No. 06-691

IN THE

Supreme Court of the United States

UNITED STATES EX REL. MICHAEL G. NEW,
Petitioner,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, AND FRANCIS J. HARVEY, SECRETARY OF THE ARMY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus is a non-profit corporation dedicated to advancing the fair administration of military justice, and will address the following questions:

1. What is the proper standard of review applicable to collateral attacks on court-martial convictions?

2. Does a more deferential standard of review apply to collateral attacks on military convictions where the defendant is not, or is no longer, in custody?

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BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Institute Of Military Justice (NIMJ) is a District of Columbia non-profit corporation dedicated to advancing the fair administration and 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, several as flag and general officers.

NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and appeared before this Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

NIMJ is actively involved in public education through its website, www.nimj.org, and its numerous publications.

SUMMARY OF ARGUMENT

This case involves the D.C. Circuit's rejection of a former United States servicemember's non-habeas collateral attack on his court-martial conviction. In this brief, NIMJ will address two issues of profound consequence for the relations between the civilian and military court systems, as well as the members of the United States armed forces: (1) what is the proper standard of review applicable to collateral attacks on court-martial convictions, and, relatedly, (2) whether a more deferential standard of review applies where the de-

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties have been filed with the Clerk. Pursuant to Rule 37.6, NIMJ states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than NIMJ or its counsel made a monetary contribution to the preparation or submission of this brief.

fendant is not or is no longer in custody. The Court should grant certiorari in order to resolve these timely and important issues, which are here uniquely intertwined.

As Judge Sullivan put it in his opinion concurring in the underlying judgment of the Court of Appeals for the Armed Forces (CAAF), "The instant case is ultimately about the process due an American servicemember on trial for the crime of disobedience of a lawful order, *i.e.*, how the lawfulness of the disobeyed order is to be determined at a court-martial and whether that procedure is constitutional." *United States v. New*, 55 M.J. 95, 115 (C.A.A.F. 2001) (Sullivan, J., concurring in the result), Pet. App. 96a. The standard by which Article III courts are to review collateral attacks on the military courts' determinations of such issues is of vital importance and has long been the subject of widespread confusion among the circuits.

Over fifty years ago in the landmark case of *Burns v. Wilson*, 346 U.S. 137 (1953), a plurality of this Court held that Article III courts must review collateral attacks on court-martial convictions to determine whether the court-martial tribunal gave "full[] and fair[]" consideration to the petitioner's claims. *Id.* at 143. That articulated standard has been the source of widespread confusion among the lower courts ever since. *See, e.g.*, *Brosius v. Warden*, 278 F.3d 239, 242 (3d Cir. 2002) (Alito, J.) ("The degree to which a federal habeas court may consider claims of errors committed in a military trial has long been the subject of controversy and remains unclear."). Indeed, the *Burns* test has proven unusually difficult for courts to understand and apply in a principled fashion, and has been variously characterized as "mean[ing] many things to many courts," *Kauffman v. Sec'y of Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969), "anything but clear," *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990), "somewhat hazy," *Swisher v. United States*, 354 F.2d 472, 475 (8th Cir. 1966), and the source of "considerable confusion." *Allen v. Van Cantfort*, 436 F.2d 625, 629 (1st Cir. 1971). Commentators have been even more critical, one calling the *Burns* standard "a facile phrase, easy to state, but

difficult to define and to apply[.]"[2] And, from the very beginning, at least one member of this Court deemed the *Burns* test "inconclusive" and based on an understanding of the "traditional scope of inquiry" that was "demonstrably incorrect," as well as a conception of the relationship between this Court and military law that "disregards both history and the statute books." *Burns*, 346 U.S. at 844-46, 849 n.1 (Frankfurter, J., dissenting from denial of rehearing).

It is unsurprising, then, that the circuits have given the *Burns* "full and fair consideration" standard significantly divergent interpretations. *Compare Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986) ("When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion."), *with Kauffman*, 415 at 997 ("We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule."). As a result, servicemembers seeking to challenge collaterally a court-martial conviction face a confusing patchwork of obscure and often inconsistent tests, with materially disparate results.

