IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	OPENING BRIEF ON BEHALF
Appellee / Cross-Appellant,	)	OF APPELLANT /
	)	CROSS-APPELLEE
v.	)	
	)	
STEPHEN A. BEGANI,	)	
Chief Petty Officer (E-7),	)	Crim. App. No. 201800082
United States Navy (Retired),	)	USCA Docket Nos. 20-0217/NA
Appellant / Cross-Appellee.	)	and 20-0327/NA

Clifton E. Morgan III
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
(202) 685-7052
clifton.morgan@navy.mil
CAAF Bar No. 37021

Stephen I. Vladeck
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu
CAAF Bar No. 36839

Daniel E. Rosinski
LT, JAGC, USN
Defense Counsel
Defense Service Office Southeast
9620 Maryland Avenue
Suite 100
Norfolk, VA 23511
(202) 643-2637
daniel.e.rosinski@navy.mil
CAAF Bar No. 36727

Counsel for Appellant / Cross-Appellee

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GRANTED ISSUE (No. 20-0217/NA)

WHETHER ARTICLE 2, UCMJ, VIOLATES APPELLANT'S RIGHT TO EQUAL PROTECTION WHERE IT SUBJECTS THE CONDUCT OF ALL FLEET RESERVISTS TO CONSTANT UCMJ JURISDICTION, BUT DOES NOT SUBJECT RETIRED RESERVISTS TO SUCH JURISDICTION.

CROSS-CERTIFIED ISSUE (No. 20-0327/NA)

WHETHER APPELLANT WAIVED OR FORFEITED THE RIGHT TO ASSERT THAT HIS COURT-MARTIAL VIOLATED HIS RIGHT TO EQUAL PROTECTION.

STATEMENT OF STATUTORY JURISDICTION

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction over Mr. Begani's[1] appeal under Article 66 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Court has jurisdiction over Mr. Begani's appeal under Article 67(a)(3), *id.* § 867(a)(3), and over the government's cross-appeal under Article 67(a)(2). *Id.* § 867(a)(2).

1. Consistent with his status as a retiree and with how he was referred to by the military judge at his court-martial, *see* J.A. 308, this brief refers to Appellant/Cross-Appellee as "Mr. Begani."

STATEMENT OF THE CASE

A military judge sitting as a general court-martial convicted Mr. Begani, pursuant to his pleas, of one specification alleging an attempted sexual act on a child and two specifications alleging an attempted lewd act on a child, in violation of Articles 80 and 120b of the UCMJ, 10 U.S.C. §§ 880, 920b. The military judge sentenced Mr. Begani to eighteen months' confinement and a dishonorable discharge. Per a pre-trial agreement, the Convening Authority approved the confinement as adjudged, and commuted the adjudged dishonorable discharge to a bad-conduct discharge. Except for the bad-conduct discharge, the Convening Authority ordered the sentence executed.

STATEMENT OF FACTS

After over 24 years of active-duty service in the Navy, Mr. Begani retired at the rank of Chief Petty Officer (E-7) on 30 June 2017, at which time he became a member of the Fleet Reserve. J.A. 329. He continued to reside near his final duty station—Marine Corps Air Station Iwakuni, Japan—and obtained employment as a civilian corrosion maintenance contractor. *Id.* at 7. Shortly thereafter, as Judge Stephens noted below,

> [H]e exchanged sexually-charged messages over the internet with someone he believed to be a 15-year-old girl named "Mandy," but who was actually an undercover Naval Criminal Investigative Service (NCIS) special agent. When he arrived at a residence onboard MCAS Iwakuni, instead of meeting with "Mandy" for sexual activities, NCIS special agents apprehended him.

United States v. *Begani*, 79 M.J. 767, 770 (N-M. Ct. Crim. App. 2020) (en banc) (opinion of Stephens, J.), J.A. 7.[2]

Mr. Begani subsequently agreed to plead 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, 10 U.S.C. §§ 880, 920b. He waived all waivable motions except his claim that he could not lawfully receive a punitive discharge because he was a member of the Fleet Reserve.[3] J.A. 320–22. The trial court rejected that objection and sentenced Mr. Begani in accordance with his pleas. *Id.* at 333.

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2. For convenience, the en banc NMCCA's ruling is cited in parallel to both the *Military Justice* reporter and the Joint Appendix. Unless otherwise indicated, all citations to the en banc NMCCA's ruling are to Judge Stephens's opinion on behalf of himself and Senior Judge Tang.

3. In *United States* v. *Dinger*, 77 M.J. 447 (C.A.A.F.), *cert. denied*, 139 S. Ct. 492 (2018), this Court held that members of the Fleet Reserve *could* be subject to punitive discharges. *Id.* at 452–53.

On appeal, a unanimous three-judge panel of the NMCCA held that the assertion of military jurisdiction over Mr. Begani was unconstitutional in violation of the equal protection principles enmeshed in the Fifth Amendment's Due Process Clause. *United States* v. *Begani*, 79 M.J. 620, 622–23 (N-M. Ct. Crim. App. 2019), J.A. 86. The panel held that, as a member of the Fleet Reserve, Mr. Begani was similarly situated to retirees from the reserve components. And whereas reserve retirees are only subject to the UCMJ while they are "receiving hospitalization from an armed force," 10 U.S.C. § 802(a)(5), Mr. Begani remains subject to the UCMJ and to court-martial at any time. *See Begani*, 79 M.J. at 623–26, J.A. 91–94.

Because the UCMJ treats similarly situated individuals differently with respect to their entitlement *vel non* to the fundamental constitutional right of criminal trial by jury, the NMCCA panel held that this differential treatment can only be sustained if it is narrowly tailored to achieve a compelling governmental interest. *Id*. at 627–28, J.A. 95–96. Applying such strict scrutiny, the NMCCA panel held that Article 2's jurisdictional distinction between active-duty retirees and reserve retirees is unconstitutional. *Id*. at 629–31, J.A. 97–99.

On the government's petition, the NMCCA agreed to rehear Mr. Begani's appeal en banc. As part of that review, the en banc court ordered the government to "produce information regarding involuntary recalls" from Navy Personnel Command (PERS) or another accurate source, including whether any members of the Fleet Reserve or other retirees were "involuntarily recalled to active duty" for anything "other than disciplinary purposes" from 1 January 2000 to 31 December 2017. J.A. 48–49. But after the government objected, *id.* at 33–47,[4] the NMCCA withdrew the order. J.A. 32.

On 24 January 2020, the en banc NMCCA affirmed Mr. Begani's conviction in a fractured, 4-3 ruling. 79 M.J. 767, J.A. 1. Writing for only himself and Senior Judge Tang, Judge Stephens held (under *de novo* review) that active-duty retirees, including Fleet Reservists, are *not* similarly situated to reserve retirees, such that Article 2's jurisdictional distinction does not trigger strict scrutiny. *Id.* at 777–78,

4. The NMCCA accepted unsworn representations from PERS (included by the government in its motion for reconsideration) that the requested "data would be labor-intensive and that the term 'involuntary' . . . is ambiguous given the way . . . Naval Personnel categorizes recall orders." J.A. 32.

J.A. 13–14. But even if they are similarly situated, Judge Stephens concluded that Congress was entitled to deference when it comes to the scope of the jury-trial right—and that the panel's equal protection analysis would produce absurd results. *Id.* at 778–82, J.A. 15–18.

Concurring in part and concurring in the result, Judge Gaston, joined by Senior Judge King, rested his vote to affirm Mr. Begani's convictions on the ground that Mr. Begani waived his equal protection objection by not preserving it when he pleaded guilty. *Id.* at 783–87 (Gaston, J., concurring in part and concurring in the result), J.A. 19–22. Conceding that "questions of jurisdiction are never waived," Judge Gaston nevertheless reasoned that Mr. Begani's challenge was not *actually* jurisdictional, because it rested on the allegedly wrongful deprivation of his Sixth Amendment right to trial by jury—not on the court-martial's lack of subject-matter jurisdiction. *Id.* at 784, J.A. 20.

