No. 22-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Articles 2(a)(4) and 2(a)(6) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(a)(4), (6), authorize courts-martial of retired servicemembers for both military and civilian offenses committed after they have left active duty. This jurisdiction reaches millions of military retirees, all of whom have returned to civilian life and have no military responsibilities unless and until they are recalled to active duty.

Two courts of appeals have recently upheld the constitutionality of this jurisdiction, but only by relying upon divergent rationales. In *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021), the Court of Appeals for the Armed Forces (CAAF) held that Congress's authorization of such military jurisdiction was entitled to deference. In this case, the D.C. Circuit rejected the CAAF's deference-driven analysis, holding that the constitutionality of court-martial jurisdiction requires plenary judicial review. Over Judge Tatel's dissent, the majority reached the same result as the CAAF had—by embracing factually and methodologically incorrect assessments of Founding-era British and American military practices.

The question presented is:

Whether the Constitution permits military retirees to be tried by court-martial for offenses committed after they have left active duty?

RELATED PROCEEDINGS

Larrabee v. Braithwaite, No. 1:19-cv-00654-RJL (D.D.C.)

Larrabee v. Del Toro, No. 21-5012 (D.C. Cir.)

United States v. Larrabee, No. 201700075 (N-M. Ct. Crim. App.)

United States v. Larrabee, No. 18-0114/MC (C.A.A.F.)

Larrabee v. United States, No. 18-306 (U.S.)

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PETITION FOR A WRIT OF CERTIORARI

Steven M. Larrabee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 45 F.4th 81 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-46a. The decision of the district court is reported at 502 F. Supp. 3d 322 and reprinted at Pet. App. 47a-68a. The unpublished order of the court of appeals denying rehearing en banc is reprinted at Pet. App. 69a.

JURISDICTION

The court of appeals entered its judgment on August 2, 2022, Pet. App. 1a, and denied a timely petition for rehearing en banc on December 20, 2022, *id.* at 69a. On March 1, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 4, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Make Rules Clause authorizes Congress "[t]o make rules for the government and regulation of the land and naval forces." U.S. CONST. art. I, § 8, cl. 14.

The Fifth Amendment exempts from the right to a grand jury indictment "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." *Id.* amend. V.

Articles 2(a)(4) and 2(a)(6) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(a)(4) and (6), provide, respectively, that "[r]etired members of a regular component of the armed forces who are entitled to pay" and "[m]embers of the Fleet Reserve and Fleet Marine Corps Reserve" are subject to the UCMJ and to court-martial for any offense prescribed therein.

INTRODUCTION

This petition presents an exceptionally important question of constitutional law: whether the military may constitutionally try by court-martial any of the more than two million living retired servicemembers for offenses committed after they have retired from active duty and are functionally living as civilians. The range of offenses covered by this sweeping grant of military jurisdiction is stunning. It would cover everything from shoplifting by "a 90-year-old Korean War veteran, who retired after being injured in the war," Pet. App. 45a (Tatel, J., concurring in part and dissenting in part), to the use of "contemptuous words" by a retired officer to criticize President Biden's withdrawal of U.S. troops from Afghanistan, *see* 10 U.S.C. § 888. This enormous expansion of military jurisdiction calls out for review here. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13, 19 (1955) (underscoring the importance of resolving whether courts-martial could try ex-servicemembers by reference to the three million former soldiers who would be affected by the answer).

This Court's review is warranted not only because of the importance of the question presented, but because courts of appeals have embraced divergent—

and independently unpersuasive—rationales in answering it. In *United States v. Begani*, the CAAF upheld such jurisdiction largely by deferring to Congress in how it regulated the "land and naval forces"—which necessarily raises the question of whether retired servicemembers remain *in* the "land and naval forces" in the first place. 81 M.J. 273, 278-80 (C.A.A.F.), *cert. denied*, 142 S. Ct. 711 (2021). The D.C. Circuit, in contrast, specifically *rejected* the CAAF's analysis—holding that no such deference is appropriate. Pet. App. 10a-13a; *see also id.* at 41a (Tatel, J., concurring in part and dissenting in part). But the panel majority nevertheless reached the same result as the CAAF by a different and equally erroneous route, placing heavy reliance on its own assessment of Founding-era British and American practices—which neither party had briefed. In fact, Founding-era materials cut decisively *against* ongoing military jurisdiction over inactive retirees, not in favor of it.

When petitioner sought this Court's review of the same question on direct appeal, the government opposed certiorari, arguing that the Court lacked statutory jurisdiction to review the CAAF's decision under 28 U.S.C. § 1259(3), and suggesting that, in any event, the Court should await "further consideration of the question presented in the courts of appeals." Brief for the United States in Opposition at 10–12, 15, *Larrabee v. United States*, 139 S. Ct. 1164 (2019) (No. 18-306) ["*Larrabee* BIO"]. That "further consideration" has now occurred—and courts have offered divergent rationales for upholding this expansive grant of military jurisdiction. This Court should resolve the

critical constitutional question before millions of persons who have honorably served their country are exposed to the military justice system for offenses committed in civilian life years—if not decades—after retiring from active duty. This case presents an ideal vehicle through which to do so.

STATEMENT

A. Legal Framework

1. After twenty years of active service in the Marine Corps, enlisted Marines may transfer to the Fleet Marine Corps Reserve. 10 U.S.C. § 101(a)(4). Despite its name, the Fleet Marine Reserve is not a "reserve component" of the armed forces. *See id.* § 10101. Rather, it is a de facto retirement status: after a Marine transfers to the Fleet Marine Corps Reserve, "for all intents and purposes, he [has] retired." *Begani*, 81 M.J. at 275.