The court of appeals' decision here compounds the confusion by holding, based on *dicta* in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), that yet another standard of review – one even more deferential, and even more impenetrable, than *Burns* – applies to *non-habeas* collateral attacks. *See United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 406 (D.C. Cir. 2006), Pet. App. 4a-5a. But there is no principled

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[2] Note, *Civilian Review of Court Martial Adjudications*, 69 Colum. L. Rev. 1259, 1262 (1969). *See also* Maj. Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 5, 7 (1985) ("The [*Burns*] Court … provided little direction for applying [the] 'full and fair' consideration test, causing considerable confusion among the lower federal courts.").

reason to review differently convictions where the servicemember is not or is no longer in custody, since sentences such as the bad-conduct discharge at issue here have stigmatizing and deeply harmful effects that follow the ex-servicemember throughout the rest of his or her life. Moreover, the court of appeals' decision misreads *Councilman* to require a standard that the court itself "ha[d] serious doubt whether the judicial mind is really capable of applying." *Id.* at 408. The decision thus exemplifies the confusion that *Burns* continues to engender in the lower courts – a confusion that *Councilman*, with its cryptic *dicta* and uncertain relationship to *Burns*, exacerbates.

The members of the United States armed services and those subject to the military justice system[3] deserve reasonable clarity on an issue on which their fundamental liberties, reputations, and ability to participate fully in society may ultimately rest.[4] NIMJ is concerned solely with the adverse systemic implications of the decision below as it relates to the standard of review of collateral attacks on military convictions, and takes no position on the underlying merits of petitioner's claims. In view of the undesirable, widespread implications of the decision below, NIMJ urges this Court to grant the petition and clarify the standard of review by adopting the test articulated by the D.C. Circuit in *Kauffman*, 415 F.2d at 997, which should apply to both habeas and non-habeas collateral attacks.

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[3] In addition to the more than two million active duty personnel, certain categories of retired and reserve personnel, members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces, military prisoners, prisoners of war, and, in time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field also are subject to trial by court martial. 10 U.S.C. § 802(a) (as amended by Pub. L. No. 109-364, § 552, 120 Stat. 2083 (2006)).

[4] Collateral attack is, as a practical matter, generally the only available avenue for review of military convictions by Art. III courts, though this Court may review by certiorari cases where CAAF has granted review. 10 U.S.C. § 867a(a).

STATEMENT

In 1995, petitioner New, a medical specialist in the United States Army, was court martialed and charged with violating Article 92(2) of the Uniform Code of Military Justice (codified at 10 U.S.C. § 892(2)), which provides that any person who, "having knowledge of any ... lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order ... shall be punished as a court-martial may direct." *New*, 448 F.3d at 405, Pet. App. 2a.

New had refused to obey an order to add United Nations insignia—a shoulder patch and a field cap—to his uniform in preparation for deployment to Macedonia. *Id.* New contended that the order was unlawful "on various statutory and constitutional grounds." *New*, 448 F.3d at 405, Pet. App. 3a.

The court martial convicted New and sentenced him to a bad-conduct discharge. *Id*. The Army Court of Criminal Appeals affirmed. *Id.*

CAAF granted review, noting in its decision: "This case involves some of the most difficult choices that may confront our Government and our men and women in uniform." *United States v. New*, 55 M.J. 95, 100 (2001) ("CAAF Op."), Pet. App. 63a. "Military personnel are obligated to obey lawful orders and regulations…. The term 'lawful' recognizes the right to challenge the validity of a regulation or order with respect to a superior source of law." CAAF Op., 55 M.J. at 100 (citing 10 U.S.C. §§ 890, 891 & 892), Pet. App. 64a. If New thought the orders unlawful, he "had to decide whether he should voice his opposition to those decisions, how to do so, and whether to obey orders that he viewed as unlawful." CAAF Op., 55 M.J. at 100, Pet. App. 63a.

Before CAAF, New contended that his court martial conviction should be reversed because, inter alia, his Fifth Amendment rights were violated when the military judge decided the lawfulness of the order – assertedly an element of 10 U.S.C. § 892(2) – without submitting it to the members ("military jury"). *Id.*, Pet. App. 63a-64a.

CAAF upheld New's conviction, in a decision that produced four opinions from among the five-member panel.

