No. 18-306

IN THE

Supreme Court of the United States

STEVEN M. LARRABEE,
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 FOR PETITIONER

This Court has never resolved whether the Constitution permits the trial by court-martial of retired military personnel—either in general or, as in this case, for non-military offenses committed after they leave active duty. Nor has this Court settled whether, once the U.S. Court of Appeals for the Armed Forces (CAAF) "grants a petition for review on some issues, [this] Court has the power to consider other issues in the case that were not granted review." STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 2.14, at 130 n.120 (10th ed. 2013).

Even though the government does not dispute that these questions are important and unresolved, it opposes certiorari. As to this Court's jurisdiction, the brief in opposition insists that 28 U.S.C. § 1259 limits this Court to reviewing only the actual "decision" by CAAF from which review is sought—and no other rulings in Petitioner's case. Br. Opp. 10–16. On the merits, the government claims that, even though Petitioner no longer performs *any* military function, the fact that he chose to retire—and receive a pension—by being transferred to the Fleet Marine Corps Reserve (FMCR) at the end of his active duty means that he remains part of the "land and naval Forces" (in perpetuity) for purposes of the Make Rules Clause, U.S. CONST. art. I, § 8, cl. 14. Thus, the Constitution permits his trial by court-martial for any conduct that Congress proscribes. Br. Opp. 16–24.

The government is wrong on both counts. Just as significantly, the brief in opposition fails to explain why either of these arguments would militate against certiorari even if they were right. Doubt as to this Court's jurisdiction is a reason to *resolve* the matter,

not leave it unsettled. *See, e.g.*, *Montgomery* v. *Louisiana*, 135 S. Ct. 1546, 1546 (2015) (mem.). And if ever there was a matter of military justice on which this Court should have the last word, it is the scope of Congress's constitutional power to abrogate Article III's judge and jury-trial protections for persons who are not active-duty servicemembers. *See Noyd* v. *Bond*, 395 U.S. 683, 696 n.8 (1969) ("[T]he expertise of military courts [does not] extend[] to the consideration of constitutional claims of the type presented.").

As was true in *Toth*, "[t]o allow this extension of military authority would require an extremely broad construction of the language used in the constitutional provision relied on." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14–15 (1955). Even if such an "extremely broad construction" is indeed the law of the land, and even if Article III did not require Petitioner to be tried in a civilian court, it should be for this Court—and not the military justice system—to say so.

I. THIS COURT HAS JURISDICTION TO ANSWER THE QUESTIONS PRESENTED

As relevant here, this Court has jurisdiction to review CAAF's "decisions" in "[c]ases in which [CAAF] granted a petition for review under section 867(a)(3) of title 10." 28 U.S.C. § 1259(3). The government never disputes that this *is* such a "case"—nor could it. CAAF granted Petitioner's petition for review and rendered a decision in his case. That is all the plain text of § 1259(3) requires.

Instead, the brief in opposition asserts that this Court lacks jurisdiction because CAAF did not rule on the specific questions presented. In the government's view, because the opening clause of § 1259 limits this Court to review of CAAF's "decisions," this Court's

jurisdiction is "limited to review of the issues actually decided by [CAAF's] decision." Br. Opp. 11. This reasoning is unavailing on its face—and it is grounded in a fundamental mischaracterization of § 1259's background and purpose.

That Congress conditioned this Court's jurisdiction on CAAF's issuance of a "decision" has consistently been understood as going to the *timing* of this Court's review, not its scope. SHAPIRO ET AL., *supra*, § 2.14, at 132 ("[T]he Court cannot grant certiorari to review a nonfinal judgment of [CAAF], or an appeal from a lower military court judgment that has just been lodged in [CAAF]."). Congress thereby analogized this Court's jurisdiction over CAAF to its jurisdiction over state and territorial courts—which is likewise limited to reviewing "[f]inal judgments or decrees" rendered by the relevant court of last resort. *E.g.*, 28 U.S.C. § 1257(a) (state courts); *id.* § 1257(b) (District of Columbia); *id.* § 1258 (Puerto Rico); *id.* § 1260 (Virgin Islands); *see Ortiz* v. *United States*, 138 S. Ct. 2165, 2178 (2018) ("The non-Article III court-martial system stands on much the same footing as territorial and D.C. courts, as we have often noted.").

