**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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|---|---|---|
| **UNITED STATES,** | ) | REPLY BRIEF |
| *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 |

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## SUMMARY OF ARGUMENT

Under Article 2(a) of the UCMJ, servicemembers who retire from active-duty components to the Fleet Reserve, the Fleet Marine Corps Reserve, or the retired list remain subject to military jurisdiction for offenses committed any time after leaving active duty — even if they are never recalled. 10 U.S.C. § 802(a)(4), (6). Servicemembers who retire from the *reserves*, in contrast, are subject to the UCMJ in retirement only while "receiving hospitalization from an armed force," *id.* § 802(a)(5) — and are thus effectively immune, absent recall, from being punitively discharged for any misconduct they commit *while* retired.

The government does not dispute that, as Mr. Begani[1] argued in his opening brief, this distinction is the remnant of an anachronistic compromise Congress reached when it enacted the UCMJ in 1950. *See* Gov't Br. 36. Instead, the government argues that it does not *need* a good reason for continuing to treat such retirees differently — either because Mr. Begani failed to preserve his constitutional objection to the subject-matter jurisdiction of his court-martial, or because active-duty

1. As in the opening brief in these cross-appeals, we refer to Appellant/Cross-Appellee as "Mr. Begani." *See* Opening Br. 1 n.1.

and reservist retirees are not "similarly situated" with respect to their continuing amenability *vel non* to the UCMJ. As Mr. Begani previously explained, both arguments are unavailing. Opening Br. 14–24, 45–51.

But the most important point is one the government doesn't make: Across 9,268 words, the government never provides a justification for treating active-duty and reservist retirees differently with respect to their amenability to the UCMJ. All the government can muster is Congress's reason for continuing to subject *active-duty* retirees to the UCMJ — without any explanation for how it could reasonably conclude that reservist retirees are different. To whatever theoretical extent the government might need to rely upon retired servicemembers to augment active-duty and reserve forces in a future conflict, nothing about that possibility — or about the retirees on whom the government might rely — justifies the distinction Article 2(a) continues to draw.

Thus, so long as this Court agrees with Mr. Begani that, at least for purposes of amenability to the UCMJ, active-duty and reservist retirees are "similarly situated," Article 2(a)'s distinction between them violates equal protection — and Mr. Begani is entitled to dismissal of his convictions for lack of subject-matter jurisdiction.

## ARGUMENT

### I. ACTIVE-DUTY AND RETIRED RESERVISTS ARE "SIMILARLY SITUATED" WITH RESPECT TO THE PURPOSES OF ARTICLE 2(a)

The parties agree that the relevant question for equal protection purposes is whether active-duty and reservist retirees are "similarly situated" for purposes of their continuing amenability to the UCMJ. *See 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)).[2] And as the Supreme Court has stressed, similarly situated does not mean categorically identical; it means "in all *relevant* respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992) (emphasis added); *see also CSX Transp., Inc.* v. *Ala. Dep't of Revenue,* 562 U.S. 277, 287 (2011).

"Relevant," in this context, has not been well defined in case law. But the fountainhead academic discussion of the topic explains that "[a] reasonable classification is one which includes all persons who are

2. Mr. Begani's opening brief explained why members of the Fleet Reserve are similarly situated to other active-duty retirees. Opening Br. 16–20. The government's brief does not contest any of that analysis. Indeed, its initial court-martial request identified Mr. Begani not as a Fleet Reservist, but as a "retired member." J.A. 347.

similarly situated with respect to *the purpose of the law*." Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949) (emphasis added). To that end, as Professor Giovanna Shay recently explained,

> In cases regarding express categories, no matter the level of equal protection scrutiny applied, the focus of the "similarly situated" analysis is substantially the same as the key inquiry of equal protection review: Does the legislative classification bear a close enough relationship to the purpose of the statute? While courts and litigants may disagree about whether individuals really are "similarly situated" with respect to a statutory purpose, the analysis, properly understood, is another way of describing the substantive equal protection inquiry.

Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 588 (2011) (footnotes omitted).[3] "[P]roperly understood," and contrary to the government's brief, *see* Gov't Br. 15, "'similarly situated' is not a

3. The government cites *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591 (2008), for the proposition that two groups are similarly situated only if "they are conferred the same privileges and imposed with the same liabilities." Gov't Br. 15. But the actual passage from *Engquist* — in which Mr. Begani's counsel was co-counsel for the Petitioner — explained that "the Fourteenth Amendment 'requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.'" 553 U.S. at 602 (quoting *Hayes* v. *Missouri*, 120 U.S. 68, 71–72 (1887)). Thus, the cited passage merely reiterates that, when two groups *are* similarly situated, they must be treated equally.

threshold hurdle to equal protection analysis on the merits," Shay, *supra*, at 589, but rather a core *feature* of the merits analysis.