The CAAF majority recognized that "the case before us represents the first time, subsequent to [*United States v.*] *Gaudin*, [515 U.S. 506 (1995),] that we must answer the question whether lawfulness is an element that must be submitted to the members," CAAF Op., 55 M.J. at 102, Pet. App. 67a-68a, and that "[t]here are respectable arguments on both sides of the question." CAAF Op., 55 M.J. at 100, Pet. App. 64a. The majority held that "[i]n light of the legislative history of the [Uniform] Code [of Military Justice] and the Manual [for Courts-Martial]," lawfulness was not an element. CAAF Op., 55 M.J. at 105, Pet. App. 74a.

Judge Sullivan sharply rejected this view: "[A] military accused has a codal and constitutional right to have the members of his court-martial, not the military judge, determine whether the Government has proved, beyond a reasonable doubt, each and every element of the offense of which he is charged." CAAF Op., 55 M.J. at 118 (Sullivan, J., concurring in result), Pet. App. 103a. He protested that "the majority characterizes the lawfulness of an order as mere 'surplusage' and judicially eliminates it as an essential element of a disobedience offense," contrary to "the traditional Anglo-American view that only the disobedience of 'lawful' orders is prohibited." CAAF Op., 55 M.J. at 115, Pet. App. 95a. "I strongly disagree with this radical departure from our political, legal, and military tradition." *Id.*

Following the exhaustion of his direct appeals, New sought to collaterally attack his conviction in the United States District Court for the District of Columbia. *See United States ex rel. New v. Rumsfeld*, 350 F. Supp. 2d 80 (D.D.C. 2004). New sought a declaration that his court-martial conviction was null and void because it was obtained in violation of his constitutional rights. *Id.* at 87, Pet. App. 22a.

After noting that the scope of review applicable to New's claims was "a matter that demands some clarification," *New*, 350 F. Supp. 2d at 89, Pet. App. 26a, and "the

circuits have arrived at a variety of interpretations," *id.*, the district court granted the government's Rule 12(b)(6) motion to dismiss. *New*, 350 F. Supp. 2d at 102; Pet. App. 52a-53a.

The Court of Appeals for the D.C. Circuit affirmed. *New*, 448 F.3d at 405; Pet. App. 1a. The court recognized that the threshold question of the standard of review was a "tangled" issue. *New*, 448 F.3d at 406, Pet. App. 4a. Because New was not in custody, the court concluded that the habeas corpus standard did not apply, even though "New, the government, and the district court ha[d] all assumed that jurisdiction rests on 28 U.S.C. § 2241." *Id.*

Based on *Councilman*, the court held "that collateral relief was barred unless the judgment[was] 'void,'" which required an analysis of successive levels of comparative deference: "The Supreme Court pitched the *Councilman* standard as more deferential than habeas review of military judgments, which it has in turn described as no less deferential than habeas review of state court judgments." *New*, 448 F.3d at 406-07, Pet. App. 4a-6a. The court, however, conceded that this multi-tiered standard was too uncertain to actually guide its analysis. *New*, 448 F.3d at 408, Pet. App. 7a. Accordingly, it applied a compromise guideline that did not provide the protections set forth in *Kauffman*:

> It suffices for our purposes to repeat *Councilman*'s statement that errors must be fundamental to void a court-martial judgment on collateral review. And in light of *Councilman*'s point that non-habeas review is if anything more deferential than habeas review of military judgments, a military court's judgment clearly will not suffer such a defect if it satisfies *Burns*'s "fair consideration" test.

Id. (citations omitted).

Employing this standard, the court of appeals refrained from fully considering the constitutional issues on the merits, but, instead, merely recapitulated the bases for CAAF's rulings and concluded there was no "fundamental defect" in the present case, *New*, 448 F.3d at 408-11, Pet. App. 7a-14a,

"even though [the military court's] application might be highly contestable in another context." *New*, 448 F.3d at 411, Pet. App. 13a. Had the court applied the *Kauffman* test, it would have conducted its own independent analysis to determine whether CAAF's rulings were consistent with the Constitution, and, if not, whether the peculiarities of military life justified a departure from the constitutional standard. *Kauffman*, 415 F.2d at 997. Instead, it simply deferred.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THE STANDARD OF REVIEW FOR COLLATERAL ATTACKS ON COURT-MARTIAL CONVICTIONS ALONG THE LINES SET FORTH IN *KAUFFMAN*.

