No. 21-335

In the Supreme Court of the United States

STEVEN A. BEGANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Congress's determination in Article 2(a)(6) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 802(a)(6), to apply the UCMJ to military servicemembers like petitioner—a Chief Petty Officer in the United States Fleet Reserve—is a constitutional exercise of Congress's authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14.

ADDITIONAL RELATED PROCEEDINGS

General Court-Martial (Navy Region Japan):

United States v. *Begani*, (Dec. 1, 2017) (no docket number assigned)

United States Navy-Marine Corps Court of Criminal Appeals:

United States v. *Begani*, No. 201800082 (Jan. 24, 2020)

United States Court of Appeals for the Armed Forces:

United States v. *Begani*, Nos. 20-217 and 20-327 (June 24, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-33a) is reported at 81 M.J. 273. The en banc opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 37a-107a) is reported at 79 M.J. 767. The panel opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 112a-135a) is reported at 79 M.J. 620.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on June 24, 2021. The petition for a writ of certiorari was filed on August 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a guilty plea before a general court-martial, petitioner, a chief petty officer (E-7) in the

United States Fleet Reserve, was convicted on one specification of attempted sexual assault of a child and two specifications of attempted sexual abuse of a child, in violation of Articles 80 and 120b of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 920b. See Pet. App. 112a, 114a. Petitioner was sentenced to 18 months of confinement and a dishonorable discharge. See *id.* at 37a-38a. The convening authority approved the period of confinement and, pursuant to a pretrial agreement, commuted the adjudged dishonorable discharge to a bad-conduct discharge. See *id.* at 38a. A panel of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) vacated petitioner's convictions, *id.* at 112a-135a, but the en banc court withdrew that decision and affirmed, *id.* at 37a-107a. The United States Court of Appeals for the Armed Forces (CAAF) granted discretionary review and affirmed. *Id.* at 1a-33a.

1. In November 1992, petitioner enlisted in the United States Navy. CAAF App. 334. An individual who enlists in the Nation's Armed Forces must serve an initial period of six to eight years of service unless discharged for personal hardship. 10 U.S.C. 651(a); see 10 U.S.C. 1173. Such a servicemember may then voluntarily extend his or her period of enlistment for up to four years, 10 U.S.C. 509, and if qualified for reenlistment, may reenlist for additional term(s) of active-duty service thereafter, 10 U.S.C. 505(d), 508. Petitioner voluntarily reenlisted multiple times, serving in active duty for over 24 years. Pet. App. 2a. His final duty station was at Marine Corps Air Station (MCAS) Iwakuni in Iwakuni, Japan. *Ibid.*

An enlisted servicemember may elect to be discharged from the Armed Forces after completing his or

her service obligation. Once fully discharged from the Armed Forces, the former servicemember is no longer subject to the UCMJ. See 10 U.S.C. 802(a); see also *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 13, 23 (1955). An enlisted active-duty member of the Navy may, however, forgo discharge and elect instead to apply either for retired status or for a transfer to the Fleet Reserve. See 10 U.S.C. 8326, 8330. Members of the Fleet Reserve and members on the retired list of the Regular Navy are entitled to pay and are subject to the UCMJ. See 10 U.S.C. 802(a)(1), (4), and (6).

A retired member of the Navy is entitled to retired pay, 10 U.S.C. 8326(c), and "may be ordered to active duty * * * at any time," 10 U.S.C. 688(a) and (b)(1), for up to 12 months within any 24-month period during peacetime and for any period of time during a national emergency or war. 10 U.S.C. 688(e)(1) and (f). Alternatively, an enlisted Navy servicemember, like petitioner, with 20 years of active service "may, at his request, be transferred to the Fleet Reserve." 10 U.S.C. 8330(b). The Fleet Reserve is a component of the Navy, 10 U.S.C. 8001(a)(1), "established to provide an available source of experienced former members of the Regular Navy or Navy Reserve" who can "be organized without further training to fill billets requiring experienced personnel in the first stages of mobilization during an emergency or in time of war," 7B U.S. Dep't of Def., Reg. 7000.14-R, *Financial Management Regulation*, Ch. 2, ¶ 020101(A) (Jan. 2020), https://go.usa.gov/xH5WB (Reg. 7000.14-R).