Retirees wield no actual military authority. They are not assigned to a specific command,[1] lack authority to give binding orders,[2] have no obligation to maintain any level of physical fitness,[3] are ineligible for

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[1] *See* Marine Corps Order [MCO] 1001R.1L, Marine Corps Reserve Administrative Management Manual ch. 1 ¶ 5 (Mar. 25, 2018), https://perma.cc/PBN5-H4KH.

[2] *Cf.* 10 U.S.C. § 750 ("A retired officer has no right to command except when on active duty.").

[3] *See* MCO 6100.13A, Marine Corps Physical Fitness and Combat Fitness Tests ch. 2 ¶ 2 (Feb. 23, 2021) (omitting members of the Fleet Marine Corps Reserve from the categories of personnel required to regularly pass a physical fitness test), https://perma.cc/D2K7-LFKY.

promotion,[4] and may refer to their retired rank only if it does not "give[] the appearance of sponsorship, sanction, endorsement, or approval" by the Department of Defense.[5] Retirees may not even wear their uniforms except in specifically approved circumstances.[6] Retirees' only obligation is to present themselves in the highly unlikely event that they are summoned from civilian life during a war or national emergency—which almost never happens. *See* 10 U.S.C. § 8385(a). Retirees also receive pensions. *Id.* §§ 8330(c)(1), 8333(a); *see Barker v. Kansas*, 503 U.S. 594, 605 (1992) ("military retirement benefits are to be considered deferred pay for past services," not "current compensation").

2. The UCMJ authorizes the court-martial of military retirees. 10 U.S.C. § 802(a)(4), (6). Exposure to court-martial jurisdiction has enormous consequences because military courts continue to operate very differently from civilian courts. Their jurisdiction, for instance, extends to offenses civilian courts could not constitutionally try—retirees can be prosecuted for anti-war speech protected by the First Amendment, *see Parker v. Levy*, 417 U.S. 733, 735 (1974); wearing religious attire, *see Goldman v. Weinberger*, 475 U.S. 503 (1986); and using contemptuous words toward the President, other high executive officials, and Congress, 10 U.S.C. § 888. And courts-

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[4] *See* MCO 1900.16 ¶ 7013, Marine Corps Separation and Retirement Manual (Feb. 15, 2019), https://perma.cc/7P5R-MHJH.

[5] Dep't of Def. Directive 5500.7-R, Joint Ethics Regulation § 2-304 (Aug. 30, 1993), https://perma.cc/N62H-WZDH.

[6] *See* MCO 1900.16, *supra*, ¶ 1101.5(b)(4)(B).

martial employ numerous procedures that would be unconstitutional or unlawful in civilian courts. For example, guilty verdicts in non-capital cases require the concurrence of only three-fourths of the panel members, 10 U.S.C. § 852(a)(3); *but see Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (Sixth Amendment prohibits conviction based on non-unanimous verdicts); panel members are those who "in [the convening authority's] opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament," 10 U.S.C. § 825(e)(2); *but see Taylor v. Louisiana*, 419 U.S. 522, 528-30 (1975) (Sixth Amendment protects right to "selection of a petit jury from a representative cross section of the community"); and in capital cases, courts-martial have not been required to appoint "learned counsel" to represent servicemembers facing death sentences. *Compare United States v. Akbar*, 74 M.J. 364, 404 (C.A.A.F. 2015), *with* 18 U.S.C. § 3005.

3. Given these significant differences, this Court has repeatedly stated that the Constitution limits courts-martial to "the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22. To that end, the Court has struck down court-martial jurisdiction over military dependents, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); military contractors and employees, *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); and even discharged former servicemembers for offenses committed while they were on active duty. *Toth*, 350 U.S. at 22. As the CAAF put it more than a decade ago, these decisions

reflect this Court's "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) (emphasis added).

To constitutionally exercise jurisdiction, courts-martial must also have jurisdiction over the offense. The offense must "aris[e] in . . . the land or naval forces" so that it expressly falls outside the Fifth Amendment's grand jury requirement, and implicitly falls outside Article III and the Sixth Amendment's petit jury requirements. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 39-40 (1942). The Court has held that all non-capital offenses committed by active-duty servicemembers necessarily arise in the land or naval forces, *see Solorio v. United States*, 483 U.S. 435 (1987), but it has never held—or even suggested—that the same is true for non-military offenses committed by retirees.

4. In sum, this case presents an expansive exercise of court-martial jurisdiction never upheld by this Court: the assertion of military power to try inactive retirees for offenses committed while they are retired, functionally living as civilians in society, and subject only to the theoretical possibility of being recalled to active duty at some later date.

B. Proceedings Below

1. Just days before his eighteenth birthday, petitioner enlisted in the Marine Corps. Pet. App. 48a. After serving for twenty years, in August 2015, he retired and transferred to the Fleet Marine Corps Reserve. *Id.* at 5a. After retirement, he continued to

reside in Iwakuni, Japan (his final duty station) and began managing two local bars. *Id.* In November 2015, he sexually assaulted a bartender at one of the bars and recorded the incident on his phone. *Id.* The victim's spouse was a member of the U.S. armed forces, but the victim was not. *Id.*

Petitioner was charged under the UCMJ. He pleaded guilty to sexual assault and indecent recording and was sentenced to ten months' confinement and a dishonorable discharge. *Id.*

2. Petitioner appealed to the Navy-Marine Corps Court of Criminal Appeals (CCA). *Id.* As relevant here, he argued that because he was retired, the court-martial's exercise of jurisdiction over him was unconstitutional. *Id.* Because the CCA had recently held in a companion case that military retirees "remain members of the land and Naval forces who may face court-martial," *United States v. Dinger*, 76 M.J. 552, 556 (N-M Ct. Crim. App. 2017), it "summarily reject[ed]" his challenge. *United States v. Larrabee*, 2017 WL 5712245, at *1 n.1 (N-M Ct. Crim. App. Nov. 28, 2017). The CAAF summarily affirmed without reaching the question presented, *United States v. Larrabee*, 78 M.J. 107 (C.A.A.F. 2018) (mem.), and this Court denied certiorari. 139 S. Ct. 1164 (2019).

