretation of 10 U.S.C. § 6332 by noting that it was consistent with the Navy's historical practice of precluding any automatic reduction in a retiree's rank (and pay). *Id.* at 216. Consequently, the *Allen* decision made clear that 10 U.S.C. § 6332 precluded any punishment in the form of a reduction of rank or pay grade (and hence any punitive discharge), for offences committed by retired Navy enlistees such as Petitioner.

The following year CAAF decided *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992). There, the appellant was a retired U.S. Army sergeant who was sentenced to a bad-conduct discharge, confinement for three years, and reduction in rank for the offences committed while he was on active duty. *Id.* Pursuant to a plea agreement, the convening authority approved the sentence, except for the punitive discharge. *Id.* at 5. On appeal, CAAF reversed the service appellate court's approval of the reduction in rank, expressly relying on *Allen*. *Id.* at 12. In *Sloan*, CAAF went further than reliance and reinforced *Allen's* finding that a retiree's transfer to the retired list is conclusive regarding pay rate and grade; it found that "in addition to the statutory provision cited in *Allen* that uniquely applies to the Navy, there are other sound underpinnings of that decision." *Id.* at 11. CAAF expressly rejected the Government's argument that *Allen* should be overruled, and instead enlarged it by extending

Allen's holding to Army enlistees. *Id*. at 12.[4]

Allen and *Sloan*, decided in 1991 and 1992, respectfully, remained settled law until CAAF's decision in Petitioner's case. In the instant case, CAAF reinterpreted 10 U.S.C. § 6332 in a manner that reinstated punitive discharges as viable punishments for Marine and Navy retirees, overruling its own caselaw. In doing so, CAAF expressly acknowledged that the *Allen* and *Sloan* decisions firmly held that 10 U.S.C. § 6332 precluded imposition of a punitive discharge (of which dishonorable discharge is one type) for Petitioner's offenses; this acknowledgment underscores the notion that no fair warning had been provided to Petitioner. If CAAF thought its earlier decisions clearly precluded such punishment, it stands to reason that others such as Petitioner would reasonably rely on such precedential understanding as well. *Dinger*, 77 M.J. at 452-453.

CAAF's ultimate about-face in Petitioner's case was not reasonably foreseeable. For example, Congress took no action to revise or clarify 10 U.S.C. § 6332 after CAAF interpreted this provision as taking reductions in rank and hence punitive discharges off the table for retirees such as Petitioner through its 1991 and 1992 precedents. Indeed, the 27-year Congressional silence on the matter constituted a *de facto* ratification of CAAF's earlier interpretation of 10 U.S.C. § 6332. All

[4] On this point, it is critical to highlight that if a reduction in rank is disallowed because a retiree's pay grade at retirement is conclusive for all purposes, *a fortiori* all punitive discharges are also prohibited, because such discharges work to permanently remove rank and grade.

criminal defendants, civilian and military, should be able to rely on the due process principle that settled jurisprudential precedent, at least as to what constitutes substantive criminal conduct and potential punishment exposure at the time of their misconduct, is what will apply to their eventual prosecution.

Furthermore, unlike the situation in *Rogers*, there were no other appellate decisions or rulings that conflicted with or cast doubt on the "conclusive effect" of 10 U.S.C. § 6332. In other words, between the decisions in *Sloan* and *Allen* and Petitioner's CAAF decision, there was nothing to suggest that the law was "evolving" toward the conclusion reached by CAAF in Petitioner's case. Rather, CAAF's decision was an abrupt and sudden reversal of judicial interpretation that had been unquestioned for many years.