A member of the Fleet Reserve is "entitled, when not on active duty, to retainer pay." 10 U.S.C. 8330(c)(1). A member of the Fleet Reserve may be required during

peacetime to perform two months of "active duty" training in each four-year period, 10 U.S.C. 8385(b), and may be ordered to active-duty service for up to 12 months within a 24-month period, 10 U.S.C. 688(a), (b)(3), and (e)(1). And a member of the Fleet Reserve may be "ordered * * * to active duty without his consent" for any period of time during a national emergency or war "and for six months thereafter" or "when otherwise authorized by law." 10 U.S.C. 8385(a); see 10 U.S.C. 688(e)(1) and (f). After a member of the Fleet Reserve completes a total of 30 years of service, or if he is found "not physically qualified," the member must transfer to the "retired list of the Regular Navy" if he was a member of "the Regular Navy * * * at the time of his transfer to the Fleet Reserve." 10 U.S.C. 8331(a)(1).

After petitioner had served 24 years on active duty, he elected to transfer to the Fleet Reserve, effective June 30, 2017. Pet. App. 2a; CAAF App. 334.

2. Upon his transfer to the Fleet Reserve, petitioner remained in Iwakuni, Japan, where he worked as a government contractor. Pet. App. 2a. Within a month of his transfer, petitioner exchanged sexually charged messages over the Internet with someone he believed to be "Mandy," the 15-year-old daughter of a Marine stationed at MCAS Iwakuni. *Ibid.*; CAAF App. 334-335. "Mandy" was actually an undercover Naval Criminal Investigative Service (NCIS) special agent. Pet. App. 2a; CAAF App. 335. When petitioner arrived at a residence at MCAS Iwakuni expecting to engage in sexual conduct with "Mandy," he was instead arrested by NCIS special agents. *Ibid.*

Because, as a member of the Fleet Reserve, petitioner was subject to the UCMJ, he could not be prosecuted under the Military Extraterritorial Jurisdiction

Act of 2000, 18 U.S.C. 3261-3267. See 18 U.S.C. 3261(d)(1). The Commander, U.S. Naval Forces Japan, accordingly sought and received approval from the Secretary of the Navy to prosecute petitioner at a court-martial. Pet. App. 2a-3a. Petitioner was charged with one specification of attempted sexual assault on a child and two specifications of attempted sexual abuse of a child. CAAF App. 297-299. Specifically, the charge sheet alleged that petitioner attempted to sexually assault and sexually abuse a minor whom he believed to be between the ages of 12 and 15. *Ibid.*

Petitioner entered into a pretrial agreement, waiving his right to trial and agreeing to plead guilty to the three specifications and to be sentenced by a military judge. Pet. App. 3a. Petitioner waived all waivable motions except for one based on an argument that he could not lawfully receive a punitive discharge because he was a member of the Fleet Reserve. *Id.* at 4a. After the military judge denied that motion, *ibid.*, petitioner pleaded guilty to, and was found guilty of, one specification of attempted sexual assault of a child and two specifications of attempted sexual abuse of a child, in violation of Articles 80 and 120b of the UCMJ, 10 U.S.C. 880, 920b. Pet. App. 114a.

The military judge sentenced petitioner to 18 months of confinement and a dishonorable discharge. Pet. App. 37a-38a. The Commander approved the period of confinement and, pursuant to the pretrial agreement, commuted the dishonorable discharge to a bad-conduct discharge. *Id.* at 38a.

3. On appeal before a panel of the NMCCA, petitioner argued, *inter alia*, (1) that applying the UCMJ to members of the Fleet Reserve but not to retired Navy

Reserve members violates the equal-protection guarantee of the Fifth Amendment's Due Process Clause, and (2) that petitioner was a "former member" of the armed forces and therefore could not be subject to the UCMJ. Pet. App. 114a. The NMCCA panel reversed petitioner's convictions on the first ground. *Id.* at 112a-135a. The panel expressed "no doubt" that "Congress could lawfully subject all retirees of the armed forces to UCMJ jurisdiction." *Id.* at 129a, 135a. But based on its "sense that retirees of the reserve and active components are * * * similarly situated," *id.* at 122a, it took the view that the differential treatment of Fleet Reserve members and retired Navy Reserve members violates equal-protection principles. *Id.* at 135a.

The NMCCA subsequently granted the government's request for en banc rehearing, withdrew the panel opinion, and affirmed petitioner's convictions by a vote of four-to-three. Pet. App. 37a-107a. Like the panel, the en banc NMCCA unanimously recognized that a member of the Fleet Reserve, such as petitioner, is "a member of the land and naval Forces" who "Congress has the authority to make subject to the UCMJ." *Id.* at 53a, 72a, 81a. With respect to petitioner's equal-protection challenge, the en banc court issued a splintered decision, disagreeing with the panel's resolution. Two judges found, contrary to the panel's conclusion, that members of the Fleet Reserve are not similarly situated to retired members of the Navy Reserve. *Id.* at 53a-69a. Two others found that petitioner had waived his equal-protection claim. *Id.* at 72a-81a. The three remaining judges dissented. *Id.* at 81a-107a.

