IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	SUPPLEMENTAL OPENING
Appellee / Cross-Appellant,	)	BRIEF ON BEHALF OF
	)	APPELLANT /
v.	)	CROSS-APPELLEE
	)	
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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ISSUE PRESENTED[1]

SUPPLEMENTAL GRANTED ISSUE (No. 20-0217/NA)

WHETHER FLEET RESERVISTS HAVE A SUFFICIENT CURRENT CONNECTION TO THE MILITARY FOR CONGRESS TO SUBJECT THEM TO CONSTANT UCMJ JURISDICTION.

STATEMENT OF STATUTORY JURISDICTION

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

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1. In addition to the supplemental issue addressed in this brief, these consolidated cases present two issues addressed in prior briefing:

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

Opening Br. at 1. This brief discusses the supplemental granted issue.

2. 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[3]

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

3. Mr. Begani respectfully refers this Court to his Opening Brief for additional facts and procedural history relevant to the previously granted and certified issues. *See* Opening Br. at 2–7.

corrosion maintenance contractor. *Id*. at 7. Mr. Begani did not have notice that he was subject to the UCMJ for conduct occurring while he was retired as a member of the Fleet Reserve. *Id*. at 294.

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.[4] 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.

On appeal, a unanimous three-judge panel of the NMCCA held that the assertion of military jurisdiction over Mr. Begani was

4. 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.

unconstitutional—in violation of equal protection principles enmeshed in the Fifth Amendment's Due Process Clause. *See United States* v. *Begani*, 79 M.J. 620, 622–23 (N-M. Ct. Crim. App. 2019), J.A. 86.

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,[5] 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. As relevant here, Judge Stephens (joined by Senior Judge Tang) concluded under *de novo* review that, as a member of the Fleet Reserve, Mr. Begani

5. 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.

remained part of the "land or naval forces," and therefore remained subject to court-martial for post-retirement offenses under the NMCCA's decision in *United States* v. *Dinger*, 76 M.J. 552, 554 n.3 (N-M. Ct. Crim. App. 2017), and the Court of Military Appeals' ruling in *United States* v. *Overton*, 24 M.J. 309 (C.M.A. 1987). *See* 79 M.J. at 775, J.A. 12. Although Judge Gaston and Senior Judge King only concurred in part and in the result, they joined Judge Stephens's discussion on this point. *See id*. at 783 (Gaston, J., concurring in part and in the result), J.A. 19.

Mr. Begani timely petitioned for review under Article 67(a)(3) on three issues, including both his equal protection challenge to Article 2(a) and his broader claim that members of the Fleet Reserve are not constitutionally subject to the UCMJ in retirement. On 25 June 2020, this Court granted Mr. Begani's petition only as to the equal protection issue. On 23 July 2020, the Judge Advocate General of the Navy timely certified an additional issue for review—whether Mr. Begani had waived or forfeited his equal protection claim—under Article 67(a)(2). On 24 July 2020, this Court consolidated the two cases for briefing and argument.

On 23 November 2020, Mr. Begani petitioned for reconsideration of this Court's denial of discretionary review as to whether Fleet Reservists constitutionally remain subject to the UCMJ—in light of the D.C. district court's holding in *Larrabee* v. *Braithwaite*, No. 19-654, 2020 WL 6822706 (D.D.C. Nov. 20, 2020), that they do not. On 8 December 2020, this Court granted Mr. Begani's petition for reconsideration—and granted review on the supplemental issue addressed herein.

SUMMARY OF ARGUMENT

Mr. Begani, a member of the Fleet Reserve,[6] is one of more than 1.5 million individuals currently retired from active duty.[7] He receives a

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6. In *United States* v. *Allen*, this Court's predecessor noted that Fleet Reserve "status" is "almost identical" to being a member of "the retired list." 33 M.J. 209, 216 (C.M.A. 1991), *overruled on other grounds* by *United States* v. *Dinger*, 77 M.J. 447 (C.A.A.F. 2018); *see also Dinger*, 76 M.J. at 554 n.3 ("Since personnel in either [Fleet Marine Reserve or Retired List] status are subject to similar obligations, we too find no grounds to distinguish between the two categories with respect to . . . jurisdiction . . . .").

7. As of September 30, 2019, there were 1,584,998 retired servicemembers receiving pay, excluding retired reservists. Dep't of Defense, *Statistical Report on the Military Retirement System: Fiscal Year 2019*, at 48 (2020), *available at* https://media.defense.gov/2020/Aug/12/2002475697/-1/-1/0/MRS_STATRPT_2019_FINAL.PDF. The *Statistical Report* does not distinguish between members of the Fleet Reserve and other retirees.

military pension in the form of "retainer pay,"[8] but has no regular military duties or authority. He was nevertheless tried and convicted by a court-martial for civilian offenses committed after he left active duty. Because he was no longer part of the "land and naval forces" at the time of his offenses, and because, in any event, his offenses had no significant connection to the military, his court-martial was unconstitutional.