Additionally, the interpretation of 10 U.S.C. § 6332 given by CAAF in *Allen* and *Sloan* corresponds with the plain language of the statute; the interpretation announced by CAAF in Petitioner's case does not. Specifically, 10 U.S.C. § 6332 provides that when a member is transferred from active duty, "the transfer is conclusive for all purposes." The legislature's use of the words "conclusive" and "all purposes" do not, in and of themselves, suggest any qualification. The statute goes on to "entitle" each transferred member to "retired pay from the date of transfer in accordance with his grade and number of years of creditable service." Here again, contrary to the new and startling reversal in CAAF's troubling and analytically-opaque decision, the statutory language does not suggest any qualification or condition relating to the stated entitlement. In this

regard, the language of the statute clearly shows that the retirement pay grade to which the member is entitled arises from member's preceding "credible service," irrespective of his or her future conduct as a retired enlistee. Given such logical meaning of the statute as established by *Sloan* and *Allen*, one that flows from the statute's plain text, Petitioner was deprived of fair warning that he was subject to a dishonorable discharge at the time he committed his offenses.

The gravity of this lack of fair warning cannot be overstated. The importance of protecting Petitioner's due process rights in the context of this case goes far beyond simply protecting him or other similarly-situated retired enlistees. Like the Ex Post Facto Clause, the due process fair warning constraint on adjudicative retroactivity makes applicable to judicial decisions many of the principles that the Ex Post Facto Clause applies to legislation, including the principle of fundamental fairness. *Bouie* at 353.

"There is plainly a fundamental fairness interest, [even apart from any claim of reliance or notice], in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000). Similarly, the constraints placed by the reasonable foreseeability fair warning requirement provide the last line of defense against the government's arbitrary exercise of power. Like the Ex Post Facto Clause, this requirement restricts governmental power by restraining arbitrary and potentially vindictive application of laws via judicial interpretation. This rule guards against the risk that

judicial officers will use the criminal law to target individuals or groups based on prior conduct. As the Supreme Court stated in *Lynce v. Mathis*, 519 U.S. 433, 440 (1997) "the specific prohibition on ex post facto laws is…one aspect of the broader constitutional protection against arbitrary changes in the law." For these reasons, the Court should grant Petitioner's request to clearly and resoundingly uphold this bedrock due process principle.

II. ABRUPTLY EXPOSING RETIREES LONG OUT OF THE MILITARY'S "SPECIAL SOCIETY" TO UNIQUE MILITARY PUNISHMENT DEMANDS MORE PROCESS THAN PETITIONER RECEIVED.

Due process and whether it was provided is a context-specific analysis. As this Court acknowledged in *Mathews v. Eldridge*, 424 U.S. 319, 334, (1976) "'(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (*Citing Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)). Typically, this Court has addressed *Bouie* due process concerns in the context of civilian laws being applied to civilians. In contrast, this case involves military law, one that in many respects differs significantly from civilian criminal justice due to the special nature and purpose of the military. The particular nature of military criminal law, including its unique punitive discharge punishments, forms part of the overall context that must be taken

into consideration when assessing the level of notice required.

Indeed, the very uniqueness of military criminal law, particularly when applied to a civilian whose misconduct occurred long after he had last taken off his military uniform, strongly undermines the government's contention that Petitioner received the level of fair warning required by the Due Process Clause. Specifically, this case involves subjecting a civilian, one long separated from the military, to the military's unique criminal justice system for misconduct that was committed years after Petitioner transitioned to civilian life. Not only was Petitioner subject to this now-alien code (alien to him), he was subject to a punishment that has no civilian parallel, and one that CAAF had long held was not applicable to retirees such as himself. No one in Petitioner's circumstances can reasonably be said to have been on any type of notice that they were going to be exposed to the most stigmatizing military punishment that exists under the law, given that they weren't so exposed at the time they took off their uniform for the last time.

This Court has long recognized that the constitutional rights of members of the armed forces must be viewed with the recognition that the military is a separate society, one that, by necessity, enforces discipline and hence achieves justice differently than in the civilian sector. *See Parker v. Levy*, 417 U.S. at 758. The rationale for the treatment of the military as a different, hence special society with different rules is a logical one, flowing by necessity from the fact that "it is the primary business of armies and navies to fight or ready fight wars should the occasion arise." *Parker v. Levy,* 417

U.S. at 743-744. On many occasions, this Court has observed that "(t)he military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), "and that the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Parker v. Levy,* 417 U.S. at 744 (*Citing Burns v. Wilson,* 346 U.S. 137, 140 (1953)).