Dissenting, Chief Judge Crisfield, joined by Senior Judge Hitesman and Judge Lawrence, would have reinstated the panel's analysis that active-duty and reserve retirees are similarly situated for purposes of court-martial jurisdiction, and would have held that Article 2 thereby triggers—and fails—strict scrutiny. *Id.* at 787–96 (Crisfield,

C.J., dissenting), J.A. 22–31. And in response to Judge Gaston's concurrence, Chief Judge Crisfield noted that, although Mr. Begani's claim sounds in equal protection, if it is successful, "then there is a jurisdictional defect in his court-martial." *Id*. at 797, J.A. 31. In that circumstance, Chief Judge Crisfield explained, the very statute on which the subject-matter jurisdiction of Mr. Begani's court-martial rested would be unconstitutional.

On 25 June 2020, this Court granted Mr. Begani's timely petition for review under Article 67(a)(3). On 23 July 2020, the Judge Advocate General of the Navy timely certified an additional issue for review under Article 67(a)(2). On 24 July 2020, this Court consolidated the two cases for briefing and argument.

SUMMARY OF ARGUMENT

In identifying the classes of offenders who may be tried by court-martial, Article 2(a) of the UCMJ sharply distinguishes between servicemembers who retired from active-duty components and those who retired from the reserves. Active-duty retirees, including members of the Fleet Reserve and Fleet Marine Corps Reserve, generally remain subject to the UCMJ in perpetuity even if they are never recalled to

active duty. *See* 10 U.S.C. § 802(a)(4), (6). In contrast, unless recalled, reserve retirees are subject to the UCMJ only while receiving military hospitalization. *Id.* § 802(a)(5). Thus, if Mr. Begani were a retired reservist, he could not be tried by court-martial for the exact same offenses committed after he retired from active duty. Instead, he would be entitled to trial by a civilian court before a jury of his peers—a trial that, in addition to including the myriad constitutional protections inapplicable to courts-martial, could not lead to the forfeiture of his military pension. *See* J.A. 343 (projecting an after-tax value for Mr. Begani's retainer and retired pay over 30 years of more than $1 million).

Article 2's distinction between when active-duty and reserve retirees are subject to the UCMJ stems from a compromise reached by Congress when it enacted the UCMJ in 1950—one that is no longer relevant today. Prior to 1950, the Army and Navy took materially different approaches to whether reserve retirees remained subject to military law. Under the Articles for the Government of the Navy, retired members of *both* the regular and reserve components of the Navy and Marine Corps were placed on the same retired list, were

governed (and paid) by the Navy, and remained subject to military law—and to court-martial—at all times. *See, e.g.*, Act of Aug. 29, 1916, ch. 417, 39 Stat. 556, 591 [hereinafter "1916 Act"], J.A. 187.

The Articles of War, in contrast, not only distinguished between officers and enlisted personnel but also distinguished between officers who retired from active duty (whose retirement was administered by the Army and who remained subject to the Articles) and those who retired from the reserves (whose retirement was administered by the Veterans' Administration and who were not subject to court-martial except while receiving military hospitalization). *See* National Defense Act of 1916, ch. 134, § 32, 39 Stat. 166, 188, J.A. 193. The differential jurisdictional treatment was, therefore, the direct result of the organizational differences between the service branches.

To whatever extent those organizational distinctions could somehow have justified the differential treatment of *all* regular and reserve retirees across the service branches in 1950, there are at least three reasons why they no longer can today. First, today (and, indeed, since 1952), each service branch, including the Army, manages and administers its own reserve retirees under the same regulatory

auspices. Second, other reforms to the UCMJ (and to Department of Defense regulations promulgated thereunder) have effectively collapsed the relevant distinctions between active-duty retirees (including members of the Fleet Reserve) and reserve retirees with respect to their duties and obligations while retired and their amenability to involuntary recall. Third, there is no evidence that *any* retirees are involuntarily recalled to active duty today—and certainly not in sufficient number to justify any continuing distinction among them with respect to their amenability to the UCMJ for offenses committed after they have retired.

For those reasons, Article 2's disparate treatment of active-duty and reserve retirees now lacks a rational basis. Even assuming that the government has a legitimate interest in continuing to subject retirees to the UCMJ in perpetuity, that interest is not rationally related to distinguishing between two groups of retirees who, for purposes of recall, are functionally indistinguishable. Indeed, even though Congress has amended Article 2 at least 15 times since the UCMJ was enacted, *see Begani*, 79 M.J. at 772 & n.25, J.A. 9, it has left Articles 2(a)(4), 2(a)(5), and 2(a)(6) untouched. Contra Judge Stephens's view that this

somehow shows Congress's contentment with such disparate jurisdictional treatment, what it really demonstrates is Congress's refusal to provide any modern justification for preserving it.

But even if this Court concludes that Article 2's distinction between active-duty and reserve retirees *does* have a rational basis, that is not enough to sustain it, for the scope of Article 2 directly implicates retirees' fundamental constitutional right to trial by jury. Thus, to survive constitutional scrutiny, Article 2's disparate jurisdictional treatment of similarly situated retirees must be narrowly tailored to achieve a compelling government interest. Even if, despite the significant evidence to the contrary, such an interest existed at the time Article 2 was drafted, it clearly no longer exists today.

Because Article 2 violates equal protection by providing disparate jurisdictional treatment of similarly situated retirees, the proper remedy is to strike down Article 2(a)(6) insofar as it subjects Fleet Reservists to the UCMJ beyond when they are receiving military hospitalization. Not only has the Supreme Court made clear that "the preferred rule in the typical case is to extend favorable treatment" (rather than punish the group that was previously receiving favorable

treatment), *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1701 (2017); it has also emphasized that the scope of military jurisdiction is "another instance calling for limitation to '*the least possible power adequate to the end proposed*.'" *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 23 (1955) (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230–31 (1821) (emphasis in original)). Narrowing the scope of jurisdiction over active-duty retirees to match reserve retirees is therefore a far more appropriate remedy than expanding jurisdiction over reserve retirees.

Finally, as five of the seven judges below concluded, Mr. Begani did not waive his equal protection argument—because he couldn't waive it. It is axiomatic that objections to subject-matter jurisdiction can be neither waived nor forfeited, *Gonzalez* v. *Thaler*, 565 U.S. 134, 141 (2012), and there is little question that Mr. Begani's equal protection argument *is*, in the first instance, a direct attack on the subject-matter jurisdiction of his court-martial. If, as Mr. Begani argues, Article 2(a)(6) is unconstitutional, then his court-martial necessarily lacked statutory subject-matter jurisdiction to try him.

In arguing to the contrary below, Judge Gaston maintained that Mr. Begani's claim is not "jurisdictional" because, even if he prevails,

Congress would retain the *constitutional* authority to subject him to court-martial. Even if that is correct, *statutory* defects in subject-matter jurisdiction are no less "jurisdictional" than *constitutional* defects in subject-matter jurisdiction; jurisdiction is necessarily jurisdictional.

In any event, as the Supreme Court recently reiterated, a guilty plea does not waive those constitutional objections unrelated to "'the confines of the trial.'" *Class* v. *United States*, 138 S. Ct. 798, 805 (2018) (quoting *Mitchell* v. *United States*, 526 U.S. 314, 324 (1999)). Here, Mr. Begani's equal protection claim does not bear in any way on the substance of the charges against him or the evidence on which his conviction was based. It was therefore not waived by his plea. And given that the issue was fully briefed and argued *twice* before the NMCCA, it is properly before this Court even if it is not strictly "jurisdictional." *Cf. United States* v. *Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000) (considering an equal protection claim raised for the first time in the Air Force Court of Criminal Appeals where only a due process claim was raised at trial).