In other words, whether active-duty and reservist retirees are "similarly situated" is another way of asking whether the government has an adequate reason for distinguishing between them in the first place. If they are *not* similarly situated, then that conclusion, of itself, provides an adequate justification for the distinction.

Applying that understanding here, the relevant baseline is the purpose of Article 2(a) — *i.e.*, the reason why Congress subjects the classes of individuals identified therein to the UCMJ. The answer, as the government's own brief reminds us, is the preservation of good order and discipline. *See* Gov't Br. 31 (flagging "Congress's continued interest in enforcing good order and discipline amongst those in a retired status." (quoting *United States* v. *Dinger*, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017) (internal quotation marks omitted))). More than a throwaway quotation, the government devotes three pages of its brief to exactly this argument — that Congress has a legitimate interest in maintaining jurisdiction over *all* retirees in general, whether they retired from active-duty or reserve components. *Id.* at 30–32.

As noted below, *see infra* Part II, the government's focus illuminates the absence of any justification for treating active-duty and reservist retirees differently. Additionally, it underscores that the baseline for whether active-duty and reservist retirees are similarly situated is not their *past* service, but rather their current status and future obligations. *See* Opening Br. 15 (citing *Willenbring* v. *Neurater*, 48 M.J. 152, 174 (C.A.A.F. 1998), *overruled on other grounds by United States* v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018)).

That's why, contra the government's brief, the fact that active-duty and reservist retirees have different service histories and receive different pay as a result of that service is irrelevant for purposes of their continuing amenability the UCMJ. Instead, all that matters is whether they are similarly situated while retired. And that analysis, in turn, focuses on their duties and obligations while they are retired, and their amenability to future involuntary recall.

The government's brief has nothing to say about any actual differences in the duties and obligations of active-duty and reservist retirees *while* retired — and for good reason: there aren't any. As Chief Judge Crisfield explained below, all members of both groups "are in an

inactive status and no longer perform any uniformed military duties." *United States* v. *Begani*, 79 M.J. 767, 787 (N-M. Ct. Crim. App. 2020) (en banc) (Crisfield, C.J., dissenting), J.A. 22–23. Members of both groups are ineligible for further promotion while they are retired, and although their pay differs, it 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. In other words, active-duty and reservist retirees have the exact same relationship with the military while they are retired — which is to say, none.

Instead, the government's argument against these two groups being similarly situated reduces to the different legal authorities that govern the circumstances in which their retirements can be ended — in which they can be involuntarily recalled to active duty. *See* Gov't Br. 23 ("Fleet Reservists are more broadly subject to recall than Retired Reservists, who are 'subject to recall only as a second-line of manpower' during time of war or national emergency." (quoting *Taussig* v. *McNamara*, 219 F. Supp. 757, 762 (D.D.C. 1963)).

There are two distinct problems with this line of reasoning. The first is that it is entirely hypothetical. The government has had numerous opportunities in both this and other recent litigation to identify contemporary circumstances in which *any* active-duty or reservist retiree has been involuntarily recalled to active duty. The en banc NMCCA even *ordered* the government to produce such data from Navy Personnel Command in this case — withdrawing that order only after the government stipulated that it was unable to comply. J.A. 48–49. One would think, if there *were* such examples, that the government would have been able to provide them by now.

Even the government's merits brief in this Court elides this critical distinction — by failing to present specific evidence of any *involuntary* recalls of retired personnel.[4] All that the government can

4. The government offers only *Dinger* as support for the proposition that "[i]n both Iraq wars . . . retired personnel of all services were actually recalled." Gov't Br. 30.

But the NMCCA in *Dinger* did not rely upon official government sources either. Instead, it cited only a legal treatise that itself cited no evidence — and, in any event, did not distinguish between voluntary and involuntary recalls during the Iraq wars. 76 M.J. at 557 n.21 (citing FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-20.00, at 24 (4th ed. Matthew Bender & Co. 2015)).

offer is recalls from the two Iraq wars that appear to have been voluntary,[5] and the President's authorization of the recall of Ready Reservists and Coast Guard retirees in response to the coronavirus pandemic — again, with no actual evidence that any retirees, active-duty *or* reservist, were involuntarily recalled. *See* Gov't Br. 30–31. Thus, even if the statutory differences in involuntary recall authorities were material, the fact that they are never utilized undermines the government's claim that they establish the materially different situations of active-duty and reservist retirees.[6]

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5. *See, e.g.*, Susan Kreimer, *Retired Soldiers Heed Call to Return to Duty in Iraq, Afghanistan*, AARP BULL., Nov. 9, 2010, https://www.aarp.org/personal-growth/transitions/info-11-2010/retired_soldiers_heed_call_to_return_to_duty.html ("Voluntary recall programs have made it possible for retirees . . . to return to active duty.").