4. Petitioner sought discretionary review by the CAAF. Pet. App. 34a-36a. The CAAF initially agreed

to consider only whether petitioner's right to equal protection was violated by subjecting Fleet Reservists, but not Retired Reservists, to UCMJ jurisdiction. *Id.* at 36a. The CAAF subsequently added for its review the question whether petitioner had waived or forfeited his equal-protection argument. *Id.* at 35a. Then, after the district court decision in *Larrabee* v. *Braithwaite*, 502 F. Supp. 3d 322 (D.D.C. 2020), appeal pending, No. 21-5012 (D.C. Cir.), the CAAF agreed additionally to consider "whether Fleet Reservists have a sufficient current connection to the military for Congress to subject them to constant UCMJ jurisdiction." Pet. App. 34a (capitalization altered). In a unanimous decision, the CAAF held that petitioner's arguments lacked merit and affirmed petitioner's convictions. *Id.* at 1a-17a.

a. The CAAF explained that, under this Court's precedents, the test for determining whether an individual can be constitutionally subject to the UCMJ is "one of status"—namely, "whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'" Pet. App. 6a-7a (quoting *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 240-241 (1960)) (emphasis omitted). And the court found "multiple indicators that members of the Fleet Reserve retain military status"—specifically, that such members "are still paid, subject to recall, and required to maintain military readiness." *Id.* at 8a-9a; see *id.* at 9a-11a.

Quoting this Court's decision in *Solorio* v. *United States*, 483 U.S. 435 (1987), the CAAF reasoned that "[j]udicial deference . . . is at its apogee" when Congress exercises its "authority to raise and support armies and make rules and regulations for their governance." Pet. App. 11a-12a (quoting *Solorio*, 483 U.S. at

447). And the CAAF observed that "Congress elected to create two components of the armed forces in the Department of the Navy comprised of recent retirees"—the Fleet Reserve and the Fleet Marine Corps Reserve—"whom it continues to pay, in exchange for the potential to be recalled as our national security demands," and whom Congress "has determined * * * need to be subject to the UCMJ." *Id.* at 11a. The court declined to hold that the Constitution forecloses such a determination. *Id.* at 11a-12a.

Turning to petitioner's equal-protection argument, the CAAF reasoned that the issue was jurisdictional, and thus not subject to waiver or forfeiture, but that the argument was also meritless. Pet. App. 3a-4a, 13a-17a. The CAAF explained that members of the Fleet Reserve "have served as active-duty enlisted members of the Navy for between twenty and thirty years"; "receive retainer pay, based on that experience"; "are required to maintain readiness for active service in event of war or national emergency"; "may be recalled for training in time of peace"; and "are subject to recall at any time." *Id.* at 14a (brackets and citations omitted). Retired reservists, in contrast, "usually served only a few years on continuous active duty and then served part-time"; "need not remain in the military"; "receive no pay until they reach statutory eligibility at age sixty"; "are not required to maintain any level of readiness"; and "can be recalled only in the event of a declaration of war or national emergency by Congress" and, even then, only when "other tiers of available manpower have been exhausted." *Id.* at 14a-15a (brackets and citation omitted). Because the "two groups are not similarly situated," the

CAAF determined that "it does not violate equal protection to subject one and not the other to the UCMJ." *Id.* at 17a.

b. Judge Maggs, joined by Judge Hardy and Senior Judge Crawford, concurred. Pet. App. 17a-33a. Judge Maggs joined the CAAF's opinion in full, but wrote separately to address petitioner's argument that subjecting members of the Fleet Reserve to UCMJ jurisdiction is inconsistent with "the original meaning of U.S. Const. art. I, § 8, cl. 14, and the Grand Jury Clause of the Fifth Amendment." *Id.* at 18a.

First, Judge Maggs rejected petitioner's contention that, as a matter of original meaning, a person is in the "land and naval Forces" within the meaning of U.S. Const. Art. I, § 8, Cl. 14 "only if the person has ongoing military duties or authorities." Pet. App. 19a. He found that contention inconsistent with the Continental Congress's treatment of furloughed soldiers, who could be recalled, as still in the Continental Army subject to charges of mutiny, even though they had no ongoing duties while furloughed. *Id.* at 23a-26a; see *id.* at 21a (noting petitioner's agreement that, because U.S. Const. Art. I, § 8, Cl. 14, was copied from the Articles of Confederation, the Continental Congress's practices under the Articles of Confederation correctly inform the original meaning of U.S. Const. Art. I, § 8, Cl. 14).