A. *Burns* Has Engendered Confusion

In *Burns*, a plurality of this Court defined the scope of review in collateral attacks on court-martial convictions as "whether the military have given fair consideration to each of [the petitioner's] claims." *Burns*, 346 U.S. at 144. *See also id.* at 142 ("[W]hen a military decision has dealt fully and fairly with an allegation raised in [a habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.").

The lower federal courts have struggled for fifty years to distill from the Court's "full and fair consideration" standard a workable and meaningful test. The result has been widespread confusion and widely divergent interpretations. Indeed, as one commentator observed less than a decade after *Burns*, "[t]reating the principal opinion in the *Burns* case as the controlling precedent, a court may simply and summarily dismiss a petition on the ground that the military did not refuse to consider [the petitioner's] allegations or it may, with equal ease and upon the same authority, stress the requirement that military consideration shall have been full and fair." Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61

Colum. L. Rev. 40, 59 (1961). *See also* Maj. Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 5, 7 (1985) (after *Burns*, lower courts have taken "diverse approaches to constitutional challenges to military convictions, ranging from strict refusal to review issues considered by the military courts to *de novo* review of constitutional claims").

As a result of these differing standards, "the scope of review accorded a claim will be dependent upon the particular district or circuit in which the claimant files his petition. In habeas corpus cases, this situs will be the district or circuit in which the claimant, through no fault of his own, happens to be confined." *Id.* at 8.[5]

There are presently five principal, but conflicting, formulations of the "full and fair consideration" standard.

1. The D.C. Circuit held in *Kauffman* that the "full and fair consideration" standard requires a court to determine whether the court-martial complied with prevailing standards of constitutional due process as enunciated by this Court, "unless it is shown that conditions peculiar to military life require a different rule." 415 F.2d at 997. The *Kauffman* test precludes review of a court-martial's factual findings. *Id.*

2. The Fifth Circuit held in *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975), that the "full and fair consideration" test requires a court to determine whether: (1) the asserted error was of substantial constitutional dimension; (2) the asserted error was one of law rather than of disputed fact already determined by the tribunal; (3) military considerations warrant different treatment of constitutional claims; and (4) the tribunal gave adequate consideration to the issues

[5] In most cases, this will be the United States District Court for the District of Kansas and the Tenth Circuit, respectively, because the United States Disciplinary Barracks at Fort Leavenworth is located there. *Id.* at 60 n.345; *see also* Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 Mil. L. Rev. 1, 16 (1994) (discussing the importance of Tenth Circuit's interpretation of *Burns* in military death penalty cases).

involved and applied the proper legal standard to the issue. The *Calley* standard limits review to "questions of law which present constitutional issues." *Id.* at 203.[6]

3. The Federal Circuit held in *Bowling v. United States*, 713 F.2d 1558, 1561 (Fed. Cir. 1983), that while questions of fact resolved by military courts cannot be collaterally attacked, allegations of "serious" constitutional violations, i.e., those that "demonstrate convincingly that in the court-martial proceedings there has been such a deprivation of fundamental fairness as to impair due process," may be reviewed. The Federal Court of Claims subsequently construed the *Bowling* test as providing that courts "may only review those court-martial matters in which the plaintiff alleges and proves that: (1) significant constitutional defects have deprived the plaintiff of due process; (2) fundamental fairness was lacking in the court-martial proceeding; and (3) the review does not simply amount to a retrying or reweighing of the evidence." *Matias v. United States*, 19 Cl. Ct. 635, 642 (1990) (citing *Bowling*, 713 F.2d 1560-61). *See also, e.g., Moore v. United States*, 61 Fed. Cl. 146, 150-51 (2004); *Madsen v. United States*, 48 Fed. Cl. 464, 468 (2000).

4. Recognizing the confusion *Burns* has engendered and declining to "attempt any further explication of *Burns*," the Third Circuit recently applied the standard of review for state habeas, as it is articulated in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254:

> Whatever *Burns* means, we have no doubt that at least absent a challenge to the constitutionality of the statute under which the defendant was convicted … our inquiry in a military habeas case may not go further than our inquiry in a state habeas case. Thus, we will assume – *but solely for the sake of argument* – that we may review determinations made by the military courts in this case as if they

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[6] In *Dodson v. Zelez*, 917 F.2d 1250, 1252-53 (10th Cir. 1990), the Tenth Circuit adopted the *Calley* test.