Article 2(a)(6) therefore violates equal protection, and Mr. Begani is entitled to relief—specifically, to the dismissal of his court-martial convictions for lack of subject-matter jurisdiction.

ARGUMENT[5]

I. FOR PURPOSES OF ARTICLE 2, ACTIVE-DUTY RETIREES AND MEMBERS OF THE FLEET RESERVE ARE SIMILARLY SITUATED TO RESERVE RETIREES

Under both this Court's and the Supreme Court's jurisprudence, an Act of Congress violates the equal protection principles enmeshed within the Fifth Amendment's Due Process Clause if it (1) treats similarly situated individuals differently (2) without adequate justification. *See, e.g.*, *United States* v. *Gray*, 51 M.J. 1, 22 (C.A.A.F. 1999) ("The Equal Protection Clause is generally designed to ensure that the Government treats 'similar persons in a similar manner.'" (citation omitted)). *See generally Nordlinger* v. *Hahn*, 505 U.S. 1, 8 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." (citation omitted)).

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5. As addressed more fully below, the subject-matter jurisdiction of a court-martial is not subject to waiver or forfeiture. *See post* at 46–51. Mr. Begani has not waived his equal protection claim, and so whether that claim is styled as going to the "jurisdiction of the court-martial," *United States* v. *Hennis*, 79 M.J. 370, 374 (C.A.A.F. 2020), or as raising whether a statute violates the Constitution's "Due Process and Equal Protection Clauses," *Wright*, 53 M.J. at 478, both are purely legal questions subject to *de novo* review.

As this Court's predecessor explained in 1976, even in the military, the Due Process Clause of the Fifth Amendment "forbids discrimination which is so unjustifiable as to be violative of due process." *United States* v. *Courtney*, 1 M.J. 438, 439 n.3 (C.M.A. 1976) (internal quotation marks omitted). That prohibition includes "the usual situation in which a particular class of individuals is unreasonably subjected to different treatment under the very language of the statute." *Id.* at 441.

Here, Mr. Begani challenges Article 2 of the UCMJ on the ground that it distinguishes between similarly situated Fleet Reservist and retired servicemembers with respect to their continuing amenability to the UCMJ. This Court has never set out explicit criteria to determine when two classes of individuals are "similarly situated" for equal protection purposes, even as it has alluded to the concept. *See, e.g.*, *Willenbring* v. *Neurater*, 48 M.J. 152, 174 (C.A.A.F. 1998) (rejecting the notion that "similarly situated" reservists can be subject to different court-martial jurisdiction for offenses committed during prior enlistments), *overruled on other grounds by United States* v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018). But the critical consideration, as the

Supreme Court has made clear, is whether the two classes are similar in all "*relevant* respects." *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 287 (2011) (emphasis added).

Because the question here is whether Fleet Reservists, active-duty retirees, and reserve retirees are similar with respect to their current status, the inquiry necessarily focuses on their *present* relationship to the military. So understood, members of the Fleet Reserve, like Mr. Begani, are similarly situated to active-duty retirees—and active-duty retirees as a class are likewise similarly situated to reserve retirees.

A. Active-Duty Retirees and Members of the Fleet Reserve are "Similarly Situated" for Purposes of Article 2

Its name aside, the Fleet Reserve is not a "reserve component" of the military. *See* 10 U.S.C. § 10101 (listing the seven reserve components). Although it was initially created in 1916 as part of the nascent "Naval Reserve Force," *see* 1916 Act, *supra*, 39 Stat. at 591, J.A. 187, Congress split the Fleet Reserve and the Fleet Marine Corps Reserve into distinct entities as part of the Naval Reserve Act of 1938, ch. 690, 52 Stat. 1175, J.A. 194; *see Dinger*, 77 M.J. at 449 (summarizing the significance of the 1938 statute).

Since then, the Fleet Reserve has functioned for all intents and purposes as a formal precursor to (and functional part of) the retired list. For Navy and Marine Corps enlisted personnel who have served at least 20 years, the Fleet Reserve and Fleet Marine Corps Reserve play the exact same role as the retired list plays in the other services—and as it plays for officers in the Navy and Marine Corps. *See id.*[6]

To illustrate this point, consider six central characteristics shared by former active-duty personnel on the retired list and members of the Fleet Reserve: (1) their minimum prior time in active service; (2) whether their prior service was in an active or reserve component; (3) their ineligibility for promotion; (4) their duties and obligations; (5) their pay; and (6) their amenability to recall. With respect to the first four, members of the Fleet Reserve and active-duty retirees are materially identical.[7] And with respect to pay for members of the Fleet

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6. The Navy authorizes the same "retirement ceremony" for transfer to the Fleet Reserve as it does for "retirement" (*i.e.*, to the retired list). MILPERSMAN 1800-010, ¶ 2(a), (b) (CH-44, Oct. 2, 2013), J.A. 204.

7. Technically, "[i]n time of peace any member of the Fleet Reserve or the Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period." 10 U.S.C. § 8385(b). There is no indication, however, that this statutory training authority has *ever* been activated—or that any member of the

Reserve versus other active-duty retirees, the *formula* is identical even if the *terminology* ("retainer" pay versus "retired" pay) is not. *See* 10 U.S.C. § 8333; *see also United States* v. *Morris*, 54 M.J. 898, 899 (N-M. Ct. Crim. App. 2001) ("Article 2, UCMJ, makes no distinction between retired pay and retainer pay.").

There is, of course, a formal distinction between members of the Fleet Reserve and active-duty retirees with respect to their amenability to involuntary recall. But in practice, this is a distinction without a difference. Members of the Fleet Reserve are subject to involuntary recall "(1) in time of war or national emergency declared by Congress, for the duration of the war or national emergency and for six months thereafter; [or] (2) in time of national emergency declared by the President." 10 U.S.C. § 8385(a). But 10 U.S.C. § 688(a) also separately authorizes the Secretary of Defense to provide for the involuntary recall of *any* active-duty retiree (including members of the Fleet Reserve) "at any time." Although the Secretary of the Navy might therefore be

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Fleet Reserve today is in fact subject to such a training requirement. Indeed, when ordered by the NMCCA to produce data that might have demonstrated otherwise, the government declined. *See ante* at 5 & n.4.

required to cite different statutory provisions and sign different paperwork to involuntarily recall members of the Fleet Reserve versus those on the retired list, Congress has authorized him to do so under circumstances that are functionally equivalent.

For these reasons, among others, the NMCCA has repeatedly treated members of the Fleet Reserve and Fleet Marine Corps Reserve as materially indistinguishable from active-duty retirees for purposes of court-martial jurisdiction. *See, e.g.*, *Morris*, 54 M.J. at 899. As the Navy Court explained three years ago,

> We will refer generally to Fleet Marine Reserve and retired list membership as "retired status," as military courts have treated the two statuses interchangeably for purposes of court-martial jurisdiction. Since personnel in either status are subject to similar obligations, we too find no grounds to distinguish between the two categories with respect to the jurisdiction of a court-martial.