6. The government portrays Mr. Begani's argument as a "dismissal of future threats to national security." Gov't Br. 26. Far from it. Even if Mr. Begani is correct, that would not affect the government's ability to *use* these authorities to involuntarily recall active-duty and reservist retirees should a future emergency necessitate such a measure.

After all, as the UCMJ's inapplicability to inactive reservists makes clear, there is no requirement that servicemembers be constantly subject to the UCMJ just so they can be subject to future activation and/or deployment. It is therefore difficult to conclude that two groups are not similarly situated because of distinctions between them that exist (if at all) only on paper.

Second, and in any event, the statutory differences are not material. As Mr. Begani explained at length in his opening brief, the government in some circumstances may have to pursue different paths to involuntarily recall active-duty and reservist retirees, but those paths are entirely within *its* discretion and control. Opening Br. 20–24.

For instance, 10 U.S.C. § 688(a) authorizes the Secretary of Defense to provide for the involuntary recall of active-duty *and* (many) reservist retirees "at any time." 10 U.S.C. § 688(a). Specifically, § 688(a) applies to "covered members" under § 688(b), which expressly includes some retired reservist members of each of the services:

> (1) A retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps.
>
> (2) A member of the Retired Reserve who was retired under section 1293, 7311, 7314, 8323, 9311, or 9314 of this title.[7]
>
> (3) A member of the Fleet Reserve or Fleet Marine Corps Reserve.

7. 10 U.S.C. § 1293 applies to warrant officers with "at least 20 years of active service"; § 7311 applies to Army "regular or reserve commissioned officers" with twenty years of active service, eight to ten as an officer; § 7314 applies to Army "enlisted members" with twenty to thirty years of active service; § 8323 applies to Navy or Marine officers with "more than twenty years of active service," eight to ten as an officer; § 9311 applies to Air Force "regular or reserve commissioned officers" with twenty years of active service, eight to ten as an officer; and § 9314 applies to Air Force "enlisted members" with twenty to thirty years of active service.

*Id.* § 688(b). In other words, the recall authorities under § 688 apply *equally* to active-duty retirees (§ 688(b)(1), (3)) and reservist retirees with at least 20 years of active-duty service (§ 688(b)(2)).

And even reservist retirees without 20 years of active-duty service can be involuntarily recalled under a separate provision — 10 U.S.C. § 12301(a). That provision authorizes the involuntary recall of *any* reservist retiree "[i]n time of war or of national emergency declared by Congress, or when otherwise authorized by law, . . . for the duration of the war or emergency and for six months thereafter." *Id.* The only predicate is a service Secretary's unreviewable factual determination "that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available." *Id.*

Once these layers are peeled away, the government's argument reduces to the contention that this additional procedural requirement somehow distinguishes reservist retirees from their active-duty brethren. *See* Gov't Br. 23. But as Mr. Begani explained in his opening brief, the Department of Defense's governing regulation, Dep't of Defense Instruction 1352.01, Management of Regular and Reserve

Retired Military Members (Dec. 8, 2016), J.A. 253, illustrates that this is a distinction without a difference.

In particular, Instruction 1352.01 makes clear that, from the Department of Defense's perspective, active-duty and reservist retirees form a *uniform* body of reserve personnel in circumstances in which their mobilization is necessary. For instance, section 1.2(a) provides that "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.

Section 1.2(b) likewise provides that "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. And section 1.2(c) reiterates that "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," without drawing any distinction between them. *Id.* § 1.2(c), J.A. 256.

None of these provisions suggest any ordering between active-duty and reservist retirees that supports the government's reading of its involuntary recall authorities. And the Instruction's classification of retirees into three different categories for purposes of sequencing of recall ("Category I," "Category II," and "Category III"), *id*. § G.2, J.A. 265, is based entirely on the retiree's age and the duration of their retirement — not whether they are active-duty or reservist retirees. *See id*. §§ 3.2(g), G.2, J.A. 260, 265.

