No. 21-335

IN THE

Supreme Court of the United States

STEPHEN A. BEGANI,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF

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REPLY BRIEF

"[T]he Framers harbored a deep distrust of executive military power and military tribunals." *Loving* v. *United States*, 517 U.S. 748, 760 (1996). In this case, the Court of Appeals for the Armed Forces (CAAF) turned that distrust on its head, blindly deferring to Congress's 1950 decision to subject military retirees to the Uniform Code of Military Justice (UCMJ) for *any* offense committed while retired—not just the handful of military offenses proscribed by the Founding-era Articles of War. Its ruling allows the court-martial of a 90-year-old retired Korean War veteran for shoplifting more than half a century after he left active duty, *see* 10 U.S.C. § 934, and of a retired officer using true but "contemptuous" words to criticize the withdrawal from Afghanistan. *See id.* § 888. And it empowers Congress to subject to military trial in perpetuity anyone else it defines to be "in" the "land and naval forces," regardless of their formal or functional relationship to the military. By that reasoning, Congress could deem Selective Service registrants and civilian Pentagon employees to be "in" the military, and the constitutionality of subjecting them to court-martial would necessarily follow.

In opposing certiorari, the government conjures reasons why retirees, specifically, should be subject to court-martial even while they are retired. But the brief in opposition never even tries to explain why retirees should be treated more harshly than inactive reservists or National Guard troops—who are far more likely to be called to active duty in an emergency, and yet are not subject to the UCMJ while inactive. Nor could it. There is no special case for military jurisdiction over retirees; it's just an anachronism.

The brief in opposition also claims review would be "premature." U.S. Br. 10, 22. Because the D.C. Circuit might reverse the district court in the collateral challenge in *Larrabee*, the government bids this Court to wait—in case the split among lower courts dissipates. But the Petition does not rest on *division* over whether military retirees can be court-martialed for post-retirement offenses; it rests on the *importance* of that question—and the serious flaws in CAAF's answer. Pet. 4, 13. Nothing the D.C. Circuit does in *Larrabee* could undermine those arguments. And if this Court still prefers to wait, the proper disposition would be to hold this Petition, not deny it.

"The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds." *Reid* v. *Covert*, 354 U.S. 1, 23–24 (1957) (plurality opinion). The decision below converts those bounds into empty formalisms. If military jurisdiction is to remain the exception, and civilian trials the rule, the Petition should be granted.

I. THIS PETITION IS NOT "PREMATURE"

The government devotes most of its analysis to the Question Presented, tacitly conceding its importance. The only other arguments it offers are the insinuation that this Court's denial of certiorari on direct appeal in *Larrabee* was on the merits, and the claim that granting this Petition would be "premature"—because the government's appeal to the D.C. Circuit on collateral review in *Larrabee* is pending. U.S. Br. 10. These arguments attempt to manufacture a vehicle problem where none exists. This Petition is not just *an* appropriate vehicle for resolving the Question Presented; it's *the* appropriate vehicle.

In *Larrabee*, the government opposed certiorari on direct appeal. It argued that this Court lacked jurisdiction under 28 U.S.C. § 1259(3) because CAAF had not granted a petition for review to decide (and had not decided) the retiree jurisdiction question in that case. In support, the government explained that, because collateral review *would* be available, that issue "could be considered in other cases in the courts of appeals." Brief in Opposition at 16, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (No. 18-306).

This Petition differs from the petition in *Larrabee* in two key respects. First, in this case, CAAF did agree to decide, and decided, the Question Presented. This Court therefore has jurisdiction under § 1259(3), and the government does not argue otherwise. Indeed, because CAAF will now see the issue as settled, this Petition will likely be the *only* direct appeal that, on the government's reading of § 1259(3), properly raises the Question Presented.

Second, after representing to this Court that military retirees would be free to pursue their challenges collaterally, the government argued in the district court in *Larrabee* that such review was not de novo. The government protests that this was not a "bait-and-switch," claiming it did not promise that collateral review *would* be de novo. U.S. Br. 23 n.6. But that's only further reason to decide the Question Presented here—to avoid any potential prejudice to Petitioner's ability to raise his claim collaterally.