Congress has likewise recognized the uniqueness of the U.S. military, extending such recognition specifically to the military justice arena. Many of the crimes contained in the military penal code, as well as numerous court-martial procedures, differ sharply from those governing civilians. Because Congress has long appreciated this special nature of military criminal law, Congress has correspondingly long mandated that enlisted military members receive substantial and recurring training on the military penal code. *See* 10 U.S.C. § 937. This training requirement has hoary roots, ones that reach far back into American history for both the land and naval forces. Naval commanders have for centuries been subject to the mandate that "[h]e shall cause the Articles for the Government of the Navy to be hung up in some public part of the ship and read once a month to his ship's company."[5]

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[5] Rules for the Regulation of the Navy of the United Colonies of North-America, art. 7 (William & Thomas Bradford, 1775, reprinted, Naval Historical Foundation, 1944), https://www.navyhistory.org/rules-for-the-regulation-of-the-navy-of-the-united-colonies-of-north-america/; *see also* Bureau of Navigation, Department of the Navy, Articles for the Government of the United States Navy, 1930, art. 20 (1932), https://www.history.navy.mil/research/library/online-reading-

Similarly, the Articles of War, which preceded the current Uniform Code of Military Justice for the land forces, required a similar reading of their contents to those serving in uniform.[6]

This statutory requirement for recurring education of military criminal law for enlisted members of the Armed Forces is vitally important, despite the fundamental American criminal law axiom "ignorance of the law…is no defense to criminal prosecution." *See Cheek v. United States,* 498 U.S. 192, 198 (1991). It is critical because of the wide variance between constitutional rights enjoyed by civilians versus those restrictively extended to service-members. Such differences range from the Fifth Amendment's explicit carve-out for military members from its requirement of indictment by grant jury, to this Court's divergent application of the First Amendment in the military context. *See Parker v. Levy*, 417 U.S. at 744-759. The statutory requirement of recurring training on military criminal law amounts to Congressional recognition of such differences, a mandate motivated by a sense of fundamental fairness.

Petitioner, long removed from this special society, was entitled to fair warning of the unique military punishment that would be applied to him, and this Court should grant Gunnery Sergeant Dinger's petition because he received no such notice. The relevant context is the application of a unique military punishment, one non-existent in the civilian criminal arena, to a military retiree whose

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[6] *See* William Winthrop, Military Law and Precedents 710 (2d ed. Washington Government Printing Office, 1920 reprint).

misconduct occurred years after his separation from the Marine Corps – years after he was no longer surrounded by reminders, including those required by Congress, of the special society he had been part of. As this Court acknowledged in *Parker v. Levy,* "[b]ut even though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative military sources, further content may be supplied even in these areas by less formalized custom and usage." 417 U.S. at 754. Here again, Petitioner was without any hope of any such content clarification regarding his exposure to a dishonorable discharge because even if such military "customs" would suffice to put an active-duty member on reasonable notice, he was no longer party to such customs.

When Petitioner took off his uniform, the Court of Military Appeals (later the Court of Appeals for the Armed Forces) had already decided that dishonorable discharges were not available to those in his new status. No notice, reasonable or otherwise, was given to Petitioner that this legal landscape would drastically alter and retroactively apply to his misconduct. Whatever extraordinary situation could possibly exist that would provide the fictional fair notice to Petitioner at the time of his misconduct that the law regarding his potential military punishment was subject to change, and would suddenly apply to him, did not exist here.

Furthermore, such an extraordinary situation would truly need to be just that – extraordinary – to constitute fair notice to a military retiree, years after any formal interaction with the military and its unique law and special punishments. The fact that the two reigning military appellate opinions

governing at the time he left active duty were not unanimous surely does not equal such an extraordinary circumstance, and surely do not constitute due process notice, particularly notice to a defendant such as Petitioner who had long been a civilian at the time of his misconduct.

The claim that Petitioner was given fair warning that CAAF could eventually change its authoritative interpretation of 10 U.S.C. § 6332 and apply its new interpretation to him, years after his misconduct, simply piles legal fiction upon legal fiction until the entire construct crumbles under its own weight. The Fifth Amendment demands more.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

October 29, 2018

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