Second, Judge Maggs rejected as "implausible" petitioner's contention that "he has a right to a grand jury because he did not commit his offenses while on active duty." Pet. App. 29a-30a. Judge Maggs observed that the Fifth Amendment includes a "*general* exception to the requirement of a grand jury indictment for members of the 'land and naval forces' but a *limited* exception for members of the 'Militia'" that applies only when

members of the 'Militia' are 'in actual service.'" *Id.* at 30a (quoting U.S. Const. Amend. V). Judge Maggs thus reasoned that "the text of the Grand Jury Clause indicates that members of the 'land and naval forces' can be tried without a grand jury indictment despite having no ongoing duties, even though members of the 'Militia' cannot." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 18-29) that, in authorizing courts-martial of members of the Fleet Reserve in Article 2(a)(6) of the UCMJ, 10 U.S.C. 802(a)(6), Congress exceeded its authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14.[1] The CAAF correctly rejected that contention, and the court's unanimous decision does not conflict with any opinion of this Court or of any court of appeals. This Court recently denied review of a similar question in *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (No. 18-306). And particularly in light of the D.C. Circuit's ongoing consideration of the question in collateral proceedings in that case, further review of the issue here would be premature. The petition for a writ of certiorari should be denied.

1. The CAAF correctly rejected petitioner's challenge to his court-martial. "The Constitution grants to Congress the power '[t]o make Rules for the Government and Regulation of the land and naval Forces.'" *Solorio* v. *United States*, 483 U.S. 435, 438 (1987) (quoting U.S. Const. Art. I, § 8, Cl. 14) (brackets in original).

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[1] Petitioner does not seek further review of the CAAF's resolution of his equal-protection challenge. Pet. 12 n.8. Nor does he renew an argument based on the Fifth Amendment's Grand Jury Clause.

Congress "[e]xercis[ed] this authority" when it "empowered courts-martial to try servicemen for the crimes proscribed by the U.C.M.J.," *id.* at 438-439, including—in Article 2(a)(6) of the UCMJ—servicemen who are "[m]embers of the Fleet Reserve," 10 U.S.C. 802(a)(6). That provision is constitutional because members of the Fleet Reserve are part of the Nation's land and naval forces.

This Court has long "interpreted the Constitution" as defining the scope of Congress's authority to subject an individual to military court-martial based "on one factor: the military status of the accused." *Solorio*, 483 U.S. at 439. The constitutional test under the UCMJ is therefore "one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'" *Ibid.* (quoting *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 241 (1960)).

"Implicit in the military status test" is the principle that the Constitution has "reserved for Congress" the determination whether to subject servicemembers to courts-martial for offenses, *Solorio*, 483 U.S. at 440, and that Congress accordingly has "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military," *id.* at 447. As a result, this Court has "h[e]ld that the requirements of the Constitution are not violated where * * * a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged." *Id.* at 450-451. That holds true even if the offense charged was committed on the servicemember's own time in the "civilian community" and thus lacks any type of "'service connection.'" *Id.* at 436-437.

Congress has determined that the Fleet Reserve—like the Regular Navy and the Navy Reserve—is a component of the United States Navy. 10 U.S.C. 8001(a)(1). Petitioner does not dispute that members of the Navy are members of the Armed Forces. See 10 U.S.C. 101(a)(4). And Congress has accordingly determined that servicemembers like petitioner who are transferred upon their own request to the Fleet Reserve after 20 or more years of active service rather than being discharged from the Armed Forces are part of the Nation's land and naval forces subject to court-martial. See 10 U.S.C. 802(a)(6). That determination is consistent with this Court's own longstanding recognition that "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall" and to punishment by "'military court-martial.'" *Barker* v. *Kansas*, 503 U.S. 594, 599, 600 n.4 (1992) (quoting *United States* v. *Tyler*, 105 U.S. 244, 246 (1882)); see also, *e.g.*, *McCarty* v. *McCarty*, 453 U.S. 210, 221-222 (1981) ("The retired officer remains a member of the Army and continues to be subject to the [UCMJ].") (internal citation and footnote omitted); *Denby* v. *Berry*, 263 U.S. 29, 35-36 (1923) (contrasting officers "retired from active service" with those who "become a civilian" when they are "wholly retired" and "removed from the service entirely").[2]

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[2] Colonel Winthrop, whom this Court has repeatedly referred to as "the 'Blackstone of Military Law,'" *Ortiz* v. *United States*, 138 S. Ct. 2165, 2175 (2018) (citation omitted), likewise recognized more than a century ago that the proposition that "retired officers are a part of the army and so triable by court-martial [is] a fact indeed never admitting of question." William Winthrop, *Military Law and Precedents* 87 n.27 (2d ed. 1920) (posthumous reprint of 1896 edition). Cf. Act of Feb. 14, 1885, ch. 67, 23 Stat. 305 (creating