As the Supreme Court explained 65 years ago, "given its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955) (quoting U.S. CONST. art. I, § 8, cl. 14). *Toth* thus held that the Constitution forbids the court-martial of a servicemember after his discharge—even for crimes committed while on active duty in a foreign combat theater. But the Supreme Court has never clarified whether *Toth* applies to *retired* servicemembers—and, if so, how.

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8. 10 U.S.C. § 8330. Though retired pay is under a different statute, Article 2 "makes no distinction between retired pay and retainer pay." *United States v. Morris*, 54 M.J. 898, 899 (N-M. Ct. Crim. App. 2001).

For a time, this Court's predecessor had distinguished *Toth* as applied to retired servicemembers on the ground that, unlike former soldiers who had simply been discharged, most retirees continue to receive pay. *See, e.g.*, *Pearson* v. *Bloss*, 28 M.J. 376, 378 (C.M.A. 1989) (citing *In re Haynes*, 679 F.2d 718, 719 (7th Cir. 1982) (treating "retainer pay for serving in the Fleet Reserve" as "reduced compensation for reduced current services" because "the military retiree has continuing duties, military retirement is more like wages than it is like a pension")); *Overton*, 24 M.J. at 311–12; *United States* v. *Hooper*, 26 C.M.R. 417, 425 (C.M.A. 1958) ("Certainly, one . . . who receives a salary to assure his availability . . . is a part of the land or naval forces."). But in two separate lines of cases, the Supreme Court has vitiated this reasoning.

First, in *Reid* v. *Covert*, 354 U.S. 1 (1957), and *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960), the Supreme Court rejected the government's argument that civilian dependents of servicemembers were among those "in" the "land and naval forces" for purposes of the Make Rules Clause, and thus constitutionally subject to trial by court-martial, because they were "accompanying a serviceman

abroad at Government expense and receiving other benefits from the Government." *Covert*, 354 U.S. at 22–23 (plurality opinion); *see Singleton*, 361 U.S. at 246–49 (adopting *Covert*). And the companion rulings in *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960), and *Grisham* v. *Hagen*, 361 U.S. 278 (1960), likewise rejected Congress's extension of military jurisdiction to civilian employees of the military, even though they were receiving a regular salary for their service overseas alongside the military. *Guagliardo*, 361 U.S. at 282–87. Under these decisions, military jurisdiction cannot be justified solely because the defendant receives some form of compensation from the military, whatever its function. *See Larrabee*, 2020 WL 6822706, at *6 ("[R]eceipt of military retirement benefits has never been enough, by itself, to subject a class of individuals to court-martial jurisdiction.").

Second, in *Barker* v. *Kansas*, 503 U.S. 594 (1992), the Supreme Court held that military retired pay is not current income, but is instead "deferred pay for past services." *Id.* at 605. Even if a salary, on its own, *could* be sufficient to subject the recipient to court-martial, *Barker* confirms that military retirees—including members of the Fleet Reserve, such as Mr. Begani—are *pensioners*, not part-time, salaried

employees. As the most recent military court decision to look at this issue in depth held, *Barker* necessarily eliminated the central analytical justification relied upon by this Court in *Hooper* and *Overton* for holding that retirees remain members of the "land and naval forces" under the Make Rules Clause—and, in the process, the constitutional rationale for trying them by court-martial. *See Dinger*, 76 M.J. at 555; *see also Larrabee*, 2020 WL 6822706, at *5 ("The Government's position rests on the longstanding, but largely inaccurate, assumption that this retainer pay represents reduced compensation for current part-time services.").

Apart from considerations of pay, this Court's predecessor also distinguished *Toth* in retiree cases on the ground that retirees, unlike former soldiers who had been completely discharged, can be involuntarily recalled to active duty. *See*, *e.g.*, *Pearson*, 28 M.J. at 379–80; *Overton*, 24 M.J. at 310–11; *Hooper*, 26 C.M.R. at 645; *see also Dinger*, 76 M.J. at 556–57. On this view, military jurisdiction over retirees is justified, as the NMCCA concluded in *Dinger*, not because of any continuing receipt of pay, but rather to promote "good order and discipline" among those who *may*, at some indefinite point in the future, be needed for additional active-duty service. *See* 76 M.J. at 556–57.