These similarly worded statutes have never been understood to have the effect for which the government argues here—that is, to limit this Court's review to the four corners of the ultimate decision issued by the last lower court. Instead, this Court has repeatedly (and correctly) read such text to encompass review of federal questions resolved in lower courts and/or at earlier stages of the same litigation. *See, e.g.*, *Adams* v. *Robertson*, 520 U.S. 83, 86–87 (1997); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955). As in this case, "a contrary rule would insulate interlocutory state court rulings on important federal questions from our

consideration." *Hathorn* v. *Lovorn*, 457 U.S. 255, 261–62 (1982).[1]

Without even noting these analogous authorities, the government defends its novel[2] reading of § 1259 almost entirely by reference to legislative history. *See* Br. Opp. 11–12. In at least two key respects, though, those materials contradict the government's reading.

First, Congress's principal goal in enacting § 1259 was to balance the need to give this Court supervisory power over the military justice system with concerns about unduly burdening this Court's docket. *See id.* at 11. But the very legislative history the government cites makes clear that Congress was focused entirely on limiting the total *number* of cases that could be added to this Court's docket, not the scope of this Court's review in those cases. *See* S. REP. NO. 98-53, at 33 (1983) ("[T]he Committee has taken steps to ensure that the bill will not result in an undue increase in the volume of cases presented to the Supreme Court."); *id.* at 34 ("[R]estricting direct access to the Supreme Court to cases [CAAF] has agreed to hear is necessary as a practical matter.").

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1. The Solicitor General agreed. *See* Brief for the United States as *Amicus Curiae* at 13, *Hathorn*, 457 U.S. 255 (No. 81-451).

2. When the government has previously opposed certiorari because CAAF had not granted review of the question presented, it has relied upon a sentence in 10 U.S.C. § 867a(a) that provides that "[t]he Supreme Court may not review by a writ of certiorari under this section any action of [CAAF] in refusing to grant a petition for review." *See, e.g.*, Brief for the United States in Opposition at 7–8, *Stevenson* v. *United States*, 555 U.S. 816 (2008) (mem.); *see also* Pet. 23 (citing other examples). As the Petition explained, however, because CAAF did not "refus[e] to grant a petition for review" in this case, that sentence (and this argument) is irrelevant. Pet. 24.

Second, the government's proposal for § 1259(3) would have limited this Court's jurisdiction to "*issues* upon which [CAAF] granted review and other *issues* upon which [it] took action in cases in which a petition for review was granted under section 867(a)(3) of title 10." H.R. 6298, § 4(a), 96th Cong., 2d Sess. (1980) (emphases added). That Congress instead gave this Court jurisdiction over "*cases*"—a term with a specific and settled meaning, Pet. 23–24—further confirms its intent for this Court to have plenary authority over "cases" in which CAAF issues a "decision."[3]

The government's reading of § 1259 would also produce perverse results. As this case demonstrates, CAAF does not usually grant discretionary review of issues it believes to be settled. If the government is correct, this Court would only have a small number of chances (perhaps one) to review an issue arising in the military justice system—*i.e.*, when CAAF first rules on it. Such use-it-or-lose-it jurisdiction would place inordinate pressure on this Court to review CAAF's initial decision (assuming certiorari is even sought), without an opportunity to assess the frequency with which the issue arises, benefit from percolation, or identify the best vehicle for resolving it.

Worse still, this Court would be deprived of *any* opportunity to entertain a direct appeal from CAAF in cases, like this one, in which lower military courts

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3. The government claims that its reading of § 1259 is also supported by 10 U.S.C. § 867(c), which provides that, in cases in which CAAF grants a petition for review, "action *need* be taken only with respect to issues specified in the grant of review." Br. Opp. 11 (emphasis added). That this language is permissive and not mandatory only underscores the point noted in the Petition at 24 n.14—that CAAF *may* resolve issues beyond those it agreed to review, and, indeed, often does so.

expressly hold that they are making new law because of intervening precedent from *this* Court, but CAAF appears to consider the matter unworthy of review. Given that there is no good reason to accept such a "parsimonious" construction of § 1259, *United States* v. *Denedo*, 556 U.S. 904, 909–10 (2009), this Court has jurisdiction over Petitioner's entire "case," including the questions presented.