As petitioner acknowledges, for over a century, courts have "consistent[ly]" understood that "military retirees could constitutionally be subject to court-martial." Pet. 7-8; see Pet. 6-8. The foundation for a court-martial is particularly strong in a context like this, where petitioner elected not to be fully discharged from the Armed Forces upon the expiration of his period of active-duty enlistment, but instead requested to be transferred to the Fleet Reserve, whose servicemembers receive "retainer pay" (or, when applicable, active-duty pay) and can be required to serve on active duty for training two months out of every four-year period and can be ordered to active duty during peacetime and war. See pp. 3-4, *supra*; cf. *Ortiz* v. *United States*, 138 S. Ct. 2165, 2187 n.2 (2018) (Thomas, J., concurring) (stating that servicemembers "consent" to court-martial authority "when they enlist").

Indeed, one of the penalties imposed in this case was a bad-conduct discharge, which necessarily reflects petitioner's military status. Petitioner "could hardly be court-martialed and dismissed from a service he was not in." Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. Pa. L. Rev. 317, 351 (1964). And while petitioner has disputed the type of discharge, he does not appear to dispute the necessity of a discharge in order for him to leave military service.

2. Petitioner identifies no sound basis for overturning Congress's judgment that servicemembers like petitioner are part of the Nation's Armed Forces subject to court-martial under the UCMJ.

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retired list for enlisted members of the Army and Marine Corps to which transfer was authorized after 30 years of service).

a. Petitioner contends (Pet. 27-28) that this Court's decision in *Barker* "necessarily undermines one of the grounds on which" lower courts have relied in holding that retired servicemembers are subject to court-martial because, according to petitioner, *Barker* "held that the pay military retirees receive is deferred compensation for *prior* active-duty service" rather than "a current salary" for current military status. See Pet. 8 (arguing that *Barker* "swept away *Tyler*'s foundation"). But that contention is misplaced. *Barker* merely held that, "[*f*]*or purposes of 4 U.S.C. § 111*, military retirement benefits are to be considered deferred pay for past services." *Barker*, 503 U.S. at 605 (emphasis added).

Section 111 provides that the United States consents to certain nondiscriminatory state "taxation of pay or compensation for personal service" as a federal officer or employee. *Barker*, 503 U.S. at 596 (quoting 4 U.S.C. 111). To determine whether a state tax is nondiscriminatory, this Court's Section 111 jurisprudence requires a determination "whether [any] inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes." *Id.* at 598 (citation and internal quotation marks omitted). *Barker* addressed whether Section 111 prohibited Kansas from taxing the federal benefits received by military retirees, where the State did not tax benefits received by retired state and local employees. *Id.* at 596. Observing that "Congress *for many purposes* does not consider military retirement pay to be current compensation for current services," the Court ultimately concluded that Kansas's scheme violated Section 111. 503 U.S. at 604 (emphasis added). But it addressed only how to characterize the nature of military retirement benefits in a particular statutory context; it did not address whether

servicemembers like petitioner who have been transferred on their request to the Fleet Reserve remain members of the Nation's land and naval forces for whom Congress may establish rules governing prosecution under the UCMJ.

To the contrary, *Barker* recognized that "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall" as well as to ongoing punishment by "'military court-martial.'" *Barker*, 503 U.S. at 599, 600 n.4 (citation omitted). As the CAAF observed, "it would be strange indeed to find that th[is] Court implicitly held what it explicitly disclaimed." Pet. App. 10a. While petitioner attempts (Pet. 27) to dismiss this Court's description of the military retirees' status as "a throwaway statement," that statement was part of the Court's reasoning on the Section 111 question presented there. It is also of a piece with the Court's recognition that, "although military retirement pay bears some of the features of deferred compensation, two indicia of retired military service include a restriction on activities and a chance of being recalled to active duty," and its corresponding recognition of "the possibility that Congress intended military retired pay to be *in part current compensation* for those risks and restrictions." *Barker*, 503 U.S. at 602 (quoting *McCarty*, 453 U.S. at 224 n.16) (emphasis added); see *ibid.* (warning that "States must tread with caution in this area, lest they disrupt the federal scheme") (emphasis omitted).[3]

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[3] Reading *Barker* to hold that military retired pay or retainer pay should be treated as deferred pay for past service in all contexts would also call into question the decisions of various courts in numerous contexts unrelated to state taxation. See, *e.g.*, *In re Haynes*, 679 F.2d 718, 719 (7th Cir.) (bankruptcy), cert. denied, 459 U.S. 970

