No. 23-____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY A. ANDERSON,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Constitution require that a general court-martial guilty verdict be unanimous?

PARTIES TO THE PROCEEDING

Petitioner, Anthony A. Anderson, is the Appellant below.

Respondent, the United States of America, is the Appellee below.

CORPORATE DISCLOSURE STATEMENT

This proceeding does not involve any nongovernmental corporation.

RELATED PROCEEDINGS

United States v. Anderson, United States Court of Appeals for the Armed Forces, Case No. 22-0193. Opinion dated June 29, 2023.

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The Opinion of the United States Court of Appeals for the Armed Forces is reported at 83 M.J. 291 (C.A.A.F. 2023), and reproduced in the Appendix at 1a.

The Opinion of the United States Air Force Court of Criminal Appeals is unreported, but reproduced in the Appendix at 24a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1259(3).[1]

The Chief Justice approved an Application (23A219) to extend the time to file a petition for a writ of certiorari from September 27, 2023 to October 30, 2023.

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[1] Petitioner acknowledges the view of some members of this Court that it lacks jurisdiction to hear appeals directly from the United States Court of Appeals for the Armed Forces (CAAF). *See Ortiz v. United States*, 138 S. Ct. 2165, 2190 (2018) (Alito, J., dissenting); *United States v. Briggs*, 141 S. Ct. 467, 474 (2020) (Gorsuch, J., concurring). Petitioner respectfully requests that the Petition be granted in light of the Court's holding in *Ortiz* that it does have jurisdiction to hear appeals directly from the CAAF. *Ortiz*, 138 S. Ct. at 2184.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Uniform Code of Military Justice (UCMJ) provides, in relevant part: "No person may be convicted of an offense in a general or special court-martial, other than . . . by the concurrence of at least three-fourths of the members present when the vote is taken." Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)(3).

The United States Constitution provides, in relevant part:

Article I, Section 8: Congress shall have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."

Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ."

Fourteenth Amendment, Section 1: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

It was settled long ago that the United States Constitution requires a unanimous verdict to convict a person prosecuted for a federal offense. *See*, *e.g.*, *Patton v. United States*, 281 U.S. 276, 288 (1930). The same was true in almost all states under their own laws. Three years ago this Court overturned one of its prior rulings, and determined that in state courts too the federal Constitution requires a unanimous verdict to convict a person for a criminal offense. *See Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

But even after *Ramos*, *millions* of Americans are subject to conviction and severe punishment by a court-martial on the basis of a ***non-unanimous*** verdict. In addition to service members, court-martial jurisdiction reaches former service members, family of service members, military contractors, and members of non-military government organizations when assigned to and serving with the armed forces. Courts-martial jurisdiction "overlaps substantially with that of state and federal courts," covering "a wide range of offenses, including crimes unconnected with military service," in times of war and peace. *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018).

Each person subject to the jurisdiction of a court-martial may be found guilty on the basis of whatever number of votes Congress deems sufficient. Today that number is three-quarters of the panel for a non-capital case, although Congress has plenary power to reduce that threshold.

In the decision below, the Court of Appeals for the Armed Forces (CAAF) held the United States Constitution does not require that a court-martial guilty verdict be unanimous. In reaching that conclusion, the CAAF rejected Petitioner's arguments under the Fifth Amendment Due Process Clause, the Sixth Amendment, and the Equal Protection Clause of the Fourteenth Amendment applied to the federal government through the Fifth Amendment. The CAAF decision in this case will now govern all courts-marital—unless it is reviewed by this Court.

This Court has never decided whether any provision of the Constitution requires that a court-martial guilty verdict be unanimous. The CAAF erred when concluding the Constitution does not require that a general court-martial guilty verdict be unanimous.

Even in the area of military affairs, it is this Court's "ultimate responsibility to decide [] constitutional question[s.]" *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). The need for the Court to grant review is especially acute when no other Article III court can address the constitutional matter presented. Here, the Court's review is vital given that the question at issue has been decided by an arm of the executive branch, not an Article III court. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

The exceptionally important Question Presented warrants the Court's immediate consideration, and this Petition is the best vehicle to do so.

STATEMENT OF THE CASE

The United States charged Petitioner, Master Sergeant Anthony Anderson, with two specifications of attempted sexual abuse based on his online communications with a law enforcement officer posing as fictitious minor, "Sara." The Government convened a general court-martial to prosecute its claims. Pet. App. 25a, 76a.

The Uniform Code of Military Justice (UCMJ) authorizes conviction of a servicemember in a general court-martial "by the concurrence of at least three-fourths of the members present when the vote is taken." Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)(3).[2]

Before his trial, Petitioner filed a motion requesting that the military court require a unanimous verdict for any finding of guilty, or instruct the members that the president of the panel must announce whether any finding of guilty was the result of a unanimous vote. The military judge denied the motion in a written ruling. Pet. App. 105a. That ruling was supplemented after the court-martial adjourned. Pet. App. 85a.

Petitioner was tried on March 3, May 22, and June 1–3, 2020, at Ramstein Air Base, Germany. A

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[2] A general court-martial impanels eight members in a non-capital case, but that number can be reduced to six as a result of excusals. *See* 10 U.S.C. §§ 829(b)(2)(B), (d)(1)(B). An accused service member may elect to have a military judge determine guilt or innocence instead of a panel—like a civilian defendant can waive the right to a jury. *See* 10 U.S.C. § 816(b)(3). The availability of that choice is irrelevant to whether the Constitution requires that a general court-marital panel must be unanimous to convict a service member.

panel composed of officers and enlisted members convicted Petitioner, contrary to his pleas, of both specifications in violation of Article 80, UCMJ, 10 U.S.C. § 880.

Petitioner elected to be sentenced by the military judge, who imposed twelve months of confinement for each offense, to run concurrently, reduction of his rank to E-1, and a dishonorable discharge.

The convening authority took no action on the findings or sentence. The United States Air Force Court of Criminal Appeals affirmed. Pet. App. 24a.

The Court of Appeals for the Armed Forces (CAAF) granted Petitioner's request for review, agreeing to consider his arguments that the United States Constitution requires a unanimous general court-martial verdict. The CAAF specifically agreed to review Petitioner's arguments based on the Sixth Amendment, the Fifth Amendment's Due Process Clause, and the Fifth Amendment's right to equal protection.[3] Pet. App. 2a–3a. After full briefing before the CAAF, and oral argument, the CAAF concluded the Constitution does not require a unanimous general court-martial verdict, and affirmed Petitioner's conviction.

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[3] After granting review of Petitioner's case, the CAAF granted review in several other cases raising arguments about non-unanimous verdicts, but ordered that no briefs be filed in those cases. Only Petitioner's case was briefed and argued before the CAAF. After issuing a decision in Petitioner's case, the CAAF issued summary affirmances in the cases of other service members, "in view of United States v. Anderson, 83 M.J. __ (C.A.A.F. 2023)."

REASONS FOR GRANTING THE PETITION[4]

The Constitution authorizes Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Article I, Section 8. But that power is limited by other provisions in the Constitution, and it is well-settled that rules governing courts-martial are subject to constitutional constraints. *See Kinsella v. Krueger*, 351 U.S. 470, 473–74 (1956) (distinguishing between Congress's power to enact a provision of UCMJ and the question of its constitutionality); *Rostker*, 453 U.S. at 67 (Congress is not "free to disregard the Constitution" when "it acts in the area of military affairs."); *see also U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) ("There are dangers lurking in military trials which [are] sought to be avoided by the Bill of Rights and Article III of our Constitution."). As this Court recently observed, "[e]ach level of military court

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[4] Petitioner was convicted in a general court-martial. This Petition does not ask the Court to consider any issues regarding summary or special courts-martial. "The summary court-martial adjudicates only minor offenses, has jurisdiction only over servicemembers, and can be conducted only with their consent." *Weiss*, 510 U.S. at 167. A special court-martial has jurisdiction over most offenses under the UCMJ, but may not impose as punishment "death, dishonorable discharge, dismissal, confinement for more than one year, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year." Article 19(a), UCMJ, 10 U.S.C. § 819(a). This Petition also does not ask the Court to decide issues about other military tribunals, such as military commissions.

decides criminal 'cases' . . . in strict accordance with . . . the Constitution." *Ortiz*, 138 S. Ct. at 2174.

I. The CAAF's Decision is Incorrect

Before the CAAF, Petitioner raised several bases for concluding the Constitution requires that court-martial convictions be unanimous. The CAAF erroneously rejected each of those arguments.

A. The Sixth Amendment

In the decision below, the CAAF recognized that "[i]f the Sixth Amendment right to a jury trial applied in the military justice system, [Petitioner] would have a strong argument that he had a constitutional right to a unanimous verdict at his court-martial." Pet. App. 4a–5a. The CAAF, however, rejected Petitioner's Sixth Amendment argument because, it believes, this Court "has repeatedly stated that the Sixth Amendment right to a jury trial does not apply to courts-martial." Pet. App. 5a. The CAAF's analysis of the Sixth Amendment issue is wrong.

1. This Court Has Never Held the Sixth Amendment is Irrelevant to General Courts-Martial

This Court has never *held* that the Sixth Amendment is irrelevant to courts-martial—and the cases cited by the CAAF do not show otherwise.

For example, the CAAF relied heavily on *Ex parte Milligan*, 71 U.S. (4 Wall.), 2, 123 (1866), and *Ex parte Quirin*, 317 U.S. 1, 40 (1942). *See* Pet. App. 5a, 8a. But each case involved a military commission, not a court-martial—and the two types of tribunals are distinct. *See Ortiz*, 138 S. Ct. at 2179–80 (observing military commissions are unlike the court-martial

system); *see also* Dan Maurer, *Why Are Non-Unanimous (Court-Martial) Guilty Verdicts Still Alive After* Ramos*?*, 60 Am. Crim. L. Rev. 127, 130 (2023) (observing *Milligan* and *Quirin* "deal with trials of civilians and unlawful enemy combatants by military *commissions*, long-held to be practically and legally distinct adjudicatory systems from courts-martial.").

The CAAF also relied on *Whelchel v. McDonald*, 340 U.S. 122 (1950). *See* Pet. App. 5a, 8a. But there, "[t]he main point presented by the petition for certiorari [was] whether the military tribunal that tried petitioner was deprived of Jurisdiction by reason of the treatment of the insanity issue tendered by petitioner." 340 U.S. at 123. While the Court did state, in a passage quoted by the CAAF, that "[t]he right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions," *id.* at 127, the Court made that observation in response to an "analogy" to the Sixth Amendment, and the Court specifically noted that the issue did "not raise a question which goes to jurisdiction"—jurisdiction being "the only issue before the court." *Id.* at 126.

The CAAF also invoked *Reid v. Covert*, 354 U.S. 1 (1957), specifically quoting footnote 68. *See* Pet. App. 6a–7a. But even leaving aside that footnote 68 appears in a plurality opinion, it merely noted a statement made in prior Court opinions, citing *Quirin*, which (as noted above) did not involve a court-martial. Moreover, the CAAF overlooked that footnote 68 is appended to this sentence in the body of the plurality opinion: "As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of

the Constitution apply to military trials." *Reid*, 354 U.S. at 37. *See also* Kevin Carroll, *Service Members Should Have Right to Unanimous Verdicts,* Law360 (July 3, 2023), https://bit.ly/3S5dXOO (In this case, the CAAF "weakly relied for the proposition that the Sixth Amendment does not apply to courts-martial upon dicta in four cases . . . .").

For good reason, the CAAF was unable to claim that this Court has ever held the Sixth Amendment to be inapplicable in courts-martial. Nevertheless, the CAAF rejected Petitioner's Sixth Amendment claim on the basis of what the CAAF deemed this Court's "consistent guidance . . . about the applicability of the Sixth Amendment to military trials." Pet. App. 8a.

Of course, "guidance" and holdings are not the same. But the purported guidance controlling the CAAF decision is itself the product of selective reading of this Court's cases. For instance, the CAAF ignored that this Court has itself called "dicta" the statements in *Ex parte Milligan* embraced by the CAAF. *See Middendorf v. Henry*, 425 U.S. 25, 33–34 (1976). And the Court in *Middendorf* at the same time acknowledged its prior statement in *Ex parte Quirin*, but made clear it did not believe it had already decided the issue, explaining that "even were the Sixth Amendment to be held applicable to court-martial proceedings," a *summary* court-martial is not a "'criminal prosecution' within the meaning of that Amendment." *Middendorf*, 425 U.S. at 34; *see also id.* at 51 (Marshall, J., dissenting) (observing that the Court had "[a]ssum[ed] for purposes of its opinion that the Sixth Amendment applies to courts-martial in general").

2. The CAAF's View of the Sixth Amendment is Unsupported by the Text of the Constitution

The CAAF's view of the Sixth Amendment is unsupported by the text of the Constitution.

Unlike the Fifth Amendment, which exempts from the Grand Jury Clause "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," the Sixth Amendment (like the remainder of the Fifth Amendment) contains no such limitation.

The text of the Sixth Amendment is the place to start in determining whether it applies to courts-martial. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338–39 (1816) (Story, J.) ("If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible."); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("In assessing the breadth of § 5's enforcement power, we begin with its text."); *Gamble v. United States*, 139 S. Ct. 1960, 1964–65 (2019) (starting with the text of the Fifth Amendment); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019) (beginning with the text of the Takings Clause); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (starting with the text of Art. II, § 1); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring) ("Even though we now have a thick body of precedent regarding the meaning of most provisions of the Constitution, our opinions continue to respect the primacy of the Constitution's text."). Nothing in the text of the

Amendment provides a basis for concluding the Amendment does not apply to courts-martial.

Nor does examination of the remainder of the Bill of Rights, or the Constitution as a whole. Instead, the Grand Jury Clause carveout in the Fifth Amendment undermines the CAAF's view of the Sixth Amendment. The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*). *See*, *e.g.*, *Livingston's Lessee v. Moore*, 32 U.S. 469, 537 (1833) ("The express prohibition of *ex post facto* laws, meaning retrospective criminal laws, is an admission that retrospective civil laws may be made. *Expressio unius exclusio est alterius*."); *Holmes v. Jennison*, 39 U.S. 540, 591 (1840) (applying the canon and holding that "all the powers were expressly prohibited which were intended to be prohibited," because "the Constitution contains several express prohibitions upon the states, from the exercise of powers granted to the federal government"); *Haaland v. Brackeen*, 143 S. Ct. 1609, 1670 (2023) (Thomas, J., dissenting) ("[T]he Founders deliberately chose to enumerate one power specific to Indian tribes: the power to regulate 'Commerce' with tribes. Because the Constitution contains one Indian-specific power, there is simply no reason to think that there is some sort of free-floating, unlimited power over all things related to Indians. That is common sense: *expressio unius est exclusio alterius*."). Here, the presence of an express carveout in the Fifth Amendment implies no such carveout for the Sixth Amendment was intended.

3. A General Court-Martial is a "Criminal Prosecution" for Purposes of the Sixth Amendment

The CAAF's misguided rejection of Petitioner's Sixth Amendment claim never reached the question whether a general court-martial is a "criminal prosecution" for purposes of the Sixth Amendment—but it clearly is.

Courts-martial "resolve criminal charges against service members." *Ortiz*, 138 S. Ct. at 2175; *see also Palmore v. United States*, 411 U.S. 389, 404 (1973) ("Congress has declared certain behavior by members of the Armed Forces to be criminal and provided for the trial of such cases by court-martial proceedings in the military mode . . . ."); *Parisi v. Davidson*, 405 U.S. 34, 42 (1972) (courts-martial are "convened to adjudicate charges of criminal violations of military law"); *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (plurality) (discussing broad understanding of "criminal prosecution" at the Founding); *Middendorf*, 425 U.S. at 52 (Marshall, J., dissenting) ("[I]t would seem that courts-martial are criminal prosecutions and that the Sixth Amendment therefore applies on its face.").

And general courts-martial are the category of courts-martial with the authority to impose the most severe punishments, for "serious offenses" like those which this Court has held trigger the Sixth Amendment jury trial right. *See Lewis v. United States*, 518 U.S. 322, 325, 330 (1996); *Santucci v. Commandant, United States Disciplinary Barracks*, 66 F.4th 844, 846 n.1 (10th Cir. 2023) ("A general court-martial has jurisdiction to try military

personnel for serious offenses . . . ."). *Cf. Cheff* v. *Schnackenberg*, 384 U.S. 373, 379 (1966) (Sixth Amendment permits a defendant to be tried for certain "petty offenses" without a jury).

4. The Sixth Amendment Requires Unanimous General Courts-Martial Convictions

In *Ramos v. Louisiana*, the Court made clear that the Sixth Amendment requires a jury trial conviction be unanimous. 140 S. Ct. 1390. But is a court-martial panel actually or effectively a "jury" for purposes of the Sixth Amendment's unanimity requirement? This Court has not yet decided that question, but the best answer is "yes."

While the Sixth Amendment's text is the place to start, it does not appear to supply the answer. The Amendment does not define a jury, or contain a military-carveout, like a portion of the Fifth Amendment.

Other considerations do, however, support the view that the unanimity requirement flowing from the Sixth Amendment jury trial right applies in general courts-martial.[5]

Courts-martial are unquestionably "judicial bodies responsible for 'the trial and punishment' of service members." *Ortiz*, 138 S. Ct. at 2175 (quoting *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1858)). The procedural protections afforded a service member are "virtually the same" as those given in a civilian

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[5] *Ramos* makes clear the Sixth Amendment jury trial right applies outside of Article III courts.

criminal proceeding, whether state or federal. *Id.* at 2174. And "the judgments a military tribunal renders . . . 'rest on the same basis, and are surrounded by the same considerations[, as] give conclusiveness to the judgments of other legal tribunals.'" *Id.* (quoting *Ex parte Reed*, 100 U.S. 13, 23 (1879)).

Moreover, "the fundamental purposes of the court-martial panel and the civilian petit jury are the same." Maurer, 60 Am. Crim. L. Rev. at 171; *see also* Eugene R. Fidell, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 3 (2016) (In a court-martial "a group similar to a jury decides guilt or innocence based on the evidence and applying instructions received from the judge."). "In the military justice system, the members of the court-martial serve a function similar to a civilian jury, with broad discretion to adjudicate the findings by determining whether the evidence has demonstrated the guilt of the accused beyond a reasonable doubt." *United States v. Rudometkin*, 82 M.J. 396, 404 (2022) (Sparks, J., concurring in part, dissenting in part, and dissenting in the judgment). This Court recognized eight decades ago that a "court-martial performs functions more like those of a jury than a court." *Jackson v. Taylor*, 353 U.S. 569, 575 (1957).[6] Whatever differences exist between a "jury" in a civilian trial and a court-martial panel lacks constitutional significance when it comes to the question of whether determinations of guilt require unanimity. *Cf. Ortiz*, 138 S. Ct. at 2179 (observing the

[6] The nature and operation of American juries have changed over time—both before and after the Founding. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867 (1994).

court-martial system need not be "precisely analogous" to civilian system in deciding whether Constitution permits this Court's appellate jurisdiction over appeals from court-martial convictions).

The conclusion that the Sixth Amendment requires unanimous court-martial convictions is bolstered by the fact that the Declaration of Independence included among its list of grievances directed at the King of Great Britain the deprivation "of the benefits of Trial by Jury." Declaration of Independence ¶20. The "hard-won liberty" trial by jury for criminal offenses enshrined in the Constitution (in both Article III and the Sixth Amendment), *Ramos*, 140 S. Ct. at 1402, is no less important when an accused is prosecuted by the federal government through the military rather than by a civilian court. *See Haymond*, 139 S. Ct. at 2373 (plurality) ("Only a jury . . . may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government."). Indeed, that safeguard may be even more important in a court-martial, where the entire proceeding is conducted within a single branch of the federal government (the executive), with no trial-level oversight by an Article III court.