3. Petitioner brought a collateral attack against his conviction and sentence in the U.S. District Court for the District of Columbia. Pet. App. 6a. He argued that (i) Congress's subjection of retirees to courts-martial jurisdiction is unconstitutional because retirees are "for all practical purposes" civilians and therefore not subject to regulation under the Make Rules Clause, *see* U.S. CONST. art. I, § 8, cl. 14; and (ii) his

case did not "aris[e]" in the land or naval forces" because he was accused of committing civilian crimes against a civilian on private property, *see id.* amend. V. (excepting cases arising "in the land or naval forces" from grand jury indictment).

The district court held that "Congress's expansion of court-martial jurisdiction over retirees who are members of the Fleet Marine Corps Reserve is unconstitutional." Pet. App. 48a. Because "trial by military court-martial was intended to be only a narrow exception to the normal and preferred method of trial in courts of law," the court explained, the government bore the burden of showing why subjecting inactive retirees to court-martial jurisdiction was "necessary to maintain good order and discipline." *Id.* at 58a-59a. The court concluded that the government could not carry that burden. *Id.* at 66a. The court therefore held that the statute subjecting retirees to court-martial violates the Constitution. *Id.*

4. A divided panel of the court of appeals reversed. *Id.* at 1a-40a.

a. The panel first broke with the CAAF's deference-based analysis of the same question in *Begani*, 81 M.J. 273. In *Begani*, the CAAF had upheld the prosecution of a retired servicemember for offenses committed while retired by relying heavily on the substantial deference that it believed Congress was owed in identifying who could be tried by court-martial. *Id.* at 277-79. But in a part of her opinion joined by Judge Tatel, Judge Rao explained that "[w]hen confronted with a UCMJ provision allowing court-martial jurisdiction over a class of persons, the Supreme Court has repeatedly declined to defer to Congress." Pet. App.

10a-13a. The panel thus directly repudiated the deference that *Begani* had endorsed and relied upon. *Id.*; *see also id.* at 41a (Tatel, J., concurring in part and dissenting in part).

b. A different majority then held that the Constitution permits the armed forces to court-martial anyone who has a formal relationship with the military—even if that relationship consists only of the possibility of future recall to active duty. *Id.* at 2a (Rao, J., joined by Walker, J.). The majority reasoned that petitioner "was in 'the land and naval Forces' at the time of his court-martialing," and his "case[] ar[ose] in the land or naval forces," *id.* at 39a (citing U.S. CONST. art. I, § 8, cl. 14, and amend. V), based on the theory that he was subject to "ongoing military duties," *id.* at 40a, to wit, the duty to respond to a hypothetical future order involuntarily recalling him to active duty.

In reaching that conclusion, the majority relied upon inferences it drew from its survey of Founding-era British and American military practices in an effort to ascertain the "original meaning of the Make Rules Clause." *Id.* at 19a-20a (citing, *inter alia*, Parliament's brief authorization of courts-martial for "half-pay officers" and the courts-martial of allegedly "furloughed" soldiers during the Revolutionary War). The panel majority reached that conclusion even though neither party had briefed those historical practices (and the government had not argued that they were probative). *Id.* at 19a-27a.

c. Judge Tatel dissented, emphasizing that while the "possibility of a recall order . . . certainly means that the military status of the Fleet Marine Corps Reserve *could* change," the panel majority erred in

treating that possibility as anything more than "a gateway to military status." *Id.* at 44a (Tatel, J., concurring in part and dissenting in part). Until and unless they are recalled, Judge Tatel explained, inactive retirees' "day-to-day-lives are equivalent to those of ordinary civilians." *Id.* at 41a-46a. The majority's holding, he wrote, thus extended military jurisdiction over individuals who had entered civilian life, depriving them "of the right to jury trial and of other treasured constitutional protections." *Id.* at 46a (quoting *Covert*, 354 U.S. at 21 (plurality opinion)).

"The implications of this case," Judge Tatel cautioned, "stretch far beyond [petitioner] and the Fleet Marine Corps Reserve." *Id.* at 45a. "Millions of military retirees are also subject to military recall." *Id.* (citing 10 U.S.C. § 688(b)). "[U]nder the court's reasoning," he explained, "nothing would stop the Government from court-martialing a 90-year-old Korean War veteran, who retired after being injured in the war, for shoplifting a newspaper from his local supermarket." *Id.* at 45a-46a (internal quotation marks omitted).

And beyond its expansion of military jurisdiction, he added, the majority's rule subjects Americans to prosecution for conduct that would enjoy constitutional protection in civilian life. "The 200-plus retired generals and admirals who spoke out against President Trump and the 120-plus now speaking out against President Biden could likewise be court-martialed." *Id.* (citing 10 U.S.C. § 888, which subjects military officers to court-martial for "us[ing] contemptuous words against the President"). This encroachment on civilian jurisdiction, Judge Tatel concluded,

contradicted this Court's repeated warnings against the expansion of court-martial jurisdiction at the expense of constitutional protections. *Id.* at 46a.

5. Petitioner sought rehearing en banc, explaining that the majority's reasoning allows the armed forces to try any of the more than two million retired servicemembers for offenses committed while they are retired without any showing of military necessity—a grave expansion of military jurisdiction. The petition argued that the majority's holding transgresses the principle that the Constitution limits courts-martial to "the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22. And the petition argued that the majority's conclusions were unsupported by its unbriefed and incomplete historical analysis. Pet. for Reh'g, *Larrabee v. Del Toro*, No. 21-5012 (D.C. Cir. filed Oct. 17, 2022). A vote was requested, but the full court denied rehearing en banc. Pet. App. 69a.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly policed the outer constitutional bounds of military jurisdiction—even in the absence of divisions of authority among the lower courts. The bottom lines of the Court's rulings in these cases—from *Toth* to *Solorio*—have cut in both directions. But the common thread uniting them is the unquestioned imperative of having *this* Court, not lower civilian or military courts, conclusively articulate the constitutional limits on courts-martial.