It is clear that the "retainer pay" paid to members of the Fleet Reserve like petitioner, 10 U.S.C. 8330(c)(1), represents at least in part current compensation for continued status as members of the Armed Forces. A servicemember similarly situated to petitioner who opted to be discharged upon completion of his term of enlistment would not receive any retainer pay, even if he had provided the Nation exactly the same past military service as petitioner. The difference that warrants retainer pay is petitioner's continued status as a member of the Armed Forces. The particular method of calculating the amount of an enlisted servicemember's retainer pay—which is largely based on the pay grade he or she previously obtained and the duration of his or her past service, see 10 U.S.C. 8330(c)(1), 8333(a) (Formula C), see also 10 U.S.C. 1406(d), 1407, 1409(a)(2) and (b)(1)—does not suggest that members of the Fleet Reserve are equivalent to their discharged counterparts.

b. Petitioner acknowledges (Pet. 19) that Congress is entitled to "broad deference" when it makes rules for the Armed Forces. He nevertheless argues (*ibid.*) that the CAAF erred by showing deference to Congress's judgment that members of the Fleet Reserve are in the Armed Forces. But he provides no meaningful support for such a carve-out. Congress's constitutional power to "raise and support Armies," U.S. Const. Art. I, § 8, Cl. 12, and to "provide and maintain a Navy," *id.* § 8, Cl.

(1982); *Costello* v. *United States*, 587 F.2d 424, 427 (9th Cir. 1978) (due process), cert. denied, 442 U.S. 929 (1979); *Abbott* v. *United States*, 200 Ct. Cl. 384, 389 (same), cert. denied, 414 U.S. 1024 (1973); *Lemly* v. *United States*, 109 Ct. Cl. 760 (1948) (Naval Aviation Personnel Act of 1940); *United States* v. *Tafoya*, 803 F.2d 140, 142 (5th Cir. 1986) (offset for appointed counsel); *Cornetta* v. *United States*, 851 F.2d 1372, 1382 (Fed. Cir. 1988) (en banc) (economic prejudice).

13, are "plenary and exclusive." *Perpich* v. *Department of Def.*, 496 U.S. 334, 353 n.27 (1990) (quoting *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1872)). They provide Congress with authority to determine the "formation" and "organization" of the armed services, including "how the armies shall be raised" and "the service to which [a servicemember] shall be assigned." *Tarble's Case*, 80 U.S. (13 Wall.) at 408; see *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918) ("As the mind cannot conceive an army without the men to compose it," Congress has "power to provide for such men."). That necessarily includes the authority to establish different classifications of military service and the rules to which they should be subject.

While this Court has not held that "courts have *no* role in determining whether the individuals whom Congress has subjected to court-martial jurisdiction actually fall within the ordinary meaning of the 'land and naval forces' in the Constitution," Pet. 19 (citation omitted), the Court has upheld court-martial jurisdiction over servicemembers who, by statute, are part of the land and naval forces created by Congress. See, *e.g.*, *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 65 (1858). In doing so, the Court has not scrutinized Congress's determinations to form and organize the armed services to include particular military components. Petitioner's suggestion (Pet. 19-23) that the Court should do so here is incompatible with the "judicial deference" that is "at its apogee when legislative action under the congressional authority to raise and support armies . . . is challenged." *Solorio*, 483 U.S. at 447 (quoting *Goldman* v. *Weinberger*, 475 U.S. 503, 508 (1986)).

The Court has somewhat more closely reviewed congressional determinations to authorize court-martial jurisdiction over individuals who are not formally part of the armed services. But even then, the Court has used language—indeed, often the very language from those decisions on which petitioner relies—consistent with this Court's general deferential approach to evaluating membership in the land and naval forces. See, *e.g.*, *Singleton*, 361 U.S. at 241 (asking whether the person Congress has made subject to court-martial "*can be regarded* as falling within the term 'land and naval Forces,'" not whether, in the Court's independent judgment, he or she *is* in those forces) (emphasis added); *Reid* v. *Covert*, 354 U.S. 1, 22 (1957) (plurality opinion) (asking whether a person Congress has subjected to court-martial can "*fairly* be said to be 'in' the military service") (emphasis added); *Covert*, 354 U.S. at 43-44 (Frankfurter, J., concurring in the result) ("Everything that may be deemed, as the exercise of an allowable judgment by Congress, to fall fairly within the conception conveyed by the power given to Congress 'To make Rules for the Government and Regulation of the land and naval Forces' is constitutionally within that legislative grant and not subject to revision by the independent judgment of the Court."); cf. *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 15 (1955) (declining to uphold Congress's decision to subject certain civilians to court-martial, noting that doing so "would require an extremely broad construction of the language in the constitutional provision").

c. Petitioner asserts that the CAAF "wrongly described" the ongoing duties and responsibilities peti-

tioner, and servicemembers like him, owe to the military. Pet. 24 (capitalization omitted). But he fails to identify any actual error in the CAAF's opinion.