United States v. *Dinger*, 76 M.J. 552, 554 n.3 (N-M. Ct. Crim. App. 2017) (citation omitted), *aff'd on other grounds*, 77 M.J. 447; *cf. Pearson* v. *Bloss*, 28 M.J. 376, 379–80 (C.M.A. 1989) (noting, in the context of "retired enlisted members" of the Air Force who were placed in a status "comparable" to the "Fleet Reserves," that "their common pay entitlement, access to military bases and services, and general duty

obligations strongly support" treating both as "part of the armed forces for purposes of court-martial jurisdiction" (citation omitted)). Thus, for purposes of Article 2, members of the Fleet Reserve, like Mr. Begani, are similarly situated to other active-duty retirees. *See United States* v. *Allen*, 33 M.J. 209, 216 (C.M.A. 1991) (referring to a member of the Fleet Reserve as holding "an almost identical status" to an active-duty retiree), *overruled on other grounds by Dinger*, 77 M.J. 447.

B. Active-Duty Retirees and Reserve Retirees are "Similarly Situated" for Purposes of Article 2

In the NMCCA, the three dissenting judges concluded that active-duty retirees, along with members of the Fleet Reserve like Mr. Begani, are also similarly situated to reserve retirees. As they explained, with marginal exceptions in cases involving disability retirements,[8]

1. Active-duty retirees and reserve retirees "have all spent at least 20 years in the armed forces." *Compare, e.g.*, 10 U.S.C. § 8323 (Naval and Marine Corps officers), *and id.* § 8330(b) (Fleet Reserve members), *with id.* § 12731(a)(2) (retired reserve members).

8. Disabled retirees are subject to different rules and requirements than those who retire after at least 20 years of service. *See generally United States* v *Reynolds*, No. 201600415, 2017 CCA LEXIS 282 (N-M. Ct. Crim. App. Apr. 27, 2017), J.A. 104.

2. Both groups "include some members who have served in both the Regular and the Reserve components." *See, e.g.*, 10 U.S.C. § 688(b)(2) (acknowledging that reservist retirees can be retired under 10 U.S.C. § 8323, which includes "Officers of the Navy Reserve" who have "more than 20 years of active service").

3. Members of both groups "are in an inactive status and no longer perform any uniformed military duties."

4. "They are all subject to recall to active duty." *See* 10 U.S.C. §§ 688, 12301, 12307.

5. "They are all ineligible for further promotion."

6. "They are all entitled to retired pay at some point in their retired years." *Compare, e.g.*, 10 U.S.C. §§ 8327, *and* 8330–31, *with id*. § 12732.

Begani, 79 M.J. at 787 (Crisfield, C.J., dissenting), J.A. 22–23. Moreover, "once they are entitled to retired pay, the pay continues for the duration of their lives and increases according to a cost of living formula. Their retired pay is *not* contingent on their continued military usefulness or employability. Their actual ability to contribute to the accomplishment of a military mission is completely irrelevant to their status." *Id.* at 787–88, J.A. 23.

Not only are active-duty and reserve retirees similarly subject to involuntary recall to active duty, but the governing Department of Defense Instruction draws no distinction between active-duty and

reserve retirees with respect to the critical issue of recall *criteria*. *See* Dep't of Defense Instruction 1352.01, Management of Regular and Reserve Retired Military Members (Dec. 8, 2016), J.A. 253.[9] Instead,

- "Regular retired members and members of the retired Reserve may be ordered to active duty (AD) as needed to perform such duties as the Secretary concerned considers necessary in the interests of national defense." *Id.* § 1.2(a), J.A. 256.

- "Regular retired members and members of the retired Reserve must be managed to ensure they are accessible for national security and readiness requirements." *Id.* § 1.2(b), J.A. 256.

- "Regular and Reserve retired members may be used as a manpower source of last resort after other sources are determined not to be available or a source for unique skills not otherwise obtainable." *Id.* § 1.2(c), J.A. 256.

And perhaps most importantly, the Department of Defense's *mobilization* criteria likewise do not differentiate between active-duty and reserve retirees. *See id.* § 3.2(c), J.A. 259. Indeed, the Instruction's classification of retirees into three different categories for purposes of sequencing of recall ("Category I," "Category II," and "Category III"), *id.*

9. The Instruction also equates members of the Fleet Reserve with other active-duty retirees as "Regular Component Retired Members." *Id.* § 3.1(a) (requiring "[e]ach military service" to "maintain retired lists . . . composed of: (1) Regular officers and enlisted members" and "(2) Navy or Marine . . . enlisted members who requested transfer to the Fleet Reserve"), J.A. 258.

§ G.2, J.A. 265, is based entirely on the retiree's age and the duration of their retirement—and does not distinguish between active-duty and reserve retirees at all. *See id.* §§ 3.2(g), G.2, J.A. 260, 265.

In other words, *none* of the Department of Defense's formal criteria for recalling retired military personnel take into account whether the retirees at issue retired from an active-duty or a reserve component when considering whether to subject them to involuntary recall. For the central purpose for which the retired lists purportedly exist, *see Dinger*, 76 M.J. at 557 (noting "Congress' continued interest in enforcing good order and discipline amongst those in a retired status" in case their recall becomes necessary), active-duty and reserve retirees are, by the government's own rules, functionally indistinguishable.

All of this goes to reinforce the central conclusion reached by the dissenting judges below: Once they retire from either active-duty or reserve status, there is no material difference *between* these two classes of retirees with respect to their ongoing military status or obligations while retired—or their amenability to involuntary recall.[10]

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10. The *Naval Military Personnel Manual* places restrictions on how reserve retirees may use their military titles and wear their uniforms that are similar to those placed on active-duty retirees, *see*

Of course, active-duty servicemembers and reservists are not similarly situated for *all* purposes. But the relevant question for this Court is whether they are similarly situated once they are *retired*. And on this point, the NMCCA dissenters had it right: Members of both classes face an illusory specter of involuntary recall to active duty. Members of both classes lack any regular military duties or responsibilities. Members of both classes are ineligible for promotion. Members of both classes receive pay according to their grade and time in rank (plus cost-of-living adjustments).

As a result, Chief Judge Crisfield was correct that Mr. Begani (and other active-duty retirees) are similarly situated to reserve retirees at least for purposes of Article 2. Indeed, the military treats active-duty and reserve retirees similarly in every respect that matters—except with respect to when they are subject to the UCMJ.

MILPERSMAN 1820-030, ¶ 7(d), (e) (CH-53, Dec. 1, 2015), J.A. 233–34, and similarly affords reserve retirees access to subsidized health insurance, survivor benefits, and the use of the military exchange system, morale welfare and recreation facilities, military commissaries, and space available transportation on military aircraft. *Id*. ¶ 7(f), J.A. 234–35. Most of these restrictions and benefits also apply to "non-Regular Reserve retirement without pay." *Id*. 1820-020, ¶¶ 1, 11, 12 (CH-52, Sept. 21, 2015), J.A. 213, 222–24.

II. BECAUSE ARTICLE 2 TREATS SIMILARLY SITUATED RETIREES DIFFERENTLY WITHOUT SUFFICIENT JUSTIFICATION, ARTICLE 2(A)(6) VIOLATES EQUAL PROTECTION

"When a law impacts a 'suspect class' or burdens a fundamental right, the Supreme Court has applied the 'strict scrutiny test' to determine the law's validity. When no suspect class or fundamental right is involved, however, the 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), *aff'd on other grounds*, 53 M.J. 471; *see also United States* v. *Hennis*, 77 M.J. 7, 10 (C.A.A.F. 2017).[11]

The rational basis test is hardly a rubber stamp. To the contrary, the Supreme Court has repeatedly put teeth into both of its requirements—that the classification be "[1] rationally related to [2] legitimate government interests." *Washington* v. *Glucksberg*, 521 U.S. 702, 728 (1997); *see also City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (invalidating a state law under rational basis review). *See generally Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564

11. The only government action that does not require *at least* a rational basis is the termination of at-will public employees. *See Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591 (2008).