Nor is the Petition "premature." Petitioner is not collaterally attacking military jurisdiction *prior* to trial. *See Schlesinger* v. *Councilman*, 420 U.S. 735 (1975). He is pursuing a direct appeal of a conviction—a judgment that is final in every respect. The notion

that it is "premature" for this Court to review Petitioner's claim on direct appeal—rather than on an appeal of a collateral attack—not only neglects the potential difference in standard of review; it subverts the basic principles of "finality" on which this Court's post-conviction jurisprudence rests. *See, e.g.*, *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1554 (2021).[1]

II. THE GOVERNMENT'S MERITS ARGUMENTS ONLY SUPPORT GRANTING CERTIORARI

The rest of the brief in opposition is devoted to the merits of the Question Presented. But in arguing that Petitioner has ongoing military responsibilities—and that, even if he doesn't, Congress's decision to subject him to perpetual military jurisdiction is entitled to deference—the government underscores the case for this Court's intervention. If the Constitution abides such a limitless scope of military jurisdiction, it should at the very least be this Court—and not the Article I CAAF—that says so.

A. Military Retirees Perform No Military Functions

As one of more than two million military retirees,[2] Petitioner "has no duties." *United States* v. *Carpenter*, 37 M.J. 291, 295 (C.M.A. 1993); *see* Pet. 1, 25–26 (documenting Petitioner's lack of responsibilities).

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1. The possibility that collateral review might not be de novo is an additional reason why, at most, the proper disposition is to hold this Petition for the D.C. Circuit's ruling in *Larrabee*—not to deny it outright.

2. Petitioner is a member of the "Fleet Reserve," but he is not a "reservist." The Fleet Reserve is not a reserve component of the Navy; it is the body to which enlisted personnel literally "retire" after 20 years of service. Pet. 10 n.5; *see* Pet. App. 39a ("[F]or all intents and purposes, he retired.").

The only obligation the Court of Appeals identified is that retirees must keep the government apprised of a current mailing address—a requirement there are no consequences for violating, Pet. App. 83a n.1 (Crisfield, C.J., dissenting), and that is shared by plenty of other non-military personnel. *E.g.*, 32 C.F.R. § 1621.1(a) (2020) (Selective Service).

Consider the Navy's new Mandatory COVID-19 Vaccination and Reporting Policy, NAVADMIN 190/21 (Aug. 21, 2021). Under threat of administrative separation, the Navy is requiring all personnel to be "fully vaccinated"—*except* retirees. And it is doing so "to maximize readiness," even among those, such as members of the Selected Reserve, who are not subject to the UCMJ while inactive. COVID-19 Consolidated Disposition Authority, NAVADMIN 225/21 ¶¶ 2–3.a (Oct. 21, 2021).[3] This directive illustrates two points of relevance here: First, the Navy does not see any need "to maximize readiness" among retirees. Second, the Navy can maximize the readiness of other inactive personnel without subjecting them to the UCMJ.

The brief in opposition nevertheless suggests that Petitioner performs a military function because he must "[m]aintain readiness for active service in event of war or national emergency." U.S. Br. 19. That vague regulatory exhortation has neither substance nor teeth. No law or rule tells Petitioner *how* to "maintain readiness," and he pays no penalty if he doesn't.[4]

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3. The Navy directives are available at https://www.navy.mil/US-Navy-COVID-19-Updates/.

4. The government correctly notes that a Fleet Reservist who "becomes unfit for any duty" must be transferred. U.S. Br. 19. It points to no authority, however, for the proposition that one who fails to "maintain readiness," whatever that means, is "unfit."