That imperative is reinforced, in this case, by the fundamental—and express—disagreement between

the CAAF and the D.C. Circuit over *why* ongoing military jurisdiction over retired servicemembers is constitutional. *Cf. Arellano v. McDonough*, 143 S. Ct. 543, 547 (2023) (noting that certiorari was granted to resolve a dispute within the Federal Circuit over the underlying rationale, even though the lower court judges on the same court agreed on the result). It would be highly incongruous to have direct appeals of retirees' courts-martial governed in by an analysis that the D.C. Circuit has specifically rejected, and to have collateral attacks governed by historical analysis that no one properly briefed—and that the D.C. Circuit in any event got wrong.

This is the ideal vehicle for reviewing this question. It comes to this Court free of jurisdictional objections that the government and some Justices have raised about directly reviewing the CAAF's decisions in some (or all) cases. And the divided ruling of the D.C. Circuit illuminates the competing constitutional positions, making the issue ripe for review. As the Court has done on multiple past occasions, it should grant review to definitively determine the outer constitutional boundaries of court-martial jurisdiction.

A. The Question Presented Is Exceptionally Important—And Directly Affects More Than Two Million Veterans

1. As a member of the Fleet Marine Corps Reserve, petitioner bears one of several distinct military designations that all reflect the same status: retired from active duty. Indeed, the government has not argued at any point in petitioner's case that any legal justification exists to treat members of the Fleet Marine Corps Reserve differently from *other* retired

servicemembers. Nor has the government suggested any material difference between the constitutionality of the military jurisdiction authorized by Article 2(a)(6) of the UCMJ (over members of the Fleet Reserve and Fleet Marine Corps Reserve) and that authorized by Article 2(a)(4) (over "[r]etired members of a regular component of the armed forces who are entitled to pay"). *See* Pet. App. 3a–4a & n.2 (noting the lack of a distinction).

The common jurisdictional issue cutting across all classes of military retirees underscores the stakes of the question presented. The (distinct) legal rationales embraced by the CAAF in *Begani* and by the D.C. Circuit in this case would apply to the same degree to *any* individual who (1) at some point served on active duty; (2) has retired from active duty; and (3) remains at least theoretically subject to involuntary future recall to active duty. Thus, the question presented does not just implicate the 15,000-plus members of the Fleet Marine Corps Reserve, *id*. at 3a & n.1; it implicates *any* currently retired servicemember. According to the Department of Defense, 2,181,457 servicemembers were retired as of December 31, 2021—the last year for which such data are publicly available. Dep't of Def., *Military Retirees and Survivors by Congressional District*, at 1 (2022). This substantially exceeds the roughly 1.3 million servicemembers who are currently on active duty. *See* Dep't of Def., *Defense Manpower Profile Report for Fiscal Year 2023*, at 2 tbl.1-1 (2022).

2. This Court has never had occasion to resolve whether inactive—but not formally separated—military personnel may constitutionally be tried by court-

martial for offenses committed while inactive. Part of why that question has never reached the Court is because Congress has generally *not* authorized courts-martial in such cases. Under the UCMJ, reservists are subject to court-martial only for offenses committed while on active duty or inactive-duty training. 10 U.S.C. § 802(a)(3)(A)(i). National Guard troops are subject to the UCMJ only under similar circumstances—and only when in "Federal service." *Id.* § 802(a)(3)(A)(ii). Of course, the fact that inactive reservists and guardsmen are not subject to the UCMJ *while* they are inactive does not in any way call into question the government's power to recall them when needed; it merely recognizes that they ought not to be subject to military law when they are not currently performing a military function.

More than a mere policy choice on Congress's part, lower courts have repeatedly suggested that the Constitution may *require* these statutory limits—explaining that serious constitutional questions would arise, for instance, from courts-martial of truly inactive reservists. *See, e.g.*, *Wallace v. Chafee*, 451 F.2d 1374, 1380-81 (9th Cir. 1971) (distinguishing the "principle that court-martial jurisdiction should be narrowly construed on constitutional grounds" because the UCMJ "purport[ed] to extend only to on-duty periods"); *Murphy v. Garrett*, 29 M.J. 469, 471 (C.M.A. 1990) (reserving the "constitutional question whether a member of the inactive reserve who has *no contacts* with an armed force could be ordered to active duty"). *See generally United States v. Hale*, 78 M.J. 268, 275–76 (C.A.A.F. 2019) (Ohlson, J., concurring in part and dissenting in part) (discussing reservist jurisdiction).

Retirees are the lone exception to this pattern. For reasons that were already anachronistic when the UCMJ was enacted in 1950,[7] and that are even more outdated today, Congress has continued to subject those who retire from active-duty components to the UCMJ *while* they are retired—even as the Individual Ready Reserve has displaced the retired list as the first, the largest, and the all-but-exclusive body from which the government would augment (and has augmented) active-duty forces in a crisis. *See, e.g.*, Dep't of Def. Instruction 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components*, encl. 5, § 2(a) (Mar. 11, 2014).

Under the government's regulations, retirees are literally the *last* body from which the government can (and does) supplement active-duty forces; two-thirds of retirees are not even eligible to be recalled under the government's own regulatory mobilization criteria—which, as the district court concluded (and the government does not dispute), prohibit recall of disabled retirees or retirees who are 60 or older. *See* Pet. App. 64a-65a (citing DoD Instruction 1352.01, ¶ 3.2(g)(2) (2016)).