(2000) (explaining how equal protection prohibits arbitrary or irrational government action even against non-suspect classes). Article 2's disparate treatment of active-duty and reserve retirees fails that test. Whatever legitimate interests might justify the continuing assertion of jurisdiction over retired servicemembers, distinguishing between active-duty and reserve retirees is *not* rationally related to those interests; indeed, under current law, that distinction is entirely arbitrary.

Even if the disparate treatment *does* have a rational basis, that is not enough to sustain it, for Article 2 governs the circumstances in which retirees may not exercise their fundamental right to a trial by a civilian jury of their peers—including the rights (1) to have a randomly chosen jury that (2) is selected from a "fair cross-section" of the community, *see, e.g.*, *Taylor* v. *Louisiana*, 419 U.S. 522, 529 (1975), and (3) renders a unanimous verdict. *See Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020). Insofar as Article 2's disparate treatment deprives one subset of retirees of their right to a civilian criminal trial, it must therefore also satisfy heightened judicial scrutiny. Because it can't, Article 2's disparate jurisdictional treatment of active-duty and reserve retirees violates equal protection.

A. Article 2's Disparate Treatment of Active-Duty and Reserve Retirees Is Not Rationally Related to Legitimate Government Interests

As noted above, Congress in 1950 deliberately created different jurisdictional rules for active-duty and reserve retirees as an imperfect compromise—part of its broader effort to put the "U" into UCMJ. Before 1950, the Navy drew no jurisdictional distinction between active-duty and reserve retirees, whereas the Army did—at least largely out of bureaucratic necessity. Under the pre-UCMJ statutory framework, retired Army reserve officers were subject to the administrative control of the Veterans' Administration, *not* the Army. H.R. REP. No. 81-491, at 10 (1949), J.A. 281; S. REP. No. 81-486, at 7 (1949), J.A. 283. Thus, Army reserve retirees were not generally subject to court-martial. Instead, they could be court-martialed only while under military hospitalization—the ancestor of an 1859 statute that had subjected *all* residents of the Washington Soldiers' Home to military jurisdiction. *See* Act of Mar. 3, 1859, ch. 83, § 7, 11 Stat. 431, 434–35, J.A. 198.[12]

12. The 1859 Act predated Congress's creation of a "retired" status. *See* Act of Aug. 3, 1861, ch. 42, §§ 15–18, 21–22, 12 Stat. 287, 289–91, J.A. 184. It therefore drew no distinction based upon whether the defendant was retired at all—let alone what he had retired *from*.

To the extent it is relevant, *see Honeycutt* v. *United States*, 137 S. Ct. 1626, 1635 (2017), the UCMJ's legislative history makes clear that Congress understood that the awkward compromise it was reaching—dramatically reducing jurisdiction over Navy *reserve* retirees and creating an arbitrary distinction *within* the Navy's retired list—had no deeper purpose beyond accounting for the Army's idiosyncratic management of reserve retirees. H.R. REP. No. 81-491, at 10, J.A. 281; S. REP. No. 81-486, at 7, J.A. 283.[13] One of the principal House staffers specifically flagged that Congress was creating an arbitrary distinction:

> It seems a little inconsistent to me that retired personnel of a Regular component are subject when as a matter of fact you have non-Regular personnel in the Navy who are on the same retired list and entitled to the same rights and benefits as the regular. . . . It is treating reserves alike, I will admit, but *it is treating two classes of people on the same retired list differently too*.

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13. The House and Senate UCMJ reports include the exact same explanation for the language of Article 2(a)(5), *i.e.*, that it

> represents a lessening of jurisdiction over retired personnel of a Reserve component. . . . This paragraph relinquishes jurisdiction over its Reserve personnel except when they are receiving hospitalization from an armed force. This standardizes jurisdiction of the armed forces over Reserve personnel.

H.R. REP. No. 81-491, at 10, J.A. 281; S. REP. No. 81-486, at 7, J.A. 283.

Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. Of the H. Comm. on Armed Services, 81st Cong. 1261 (1949) (statement of Mr. Robert W. Smart), *reprinted in* WILLIAM K. SUTER, INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE 1261 (William S. Hein & Co. 2000) (emphasis added), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf, J.A. 271. And as Chief Judge Crisfield noted below, "the legislative history of Article 2 from 1949 contains no competing rationale, explanation, theory, or conjecture concerning *why* Congress chose to subject Regular retirees to UCMJ jurisdiction but not Reserve retirees." *Begani*, 79 M.J. at 795 (Crisfield, C.J., dissenting), J.A. 29.

The upshot of this analysis is that the only justification Congress *ever* offered for distinguishing between court-martial jurisdiction over active-duty and reserve retirees was the need to accommodate the Army's unique organizational approach to its retired list at the time the UCMJ was enacted. Unfortunately for the government, that approach—like the distinction it precipitated—has been overtaken by events. Indeed, it barely lasted two years.

On 9 July 1952, in the middle of the war in Korea, Congress enacted the Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481, J.A. 188, which was designed to "place all the reserve components of the United States Armed Forces on an equal basis," by standardizing the bureaucratic structure of the reserve components, creating the Retired Reserve within each service branch, and centralizing control of each of the reserve components under the respective service branch's Secretary. H.R. REP. No. 82-1066, at 1 (1951), J.A. 282.

Ever since then, and still today, each service, including the Army, manages and administers its own reserve retirees. *See, e.g.*, 10 U.S.C. § 12731(b) ("Application for [non-Regular (*i.e.*, Reserve)] retired pay under this section must be made to the Secretary of the military department, or the Secretary of Homeland Security, as the case may be, having jurisdiction at the time of application over the armed force in which the applicant is serving or last served"); *see also id.* § 12731(f)(3). Treating reserve retirees differently from active-duty retirees with regard to when they are subject to the UCMJ is therefore no longer justified by the lack of administrative control that the Army exercised over *its* reserve retirees at the time the UCMJ was enacted.

Thus, even assuming *arguendo* that the government has a legitimate interest in continuing to subject retired military personnel to the UCMJ in general, distinguishing between active-duty and reserve retirees—who have the same (lack of) responsibilities while retired and are subject to a similarly remote (at best) risk of involuntary recall—is not rationally related to such an interest. Congress may have the constitutional authority to subject *all* retirees to perpetual court-martial jurisdiction, *see United States* v. *Overton*, 24 M.J. 309 (C.M.A. 1987), but it cannot pick and choose *among* those retirees in a manner for which there is no rational contemporary explanation.

B. Article 2's Disparate Treatment of Active-Duty and Reserve Retirees Is Subject to—and Fails—Heightened Judicial Scrutiny

If, notwithstanding the above analysis, this Court is of the view that there *is* a rational basis supporting Article 2's disparate treatment of active-duty and reserve retirees, that is certainly necessary—but not sufficient—to affirm Mr. Begani's conviction. Because Article 2 directly impacts retirees' fundamental right to a jury trial, it can only be upheld if it withstands heightened judicial scrutiny.

It is hardly a new suggestion that the scope of military jurisdiction directly implicates the fundamental constitutional right to criminal trial by jury protected by Article III and the Sixth Amendment. *See, e.g.*, *Toth*, 350 U.S. at 15–20; *see also Reid* v. *Covert*, 354 U.S. 1, 21 (1957) (plurality opinion) ("Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial . . . .").[14] Nor is there any question that the right to criminal trial by jury protected by Article III and the Sixth Amendment ranks among the "fundamental" rights the invasion of which triggers strict judicial scrutiny. *See Duncan* v. *Louisiana*, 391 U.S. 145, 194 (1968); *see also Toth*, 350 U.S. at 16 ("This right of trial by jury ranks very high in our catalogue of constitutional safeguards.").