> were determinations made by state courts. Accordingly, we will assume that 28 U.S.C. § 2254(e)(1) applies to findings of historical fact made by the military courts…. In considering other determinations made by the military courts, we will assume that 28 U.S.C. § 2254(d) applies.

Brosius, 278 F.3d at 245.

5. The Sixth Circuit has given the "full and fair consideration" test an exceedingly narrow interpretation, essentially limiting it to the question of whether the court-martial tribunal physically listened to the petitioner's claims. *See Witham v. United States*, 355 F.3d 501, 503-05 (6th Cir. 2004) (noting the Court of Criminal Appeals had considered the claims raised by the petitioner and holding that "[w]here there is no colorable jurisdictional question, a finding of full and fair consideration ends our habeas corpus inquiry").

B. The Court Should Clarify *Burns* By Adopting The *Kauffman* Test

To clarify the *Burns* "full and fair consideration" test, this Court should adopt the *Kauffman* test, which is the clearest, most principled, and most workable articulation of the *Burns* standard. Three main reasons support its adoption.

1. The *Kauffman* test is clear and simple in its basic outlines. A court need only determine whether the court martial complied with existing due process standards, as articulated by this Court. If so, the inquiry is at end. If not, the court determines whether conditions peculiar to military life justify the military court's application of a different rule, drawing upon this Court's substantial body of case law on the interplay between the Bill of Rights and the demands of military life. *See, e.g.*, *Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974); *see also* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181 (1962).

In contrast to the relative simplicity of the *Kauffman* test, the *Calley* test, for example, requires courts to conduct a multi-pronged inquiry into whether (1) the asserted error was of substantial constitutional dimension, (2) the asserted error

was one of law rather than of disputed fact already determined by the tribunal, (3) military considerations warrant different treatment of constitutional claims, and (4) the tribunal gave adequate consideration to the issues involved and applied the proper legal standard. *Calley*, 519 F.2d at 199-203. In addition to being more cumbersome, *Calley* is confusing because it includes the *Burns* test as one of its four prongs and does not specify whether the prongs are factors to be balanced against one another or conditions that must all be satisfied.[7] Moreover, the factors vest considerable discretion in the district court with little guidance. *See Dodson*, 917 F.2d at 1253 ("these factors still place a large amount of discretion in the hands of the federal courts").

2. The *Kauffman* test also has the advantage of making explicit that United States servicemembers are presumptively entitled to the same protections of the United States Constitution as their fellow citizens, unless there is an articulated military need to depart from these constitutional standards. *Kauffman* thus ensures that the constitutional rights of servicemembers will be protected while simultaneously affording appropriate consideration of the necessities of military life and deference to court-martial proceedings.

As the *Burns* plurality recognized, several interests are at stake in collateral proceedings attacking a court-martial conviction. On the one hand, "[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Burns*, 346 U.S. at 142. Collateral review exists in part to ensure that these responsibilities are discharged. On the other hand, *Burns* recognized the unique nature of military life, *see id.* at 140 ("[T]he rights of men in the armed

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[7] Courts have taken both approaches. *Compare Khan v. Hart*, 943 F.2d 1261, 1263 (10th Cir. 1991) (weighing factors against one another and "strik[ing] the balance in favor of review") *with Lips v. Commandant, U.S. Disciplinary Barracks*, 997 F.2d 808, 811 (10th Cir. 1993) ("[R]eview by a federal district court of a military conviction is appropriate only if the following four conditions are met").

forces must perforce be conditioned to meet certain overriding demands of discipline and duty"), *see also Parker*, 417 U.S. at 743 ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."), as well as the need for some level of deference to court-martial proceedings. *Burns*, 346 U.S. at 142.