The government objects to Mr. Begani's reliance upon Instruction 1352.01 on two grounds. First, it portrays Mr. Begani's argument as "incorrectly claim[ing]" that the Instruction "repealed the explicit differences in amenability to recall." Gov't Br. 24. Hardly. Rather, as Mr. Begani's opening brief made clear, the Instruction illuminates the extent to which the government itself does not view those statutory differences as having any *real-world* effects. Opening Br. 21–22. Insofar as the Instruction can be understood as the government's effort to implement these very statutory recall authorities, its implementation fails to draw the very distinctions on which the government's brief purports to rest.

Second, the government notes, correctly, that the Instruction provides different *procedures* for mobilizing active-duty and reservist retirees. Gov't Br. 25. But the only difference is the different procedural paths to recall set forth in the relevant statutes — where recall of reservist retirees who did not complete 20 years of active service requires the additional procedural determination in 10 U.S.C. § 12301(a). *See* DoD Instruction 1352.01, § 3.3(b)(1), J.A. 261–62.

In other words, the government's entire argument for why active-duty and reservist retirees are not "similarly situated" for purposes of equal protection analysis reduces to the fact that, for *some* reservist retirees (those without 20 years of active service), involuntary recall to active duty (which never happens anyway) requires one extra unreviewable factual determination by the relevant government officer. Indeed, the government's brief nowhere suggests that this factual determination would be an onerous one — were it ever to be made.

That is why the rest of the Instruction is so probative: It underscores the extent to which the government does not view this additional procedural step as a meaningful hurdle to accessing the full pool of reservist retirees in appropriate circumstances. And it

underscores that there is no meaningful distinction, from the government's perspective, between active-duty and reservist retirees with respect to the primary reason *why* they remain subject to the UCMJ. But if the Department of Defense does not itself view these distinctions as significant for purposes of mobilizing additional manpower, then it has to follow that these distinctions are likewise not significant for purposes of whether active-duty and reservist retirees are "similarly situated" under the Due Process Clause of the Fifth Amendment.

## II. ARTICLE 2(a)'S DIFFERENTIAL TREATMENT OF SIMILARLY SITUATED RETIRED SERVICEMEMBERS VIOLATES EQUAL PROTECTION

Because active-duty and reservist retirees are "similarly situated" for purposes of their continuing amenability to the UCMJ, Article 2(a)'s disparate treatment of them must, at a minimum, be "rationally related to legitimate government interests." *Washington* v. *Glucksberg*, 521 U.S. 702, 728 (1997). More so, insofar as Congress's assertion of court-martial jurisdiction comes at the expense of Mr. Begani's Sixth Amendment right to jury trial, it can only withstand equal protection scrutiny if it survives strict scrutiny — if it is narrowly tailored to fulfill

a compelling government interest. *See Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018). Under either framework, Article 2(a) fails — because the distinction it continues to draw is entirely arbitrary.

### A. The Disparate Treatment of Active-Duty and Reservist Retirees is Not Rationally Related to a Legitimate Government Interest

As Mr. Begani explained in his opening brief, Article 2(a)'s distinction between active-duty and reservist retirees is a remnant of the varying rules governing retirees across service branches prior to 1950. Under the Articles for the Government of the Navy, active-duty and reservist Navy and Marine Corps retirees remained subject to military jurisdiction at all times, whereas under the Articles of War, active-duty Army retirees remained subject to military law, while reservist Army retirees did not — except in the vanishing set of cases in which they were receiving military hospitalization. Opening Br. 8–9, 27–30. Having Article 2(a) of the new *Uniform* Code of Military Justice was deemed necessary, in that moment, to accommodate what was then true about the Army's bureaucracy: unlike active-duty retirees, Army reservist retirees were subject to the administration 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, Article 2(a)'s disparate treatment of active-duty and reservist retirees was justified entirely by the need to account for the Army's unique bureaucratic structure. Congress understood that, in the process, it would be "treating two classes of people on the same retired list differently[.]" *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), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf, J.A. 271.

But even if that justification was sufficient under the UCMJ as enacted, Congress eviscerated it two years later when it unified control of Army retirees under the Department of the Army. Opening Br. 30 (citing Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481, J.A. 188). Thus, even if Article 2(a)'s disparate treatment of active-duty and reservist retirees was rational as initially enacted, that rationale disappeared when Congress eliminated its factual predicate.

