No. 22-1082

IN THE

Supreme Court of the United States

STEVEN M. LARRABEE,

Petitioner,

v.

CARLOS DEL TORO, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (continued)

Page(s)

Statutes

Other Authorities

REPLY BRIEF

The question presented by the petition is whether the Constitution permits the court-martial of military retirees for offenses committed after their retirement. In urging this Court to decide that question, the petition emphasized both its importance—the answer directly affects whether more than two million Americans will be subject to military jurisdiction in perpetuity—and the divergent rationales on which the panel majority in this case and the Court of Appeals for the Armed Forces (CAAF) in *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021), relied in answering it. Pet. 13–31.

In opposing certiorari, the government all but ignores that the D.C. Circuit rejected the CAAF's analysis in *Begani*—emphasizing that the decisions produced "congruent results," BIO 23, without addressing the divergence of their rationales. It dwells on "[t]he particular circumstances of this case," *id.* at 16—without disputing that the D.C. Circuit's analysis applies to all military retirees. It mischaracterizes the petition as arguing that the government lacks the power to regulate retired servicemembers "*at all*," *id.* at 17—even though petitioner argued below (and the government did not dispute) that military retirees would remain subject to administrative sanctions. *See* Pet. App. 65a. And, despite having chosen, as appellants below, not to defend such jurisdiction by reference to Founding-era practice, the government now endorses the D.C. Circuit's *sua sponte* and incorrect historical analysis—by doing little more than repeating it. *See*

BIO 19–21. These responses only underscore—rather than undermine—the need for plenary review.

The case for certiorari has only grown stronger since the petition was filed. In June, the Fifth Circuit, relying upon its own analysis of Founding-era practice, held that the Constitution bars federal courts-martial of unfederalized National Guard members. *See Abbott v. Biden*, 70 F.4th 817 (5th Cir. 2023). As long as such personnel are not in active federal service, the Fifth Circuit concluded, they cannot be subject to federal military jurisdiction. *Id.* at 842. Although *Abbott* arose in a distinct constitutional context, its holding takes a far narrower view of federal authority over inactive personnel than the panel majority here. Taken to its logical conclusion, the panel's analysis suggests that unfederalized National Guard members *could* constitutionally be court-martialed by the federal government—since, just like retired servicemembers, they are (1) part of the U.S. armed forces by statute, *see Perpich v. Dep't of Defense*, 496 U.S. 334, 345 (1990); and (2) subject to at least one federal military order (the one that federalizes them). *See, e.g.*, 10 U.S.C. § 12406.

The Fifth Circuit's decision in *Abbott* thus only reinforces the need for this Court to clarify when the Constitution allows the federal government to court-martial inactive military personnel for offenses committed while they are inactive—that is, while they are living as civilians. The growing divergence in how courts of appeals have approached that increasingly important question makes it imperative that this Court settle the matter. And the brief in

opposition identifies no persuasive reason why this Court could not do so in this case.

1. As the petition explained, Pet. 19–23, this Court's decisions have recognized two principles governing court-martial jurisdiction. The first is that the Constitution permits the government to court-martial active-duty personnel for whichever offenses Congress prescribes, regardless of the circumstances of any particular case. *See Solorio v. United States*, 483 U.S. 435 (1987). The second is that the Constitution generally bars the government from subjecting to military jurisdiction those who lack military "status." *See, e.g.*, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). *See generally United States v. Ali*, 71 M.J. 256, 269 (C.A.A.F. 2012) (reiterating the Supreme Court's "repeated caution against the application of military jurisdiction over anyone *other than* forces serving in active duty" (emphasis added)).

Like all individuals who remain "part of" the military by statute while they are inactive (including unfederalized National Guard personnel and other inactive reservists), military retirees do not readily fit into either of those categories—raising the question of which understanding governs these middle cases. But because the Uniform Code of Military Justice (UCMJ) generally does not authorize the court-martial of other inactive personnel for offenses committed while they are inactive, this Court has never had occasion to answer it. Pet. App. 61a n.8 (noting "[t]he lack of any Supreme Court case addressing the question").

A recent uptick in courts-martial of retirees—the only inactive personnel who *are* subject to the UCMJ while inactive—has finally forced courts to confront the issue. Those courts, in turn, have looked not to precedent, but to "first principles." *United States v. Dinger*, 76 M.J. 552, 556 (N-M. Ct. Crim. App. 2017).