That today's retirees serve no military function is the culmination of a decades-long shift in the U.S. military—in which the reserves have supplanted retirees as the primary and principal source of additional manpower in a crisis. *See* Pet. 16. That's why, as early as 1960, the Secretary of the Army concluded that "one of the main rationalizations for continuation of court-martial jurisdiction [over retirees] largely has evaporated." AD HOC COMMITTEE TO STUDY THE UCMJ, REPORT TO THE HONORABLE WILBER M. BRUCKER 175 (1960); *id.* at 7 (it "does not contribute to maintenance of good order and discipline and can be eliminated"). To this, the government's best response is Colonel Winthrop—who was writing in 1896. U.S. Br. 12 n.2. Whatever was true of retirees' military role 125 years ago, they play none today.

B. There is No Compelling Reason To Subject Retirees to the UCMJ

The dominant role of the reserves in contemporary contingency planning demonstrates why subjecting retirees to the UCMJ is not "absolutely essential to maintaining discipline among troops in active service." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955). Today's reserves are far more likely than retirees to be called upon in a crisis. And unlike retirees, they are subject to training, fitness, and even vaccination obligations while they are inactive. Yet, reserve personnel are subject to the UCMJ only while on active duty or inactive-duty training. *See* Pet. 15. Thus, for all other non-active-duty personnel on whom the government would rely in an emergency, there is *no* connection between their future readiness and their amenability to the UCMJ while they are inactive. *Id.* at 4, 15–16. The brief in opposition does not dispute this point; it ignores it.

Instead, the government moves the goalposts—raising, for the first time in this litigation, "a particularly important military interest in the availability of the court-martial system" for offenses arising in "an overseas military community." U.S. Br. 21. Perpetual worldwide military jurisdiction over all retirees is appropriate, the government suggests, for the tiny fraction of cases in which the locus of the offense is on or near a foreign military installation.

This exact concern precipitated the Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. §§ 3261–67. In *United States* v. *Gatlin*, 216 F.3d 207 (2d Cir. 2000), the defendant escaped prosecution for the sexual assault of his stepdaughter on a U.S. base in Germany. *See United States* v. *Santiago*, 966 F. Supp. 2d 247, 255 (S.D.N.Y. 2013) (retracing this history). To close the "jurisdictional gap," 216 F.3d at 209, Congress expanded the jurisdiction of civilian federal courts—not courts-martial.

Petitioner does not fall into any similar gap. He could have been prosecuted under 18 U.S.C. § 2423(e) or—if he was not subject to the UCMJ—MEJA. *See* Pet. 31. The government does not disagree; it just asserts that "the military cannot ensure civilian prosecution in any particular case." U.S. Br. 21. But even the formal unavailability of a civilian forum is not an argument in favor of expanding courts-martial. *See Toth*, 350 U.S. at 20–21. If a civilian court is unavailable only for political reasons, that is no more compelling.

Moreover, if retirees could not be tried by court-martial for post-retirement offenses, the government still has numerous means to discipline them. It concedes that "an administrative discharge can follow

a conviction in a state or federal [civilian] court." U.S. Br. 21. Likewise, the Hiss Act, 5 U.S.C. § 8312, allows for the termination of retired pay and other benefits following convictions for specified civilian offenses. Thus, as is true for inactive reservists and National Guard members, the government's ability to discipline retirees—or even sever ties with them—does not turn on whether they are subject to the UCMJ.

Nor does the amenability of retirees to court-martial affect the government's ability to recall them to active duty in the unlikely event that their services are ever required. A retiree who refuses to answer a recall order would be subject to court-martial—not as a retiree, but as an active-duty servicemember refusing to obey a lawful order. *See* Pet. 22 n.12 (citing cases). That simple point, which the government does not contest, brings things full circle: As is the case for reservists and the National Guard, there is no need to subject retirees to the UCMJ either to punish them or to ensure their availability for future active service.