But this justification is far too broad to be persuasive. Not only would it mean that *all* military retirees could be subject to court-martial for any crime committed until their dying day, but it also means that retirees would be subject to far more sweeping military jurisdiction than *reservists*—who may only be tried by court-martial for offenses committed on active duty or during inactive-duty training, and not for any crime that they might commit in civilian life, even in between active-duty assignments. *See, e.g.*, *United States* v. *Morita*, 74 M.J. 116, 122–23 (C.A.A.F. 2015); *see also* 10 U.S.C. § 802(d) (outlining when reservists can be tried by court-martial).

As the D.C. district court explained in *Larrabee*, this anomaly drives home the absence of a satisfying justification for continuing to subject retirees to constant UCMJ jurisdiction: "Because military retirees are much less likely to be recalled to active-duty service than Reservists are, the distinction in whether these two similar groups are subject to court-martial jurisdiction seems arbitrary at best." 2020 WL 6822706, at *6. "To say the least, it is difficult to square these distinctions with the demands of good order and discipline that are the principal objectives of the[] military's court-martial jurisdiction." *Id*. at

*7; *see also Toth*, 350 U.S. at 22 (courts-martial may exercise only "the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops *in active service*" (emphasis added)).

Tying military jurisdiction over retirees to the possibility of involuntary future recall is not just arbitrary; it is also anachronistic. Under current law, few retirees are realistically subject to such recall. Instead, since Vietnam, robust reserve components—rather than the retired lists—have been the military's go-to source for augmenting the active-duty force. *See* Library of Congress, *Historical Attempts to Reorganize the Reserve Components*, at 15–17 (2007), *available at* http://www.loc.gov/rr/frd/pdf-files/CNGR_Reorganization-Reserve-Components.pdf.

To that end, the government has not been able to provide any data—even when ordered to do so by the NMCCA—showing that *any* retirees have been involuntarily recalled to active duty in recent years, let alone enough to make the specter of such recall anything but illusory. And even if, the lack of any actual evidence notwithstanding, the ability to involuntarily recall retired servicemembers remains a compelling interest for the government today, it does not follow that

such authority would be undermined if retirees were subject only to *civilian* criminal jurisdiction for offenses they commit *while* retired; again, that's exactly what current law provides with respect to inactive reservists.

But even if, by dint of their (entirely hypothetical) potential future service, retirees were viewed as part of the "land and naval forces," their amenability to court-martial should be limited, as it is for reservists, to crimes bearing some nexus to their military responsibilities. If, contrary to Mr. Begani's submission, retirees who have not been lawfully recalled remain subject to constant UCMJ jurisdiction at all, this Court should at the very least hold that such jurisdiction is constitutionally limited to crimes substantially related to their residual military status. Mr. Begani's case does not meet such a standard, and jurisdiction over his post-retirement offenses is therefore unconstitutional.

Finally, stare decisis does not require a different result. As this Court explained in *United States* v. *Andrews*, 77 M.J. 393 (C.A.A.F. 2018), whether to overrule a prior precedent depends upon a balance of considerations, including "whether the prior decision is unworkable or

poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Id.* at 399 (citation and internal quotation marks omitted).

Here, the Court of Military Appeals' reasoning in *Overton*—the last time this Court or its predecessor reviewed the constitutionality of Article 2(a)(6)—was cursory at best. *Overton*, which relied largely on reasoning from the Court of Military Appeals' 1958 decision in *Hooper*, has indisputably been overtaken by events—to wit, both the Supreme Court's subsequent decision in *Barker* and the formal and practical demise of the retired list as a meaningful force augmentation resource. What's more, prosecutions of retired servicemembers for post-retirement offenses remain rare. And reaffirming the proper limits of military jurisdiction will only *increase*—not undermine—"public confidence in the law." *See, e.g.*, *Dinger*, 77 M.J. at 452–53 (overruling two of this Court's prior decisions).

For all of these reasons, Article 2(a)(6) is unconstitutional—either on its face or as applied to Mr. Begani's offenses—and his convictions should therefore be dismissed for lack of jurisdiction.

ARGUMENT[9]

I. THE CONSTITUTION FORBIDS COURTS-MARTIAL OF RETIRED SERVICEMEMBERS FOR POST-RETIREMENT OFFENSES

As the Supreme Court observed in *Toth*, "[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*.'" 350 U.S. at 23 (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230–31 (1821)). This is so, Justice Black elaborated three years later, because "[e]very 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 and of other treasured constitutional protections." *Covert*, 354 U.S. at 21 (plurality opinion); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122–23 (1866) ("[I]f ideas can be expressed in words, and language has any meaning, this right [of trial by jury]—one of the most valuable in a free country—is preserved to everyone accused of [a] crime who is not attached to the army, or navy, or militia in actual service.").