And none of the troops *more* likely to be called upon in such circumstances are subject to the UCMJ while they are inactive. Thus, whether or not personnel are subject to the UCMJ while they are inactive

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[7] Shortly after the UCMJ was enacted, the Secretary of the Army found that "[c]ourt-martial jurisdiction over retired members not on active duty does not contribute to maintenance of good order and discipline and can be eliminated." AD HOC COMMITTEE TO STUDY THE UCMJ, REPORT TO THE HONORABLE WILBER M. BRUCKER 7 (1960), https://www.loc.gov/item/2011525391.

has nothing to do with how likely—or even whether—they are to be relied upon in a future emergency.

3. Meanwhile, even as retirees' reserve function has become moribund, their numbers have swelled—from 132,000 when the UCMJ was enacted to one million in 1975 to more than two million today. *See* Dep't of Def., *Statistical Report on the Military Retirement System: Fiscal Year 2015*, at 18–19 (2016).[8] Comparable numbers in *Toth* led this Court to emphasize "the enormous scope of a holding that Congress could subject every ex-serviceman and woman in the land to trial by court-martial for any alleged offense committed while he or she had been a member of the armed forces." 350 U.S. at 19.

The D.C. Circuit's holding in this case has a similarly "enormous scope." By the panel majority's logic, the government could today court-martial Korean War veterans who served alongside Toth (but who retired, rather than separated), along with any other military retiree, for any offense that they commit—even if it has been decades since their retirement from active duty, and even if the offense is one that could never be tried in a civilian court. *See, e.g.*, Chrissy Clark, *Active Duty, Retired Naval Intelligence Members Told They Cannot 'Disrespect' Biden over Afghanistan Debacle*, DailyWire.com, Aug. 27, 2021 (quoting

[8] Some of this growth is a byproduct of the post-Vietnam shift to an all-volunteer force not dependent upon short-term conscripts. But Congress has also halved retirees' original time-in-service requirement—from 40 years to 20. Not only has that move increased the *number* of retirees; it has dramatically increased the time they will spend *as* retirees—further raising the stakes of the question presented.

an Office of Naval Intelligence e-mail reminding retirees about 10 U.S.C. § 888, which prohibits use of "contemptuous words" against the President and other government officials); *see also Levy*, 417 U.S. at 750) ("[T]he [UCMJ] regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians.").

This concern is not academic. Although courts-martial of retirees for post-retirement offenses were, for a long time, exceedingly rare, *see* Pet. App. 61a n.8, their frequency has meaningfully increased in recent years. Petitioner's appeal was one of four such cases to be considered by the Navy-Marine Corps Court of Criminal Appeals since 2017; other service branches have likewise prosecuted retirees; and retired servicemembers' participation in the violence at the Capitol on January 6, 2021 and other efforts to overturn the results of the 2020 election has only increased calls for additional courts-martial of these individuals—including from retired flag officers and members of Congress. *See, e.g.*, Donie O'Sullivan, *Flynn Says He Didn't Endorse Myanmar-Style Coup*, CNN.com, June 1, 2021 (quoting Rep. Elaine Luria).

These developments reinforce what both the D.C. Circuit and the CAAF well understood even as they embraced different rationales: the question presented is of enormous legal *and* practical importance to both the military and the more than two million Americans currently retired from it—if not to others,

as well.[9] For that reason alone, it is a question on which this Court should have the last word.

B. The Lower Courts' Divergent Rationales Underscore The Need For This Court's Resolution—Both Independently And Together

Neither the CAAF nor the D.C. Circuit has offered a sound constitutional justification for ongoing military jurisdiction over retired servicemembers. In the decision below, Judges Rao and Tatel persuasively explained the flaws in the CAAF's deference-driven analysis. But the historical arguments on which Judges Rao and Walker alternatively relied are both factually and methodologically wanting. That leaves no adequate constitutional basis for the rule that each court adopted.

1. The D.C. Circuit put its finger on the error in the CAAF's reasoning in *Begani*: "When confronted with a UCMJ provision allowing court-martial jurisdiction over a class of persons, the Supreme Court has repeatedly declined to defer to Congress." Pet. App. 10a. To the contrary, in decision after decision, this Court decided *de novo* whether the personnel at issue were part of the "land and naval forces"; Congress's policy judgment to subject them to court-martial played no role in the Court's analysis.

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[9] In addition to the direct implications of the decision below, it also has ramifications for what Congress could authorize going forward. At a minimum, the D.C. Circuit's rationale would also allow Congress to subject more than 1.1 million currently inactive reservists and National Guard personnel to the UCMJ even for offenses committed while *they* are inactive.

In *Toth*, for instance, the Court rejected the government's argument that it was enough that the accused's offense had taken place while he was on active duty. Instead, "the power granted Congress . . . would seem to restrict court-martial jurisdiction to persons who are *actually* members or part of the armed forces" when they are tried, and not just at the time of their offense. 350 U.S. at 15 (emphasis added).

Justice Black's plurality opinion in *Covert* was to the same effect, concluding that "the authority conferred by Clause 14 does not encompass persons who cannot *fairly* be said to be 'in' the military service," 354 U.S. at 22 (plurality opinion) (emphasis added), without regard to the fact that Congress had provided otherwise. So too, *Singleton*, where the majority stressed that "[t]he test for jurisdiction . . . 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 (emphasis added).