Application of the Sixth Amendment to general courts-martial is also supported by the nature of the current general court-marital regime, under which courts-martial "can try" service members and others within their broad jurisdiction "for a vast swath of offenses, including garden-variety crimes unrelated to military service." *Ortiz*, 138 S. Ct. at 2174. The

breadth of that regime—in the offenses and persons covered, and its imposition outside of wartime—departs from the more limited nature of courts-martial at common law and at the time of the Founding. For example, while the articles of war of 1806—"the first completely new articles enacted by Congress after ratification of the Constitution"—"faithfully reproduced the original limitations on peace-time court martial over civil offenses," the "strong probability is that the Constitutional Convention never conceived that Congress could, much less would, attempt to grant to the military the power to try and punish civil crimes committed in time of peace. Apart from the fact that Parliament had never ventured to make such a grant of power, the Convention could hardly have been unaware of Blackstone's strong condemnation of criminal justice administered under military procedures." *See* Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435, 445, 449 (1960) (citing 1 W. Blackstone, Commentaries *413). The text of the Fifth Amendment reinforces this view because its military-carveout applies *only* to "cases arising . . . when in actual service in time of War or public danger." Refusing to apply the Sixth Amendment's unanimity requirement to contemporary general courts-martial would result in widescale deprivation of that right to persons, and under circumstances, where the Framers would have expected the right to attach.

B. The Fifth Amendment's Due Process Clause

This Court has already determined that the due process protections of the Fifth Amendment apply in a court-martial—even a *summary* court-marital. *See Middendorf*, 425 U.S. at 43; *Rostker*, 453 at 67 (In the "area of military affairs . . . as any other, Congress remains subject to the limitations of the Due Process Clause . . . ."); *Weiss v. United States*, 510 U.S. 163, 176 (1994) ("Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings."). Whether a particular safeguard attaches "depends upon an analysis of the interests of the individual and those of the regime to which he is subject." *Middendorf*, 425 U.S. at 43.

This Court, however, has never decided whether the Fifth Amendment's Due Process Clause requires that a general court-martial verdict be unanimous. In the decision below, the CAAF did not claim otherwise. Instead, the CAAF held "the factors militating in favor of the right to a unanimous verdict are not so weighty as to overcome the balance struck by Congress . . . ." Pet. App. 13a. The CAAF based that holding largely on its assessment of "historical evidence" that "courts-martial verdicts have not been subject to a unanimity requirement," and its view about the sufficiency of "several unique safeguards in the military justice system." Pet. App. 13a–16a. Neither, however, justifies the CAAF's rejection of a unanimity requirement.

Starting with "historical evidence," the CAAF's factual observations, while generally accurate, miss some important points. For example, the CAAF ignores that, as explained above, courts-martial now can try service members and others within their broad jurisdiction "for a vast swath of offenses, including garden-variety crimes unrelated to military service." *Ortiz*, 138 S. Ct. at 2174. The CAAF ignores "historical evidence" showing the court-martial regime it concluded does not require unanimity for guilty verdicts is considerably more expansive than the limited regime the Framers would have recognized. While the CAAF acknowledges that "historical practice is not dispositive" (Pet. App. 15a), its arguments based on such practice are even less meaningful in light of the dramatic expansion of court-martial jurisdiction over time, and especially when compared with the system that existed when the Fifth Amendment was enacted.

As for the CAAF's reliance on "several unique safeguards in the military justice system," the examples it cites—secret ballots, and factual sufficiency review on appeal—hardly replicate the long-recognized safeguards afforded by the unanimity requirement. *See Ramos*, 140 S. Ct. at 1395 ("The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law."); *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 (2021) (Kagan, J., dissenting) ("Citing centuries of history, the Court in *Ramos* termed the Sixth Amendment right to a unanimous jury 'vital,' 'essential,'

'indispensable,' and 'fundamental' to the American legal system.").

The CAAF's analysis also looks past the fact that the few safeguards it identified are "merely statutory," and can be removed by "Congress—and perhaps the President . . . whenever it desires." *Reid*, 354 U.S. at 37. The unanimity requirement is too fundamental to have its constitutional status depend on the contingency of what other protections Congress has enacted at a given point in time.

The CAAF's decision also fails to recognize that, just as in a civilian criminal trial, lack of unanimity among a court-martial panel may be the byproduct of panel members "deliberating carefully and safeguarding against overzealous prosecutions[.]" *Ramos*, 140 S. Ct. at 1401. Dissenting votes are not a bug in the system that can be overlooked because other procedural safeguards are in place. This is especially so in prosecutions, like non-capital general courts-martial, that utilize panels with fewer than twelve members. *See* 10 U.S.C. §§ 829(b)(2)(B), (d)(1)(B) (eight panel members, which can be reduced to six); *Ballew v. Georgia*, 435 U.S. 223, 234 (1978) ("the risk of convicting an innocent person [] rises as the size of the jury diminishes"); *see also Khorrami v. Arizona*, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting from denial of certiorari) ("smaller panels tend to skew jury composition and impair the right to a fair trial").

The CAAF decision similarly ignores that, in both civilian and military contexts, requiring juror unanimity can help mitigate the effects of racial and other forms of bias. *See Ramos*, 140 S. Ct. at 1394; *id.*

at 1408 (Sotomayor, J., concurring); *id.* at 1417 (Kavanaugh, J., concurring) ("In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors."); *Khorrami*, 143 S. Ct. at 27 (Gorsuch, J., dissenting from denial of certiorari) ("During the Jim Crow era, some States . . . abandoned the demand for a unanimous verdict as part of a deliberate and systematic effort to suppress minority voices in public affairs."). Like other institutions, courts-martial have sometimes been infected by discrimination. *See* Chris Bray, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND 267 (2016) (observing that some service members during World War II "were executed following questionable courts-martial, and some of those procedurally defective trials were probably marred by racial prejudice").

* * *

This Court—as the only Article III court with jurisdiction to decide the issue, and the ultimate arbiter of constitutional questions—should decide whether an accused's interest in requiring court-martial panel unanimity to secure a conviction outweighs "the balance struck by Congress" when permitting non-unanimous convictions. *Middendorf*, 425 U.S. at 44; *Weiss*, 510 U.S. at 179.

Due Process does not require that every safeguard afforded a defendant in a civilian criminal trial be extended to an accused in a general court-martial. But the unanimity requirement is so important for

ensuring that a guilty verdict results only from a fair proceeding—*Ramos*, 140 S. Ct. at 1395 ("a vital right protected by the common law"); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 (2021) (Kagan, J., dissenting) (citing *Ramos*: "'vital,' 'essential,' 'indispensable,' and 'fundamental' to the American legal system.")—that Due Process requires general court-martial convictions be unanimous.

C. The Equal Protection Clause, Applied Through the Fifth Amendment

Permitting convictions based on non-unanimous court-martial verdicts implicates equal protection in two respects. First, consider substantially similarly-situated persons within the jurisdiction of the court-martial regime who can be charged with essentially the same offense under the UCMJ and civilian criminal laws. The persistence of non-unanimous general court-martial guilty verdicts allows disparate treatment of members of this group (like Petitioner) based on the discretion of the United States: one can be tried by court-martial and convicted by a non-unanimous jury, while the other is tried in a civilian proceeding with the benefit of a unanimity requirement for conviction. *Cf. Nyquist v. Mauclet*, 432 U.S. 1, 7–9 (1977) (rejecting argument that equal protection does not apply to disparate treatment within class of aliens). Second, it subjects persons within the jurisdiction of the court-martial regime to non-unanimous guilty verdicts, while others charged with essentially the same offense under civilian criminal laws can only be convicted with a unanimous verdict.

The CAAF rejected Petitioner's argument that the Equal Protection Clause of the Fourteenth Amendment, applied to the federal government through the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), requires unanimous guilty verdicts in general courts-martial. It was wrong to do so.

As discussed above, the unanimity requirement is crucial for ensuring that a guilty verdict results only from a fair proceeding. Depriving an accused of the protections afforded by the unanimity requirement—a vital right predating the Constitution, enshrined in it by the Founders—should trigger strict scrutiny. The CAAF erroneously applied only rational basis scrutiny. *Cf. Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966) ("Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.").

But even if the CAAF selected the appropriate test, its rational basis analysis does not hold up. The CAAF accepted, without any serious assessment (and no discussion), the Government's conclusory assertion "that nonunanimous verdicts in the military are necessary to promote efficiency . . . and to guard against unlawful command influence in the deliberation room." Pet. App. 23a. The CAAF's perfunctory analysis does not identify the purported efficiency supposedly advanced. Even so, it is hardly self-evident that permitting non-unanimous verdicts is meaningfully more efficient in *any* respect than having a unanimity requirement, or that it advances the mission of the armed forces. *Toth*, 350 U.S. at 17 ("[I]t is the primary business of armies and navies to

fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function."). As for "unlawful" command influence in the deliberation room, the CAAF does not explain how foregoing a unanimity requirement avoids such influence—or why it is necessary given that such influence is already "unlawful," according to the Government and the CAAF.

II. The Question Presented is an Extremely Important Matter of Constitutional Law Which This Court Has Not Previously Decided

The CAAF's decision that the Constitution does not require unanimity for court-martial convictions is extremely important. It will determine whether and how courts-martial deprive persons of liberty and property. And it will do so in a system with jurisdiction over millions of citizens, in times of war and peace, governing a vast array of conduct which substantially overlaps with federal and state criminal law.

A. The CAAF Decision Implicates Important Liberty and Property Interests

Courts-martial decide "momentous" issues, passing judgment on the life, liberty and property of an accused. *Ortiz*, 138 S. Ct. at 2186–87 (Thomas, J., concurring); *see also id.* at 2171 (court-martial can result in "punishment, up to lifetime imprisonment or execution"); *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) ("Restraint on liberty, although perhaps

the most immediately onerous, is not the only serious consequence of a court-martial conviction. Such convictions may result, for example, in deprivation of pay and earned promotion, and even in discharge or dismissal from the service under conditions that can cause lasting, serious harm in civilian life.").

B. The Court-Martial System Governed by the CAAF Decision Has Jurisdiction Over Millions of Americans

When taking account of service members and others subject to the jurisdiction of courts-martial, today ***millions*** of citizens are subject to prosecution, and the imposition of severe punishment, based on the finding of a non-unanimous court-martial panel.[7] For example, in addition to active service members, persons subject to court-martial jurisdiction include:

Family of service members: 10 U.S.C. §§ 802(a)(10)–(12) (subjecting to the UCMJ those who are "serving with or accompanying an armed force in the field," "serving with, employed by, or accompanying the armed forces outside the United States," or "within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned").

Former service members: 10 U.S.C. §§ 802(a)(4)–(6) (subjecting to the UCMJ those who are "[r]etired members of a regular component of the armed forces

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[7] Note, *Military Justice and Article III*, 103 Harv. L. Rev. 1909 (1990) (The military justice system "today has jurisdiction over 3,500,000 United States citizens . . . .").

who are entitled to pay"; those who are "[r]etired members of a reserve component who are receiving hospitalization from an armed force"; and those who are "[m]embers of the Fleet Reserve and Fleet Marine Corps Reserve"). *See United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021); *Larrabee v. Del Toro*, 45 F.4th 81 (D.C. Cir. 2022).

Service academy attendees: 10 U.S.C. § 802(a)(2) (subjecting to the UCMJ "[c]adets, aviation cadets, and midshipman").

Military contractors: 10 U.S.C. §§ 802(a)(10)–(12); *United States v. Ali*, 70 M.J. 514, 519 (U.S. Army Ct. of Crim. App. 2011) (holding that civilian contractors may be subjected to courts-martial "(1) during a time of actual hostilities and (2) in a location where actual hostilities were taking place"), *cert. denied*, 569 U.S. 972 (2013).

Members of non-military governmental agencies: 10 U.S.C. § 802(a)(8) (subjecting to the UCMJ those who are "[m]embers of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces").

If Congress ever reinstated a military draft, or imposed mandatory military service as in many other countries, the UCMJ could sweep millions—even tens of millions—more citizens within the ambit of the court-martial system. *See Solorio v. United States*, 483 U.S. 435, 436 (1987) (holding that jurisdiction of courts-martial depends solely on the accused's status

as a person subject to the UCMJ, and not on the "service-connection" of the offense charged).

C. The Court-Martial System Governed by the CAAF Decision is Sweeping in the Conduct Covered

Although trial by court-martial is supposed to be "the exercise of an exceptional jurisdiction," *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234, 237 (1960), that vision seems incompatible with today's court-martial system, in which "trial level courts-martial hear cases involved a wide range of offenses, including crimes unconnected with military service" and the jurisdiction courts-martial "overlaps substantially with that of state and federal courts." *Ortiz*, 138 S. Ct. at 2170; *id.* at 2174 ("[C]ourts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service."); *see also* Note, *Military Justice and Article III*, 103 Harv. L. Rev. at 1909 ("The system's once limited subject matter jurisdiction now embraces crimes that relate only indirectly to the military and that would have previously been heard only in civilian courts."); *id.* at 1910 ("The Uniform Code of Military Justice (UCMJ) extends the jurisdiction of the military justice system to nearly all crimes committed by servicemembers . . . .").

D. This Court Should Decide the Important Constitutional Question Presented

At present, the CAAF's decision below is the authoritative answer to the important constitutional question presented in this Petition. This Court should grant the Petition to decide the issue for itself.

It is this Court's role to say what the law is—especially with respect to constitutional questions. Even in the area of military affairs, it is this Court's "ultimate responsibility to decide [] constitutional question[s.]" *Rostker*, 453 U.S. at 67. Consistent with that responsibility, the Court has, for decades, granted certiorari to address constitutional questions concerning courts-martial. *See*, *e.g.*, *Toth*, 350 U.S. at 13 ("We granted certiorari to pass upon this important constitutional question."); *Krueger*, 351 U.S. at 473 ("We granted review . . . because of the serious constitutional question presented . . . ."); *Reid*, 354 U.S. at 3 (granted review to address "basic constitutional issues of the utmost concern"); *Singleton*, 361 U.S. at 235 (granted review to consider the "constitutional validity" of peace time court-martial trials of civilians accompanying the armed forces outside the United States); *Parker v. Levy*, 417 U.S. 733, 740–42 (1974) (granted review to consider void-for-vagueness constitutional challenge to court-martial conviction for violation of UCMJ provisions); *Solorio*, 483 U.S. 435 (granted review to decide constitutional issues concerning the scope of court-martial jurisdiction); *Weiss*, 510 U.S. at 165–66 (granted review to consider Appointments Clause and Due Process issues related to appointment of military judges participating in courts-martial); *Ortiz*, 138 S. Ct. at 2170 (granted review to consider application of the Appointments Clause to an element of the "court-martial system").

The need for this Court to grant review is especially acute when no other Article III court can address the constitutional matter presented. Here,

the Court's review is vital given that the question at issue has been decided by an arm of the executive branch, not an Article III court. *See Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

* * *

Even if this Court is inclined at the petition stage to answer the Question Presented in the negative, the Court nevertheless should grant the Petition, and reach a decision with the benefit of full merits briefing and oral argument. *Cf. Ortiz*, 138 S. Ct. at 2174 (affirming after granting petition to decide constitutional law issue); *Weiss*, 510 U.S. 163 (same); *Solorio*, 483 U.S. 435 (same).

III. The Question Presented Should Be Decided by this Court Now, and this Petition is the Best Vehicle to Resolve It

The Question Presented should be decided by this Court now, and this Petition is the best vehicle to consider and resolve it.

A. The Court Should Not Defer Consideration of the Question Presented

The Court should not defer consideration of the Question Presented.

28 U.S.C. § 1259(3) limits this Court's review of decisions by the Court of Appeals for the Armed Forces to those where the CAAF itself granted discretionary review. *See* 10 U.S.C. § 867a(a); *see also* Fidell, MILITARY JUSTICE: A VERY SHORT INTRODUCTION 56 ("[M]ore than 90% of courts-martial are ineligible for review by the Supreme Court[.]").

Now that the CAAF has decided the important questions presented by this Petition, it is exceedingly unlikely to grant review again of the same issue. Therefore, this Court may have no opportunity to address the Question Presented in a future case.

B. This Petition is the Ideal Vehicle to Resolve the Question Presented

CAAF jurisdiction is discretionary. The CAAF granted Petitioner's request for review, agreeing to decide each of his constitutional arguments.

After granting review, Petitioner's case was fully briefed, and argued, before the CAAF. The CAAF opinion below in Petitioner's case is now the controlling, seminal CAAF decision on the Question Presented—governing all subsequent court-martial proceedings in the United States armed forces.

This Petition presents no impediments to the Court's full consideration and resolution of the Question Presented.

C. The Court Should Grant this Petition, and Hold the *Martinez* Petition

After issuing its decision in Petitioner's case, the CAAF issued one-sentence orders in several "trailer" cases which were not briefed or argued before the CAAF. The service members in some of those cases have jointly filed a petition for certiorari (the *Martinez* Petition). *See Martinez v. United States*, No. 23-242.

The Court should grant this Petition, and hold the *Martinez* Petition until this Court decides Petitioner's case.

A glance at the table of contents to the *Martinez* Petition reflects it is effectively seeking review of the

CAAF decision at issue in *this* Petition, repeatedly discussing what the CAAF said or decided in Petitioner's case. *See*, *e.g.*, Martinez Petition at 19 ("The CAAF therefore erred in *Anderson* . . . ."); *see also id.* at 1 (After the CAAF "upheld non-unanimous convictions in *United States v. Anderson* . . . it summarily affirmed each petitioner's conviction."). That is understandable given that the CAAF did not accept briefing or issue substantive opinions about the panel unanimity issue in the cases of the *Martinez* petitioners.

This Petition also presents broader arguments than the *Martinez* Petition. While the Martinez Petition briefly mentions equal protection (at 27–28), it appears that some—perhaps most—of the *Martinez* petitioners did not raise an equal protection argument below. *See* Martinez Petition at 8–17 (identifying only Veerathanongdech as having asserted equal protection argument). In contrast, Petitioner raised, briefed and argued equal protection before the CAAF, including the appropriate level of scrutiny to be applied to Petitioner's equal protection claim (with the CAAF erroneously applying rational basis scrutiny). Granting this Petition will allow the Court the fullest consideration of the Question Presented.

In addition, the *Martinez* Petition seeks review of 16 cases consolidated into a single petition. Granting this Petition while holding *Martinez* avoids potential but yet-unsurfaced vehicle problems with one or more of the appeals covered by the *Martinez* Petition.

CONCLUSION

The Question Presented is exceptionally important, affecting the rights of all service members and others subject to court-martial jurisdiction. It is also important for society as a whole: "Our military justice tells us who we are—all of us, not just soldiers." Bray, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND xi.

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, FILED JUNE 29, 2023

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 22-0193
Crim. App. No. 39969

UNITED STATES,

Appellee,

v.

Anthony A. ANDERSON, Master Sergeant,
United States Air Force,

Appellant.

Argued October 25, 2022—Decided June 29, 2023

Military Judge: Willie J. Babor

Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, Judge MAGGS, and Senior Judge EFFRON joined.

Judge HARDY delivered the opinion of the Court.

This case asks us to decide whether courts-martial defendants have a right to a unanimous guilty verdict under the Sixth Amendment, the Fifth Amendment Due Process Clause, or the Fifth Amendment component of

equal protection. We hold that they do not. Accordingly, we affirm the judgment of the United States Air Force Court of Criminal Appeals (AFCCA).

I. Background

The Government charged Appellant with two specifications of attempted sexual abuse of a child in connection with Appellant's online communications with fictitious thirteen-year-old "Sara." Before Appellant's trial, defense counsel filed a motion requesting that the court: (1) require a unanimous verdict for any finding of guilty; or (2) instruct the members that the president of the panel must announce whether any finding of guilty was the result of a unanimous vote. The military judge denied the motion in a written ruling supplemented after the court-martial adjourned. A panel composed of officers and enlisted members convicted Appellant, contrary to his pleas, of both specifications in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880 (2018). Appellant elected to be sentenced by the military judge, who sentenced Appellant to twelve months of confinement for each offense, to run concurrently, reduction to E-1, and a dishonorable discharge. The convening authority took no action on the findings or sentence. The AFCCA affirmed. *United States v. Anderson*, No. ACM 39969, 2022 CCA LEXIS 181, at *61, 2022 WL 884314, at *21 (A.F. Ct. Crim. App. Mar. 25, 2022) (unpublished). We granted review of the following issue:

> Whether Appellant was deprived of his right to a unanimous verdict as guaranteed by the

Appendix A

> Sixth Amendment, the Fifth Amendment's due process clause, and the Fifth Amendment's right to equal protection.

United States v. Anderson, 82 M.J. 440, 440-41 (C.A.A.F. 2022) (order granting review).