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9. The subject-matter jurisdiction of a court-martial is not subject to waiver or forfeiture—and is therefore reviewed *de novo*. *United States* v. *Hennis*, 79 M.J. 370, 374, 378–79 (C.A.A.F. 2020), *petition for cert. filed*, No. 20-301 (U.S. Sept. 4, 2020).

Thus, although the Supreme Court has repeatedly shown deference to the military in general and to the system of military justice Congress created in the UCMJ in particular, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 753 (1975), the one topic on which it has (properly) shown no deference is the scope of military jurisdiction over non-active-duty personnel. *See, e.g.*, *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 585 n.16 (2006) ("[W]e do not apply *Councilman* abstention when there is a substantial question whether a military tribunal has personal jurisdiction over the defendant").[10]

The unifying theme of these decisions has been the centrality of the accused's *current* military status for purposes of the Make Rules Clause. As the Supreme Court explained in *Singleton*, "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense." 361 U.S. at 243; *see id.* ("To say that military jurisdiction defies definition in terms of military 'status' is to defy unambiguous language of Art. I, § 8, cl. 14, as well as the historical

10. "Personal jurisdiction" may be a misnomer here because the constitutional objection to courts-martial of retirees like Mr. Begani for post-retirement conduct "is a structural question of subject matter jurisdiction." *Al Bahlul* v. *United States*, 840 F.3d 757, 760 n.1 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

background thereof and the precedents with reference thereto." (citation omitted)); *see also Solorio* v. *United States*, 483 U.S. 435, 439–40 (1987) (quoting this language). As Judge Leon summarized in *Larrabee*, the status test cuts both ways:

> It is beyond question that courts should not second guess the policy judgment of Congress to extend court-martial jurisdiction to offenses by individuals who plainly fall within the "land and naval forces," as the plaintiff in *Solorio* did. However, the Supreme Court has *never* implied, much less held, that courts have *no* role in determining whether the individuals whom Congress has subjected to court-martial jurisdiction actually fall within the ordinary meaning of the "land and naval forces" in the Constitution.

2020 WL 6822706, at *4.

The central question the Supreme Court has asked is "whether the accused in the court-martial proceeding is a person who *can be regarded* as falling within the term 'land and naval Forces.'" *Singleton*, 361 U.S. at 240–41 (emphasis added). That the military charges an individual who falls within a specific class of offenders Congress has subjected to the UCMJ has been a necessary condition, but not a sufficient one. *See Covert*, 354 U.S. at 22–23; *Toth*, 350 U.S. at 13–15 & n.2. Instead, the Supreme Court has looked to whether "certain overriding demands of discipline and duty" justify the assertion of

military—rather than civilian—jurisdiction. *Solorio*, 483 U.S. at 440 (quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)). *See generally Parker* v. *Levy*, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

Retired servicemembers "are certainly not obvious members of the armed forces, as are soldiers on active duty; on the other hand they are not 'full-fledged' civilians." Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 318 (1964). This Court's predecessor nevertheless held that retirees, like Mr. Begani, are still "part of the nation's 'land and naval Forces'" because they (1) are subject to recall; and (2) continue to receive compensation. *Pearson*, 28 M.J. at 378–80; *Overton*, 24 M.J. at 310–11; *Hooper*, 26 C.M.R. at 645.

As Judge Leon recently explained, though, neither argument is persuasive. After all, no similar "demands of discipline and duty" have justified courts-martial of civilians accompanying the armed forces

abroad, *see, e.g.*, *Singleton*, 361 U.S. at 238–49; or of discharged ex-soldiers—even for crimes committed while on active duty in a foreign combat theater. *See Toth*, 350 U.S. at 14–17. And neither the Supreme Court nor this Court has ever explained how the "demands of discipline and duty" later cited in *Solorio* are advanced by subjecting military retirees to trial by court-martial—especially for post-retirement offenses. *See Larrabee*, 2020 WL 6822706, at *5 ("Neither [of the government's arguments] suffices to demonstrate why military retirees *plainly* fall within the 'land and naval forces' or why subjecting them to court-martial jurisdiction is *necessary* to maintain good order and discipline.").

A. The Receipt of Pay is Not a Sufficient Basis for Treating Retirees as Part of the "Land and Naval Forces"

The status of a "retired" servicemember dates to 1861, when Congress first authorized a "retired list" for Army and Marine Corps officers who were either physically disabled or who had served for at least forty consecutive years. *See* Act of Aug. 3, 1861, ch. 42, §§ 15–18, 12 Stat. 287, 289–90, J.A. 184. Unlike soldiers who had been "discharged" from the service, those on the retired list were generally entitled to receive annual pay at a reduced rate. *See* Frank O. House,

The Retired Officer: Status, Duties, and Responsibilities, 26 A.F. L. REV. 111, 113 (1987).