The *Kauffman* test, more so than the *Calley*, *Bowling*, and *Brosius* tests, balances these interests. On the one hand, the *Kauffman* test ensures that the rights of servicemembers will be protected by guaranteeing that court-martial proceedings comply with this Court's due process standards. On the other hand, the *Kauffman* test recognizes the unique nature of military life by providing that court-martial proceedings may depart from this Court's due process standards where the peculiar nature of military life requires it. Finally, by deferring to the court-martial tribunal's factual findings, the *Kauffman* test comports with *Burns*' mandate that "it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Burns*, 346 U.S. at 142.

Neither the Federal Circuit's *Bowling* test nor AEDPA review as embraced in *Brosius* achieves the careful balancing of interests that the *Kauffman* test does. Although *Bowling* offers similar protections to servicemembers' constitutional rights, it fails to expressly allow that the necessities of military life may require a different constitutional rule. *Brosius* suffers from a similar infirmity. AEDPA accords a court-martial tribunal's conclusions of law some deference, but nothing in AEDPA permits a court to tailor the applicable constitutional rule to the unique circumstances of military life. Instead, the only inquiry is whether the decision of the court-martial tribunal was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Brosius*, 278 F.3d at 245 (quoting 28 U.S.C. § 2254(d)(1)). Thus, the *Kauffman* test better addresses the unique interests at stake in collateral attacks on court-martial proceedings.

3. The *Kauffman* test is not pegged to the standard of review in state habeas, and thus does not fluctuate depending on whatever standard of review happens to prevail in state habeas. In contrast, the tests articulated by a number of the other circuits are often expressly framed in relation to the standard of review in state habeas. *See, e.g.*, *Brosius*, 278 F.3d at 245 ("Whatever *Burns* means, we have no doubt that … our inquiry in a military habeas case may not go further than our inquiry in a state habeas case."); *Calley*, 519 F.2d at 203 ("The scope of review for violations of constitutional rights … is more narrow than in civil cases."); *cf. New*, 448 F.3d at 407 ("As the military habeas standard of review at one time followed review of state court judgments toward *less* deference, perhaps it (and other collateral review of military decisions) should follow the current path toward *more*."). The *Kauffman* test affords a level of certainty absent from these other tests, which are subject to continual recalibration in light of changes in state habeas.

To be sure, *Burns* established a comparative standard of review for collateral attacks on court-martial convictions that is more deferential than that employed to resolve attacks on state-court convictions. *See Burns*, 346 U.S. at 139. But fidelity to the *Burns* plurality is unwarranted here, because *Burns* was simply wrong when it declared that "in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases," *id.*, as recognized at the time by Justice Frankfurter in his dissent from denial of rehearing, *Burns*, 346 U.S. at 846, and numerous commentators since. *See, e.g.*, John K. Chapman, Note, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 Vand. L. Rev. 1387, 1389, 1417-19 (2004); Note, *Civilian Review of Court Martial Adjudications*, 69 Colum. L. Rev. 1259, 1273 (1969). The scope of federal habeas review of both state court and military convictions was identical until shortly before *Burns*, *see* Chapman, 57 Vand. L. Rev. at 1389, and federal habeas review of state convictions

did not exist at all until 1867, whereas federal habeas review of military convictions had been available since 1789.[8]

II. *COUNCILMAN* DOES NOT ESTABLISH A SEPARATE STANDARD OF REVIEW FOR NON-HABEAS COLLATERAL ATTACKS

That the D.C. Circuit eschewed the *Burns* test because the petitioner was not in custody, and instead applied a standard of review it derived from admitted *dicta* in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), represents an additional reason to grant the petition. The relationship between *Burns* and *Councilman* has long divided the courts, and the decision below exacerbates this confusion. The standard of review in collateral attacks on court-martial convictions ought not to turn on whether the petitioner was sentenced to confinement or is still in custody when the petition is considered. *Councilman* does not require such a distinction, which ignores or unduly minimizes the stigmatizing and long-term, harmful effects of court-martial convictions that result "only" in punitive separation from the armed services.[9]

1. *Councilman* did not involve a collateral attack on a military conviction. Rather, it involved a servicemember's attempt to prospectively enjoin a *pending* court-martial on the grounds that the offense at issue allegedly fell outside the military court's jurisdiction. 420 U.S. at 739-40. *Councilman* should be read in this factual context. Indeed, this Court recently construed *Councilman* as an abstention case primarily concerned with principles of comity. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2770 (2006).