14. In *Kinsella ex rel. United States* v. *Singleton*, 361 U.S. 234 (1960), *Grisham* v. *Hagen*, 361 U.S. 278 (1960), and *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960), a majority of the Court adopted the analysis (and extended the holdings) of Justice Black's plurality opinion in *Reid*. Under these precedents, the Constitution forbids the court-martial during peacetime of civilian dependents *and* employees of the military—even for offenses committed overseas, and even though the UCMJ had expressly authorized such jurisdiction.

Retirees tried by court-martial has "no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen," *United States* v. *Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004); and in any non-capital case, they can be convicted on only a three-fourths vote of the members (two-thirds at the time of Mr. Begani's trial). *See* 10 U.S.C. § 852. Retired reservists who, while retired, committed the same offenses as Mr. Begani, would *have* to be tried in civilian court—where, as noted above, they would be entitled to a jury of randomly selected peers drawn from a fair cross-section of the community who could only convict them by a unanimous vote.[15]

Thus, jurisdictional distinctions between similarly situated retirees trigger strict scrutiny—because, but for Article 2, such defendants would be entitled to a civilian trial. *See Plyler* v. *Doe*, 457 U.S. 202, 217 n.15 (1982) ("In determining whether a class-based denial

15. *Toth* made clear that its analysis did not turn upon whether ex-servicemembers could have been tried in civilian court. 350 U.S. at 21 ("If [they can't be], it is only because Congress has not seen fit to subject them to trial in federal district courts."). Congress has since expanded extraterritorial criminal jurisdiction, including by making it a crime for any U.S. citizen residing in a foreign country to "engage[] in any illicit sexual conduct with another person." 18 U.S.C. § 2423(c).

of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein.").

To survive strict scrutiny, the government must demonstrate that the legislation at issue is narrowly tailored to achieve a compelling governmental interest. *See Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018). Here, Congress did not even have a compelling interest justifying the disparate treatment of active-duty and reserve retirees when the UCMJ was originally enacted; the Army's unique bureaucratic management of retirees is plainly an insufficient justification. *See Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.").[16]

16. Even if the Army's lack of control over its reserve retirees was a compelling interest when the UCMJ was enacted, *see Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103 (1976) ("[D]ue process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest."), the statute nevertheless fails narrow tailoring. The *Army*'s lack of jurisdiction over *its* reserve retirees as of 1950 hardly justifies also distinguishing between active-duty and reserve retirees of the *other* service branches.

Given the developments since 1950, it follows *a fortiori* that no such interest persists to justify Article 2's disparate treatment today.

In rejecting Mr. Begani's invocation of strict scrutiny, Judge Stephens's opinion in the NMCCA offered three arguments: First, he contended that the fundamental right to trial by jury is not implicated by Article 2 because retirees have no such right in the first place—because they are still part of the "land and naval forces" for purposes of the Constitution. Second, he argued that strict scrutiny is not appropriate given the substantial deference courts owe to Congress when it comes to regulation of the military. Finally, he suggested that Mr. Begani's argument would lead to absurd results. *See Begani*, 79 M.J. at 778–82, J.A. 14–18. Each of these arguments fails to persuade.

First, with regard to Mr. Begani's right to trial by jury, Judge Stephens's analysis rests on two flawed premises: That the constitutionality of military jurisdiction over *all* retirees is settled beyond doubt (such that neither active-duty *nor* reserve retirees are protected by the constitutional right to jury trial); and that Article 2 therefore is wholly irrelevant to the scope of the jury-trial right.

Other than in dicta in *United States* v. *Tyler*, 105 U.S. 244, 246 (1882), the Supreme Court has never addressed whether retirees are properly subject to military jurisdiction. Indeed, as the NMCCA made clear in *Dinger*, the Supreme Court's more recent jurisprudence has left the answer to that question very much in doubt. 76 M.J. at 556 ("[W]e must call upon first principles to assess the jurisdiction of courts-martial over those in a retired status.").[17] In these circumstances, the constitutional right to jury trial may well inform the propriety of military jurisdiction over active-duty and reserve retirees.

In any event, Judge Stephens's refusal to apply strict scrutiny gave short shrift to the "broader set of constitutional values" that Article 2 implicates—*beyond* "the personal exercise of Fifth and Sixth Amendment rights." *United States* v. *Ali*, 71 M.J. 256, 281 (C.A.A.F. 2012) (Effron, S.J., concurring in part and concurring in the result). As Senior Judge Effron explained, "[t]he import of the differences between

17. One of the issues Mr. Begani petitioned this Court to review is the constitutionality of military jurisdiction over *all* retirees. *See* Supp. to Pet. at 1, 25–27. Although this Court declined to grant review on that issue, the same question is presently pending on cross-motions for judgment on the pleadings before the U.S. District Court for the District of Columbia in *Larrabee* v. *McPherson*, No. 19-654-RJL (D.D.C.).

courts-martial and Article III courts primarily concerns constitutional structure, not due process. The issue of jurisdiction addresses the preference for trial by jury as a matter of constitutional choice, not fundamental fairness." *Id.* at 282 (citing *Singleton*, 361 U.S. at 246); *cf.* *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects . . . .").

In other words, even if it was settled that retirees are wholly unprotected by the constitutional right to trial by jury, Congress's decision to treat them differently—to ensure that one class of retirees *is* entitled to trial by jury while denying that privilege to another—likewise justifies heightened judicial scrutiny.

Judge Stephens's other objections fare no better. With respect to the deference owed to Congress, that deference is not a justification for a lower degree of scrutiny than what would otherwise be warranted. If anything, *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), is squarely to the contrary. There, in upholding the exclusion of women from the Selective Service, the Supreme Court *invoked*, rather than distinguished, *Craig* v. *Boren*, 429 U.S. 170 (1976)—the fountainhead of the Court's

intermediate scrutiny standard for equal protection challenges to sex-based classifications. *See* 453 U.S. at 70 ("[D]eference does not mean abdication."); *see also Nat'l Coalition for Men* v. *Selective Serv. Sys.*, No. 19-20272, 2020 U.S. App. LEXIS 25796 (5th Cir. Aug. 13, 2020) (per curiam) (holding that *Rostker* remains good law).

In discussing *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), which sustained a sex-based distinction between male and female Navy officers, *Rostker* emphasized that "*Ballard* did not purport to apply a different equal protection test because of the military context, but did stress the deference due congressional choices among alternatives in exercising the congressional authority to raise and support armies and make rules for their governance." 453 U.S. at 71. In other words, the standard of scrutiny is the same; deference "is factored into the importance of the government's asserted interest." *Harrison* v. *Kernan*, No. 17-16823, 2020 U.S. App. LEXIS, at *23 (9th Cir. Aug. 21, 2020); *see also Karnoski* v. *Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (per curiam) ("[D]eference informs the application of intermediate scrutiny, but it does not displace intermediate scrutiny and replace it with rational basis review.").

Here, even if such deference justified Article 2's disparate treatment of active-duty and reserve retirees when it was first adopted in 1950, the total collapse of that justification two years later (when Congress gave the Army administrative responsibility over its reserve retirees) renders any deference under *Rostker* entirely beside the point.[18] Deference to Congress cannot create a government interest where one does not otherwise exist, and it cannot create rationality out of arbitrariness. *See Berkley* v. *United States*, 287 F.3d 1076, 1091 (Fed. Cir. 2002) ("[D]eference . . . does not prevent or preclude our review . . . of constitutional equal protection claims.").

Finally, Judge Stephens argued against strict scrutiny on the ground that applying it would lead to absurd results—by either

18. This same reasoning is also fatal to the relevance of *Taussig* v. *McNamara*, 219 F. Supp. 757 (D.D.C. 1963). Although the district court there rejected the same equal protection argument that Mr. Begani advances here, it did so based upon the far-more-different recall standards in place at the time for active-duty and reserve retirees. *See id*. at 762 ("There is clearly a rational distinction between the careerist, who is subject to recall at any time during war or national emergency, and the reservist, who is subject to recall only as a second-line of manpower." (citations omitted)). As the Department of Defense Instruction discussed above makes clear, those distinctions are no longer extant today. *See ante* at 22–24 & n.9.

subjecting reserve retirees to the UCMJ to a far greater degree than *before* they retired or by depriving the government of the ability to court-martial active-duty retirees who don't respond when involuntarily recalled to active duty. *Begani*, 79 M.J. at 780–81, J.A. 16–17.