Even if this Court has jurisdiction, and "even if the question presented warranted review," the brief in opposition also claims that "no need exists to stretch this Court's direct-review jurisdiction over the CAAF in order to consider it." Br. Opp. 15. Instead, Petitioner and those with similar claims should pursue their constitutional challenges through habeas, so that the issue "could be considered in other cases in the regional courts of appeals." *Id*. at 16.

Those courts, however, cannot bind CAAF. *See Ctr. for Const'l Rights* v. *United States*, 72 M.J. 126, 132 (C.A.A.F. 2013) (Baker, C.J., dissenting). Thus, even if Petitioner prevailed, a ruling in his favor would not preclude *future* courts-martial of military retirees. And even if the same issues eventually returned to this Court, there would be no basis, in that context, for resolving the scope of § 1259—or thereby clarifying for CAAF the jurisdictional implications of *its* actions. At most, then, the government's claim that there is doubt as to this Court's jurisdiction only furnishes an additional justification for this Court's intervention, not an argument against it.

II. THE GOVERNMENT'S MERITS ARGUMENTS UNDERSCORE THE IMPORTANCE OF RESOLVING THE QUESTIONS PRESENTED

On the merits, the brief in opposition opens by quoting *Solorio* v. *United States*, 483 U.S. 435, 440 (1987), for the proposition that "the Constitution has 'reserved for Congress' the determination whether to subject servicemembers to court-martial for offenses." Br. Opp. 17. By statute, the thousands of members of the FMCR all remain subject to the Uniform Code of Military Justice (UCMJ). Thus, the government says, Congress's determination should be conclusive. *See id.*

This argument begs the question, for it assumes that members of the FMCR, such as Petitioner, truly *are* indistinguishable from the servicemembers at issue in *Solorio*—whose active-duty status was central to this Court's analysis. *See* Pet. 17. But this Court has never shown such deference to Congress's assertion of military jurisdiction over *other* classes of offenders. *See id.* at 15. Instead, it has focused on "whether the accused in the court-martial proceeding is a person who *can be regarded* as falling within the term 'land and naval Forces.'" *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 240–41 (1960) (emphasis added). That Congress had subjected the offenders to the UCMJ was necessary, but never sufficient. *See Reid* v. *Covert*, 354 U.S. 1, 22–23 & n.41 (1957) (plurality opinion); *Toth*, 350 U.S. at 14–15.

As *Solorio* explained, Congress has the authority to subject active-duty servicemembers to court-martial for any offense because "'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.'" *Solorio*, 483 U.S. at 440 (quoting *Burns* v. *Wilson*, 346

U.S. 137, 140 (1953) (plurality opinion)); *see also, e.g.*, *Parker* v. *Levy*, 417 U.S. 733, 758 (1974). No similar "demands of discipline and duty" have justified courts-martial of civilians accompanying the armed forces abroad, *see, e.g.*, *Singleton*, 361 U.S. at 238–49; or of discharged ex-soldiers—even for crimes committed while on active duty in a foreign combat theater. *See Toth*, 350 U.S. at 14–17.

Against this backdrop, the brief in opposition never explains how "demands of discipline and duty" are advanced by subjecting military *retirees* to court-martial, especially for post-retirement offenses.[4] Just like civilians and discharged ex-soldiers, "Petitioner holds no active rank; he has no commanding officer or subordinates; he lacks the authority to issue binding orders; he has no obligation to follow orders; he performs no duties; and he participates in no regular military activities." Pet. 1. He is not even allowed to wear his uniform without special dispensation.