The petition demonstrated how the CAAF in *Begani* and the panel majority in this case relied on *inconsistent* first principles. For the CAAF, the framing principle was deference—that courts should not disturb Congress's 1950 determination that retired servicemembers should be subject to court-martial in perpetuity. But the D.C. Circuit expressly rejected such deference—emphasizing the importance of having the constitutional line drawn by civilian courts, not Congress. *See* Pet. App. 10a–13a. Instead, over Judge Tatel's dissent, the panel derived its framing principle from its readings of this Court's precedents and of Founding-era practice—concluding that they supported such jurisdiction.

In defending the D.C. Circuit majority's flawed analysis, the government accuses petitioner of "not engag[ing] with the overwhelming weight of [the] longstanding and uniform authority" supporting military jurisdiction over retired servicemembers. BIO 18. But as the petition noted, Pet. 20–24, and as lower courts have consistently acknowledged, none of that authority actually addresses—let alone resolves—the question presented. *E.g.*, Pet. App. 31a ("[T]he Court has not squarely addressed whether military retirees, such as members of the Fleet Marine Reserve, may be court-martialed consistent with the Constitution.").

Instead, this Court has, on three occasions, noted only that Congress has *authorized* courts-martial of retired servicemembers—without addressing whether those statutes are constitutional. *See Barker v. Kansas*, 503 U.S. 594, 600 n.4 (1992); *McCarty v. McCarty*, 453 U.S. 210, 221–22 (1981); *United States v. Tyler*, 105 U.S. 244, 246 (1882).[1] Nor was there any reason for the Court to consider the question; none of those cases involved a court-martial at all—much less a constitutional objection to one.

While asserting that petitioner fails to engage with inapposite authorities, the government fails to engage with petitioner's actual argument—that the schism between the CAAF's analysis in *Begani* and the panel majority's analysis here warrants this Court's intervention. After all, the D.C. Circuit has now repudiated the principal rationale through which the "Supreme Court of the military justice system," *United States v. Armbruster*, 29 C.M.R. 412, 414 (C.M.A. 1960), has sustained court-martial jurisdiction over more than two million Americans. Even if the *results* of these lower court decisions are "congruent," the rationales—and implications—are emphatically not. *Cf. Ctr. for Const. Rights v. United States*, 72 M.J. 126, 132 (C.A.A.F. 2013) (Baker, C.J., dissenting) (noting the problems that can arise when the CAAF and Article III appeals courts adopt divergent analyses).

The variances in how lower courts have analyzed when inactive military personnel may be subject to

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[1] The fourth case the government cites, *Denby v. Berry*, 263 U.S. 29, 35–26 (1923); *see* BIO 15, did not discuss courts-martial.

court-martial for offenses committed while inactive is only reinforced by the Fifth Circuit's recent holding in *Abbott*—that the federal government cannot court martial unfederalized National Guard troops. The upshot is that the time has come for this Court to resolve, one way or the other, not just *whether* inactive personnel can ever be court-martialed for offenses committed while inactive, but, if so, *why*.

2. Having soft-pedaled the divergence in lower-court analyses, the government also downplays the importance of the question presented by emphasizing "[t]he particular circumstances of this case." BIO 16. But those circumstances in no way confine the scope of the question presented or the decision below. In the lower courts, the government never argued that members of the Fleet Marine Corps Reserve, like petitioner, are materially distinct from other retired servicemembers for jurisdictional purposes. "[M]ilitary courts have treated the two statuses interchangeably for purposes of court-martial jurisdiction," *Dinger*, 76 M.J. at 554 n.3, and the D.C. Circuit did, as well. Pet. App. 3a n.2 ("By statute, Fleet Marine Reservists and formally retired Marines have similar rights and responsibilities."). That's why the panel majority did not dispute that its analysis applies equally to petitioner and Judge Tatel's "90-year-old Korean War veteran." *Id.* at 45a (Tatel, J., concurring in part and dissenting in part).

In any event, members of the Fleet Marine Corps Reserve and other retirees *are* materially the same. The government makes much of the fact that various regulations require members of the Fleet Marine Corps Reserve to "maintain readiness." BIO 24–25.