None of this Court's decisions—in *Toth*, *Covert*, *Singleton*, *Grisham*, or *Guagliardo*—deferred to Congress on the permissible scope of court-martial jurisdiction.[10] Instead, each case brought judicial judgment to bear on the *functional* constitutional question—whether, given his particular role, the accused could "be regarded as falling within the term 'land

[10] Reinforcing this Court's focus on function over form, *Guagliardo* suggested that, if Congress truly wanted to subject civilian employees of the armed forces to court-martial, it would have had to conscript them into active service, 361 U.S. at 286, and not just deem them to be part of the armed forces.

and naval Forces.'" *Singleton*, 361 U.S. at 241; *See United States v. Cole*, 24 M.J. 18, 22 (C.M.A. 1987) ("The Supreme Court has not chosen to delineate a bright-line rule but instead has proceeded on a case-by-case basis to identify those who are civilians and not within the scope of Article I, section 8, clause 14."). Indeed, until *Begani*, this functional approach had been reflected in the CAAF's jurisprudence, as well. *See, e.g.*, *Murphy*, 29 M.J. at 471 ("Because of his continuing active contacts with the United States Marine Corps . . . , we need not address [the accused's objection to jurisdiction].").

And the reason why each class of defendants in this Court's cases *failed* the test for military status was because, when assessed under *de novo* review, they had no *actual* military role—not because they simply fell outside Congress's statutory definition of the "armed forces." The accused were civilians not only in form, but in function—as borne out by their lack of military duties, powers, or responsibilities. *E.g.*, *Covert*, 354 U.S. at 19 n.38 (plurality opinion) (noting that the accused "render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity" (internal quotation marks omitted)).

Thus, although this Court has never precisely defined the boundary between those who are "in" the "land and naval forces" and those who are not, *see id.* at 22, its decisions have consistently made clear that the boundary is heavily informed by the accused's military *function*—by whether the accused has any authority or obligation to act in a military capacity. Military prisoners, for example, may lack the capacity to

give lawful orders, but they unquestionably remain obligated to follow them. *See Kahn v. Anderson*, 255 U.S. 1 (1921) (upholding courts-martial of prisoners for offenses committed while in military custody). So too for cadets in the service academies. *See* 10 U.S.C. § 802(a)(2). Congress thus controls the permissible bounds of court-martial jurisdiction not by fiat, but by deciding upon the circumstances under which each class of personnel are given military duties and responsibilities. *See Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). And for those to whom Congress has given no such current duties, the courts have consistently barred court-martial jurisdiction.

Thus, Congress has the authority to decide the specific functions that a particular individual will have in relation to the miliary. But this Court makes the independent constitutional judgment whether the functions Congress has prescribed *suffice* to place a person "in the land and naval forces" for purposes of the Make Rules Clause. For those on active duty, that analysis is straightforward. For those who are not, the analysis is more complicated—and depends upon the actual functions the individuals at issue perform in relation to the military, and not just whether Congress has asserted their amenability to court-martial.

By sidestepping the (lack of) military function that retirees perform *while* retired, the CAAF's analysis rested on irrelevant factors to the legal question at issue—that Congress deems retirees to be "in" the "land and naval forces"; that retirees continue to receive deferred compensation; and that retirees remain theoretically subject to involuntary future recall. *Begani*,

81 M.J. at 277-80. None of these have anything to do with retirees' actual, *current* military functions.[11]

Instead of focusing on retirees' (lack of) current military duties or responsibilities, the CAAF rested its analysis instead on a far more inapt analogy—comparing Congress's power to subject retirees to court-martial to its power to prescribe *civilian* criminal offenses triable in Article III civilian courts. *See id.* at 279 (relying upon "the Supreme Court's broad deference towards Congress in enacting federal criminal statutes pursuant to Congress's regulatory powers). But that equation of federal civilian court jurisdiction to court-martial jurisdiction overlooks a basic principle of Article III: the need to carefully circumscribe adjudication of federal cases by non-Article III federal tribunals. *See Stern v. Marshall*, 564 U.S. 462, 484 (2011).

To nevertheless conclude, as the CAAF did, that Congress is entitled to the same deference when deciding who is subject to the UCMJ as it receives when defining new offenses to be tried by Article III civilian courts runs afoul of this Court's wariness of non-Article III jurisdiction in general and military jurisdiction specifically. If Congress can evade Article III by

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[11] Nor is it necessary to subject retirees to the UCMJ while retired in order to ensure that they will answer in the unlikely event they are involuntarily recalled to active duty. The military may court-martial those who refuse to appear when lawfully called to active duty. *Billings v. Truesdell*, 321 U.S. 542, 544 (1944); *United States v. Lwin*, 42 M.J. 279, 282 (C.A.A.F. 1995). These accused are not court-martialed *while* inactive; they are court-martialed while legally on active duty for refusing to acknowledge that they were lawfully activated.

deeming individuals with no ongoing military duties to be part of the "land and naval forces," then "Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking." *Id.* at 495. Insofar as the CAAF's analysis in *Begani* provides the basis for continuing to exercise ongoing military jurisdiction over retired servicemembers, the latent inconsistency between that analysis and this Court's previous rulings independently warrants review.

2. In the decision below, Judges Rao and Tatel rightly rejected the CAAF's deference-driven analysis in *Begani*. But Judges Rao and Walker replaced that analysis with an even more capacious constitutional rule—that the Constitution allows for the court-martial for any offense of any individual who remains subject to even a *single* military order, regardless of their current military function or responsibilities. Pet. App. 13a-19a.

The strongest support the panel majority offered for this "one-order" rule is its assessment of "the original meaning of the Make Rules Clause." *Id.* at 19a. But in surveying Founding-era British and American military practices, the panel drew the wrong factual and methodological conclusions from an incomplete recitation of the historical record—which neither party had briefed (in part because the government, as appellants, had declined to make any historical arguments in support of reversal).