II. Discussion

Nonunanimous verdicts have been a feature of American courts-martial since the founding of our nation's military justice system. *See* William Winthrop, *Military Law and Precedents* 377 (2d ed., Government Printing Office 1920) (1895); Article XXXVII of the American Articles of War of 1775, *reprinted in* Winthrop, *supra*, at 956 [hereinafter 1775 Articles of War]; Section XIV, Article 10 of the American Articles of War of 1776, *reprinted in* Winthrop, *supra*, at 968 [hereinafter 1776 Articles of War]. Congress chose to maintain nonunanimous verdicts when it enacted the UCMJ in 1950, Act of May 5, 1950, ch. 169, Pub. L. No. 81-506, 64 Stat. 107, 125, and has continued to do so through the most recent updates to court-martial voting requirements in the Military Justice Act of 2016. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5234, 130 Stat. 2000, 2916 (2016).

Consistent with this long tradition, the UCMJ expressly authorizes a court-martial to convict a servicemember subject to a general or special court-martial of a criminal offense "by the concurrence of at least three-fourths of the members present when the vote is taken." Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)

(3) (2018). Appellant's conviction comports with this requirement. Appellant nonetheless contends that he is entitled to relief on the grounds that Article 52(a)(3), UCMJ, contravenes his right to a unanimous verdict under the Fifth and Sixth Amendments. Because we disagree, we affirm the judgment of the AFCCA.

A. The Sixth Amendment

As relevant here, the Sixth Amendment demands that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. As noted in its recent decision in *Ramos v. Louisiana*, the Supreme Court "has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity." 140 S. Ct. 1390, 1396 (2020); *see also id.* at 1397-99 (collecting cases). In *Ramos*, the Supreme Court observed that "the Sixth Amendment affords a right to 'a trial by jury as understood and applied at the common law, . . . includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted.' " *Id.* at 1397 (alterations in original) (quoting *Patton v. United States*, 281 U.S. 276, 288 (1930), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78, 90 (1970)). One of those essential elements of a trial by jury was "that the verdict should be unanimous." *Id.* (quoting *Patton*, 281 U.S. at 288) (citing *Andres v. United States*, 333 U.S. 740, 748 (1948)).

If the Sixth Amendment right to a jury trial applied in the military justice system, Appellant would have a strong argument that he had a constitutional right to a

unanimous verdict at his court-martial. *See Andres*, 333 U.S. at 748 ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."). The trouble for Appellant, however, is that the Supreme Court has repeatedly stated that the Sixth Amendment right to a jury trial does not apply to courts-martial. In *Ex parte Milligan*, the Supreme Court explained "the right of trial by jury . . . is preserved to every one accused of [a] crime who is not attached to the army, or navy, or militia in actual service." 71 U.S. 2, 123 (1866).[1] Later, in *Ex parte Quirin*, the Supreme Court reiterated that " 'cases arising in the land or naval forces' are . . . . deemed excepted by implication from the Sixth [Amendment]." 317 U.S. 1, 40 (1942); *see also Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions."). Following the Supreme Court's lead, this Court has long held the same. *See, e.g.*, *United States v. Begani*, 81 M.J. 273, 280 n.2 (C.A.A.F. 2021) (explaining that members of the land and naval forces do not have a Sixth Amendment right to a jury trial); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) ("[T]here is no Sixth Amendment right to trial by jury in courts-martial."); *United States v. Kemp*, 22 C.M.A. 152,

1. The Supreme Court acknowledged that although the Fifth Amendment expressly exempts cases arising in the land or naval forces from its grand jury requirement, the Sixth Amendment contains no such exception. *Ex parte Milligan*, 71 U.S. at 123 (comparing the text of the Fifth and Sixth Amendments). Nevertheless, after noting this disparity, the Supreme Court concluded that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Id.*

154, 46 C.M.R. 152, 154 (1973) (explaining the same in the context of panel member appointment).

1. The Supreme Court's decisions exempting the military justice system from the Sixth Amendment right to a jury trial cannot be dismissed as dicta

Appellant argues that all the Supreme Court cases stating that there is no Sixth Amendment right to a jury trial in the military justice system can be dismissed as dicta. We disagree. Even if we were inclined to accept Appellant's premise—that the Supreme Court has never been presented with or squarely answered the question whether the Sixth Amendment jury right applies to courts-martial—we cannot ignore the fact that the lack of such a right has been a central component of a series of landmark Supreme Court military justice cases. For example, in *United States ex rel. Toth v. Quarles*, the Supreme Court held that the Constitution forbids Congress from subjecting a former servicemember to trial by court-martial after the servicemember had severed all relationships to the military. 350 U.S. 11, 23 (1955). Key to the Supreme Court's reasoning was the fact that the former servicemember would be denied his Sixth Amendment right to a jury trial in a court-martial. *Id.* at 17-18 (explaining the "great difference between trial by jury and trial by selected members of the military forces").

Two years later in *Reid v. Covert*, the Supreme Court once again considered the constitutional limits of the military justice system, holding that Congress could not subject the accompanying civilian dependents of overseas servicemembers to courts-martial. 354 U.S.

1, 5 (1957). Justice Black's plurality opinion noted that "[e]very extension of military jurisdiction . . . acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Id.* at 21. The opinion further observed that courts-martial do not give an accused the same protections that exist in the civilian courts, and that "[l]ooming far above all other deficiencies of the military trial, of course, is the *absence of trial by jury* before an independent judge after an indictment by a grand jury." *Id.* at 37 (emphasis added); *see also id.* at 37 n.68 ("The exception in the Fifth Amendment, of course, provides that grand jury indictment is not required in cases subject to military trial and this exception has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable.").[2]

The same concern led the Supreme Court a decade later in *O'Callahan v. Parker* to hold that servicemembers could only be tried by court-martial for crimes that were connected to their military service. 395 U.S. 258, 272 (1969), *overruled by Solorio v. United States*, 483 U.S.

2. *Reid* specifically addressed civilian dependents who had been charged with a capital offense. 354 U.S. at 4. Three years later, in a series of companion cases, the Supreme Court further held that Congress could not subject the civilian dependents of overseas servicemembers to courts-martial when charged with a noncapital offense, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960), nor civilian military employees stationed overseas, whether charged with a capital, *Grisham v. Hagan*, 361 U.S. 278, 280 (1960), or noncapital offense, *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 282, 284 (1960). In each of these cases the Supreme Court again emphasized the nonapplicability of the Sixth Amendment right to a jury trial at a court-martial. *Singleton*, 361 U.S. at 249; *Grisham*, 361 U.S. at 280; *Guagliardo*, 361 U.S. at 284.

435 (1987). Once again, the Supreme Court's decision was based on its view that there were fundamental differences between military and civilian trials, including the absence of a Sixth Amendment right to a jury trial in the military. *Id.* at 261- 62 ("If the case does not arise 'in the land or naval forces,' then the accused gets first, the benefit of an indictment by a grand jury and second, a trial by jury before a civilian court as guaranteed by the Sixth Amendment . . . ."). Although the Supreme Court overruled *O'Callahan* eighteen years later, *Solorio*, 483 U.S. at 450-51, nothing in that opinion undermined the long-standing principle that the Sixth Amendment right to a jury trial does not apply in the military justice system. Rather, *Solorio* rested its holding on *O'Callahan*'s dubious treatment of historical practice and the plain language of the constitutional grant of power to Congress "to make rules for the 'Government and Regulation of the land and naval Forces.' " *Solorio*, 483 U.S. at 441-42 (quoting U.S. Const. art. I, § 8, cl. 14).

Even if the Supreme Court's statements exempting the military justice system from the Sixth Amendment's right to a jury trial in *Ex parte Milligan*, *Ex parte Quirin*, and *Whelchel* technically qualify as nonbinding dicta, the Supreme Court has never treated them as such. To the contrary, the Supreme Court has repeatedly relied on the principle that courts-martial are fundamentally different from civilian trials because of that exemption. It would be disingenuous for this Court to ignore over a century of consistent guidance from the Supreme Court about the applicability of the Sixth Amendment to military trials.

2. The right to an impartial court-martial panel does not guarantee a unanimous verdict

Although the Sixth Amendment right to a jury trial has never applied in the military justice system, an accused servicemember's right to be tried by impartial panel members has long been a "cornerstone of the military justice system." *United Stated v. Hilow*, 32 M.J. 439, 442 (C.M.A. 1991); *see* Article XXXV, 1775 Articles of War, *supra*, at 956 ("All the members of a court-martial, are to behave with calmness, decency, and impartiality . . . ."); Article 69 of the American Articles of War of 1806, *reprinted in* Winthrop, *supra*, at 982 (requiring members to swear to " 'administer justice . . . without partiality, favor, or affection' "); *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995) ("Impartial court-members are a *sine qua non* for a fair court-martial."). While Congress has long guaranteed this right via statute, this Court has also recognized that "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (first citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994); and then citing Rule for Courts-Martial 912(f)(1)(N), *Manual for Courts-Martial, United States* (2000 ed.)). Appellant argues that in *Ramos*, "the Supreme Court explicitly equated the term impartial with the term unanimity." Brief for Appellant at 14, *United States v. Anderson*, No. 22-0193 (C.A.A.F. Aug. 24, 2022). As a result, Appellant contends, he has a right to a unanimous verdict as part of his right to an impartial panel.[3]

3. Appellant does not contend that a court-martial panel is a "jury" within the meaning of the Sixth Amendment, nor that he was

Ramos held that the Sixth Amendment right to a jury trial, as incorporated to the states under the Fourteenth Amendment, requires unanimous verdicts to convict defendants of serious offenses. 140 S. Ct. at 1397. The Supreme Court did not explicitly equate impartiality with unanimity, nor hold that the Sixth Amendment's impartiality requirement commands unanimity. In the Supreme Court's own words, "[T]he Sixth Amendment's *right to a jury trial* requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." *Id.* (emphasis added).

Appellant points to the following language in *Ramos* to support his argument: "Wherever we might look to determine what the term 'trial by an impartial jury' meant at the time of the Sixth Amendment's adoption . . . the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." *Id.* at 1395. However, each time the majority opinion uses the phrase "trial by an impartial jury," the phrase is in quotation marks, indicating it is meant to be a quotation from the Sixth Amendment, rather than a deliberate emphasis on the word "impartial." *See id.* at 1395-96, 1400. Furthermore, at several points in the

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entitled to a jury trial—and all that that would require under the Sixth Amendment—as opposed to a trial by a court-martial panel. Appellant explicitly acknowledges that "[t]he issue is not whether Appellant has a constitutional right to a jury trial; rather, the issue is whether Article 52(a)(3), UCMJ . . . is unconstitutional under the Sixth Amendment following *Ramos*, or under the Due Process and/or Equal Protection Clauses of the Fifth Amendment." Reply Brief for Appellant at 11, *United States v. Anderson*, No. 22-0193 (C.A.A.F. Sept. 30, 2022).

opinion, the majority refers only to the right to a jury trial as requiring a unanimous verdict, without reference to impartiality at all. *See, e.g.*, *id.* at 1394, 1397. At no point in the opinion does the Supreme Court consider what the word "impartial" means or what is required for a jury to be "impartial." In the absence of any analysis or discussion of any kind about what the Sixth Amendment's guarantee of an "impartial" jury requires, we are not persuaded by Appellant's argument that the Supreme Court held—sub silentio— that only a unanimous jury can be impartial.

Nor do we view "impartial" as synonymous with "unanimous." The Government persuasively argues that impartiality and unanimity are distinct concepts that address different characteristics of a fair jury. In support of its argument, the Government points first to Justice Kavanaugh's *Ramos* concurrence, where he recognized that impartiality and unanimity are complementary concepts. *See id.* at 1418 (Kavanaugh, J., concurring in part) ("After all, the requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury." (internal quotation marks omitted) (citation omitted)). The Government also references multiple Founding Era dictionaries to illustrate that the drafters of the Sixth Amendment would not have understood "impartial" and "unanimous" to have the same meaning.[4] Appellant offered no rebuttal to these specific

4. The dictionaries cited by the Government universally define "impartial" as meaning just and unbiased and "unanimous" as being of one mind. *See*, *e.g.*, James Barclay, *A Complete and Universal English Dictionary* (1792) (defining impartial as "just; without any

arguments other than to point out once again that the majority opinion in *Ramos* repeatedly used the quoted phrase "trial by an impartial jury."

We also note that the concept of impartiality in courts-martial dates to the earliest American Articles of War that predate the Sixth Amendment. *See* Article XXXV, 1775 Articles of War, *supra*, at 956 ("All the members of a court-martial, are to behave with calmness, decency, and impartiality . . . ."); Section XIV, Article 3, 1776 Articles of War, *supra*, at 968 (requiring members to swear to " 'administer justice . . . without partiality, favor, or affection' "). The simultaneous presence of an impartiality requirement and nonunanimous verdicts in the original Articles of War illustrates that at no time during the entire history of the American military justice system has impartiality been understood to require unanimous verdicts.

We agree with Appellant that *Ramos* held that unanimity is an essential element of a Sixth Amendment jury trial, but we disagree that it further held that it is

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bias or undue influence" and unanimous as "of one mind; agreeing in opinion"); Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792) (defining impartial as "[e]quitable; free from regard or party; indifferent; disinterested; equal in distribution of justice; just" and unanimous as "[b]eing of one mind; agreeing in design or opinion"); 1 John Ash, *The New And Complete Dictionary of the English Language* (1775) (defining impartial as "[f]ree from any undue regard to party, equitable, just, disinterested"); 2 John Ash, *The New And Complete Dictionary of the English Language* (1775) (defining unanimous as "[h]aving one mind, agreeing in opinion, agreeing in a design"). These definitions comport with our own understanding of these terms.

also an essential element of an impartial factfinder. In the absence of a Sixth Amendment right to a jury trial in the military justice system, Appellant had no Sixth Amendment right to a unanimous verdict in his court-martial.

B. Fifth Amendment Due Process

Even if the Sixth Amendment right to a jury trial does not apply to the military justice system, Appellant argues that he is still guaranteed the right to a unanimous verdict by the Due Process Clause of the Fifth Amendment. *See* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."). Appellant asserts that the guarantee of a unanimous verdict is a vital and essential constitutional right that is fundamental to the American scheme of justice.

To succeed in a due process challenge to a statutory court-martial procedure, an appellant must demonstrate that " 'the factors militating in favor of [a different procedure] are so extraordinarily weighty as to overcome the balance struck by Congress.' " *Weiss v. United States*, 510 U.S. 163, 177-78, 181 (1994) (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). When Congress acts pursuant to its power "to make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, "judicial deference . . . is at its apogee." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

Here, the factors militating in favor of the right to a unanimous verdict are not so weighty as to overcome the balance struck by Congress in Article 52, UCMJ.

The Supreme Court's analysis in *Weiss* is instructive. In that case, petitioners raised a due process challenge to the lack of a fixed term for military judges in Article 26, UCMJ, 10 U.S.C. § 826 (1988). *Weiss*, 510 U.S. at 176. The Court held that the factors supporting a fixed term for military judges did not overcome the balance struck by Congress based on two primary considerations: "[t]he absence of tenure as a historical matter in the system of military justice, and the number of safeguards in place to ensure impartiality." *Id.* at 181. Looking to those same considerations in this context, both support the conclusion that the factors militating in favor of unanimous verdicts do not outweigh the balance struck by Congress in Article 52, UCMJ.

First, historical evidence establishes that for more than two centuries, courts-martial verdicts have not been subject to a unanimity requirement. Both the 1775 and 1776 American Articles of War expressly provided for majority convictions in regimental courts-martial.[5] *See* Article XXXVII, 1775 Articles of War, *supra*, at 956; Section XIV, Article 10, 1776 Articles of War, *supra*, at 968. Although the early Articles of War did not specify the required votes to convict in a general court-martial, Winthrop notes that "the result—in all cases, whether grave or slight, and whether capital or other—is determined by a majority of the votes." Winthrop, *supra*, at 377. In 1920, Congress formally codified the required

5. Regimental courts-martials were "instituted for the trial and punishment of 'small offences.' " Winthrop, *supra*, at 485 n.23 (quoting Article XXXVII, 1775 Articles of War, *supra*, at 956, and Section XIV, Article 10, 1776 Articles of War, *supra*, at 968).

number of votes for conviction as two-thirds,[6] which the UCMJ similarly required upon its enactment in 1950. Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 754, 795-96; Act of May 5, 1950, 64 Stat. at 125.[7] Most recently, in the Military Justice Act of 2016, Congress updated Article 52, UCMJ, to require at least a three-fourths majority vote for conviction. § 5234, 130 Stat. at 2916.[8] While historical practice is not dispositive, it "is a factor that must be weighed," and "historical maintenance . . . 'suggests the absence of a fundamental fairness problem.' " *Weiss*, 510 U.S. at 179 (quoting *United States v. Graf*, 35 M.J. 450, 462 (C.M.A. 1992)). More than two centuries of nonunanimous verdicts in courts-martial weigh against Appellant's due process challenge.

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6. The two-thirds requirement in the 1920 Articles of War did not apply to the Navy. *See* Act of June 4, 1920, 41 Stat. at 787. Until the enactment of the UCMJ, "the Navy was still governed by a code passed in 1862 and that was based upon 17th century British naval law." Walter B. Huffman & Richard D. Rosen, *Military Law: Criminal Justice and Administrative Process* § 1:25 (2022-2023 ed.).

7. Both the 1920 and 1950 enactments required unanimous votes for conviction of an offense for which the death penalty was mandatory. Act of June 4, 1920, 41 Stat. at 795-96; Act of May 5, 1950, 64 Stat. at 125.

8. Under the updated Article 52, UCMJ, "[a] sentence of death requires (A) a unanimous finding of guilty of an offense [under the UCMJ] expressly made punishable by death and (B) a unanimous determination by the members that the sentence for that offense shall include death." Article 52(b)(2), UCMJ. These provisions demonstrate that Congress continues to give specific attention to the proper voting requirements for courts-martial and is making deliberate decisions about when to require unanimous verdicts.

Second, several unique safeguards in the military justice system address Appellant's concerns about the impartiality and fairness of courts-martial without unanimous verdicts. For example, Article 51(a), UCMJ, requires voting by secret ballots, which protects junior panel members from the influence of more senior members. 10 U.S.C. § 851(a) (2018). Appellants in the military justice system are also entitled to factual sufficiency review on appeal, ensuring panel verdicts are subject to oversight. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018).[9] While these safeguards are not identical to those present in the civilian system, they need not be. As the Supreme Court has recognized, " 'the tests and limitations [of due process] may differ because of the military context.' " *Weiss*, 510 U.S. at 177 (alteration in original) (quoting *Rostker*, 453 U.S. at 67). Preserving impartiality and fairness does not require identical safeguards in the military and civilian justice systems.

"Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio*, 483 U.S. at 447. In light of this deferential standard, two centuries of historical maintenance, and the other safeguards that Congress has, in its sound discretion, put in place to preserve impartiality, we hold that the factors militating in favor of unanimous verdicts are not so extraordinarily weighty

9. We acknowledge that Congress amended the language of Article 66(d)(1), UCMJ, in the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542, 134 Stat. 3388, 3611-12. The amendment does not change our analysis of this issue.

as to overcome the balance struck by Congress in Article 52, UCMJ.

Appellant makes two additional due process arguments that we find unpersuasive. First, Appellant argues that by incorporating the Sixth Amendment right to a unanimous jury verdict to the states in *Ramos*, "the Court implicitly recognized that due process of law . . . guarantees the right to a unanimous verdict." According to Appellant, a prerequisite for incorporation is finding that a right is required as a matter of Fourteenth Amendment due process, and because Fourteenth and Fifth Amendment due process are coextensive, Fifth Amendment due process requires unanimous guilty verdicts. However, Appellant misconceives incorporation doctrine and its effect on Fifth Amendment due process. As the United States Court of Appeals for the District of Columbia Circuit has explained, under incorporation, a right " 'is *made applicable* to the States by the Fourteenth Amendment.' The right . . . is not, however, converted into a procedural due process right by incorporation." *Sanford v. United States* 586 F. 3d 28, 35 (D.C. Cir. 2009) (quoting *Ballew v. Georgia*, 435 U.S. 223, 224 n.1 (1978)) (holding that incorporation of the Sixth Amendment right to a jury trial under the Fourteenth Amendment does not create a due process right to a jury trial that would apply directly to courts-martial). The Supreme Court's incorporation of the right to a unanimous verdict to the states in *Ramos* made that right applicable to the states; it did not convert unanimous verdicts into a procedural due process right.