Against that background, the Supreme Court held in *United States* v. *Tyler*, 105 U.S. 244 (1882), that a military retiree receiving pay was still "serving" in the military for purposes of a statute that provided for raises for every five years of a military officer's service. For retirees such as Tyler, "the compensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only." *Id.* at 245. And although *Tyler* only raised the scope of a specific federal benefit, it suggested in dicta that retirees "may be tried, not by a jury, as other citizens are, but by a military court-martial." *Id. Tyler* thus "first tacitly recognized the power of Congress to authorize court-martial jurisdiction" over retirees. *Dinger*, 76 M.J. at 555.

As one commenter has explained, "the amenability of retired regulars to court-martial, though unknown to the founding fathers, is as old as the retired list itself, which was also unknown to them." Bishop, *supra*, at 332. Indeed, both the Continental Congress and the U.S. Congress under the Constitution provided for post-duty compensation *without* military status. The Continental Congress in 1780 offered to

"officers who shall continue in the service to the end of the war" half pay for life *after* their "*reduction*"[11] *i.e.*, their discharge, from the Army.[12] It extended a similar benefit to "hospital department" officers in 1781.[13]

After the Constitution was ratified, Congress continued pensions for Revolutionary War "invalids."[14] Yet the Articles of War that the Continental Congress enacted in 1776,[15] and which were used (as amended in 1786)[16] through ratification of the Constitution in 1788

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11. 18 JOURNALS OF THE CONTINENTAL CONGRESS 958–60 (Oct. 21, 1780) (emphasis added), *available at* https://memory.loc.gov/ammem/amlaw/lwjclink.html (each volume is a separate link from this page).

12. The Continental Congress again stated in 1783 that a recipient's military "service" only had to "continue . . . to the end of the war" to receive this compensation, but reduced it to five years' full pay. 24 *id.* at 207–10 (Mar. 22, 1783).

13. 19 *id.* at 68–70 (Jan. 17, 1781). The Continental Congress later authorized "retir[ed] officers" from the "hospital department" who had "retired at different periods" from duty to accept five years' full pay, but only "in lieu of whatever may be now due to them since the time of their *retiring from service*." 24 *id.* at 208 (Mar. 22, 1783) (emphasis added).

14. Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95 (stating that "military pensions" which have been granted and paid by the states . . . to the invalids who were wounded and disabled during the late war, shall be continued and paid by the United States").

15. Articles of War, 5 JOURNALS OF THE CONTINENTAL CONGRESS 788–807 (Sept. 20, 1776).

16. 30 *id.* at 316–322 (May 31, 1786).

(and ratification of the Fifth Amendment in 1791),[17] had no clear applicability to these quasi-retirees. Such jurisdiction would have been absurd, given that "interference of the military with the civil courts [had] aroused great anxiety and antagonism . . . throughout the colonies." *Covert*, 354 U.S. at 28 (plurality opinion).

That may be why, notwithstanding *Tyler*'s implicit endorsement of the practice in 1882, "reported courts-martial of military retirees [have historically been] relatively rare." J. Mackey Ives & Michael J. Davidson, *Court-Martial Jurisdiction Over Retirees Under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 MIL. L. REV. 1, 11 (2003). But in the handful of reported cases in which a retiree has challenged his amenability to military jurisdiction, the reviewing court invariably rested its analysis on *Tyler*—and the facts that the accused (1) was still receiving military pay and (2) remained theoretically subject to recall to active duty.

For example, in *United States ex rel. Pasela* v. *Fenno*, 167 F.2d 593 (2d Cir. 1948), the Second Circuit rejected a constitutional challenge to

17. *See* Act of Sept. 29, 1789, ch. 25, § 1, 1 Stat. 95, 96 (re-enacting the 1786 Articles of War into law under the Constitution).

the court-martial of a member of the Fleet Reserve for an offense committed after he had left active duty. As the court explained, "[t]he Fleet Reserve is so constituted that it falls reasonably and readily within the phrase 'naval forces' in the Fifth Amendment. Its membership is composed of trained personnel who are paid on the basis of their length of service and remain subject to call to active duty." *Id.* at 595.

Shortly after *Toth*, this Court's predecessor embraced that reasoning in *United States* v. *Hooper*:

> Officers on the retired list are not mere pensioners in any sense of the word. They form a vital segment of our national defense[,] for their experience and mature judgment are relied upon heavily in times of emergency. The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies.