But those exhortations are devoid of both substance and an enforcement mechanism. *United States v. Begani*, 79 M.J. 767, 787 n.1 (N-M. Ct. Crim. App. 2020) (en banc) (Crisfield, C.J., dissenting) ("[T]he Government has not represented . . . that there is any consequence for failure to maintain readiness.").

Indeed, the *specific* Marine Corps Orders setting out the Corps' annual training and drug testing requirements, which the government does not cite, do not even apply to members of the Fleet Marine Corps Reserve (or other retirees).[2] As Judge Tatel noted, like other retirees, members of the Fleet Marine Corps Reserve were also exempted from the military's COVID vaccination mandate. Pet. App. 44a (Tatel, J., concurring in part and dissenting in part).[3]

Thus, it is of no moment that "[d]ifferent statutory provisions" authorize the court-martial of members of the Fleet Marine Corps Reserve and other retired servicemembers. BIO 25. The D.C. Circuit's *constitutional* analysis applies with equal force to all retirees—which is why this Court's review of that analysis is so essential. And although the government insists that petitioner is "mistaken" in his "effort to make this case about 'more than two million' military retirees," it never explains *why*—or identifies any

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[2] *See* Marine Corps Order 6100.13A, Marine Corps Physical Fitness and Combat Fitness Tests ch. 2 ¶ 2 (Feb. 23, 2021); Marine Corps Order 5300.17A, Marine Corps Substance Abuse Program app. B ¶ 1(c) (June 25, 2018).

[3] The vaccination mandate applied to inactive reservists, including unfederalized National Guard personnel—which is what prompted the Fifth Circuit's ruling in *Abbott*.

principle that limits the D.C. Circuit's analysis to members of the Fleet Marine Corps Reserve. Indeed, in a different case, the government is arguing exactly the opposite—that the D.C. Circuit's analysis also supports the constitutionality of 10 U.S.C. § 802(a)(4), the UCMJ provision authorizing courts-martial of *all* "[r]etired members of a regular component of the armed forces who are entitled to pay." *See* Respondent's Supplemental Brief Addressing *Larrabee* at 5–14 & n.3, *Wilson v. Johnston*, No. 21-cv-3277 (D. Kan. Sept. 22, 2022). There, at least, the government is correct—which is why certiorari here is imperative.

3. The need for this Court's intervention is only heightened by the methodological errors the panel majority made in relying, without any briefing, upon its own incomplete account of Founding-era British and American practice. Pet. 25–30. The government, which failed to brief these historical claims as appellants in the D.C. Circuit, now defends them—principally by restating them. BIO 19–21. But the two episodes the government invokes are far too thin a reed on which to rest any conclusion that those who drafted the Constitution would have understood it to authorize courts-martial of retired servicemembers for post-retirement offenses.

For instance, the government appears to agree with the D.C. Circuit that, in assessing Founding-era British *practice*, what Parliament could have done is more important than what it actually did. *Id*. at 19–20. But by 1787, it had been 36 years since Parliament had briefly authorized (and then loudly repudiated) courts-martial of inactive, half-pay officers. And in

1785, that practice had been specifically and unanimously disavowed by English judges in the high-profile case of Major General Ross, Pet. 26–27—an episode of which the Founders were well aware (and which the government simply ignores).

The brief in opposition then repeats the panel majority's claim that "Parliament later again subjected certain half-pay brevet-rank officers to court-martial." BIO 19–20. This reference to the 1786 Mutiny Act, 26 Geo. 3 c. 10, misses the point of "brevet" rank—a temporary promotion bestowed while an officer is carrying out the duties of an essential military billet. A "half-pay brevet-rank officer" under the Mutiny Act was an officer invested with an active command. That Parliament had to specifically *authorize* courts-martial of such officers (so that they would be subject to the same military law as those they were commanding) underscores that half-pay officers, as such, were *not* subject to court-martial when our Constitution was drafted the next year.