Second, Appellant argues that "a unanimous verdict is part and parcel of the Fifth Amendment right to

have one's guilt proved beyond a reasonable doubt," and that nonunanimous verdicts unconstitutionally lower the Government's burden of proof. Brief for Appellant at 33, *United States v. Anderson*. Appellant conflates unanimous verdicts and the beyond-a-reasonable-doubt standard by misconceiving juries as reaching their verdicts as an entity, rather than as a group of individuals. To the contrary, the reasonable doubt standard refers to reasonable doubt in the mind of the individual juror. *See Johnson v. Louisiana*, 406 U.S. 356, 362-63 (1972), *overruled by Ramos*, 140 S. Ct. 1390;[10] *Tibbs v. Florida,* 457 U.S. 31, 42 n.17 (1982) ("Our decisions also make clear that disagreements among jurors or judges do not themselves create a reasonable doubt of guilt."). This must be the case, because if reasonable doubt were evaluated based on the group of jurors, there could be no hung juries in the civilian system—one juror with reasonable doubt would require an acquittal, not a hung jury. *Johnson*, 406 U.S. at 363. Consequently, nonunanimous verdicts do not run afoul of the Due Process Clause's requirement that the government prove the defendant's guilt beyond a reasonable doubt.

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10. Although *Ramos* overturned *Johnson*'s holding that the Fourteenth Amendment does not require unanimous jury verdicts, *Ramos* was decided based on incorporation of the Sixth Amendment via the Fourteenth Amendment. *Ramos*, 140 S. Ct. at 1397. The case did not challenge *Johnson*'s holding that the Fourteenth Amendment standing alone does not require unanimous verdicts, nor disturb the rationale that a nonunanimous verdict "is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard." *Johnson*, 406 U.S. at 362.

C. Fifth Amendment Equal Protection

Finally, Appellant argues that his nonunanimous panel verdict violated his Fifth Amendment right to equal protection because he is being denied a fundamental right—the Sixth Amendment right to a unanimous jury verdict—that is guaranteed to civilians. Arguing that servicemembers facing courts-martial and civilians facing criminal trials in state and federal courts are similarly situated, Appellant asserts that Congress's authorization of nonunanimous verdicts in Article 52, UCMJ, cannot withstand strict scrutiny. Even if he is not being denied a fundamental right, Appellant argues that Congress has no rational basis for denying servicemembers the right to a unanimous verdict. We disagree.

The Equal Protection Clause of the Fourteenth Amendment prohibits denying to "any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1. The " 'right to equal protection is part of due process under the Fifth Amendment, and so it applies to courts-martial, just as it does to civilian juries.' " *United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) (citations omitted) (quoting *United States v. Santiago-Davila*, 26 M.J. 380, 389-90 (C.M.A. 1988)). Equal protection does not prohibit all classifications, indeed "most laws differentiate in some fashion between classes of persons." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

The threshold question in equal protection analysis is whether the groups treated differently by the law are similarly situated. *Begani*, 81 M.J. at 280. Distinctions

between similarly situated groups must satisfy the rational basis test unless the distinction implicates either a suspect class or a fundamental right, in which case strict scrutiny applies. *Nordlinger*, 505 U.S. at 10 (first citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985); and then citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

This Court has previously declined to find that servicemember and civilian defendants are similarly situated. In *United States v. Akbar*, this Court rejected the argument that the failure to apply civilian death penalty protocols in the military justice system violates equal protection. 74 M.J. 364, 405-06 (C.A.A.F. 2015). The Court held that the appellant, "as an accused servicemember, was not similarly situated to a civilian defendant." *Id.* at 406. The Supreme Court, moreover, has repeatedly emphasized the differences between the military and civilian societies and justice systems. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Weiss*, 510 U.S. at 174-75; *Toth*, 350 U.S. at 17-20. Appellant offers no persuasive reason to upset those conclusions here.

Citing the Supreme Court's recent decision in *Ortiz v. United States*, 138 S. Ct. 2165 (2018), Appellant argues that servicemember and civilian defendants are similarly situated based on the similarities between the military and civilian justice systems. It is true that in *Ortiz* the Supreme Court described the military justice system's essential character as "judicial," and noted that the procedural protections afforded to military defendants are " 'virtually the same' " as those provided to civilian

criminal defendants. *Id.* at 2174 (quoting 1 David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 1-7, at 50 (9th ed. 2015)). But we are not persuaded that the Supreme Court intended to suggest that military and civilian defendants are similarly situated for equal protection purposes. Instead, we agree with the United States Army Court of Criminal Appeals that, "[t]o the extent there are similarities between the two systems, it is because Congress, in its discretion, struck a balance between the interests of justice and the distinct purposes of the military, not because accused service members and civilians are alike before the law." *United States v. Pritchard*, 82 M.J. 686, 692-93 (A. Ct. Crim. App. 2022) (first citing *Weiss*, 510 U.S. at 177; and then citing *Middendorf*, 425 U.S. at 46).

Two groups are similarly situated if they are " 'in all relevant respects alike.' " *Begani*, 81 M.J. at 280 (quoting *Nordlinger*, 505 U.S. at 10). We acknowledge that Congress has—over time—amended the UCMJ to make the military justice system more like civilian courts. *See Weiss*, 510 U.S. at 174 ("By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system."). But Congress's efforts to close the gap between the two systems does nothing to make us question our decision in *Akbar* that an accused servicemember is not similarly situated to a civilian defendant. *Akbar*, 74 M.J. at 406. As the Supreme Court recognized in *Parker*, "[t]he differences between the military and civilian communities result from the fact that

'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' " 417 U.S. at 743 (quoting *Toth*, 350 U.S. at 17). That primary business does not disappear when a servicemember is charged with a crime, and it prevents servicemember and civilian defendants from being " 'in all relevant respects alike.' " *Begani*, 81 M.J. at 280 (quoting *Nordlinger*, 505 U.S. at 10). Moreover, the three principal differences between the systems that so troubled the Supreme Court in cases like *Toth*, *Reid*, and *O'Callahan* still remain true today: servicemembers facing courts-martial still have no constitutional right to: (1) a trial by jury; (2) before an independent Article III judge; (3) after an indictment by a grand jury. The similarities in the two criminal systems do not render servicemember and civilian defendants similarly situated.

Even if Appellant were similarly situated to a civilian criminal defendant, he has no fundamental right to a unanimous verdict in the military justice system, and he does not argue that servicemembers are a protected class. Accordingly, Article 52, UCMJ, could only violate Appellant's equal protection rights if Congress's disparate treatment of servicemembers serves no legitimate government purpose. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."). Under rational basis review, we must presume that Article 52, UCMJ, is constitutional and the burden falls on Appellant to rebut " 'every conceivable basis which might support it.' " *Id.* at 320 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

The Government asserts that nonunanimous verdicts in the military are necessary to promote efficiency in the military justice system and to guard against unlawful command influence in the deliberation room. Appellant characterizes these arguments as strawmen and argues that the military could "legitimately proceed" with unanimous verdicts. Brief for Appellant at 44, *United States v. Anderson*. But especially considering the deference that Congress is owed with respect to national defense and military affairs, *Rostker*, 453 U.S. at 64, Appellant's responses do not rebut the presumption that Congress had a rational basis for enacting Article 52, UCMJ. The Government's justifications for nonunanimous verdicts in courts-martial are rationally related to legitimate state interests and do not violate Appellant's Fifth Amendment right to equal protection.

III. Conclusion

Appellant did not have a right to a unanimous verdict at his court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. Accordingly, we affirm the judgment of the United States Air Force Court of Criminal Appeals.

APPENDIX B — OPINION OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS, DATED MARCH 25, 2022

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39969

UNITED STATES,

Appellee,

v.

ANTHONY A. ANDERSON, MASTER
SERGEANT (E-7), U.S. AIR FORCE,

Appellant.

March 25, 2022, Decided

Before JOHNSON, RICHARDSON, and ANNEXSTAD, Appellate Military Judges. Chief Judge JOHNSON delivered the opinion of the court, in which Judge RICHARDSON and Judge ANNEXSTAD joined.

Appendix B

NOT FOR PUBLICATION

OPINION

JOHNSON, Chief Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of two specifications of attempted sexual abuse of a child on divers occasions, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880.[1] Appellant elected to be sentenced by the military judge, who sentenced Appellant to a dishonorable discharge, 12 months of confinement for each specification to run concurrently, and reduction to the grade of E-1. The convening authority took "no action" on the sentence; however, he deferred the automatic forfeiture of pay and the adjudged reduction in grade until the entry of judgment, and waived the automatic forfeitures for a period of six months for the benefit of Appellant's spouse and dependent child. *See* Articles 57(b)(1) and 58b(b), UCMJ, 10 U.S.C. §§ 857(b)(1), 858b(b). The military judge entered the judgment of the court-martial.

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1. References to Article 80, UCMJ, in relation to Specification 1 of the Charge, which alleged Appellant attempted to commit a lewd act on divers occasions between on or about 11 December 2018 and on or about 13 February 2019 by communicating indecent language, are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise indicated, all other references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

Appendix B

Appellant raises six issues for our consideration on appeal: (1) whether the evidence is legally and factually sufficient to support his convictions; (2) whether the definition of "lewd act" as it relates to indecent conduct prohibited by Article 120b, UCMJ, 10 U.S.C. § 920b, impermissibly lowers the Government's burden of proof; (3) whether the military judge abused his discretion by admitting evidence under Mil. R. Evid. 404(b); (4) whether the military judge erroneously admitted the testimony of the Government's digital forensic expert witness in violation of the Confrontation Clause of the Sixth Amendment;[2] (5) whether Appellant was denied his right to a unanimous verdict in violation of the Sixth Amendment, the Fifth Amendment's[3] Due Process Clause, and the Fifth Amendment right to equal protection; and (6) whether Appellant is entitled to appropriate relief due to the convening authority's failure to take action on the sentence. We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

I. Background

In the fall of 2018, Special Agent (SA) MN, an Air Force Office of Special Investigations (AFOSI) agent stationed in Germany, created the fictitious persona "Sara" for an undercover operation using Whisper, an Internet application that permitted users to post and send photos and messages anonymously. "Sara," as created by SA MN, was a 13-year-old female who lived on Ramstein

2. U.S. Const. amend. VI.

3. U.S. Const. amend. V.

Air Base (AB), Germany, with her single mother, an Air Force member.

Employing the user name "Sara_2005," on 1 December 2018, SA MN as "Sara" posted the following message on Whisper: "Moving sucks when u dnt have a b/f. #maninuniform #new2ramstein."[4] On 11 December 2018, "Sara" received the following message from Appellant employing the user name "ar_tbone": "Hey Sara, let's chat and possibly catch a movie is things go well." "Sara" responded on the same day, and Appellant and "Sara" continued to exchange messages on Whisper. Appellant quickly revealed that he was 34 years old and stationed at Ramstein AB; in response to a question from Appellant, "Sara" told him that she was 13 years old. Rather than ending the exchange at that point, Appellant's next message asked "Sara" for a photograph of herself. When "Sara" replied "Lol, no!" Appellant asked her why she was using Whisper, and told her he used it "[f]or entertainment, to talk to chicks when they don't know anything about me."

On the same day he initially contacted "Sara," Appellant suggested that they "play a game" and sent her an image of a list of 46 questions. Some of the questions were innocuous, such as "age," "height," "favorite color," and "favorite movie;" however, a number of them were sexual in nature, for example, "When was the last time you had sex" and "What's your favorite sex position."

4. The Whisper messages quoted in this opinion are reproduced verbatim without attempting to correct or identify abbreviations or errors in spelling and grammar.

Appellant explained to "Sara" that the "game" involved picking a question that the other person was required to answer. Through the game, Appellant asked "Sara" her height, what kind of underwear she was wearing, her relationship status, and whether she was a virgin.

As the message exchange continued, Appellant sent "Sara" a clothed head-and-shoulders photo of himself seated in a car. "Sara" replied, "U look so mature." In return, "Sara" sent Appellant a clothed photo of herself which was in reality an age-regressed photo of a 25-year-old woman. In addition to being digitally modified to make "Sara" appear younger, the photo had a filter applied to give "Sara's" face two ears and a nose similar to a teddy bear. After receiving "Sara's" photo, Appellant replied, "It's really you? Your super cute," and later, "Well it's what I really think [ ] You look more mature."

Later in their exchanges, Appellant asked "Sara" several additional sexually-oriented questions. Among other questions and comments, Appellant asked "Sara" whether she had kissed a boy, and told her, "French kissing is fun." He asked whether "Sara" masturbated and whether it felt "good" when she did. Appellant sent "Sara" a chart of 21 cartoon-style images of women with bare breasts of different shapes, and he asked "Sara," "Which one are you?" He also asked "Sara" if she let her supposed ex-boyfriend touch her breasts.

During their communications, Appellant revealed that he was in the Air Force and worked in aircraft maintenance. He further revealed that he was married. After "Sara" agreed with Appellant that "Sara's"

mother would be angry if she knew about their Whisper conversations, Appellant proposed he and "Sara" "both will promise to keep it a secret."

On 18 December 2018, after a week of messages, "Sara" initiated the following exchange:

> ["Sara":] Hey, so this is real hard 4 me 2 say but idk if we shuld talk n e more. U seem real nice an all but I'm lookin 4 a b/f 2 go 2 movies w/ an stuff. An I no ur weirded out cuz I'm 13
>
> [Appellant:] Sorry I was asleep. [ ] If that's what you want to do that's fine. [ ] I just figured we could talk till you got a bf then we can stop. How about that?
>
> ["Sara":] I meen, I guess that's ok. I jus kind of want a bf 2 go 2 movies an stuff w/
>
> ["Sara":] And I meen I no u wuldnt want 2 date me cuz I'm 13
>
> [Appellant:] Yea I know you want to find someone to go to the movies with. [ ] We can talk but I can get into a lot of trouble for hanging out with you. Espiecally in public

The exchanges continued, and at a later point Appellant suggested they might be able to meet in person sometime in the future. Appellant also repeatedly requested additional photos of "Sara." On 20 January 2019, Appellant

sent "Sara" a photo of himself taken in a mirror with his face obscured, wearing only underwear through which the outline of his penis was visible. Appellant subsequently told "Sara," "I'd love to see you the same way too." "Sara" responded, "Like w/ my shirt off?" to which Appellant replied, "Sure but not naked though." "Sara" told Appellant she would not take her shirt off, but would send him another photo. "Sara" re-sent Appellant the same age-regressed and filtered photo she sent before, and then sent him a different fully clothed age-regressed photo of the same woman holding a cat. Appellant asked "Sara" if she wanted another photo of him, to which she replied "Sure." Appellant then sent "Sara" another photo similar to his previous one, wearing only underwear and with the shape of his penis clearly visible through the fabric.

Appellant subsequently wrote, "I'd like to show you more but then I could go to jail lol." When "Sara" asked what he meant, Appellant responded, "Cuz your underage and if anyone finds out I can be in trouble [ ] For showing you my naked pics [ ] Or if you show me anything naked too." However, Appellant continued to ask for more photos of "Sara," including requests to see what was "under [her] sweater" and of "Sara" wearing her bra. After "Sara" expressed concern that Appellant might be "a cop," at her request Appellant sent her a photo of his face next to a piece of paper with "Hi Sara" written on it.

SA MN was able to identify Appellant by showing his photograph to the first sergeants of the maintenance squadrons at Ramstein AB. The message exchanges on Whisper continued until 13 February 2019, when AFOSI

agents apprehended Appellant at his duty location. The AFOSI seized Appellant's phone, and subsequent forensic analysis recovered the messages and photos Appellant had exchanged with "Sara" on Whisper.

The AFOSI recovered additional relevant information from Appellant's phone that was subsequently admitted as evidence in his trial. On 10 December 2018, the day before he first contacted "Sara," Appellant viewed an Internet article entitled "13 popular new apps teens are using," which described Whisper as an application where users "post random or deeply private thoughts" which "are often sexual," and "also has a 'Meet Up' section." In addition, the AFOSI discovered that on 11 and 12 February 2019, Appellant contacted and exchanged Whisper messages with a user known as "Kittycat" who had posted the message, "Who goes to Ramstein High School?" Appellant asked "Kittycat" if she was "into guys older than [her]." After "Kittycat" told Appellant she was 15 years old, Appellant continued sending her messages, exchanged clothed photos with her, sent her the same image with 46 questions that he had sent to "Sara," and suggested they play the same "game." When "Kittycat" indicated she was not interested in the game because she had a boyfriend, Appellant told her "It's ok" because her boyfriend "won't know." The AFOSI subsequently identified "Kittycat" as an actual 15-year-old female high school student at Ramstein AB.

Appellant was charged with two specifications of attempted sexual abuse of a child with regard to his communication with "Sara." He was not charged in relation to his communication with "Kittycat."

Appendix B

II. Discussion

A. Legal and Factual Sufficiency

1. Law

"We review issues of legal and factual sufficiency de novo." *United States v. Knarr*, 80 M.J. 522, 528 (A.F. Ct. Crim. App. 2020) (citation omitted), *rev. denied*, 80 M.J. 348 (C.A.A.F. 2020). "Our assessment of legal and factual sufficiency is limited to evidence produced at trial." *Id.* (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict . . . ." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Thus, the "standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (internal quotation marks and citation omitted).

Appendix B

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *Knarr*, 80 M.J. at 528 (alterations in original) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

In order to find Appellant guilty of attempted sexual abuse of a child in violation of Article 80, UCMJ, as alleged in Specification 1 of the Charge, the court members were required to find the following beyond a reasonable doubt: (1) that on divers occasions between on or about 11 December 2018 and on or about 13 February 2019, in or near Germany, Appellant did a certain overt act, that is, intentionally communicated indecent language to "Sara" via communication technology, with the intent to gratify his sexual desires; (2) that the act was done with the specific intent to commit a certain offense under the UCMJ, specifically, sexual abuse of a child in violation of Article 120b, UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.

See Manual for Courts-Martial, United States (2016 ed.) (2016 *MCM*), pt. IV, ¶ 4.b. The attempted offense, sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2016 *MCM*), required the commission of a "lewd act" on a child under the age of 16 years. *See* 2016 *MCM*, pt. IV, ¶ 45.a.(c). In this context, a "lewd act" included, *inter alia*, "intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to . . . arouse or gratify the sexual desire of any person." 2016 *MCM*, pt. IV, ¶ 45b.a.(h)(5)(C). "'Indecent' language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts." 2016 *MCM*, pt. IV, ¶ 89.c.

In order to find Appellant guilty of attempted sexual abuse of a child as alleged in Specification 2 of the Charge, the court members were required to find the following beyond a reasonable doubt: (1) that on divers occasions between on or about 20 January 2019 and on or about 22 January 2019, in or near Germany, Appellant did a certain overt act, that is, intentionally displayed his genitalia through his clothing in the presence of "Sara" via communications technology; (2) that the act was done with the specific intent to commit a certain offense under the UCMJ, specifically sexual abuse of a child in violation of Article 120b, UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.

See Manual for Courts-Martial, United States (2019 ed.) (*MCM*), pt. IV, ¶ 4.b. As with Specification 1, sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b, required the commission of a "lewd act" on a child under the age of 16 years. *See MCM*, pt. IV, ¶ 62.a(c). For purposes of Specification 2, the relevant definition of a "lewd act" included, *inter alia*,

> any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

MCM, pt. IV, ¶ 62.a.(h)(5)(D).

Rule for Courts-Martial (R.C.M.) 916(g) states: "It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." Applying what has been called the "subjective" test for entrapment, the defense has the initial burden of showing some evidence that an agent of the Government originated the suggestion to commit the crime. *United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992).[5] Once

5. In addition to the "subjective" test for entrapment, military appellate courts have recognized an "objective" test whereby a court may find the Government's conduct so outrageous or shocking to the judicial conscience that it violates an accused's right to due process

raised, "the burden then shifts to the Government to prove beyond a reasonable doubt that the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense." *Id.* (citations omitted). When a person accepts a criminal offer without an extraordinary inducement to do so, he demonstrates a predisposition to commit the crime in question. *Id.* (citations omitted). "Inducement" means more than merely providing the means or opportunity to commit a crime; the Government's conduct must "create[ ] a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense." *United States v. Howell*, 36 M.J. 354, 359 (C.M.A. 1993) (internal quotation marks and citations omitted).