At the heart of the panel's analysis was the treatment of "half-pay officers" in Britain before the American Revolution. *See id.* at 20a-21a. Much like retired servicemembers today, half-pay officers were

individuals who continued to receive a form of pay after leaving active duty in exchange for remaining subject to the possibility of future service. *See id.*

It is undisputed that, for a brief period (1748–51), Parliament exposed these individuals to trial by court-martial for offenses committed while they were inactive. *See* 22 Geo. 2 c. 5. But as a recent study makes clear, that authority was quickly repealed in response to popular opposition to such an unprecedented expansion of military jurisdiction over individuals who were functionally, if not formally, civilians. *See* Marc J. Emond, *Can Grandpa Really be Court-Martialed? The Constitutionality of Imposing Military Law upon Retired Personnel* (2022) (LL.M. dissertation, U.S. Army JAG Legal Ctr. & Sch.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089746.

The panel majority dismissed Major Emond's analysis (which petitioner had brought to the court's attention after oral argument), focusing on the fact that Parliament had briefly *authorized* such jurisdiction. To Judges Rao and Walker, Parliament's prompt repudiation of that extension was irrelevant, even though the repudiation predated the drafting of the Constitution by 36 years. All that mattered to the panel majority was that "Parliament had subjected half-pay officers to court-martial jurisdiction earlier in the eighteenth century, and that its *authority* to do so was not disputed." Pet. App. 23a n.8.

But the absence of a "dispute" over Parliament's "authority" proves nothing about Founding-era British *practice*. Parliament had—and continues to have—near-plenary authority to enact *any* law. Congress, by contrast, is bound by the Constitution, which

deliberately rejected the parliamentary model by conferring upon Congress only those legislative powers "herein granted." U.S. CONST. art. I, § 1. And the panel majority's reflections on the "transcendent and absolute" powers of Parliament, *see* 1 William Blackstone, *Commentaries* *156, confuses the question of what Parliament could have done with what it actually did. If the claim is that the Constitution's reference to "land and naval forces" should be interpreted to reflect then-prevailing British *practice*, then any historical analysis should necessarily privilege what that practice *was* as of the mid-1780s over what it *could have been*. And as true as that principle is in the abstract, it is only the more inescapable when that Founding-era practice embodied a conscious *rejection* of authority that had previously been (briefly) asserted.

That Britain rejected military jurisdiction over half-pay officers at the time of the Founding is driven home by a high-profile 1785 case that the D.C. Circuit also wrongly dismissed. After charges were brought against Major General Charles Ross (a half-pay officer) for a disparaging letter to the editor about a superior officer, the court-martial sought the judges' views as to whether Ross was subject to military trial. When the judges concluded that there was no such jurisdiction over half-pay officers, the charges were dismissed. The panel *cited* that ruling, *see* Pet. App. 22a, but concluded that "that judicial decision did not limit the legislature's authority to subject half-pay officers to military jurisdiction." *Id.*

This reasoning again wrongly privileges Parliament's theoretical authority over the reality of

Founding-era practice. Indeed, the dénouement of the Ross case was repeatedly cited by British courts and other authorities for the proposition that half-pay officers were *not* subject to military jurisdiction for offenses committed *while* on half pay. *See, e.g.*, *Bradley v. Arthur*, Barn. & C. 292, 308 & n.a (K.B. 1825) (opinion of Bayley, J.) ("The decision of the Judges that a half pay officer is not liable to a court martial, applies, I apprehend, to unemployed half pay officers only: they do not come within the words of the mutiny act, which describe such officers as are amenable to a court martial, viz. persons commissioned or in pay as officers"); *see also, e.g.*, HARRIS PRENDERGAST, THE LAW RELATING TO OFFICERS IN THE ARMY 25 (1855). In other words, the Ross precedent was understood as *rejecting* the amenability of half-pay officers to court-martial as a matter of contemporaneous practice.

Thus, to the extent the permissible constitutional scope of court-martial jurisdiction should be informed by prevailing (and accepted) British *practice* at the time the Constitution was written, that practice repudiated the power of courts-martial to try inactive military personnel for offenses committed while they were inactive; it certainly did not support it.

Returning from across the Atlantic, the panel majority in the D.C. Circuit also found support in an historical argument first advanced by Judge Maggs in his concurring opinion in *Begani* (where it also was not briefed)—looking to Founding-era American courts-martial of a handful of supposedly "furloughed" soldiers for mutiny. *See* Pet. App. 24a-26a & n.10 (citing *Begani*, 81 M.J. At 284-85 (Maggs, J., concurring)). Here, again, the panel drew the wrong

conclusions from its (and Judge Maggs's) misreading of the relevant history.

In *Begani*, Judge Maggs relied upon several courts-martial that arose from the 1783 Pennsylvania Mutiny, a notorious episode in which Continental Army soldiers protested a new policy that authorized furloughs that would turn into discharges. *See Begani*, 81 M.J. at 284-85 (Maggs, J., concurring). Angry that this would deprive them of pay to which they believed they were entitled, the mutineers refused to *accept* the furloughs (which, critically, General Washington had decreed would be voluntary)—and *then* mutinied. *See* Kenneth R. Bowling, *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, 101 Pa. Mag. Hist. & Biog. 419, 424, 428 (1977).

Thus, treating the courts-martial of some of the mutineers as proof that furloughed officers remained subject to court-martial, Judge Maggs missed the critical fact that the mutineers had *rejected* the furlough—and had mutinied from their barracks while still on active duty. *See id*. The panel majority was thus correct that contemporaneous observers saw no problem with the ensuing courts-martial, Pet. App. 25a-26a, but misunderstood *why* that was so. Although the mutiny was *about* furloughs, the mutineers themselves were *not* on furlough either when they mutinied or when a handful were court-martialed. Those trials thus did not implicate whether soldiers on furlough were subject to court-martial for offenses committed while furloughed.