Petitioner faults (Pet. 24) the CAAF for purportedly failing to document "proof" of its observation that members of the Fleet Reserve are "required to maintain military readiness." But he provides no basis for his suggestion (*ibid.*) that he or his fellow Fleet Reservists are free to ignore the Naval Military Personnel Manual provision requiring such readiness. See Bureau of Naval Personnel, U.S. Dep't of the Navy, *Naval Military Personnel Manual*, Art. 1830-040, CH-72, at 9 (Sept. 9, 2020) ("Fleet reservists are required to * * * [m]aintain readiness for active service in event of war or national emergency");[4] see also Reg. 7000.14-R ¶ 020101(A) (providing that Fleet Reservists "could be organized without further training to fill billets requiring experienced personnel in the first stages of mobilization during an emergency or in time of war"). And while petitioner claims the government has failed to "identify 'any consequence for failure to maintain readiness,'" the CAAF recognized that "[i]f a member of the Fleet Reserve becomes unfit for any duty," he must, by statute and regulation, be transferred out of the Fleet Reserve. Pet. App. 10a (citing 10 U.S.C. 6331(a)); see Reg. 7000.14-R ¶ 020101(B).

Contrary to petitioner's contention (Pet. 16), the statutory duty of experienced servicemembers in nonactive status to be available to be ordered to active service is not "anachronistic" or "moribund." In both Iraq wars, for instance, "'retired personnel of all services

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[4] The CAAF cited an earlier version of the Manual, but the relevant text is the same. See Pet. App. 10a.

were actually recalled,'" illustrating "Congress' continued interest in enforcing good order and discipline amongst those in a retired status." *United States* v. *Dinger*, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017) (footnote omitted), aff'd on other grounds, 77 M.J. 447 (C.A.A.F.), cert. denied, 139 S. Ct. 492 (2018); see also Pet. App. 11a. And although petitioner claims (Pet. 25 n.15) that "over two-thirds of military retirees" are "effectively disqualif[ied]" from being recalled to active duty by the government's "mobilization criteria," that would have no bearing on whether Congress has properly made members of the *Fleet Reserve*, rather than all military retirees, subject to court-martial.

Petitioner also errs in suggesting (Pet. 13-14) that the CAAF's rationale could theoretically lead to anyone required to register with the Selective Service System being constitutionally subject to court-martial. As a threshold matter, any such hypothetical scenario—involving a statute that Congress has never enacted—is not at issue in this case. In any event, petitioner's hypothetical is misconceived. As petitioner acknowledges (Pet. 22 n.12), individuals selected and inducted into the Armed Forces under the Selective Service System, 50 U.S.C. 3803(a) (Supp. V 2017), would be subject to the UCMJ (if Congress were to reinstate the draft),[5] because such individuals would become members of the

[5] The authority to induct individuals into the Armed Forces under Section 3803 expired nearly a half-century ago. See 50 U.S.C. 3815(c) ("Notwithstanding any other provisions of this chapter, no person shall be inducted for training and service in the Armed Forces after July 1, 1973, except [for persons with draft deferments upon the expiration of their deferments]."). For that reason, "any actual conscription would require further congressional action." *Rostker* v. *Goldberg*, 453 U.S. 57, 60 n.1 (1981).

Armed Forces, making the UCMJ applicable to them. But the mere possibility of such selection and induction is not enough to subject an individual to the UCMJ. The constitutional test under the UCMJ is "one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'" *Solorio*, 483 U.S. at 439 (citation omitted). The mere possibility that an individual might in the future become a member of the Armed Forces is insufficient to satisfy that test.

Petitioner, however, was already a member of the Armed Forces, decided not to be discharged therefrom, and was transferred from active-duty service to the Fleet Reserve upon his own request. The only contingency is whether he will be recalled to active duty, not whether he is still part of the Navy. By his own choice to be transferred to the Fleet Reserve, petitioner remains a member of the Armed Forces subject to the UCMJ.

The circumstances of this case, moreover, give rise to a particularly important military interest in the availability of the court-martial system. Where a Fleet Reserve or Fleet Marine Corps Reserve member remains part of an overseas military community and commits a crime within that community, the government has a strong interest in punishing the crime, and a Fleet Reserve or Fleet Marine Corps Reserve member who has abused his military affiliation in that way presents a particularly compelling case for a punitive military discharge. While an administrative discharge can follow a conviction in a state or federal court, the military cannot ensure civilian prosecution in any particular case.