2. Analysis

Appellant contends the evidence is legally and factually insufficient to support his conviction of either Specification 1 or Specification 2 of the Charge. We disagree. The Government introduced convincing evidence for each specification.

a. Sufficiency of the Evidence Generally

With regard to Specification 1, the Government proved Appellant sent a series of sexually provocative messages to "Sara," who he believed to be a 13-year-old child. Although

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under the Fifth Amendment, and thereby constitutes entrapment as a matter of law. *United States v. Berkhimer*, 72 M.J. 676, 679-80 (A.F. Ct. Crim. App. 2013). Appellant does not contend, and we do not find, the facts of the instant case implicate "objective" entrapment.

the specification did not recite the allegedly indecent language from Appellant's messages, the military judge's instructions provided to the court members the particular language upon which the specification was based.[6] That language is directly supported by the messages exchanged between Appellant and SA MN as "Sara," which were also recovered from Appellant's phone. There is no question as to Appellant's identity as Whisper user "ar_t-bone." A reasonable factfinder could conclude that, under the circumstances, Appellant's messages to someone he believed to be a 13-year-old girl were indecent and communicated with the intent to gratify his sexual desires.

With regard to Specification 2, the Government proved Appellant sent "Sara" two different photos of himself displaying his penis through his underwear. Again,

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6. Specifically, the military judge instructed that the charged indecent language consisted of the following:

> The accused sending "Sara" the number game; asking "Sara" what kind of underwear she had on; asking if "Sara" was a virgin; asking when "Sara" last masturbated; asking "Sara" if masturbation felt good to her; asking for descriptions of "Sara's" breasts; telling "Sara" he was in his underwear; asking "What are you wearing?" and including a flirtatious "winking" emoji; asking for pictures of "Sara" in a sports bra; and asking if "Sara" needs him to "warm her up."

Appellant was on notice that these specific messages formed the basis for the specification; the specific language cited by the military judge mirrored the Government's bill of particulars, provided to the Defense on 27 May 2020.

there is no question about the identity of Appellant as the sender. In addition, the Government provided ample proof that the photos Appellant sent were of himself. Although Appellant's face is not visible in the photos, Appellant told "Sara" the images were of him. In addition, the visible skin tone generally matches Appellant's, and a tattoo on one arm partially visible in both photos matches a distinctive tattoo on Appellant's arm in a photo AFOSI agents took and that the Government entered into evidence. Furthermore, the distinctive coloration and bathroom furnishings visible behind the figure in the photos matches those photographed in Appellant's residence. Although the penis is not exposed, its shape is discernible under the clothing and prominent in the photo. A reasonable factfinder could conclude Appellant's conduct in sending such images to someone he believed to be a 13-year-old girl was indecent in that it "amount[ed] to a form of immorality relating to sexual impurity which [was] grossly vulgar, obscene, and repugnant to common propriety, and tend[ed] to excite sexual desire or deprave morals with respect to sexual relations." *See MCM*, pt. IV, ¶ 62.a.(h)(5).

With regard to each of the specifications, a reasonable fact-finder could conclude beyond a reasonable doubt Appellant committed the charged overt acts, beyond mere preparation, with the specific intent to commit the offense of sexual abuse of a child in violation of Article 120b, UCMJ, and which apparently tended to effect the commission of the offense.

On appeal, Appellant raises two specific arguments challenging the sufficiency of the evidence: first, that he

was entrapped; and second, specifically with regard to Specification 1, that the Government failed to prove that he intended to gratify his sexual desires. We address each argument in turn.

b. Entrapment

At trial, the military judge instructed the court members on the defense of entrapment. The court members evidently found this defense did not apply to Appellant's actions; neither do we. The evidence supports finding beyond a reasonable doubt that the criminal design did not originate with the Government, and even if it had, that Appellant was predisposed to commit the offenses.

"The essence of entrapment is an improper inducement by government agents to commit the crime." *Wheeler*, 76 M.J. at 574 (citing *Howell*, 36 M.J. at 359). "Such improper inducement does not exist if government agents merely provide the opportunity or facilities to commit the crime." *Id.* In this case, SA MN merely provided Appellant the opportunity to commit the offense through the persona of "Sara." It was consistently Appellant who turned the conversation to sexual subjects. For example, Appellant initiated the "game" involving the list of 46 questions, which he used to ask "Sara" about her underwear and sexual experience; he sent "Sara" the breast chart to ask about the shape of her breasts; he asked whether she masturbated; and he sent her two photos with the shape of his penis visible through his underwear. Appellant contends SA MN's initial Whisper post targeted active duty Air Force members with "#maninuniform," but

that is hardly an improper inducement to send sexual messages to a child after being informed "Sara_2005" was a 13-year-old girl. Nor does the fact that "Sara" continued to exchange messages with Appellant and sent the first message on certain days demonstrate an improper inducement. SA MN did not ask sexual questions of Appellant, even as part of the "game," and did not solicit sexual photos from him. Appellant could have easily ceased communicating with SA MN at any point, or refrained from injecting sexually-charged content in his messages to her.

Furthermore, assuming *arguendo* that the criminal design did originate with the Government, the evidence supports the court members finding beyond a reasonable doubt that Appellant was predisposed to commit the offense. An accused who commits an offense without an extraordinary inducement from a Government agent to do so demonstrates a predisposition to commit the offense and is not the victim of entrapment. *Whittle*, 34 M.J. at 208 (citations omitted). For entrapment to exist, the government conduct must:

> create[ ] a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense . . . [and may take the form of] pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship.

Wheeler, 76 M.J. at 574-75 (alterations in original) (quoting *Howell*, 36 M.J. at 359-60). "Sara" provided Appellant no such extraordinary inducements in this case. Moreover, Appellant's messages to "Kittycat," who (accurately) identified herself as a 15-year-old girl, including Appellant's attempt to initiate with "Kittycat" the same 46-question "game" he played with "Sara," are powerful evidence he was predisposed to such behavior and not entrapped by SA MN.

Embedded in his argument that he was entrapped, Appellant contends he did not actually believe "Sara" was 13 years old. He argues that SA MN used odd language that a 13-year-old would not use, such as "#maninuniform;" that "Sara" sent numerous messages at times when she should have been in school; and that the two age-regressed photos SA MN sent Appellant were "obviously doctored." We are not persuaded "Sara's" language was significantly implausible for a 13-year-old girl, and we do not find it unlikely that a middle school student would find opportunities to send text messages while at school. How genuine the photos appear may be a matter of opinion, but more importantly, Appellant's messages provide no substantial indication that he doubted "Sara" was 13 years old. On the contrary, he asked "Sara" to hide their correspondence from her mother; warned her not to send him nude pictures because it would be illegal; and explained he did not want to meet her in person because he could "get into a lot of trouble for hanging out with [her]." Appellant cites his comment that "Sara's" photo looked "more mature," but this comment—which echoes "Sara's" prior statement that Appellant looked

"so mature"—can readily be interpreted as an effort to compliment "Sara" and make her more comfortable with their communications. [7] At no point in his messages did Appellant suggest he doubted "Sara" was who she said she was.

c. Intent to Gratify Sexual Desires

Appellant contends the Government failed to prove beyond a reasonable doubt that the indecent language he sent "Sara" was intended to gratify his sexual desires. However, Appellant does not suggest a non-sexual reason why he would ask "Sara" what kind of underwear she was wearing, what her breasts were like, whether she masturbated, et cetera. Instead, he emphasizes that he did not solicit nude photos from "Sara," discuss sexual acts they could perform together, attempt to meet with her, or escalate the level of their interactions in other ways. However, Appellant's own messages indicate this reluctance was significantly motivated by his fear of "get[ting] into a lot of trouble" because of "Sara's" age, rather than an absence of sexual interest. More generally, evidence that Appellant was willing to engage in some forms of sexual abuse of a child but not in other sexual offenses does not disprove his sexual intent or his guilt. A reasonable finder of fact could easily conclude beyond a reasonable doubt that Appellant sent indecent messages to "Sara" for the purpose of gratifying his sexual desires.

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7. Relevantly, Appellant also told "Kittycat" that she looked older than 15 years.

d. Conclusion as to Legal and Factual Sufficiency

Drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's convictions beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297-98. Additionally, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt and find his convictions factually sufficient. *See Turner*, 25 M.J. at 325.

B. Mens Rea for Indecent Conduct Under Article 120b, UCMJ

1. Law

Whether the military judge correctly instructed the court members is a question of law we review de novo. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014) (citation omitted). The constitutionality of a statute and the mens rea requirement applicable to a particular offense are also questions of law reviewed de novo. *United States v. Gifford*, 75 M.J. 140, 142 (C.A.A.F. 2016) (citations omitted); *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012) (citation omitted). However, "[f]ailure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." R.C.M. 920(f). We review forfeited issues for plain error. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation

omitted). In a plain error analysis, the appellant "has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (footnote and omitted omitted).

In addition, where an appellant "affirmatively declined to object to the military judge's instructions and offered no additional instructions," he may thereby affirmatively waive any right to raise the issue on appeal, even "in regards to the elements of the offense." *Davis*, 79 M.J. at 331 (citations omitted). "However, in *Davis*, [the Court of Appeals for the Armed Forces (CAAF)] noted that [it] review[s] a matter for plain error when there is a new rule of law, when the law was previously unsettled, and when the [trial court] reached a decision contrary to a subsequent rule." *United States v. Schmidt*, M.J. , No. 21-0004, 82 M.J. 68, 2022 CAAF LEXIS 139, at *10-11 (C.A.A.F. 11 Feb. 2022) (fourth alteration in original) (internal quotation marks and citations omitted). "Whether an appellant has waived an issue is a legal question we review de novo." *Id.* at *8-9 (citations omitted).

As discussed above with regard to the sufficiency of the evidence, Specification 2 alleged Appellant attempted to commit the offense of sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b, by committing a "lewd act" upon "Sara," specifically, by intentionally displaying his genitalia through his clothing in her presence via communications technology. For purposes of Specification 2, the relevant definition of a "lewd act" included, *inter alia*,

> any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

MCM, pt. IV, ¶ 62.a.(h)(5)(D).

"In determining the mens rea applicable to an offense, we must first discern whether one is stated in the text, or, failing that, whether Congress impliedly intended a particular mens rea." *United States v. McDonald*, 78 M.J. 376, 378-79 (C.A.A.F. 2019) (citation omitted). "[T]he existence of a mens rea is presumed in the absence of clear congressional intent to the contrary." *Id.* at 379 (citing *United States v. Haverty*, 76 M.J. 199, 203-04 (C.A.A.F. 2017)). "[A] general intent mens rea is not the absence of a mens rea, and such offenses remain viable in appropriate circumstances post-*Elonis*." *Id.* (citing *Elonis v. United States*, 575 U.S. 723, 736, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015)). A general intent offense implies a mens rea that the accused intentionally committed the charged act. *Id.* at 381.

2. Analysis

As clarified by his reply brief, Appellant contends that Article 120b, UCMJ, is unconstitutional to the extent that the definition of a "lewd act" permits conviction for

indecent conduct according to an objective standard, and without requiring proof that the accused acted with subjective intent with respect to indecency. Appellant contrasts Specification 1, which as charged required the Government to prove he communicated indecent language to "Sara" with the specific intent to gratify his sexual desires, with Specification 2, which required that the alleged *conduct* be intentional but meet an *objective* standard of immorality as determined by the court members, without any requirement to prove Appellant's subjective intent to gratify sexual desires. Appellant relies on *Elonis*, where the United States Supreme Court overturned a conviction based on an erroneous jury instruction "that the Government need prove only that a reasonable person would regard [the petitioner's] communications as threats." 575 U.S. at 740. Doing so, the Court noted, would effectively create a mens rea of negligence based on an objective standard. *Id.* Accordingly, Appellant contends this court should set aside the finding of guilty as to Specification 2.

However, as an initial matter we must address whether, as the Government contends, Appellant waived this issue when trial defense counsel told the military judge the Defense did not have any objection with regard to the court member instructions on the elements of Specification 2. *See Davis*, 79 M.J. at 331 (citations omitted). Appellant has not specifically addressed this point. In order to answer this question, we must consider whether the situation in Appellant's trial was more analogous to *Davis*, where the CAAF applied waiver, or to its recent decision in *Schmidt*, where it did not.

In *Davis*, the CAAF held the appellant "expressly and unequivocally acquiesce[ed]" to the military judge's findings instructions when the defense "affirmatively declined to object [twice] and offered no additional instructions." 79 M.J. at 331 (citations omitted). Similarly, in the instant case, before the military judge provided the findings instructions to the court members, the civilian trial defense counsel agreed that the instructions were "a correct statement of law." In addition, after the military judge read the instructions to the court members he asked the parties if there were any objections or requests for additional instructions; the civilian trial defense counsel responded, "No, Your Honor."

In *Schmidt*, Judge Sparks, announcing the opinion of the court,[8] acknowledged trial defense counsel "assented" to the legal definition the military judge provided the court members, which the appellant subsequently challenged on appeal. *Schmidt*, 82 M.J. 68, 2022 CAAF LEXIS 139, at *10. Although "[i]n light of *Davis*, this affirmative declination to object to the military judge's definition . . . would appear to waive [the appellant]'s right to challenge that definition on appeal," Judge Sparks explained the defense's "failure to object was not waiver given the unsettled nature of the law" at the time of the trial with respect to the specific definition at issue. *Id.* at

8. Judge Sparks's opinion was not joined by any other judge. However, Chief Judge Ohlson writing separately and concurring in the judgment, joined by Senior Judge Erdmann, "agree[d] with Judge Sparks that this is not a waiver case." *Schmidt*, 82 M.J. 68, 2022 CAAF LEXIS 139, at *15-16 (Ohlson, C.J., concurring in the judgment).

*11. Accordingly, Judge Sparks reviewed the challenged instruction for plain error. *Id.* at *11-15.

Returning to the instant case, similar to *Davis*, and contrary to his argument on appeal, Appellant affirmatively acquiesced in the military judge's definition of the elements of attempted sexual abuse of a child by indecent conduct in violation of Article 120b, UCMJ, as alleged in Specification 2. Therefore, applying *Davis* in light of *Schmidt*, the question becomes whether the legal point Appellant now asserts on appeal was "unsettled" in a manner similar to the definition at issue in *Schmidt*. On one hand, the language of the statute appears clear, and Appellant cites no decision by the CAAF, by this court, or by our sister Courts of Criminal Appeals that suggests the objective standard for indecency under Article 120b, UCMJ, may be unconstitutional. *Cf. United States v. Miller*, No. ACM 39747, 2021 CCA LEXIS 95 (A.F. Ct. Crim. App. 3 Mar. 2021) (unpub. op.) (affirming convictions for attempted sexual abuse of a child by indecent conduct), *rev. denied*, 81 M.J. 334 (C.A.A.F. 2021). However, we have not found "binding precedent" applying *Elonis* to the objective standard of indecency in Article 120b, UCMJ, as Appellant now seeks to do. *See Schmidt*, 82 M.J. 68, 2022 CAAF LEXIS 139, at *11. Recognizing our authority under Article 66, UCMJ, 10 U.S.C. § 866, to pierce waiver in order to ensure an appellant has not been unfairly prejudiced by a legal error, we will assume, without deciding, that Appellant forfeited rather than waived this issue. *See United States v. Hardy*, 77 M.J. 438, 442-43 (C.A.A.F. 2018) (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)).

Appendix B

Reviewing Appellant's claim for plain error, we find Appellant is entitled to no relief. Questions of statutory construction begin with the language of the statute. *McDonald*, 78 M.J. at 379 (citation omitted). *Elonis* explained that "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." 575 U.S. at 736 (internal quotation marks and citations omitted). Moreover, courts "'must give effect to the clear meaning of statutes as written' and questions of statutory interpretation should 'begin and end . . . with [statutory] text, giving each word its ordinary, contemporary, and common meaning.'" *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (alterations in original) (quoting *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 137 S. Ct. 1002, 1010, 197 L. Ed. 2d 354 (2017)). The statute challenged in *Elonis* expressly provided for a "reasonable person" standard with respect to the definition of a "true threat," effectively applying a negligence standard with regard to the content of the communication. 575 U.S. at 731. In contrast, Article 120b(h)(5)(D), UCMJ, at issue in the instant case, provides a definition for indecency that does not rely on a reasonable person standard. Thus, we find that in the absence of any defense objection, a military judge would not "plainly" or "obviously" conclude *sua sponte* that Article 120b, UCMJ, was unconstitutional in light of *Elonis*. Furthermore, we find the statute's requirement that the conduct be intentionally performed with or in the presence of a child under the age of 16 years, coupled with the requirement that the conduct be "indecent" and actually "tend[ ] to

excite sexual desire or deprave morals with respect to sexual relations," sufficiently separates wrongful conduct from otherwise innocent conduct. Accordingly, we find Appellant has failed to demonstrate plain or obvious error.

C. Mil. R. Evid. 404(b)

1. Additional Background

On 1 May 2020, a month before Appellant's trial, the Government provided the Defense written notice in accordance with Mil. R. Evid. 404(b) that it might seek to introduce evidence of the following acts: (1) that Appellant "sent the same breast chart cartoon and 'pick a number game' to multiple users on the Whisper chat application," as evidence of a common scheme or plan; (2) that Appellant "sent the same clothed image of himself to both [SA MN] as he did to a Whisper user identified as '[K]ittycat' who told [Appellant] she was fifteen" and who "was later identified as a fifteen year old Ramstein high school student," as potential rebuttal evidence; and (3) that Appellant "spoke with a user [on Whisper] who identified herself as a 17 year old and [Appellant] asked her for 'sexy' pictures," also as potential rebuttal evidence.

On 26 May 2020, less than a week before Appellant's trial, the Government provided additional Mil. R. Evid. 404(b) notice regarding searches Appellant performed on a particular website, and evidence Appellant exchanged messages and photos with two additional Whisper users, as evidence of Appellant's intent, "knowledge" that "Sara" was a child, absence of mistake, and the existence of a common scheme or plan.

Appendix B

At trial, after opening statements, the Defense submitted a motion to exclude the evidence referred to in the Government's 26 May 2020 notice on the grounds that it was untimely, that the Government provided insufficient information regarding the specifics and context of the noticed evidence, and that any probative value would be substantially outweighed by the danger of unfair prejudice. The Government submitted a written opposition to the defense motion with several attachments, including the AFOSI Report of Investigation (ROI).

The military judge held a hearing on the motion at which he received argument from counsel. The scope of the hearing expanded to address the admissibility of the evidence identified in the Government's 1 May 2020 notice as well as the 26 May 2020 notice. At the conclusion of the hearing, the military judge issued an oral ruling which he subsequently supplemented in writing. With respect to the 1 May 2020 notice, the military judge noted the Government had "withdrawn" its use of evidence that Appellant sent the "breast chart cartoon" and "pick a number game" to multiple Whisper users, as well as evidence Appellant requested "sexy pictures" from a Whisper user who described herself as 17 years old, and that such evidence was "not admissible without further notice." The military judge further noted the Government had withdrawn the use of evidence that Appellant sent the same clothed image of himself to "Kittycat" that he had sent to "Sara." However, he ruled that evidence Appellant communicated with a Whisper user identified as "Kittycat" who told Appellant she was 15 years old, and was in fact a 15-year-old high school student, was

relevant and admissible to show the existence of a common plan or scheme and to show Appellant's intent in his communications with "Sara," and its probative value was not substantially outweighed by the danger of unfair prejudice. In addition, the military judge excluded the evidence identified in the 26 May 2020 notice because the notice was untimely and not in compliance with the military judge's scheduling order.

After trial defense counsel cross-examined the Government's first witness, SA MN, the Government requested an Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing. There, trial counsel argued the Defense had opened the door to several matters in the 1 May 2020 Mil. R. Evid. 404(b) notice. Trial counsel pointed to questions the Defense had asked which suggested Appellant may have believed "Sara" was actually an adult, such as the number of times SA MN had sent messages to Appellant on Whisper when a 13-year-old would have been at school, and the fact that the person depicted in the age-regressed photos SA MN sent Appellant was actually 25 years old. The military judge agreed with trial counsel that the door had been opened, and further indicated he believed the issue of entrapment had been raised. The military judge permitted the Government to introduce evidence of the entirety of the Whisper conversation between Appellant and "Kittycat." However, the military judge continued to exclude evidence addressed in the 26 May 2020 Mil. R. Evid. 404(b) notice.