The government's brief, critically, does not dispute any of Mr. Begani's historical analysis; it simply "assumes" that it is correct and otherwise ignores it. Gov't Br. 36. Instead, it argues that "[i]t is reasonably conceivable that Congress maximized military jurisdiction over Fleet Reservists in an effort to maintain good order and discipline among the most experienced retired servicemembers, who by statute are principally subject to recall." *Id*. That one sentence is the sum-total of the government's proffered rational basis for Article 2(a)'s disparate treatment of active-duty and reservist retirees, and it is woefully insufficient for at least three reasons:

First, as noted above, active-duty retirees are *not* "principally subject to recall" in relation to other retirees. For reservist retirees with at least 20 years of active service, the recall authorities are entirely identical. For other reservist retirees, the government need only make an additional procedural determination in order to subject them to involuntary recall. Either way, the notion that Article 2(a)'s disparate treatment reflects some fundamental difference in the government's recall priorities does not withstand scrutiny.

Second, insofar as the government's argument is that Congress was privileging the *experience* of the retirees, the government's own regulations belie that conclusion. Again, as noted above, the relevant DoD Instruction divides *all* retirees into three categories without regard to whether they retired from an active-duty or reserve component. Those categories, in turn, classify retirees based entirely upon their age and the duration of their retirement — not their time in service or any substantive facet of their military experience. It is hardly "reasonably conceivable" that Congress would draw a jurisdictional distinction between two groups of retirees for reasons that are *nowhere* reflected in the relevant military policies with respect to recall.

Third, and perhaps most significantly, the government's argument presupposes the existence of a correlation between the amenability of a group to military jurisdiction and the likelihood that it will be relied upon to augment active-duty personnel in a crisis. In fact, there is no such correlation. Long before the government would ever involuntarily recall any retired servicemembers, it would first rely upon the reserve components — the members of which are not subject to the UCMJ except when activated or on inactive-duty training. *See* 10 U.S.C.

§ 802(a)(1), (3); *see also United States* v. *Morita*, 74 M.J. 116, 122–23 (C.A.A.F. 2015).

The government caricatures Mr. Begani's argument as trying "'to divorce' military jurisdiction over Fleet Reservists 'from the military and national defense context.'" Gov't Br. 37 (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 68 (1981)). In fact, Congress has *already* "divorced" military jurisdiction "from the military and national defense context" by *not* extending it to encompass inactive reservists or reservist retirees. *See* 10 U.S.C. § 802(a)(3), (5). It is a little late for the government to insist on parity between court-martial jurisdiction and those non-active-duty personnel who could be relied upon to augment active-duty troops in a future contingency. Of the three major sources of such manpower, only one — active-duty retirees — remains subject to the UCMJ for offenses committed *while* inactive.

In that respect, this case bears a remarkably close resemblance to *Baxstrom* v. *Herold*, 383 U.S. 107 (1966). At issue there was a New York law that provided for the involuntary civil commitment to a mental institution of prisoners who had finished serving criminal sentences — without the same judicial procedures that New York otherwise required

for civil commitments. As Chief Justice Warren explained for the Court, such a distinction was irrational in violation of the Equal Protection Clause: "Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all." *Id.* at 111; *see also id.* at 111–12 ("For purposes of granting judicial review . . . , there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.").

Applying that logic here, it is entirely arbitrary for Congress to subject active-duty retirees to court-martial jurisdiction in circumstances in which neither inactive reservists nor reservist retirees may be so tried. And although that may underscore the constitutional infirmity of subjecting any retirees to the UCMJ more generally, as relevant here, it illuminates the lack of any rationale for treating active-duty and reservist retirees differently — and why Article 2(a) violates equal protection.

### B. Article 2(a)'s Disparate Jurisdictional Treatment Also Triggers — and Fails — Strict Scrutiny

Even if this Court agrees with the government that there *is* a rational basis for Article 2(a)'s disparate jurisdictional treatment of active-duty and reservist retirees, that conclusion is necessary, but not sufficient, to affirm Mr. Begani's convictions. Because Article 2(a) implicates Mr. Begani's Sixth Amendment right to a jury trial, its disparate jurisdictional treatment of active-duty and reservist retirees triggers strict scrutiny — and can be upheld only if it is narrowly tailored to achieve a compelling governmental interest.

Notably, the government does not argue that Article 2(a)'s distinction between active-duty and reservist retirees *could* survive strict scrutiny. Instead, its opposition to strict scrutiny rests entirely on its assertion that Mr. Begani has no Sixth Amendment jury-trial right in the first place, and that Mr. Begani "concede[d] that even if he prevails on the merits, Congress could constitutionally continue to deny both groups the right that he decries as fundamental." Gov't Br. 39 (citing Opening Br. 42). Again, this is not true. Not only did Mr. Begani petition this Court to review whether it is *ever* constitutional to subject a retiree to court-martial jurisdiction, *see* Supp. to Pet. 1, 25–27, but his

opening brief specifically noted the extent to which this remains an *open* question. Opening Br. 35–36 & n.17; *see also Dinger*, 76 M.J. at 556 (explaining why the NMCCA had to resort to "first principles" in addressing that issue). Indeed, a decision by the U.S. District Court for the District of Columbia on this very question is expected shortly. *See Larrabee* v. *Braithwaite*, No. 19-654-RJL (D.D.C.). Against that backdrop, it is hardly obvious that the scope of Article 2(a) is wholly unrelated to Mr. Begani's fundamental right to a jury trial.