26 C.M.R. at 425; *see also Hooper* v. *United States*, 326 F.2d 982, 987 (Ct. Cl. 1964) (adopting this analysis on collateral review despite "certain doubts" as to its validity). For over a century, *Tyler*'s (mis)understanding of retiree pay was thus central to lower courts' conclusions that military retirees could constitutionally be subject to courts-martial—even though the Supreme Court's decisions after and in

light of *Toth* should have eroded the compensation rationale as a sufficient predicate for military jurisdiction. *Cf. Overton*, 24 M.J. at 311.

But whether or not these cases were correctly decided at the time, they have been overtaken by subsequent events, especially the Supreme Court's decision in *Barker*.[18] There, in considering the tax treatment of retiree pay, the Court concluded that "military retirement benefits are to be considered deferred pay for past services" instead of "current compensation" to retirees "for reduced current services." 503 U.S. at 605. Among other things, as Justice White wrote for the unanimous Court, "[t]he amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement." *Id.* at 599 (citation and internal quotation marks omitted); *cf. United States* v. *Carpenter*, 37 M.J. 291, 295 (C.M.A. 1993) ("[A] retired officer has no duties . . . ."), *vacated on other grounds*, 515 U.S. 1138 (1995) (mem.).

18. The Supreme Court had reserved the question decided in *Barker* in *McCarty* v. *McCarty*, 453 U.S. 210, 222–23 & nn.15–16 (1981).

Although *Barker* observed in dicta that "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall," 503 U.S. at 599, it did so while eviscerating the part of *Tyler* that had previously carried those jurisdictional implications. As *Barker* explained, *Tyler*'s framing of retiree pay as "current compensation" had been unnecessary to the result; had failed to appreciate the disparities that "current pay for current services" would create among those who held the same preretirement rank; and had generally created confusion among courts considering how to treat retiree pay for purposes of an array of probate and tax considerations. *See id*. at 599–602.

Instead, *Barker* held that, at least for purposes of the relevant federal statute, "military retirement benefits are to be considered deferred pay for past services." *Id*. at 605; *see also Larrabee*, 2020 WL 6822706, at *5 ("The Government's position rests on the longstanding, but largely inaccurate, assumption that [Fleet Reserve] retainer pay represents reduced compensation for current part-time services.").[19]

19. The Solicitor General, as an *amicus*, had argued for exactly this understanding of retiree pay. *See* Brief for the United States as *Amicus Curiae* in Support of Petitioners at 19–21, *Barker*, 503 U.S. 594, 1991 WL 11009204 (No. 91-611).

As the NMCCA explained in *Dinger*, "from these developments it is clear that the receipt of retired pay is neither wholly necessary, nor solely sufficient, to justify court-martial jurisdiction [over retirees]." 76 M.J. at 555–56. If, as *Barker* held, Congress treats retiree pay as tantamount to a pension,[20] then that remuneration is a benefit paid to a *former* servicemember, rather than a continuing financial tether to a *current* one. Those who only receive benefits from the military can hardly be said to be "in" the "land and naval forces" for that reason. *See Covert*, 354 U.S. at 23 & n.16 (plurality opinion).

Indeed, Congress has already created an entire category of "former member[s]" of the military who receive retired pay. *See* 10 U.S.C. § 1408(a)(5) (2018) (noting that there are "former [military] member[s] entitled to retired pay under [10 U.S.C. § 12731]"). As explained in the *Code of Federal Regulations*, "[f]ormer members are" those "eligible to receive retired pay, at age 60, for [reservist] service in

20. To similar effect, the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 718, 730 (1982), generally provides "that retired pay should be treated as a form of property divisible upon divorce according to state marital property laws." Ives & Davidson, *supra*, at 52. That statutory proviso would hardly make sense if retired pay was understood as continuing compensation rather than a vested interest in deferred salary.

accordance with 10 U.S.C. [§12731], but [who] have been discharged from their respective Service or agency and maintain no military affiliation." 32 C.F.R. § 161.12 (2018). In other words, even the *government* does not treat the receipt of retired pay as conclusive of whether the recipient remains subject to the UCMJ for offenses committed after retirement.

Like these "former members" and the defendant in *Toth*, prior active-duty retirees like Mr. Begani are "ex-soldier[s] . . . wholly separated" in all meaningful ways "from the service for months, years, or perhaps decades." 350 U.S. at 21. Consistent with *Toth*, retirees should therefore be treated as *former members*, entitled to pay for past service, but not "members" of the "land and naval forces" subject to constant jurisdiction. As the NMCCA held in *Dinger* and the D.C. district court concluded in *Larrabee*, *Barker* compels this conclusion—and underscores why military jurisdiction over retired servicemembers can no longer rest on the fact that they continue to receive pay, and perhaps never should have.