The military judge subsequently issued a supplemental written ruling on the Defense's motion to exclude Mil.

R. Evid. 404(b) evidence. The ruling held that evidence Appellant communicated on Whisper with "Kittycat," who identified herself as 15 years old and was later identified as an actual 15-year-old high school student, was admissible as evidence of a common scheme or plan, of Appellant's intent, and to rebut the defense of entrapment. However, the ruling did not specifically address the substance of the communications between Appellant and "Kittycat." The ruling also reiterated that the Government had withdrawn its use of the other evidence addressed in its 1 May 2020 Mil. R. Evid. 404(b) notice, and that the motion to exclude was granted with respect to the evidence addressed in the 26 May 2020 notice.

The Government introduced the entirety of Appellant's messages with "Kittycat." Her initial Whisper post asked, "Who goes to Ramstein High School?" Appellant responded on 11 February 2019 by asking "Kittycat," "You know what I like about high school girls?" After "Kittycat" responded, "What," Appellant replied, "I keep getting older and they stay the same age [laughing emoji]." Appellant then asked if "Kittycat" was "into guys older than [her]." After "Kittycat" informed Appellant she was 15 years old and a sophomore in high school, Appellant continued to exchange messages with her. When Appellant told "Kittycat" he was curious what she looked like, she sent him an actual clothed photo of her upper torso and head. Appellant told "Kittycat" she was "cute" and looked 17 or 18 years old rather than 15. Appellant then sent "Kittycat" the "pick a number game" and invited her to play with him. When "Kittycat" responded "Eh" and told him she had a boyfriend, Appellant responded, "It's ok,

it's an chat on whisper. He won't know," and then sent her the same photo of himself sitting in a car that he had sent "Sara." Appellant asked "Kittycat" if her boyfriend was in Germany, to which she replied, "Yes." Appellant then responded, "Right on, [ ] What are you doing on whisper?" The following afternoon, 12 February 2019, Appellant attempted to reinitiate contact with "Kittycat," asking, "Hey how are you?" which was the last message.

AFOSI agents apprehended Appellant the following day.

2. Law

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia*, proving intent or the existence of a plan. Mil. R. Evid. 404(b)(2). The list of potential purposes in Mil. R. Evid. 404(b)(2) "is illustrative, not exhaustive." *United States v. Ferguson*, 28 M.J. 104, 108 (C.M.A. 1989). "When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition." R.C.M. 916(g), Discussion (citing Mil. R. Evid. 404(b)). We apply a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b): (1) does the evidence "reasonably support a finding" that the accused committed the prior crime, wrong, or act; (2) what "fact of . . . consequence is

made more or less probable" by the proffered evidence; and (3) is the "probative value . . . substantially outweighed by the danger of unfair prejudice?" *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) (alterations in original) (internal quotation marks and citations omitted).

Mil. R. Evid. 403 provides that evidence that is relevant and otherwise admissible may be excluded if its probative value is substantially outweighed by the danger of, *inter alia*, unfair prejudice or confusion of the issues.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted). "If the military judge fails to place his findings and analysis on the record, less deference will be accorded." *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014).

3. Analysis

Appellant contends the military judge abused his discretion both by permitting the Government to introduce evidence that Appellant communicated on Whisper with "Kittycat," who told Appellant she was 15 years old and

was in fact 15 years old, as well as by permitting the Government to introduce the actual messages themselves. As an initial matter, Appellant correctly notes that neither the military judge's initial oral ruling nor his supplemental written ruling addressed the content of Appellant's communications with "Kittycat" beyond the fact that she told Appellant her age; therefore, the military judge's decision to admit the actual communications is afforded less deference. Accordingly, we analyze the two prongs of Appellant's argument separately.

a. Evidence that Appellant Communicated with "Kittycat"

First, Appellant contends the military judge's findings of fact are not supported by the record. We disagree. The relevant finding of fact, as stated in the written ruling, was that "[t]he search of [Appellant's] cellular phone revealed Whisper chat messages between [Appellant] and a user identified as '[K]ittycat' who told [Appellant] she was fifteen and that this user was later identified as a fifteen[-]year-old Ramstein Air Base high school student." The ruling further stated the military judge "adopted as findings of fact" the "relevant statements" contained in the ROI attached to the Government's response to the defense motion to dismiss. Although the ROI did not include the actual messages between Appellant and "Kittycat," it did include sufficient information regarding what the AFOSI obtained from Appellant's phone and learned about "Kittycat" to support the military judge's finding of fact.

Appellant next argues that the evidence that Appellant communicated with "Kittycat" does not make a fact of

consequence to the trial more or less probable. He cites the comment in the AFOSI report that "[Appellant] did not discuss sexual information or share inappropriate photos with ['Kittycat']." Appellant also cites *United States v. Morrison* for the principle that "uncharged acts must be almost identical to the charged acts to be admissible as evidence of a plan or scheme." 52 M.J. 117, 122 (C.A.A.F. 1999) (internal quotation marks and citations omitted). Yet Appellant's conduct with "Kittycat," so far as it went, was extremely similar to his conduct with "Sara." In both cases, Appellant initiated contact with a female in Appellant's geographic area who had made a Whisper post; in both cases, Appellant carried on the conversation with someone who identified themselves as a child under 16 years old; and Appellant's contact with "Kittycat" occurred close in time to his communication with "Sara." We find the military judge did not abuse his discretion by concluding this evidence was admissible as some evidence of a scheme or plan on Appellant's part to "initiate sexual conversations with other Whisper users" under the age of 16 years.[9]

For similar reasons, contrary to Appellant's argument, we find this evidence also met the lower standard for evidence relevant to Appellant's intent—that the "wrongs or acts need only be similar to the offense charged and not too remote therefrom." *United States v. Woodyard*, 16 M.J. 715, 718 (A.F.C.M.R. 1983) (footnote and citation

9. Assuming *arguendo* the military judge did abuse his discretion by admitting evidence Appellant communicated with "Kittycat" as evidence of a scheme or plan, we find such an error did not materially prejudice Appellant's substantial rights.

omitted). As explained above, Appellant's actions with "Kittycat" were very similar to his actions with "Sara," so far as they went, and close in time with them. Appellant argues the ROI does not indicate the date or month when Appellant's communications with "Kittycat" took place. However, the ROI does include interview summaries that indicate "Kittycat" moved to Germany in the fall of 2018, which would support the military judge's determination that "Kittycat's" contact with Appellant must have been sufficiently close in time to the charged conduct to be relevant.

Appellant does not address the military judge's ruling that this evidence would be admissible to rebut a defense of entrapment, and we find no abuse of discretion in that respect. The fact that Appellant knowingly communicated with an actual 15-year-old child on Whisper regarding sexual matters was strong evidence that he was predisposed to engage in indecent sexual conversations with children under the age of 16 years, and was not lured into doing so by an extraordinary inducement. *See Whittle*, 34 M.J. at 208; Mil. R. Evid. 405(b) (allowing "character or [a] character trait [that] is an essential element" of a claim or defense to be "proved by relevant specific instances of the person's conduct"); *see also United States v. Schelkle*, 47 M.J. 110, 112 (C.A.A.F. 1997) ("Character might be an element of a defense if entrapment is claimed and the [G]overnment wants to prove predisposition.").

The military judge included his balancing of the probative value of the evidence against the danger of unfair prejudice, and accordingly his determination

is entitled to greater deference. The military judge explained the probative value was "not substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." The military judge further explained:

> Specifically, presenting this evidence will take very little additional time as the [G]overnment was already going to call the law enforcement agent to testify regarding [Appellant's] use of Whisper and this portion of their testimony will not take a significant period of time, the evidence is not cumulative as to any other evidence, and the danger of unfair prejudice to [Appellant] is minimal given the nature of the charged misconduct.

We find no abuse of discretion in the military judge's balancing of the relevant factors. Accordingly, we find the military judge did not err in admitting evidence to the effect that Appellant communicated on Whisper with a 15-year-old female Ramstein High School student who identified herself as such.

b. Specific Communications between Appellant and "Kittycat"

As indicated above, the military judge's rulings did not specifically address the actual communications between Appellant and "Kittycat," and our review of the admission of this evidence calls for a less deferential standard.

However, even reviewing the military judge's action de novo, we find no error in the admission of this evidence.

First, the messages introduced through an AFOSI digital forensic consultant, SA JB, reasonably support a finding that Appellant engaged in the asserted communications with "Kittycat" on Whisper. In addition, the substance of the messages were relevant for reasons similar to those articulated above. The Defense's cross-examination of SA MN implicated the defense of entrapment and attempted to raise doubt that Appellant believed "Sara" was 13 years old. Therefore, evidence of Appellant's Whisper communications with "Kittycat" depicting a similar pattern of behavior—including attempting to initiate the same "game" involving sexually oriented questions—with another self-identified girl under 16 years of age became relevant evidence of Appellant's intent and predisposition to engage in such behavior. The fact that Appellant was not able to progress as far with "Kittycat" as he was with "Sara" due to "Kittycat's" reluctance or disinterest does not eliminate the relevance of Appellant's behavior.

We further find the probative value of these messages was not substantially outweighed by the danger of unfair prejudice—for reasons similar to those articulated by the military judge with respect to the general evidence that Appellant had communicated with the 15-year-old "Kittycat" on Whisper. Introducing the messages did not require additional witnesses or involve significant confusion or delay. Although the "Kittycat" communications were certainly damaging to the Defense,

they were not *unfairly* prejudicial. To the extent those messages tended to indicate a pattern of behavior, intent, or predisposition to engage in sexual communications with underage girls, that was exactly why they were relevant to the court members' deliberations as to Appellant's intent and the defense of entrapment as to the charged offenses.

D. Digital Forensic Expert Testimony

1. Additional Background

At trial, the Government intended to call SA JB, the AFOSI digital forensic consultant stationed in Germany who created multiple reports based on the data extracted from Appellant's phone. Before SA JB testified, the Defense raised an oral objection and asked to voir dire the witness "for the purposes . . . of a *Melendez-Diaz* type issue."[10] The military judge agreed to permit counsel to voir dire SA JB.

In SA JB's testimony for purposes of the defense objection, he explained that another AFOSI agent, SA DF, performed the actual extraction of data from Appellant's phone. SA JB was not present when SA DF extracted the data, but SA JB later analyzed the extraction—which he referred to as a "dot-TAR file"—to generate his report. When the military judge asked SA JB what SA DF had told him about the data, the following colloquies ensued:

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10. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

[SA JB:] Well, he provided me a report, as well as all his notes. I don't recall if I was -- I don't believe I was there for him to do the extraction, like I said earlier, but I was intimately familiar with what he found, the Whisper messages, other stuff that were Whisper messages that were concerning to us, possibly another underage person and things of the sort.

[Military Judge:] And is there anything from that report that [SA DF] produced that you then kind of adopted and put into your report?

[SA JB:] I can't say for sure, Your Honor, but I don't believe so.

. . . .

[Circuit Trial Counsel (CTC):] The reports that we intended to introduce at trial today, those are reports that you created within the last few days, within the last week?

[SA JB:] Yes, sir. But they're from the TAR file. They're not from any of [SA DF's] analysis or anything like that. It's basically straight from the archive of the phone.

[CTC:] So they're -- it's your independent analysis . . . based on the machine generated TAR file?

> [SA JB:] Yes, yeah.
>
> . . . .
>
> [CTC:] Did [SA DF] in any way contribute to the creation of the reports that we intend to offer at trial?
>
> [SA JB:] No.

In response to additional questioning by the military judge, SA JB reiterated that although his report was based on data extracted by SA DF, he did not rely on SA DF's report when he generated his own report.

After SA JB was excused, the military judge instructed the parties to provide written briefs on the issue that night. The Defense subsequently filed a written motion to exclude SA JB's testimony regarding his analysis of the data extracted by SA DF. Essentially, the Defense argued that by calling SA JB rather than SA DF, who performed the actual extraction, the Government would violate the Confrontation Clause of the Sixth Amendment under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Government evidently did not provide a written brief.

At the outset of the next day of trial, the military judge provided a written ruling denying the Defense's motion and objection, and read his analysis and conclusion on the record. The military judge explained that the machine-generated data itself was not testimonial and therefore

did not implicate the Confrontation Clause. He further explained:

> [T]estimony of [ ] SA [JB] does not and will not violate [Appellant]'s right to confrontation . . . . SA [JB's] personal knowledge regarding the derivation of the evidence at issue made him neither a "surrogate" expert nor a mere "conduit" for the testimonial statements of another . . . . [SA JB] also personally conducted an independent analysis, without relying upon SA [DF's] prior reports and formulated his own carefully considered conclusions and report. All of the data underlying his opinion was not testimonial, and, assuming *arguendo* that [ ] any prior report or conversation with SA [DF] was testimonial, there is no evidence before this [c]ourt that SA [JB] acted as a mere conduit for the report.
>
> [T]estimony by SA [JB] regarding his own analysis of the extraction of [Appellant]'s cell phone is testimonial . . . . This testimonial hearsay, however, satisfies the Confrontation Clause because the declarant of that hearsay, SA [JB], will be subject to cross-examination at trial.

SA JB was subsequently called and testified as an expert in digital forensics regarding his analysis of the data extracted from Appellant's phone.

2. Law

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59.

"[A] statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011) (quoting *United States v. Blazier*, 68 M.J. 439, 442 (C.A.A.F. 2010)). "[M]achine-generated data and printouts are not statements and thus not hearsay -- machines are not declarants -- and such data is therefore not 'testimonial.'" *United States v. Blazier*, 69 M.J. 218, 224 (C.A.A.F. 2010) (citations omitted). Chain of custody documents may also be non-testimonial. *United States v. Tearman*, 72 M.J. 54, 59 (C.A.A.F. 2013).

"[A]n expert witness may review and rely upon the work of others, including laboratory testing conducted by others, so long as they reach their own opinions in conformance with evidentiary rules regarding expert opinions." *Blazier*, 69 M.J. at 224 (citations omitted). "An expert witness need not necessarily have personally performed a forensic test in order to review and interpret the results and data of that test." *Id.* at 224-25 (citations omitted). "That an expert did not personally perform

the tests upon which his opinion is based . . . goes to the weight, rather than to the admissibility, of that expert's opinion." *Id.* at 225 (citation omitted). However, an expert witness may not circumvent the rules of evidence and Sixth Amendment by acting "as a conduit for *repeating* testimonial hearsay." *Id.* (citation omitted).

We review a military judge's ruling on a motion to exclude evidence for an abuse of discretion. *United States v. Katso*, 74 M.J. 273, 278 (C.A.A.F. 2015) (citation omitted). Whether a statement is testimonial for purposes of the Sixth Amendment is a question of law we review de novo. *United States v. Baas*, 80 M.J. 114, 120 (C.A.A.F. 2020) (citation omitted).

3. Analysis

Appellant contends the military judge abused his discretion in admitting SA JB's testimony because his findings of fact were not supported by the record. Appellant argues that, contrary to the military judge's findings, SA JB's analysis of the extraction relied on testimonial hearsay as well as machine-generated data, and the military judge should have excluded it. We disagree.[11]

Appellant first contends the military judge erroneously states in his findings of fact, "SA [DF] seized the accused's phone before conducting the extraction." As the

11. The Government asserts trial defense counsel affirmatively waived this issue at an earlier point in the trial. We find the record does not support the Government's assertion.

Government concedes, this finding is not supported by the record in that a different agent actually seized the phone before SA DF performed the extraction. However, this error was immaterial to the military judge's analysis. The salient point for purposes of the military judge's ruling was not the identity of the agent who initially seized the phone, but the fact that SA JB relied on the extraction performed by SA DF. Evidence regarding the chain of custody preceding that point goes to the weight of SA JB's testimony, not its admissibility. *See Blazier*, 69 M.J. at 225. Thus, although Appellant correctly identified an error in the military judge's findings, that error did not render the admission of SA JB's testimony an abuse of discretion.

Appellant next asserts the military judge erred in finding SA JB did not rely on SA DF's analysis, citing SA JB's testimony that he received a report and notes from SA DF. We disagree. SA JB's subsequent clarifications that his own report was the product of his independent analysis of the extraction, and that he did not rely upon SA DF or SA DF's report "in any way," was more than adequate to support the military judge's conclusion. *See United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003) (stating a military judge's findings of fact are reviewed for clear error).

Because Appellant fails to demonstrate the military judge clearly erred in finding SA JB did not rely on any testimonial hearsay from SA DF, his argument that SA JB's testimony violated the Confrontation Clause also fails.

Appendix B

E. Unanimous Verdict

1. Additional Background

Before trial, the Defense moved the military judge "to require a unanimous verdict for any finding of guilty," or, in the alternative, to "provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names." The Defense asserted that in light of the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), the Sixth Amendment, the Fifth Amendment's Due Process Clause, and the Fifth Amendment right to equal protection all required a unanimous verdict in trials by court-martial with court members. The Government opposed the motion, asserting that binding precedent from the Supreme Court and the CAAF held that the Sixth Amendment right to a jury trial did not apply to courts-martial; citing several unpublished opinions of this court holding that Fifth Amendment due process does not require unanimous court-martial verdicts; and asserting the right to a unanimous verdict was not a "fundamental right" that would implicate Fifth Amendment equal protection, and if it did, Congress's statutory provision for non-unanimous verdicts in courts-martial would pass judicial scrutiny.

The military judge denied the motion in a written ruling which he supplemented after the court-martial adjourned. He found *Ramos* neither explicitly nor implicitly overruled prior Supreme Court and CAAF

precedent holding that the Sixth Amendment right to a jury trial did not apply to courts-martial. He further found any due process considerations weighing in favor of unanimous verdicts were not "so extraordinarily weighty as to overcome the balance struck by Congress" in Article 52, UCMJ, 10 U.S.C. § 852, in light of the "specific military conditions" favoring finality of verdicts and the avoidance of unlawful command influence. He further explained that a unanimous verdict in a jury trial was not a fundamental right guaranteed in a court-martial because the right to a jury trial did not apply to court-martial panels; moreover, he agreed with the Government that even if such a fundamental right did apply, Congress's provision for non-unanimous verdicts would survive either rational basis review or heightened scrutiny by the courts.

The court members convicted Appellant of two specifications of attempted sexual abuse of a child on divers occasions in violation of Article 80, UCMJ, as described above. The vote of the court members was not disclosed.

2. Law

Article I, Section 8 of the Constitution provides, "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces." "[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Solorio v. United States*, 483 U.S. 435, 447, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987)

(second alteration in original) (internal quotation marks and citations omitted); *cf. Loving v. United States*, 517 U.S. 748, 768, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996) ("[W]e give Congress the highest deference in ordering military affairs.").

Article 52, UCMJ, 10 U.S.C. § 852, provides, "No person may be convicted of an offense in a general or special court-martial, other than . . . in a courtmartial with members . . . by the concurrence of at least three-fourths of the members present when the vote is taken."

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." However, "'constitutional rights may apply differently to members of the armed forces than they do to civilians.'" *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (quoting *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004)). "[T]here is no Sixth Amendment right to trial by jury in courts-martial." *Id.* (citing *Ex parte Quirin*, 317 U.S. 1, 39, 63 S. Ct. 2, 87 L. Ed. 3 (1942); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002) (per curiam)); *see also Whelchel v. McDonald*, 340 U.S. 122, 127, 71 S. Ct. 146, 95 L. Ed. 141 (1950); *United States v. Begani*, 81 M.J. 273, 280 n.2 (C.A.A.F. 2021); *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018).

"Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of

protection to defendants in military proceedings." *Weiss v. United States*, 510 U.S. 163, 176, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994) (citations omitted). However, "in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces . . . ." *Id.* at 177 (internal quotation marks and citations omitted). Where the Supreme Court has "faced a due process challenge to a facet of the military justice system," it has asked whether the factors militating in favor of the asserted due process right "'are so extraordinarily weighty as to overcome the balance struck by Congress.'" *Id.* at 177-78 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976)).