In any event, as Mr. Begani noted in his opening brief, Article 2 implicates a "broader set of constitutional values" 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); *see* Opening Br. 36–37 (arguing for heightened scrutiny even if "retirees are wholly unprotected by the . . . right to trial by jury" (citing *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003))); *cf.* *Augustus* v. *Roemer*, 771 F. Supp. 1458, 1467–68 (E.D. La. 1991) (holding that, even though there is no fundamental right to bail, once a statute has created a bail system, a "fundamental right of access to that system" triggers strict scrutiny).

Unlike the government's inapposite examples, Gov't Br. 39–40, the question here is whether Congress must have a compelling reason for depriving *some* similarly situated individuals (active-duty retirees who commit offenses while retired) of a right to a civilian trial and jury of their peers drawn, but *not* others (reservist retirees who commit the same offenses). No sky would fall if the answer is "yes."[8]

* * *

On page 31 of its brief, the government (perhaps unintentionally) argues that "[i]t has long been understood that servicemembers in a retired status continue to maintain a close relationship with the Armed Forces, which necessitates the *uniform* application of military

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8. Holding that Article 2(a)(6) violates equal protection would not only have no impact on the government's ability to involuntarily recall retirees going forward, *ante* at 9 n.6, but it would also not impair the government's existing ability to recall retirees to active duty to court-martial them for past offenses committed while on active duty under Article 2(a)(1) and Article 3. *See, e.g.*, *Morgan v. Mahoney*, 50 M.J. 633, 633–36 (A.F. Ct. Crim. App. 1999); *see also United States* v. *Hennis*, 79 M.J. 370, 378, 380 (C.A.A.F. 2020), *petition for cert. filed*, No. 20-301 (U.S. docketed Sept. 9, 2020).

Nor would such a holding provide retired servicemembers with a windfall; they would remain subject to trial in civilian court for civilian criminal offenses — as Mr. Begani was here. *See, e.g.*, 18 U.S.C. § 3261(d) (those who have "cease[d] to be subject" to the UCMJ can be prosecuted under the Military Extraterritorial Jurisdiction Act).

discipline." Gov't Br. 31 (emphasis added). But that's just it — Article 2(a) does not subject "servicemembers in a retired status" to "the *uniform* application of military discipline"; it treats them *differently*, and for no good reason. That is why the disparate jurisdictional treatment of active-duty and reservist retirees in Article 2(a) of the UCMJ fails equal protection and thereby violates the Due Process Clause of the Fifth Amendment.

## III. MR. BEGANI IS ENTITLED TO DISMISSAL OF HIS CONVICTIONS

Even if Article 2(a) violates equal protection, the government maintains that Mr. Begani is not entitled to relief because he waived his objection in his plea agreement by waiving all "waivable" claims (except one claim that is of no moment here). Of course, if Mr. Begani is correct that Article 2(a)'s distinction between active-duty and reservist retirees violates equal protection, then the statute on which the subject-matter jurisdiction of his court-martial was based cannot constitutionally be applied to him.[9]

9. In his opening brief, Mr. Begani explained why, if Article 2(a)'s distinction between active-duty and reservist retirees violates equal protection, the proper remedy would be to bar application of Article 2(a)(6) in his case — rather than to expand the scope of Article 2(a)(5). Opening Br. 42–44. The government's brief offers no response.

In arguing that Mr. Begani nevertheless waived his jurisdictional objection, the government relies upon inapposite cases and a misreading of the Supreme Court's recent decision in *Class* v. *United States*, 138 S. Ct. 798 (2018). If Article 2(a) violates equal protection as applied to him, Mr. Begani is entitled to dismissal of his convictions.