B. Tying Constant Military Jurisdiction to the Specter of Involuntary Recall Would Lead to a Stunning Expansion in Military Jurisdiction

The other basis relied upon by this Court's predecessor to uphold constant UCMJ jurisdiction over retired servicemembers in *Pearson*, *Overton*, and *Hooper*, as well as by the NMCCA in *Dinger*, is that retirees remain subject to involuntary recall to active duty. *See Pearson*, 28 M.J. at 379–80; *Overton*, 24 M.J. at 310–11; *Hooper*, 26 C.M.R. at 645; *Dinger*, 76 M.J. at 556–57; *see also Kahn v. Anderson*, 255 U.S. 1, 6–7 (1921) (suggesting that "in view of the ruling in . . . *Tyler*," retired "officers are officers in the military service of the United States"). There are three different reasons why this argument is unavailing.

First, the Court of Military Appeals in *Overton* and the NMCCA in *Dinger* justified this "subject to recall" rationale based largely upon the deference Congress is owed when it legislates under the Make Rules Clause. *Overton*, 24 M.J. at 309 ("Congress, in its wisdom, has decided that court-martial jurisdiction may be exercised over members of the Fleet Marine Corps Reserve."); *see also Dinger*, 76 M.J. at 556 (citing *Solorio*, 483 U.S. at 447). But those analyses failed to recognize that this deference was derived only from cases involving *active-duty*

servicemembers—to whom there was no question that the Make Rules Clause applied. As Chief Justice Rehnquist wrote for the Court in *Solorio*, "we have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights *of servicemen* were implicated." 483 U.S. at 448 (emphasis added); *see also id.* (citing seven exemplar cases, all of which involved active-duty personnel).

The conclusion that Congress is entitled to similar deference in extending military jurisdiction to individuals who are *not* active-duty servicemembers does not remotely follow from these cases. *See Larrabee*, 2020 WL 6822706, at *4. At a more basic level, it is affirmatively belied by the numerous decisions in which the Supreme Court has recognized the special need for (and has conducted) searching review of claims that the military lacked jurisdiction based upon the offender's non-active-duty status. *See, e.g.*, *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969) (recognizing that the defendants in *Toth*, *Covert*, and *Guagliardo* were not required to exhaust military remedies as they "raised substantial arguments denying the right of the military to try them at all"). Whether Congress may subject retirees to constant UCMJ jurisdiction is therefore a question on which it should receive not the

same deference the Supreme Court afforded in *Solorio*, but rather the skepticism that marked each of the Supreme Court's decisions in *Toth*, *Covert*, *Singleton*, *Grisham*, *Guagliardo*, and *Hamdan*.

Second, the understanding that retirees face a reasonable likelihood of recall to active duty, "like Cincinnatus from the plow," Bishop, *supra*, at 357, is generally anachronistic—and has been for decades. Since Vietnam, if not earlier, the reserve components, rather than the services' retired lists, have been the mechanism for augmenting the active-duty force. *See, e.g.*, Library of Congress, *supra*, at 15–17. Thus, the future-activation argument for military jurisdiction "seems rather more plausible when applied to reservists, who are in reality [more] likely to be called to service in emergencies." Bishop, *supra*, at 357.[21] In that respect, it is more than a little telling that, even

21. As noted above, inactive reservists, unlike retirees, are *not* subject to trial by court-martial for any offense committed at any time. Instead, Congress has strictly limited jurisdiction in such cases to offenses committed while the reservist was "on active duty" or "on inactive-duty training." 10 U.S.C. § 802(d)(2); *compare Morita*, 74 M.J. at 121–23 (finding no jurisdiction over reservist as forged orders to active duty could not confer the military status required for court-martial), *with Lawrence* v. *Maksym*, 58 M.J. 808, 814 (N-M. Ct. Crim. App. 2003) (denying application for extraordinary writ by "the inactive reserve petitioner" because he "is subject to court-martial jurisdiction

as Congress has repeatedly tweaked the statutory scope of court-martial jurisdiction over reservists, *see, e.g.*, *United States* v. *Hale*, 78 M.J. 268, 275–76 & n.1 (C.A.A.F. 2019) (Ohlson, J., concurring in part and dissenting in part), it has not revisited jurisdiction over *retirees* since the UCMJ was initially enacted in 1950. Indeed, Article 2(a)(6) today is the same, word-for-word, as what Congress provided 70 years ago. *See* Act of May 5, 1950, ch. 169, 64 Stat. 107, 109.

The shift away from retirees and toward reservists is reflected not only in the legal framework governing activation of the reserve components, but also in two different constraints on when and how retirees can be recalled. For example, 10 U.S.C. § 690(b) imposes a rigid cap (15 flag officers and 25 other officers from each service branch) on the number of retired officers who can be recalled to active duty under 10 U.S.C. § 688 at the same time—outside of a time of war or national emergency.