Equal protection "is generally designed to ensure that the Government treats similar persons in a similar manner." *United States v. Gray*, 51 M.J. 1, 22 (C.A.A.F. 1999) (internal quotation marks and citation omitted).

> For the Government to make distinctions does not violate equal protection guarantees unless constitutionally suspect classifications like race, religion, or national origin are utilized or unless there is an encroachment on fundamental constitutional rights like freedom of speech or of peaceful assembly. The only requirement is that reasonable grounds exist for the classification used.

Id. at 22-23 (quoting *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981)) (additional citations omitted).

"An 'equal protection violation' is discrimination that is so unjustifiable as to violate due process." *United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015) (quoting *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985)). However, an accused servicemember is "not similarly situated to a civilian defendant." *Id.* (citing *Parker v. Levy*, 417 U.S. 733, 743, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)). Fundamental rights "are only fundamental to the extent (and to the persons to whom) the Constitution grants them in the first place." *United States v. Begani*, 79 M.J. 767, 776 (N.M. Ct. Crim. App. 2020), *aff'd*, 81 M.J. 273 (C.A.A.F. 2021).

"When no suspect class or fundamental right is involved, . . . the [Supreme] Court requires only a demonstration of a rational basis as support for the law." *United States v. Wright*, 48 M.J. 896, 901 (A.F. Ct. Crim. App. 1998) (citing *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)). "Under the rational basis test, the burden is on the appellant to demonstrate that there is no rational basis for the rule he is challenging. The proponent of the classification 'has no obligation to produce evidence to sustain the rationality of a statutory classification.'" *United States v. Paulk*, 66 M.J. 641, 643 (A.F. Ct. Crim. App. 2008) (quoting *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)). "As long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it." *Id.* (citing *Heller*, 509 U.S. at 320; *United States v. Carolene Products Co.*, 304 U.S. 144, 153, 58 S. Ct. 778, 82 L. Ed. 1234 (1938)).

Under the doctrine of vertical stare decisis, courts must strictly follow the decisions issued by higher courts. *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (citation omitted). "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

3. Analysis

On appeal, Appellant reasserts that in light of *Ramos* the Sixth Amendment and the Fifth Amendment rights to due process and equal protection all required a unanimous verdict by the court-martial panel in order to convict him of any offense. We are not persuaded.

In *Ramos*, the Court overruled its prior decisions in *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972), and *Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972), to hold that the Sixth Amendment's guarantee of the right to trial "by an impartial jury" required a unanimous verdict in state as well as federal criminal trials. *Ramos*, 140 S. Ct. at 1396-97. However, the essence of the Court's opinion is to explain that the jury required by the Sixth Amendment is one that renders a unanimous verdict. *Ramos* does not purport, explicitly or implicitly, to extend the *scope* of the Sixth Amendment right to a jury trial to courts-

martial; nor does the majority opinion in *Ramos* refer to courts-martial at all. Accordingly, after *Ramos*, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment right to a jury trial does not apply to trial by courts-martial—and, by extension, neither does the unanimity requirement announced in *Ramos*.[12]

Appellant's due process argument is equally unavailing. This court has repeatedly held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. *See, e.g., United States v. Canada*, No. ACM S32298, 2016 CCA LEXIS 610, at *34 (A.F. Ct. Crim. App. 20 Oct. 2016) (unpub. op.), *aff'd on other grounds*, 76 M.J. 127 (C.A.A.F. 2017); *United States v. Spear*, No. ACM 38537, 2015 CCA LEXIS 310, at *9 (A.F. Ct. Crim. App. 30 Jul. 2015) (unpub. op.); *United States v. Daniel*, No. ACM

12. We recognize that, as Appellant notes, several rights guaranteed by the Sixth Amendment have been applied to courts-martial. *See, e.g., United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014) (speedy trial); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (notice); *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (effective counsel); *Blazier*, 69 M.J. at 222 (confrontation); *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) (public trial). However, Appellant has not drawn our attention to any case in which a Sixth Amendment right has been found applicable to trial by courts-martial *in direct contradiction* to express statutory language enacted by Congress pursuant to its Article I, Section 8 authority to makes rules for the government of the land and naval forces. Rather, the CAAF has found Sixth Amendment guarantees applicable where they are also consistent with the statutory regime Congress enacted. In contrast, in the instant case Appellant would have us, in effect, declare Article 52, UCMJ, unconstitutional, notwithstanding Article I, Section 8.

38322, 2014 CCA LEXIS 224, at *7-10 (A.F. Ct. Crim. App. 1 Apr. 2014) (unpub. op.), *aff'd*, 73 M.J. 473 (C.A.A.F. 2014). We are similarly unconvinced that the factors weighing in favor of a heretofore unrecognized unanimity requirement in courts-martial are so extraordinarily weighty as to override Congress's determination that a three-fourths vote strikes the correct balance of competing considerations in the administration of military justice, potentially including the prevention of unlawful command influence and securing finality of verdicts.[13]

Finally, we find no equal protection violation either. The non-unanimity requirement of Article 52, UCMJ, does not implicate a suspect classification. Furthermore, a servicemember standing trial in a court-martial is not similarly situated to a civilian accused in this respect, and the unanimity requirement announced in *Ramos* is not a "fundamental right" afforded to the former. As described above, *Ramos* established that the jury trial guaranteed by the Sixth Amendment requires a unanimous verdict, but it did not purport to expand the scope of the Sixth Amendment jury trial right to servicemembers tried

13. *Cf. United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, 76 S. Ct. 1, 100 L. Ed. 8 (1955):

> [I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.

by courts-martial. To the extent Article 52, UCMJ, is therefore subject to rational basis review, we find Appellant has failed to meet his burden to demonstrate no plausible rational reason exists for the three-fourths provision; therefore, we find no cause to overturn it. *See Paulk*, 66 M.J. at 643.

F. Convening Authority's Failure to Take Action

1. Additional Background

The offenses of which Appellant was convicted occurred between on or about 11 December 2018 and on or about 13 February 2019. The convening authority referred the charges and specifications on 28 January 2020 for trial by a general court-martial. The court-martial concluded on 3 June 2020, and the military judge signed the Statement of Trial Results on the same day.

On 12 June 2020, Appellant submitted a request that the convening authority defer his adjudged confinement and reduction in grade, and the automatic forfeitures, until the military judge entered the judgment of the courtmartial. *See* 10 U.S.C. § 857(b)(1). In addition, Appellant requested the convening authority waive his automatic forfeitures for a period of six months, his release from confinement, or the expiration of his term of service, whichever occurred first, for the benefit of his wife and dependent child. *See* 10 U.S.C. § 858b(b). Appellant did not request a reduction in his sentence pursuant to R.C.M. 1106.

Appendix B

On 4 August 2020, the convening authority signed a Decision on Action memorandum wherein he stated he took "no action" on the findings or the sentence in Appellant's case. The convening authority further stated that he granted the requested deferment of the reduction in grade and automatic forfeitures, and that he also granted the waiver of automatic forfeitures in order "to maximize the financial benefit to [Appellant's] dependents." However, the convening authority denied the request to defer Appellant's confinement; he did not provide a reason for the denial.[14]

On 21 August 2020, the military judge signed the entry of judgment. Appellant did not object to the convening authority's decision on action or to any other aspect of the post-trial process prior to submitting his assignments of error to this court. *See* R.C.M. 1104(b) (governing post-trial motions).

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14. Although not raised by Appellant, we note the convening authority erred by failing to state the reasons why he denied Appellant's request to defer confinement. *See United States v. Sloan*, 35 M.J. 4, 7 (C.M.A. 1992), *overruled on other grounds by United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018); *see also* R.C.M. 1103(d)(2) (stating decisions on deferment requests are subject to judicial review for abuse of discretion). We further note Appellant did not object to the convening authority's failure to state the reasons for denying the request. *See* R.C.M. 1104(b) (permitting parties to file post-trial motions to address various matters, including errors in post-trial processing). Reviewing for plain error, under the circumstances of this case, we find the omission did not materially prejudice Appellant's substantial rights. *See United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citations omitted).

2. Law

> [I]n any court-martial where an accused is found guilty of at least one specification involving an offense that was committed before January 1, 2019, a convening authority errs if he fails to take one of the following post-trial actions: approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.

United States v. Brubaker-Escobar, 81 M.J. 471, 472 (C.A.A.F. 2021) (per curiam); *see also* Article 60, UCMJ, 10 U.S.C. § 860 (2016 *MCM*). The convening authority's failure to explicitly take one of those actions is a "procedural" error. *Brubaker-Escobar*, 81 M.J. at 475. "Pursuant to Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2018), procedural errors are 'test[ed] for material prejudice to a substantial right to determine whether relief is warranted.'" *Id.* (alteration in original) (quoting *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005)).

3. Analysis

Appellant requests that we remand the record in order for the convening authority to take action on the sentence as Article 60, UCMJ, required him to do. However, Appellant—who submitted his assignment of error on this issue before the CAAF issued its opinion in *Brubaker-Escobar* quoted above—does not allege that he was prejudiced by the convening authority's failure to take action on the sentence. Instead, Appellant reviews several

unpublished opinions of this court that pre-date *Brubaker-Escobar*, in which various panels reached conflicting conclusions as to whether the convening authority's failure to take action on the entire sentence was an error and, if so, under what circumstances corrective action was required.[15] Relying particularly on *United States v. Lopez*, No. ACM S32597, 2020 CCA LEXIS 439, at *9 (A.F. Ct. Crim. App. 8 Dec. 2020) (unpub. op.), *rev. denied*, M.J. , 82 M.J. 99, 2021 CAAF LEXIS 978 (C.A.A.F. 9 Nov. 2021), and *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246, at *11-17 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.), *rev. denied*, M.J. , 2022 CAAF LEXIS 168 (C.A.A.F. 3 Mar. 2022), Appellant contends Article 60, UCMJ, "must be scrupulously honored" and that action on the sentence is required.

However, in light of *Brubaker-Escobar*, the convening authority's failure to take action on the sentence was a non-jurisdictional procedural error to be tested for material prejudice. We find no such prejudice to Appellant's substantial rights in this case. The convening authority was not authorized to disapprove, commute, or suspend Appellant's adjudged bad-conduct discharge

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15. *See United States v. Lopez*, No. ACM S32597, 2020 CCA LEXIS 439, at *9 (A.F. Ct. Crim. App. 8 Dec. 2020) (unpub. op.); *United States v. Aumont*, No. ACM 39673, 2020 CCA LEXIS 416 (A.F. Ct. Crim. App. 20 Nov. 2020) (en banc) (unpub. op.); *United States v. Barrick*, No. ACM S32579, 2020 CCA LEXIS 346, at *3-5 (A.F. Ct. Crim. App. 30 Sep. 2020) (unpub. op.); *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246, at *11-17 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.), *rev. denied*, M.J. , 2022 CAAF LEXIS 168 (C.A.A.F. 3 Mar. 2022).

or term of confinement. *See* 10 U.S.C. § 860(c)(4) (2016 *MCM*). The convening authority did have power to disapprove, commute, or suspend Appellant's adjudged reduction in grade, *see* Article 60(c)(2)(B) and (c)(4), UCMJ, 10 U.S.C. § 860(c)(2)(B), (c)(4); however, Appellant requested no such relief. Considering the totality of the circumstances, including Appellant's failure to identify specific prejudice, the sentence imposed, the absence of any request for clemency with respect to the sentence (as opposed to deferment or waiver), the convening authority's limited ability to modify the sentence, and the nature and seriousness of the offenses of which Appellant was convicted, we find no material prejudice to Appellant's substantial rights by the convening authority's failure to take action on the sentence.

III. Conclusion

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

APPENDIX C — ORDER OF THE UNITED STATES AIR FORCE TRIAL JUDICIARY, DEPARTMENT OF THE AIR FORCE, FILED JUNE 18, 2020

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES

v.

MSGT ANTHONY A. ANDERSON
86TH MAINTENANCE SQUADRON (USAFE)
RAMSTEIN AIR BASE, GERMANY

SUPPLEMENTAL RULING –
DEFENSE MOTION FOR
A UNANIMOUS VERDICT

18 June 2020

On 28 May 2020, the defense filed a motion to require a unanimous verdict for any finding of guilty and to modify the instructions accordingly. On 29 May 2020, the government responded. Neither party requested oral argument. *See* R.C.M. 905(h). On 31 May 2020, this Court issued a ruling denying the defense motion. This following serves as a supplement to the Court's initial written ruling. After considering the motion, the response, the evidence presented by the parties, and the relevant law, the Court finds by at least a preponderance of the evidence and concludes the following:

Appendix C

FINDINGS OF FACT

1. The accused is charged with one Charge and two Specifications alleging attempted sexual abuse of a child in violation of Article 80, U.C.M.J.

2. On 3 June 2020, the accused was found guilty of the Charge and Specifications by a panel of officer and enlisted members.

BURDEN OF PROOF

3. Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. R.C.M. 905(c)(l). Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. R.C.M. 905(c)(2)(A).

4. Judicial deference is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged. *Solorio* v. *United States,* 483 U.S. 435,447 (1987) (internal quotation marks omitted). We have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated. *Id.* at 448.

5. With regard to Due Process challenges to Congressional enactments regulating the armed forces, the Supreme Court of the United States imposes upon the defense the heavy burden to demonstrate that the factors militating

in favor of the accused's interest are so extraordinarily weighty as to overcome the balance struck by Congress. *See Middendorf v. Henry,* 425 U.S. 25, 44 (1976); *Weiss v. United States,* 510 U.S. 163, 165 (1994).

6. Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable. In general, the Bill of Rights applies to members of the military absent a specific exemption or certain overriding demands of discipline and duty. Though we have consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite these constitutional rights may apply differently to members of the armed forces than they do to civilians. The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule. *United States v. Easton,* 71 M.J. 168, 174-75 (C.A.A.F. 2012) (internal quotation marks and citation omitted).

LAW

7. The Court has considered the law and decisions cited by the parties in their written filings as well as those matters set out below.

Constitutional Overview

8. The Congress is given the power "To make Rules for the Government and Regulation of the land and naval Forces." *See* U.S. CONST. art. I, § 8, cl. 14.

9. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

10. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI.

11. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

Appendix C

Military Courts-Martial

12. This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. *Parker v. Levy,* 417 U.S. 733, 743 (1974) (internal quotation marks and citation omitted). Just as military society has been a society apart from civilian society, so military law is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. *Id.* at 744 (internal citation omitted). The differences noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian criminal code. *Id.* at 749 (internal citation omitted). For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter. *Id.* at 756.

13. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function.

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To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 17 (1955).

14. Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. As we recently reiterated, judicial deference is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged. *Solorio v. United States,* 483 U.S. 435, 447 (1987) (internal quotation marks omitted).

15. It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view. *Chappell v. Wallace,* 462 U.S. 296, 301 (1983).

16. Indeed, it would be contrary to precedent and tradition for us to impose a special limitation on this particular Article I power, for we give Congress the highest deference in ordering military affairs. *Loving v. United States,* 517 U.S. 748, 768 (1996) (internal citation omitted).

Fifth Amendment Due Process

17. Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of

military affairs, and that Clause provides some measure of protection to defendants in military proceedings. But in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces. *Weiss v. United States,* 510 U.S. 163, 176-77 (1994) (internal quotation marks and citation omitted). We therefore believe that the appropriate standard to apply in these cases is found in *Middendorf,* where we also faced a due process challenge to a facet of the military justice system. In determining whether the Due Process Clause requires that servicemembers appearing before a summary court-martial be assisted by counsel, we asked whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance struck by Congress. *Id.* at 177-178 (internal quotation marks and citation omitted).

18. The *Weiss* standard is the appropriate test to determine whether a due process violation has occurred in the court-martial setting. *United States v. Spear,* No. ACM 38537, 2015 CCA LEXIS 310, at *6 (A.F. Ct. Crim. App. July 30, 2015) (unpub. op.) *(citing United States v. Vazquez,* 72 M.J. 13, 18 (C.A.A.F. 2013)).

19. The Air Force Court of Criminal Appeals has repeatedly found no due process violation concerning non-unanimous verdicts in courts-martial based on the Supreme Court's holdings on the matter. *See United States v. Roblero,* No. ACM 38874, 2017 CCA LEXIS 168, at *20 (A.F. Ct. Crim. App. Feb. 17, 2017) (unpub. op.); *United States v. Canada,* No. ACM S32298, 2016 CCA LEXIS 610, at *34 (A.F. Ct. Crim. App. Oct. 20, 2016) (unpub.

op.); *United States v. Spear,* No. ACM 38537, 2015 CCA LEXIS 310, at *8 (A.F. Ct. Crim. App. July 30, 2015) (unpub. op.); *United States* v. *Daniel,* No. ACM 38322, 2014 CCA LEXIS 224, at *10 (A.F. Ct. Crim. App. Apr. 1, 2014) (unpub. op.).

Fifth Amendment Equal Protection

20. An equal-protection violation is discrimination that is so unjustifiable as to violate due process. *United States v. Rodriguez-Amy,* 19 M.J. 177, 178 (C.M.A. 1985) (internal quotation marks and citation omitted). This question of unjustifiable discrimination in violation of due process is not raised, however, unless the Government makes distinctions using constitutionally suspect classifications such as race, religion, or national origin or unless there is an encroachment on fundamental constitutional rights like freedom of speech or assembly. *Id.* (internal quotation marks and citation omitted).

21. While the Fourteenth Amendment on its face prohibits only the States from denying any person within its jurisdiction the equal protection of the laws, the Supreme Court has held its equal protection component applies to the Federal government via the Fifth Amendment Due Process Clause. The text of the Fifth Amendment … reveals several features. First, the amendment treats cases arising in the land and naval forces as categorically separate and distinct from those tried in civilian courts concerning the fundamental right to a grand jury. Second, with respect to that right, it differentiates between the standing land and naval forces and the temporary Militia. Finally, it declares that the right to a grand jury

is excepted from the Militia only during times of actual service, time of war, or public danger. *United States v. Begani,* 79 M.J. 767, 775-76 (N-M Ct. Crim. App. 2020) (internal quotation marks and citation omitted).

22. Taken together, this language reveals a design whereby the Constitution explicitly allows Congress, as the creator of all Federal tribunals and courts-martial, to withhold certain otherwise fundamental constitutional rights from those in the profession of arms, and for the circumstances of their service to be considered when so doing. As the Supreme Court long ago explained, In pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *Id.* at 776 (internal quotation marks and citation omitted).

23. While there is no question the right to a grand jury and the right to a trial by jury are fundamental constitutional rights, they are only fundamental to the extent (and to the persons to whom) the Constitution grants them in the first place. *Id.*

24. This intentional design, found on the face of the Constitution, is of vital importance in this case for two reasons. First, it impacts how we view whether Appellant is indeed similarly situated with a retired Reservist. The law of equal protection leaves to the legislature the initial

discretion to determine what is different and what is the same, and also broad latitude to establish classifications depending on the nature of the issue, the competing public and private concerns it involves, and the practical limitations of addressing it. Generally, these discretionary legislative decisions are valid and enforceable as long as the classification is drawn in a manner rationally related to a legitimate governmental objective. As we shall see, the broad deference owed to Congress in the area of military affairs makes this an area we do not lightly second-guess. *Id.* (internal quotation marks and citation omitted).

25. Second, this constitutional design evidenced by the Fifth Amendment impacts how we view the fundamental nature of the rights involved, which is important because the equal protection component's general rule of deference only gives way when laws involve suspect classifications (which is not at issue here) or impinge on fundamental personal rights protected by the Constitution. Laws burdening fundamental rights are subjected to strict scrutiny and will be sustained only if they are necessary to promote a compelling governmental interest. As the Supreme Court has found, however, the only fundamental right Appellant now claims he is being deprived of-the Sixth Amendment right of trial by jury—has the same constitutional breadth as the grand jury right. Hence, it only applies under circumstances in which the grand jury right would apply. *Id.* at 776-77 (internal quotation marks and citation omitted).

26. Under the rational basis test, the burden is on the appellant to demonstrate that there is no rational basis

for the rule he is challenging. The proponent of the classification has no obligation to produce evidence to sustain the rationality of a statutory classification. United States v. Paulk, 66 M.J. 641, 643 (A.F. Ct. Crim. App. 2008) (internal quotation marks and citation omitted). As long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it. *Id.* (internal citation omitted).