2. *Councilman* does not establish a separate standard of review for non-habeas collateral attacks. Rather, it holds that

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[8] *Compare* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82, *with* Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385.

[9] A punitive discharge is one of nine types of authorized punishment. MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 1003 (2005). There are three types of punitive discharge: (a) dismissal, (b) dishonorable discharge, and (c) bad-conduct discharge. *Id.* at R.C.M. 1003(b)(8).

(1) enactment of Art. 76 of the Uniform Code of Military Justice, 10 U.S.C. § 876,[10] did not remove the federal courts' traditional jurisdiction to hear non-habeas collateral attacks on court-martial convictions, *Councilman*, 420 U.S. at 744-45, and (2) as a matter of equitable doctrine, federal courts must refrain from intervening in pending court-martial proceedings when the defendant servicemember can show no harm other than the attendant resolution of his or her case in the military court system. *Id.* at 758. Neither holding purports to alter or in any way affect the standard of review articulated in *Burns*. Indeed, because the Court concluded that abstention was appropriate, *Councilman* does not apply any standard of review at all to the substantive claims.

Accordingly, in the thirty years since *Councilman*, many courts have continued to apply the *Burns* test to non-habeas collateral attacks – just as, prior to *Burns*, courts had applied the same test to habeas and non-habeas collateral attacks. Indeed, the case law of the Federal Circuit and the Court of Federal Claims is confined to non-habeas collateral attacks – mostly suits for backpay and reinstatement.[11] Yet, since *Councilman*, those courts have largely applied the *Burns* standard, as interpreted by *Bowling*. *See, e.g.*, *Matias v. United States*, 923 F.2d 821, 826 (Fed. Cir. 1990) (applying *Burns* and *Bowling*); *Moore*, 61 Fed. Cl. at 150 ("plaintiff must show … that the military courts failed to give fair con-

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[10] Art. 76 provides in relevant part that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter … are final and conclusive" and "all action taken pursuant to those proceedings [is] binding upon all … courts … of the United States." 10 U.S.C. § 876.

[11] Under 28 U.S.C. § 1295(a)(2), the Federal Circuit has jurisdiction over appeals from the district courts in certain backpay suits (under $10,000) brought pursuant to 28 U.S.C. § 1346(a)(2). The Federal Circuit's jurisdiction also extends to appeals from the Court of Federal Claims, 28 U.S.C. § 1295(a)(3), which has jurisdiction to hear certain claims against the United States, including those involving backpay, restoration of service, and correction of records. *See* 28 U.S.C. § 1491.

sideration to the claim") (internal quotations omitted); *Longval v. United States*, 41 Fed. Cl. 291, 295 (1998) (same).

3. *Councilman*, however, does contain some language, which the court below recognized was *dicta*, 448 F.3d at 406, Pet. App. 4a, that could be understood to conflict with *Burns* and that has caused confusion in the courts:

> A judgment … is not rendered void merely by error, nor does the granting of collateral relief necessarily mean that the judgment is invalid for all purposes. On the contrary, it means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief….

Id. at 747

> [T]he question whether a court-martial judgment properly may be deemed void – i.e., without res judicata effect for purposes of the matter at hand – may turn on the nature of the alleged defect, and the gravity of the harm from which relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress.

Id. at 753. *Councilman* also observes that "the grounds upon which military judgments may be impeached collaterally are not necessarily invariable" and "[f]or example, grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief." *Id.*

This "fundamental defect" test figured in the Court's analysis only as a brief elucidation of what makes a judgment "void" for purposes of a collateral attack, such that the Article III courts have subject matter jurisdiction. *Id.* at 746-747. That this is not meant to supplant *Burns*' standard of review is clear from the sentence that follows the Court's discussion of the "fundamental defect" test: "But we are concerned here

only with petitioner's broad jurisdictional argument, which we reject for the reasons stated above." *Id.* at 753. Under the circumstances, *Councilman*'s brief reference to "fundamental defect[s]" should not be read to require the far-reaching changes in the *Burns* standard the D.C. Circuit here adopted.