Leaving aside that this argument has nothing to do with the appropriate standard of review, it also illustrates the central shortcomings of the *government*'s position here, not Mr. Begani's. The fact that active (and inactive) reservists are subject to far less court-martial jurisdiction under the UCMJ than active-duty *retirees* is, if anything, only further evidence of how anachronistic Article 2(a)(4) and 2(a)(6) have become—and a further reason to scrutinize them carefully. Especially as non-retired reservists and National Guard personnel have come to supplant the retired list as the primary and preferred source of manpower for augmenting the active-duty force, *see, e.g.*, LIBRARY OF CONGRESS, HISTORICAL ATTEMPTS TO REORGANIZE THE RESERVE COMPONENTS, at 15–17 (2007), J.A. 201–03, this distinction has made increasingly little sense.[19]

19. As noted above, *ante* at 5 & n.4, the en banc NMCCA in this case ordered the government to identify the total number of active-duty retirees, members of the Fleet Reserve, and retired reservists who had

As for Judge Stephens's suggestion that active-duty retirees could not be tried by court-martial if they refused to respond to an involuntary recall, that contention is belied by (1) *Billings* v. *Truesdell*, 321 U.S. 542 (1944), which upheld Congress's power to provide for the court-martial of a draftee who was lawfully inducted but refused to report; and (2) common sense, since retirees would, quite obviously, risk their pension by failing to report.

A more fundamental issue, which Judge Stephens's opinion drives home, is that the distinction Congress drew in 1950 is *already* producing absurd results, including the extent to which active-duty retirees are far more broadly subject to the UCMJ (and court-martial) not only than reserve retirees, but than even non-retired reservists who are away from duty. *See, e.g.*, 10 U.S.C. § 802(a)(3); *see also United States* v. *Morita*, 74 M.J. 116 (C.A.A.F. 2015). Contra Judge Stephens's suggestion, this disparate treatment is not the result of Congress

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been involuntarily recalled to active duty between 1 January 2000 and 31 December 2017. J.A. 48–49. It withdrew the request after the government declined to comply, claiming that compliance with such a request would be "labor-intensive," especially because of what the government identified as "ambiguity" surrounding the term "involuntary." *Id.* at 32.

having intentionally decided to leave things as they were in 1950; it's simply legislative inertia. Such inertia may explain *why* this arbitrary, anachronistic distinction persists in the U.S. Code, but it does not—and cannot—*justify* it.

C. The Appropriate Remedy is To Invalidate Article 2(a)(6)

As the Supreme Court recently reiterated, when courts determine that a statute unconstitutionally discriminates in violation of equal protection, "[t]here are 'two remedial alternatives.'" *Morales-Santana*, 137 S. Ct. at 1698 (quoting *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979)); *see also Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result). Courts can either "level up" or "level down." *See Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984) ("[T]he appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.").

Here, the equal protection violation arises from the dissimilar treatment of active-duty retirees and reserve retirees under Article 2. Thus, the "two remedial alternatives" are to hold that Article 2 should be *expanded* to allow for the court-martial of reserve retirees whenever

active-duty retirees may be tried, or that it should be *contracted* to limit jurisdiction over active-duty retirees to the same circumstances in which reserve retirees may presently be tried. For two reasons, the latter remedial alternative is the correct one.

First, as the Supreme Court has emphasized, military jurisdiction is the exception, not the norm. Thus, the scope of military jurisdiction is "another instance calling for limitation to '*the least possible power adequate to the end proposed*.'" *Toth*, 350 U.S. at 23 (quoting *Anderson*, 19 U.S. (6 Wheat.) at 230–31). Against that backdrop, it would be odd indeed for this Court, in response to identifying a constitutional violation, to conclude that the appropriate remedy is to *expand* military jurisdiction to encompass over 400,000 retired reservists[20] who, prior to such a ruling, were "practically immune from court-martial jurisdiction." Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged*

20. "As of September 30, 2019, there were 417 thousand reserve retirees receiving retired pay." U.S. DEP'T OF DEFENSE, STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM: FISCAL YEAR ENDED SEPTEMBER 30, 2019, at 9 (2020), https://media.defense.gov/2020/Aug/12/2002475697/-1/-1/0/MRS_STATRPT_2019_FINAL.PDF.

Prisoners, 112 U. PA. L. REV. 317, 359 (1964). After all, as Article 2(a)(5) illustrates, it clearly has not proven necessary thus far for Congress to subject retired *reservists* to the UCMJ in all but the most marginal cases—even though their amenability to recall is materially indistinguishable from active-duty retirees. Even the limited jurisdiction conferred by Article 2(a)(5) has proven "comatose." *Id.*

Second, and in any event, it is not at all clear that this Court *could* expand the statutory jurisdiction of a court-martial—even as a remedy for a constitutional violation. *See, e.g.*, *Denedo* v. *United States*, 66 M.J. 114, 135 (C.A.A.F. 2008) (Ryan, J., dissenting) ("It is contrary to the limited nature of a legislatively created Article I court to exercise jurisdiction over a person not specifically prescribed by statute."), *aff'd on other grounds*, 559 U.S. 904 (2009). Thus, the appropriate remedy for the equal protection violation identified above is to hold that Article 2(a)(6) is unconstitutional insofar as it subjects members of the Fleet Reserve or Fleet Marine Corps Reserve to the UCMJ to a greater extent than retired reservists, *i.e.*, when they are not receiving military hospitalization.

III. THE EQUAL PROTECTION VIOLATION REQUIRES DISMISSAL OF MR. BEGANI'S COURT-MARTIAL CONVICTIONS

A. Challenges to Subject-Matter Jurisdiction Are Not Subject to Waiver or Forfeiture[21]

Time and again, the Supreme Court has reiterated that "[s]ubject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 671 (2009); *see also Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle."). So too, here.

It is black-letter law that the subject-matter jurisdiction of a court-martial is not subject to either waiver or forfeiture. R.C.M. 907(b)(1) is unambiguous on this point. Under the heading "[n]onwaivable grounds," it provides that "[a] charge or specification shall be dismissed at any stage of the proceedings if . . . [t]he court-

21. The standard of review for the certified issue on waiver is *de novo*. *United States* v. *Rich,* 79 M.J. 472, 475 (C.A.A.F. 2020).

martial lacks jurisdiction to try the accused for the offense." And R.C.M. 705(c)(1)(B) bars enforcement of any pretrial agreement through which the accused agrees to forgo "the right to challenge the jurisdiction of the court-martial." *See also* R.C.M. 905(e) ("Other motions, requests, defenses, or objections, *except lack of jurisdiction* or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver." (emphasis added)).

Thus, as this Court has made clear, an unconditional guilty plea waives only "*nonjurisdictional* defects." *United States* v. *Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010) (emphasis added). If Mr. Begani's equal protection claim is successful, then the court-martial would have lacked subject-matter jurisdiction to try him for offenses committed while he was in the Fleet Reserve—including the offenses *sub judice*. That ought to be the end of the matter insofar as waiver is concerned.