### A. Mr. Begani's Equal Protection Claim Goes Directly To the Subject-Matter Jurisdiction of His Court-Martial

The government's argument that Mr. Begani's equal protection claim was waived opens with the assertion that "[a] majority of federal courts do not treat constitutional challenges to criminal statutes as challenges to subject-matter jurisdiction." Gov't Br. 5. That's true so far as it goes, but it is entirely irrelevant here. Mr. Begani is not challenging the constitutionality of the statutes he was convicted of *violating* (Articles 80 and 120b of the UCMJ, 10 U.S.C. §§ 880, 920b); he is challenging the constitutionality of the statute on which the subject-matter jurisdiction of his court-martial rested — Article 2(a)(6), 10 U.S.C. § 802(a)(6).

The government tries to collapse this distinction by claiming that "a violation of law is a necessary prerequisite to original jurisdiction under 18 U.S.C. § 3231." Gov't Br. 5. That is incorrect. All that is

required to assert jurisdiction under § 3231 is an *indictment* for an "offense[] against the laws of the United States." This is far more than a semantic distinction: The government's failure to prove its case for whatever reason, *including* a determination that the charged offenses are unconstitutional, does not deprive the district court of subject-matter jurisdiction under § 3231 — and the government points to no case holding to the contrary.

And as this Court has long recognized, Article 2(a) is necessarily jurisdictional, for if it did not lawfully confer jurisdiction upon the court-martial, then the court-martial necessarily lacked the power to act regardless of any waiver or forfeiture. *See, e.g.*, *United States* v. *Hale*, 78 M.J. 268, 269 n.2, 271–74 (C.A.A.F. 2019) (specifying review of "[w]hether the lower court erred in concluding the court-martial had jurisdiction over" a charged specification as modified by the lower court, noting that "[c]ourt-martial jurisdiction is determined by Article 2," and finding jurisdiction over the modified specification); *see also Loving* v. *United States*, 68 M.J. 1, 27 n.9 (C.A.A.F. 2009) (Ryan, J., dissenting) ("[I]t is *our* responsibility to ensure we have jurisdiction, not [the accused's]." (emphasis added)).

The government tries to sidestep this obvious point by shifting its focus to the waivability, in *most* contexts, of equal protection claims, Gov't Br. 6–7, and its strange suggestion that Mr. Begani's equal protection argument "at best *incidentally* implicates subject-matter jurisdiction." *Id.* at 13 (emphasis added); *see also id.* at 9 ("a disparity that *allegedly* sounds in equal protection" (emphasis added)).

But there's nothing "alleged" or "incidental" about it. If Article 2(a)(6) cannot lawfully be applied to Mr. Begani, then no statute authorized his trial by court-martial, and no statute authorized the court-martial to accept his guilty plea, regardless of his actions below. Indeed, the government does not identify a single contrary case — in which any court has ever held that waiver or forfeiture applied to a criminal defendant's constitutional objection to the statute on which the subject-matter jurisdiction of the trial court rested.[10]

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10. The government's brief claims that Mr. Begani's equal protection claim is "no more related to a court-martial's subject matter jurisdiction than was the due process challenge to subject-matter jurisdiction in" *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987). Again, the government is mistaken.

In *Solorio*, of course, the Supreme Court held that active-duty servicemembers could constitutionally be subject to court-martial for any offense, even those with no service connection. But at an earlier stage in that case, the Coast Guard Court of Military Review had used

### B. Even if It Is Not "Jurisdictional," Mr. Begani's Equal Protection Claim Is Properly Before This Court

Even if this Court is inclined to agree with the government that a constitutional challenge to a statute conferring subject-matter jurisdiction is somehow not "jurisdictional," Mr. Begani's equal protection claim is still properly before this Court under the Supreme Court's recent guidance in *Class*, because it does not "contradict the terms of the indictment or the written plea agreement." 138 S. Ct. at 804. Instead, as *Class* reaffirms, an unconditional plea agreement does not waive the defendant's right to bring constitutional challenges *unrelated* to the plea on direct appeal — including, in *Class*, a constitutional challenge to the statute of conviction. *Id*. at 805. It follows *a fortiori* that a constitutional challenge to the subject-matter jurisdiction of the trial court is likewise not waived by an unconditional

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*Solorio* to announce a broader service-connection test — which Solorio objected to on the ground that it was impermissibly retroactive in violation of the Due Process Clause. *See* Petitioner's Reply Br. at 16–19, *Solorio*, 487 U.S. 435 (No. 85-1581), 1987 WL 881011. Thus, the unpreserved objection that the Supreme Court refused to consider in *Solorio* was not that the court-martial lacked subject-matter jurisdiction; it was that trying Solorio based on *valid* statutory and constitutional assertions of subject-matter jurisdiction was *unfair*. *See Solorio*, 487 U.S. at 451 n.18.

plea agreement — even if such a jurisdictional argument could otherwise be subject to waiver or forfeiture.