The court of appeals appears to have been the first to decide that *Councilman* established a separate standard of review for non-habeas collateral attacks. However, the court below was not alone in its uncertainty regarding *Councilman*'s implications for *Burns*. While many courts have ignored the "fundamental defect" test, applying the "full and fair consideration" standard instead, *see, e.g.*, *Mendrano v. Smith*, 797 F.2d 1538, 1541-42 (10th Cir. 1986) (citing *Burns* but not *Councilman*), other courts have attempted to reconcile *Councilman* with *Burns* in one of two ways.

Some courts have combined *Burns* and *Councilman* to formulate a single test. For instance, in *Calley*, the court summarized its interpretation of *Burns* as follows:

> Military court-martial convictions are subject to collateral review by federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so *fundamentally defective* as to result in a miscarriage of justice.

Calley, 519 F.2d at 203 (emphasis added).

Other courts have interpreted the "fundamental defect" test as a threshold jurisdictional inquiry that, if satisfied, sets the stage for review under the *Burns* standard. *See*, *e.g.*, *Hatheway v. Sec'y of Army*, 641 F.2d 1376, 1379-80 (9th Cir. 1981); *Priest v. Sec'y of Navy*, 570 F.2d 1013, 1016 (D.C. Cir. 1977). In this view, *Councilman* articulates the jurisdictional pleading standard that plaintiffs must satisfy in order to obtain collateral review. *See id.* ("We conclude that if Priest's interpretation of the First Amendment is correct, the

defect in the court-martial judgment caused by improper instructions would be sufficiently fundamental to void it.").

4. At least in the absence of some statutory bar, there is no principled reason to distinguish the standard of review applicable to habeas and non-habeas collateral attacks on military convictions. Such a distinction ignores or minimizes the stigmatizing and harmful effects of any court-martial conviction, including one that does not result in confinement. As this Court has recognized, these grave, non-confinement consequences include "deprivation of pay and earned promotion, and even … discharge or dismissal … under conditions that can cause lasting, serious harm in civilian life." *Councilman*, 420 U.S. at 752. Indeed, a servicemember convicted by court martial may also suffer "collateral civil disabilities," including restrictions on the right to vote, purchase or own firearms, parental rights, and public employment eligibility. Maj. Jeff Walker, *The Practical Consequences of a Court-Martial Conviction*, 2001-Dec. Army Law 1, 8-11 (2001).

A punitive discharge is a serious matter that can be the equivalent of a felony conviction, *see* MANUAL FOR COURTS MARTIAL at R.C.M. 1003(b)(8)(B), and is profoundly stigmatizing. As the D.C. Circuit observed in *Kauffman*, "'In terms of its effects on reputation, the stigma experienced by the recipient of a discharge under other than honorable conditions is very akin to the concept of infamy.'" 415 F.2d at 995 (quoting Everett, *Military Administrative Discharges – The Pendulum Swings*, 1966 Duke L. J. 41, 50).

In addition, a court-martial conviction resulting in a punitive discharge can have deeply debilitating economic consequences for the servicemember and his or her dependents, such as loss of veterans' retirement and medical benefits. *See* Walker, *supra*, 2001-Dec. Army Law at 8-11. Equally grave, the soldier may face severely curtailed employment opportunities in the civilian sector. *See, e.g.*, *Kaiser v. Sec'y of the Navy*, 525 F. Supp. 1226, 1228 (D. Colo. 1981) ("Among the serious collateral, non-imprisonment consequences of a court-martial conviction are the lifelong social

and psychological stigma and greatly limited employment opportunities"); Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution)*, 8 Harv. Black-Letter J. 221, 238 (1991) (adverse effects on future employment); Charles P. Sandel, Comment, *Other-Than-Honorable Military Administrative Discharges: Time for Confrontation*, 21 San Diego L. Rev. 839, 847 (1984) (significant stigma and restriction of employment opportunities).

Applying a different, more deferential standard of review to non-habeas collateral attacks on court-martial convictions ignores these grave effects based on a factor bearing no relationship to the severity of the alleged constitutional defect. *Cf. Kauffman*, 415 F.2d at 996 ("To hold that collateral review is contingent on confinement in every case would arbitrarily condition the serviceman's access to civilian review of constitutional errors upon a factor unrelated to the gravity of the offense, the punishment, and the violation of the serviceman's [sic] rights.").

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted.

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