The government's effort to shore up the D.C. Circuit's analysis of the 1783 Pennsylvania Mutiny fares no better. All agree that the mutiny arose from Congress's effort to shirk its payment obligations to Continental Army soldiers—by issuing furloughs that would turn into discharges upon consummation of the Treaty of Paris. Like the D.C. Circuit, the government points to courts-martial of soldiers who mutinied in protest as Founding-era evidence of courts-martial of inactive personnel. BIO 20–21. But this claim "fails to account for the relevant historical context." *Id*. at 20. Not only were the mutineers still in their barracks

when they mutinied (a mutiny from home is no mutiny), but whatever their location, furloughed soldiers—like today's servicemembers on terminal leave—remain on active duty until formally discharged. *See, e.g.*, *United States v. Steen*, 81 M.J. 261 (C.A.A.F. 2021) (upholding a court-martial conviction for offenses committed while on terminal leave).[4]

The Pennsylvania Mutiny thus proves nothing about whether the Framers thought that the military could court-martial inactive personnel like retirees for crimes committed while inactive.[5] Without that episode, without Parliament's repudiated treatment

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[4] The government now suggests that the furloughs should be understood *as* discharges—so that the mutineers had been discharged from active service *before* they mutinied. BIO 21. But as the government concedes, *see id.* at 20–21, those "discharges" were expressly conditioned on the subsequent ratification of the Treaty of Paris—which would not take place until three months *after* the mutiny. Even on the government's revisionist account, then, the furloughs could not yet have ripened into discharges. But even if they had, that still wouldn't help the government; the Constitution forbids courts-martial after discharge—even for pre-discharge offenses. *See Toth*, 350 U.S. 11.

[5] The government tries to bolster its historical analysis by citing to Winthrop. BIO 15. But Winthrop wrote decades *before* this Court first articulated constitutional limits on courts-martial jurisdiction in *Toth*. As one of his biographers notes, Winthrop "rested his statement on [this Court's] dicta rather than any constitutional statement on jurisdiction." Joshua Kastenberg, *Reassessing the Ahistorical Judicial Use of William Winthrop and Frederick Bernays Wiener*, 14 J. NAT'L SECURITY L. & POL'Y (forthcoming 2023) (manuscript at 18), *available at* https://jnslp.com/wp-content/uploads/2022/04/Military_Justice_Kastenberg_William_Winthrop_Frederick_Wiener.pdf.

of half-pay officers from 1748–51, and without the "longstanding and uniform authority" that the government wrongly claims to have settled the matter, *see* BIO 18, it becomes clear why this Court must resolve the question presented—rather than leave the CAAF's decision in *Begani* and the D.C. Circuit's divided ruling here as the last words on the subject.

4. Finally, the government urges this Court to wait for a future case to resolve the question presented—suggesting that "this Court presumably could not resolve [whether retirees could be court-martialed] if the Court were to grant review in this case involving the court-martial of a Fleet Marine Corps Reservist." BIO 26. As noted above, though, not only did the D.C. Circuit assume that its analysis applies to all retirees, *see* Pet. App, 14a, but the government is (correctly) arguing as much in other cases. *Supra* at 7–8. Thus, this petition squarely presents the important question whether *any* military retiree can be tried by court-martial for crimes committed after retirement.

Nor does this case raises the jurisdictional issues that militated against a grant of certiorari in petitioner's direct appeal and in *Begani*. Pet. 31–33. The government does not argue otherwise, reinforcing that this petition presents an ideal vehicle for the Court to resolve the government's assertion of court-martial jurisdiction over millions of retired servicemembers.

* * *

The government never claims that it *needs* the power to court-martial retired servicemembers for

post-retirement offenses—and for good reason: Neither class of personnel more likely to be relied upon to augment active-duty troops in a crisis—National Guard members or others serving in the Individual Ready Reserve—is subject to the UCMJ while inactive. Instead, those personnel are subject to the UCMJ only while they are performing federal military duties—a statutory rule that the Fifth Circuit has now held to be constitutionally required, at least for National Guard members. *Abbott*, 70 F.4th at 842.

Petitioner does not dispute that, like these other inactive personnel, members of the Fleet Marine Corps Reserve remain subject to future recall and to the UCMJ for any offenses they might commit once recalled. Those authorities amply serve the government's interest in military readiness. The government's position, in contrast, spreads military criminal jurisdiction over a wide swath of retirees for otherwise-civilian offenses. That power is neither necessary nor constitutional. Petitioner asks this Court to resolve whether, like millions of other Americans who retire from their military careers, he must forgo receiving a pension lest he remain subject to military law and jurisdiction—for the rest of his life in civilian society—just because an order involuntarily recalling him to active service might one day come.

CONCLUSION

The petition for a writ of certiorari should be granted.

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