3. Petitioner fails not only to identify any error in the CAAF's decision, but also to identify any conflict in the courts of appeals that might warrant this Court's review.

Cf. Pet. 4. To the contrary, the circumstances indicate that this Court's intervention would be premature.

As petitioner recognizes (*e.g.*, Pet. 4), the D.C. Circuit is currently considering a similar question in the government's appeal in *Larrabee* v. *Braithwaite*, No. 21-5012, which presents circumstances similar to this one. The petitioner in *Larrabee* was a member of the Fleet Marine Corps Reserve; he was employed in a civilian capacity at MCAS Iwakuni; he pleaded guilty to, and was convicted at court-martial of, a sex crime committed in Japan; his sentence included a punitive discharge; and he challenged the constitutionality of the court-martial. *Larrabee* v. *Braithwaite*, 502 F. Supp. 3d 322, 324-325 (D.D.C. 2020). The D.C. Circuit held oral argument in that case on October 22, 2021. Its ongoing consideration strongly counsels against further review in this case. If the D.C. Circuit agrees with the CAAF, no conflict in the courts of appeals on the question presented will exist. If the D.C. Circuit disagrees, this Court would have the benefit of the D.C. Circuit's reasoning, in addition to that of the CAAF, in determining whether further review of the question would be appropriate in either *Larrabee* or a future case.

Petitioner errs in contending (Pet. 30-31) that this case would be a superior vehicle to the D.C. Circuit's future decision in *Larrabee* for addressing the question presented because of a potential difference in the standard of review for the court-martial's exercise of jurisdiction in this case as compared to the standard of review in collateral-review proceedings before the D.C. Circuit. But if the Court were to grant review of the D.C. Circuit's forthcoming decision in *Larrabee*, this Court's review of the question presented would be *de novo*. As petitioner recognizes, the district court in

Larrabee reasoned that a challenge to the "permissible scope of court-martial jurisdiction * * * is subject to *de novo* review" in a collateral-review proceeding. 502 F. Supp. 3d at 327 (citing *Al Bahlul* v. *United States*, 840 F.3d 757, 760 n.1 (D.C. Cir. 2016) (en banc), cert. denied, 138 S. Ct. 313 (2017)). And although the government has appealed the district court's ultimate determination of Congress's constitutional authority to subject members of the Fleet Marine Corps Reserve to trial by court-martial, it has not argued on appeal for deference to the court-martial's own determination of that question. See Gov't C.A. Br. at 15 & n.5, *Larrabee* v. *Del Toro*, No. 21-5012 (Apr. 26, 2021).[6]

Petitioner likewise errs in contending (Pet. 31) that this case presents an ideal vehicle for resolving

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[6] Petitioner's claim of a "bait-and-switch" between the government's brief in opposition to certiorari from the CAAF in Larrabee's case and the ensuing collateral-review proceeding is misplaced. The government's brief in opposition in *Larrabee* did not discuss the appropriate standard of review to be applied in a collateral-review proceeding challenging a court-martial's exercise of authority over the accused. The government pointed out that this Court did not need to "stretch [its] direct-review jurisdiction" to reach the question presented there because the CAAF could address the question in a future case or the question "could be considered in other cases in the regional courts of appeals." Gov't Br. in Opp. at 15-16, *Larrabee* v. *United States*, No. 18-306 (Jan. 9, 2019). In support of the latter point, the government noted that "federal courts do not abstain from adjudicating habeas petitions [even] during the pendency of court-martial proceedings when the habeas petitioner challenges a military tribunal's authority to try him or her" on a purely legal ground that he or she is not among the class of offenders who "'constitutionally [may] be subjected to trial' by court-martial." *Id.* at 15. The government thus observed only that the regional courts of appeals could address the question; it did not make any representations about what standard those courts would apply.

whether, even if he remains a member of the Armed Forces, Congress's constitutional authority to apply the UCMJ to servicemembers in the Fleet Reserve should be limited to "military offenses beyond the jurisdiction of civilian courts." This Court in *Solorio* v. *United States*, *supra*, specifically rejected such a "service connection" limitation, 483 U.S. at 436, finding "no indication" in Article I's text that "the grant of power in Clause 14 [of Section 8] was any less plenary than the grants of other authority to Congress in the same section," overruling the "service connection requirement" that had been imposed by *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), and emphasizing the "confusion" that "the complexity" of applying such a requirement had caused in actual cases. *Solorio*, 483 U.S. at 449. Petitioner offers this Court no reasons for revisiting that determination and no path for avoiding the "confusion [previously] wrought" by the service-connection requirement, *id.* at 450, which no court has ever attempted to reimpose in any military context.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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