27. Appellant's equal protection argument is equally unpersuasive. Appellant asserts that servicemembers who are death-eligible are treated differently than their similarly situated civilian counterparts because convening authorities do not have to comply with death penalty protocols. An equal protection violation is discrimination that is so unjustifiable as to violate due process. However, equal protection is not denied when there is a reasonable basis for a difference in treatment. We do not find any unjustifiable discrimination in the instant case because Appellant, as an accused servicemember, was not similarly situated to a civilian defendant. *United States v. Akbar*, 74 M.J. 364, 405-06 (C.A.A.F. 2015) (internal quotation marks and citation omitted).

Sixth Amendment

28. In *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020), the Supreme Court held the rules in Louisiana and Oregon that permit non-unanimous jury verdicts in criminal cases violate the Sixth Amendment, as incorporated against the States through the Fourteenth Amendment.

29. Several of the Sixth Amendment rights are applicable to military members, including: speedy trial, *see e.g., United States v. Danylo,* 73 M.J. 183, 186 (C.A.A.F. 2014); public trial, *see e.g., United States v. Hershey,* 20 M.J. 433, 435 (C.M.A. 1985); confrontation of witnesses, *see e.g., United States v. Blazier,* 69 M.J. 218, 222 (C.A.A.F. 2010); notice, *see e.g., United States v. Fosler,* 70 M.J. 225, 229 (C.A.A.F. 2011); compulsory process, *see e.g., United States v. Bess,* 75 M.J. 70, 74 (C.A.A.F. 2016); counsel, *see e.g., United States v. Wattenbarger,* 21 M.J. 41, 43 (C.M.A. 1985); and effective assistance of counsel, *see e.g.,* United States v. Gooch, 69 M.J. 353,361 (C.A.A.F. 2011).

30. There is no Sixth Amendment right to trial by jury in courts-martial. *United States v. Easton,* 71 M.J. 168, 175 (C.A.A.F. 2012) (internal citation omitted).

31. All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2, or the provisions of the Fifth and Sixth Amendments relating to crimes and criminal prosecutions. In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts. *Ex parte Quirin,* 317 U.S. 1, 40, 63 S. Ct. 2, 17 (1942) (internal quotation marks omitted).

32. Courts-martial are not subject to the jury trial requirements of the Sixth Amendment. *United States*

v. Riesbeck, 77 M.J. 154, 162 (C.A.A.F. 2018). A military defendant has a right both to members who are fair and impartial. *Id.* at 163 (internal quotation marks and citation omitted).

33. The decision to allow non-unanimous verdicts was a policy decision made by Congress during the crafting of the UCMJ. In those post-World War II years a preeminent concern was the danger posed by unlawful command influence. A requirement for a unanimous panel decision, while having obvious advantages in truth-determination, would also undercut several protections against unlawful command influence that exist under current military justice practice. *United States v. Mayo,* No. ARMY 20140901, 2017 CCA LEXIS 239, at *19-20 (A. Ct. Crim. App. Apr. 7, 2017) (internal citation omitted).

34. No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken. Article 52(a)(2), UCMJ, 10 U.S.C. § 52(a)(2) (2016 *MCM).* No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death. No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken. All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken. Article 52(b), UCMJ, 10 U.S.C. § 52(b) (2016 *MCM).*

Appendix C

35. In a court-martial with members under section 816 of this title (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken. Article 52(a)(3), UCMJ, 10 U.S.C. § 52(a)(3) (2019 *MCM).* A sentence of death requires (A) a unanimous finding of guilty of an offense in this chapter expressly made punishable by death and (B) a unanimous determination by the members that the sentence for that offense shall include death. All other sentences imposed by members shall be determined by the concurrence of at least three-fourths of the members present when the vote is taken. Article 52(b)(2), UCMJ, 10 U.S.C. § 52(b)(2) (2019 *MCM).*

36. Except as provided in Mil. R. Evid. 606, members may not be questioned about their deliberations and voting. R.C.M. 922(e).

Stare Decisis

37. *Stare decisis* is defined as the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation. The doctrine encompasses at least two distinct concepts: (1) an appellate court must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself (horizontal *stare decisis);* and (2) courts must strictly follow the decisions handed down by higher courts (vertical *stare decisis). United States v. Andrews,* 77 M.J. 393, 399 (C.A.A.F. 2018) (internal quotation marks and citation omitted).

38. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow

the case which directly controls, leaving this Court the prerogative of overruling its own decisions. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

ANALYSIS

Overview

39. Relying on *Ramos v. Louisiana,* the Defense argues military courts-martial should require unanimous verdicts, based on (1) the Sixth Amendment, (2) the Due Process Clause of the Fifth Amendment, and (3) the Equal Protection Clause of the Fifth Amendment. However, by its own terms, *Ramos* does not address courts-martial. Neither does *Ramos* purport to explicitly overrule the Supreme Court's own precedent in *Ex Parte Quirin,* which expressly exempted courts-martial from the Sixth Amendment requirement for a jury trial.

40. Applying the rules of "vertical *stare decisis,"* C.A.A.F. remains bound by existing, explicit Supreme Court precedent holding the Sixth Amendment jury trial right does not apply to courts-martial. Accordingly, *Ramos* does not impact existing C.A.A.F. precedent holding there is no Sixth Amendment right to a "Jury trial" in the military context. Rather, an accused's right to select trial by a panel of members at court-martial derives from statute (Article 29, U.C.M.J.).

41. Considering the accused's Fifth Amendment Due Process and Equal Protection claims, it is important to note the Supreme Court has historically and consistently

recognized the unique needs of the military society in providing a disciplined force to safeguard the national security of the United States. To achieve this end, Congress lawfully exercised its constitutional authority under Article I, Section 8, Clause 14, by enacting both Article 29, U.C.M.J. (creating court-martial panels, not juries) and Article 52, U.C.M.J. (authorizing non-unanimous verdicts). In doing so, Congress did not violate the Accused's due process or equal protection rights.

42. For the reasons set forth below, this Court holds the defense has failed to carry its heavy burden to demonstrate the factors militating in favor of the accused's interest are so extraordinarily weighty to overcome the balance struck by Congress. Specifically, this Court finds, consistent with the standard set forth by C.A.A.F. in *Easton,* two specific military conditions require a different rule than that prevailing in the civilian community, including (1) finality of verdicts and (2) avoidance of unlawful command influence. These conditions firmly support the balance struck by Congress in legislating non-unanimous verdicts at courts-martial.

The Sixth Amendment

43. *Ramos v. Louisiana* neither explicitly nor implicitly overrules prior Supreme Court precedent regarding the inapplicability of the Sixth Amendment jury trial right to courts-martial. The defense acknowledges the Court is bound by precedent regarding the applicability of the Sixth Amendment right to a jury trial and non-unanimous verdicts, but argues prior court decisions are incorrect and should not be followed. This Court is not persuaded.

44. Under the doctrine of stare decisis, this Court is required to uphold the precedent established by its superior courts. Absent explicit holdings by the Court of Appeals for the Armed Forces and the Supreme Court of the United States regarding the scope of their own precedents, this court-martial cannot, and will not, depart from binding precedent holding the right to a jury trial and unanimous verdicts inapplicable to military courts-martial.

45. The Supreme Court's decision in *Ramos v. Louisiana* does not change the binding precedent that applies to this Court. The decision in *Ramos* is predicated upon the right to a jury trial in the civilian context, where the Court held the right to an impartial jury trial includes the right to a unanimous verdict in order to convict the defendant. The Court's holding in *Ramos* does not apply to military courts-martial.

46. While the Court recognizes several Sixth Amendment protections extend to military service members, the right to a jury trial does not. Congress has great power to regulate the armed forces, in order to provide a disciplined force ready to safeguard the national security of the United States. To meet this requirement, Congress has created trial by court-martial panels, rather than juries. In doing so, Congress has determined unanimity is not required for court-martial panels.

47. While the Supreme Court in *Ramos* held the Sixth Amendment required unanimous verdicts, the holding was part and parcel of the Sixth Amendment right to a jury trial. As there is no right to a jury trial in military

courts-martial, the Court is not persuaded that unanimous verdicts are applicable to military courts-martial.

The Fifth Amendment: Due Process

48. The defense argues the requirement for a unanimous verdict is inextricably interwoven into the Fifth Amendment's requirement to prove guilt beyond a reasonable doubt. The defense further argues the Supreme Court's decision in *Untied States v. Ortiz*, 138 S. Ct. 2165, 2170 (2018), portends or implies application of the Court's *Ramos* decision to courts-martial given what the defense depicts as the evolving nature of the modern court-martial and its newfound likeness to state and federal criminal courts. This Court is not persuaded.

49. The Supreme Court in *Ortiz* praised the military justice system and its judicial nature, despite the differences between the military justice system and the civilian justice system. The differences in the military justice system were intentionally created by Congress, in exercise of its Article I authority. As a result, *Ortiz* is not in conflict with the Military Deference Doctrine, but serves as an explicit endorsement of the fundamental fairness, and hence due process of the court-martial system. This is particularly so because court-martial procedures exist in a unique military context, a context explicitly recognized in *Parker v. Levy* and supported by 163 years of Supreme Court precedent: beginning with *Dynes v. Hoover;* extending through *Ex Part Quirin;* and defended by a robust burden placed upon the party challenging Congress' plenary authority in this arena as articulated by *Middendorf* and *Weiss.*

50. The defense also highlights Footnote 13 in *Middendorf,* which states, "[T]he Sixth Amendment makes absolutely no distinction between the right to jury trial and the right to counsel." *See Middendorf,* 425 U.S. at 34, n.13. However, the footnote is *dicta,* in response to the dissent's position. Further, Supreme Court jurisprudence reflects the continued applicability of the Military Deference Doctrine, which compels all reviewing courts to consider unique military circumstances in ruling upon Due Process challenges in the military context.

51. As noted previously, our superior courts have repeatedly held there is no due process violation for non-unanimous verdicts in courts-martial. Further, for the defense to prevail on a due process challenge, they must demonstrate the factors militating in favor of a unanimous verdict are so extraordinarily weighty as to overcome the balance struck by Congress. While the defense posits several factors, none are so extraordinarily weighty such that this Court will overrule the balance struck by Congress.

52. Further reinforcing the balance struck by Congress, Congress recently revisited the issue of non-unanimous verdicts in Article 52, UCMJ. As a result of the Military Justice Act of 2016, Congress amended 10 USC §852 to now require a concurrence of three-fourths of the members to convict and sentence an Accused, except in cases involving death. Prior to the enactment of the Military Justice Act of 2016, the concurrence of two-thirds was necessary to convict and sentence an Accused for any confinement less than 10 years. A sentence greater than 10 years required the concurrence of at least three-fourths of the members,

except in cases involving death. The enactment of the Military Justice Act of2016 was the most sweeping reform to the U.C.M.J. in 30 years and revealed a deliberate decision by Congress not to require unanimous verdicts from court-martial panels.

53. In *Weiss,* the Supreme Court utilized the frequency of congressional involvement in military justice reform as a basis for finding no due process violation. The *Weiss* court found it significant that Congress had continually made changes to the military justice system, yet never deemed it necessary to grant tenure to military judges. Accordingly, the Court affirmed that congressional determination, finding no Fifth Amendment due process violation for Congress declining to provide tenure to military judges. So here too, clear Congressional intent and action is present in Article 52, UCMJ, which revisited and preserved non-unanimous verdicts in courts-martial (with a higher three-fourths voting quorum) as recently as 2016.

54. Additionally, the Court respectfully rejects the defense's assertion that a non-unanimous verdict somehow undermines the beyond a reasonable doubt standard for conviction at a court-martial. A non-unanimous verdict does not impact the government's requirement to prove its case beyond a reasonable doubt. The panel has always been instructed on the burden of proof and such instruction will continue.

55. Finally, two specific military conditions exist that require a different rule than that prevailing in the civilian

community. They include (1) finality of verdicts and (2) avoidance of unlawful command influence.

56. First, the balance struck by Congress provides finality of verdicts in the military context. Although the Supreme Court in *Ramos* dismissed the finality of cases state interest, there are different considerations for the military. In the military, there is an increased need for finality because of our unique military needs and military missions. The Supreme Court recognized this need in *Quarles:*

> [I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.

United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955). In the military, finality of judgments is necessary to resolve cases and return the military to its primary mission of protecting the national security of the United States.

57. Second, the balance struck by Congress avoids unlawful command influence, the mortal enemy of military justice. As a concept unique to the military, Congress enacted Article 37, U.C.M.J., in an effort to combat

unlawful command influence by, *inter alia,* prohibiting any reprisal against court-martial members based on the exercise of their duties. Congress also sought to further insulate members from unlawful command influence by providing anonymity for their votes via non-unanimous verdicts. A requirement for unanimous verdicts would frustrate this goal of avoiding unlawful command influence in court-martial proceedings.

58. The need for finality of verdicts and avoiding unlawful command influence constitute overriding demands of discipline and duty. These conditions firmly support the balance struck by Congress in legislating non-unanimous verdicts at courts-martial.

The Fifth Amendment: Equal Protection

59. The defense argues a non-unanimous verdict requirement violates the accused's equal protection under the Fifth Amendment because he is treated differently than his civilian counterpart. This Court is not persuaded.

60. Contrary to the defense's assertion, the right to a jury trial and a unanimous verdict are not fundamental rights under equal protection jurisprudence. At its core, a military court-martial does not have a jury, from which a unanimous verdict could be required; instead, a military court-martial has a panel.

61. Even if the right to a jury trial and unanimous verdicts were fundamental rights, statutes regulating military affairs are not subject to heightened scrutiny when dealing

with equal protection claims. As a result, the government is not required to pass a strict scrutiny analysis, as defense suggests, but instead must pass only rational basis scrutiny. Certainly, Congress has a legitimate objective in securing court-martial verdicts and avoiding unlawful command influence; a panel's voting requirement is rationally related to achieve that objective. However, even if heightened scrutiny were applied, Congress' legislation of trial by panel with nonunanimous verdicts would meet that burden as the statutes were implemented as a guard against unlawful command influence.

Conclusion

62. The United States Constitution provides Congress the power to regulate the armed services under Article I, Section 8, Clause 14. In an exercise of that power, Congress created a military justice system with court-martial panels (Article 29, U.C.M.J.) where unanimity is not required to render a verdict (Article 52, U.C.M.J.). The Supreme Court's recent decision in Ramos v. Louisiana requiring unanimous verdicts is predicated on the Sixth Amendment right to a jury, which does not apply in the military. As a result, the requirement for unanimous verdicts is inapplicable to the military justice system. Accordingly, non-unanimous verdicts at courts-martial do not violate the Sixth Amendment, Fifth Amendment Due Process, or Fifth Amendment Equal Protection, as applied to the military.

Appendix C

RULING

For the foregoing reasons the defense motion is hereby DENIED.

The Court, however, will consider any requests for reconsideration supported with additional evidence or argument if timely raised. This ruling also remains subject to revision and clarification and I reserve the right to supplement the ruling as necessary and appropriate.

So Ordered, June 18, 2020.

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BABOR.WILLIE.J.

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WILLIE J. BABOR, Lt Col, USAF
Military Judge

APPENDIX D — ORDER OF THE UNITED STATES AIR FORCE TRIAL JUDICIARY, DEPARTMENT OF THE AIR FORCE, FILED MAY 31, 2020

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES

v.

MSGT ANTHONY A. ANDERSON
86TH MAINTENANCE SQUADRON (USAFE)
RAMSTEIN AIR BASE, GERMANY

RULING – DEFENSE MOTION FOR A UNANIMOUS VERDICT

31 May 2020

On 28 May 2020, the defense filed a motion to require a unanimous verdict for any finding of guilty and to modify the instructions accordingly. On 29 May 2020, the government responded. Neither party requested oral argument. See R.C.M. 905(h). After considering the motion, the response, the evidence presented by the parties, and the relevant law, the Court finds by at least a preponderance of the evidence and concludes the following:

FINDINGS OF FACT

1. The accused is charged with one charge and two specifications alleging attempted sexual abuse of a child in violation of Article 80, U.C.M.J.

2. On 20 May 2020, the accused, through counsel, requested trial by a panel of officer and enlisted members.

LAW

3. The Court has considered the law and decisions cited by the parties in their written filings as well as those statutory authorities and cases cited below.

4. U.S. CONST. art. I, § 8, cl. 14.

5. U.S. CONST. amend. V.

6. U.S. CONST. amend. V.

7. *Ex parte Quirin*, 317 U.S. 1 (1942).

8. *Burns v. Wilson*, 346 U.S. 137 (1953).

9. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

10. *O'Callahan v. Parker*, 395 U.S. 258 (1969).

11. *Middendorf v. Henry*, 425 U.S. 25 (1976).

12. *Ortiz v. United States*, 138 S. Ct. 2165 (2018).

13. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

14. *United States v. Viola*, 27 M.J. 456 (C.A.A.F. 1988).

15. *United States v. Loving*, 41 M.J. 213, 287 (C.A.A.F. 1994) *cert. denied* 562 U.S. 827, 131 S. Ct. 67, 178 L. Ed. 2d 22 (2010).

16. *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002).

17. *United States v. Brown*, 65 M.J. 356 (C.A.A.F. 2007).

18. *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012).

19. *United States v. Daniel*, No. ACM 38322, 2014 CCA LEXIS 224 (A.F. Ct. Crim. App. Apr. 1, 2014) (unpub. op}.

20. *United States v. Novy*, No. ACM 38554, 2015 CCA LEXIS 289 (A.F. Ct. Crim. App. July 14, 2015) (unpub. op).

21. *United States v. Spear*, No. ACM 38537, 2015 CCA LEXIS 310 (A.F. Ct. Crim. App. July 30, 2015) (unpub. op).

22. *United States v. Palma*, No. ACM 38638, 2015 CCA LEXIS 444 (A.F. Ct. Crim. App. Oct. 19, 2015) (unpub. op).

23. Article 51, U.C.M.J., 10 U.S.C. § 51.

24. Article 52, U.C.M.J., 10 U.S.C. § 52.

25. R.C.M. 922.

ANALYSIS

26. The defense asserts the accused is entitled to a unanimous verdict for any finding of guilt pursuant to the Fifth and Sixth Amendments. There has been no evidence, case law, or argument that convinces this Court of the requirement or authority to require a unanimous verdict by the panel.

27. It is well established that military courts-martial are not subject to the same verdict requirements as other criminal trials. Likewise, it is established that there is no Constitutional right to trial by jury in courts-martial. It is also well established that military criminal practice has no requirement for unanimous verdict from the panel members. There has been nothing presented that this case should be treated differently than every other general court-martial tried since 31 May 1951, when the U.C.M.J. and the M.C.M. went into effect.

28. This Court is cognizant a requirement for a unanimous panel decision, while having obvious advantages in truth-determination, would also undercut several protections against unlawful command influence that exist under current military justice practice. However, weighing the costs and benefits of unanimous or non-unanimous verdicts is a policy decision vested in the Congress. Congress is specifically empowered to regulate the "land and naval forces," and any change to the voting requirements contained in Article 52, U.C.M.J., will likely have to originate with that branch of government. If anything, the Congress's recent amendment to Article 52, U.C.M.J., (requiring three-fourths instead of two-thirds to convict) is a reaffirmation of the military practice of non-unanimous findings verdicts. Ultimately, however, the requirement for non-unanimous verdicts in the military justice system is long-standing and well-settled law which this Court is obligated to follow.

29. Judicial deference is at its apogee when an accused is challenging the authority of Congress to govern military affairs. It is the accused's heavy burden to demonstrate

that Congress's determinations about unanimity should not be followed. In this case the accused has failed to meet his heavy burden to demonstrate that Congress's determinations should not be followed.

30. Similarly, the defense has failed to evoke any requirement or exception to Article 51, U.C.M.J. and R.C.M. 922(e) that would allow for polling of the panel members as requested in their motion.

RULING

For the foregoing reasons the defense motion is hereby DENIED.

The Court, however, will consider any requests for reconsideration supported with additional evidence or argument if timely raised. This ruling also remains subject to revision and clarification until authentication of the record and I reserve the right to supplement the ruling as necessary and appropriate.

So Ordered, May 31, 2020.

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BABOR.WILLIE.J.

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WILLIE J. BABOR, Lt Col, USAF
Military Judge