C. The Deference the Government Seeks Has No Limiting Principle

Having failed to identify reasons why retirees, specifically, should be subject to the UCMJ, the government falls back on the argument on which CAAF relied: retiree jurisdiction is constitutional simply because Congress has defined the "land and naval forces" to include retirees. Thus, scrutiny of who can be tried by courts-martial "is incompatible with the 'judicial deference' that is 'at its apogee when legislative action under the congressional authority to raise and support armies . . . is challenged.'" U.S. Br. 17 (quoting *Solorio* v. *United States*, 483 U.S. 435, 447 (1987)).

The government claims to find support for this argument in *Toth*, *Covert*, and *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960). As the Petition explained, though, those cases stand for the opposite proposition—that determining who is "in" the "land and naval forces" for purposes of the Make Rules Clause is a quintessential judicial task. *See* Pet. 19–23. Consider, for instance, the key passage from *Singleton*: "The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who *can be regarded* as falling within the term 'land and naval Forces.'" 361 U.S. at 240–41 (second emphasis added); *see Solorio*, 483 U.S. at 439 (quoting *Singleton*).

The government reads this language as asking only whether the accused can be regarded *by Congress* as falling within the "land and naval forces"—not whether they can be so regarded *by the courts*. U.S. Br. 18. But if that's what *Toth* and its progeny meant, those cases would have turned on the formalism that Congress had *not* included ex-servicemembers, military dependents, or civilian employees within the statutory definition of the "armed forces"—holdings Congress could easily have overcome.

Instead, as this Court put it in *McElroy* v. *United States ex rel. Guagliardo*, if Congress truly wanted to subject civilian employees of the military to court-martial, it could conscript them into active service—not decree them to be "in" the military. 361 U.S. 281, 286 (1960); *see* Pet. 20 & n.11. It would be the apex of irony to derive broad deference to Congress from decisions insisting that "[d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to the least possible power adequate to the

end proposed." *Toth*, 350 U.S. at 23 (internal quotation marks omitted).

Solorio is no more helpful to the government. The issue there was not *who* could be tried by courts-martial, but rather for *which offenses* courts-martial could try active-duty servicemembers. There was no question that Solorio himself was "in" the "land and naval forces"; that's how this Court distinguished *Toth*. *See* 483 U.S. at 440 n.3. *Solorio* thus deferred to Congress's power to regulate individuals who were not just indisputably "in" the "land and naval forces," but in active service. That hardly supports deferring to Congress's determination of who comprises the "land and naval forces" in the first place.

If anything, *Solorio* cuts the other way. Because that decision allows Congress to authorize courts-martial of those with military status for *any* offense, and not just offenses connected to their service, it is that much more essential for courts to zealously enforce the status boundaries. Otherwise, as this case illustrates, once Congress deems personnel to be "in" the "land and naval forces," they are subject to court-martial for the same limitless class of civilian and military offenses as active-duty personnel, regardless of their actual military function.

The brief in opposition thus misunderstands the Petition's Selective Service hypothetical. *See* U.S. Br. 20–21. By the government's logic, Congress could subject Selective Service registrants to court-martial *without* providing for their conscription by adopting two technical amendments: adding the Selective Service to the list of "armed forces" in 10 U.S.C. § 101(a)(4); and adding members of the Selective Service to those subject to the UCMJ under 10 U.S.C.

§ 802(a). If the government is right that Congress is entitled to sweeping deference when deciding who is "in" the "land and naval forces," it's hard to see how those amendments—which would subject one in ten American men to constant military jurisdiction even while they are performing no military duties—would be unconstitutional.

And all of this comes against the backdrop outlined in the Petition—in which courts-martial still fail to provide many of the basic procedural and substantive constitutional protections to which every other criminal defendant in the United States is entitled. *See* Pet. 2, 33. For that reason, this Court has long insisted that "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution." *Toth*, 350 U.S. at 22. Still today, its decisions reflect "repeated caution against the application of military jurisdiction over anyone other than forces serving in active duty." *United States* v. *Ali*, 71 M.J. 256, 269 (C.A.A.F. 2012).

Like the decision below, the brief in opposition calls both those principles and those precedents into question. Whether they should be reaffirmed or abandoned, however, is not for CAAF or the government to decide; it is for this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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