Perhaps for that reason, in the ruling at issue here, the Navy-Marine Corps Court of Criminal Appeals

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4. The brief in opposition asserts that *Solorio* forecloses Petitioner's alternative argument—that, at a minimum, the Constitution limits military jurisdiction over retirees to offenses related to the retiree's military status. *See* Br. Opp. 23–24. As the government concedes, however, even though *Solorio* rejected such a requirement for *active-duty* servicemembers, reservists—who are far more likely to be called to active duty than retirees—are subject to court-martial today only for offenses committed *while* on active duty or inactive-duty training. *Id.* at 22 n.4.

The government never explains why requiring a comparable connection for retirees would "introduce confusion." Br. Opp. 24. Nor does the government offer any rationale for why retirees should be subject to court-martial for non-military offenses in their civilian lives when reservists are not. *See* Pet. 18 n.11.

(NMCCA) held that members of the FMCR remain part of the "land and naval Forces" only because they are subject to *future* recall to active duty. *United States* v. *Dinger*, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017). But even if this prospect were more than theoretical,[5] the government concedes that "[t]he mere possibility that an individual might in the future become a member of the Armed Forces is insufficient," standing alone, to conclude that they are part of the "land and naval Forces"—and properly subject to military jurisdiction. Br. Opp. 23.

The government's case that Petitioner remained part of the "land and naval Forces" therefore reduces to a single fact—that he was receiving a pension in the form of "retainer pay." *Id.* at 21. The NMCCA rejected this reasoning in *Dinger*, and rightly so. This Court has long held that even an employee of the military who receives a salary is not part of the "land and naval Forces." *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281, 286 (1960); *Grisham* v. *Hagen*, 361 U.S. 278 (1960). And "retainer pay" is not a salary. *See Barker* v. *Kansas*, 503 U.S. 594, 599 (1992).

The government nevertheless insists that "retainer pay" *is* "current compensation for petitioner's continued status in the Armed Forces" because a Marine who is discharged would not receive it. Br. Opp. 20–21. Thus, the government (circularly) concludes, "[t]he difference that warrants retainer pay is petitioner's continued status as a member of the Armed Forces." *Id.* at 21. In fact, the only "difference that warrants retainer pay" is the remote possibility

5. The government does not dispute that, under current law, most retirees are *not* realistically subject to recall to active duty. *See* Pet. 18–19 & n.12.

of future recall, which, unlike Petitioner, a discharged ex-Marine does not even theoretically face.[6] Thus, although the government asserts that Petitioner has an "ongoing role as a member of the [FMCR]," Br. Opp. 21; *see also id.* at 3, that role is an empty formalism. Until and unless he is recalled, Petitioner owes the same obligation to the military as a discharged ex-Marine—which is to say, nothing. His trial by court-martial was therefore unconstitutional.

* * *

The brief in opposition closes by insisting that Petitioner's argument "would inject uncertainty" into who can constitutionally be tried by court-martial. *Id.* at 24. In fact, as the NMCCA's ruling in *Dinger* makes clear, that uncertainty already exists. This Court has never directly addressed the validity of court-martial jurisdiction over retirees, and *Dinger* rejected the very constitutional analysis on which lower civilian and military courts had previously sustained it. Instead, as a matter of "first principles," 76 M.J. at 556, *Dinger* embraced a theory that the government does not here endorse—perpetuating that uncertainty. Pet. 17–20.

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6. The government also suggests that, by choosing to receive "retainer pay" rather than be discharged, Petitioner "consented" to military jurisdiction. Br. Opp. 18. This Court does not ordinarily consider arguments, like this one, "that were neither raised nor addressed below." *Travelers Cas. & Sur. Co.* v. *Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007).

In any event, even if a party to a civil case can consent to an otherwise unconstitutional exercise of jurisdiction by a non-Article III federal court, *see Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932 (2015), the same is not true of criminal defendants before military tribunals. *See Al Bahlul* v. *United States*, 840 F.3d 757, 760 n.1 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

In contrast, a holding from this Court that the Constitution categorically forbids the court-martial of military retirees—whether in general or for post-retirement offenses, specifically—would hardly create uncertainty. But regardless of the result, if *certainty* is what the government seeks, the best way to obtain it is through a conclusive resolution by this Court of the questions presented—not a denial of certiorari.

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

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