The government attempts to distinguish *Class* on three grounds, but none are persuasive. First, the government argues that, unlike the defendant in *Class*, Mr. Begani is "not asserting the right 'not to be haled into court at all,' but instead belatedly urges a right to be haled into court equally." Gov't Br. 11. Again, this mischaracterizes Mr. Begani's argument. If Mr. Begani were a retired reservist, he could not be haled into a military court for these offenses "at all." If Article 2(a)(6) violates equal protection, then the same is true for Mr. Begani no matter what else is true about his case.

But it also misreads *Class* as being limited to constitutional challenges to the offense of conviction. To the contrary, the whole point of Justice Breyer's majority opinion in *Class* was that a waiver of claims in a guilty plea is limited to those issues subsumed within the plea. Class himself remained subject to the jurisdiction of the D.C. federal district court; he simply challenged the constitutionality of the offense of conviction. If anything, Mr. Begani's constitutional claim is, in this respect, an even *stronger* case for the rule *Class* articulates.

Second, the government tries to distinguish between implicit and explicit waiver, suggesting that Mr. Begani's stipulation that he "agree[s] to waive all motions that are otherwise non-waivable" somehow distinguishes his waiver from the waiver in *Class*. Gov't Br. 12. But this misreads *Class*. There, the Supreme Court was focused on the effect of a guilty plea on claims that the plea did not *expressly* encompass. *See Al Bahlul* v. *United States*, 967 F.3d 858, 875 (D.C. Cir. 2020) ("The Court twice emphasized that Class had not waived his objections through conduct other than his guilty plea, thus making clear that the Court was addressing only the effect of pleading guilty." (citation omitted)). *Class* would be little more than a plea-agreement drafting rule if a general waiver of non-waivable motions was enough to explicitly waive every conceivable constitutional objection.

Finally, whereas *Class* stressed that its holding was limited to claims that "can be 'resolved without any need to venture beyond that record,'" 138 S. Ct. at 804 (quoting *United States* v. *Broce*, 488 U.S. 563, 575 (1989)), the government somehow argues that this case isn't one of them. *See* Gov't Br. 12 ("Unlike *Class*, Appellant did not raise at trial the constitutional challenge now urged, leaving the Record

undeveloped."). Tellingly, the government does not identify a *single* factual issue the further development of which would benefit this Court's resolution of Mr. Begani's equal protection claim. Instead, just like in *Class*, this Court is faced with a constitutional challenge unrelated to a criminal defendant's guilty plea that it has everything it needs to decide at this juncture and on this record.

## CONCLUSION

The government's brief is replete with references to "deference," suggesting that this Court ought to put a thumb on the scale in favor of Congress when assessing Mr. Begani's equal protection claim. *See, e.g.*, Gov't Br. 27, 33, 37; *see also Solorio*, 483 U.S. at 447. But as the Supreme Court made clear in one of the main cases on which this deference argument purports to rely, "deference does not mean abdication." *Rostker*, 453 U.S. at 70. Rather, if anything, deference "is factored into the importance of the government's asserted interest," and is not an interest unto itself. *Harrison* v. *Kernan*, 971 F.3d 1069, 1079 (9th Cir. 2020).

*Solorio* drives home that, where offenses by active-duty servicemembers are at issue, the deference due to Congress is at its apex. But the Supreme Court has been just as clear that "[d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial presents 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)). Thus, it has shown no

comparable deference to Congress's jurisdictional determinations in Article 2(a) where *non*-active-duty personnel are at issue — including retirees from both active-duty and reserve components.

Here, the only interest that the government has identified as justifying Article 2(a)'s *distinction* between active-duty and reservist retirees is an interest that such a distinction simply does not support — the need to "maintain good order and discipline among the most experienced retired servicemembers, who by statute are principally subject to recall." Gov't Br. 36. That interest may bear upon whether it is constitutional to subject *all* retired servicemembers to the UCMJ, but it just does not support distinguishing *between* them.

Where, as here, Congress has not amended the relevant provisions since 1950, it is clear that Article 2(a)'s disparate treatment of similarly situated retired servicemembers is a relic of a bygone era — that may have been arbitrary then, and is certainly arbitrary now, in violation of Mr. Begani's right to equal protection under the Due Process Clause of the Fifth Amendment.

For the foregoing reasons and those previously stated, Mr. Begani's convictions should be dismissed.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that on November 16, 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 Government Appellate Divisions.

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## CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,875 words. This brief complies with the typeface and type-style requirements of Rule 37.

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