In any event, "furlough," both then and now, provided a temporary physical reprieve from the front

lines, not a permanent change in the soldier's legal status. Samuel Johnson's 1755 dictionary defined the term as "[a] temporary dismission from military service; a licence given to a soldier to be absent." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, "Furlough" (1755). Thus, even if the handful of 1783 mutineers who were prosecuted (and soon pardoned by Congress) *were* on furlough at the time of their mutiny and courts-martial (and they were not), that did not mean that they were legally inactive; it meant only that they had been granted a temporary license to be absent from their posts. Reinforcing this distinction, Congress has in the past expressly exempted retirees from furlough—since, unlike active-duty personnel, they are *categorically* inactive. *See, e.g.*, 10 U.S.C. § 6406(a) (repealed 1970) ("The Secretary of the Navy may furlough any officer of the Regular Navy or the Regular Marine Corps, other than a retired officer.").[12]

A proper assessment of this historical practice is hardly surprising; "having experienced the military excesses of the Crown in colonial America, the

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[12] Research in eighteenth-century materials relevant to the 1783 Pennsylvania Mutiny and the status of the soldiers who faced court-martial was conducted by historians Patrick Spero, Ph.D., and Brenna Holland, Ph.D. Both hold positions at the American Philosophical Society in Philadelphia, which stewards records relevant to this case and the Founding era more broadly. Dr. Spero is Librarian and Director of the Library & Museum; Dr. Holland is Assistant to the Librarian. Counsel also received assistance from Dr. Zack White, Visiting Research Fellow at the University of Southampton, who provided materials from the UK National Archives and other British military historical sources.

Framers harbored a deep distrust of executive military power and military tribunals." *Loving v. United States*, 517 U.S. 748, 760 (1996); *see Lee v. Madigan*, 358 U.S. 228, 232 (1959) ("The attitude of a free society toward the jurisdiction of military tribunals . . . has a long history.").

The upshot of these errors is that they undermine the only rationale that remained after the D.C. Circuit rejected the CAAF's reasoning in *Begani*. Thus, whether or not a proper assessment of Founding-era British and American practice *forecloses* the constitutionality of military jurisdiction over retired servicemembers for offenses committed while they are retired, what is clear is that that practice does not independently *support* such jurisdiction—and that the panel majority's contrary analysis in this case is therefore irredeemably flawed.

At the very least, if the answer to such an important constitutional question *is* to turn on what was permitted in eighteenth-century military law, that history ought to be fully and properly briefed *before* it is relied upon. The D.C. Circuit panel majority's excursion into historical materials never cited by the government or explored through the adversary process is at odds with "the principle of party presentation," which this Court recently reaffirmed in the context of Founding-era historical claims. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022) (citing *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)). And the panel's erroneous historical conclusions underscore the need for a proper adversarial process in this context. *See id.* ("Courts

are thus entitled to decide a case based on the historical record compiled by the parties.").

That the panel majority (and Judge Maggs in his concurring opinion in *Begani*) relied upon such a factually and methodologically flawed historical account to validate a massive expansion of court-martial jurisdiction is thus a compelling additional reason why certiorari should be granted—not just because of its own factual and methodological shortcomings, but because the court of appeals thought that it provided a *better* ground on which to rest such jurisdiction than the CAAF's deference-driven analysis in *Begani*.

C. This Case Is An Ideal Vehicle To Address The Question Presented

This petition is the third to raise the question presented in the last five Terms; the first two—in petitioner's direct appeal and in *Begani*—were denied. But both of those petitions suffered from jurisdictional and procedural complications that are not present here.

In the direct appeal in petitioner's case, the government argued that this Court lacked jurisdiction to review the CAAF's decision under 28 U.S.C. § 1259(3)—entirely because the CAAF had not actually decided the jurisdictional question in petitioner's case (it had granted review on—and decided—a distinct question). *See Larrabee* BIO, *supra*, at 10-12. That objection has no bearing here—where the D.C. Circuit reached and resolved this question in its ruling, and where this Court's authority to conduct plenary review of petitioner's case under § 1254(1) is beyond question.

And although the CAAF *did* decide the question presented question in *Begani* (mooting the government's § 1259(3) argument), the petition on direct appeal in that case came after this Court's decision in *Ortiz v. United States*—where Justices Alito and Gorsuch dissented on the ground that this Court lacks the constitutional authority to entertain *any* direct appeals from the CAAF. *See* 138 S. Ct. 2165, 2189 (2018) (Alito, J., dissenting). That potential objection will necessarily infect every subsequent appeal from the CAAF—and, thus, every direct appeal by a retired servicemember attacking the constitutional jurisdiction of the court-martial that convicted them.

Unlike those petitions, this one comes from an Article III court of appeals, and thus raises neither of those jurisdictional obstacles. What's more, not only did the government expressly point to "the potential for further consideration of the question presented in the courts of appeals" in arguing against certiorari on petitioner's direct appeal, *Larrabee* BIO, *supra*, at 15, but the government has also abandoned the argument it unsuccessfully made in the district court here—that review of petitioner's challenge is not *de novo*. In other words, the only argument that the government still possesses for opposing certiorari is that the lower courts were both right. But given that the D.C. Circuit specifically *rejected* the CAAF's rationale in *Begani*, an irreconcilable disagreement over the correct rationale is undeniable.

Petitioner's case presents one additional characteristic that favors using it as the vehicle for reaching the question presented: Petitioner was convicted of civilian offenses for which he could have been tried in a

civilian court, especially if he could not be tried by court-martial. *See* 18 U.S.C. § 3261(d)(1); *see also* Pet. App. 45a (Tatel, J., concurring in part and dissenting in part) ("The implications of this case stretch far beyond Larrabee and the Fleet Marine Corps Reserve."). Thus, even if there could be exceptional cases in which the unavailability of a civilian forum might militate in favor of sustaining the exercise of military jurisdiction, this is not one.

This petition therefore poses the question presented in the cleanest form in which this Court could receive it, and on appeal of a collateral attack in an Article III court. If this Court agrees that the question presented ought to be resolved once and for all, this petition presents an ideal vehicle through which to do so.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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