B. Mr. Begani's Equal Protection Claim Directly Implicates the Subject-Matter Jurisdiction of the Court-Martial

Judge Gaston's concurring opinion below agreed that objections to subject-matter jurisdiction cannot be waived. He nevertheless concluded that Mr. Begani's equal protection argument was subject to waiver

because it was related to his constitutional right to trial by jury, not the constitutional limits on court-martial jurisdiction. *See Begani*, 79 M.J. at 784 (Gaston, J., concurring in part and concurring in the result), J.A. 20. In Judge Gaston's view, because courts-martial may constitutionally exercise jurisdiction over retirees in general, Mr. Begani's claim was not an attack on the court-martial's subject-matter jurisdiction in the constitutional sense. *See id*., J.A. 20.

Putting to one side the open constitutional question about court-martial jurisdiction over retirees in general, *see ante* at 36 & n.17, the problem with this argument is that it appears to assume that *statutory* defects in the subject-matter jurisdiction of a court-martial are somehow *not* "jurisdictional." *See Begani*, 79 M.J. at 786 (Gaston, J., concurring in part and concurring in the result), J.A. 20 ("This claim is fundamentally not about whether his court-martial had jurisdiction over him—which it most assuredly did.").

Mr. Begani's claim, at least before this Court, is not that the Constitution categorically precludes his court-martial because he is in the Fleet Reserve; it is that Article 2(a)(6) unconstitutionally conferred subject-matter jurisdiction in his case because it violates equal

protection. If he is correct, then, contra Judge Gaston, the court-martial did *not* have subject-matter jurisdiction; if Article 2(a)(6) is unconstitutional as applied to Mr. Begani, then it did not confer upon a court-martial the power to try him for offenses committed while in the Fleet Reserve and not on active duty. *See United States* v. *Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012) (jurisdiction "governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction"). Nor could the court-martial's jurisdiction have rested on any *other* statute. Simply put, if Mr. Begani's court-martial lacked subject-matter jurisdiction, the *effects* of that conclusion in no way depend upon the origin of the jurisdictional defect or the extent to which it was preserved below.

The cases on which Judge Gaston purported to rely in concluding to the contrary, *see Begani*, 79 M.J. at 785 (Gaston, J., concurring in part and concurring in the result), J.A. 21, do not remotely support his analysis. For instance, *United States* v. *Cupa-Guillen*, 34 F.3d 860 (9th Cir. 1994), involved an equal protection challenge to the statute the defendant was convicted of violating. There was no question in that case as to whether the trial court had subject-matter jurisdiction. Nor was

such a jurisdictional question implicated in *Chandler* v. *Jones*, 813 F.2d 773 (6th Cir. 1977), which involved an equal protection challenge to a state criminal statute—not to whether the state court had subject-matter jurisdiction.[22]

The same can be said of the inapposite double jeopardy examples marshaled by Judge Gaston. *See Begani*, 79 M.J. at 785 (Gaston, J., concurring in part and concurring in the result) (citing *United States* v. *Broce*, 488 U.S. 563, 576 (1989); and *Menna* v. *New York*, 423 U.S. 61, 62 (1975)), J.A. 21. *None* of the cases in which Judge Gaston's analysis claimed to find support involved a situation in which the constitutional defect, if meritorious, would have deprived the trial court of statutory or constitutional subject-matter jurisdiction. And that's for the obvious and inescapable reason that, whatever the *reason* for the defect, the absence of statutory or constitutional subject-matter jurisdiction is *always* jurisdictional.

22. *Cupa-Guillen* and *Chandler* are also almost certainly overtaken by the Supreme Court's subsequent decision in *Class*, 138 S. Ct. 798, which held that a guilty plea does *not* waive the defendant's right to attack the constitutionality of the statute of conviction on appeal.

C. Mr. Begani's Equal Protection Claim is Properly Before This Court Even If It Is Not Jurisdictional

Finally, even if this Court were somehow inclined to hold that Mr. Begani's equal protection objection to Article 2(a)(6) does not affect the subject-matter jurisdiction of his court-martial, that claim is still properly before this Court insofar as it is a constitutional objection unrelated to the substance of Mr. Begani's convictions or the evidence adduced against him. As the Supreme Court has made clear, a guilty plea that fails to preserve a constitutional objection is not "a waiver of the privileges which exist beyond the confines of the trial." *Mitchell* v. *United States*, 526 U.S. 314, 324 (1999); *see also Class*, 138 S. Ct. at 805–06 (explaining the difference between constitutional claims that are waived in an unconditional guilty plea and claims that may still be raised on appeal).

As in *Mitchell* and *Class*, whether Article 2(a)(6) violates equal protection "cannot in any way be characterized as part of the trial." *Lafler* v. *Cooper*, 566 U.S. 156, 165 (2012); *cf. United States* v. *Barker*, 77 M.J. 377, 381 n.6 (C.A.A.F. 2018) ("We decline to adopt a reading of a waive all waivable motions provision in a pretrial agreement

that . . . restricts the accused ex ante from objecting to any and all future infirmities unrelated to the plea.").

Nor would the government suffer any prejudice from this Court's resolution of Mr. Begani's equal protection claim on its merits. The issue received two full rounds of plenary briefing and argument before the NMCCA and was the subject of a petition for discretionary review by this Court. In these circumstances, even if Mr. Begani's equal protection challenge to Article 2(a)(6) *could* have been waived—and it could not have been—it is still properly before this Court at this time.

CONCLUSION

When Congress enacted the UCMJ in 1950, the Supreme Court had not yet held that the federal government was bound by equal protection principles through the Due Process Clause of the Fifth Amendment; that would come four years later. *See Bolling* v. *Sharpe*, 347 U.S. 497 (1954). But even if modern equal protection scrutiny had already been in place, Article 2's disparate treatment of active-duty and reserve retirees may well have passed muster. For starters, there were meaningful differences in how active-duty and reserve retirees continued to relate to the military once retired, including when and how they could be recalled to active duty. And the desire to create a uniform jurisdictional rule across the services that accounted—however awkwardly—for the Army's lack of administrative responsibility for its reserve retirees may well have been a sufficient governmental interest.

But it isn't 1950 anymore. For all relevant purposes, active-duty and reserve retirees today are similarly situated—especially insofar as (1) their retirements are subject to the administration and control of the branch from which they retired; and (2) they are equally susceptible to involuntary recall, however illusory a prospect that may actually be.

Together, those developments have vitiated any constitutional defense of the jurisdictional distinction Article 2 draws, leaving in their stead a textbook violation of equal protection. This Court's responsibility in such a case is clear: to bar the court-martial of Fleet Reservists for offenses committed after their retirement and off active duty until and unless Congress eliminates this disparity. Mr. Begani's convictions should therefore be dismissed for lack of jurisdiction.

Respectfully submitted,

Stephen I. Vladeck
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu
CAAF Bar No. 36839

Daniel E. Rosinski
LT, JAGC, USN
Defense Counsel
Defense Service Office Southeast
9620 Maryland Avenue
Suite 100
Norfolk, VA 23511
(202) 643-2637
daniel.e.rosinski@navy.mil
CAAF Bar. No. 36727

Clifton E. Morgan III
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
(202) 685-7052
clifton.morgan@navy.mil
CAAF Bar No. 37021

Counsel for Appellant / Cross-Appellee

CERTIFICATE OF FILING AND SERVICE

I certify that on August 31, 2020, a copy of the foregoing brief in the case of *United States* v. *Begani*, USCA Dkt. Nos. 20-0217/NA and 20-0327/NA, was electronically filed with the Court (efiling@armfor.uscourts.gov) and contemporaneously served on the Defense and Government Appellate Divisions.

Stephen I. Vladeck
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu
CAAF Bar No. 36839

Counsel for Appellant / Cross-Appellee

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 10,726 words. This brief complies with the typeface and type-style requirements of Rule 37.

Stephen I. Vladeck
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu
CAAF Bar No. 36839

Counsel for Appellant / Cross-Appellee

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