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under Articles 2 and 3 for offenses alleged to have been committed while on reserve active duty").

There is simply no plausible explanation for why jurisdiction over reservists—who are far more likely to be called to active duty—should be so limited when jurisdiction over retirees is not. *See Larrabee*, 2020 WL 6822706, at *6.

Moreover, current Defense Department regulations all but preclude the involuntary recall to active military duty of *any* former servicemember who retired due to disability or who has reached the age of 60. *See* DoD Instruction 1352.01, ¶ 3.2(g)(2) (2016), J.A. 260 (noting limits on recall of "Category III" retirees).[22] "Theoretically," under current law, "only death cuts off the military's ability to recall its retired members to active duty" or "subject them to court-martial jurisdiction." Ives & Davidson, *supra*, at 8. In reality, however, the overwhelming majority of military retirees face no meaningful *legal* prospect whatsoever of involuntary recall to active duty.

As Judge Leon put it, "the current scope of court-martial jurisdiction disregards the obvious fact that some military retirees face virtually no prospect of recall to military service at all, whether because of their age, physical condition, or disability." *Larrabee*, 2020 WL 6822706, at *7; *cf. United States v Reynolds*, No. 201600415, 2017 WL

22. Of the more than two million living retirees (including retired reservists) reported by the Department of Defense as of September 30, 2019, 1,331,815 were 60 or older. *Statistical Report*, *supra*, at 29–30. An additional 86,424 retirees under 60 were disabled. *Id*. at 37–38. Thus, at least 70.8% of all retirees fell into Category III as of September 30, 2019.

1506062, at *5 (N-M. Ct. Crim. App. Apr. 27, 2017) (claiming that there is a "sufficient continued interest in enforcing good order and discipline" even "amongst those" who were "[r]etired for reasons of permanent disability, not exempt from recall to active duty, and entitled to retired pay"), J.A. 109.

Third, taken to its logical limit, constant UCMJ jurisdiction based upon a theoretical possibility of recall would allow Congress to provide for such jurisdiction not only over every *retired* servicemember, but also over the 16.4 million men currently registered for the Selective Service[23]—who remain subject to involuntary induction and activation by the President for training and service at any time, "whether or not a state of war exists." 50 U.S.C. § 3803(a). Though no statute *currently* authorizes the assertion of court-martial jurisdiction over Selective Service registrants prior to their induction, the mere existence of such activation authority would be enough to justify a future Congress's

23. As of the end of 2019, 16,417,042 men were registered for the Selective Service. *See* Selective Serv. Sys., *Annual Report to the Congress of the United States: Fiscal Year 2019*, at 22 (2020), *available at* https://www.sss.gov/wp-content/uploads/2020/03/Annual-Report-FY2019.pdf.

authorization of court-martial jurisdiction over those who have never *actually* been activated.

To be sure, the Supreme Court has suggested in dicta that it is constitutional for Congress to subject to military jurisdiction a draftee who failed to report for his induction. *Billings* v. *Truesdell*, 321 U.S. 542, 544 (1944). But all *Billings* recognizes is the straightforward point that Congress can treat as part of the "land and naval forces" those who have in fact been lawfully called to active duty, whether or not the call was answered. It hardly follows that anyone who might one day be called to service can therefore be subject to military jurisdiction so long as that remains even a theoretical possibility. Were it otherwise, the constitutional limits on court-martial jurisdiction on which the Supreme Court has repeatedly seized would mean very little.

Indeed, in rejecting military jurisdiction over civilians who are merely former servicemembers, *Toth* emphasized "the enormous scope of a holding that Congress could subject every ex-serviceman and woman in the land to trial by court-martial for any alleged offense committed while he or she had been a member of the armed forces." 350 U.S. at 19. Those figures only pale in comparison with what upholding

constant UCMJ jurisdiction over all who could lawfully be called (or recalled) to active duty would allow.

C. At Most, Retirees Are Subject to Court-Martial Only for Offenses Related to Their Military Status

Finally, even if the Make Rules Clause empowers Congress to subject to military jurisdiction anyone who is currently subject to future activation, that conclusion would provoke a related constitutional question—whether, by limiting such cases to those "*arising in* the land or naval forces," the Grand Jury Indictment Clause of the Fifth Amendment requires that the offense have a sufficient relationship to the retiree's military status.

In *Solorio*, the Supreme Court rejected the argument that the Constitution requires offenses by *active-duty* servicemembers be connected to their military service in order to be subject to military jurisdiction. 483 U.S. at 450–51 ("The requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged."). But the Court's analysis was predicated entirely on the view that, where active-duty servicemembers were at issue, their status necessarily brought them within the regulatory scope of the

Make Rules Clause and therefore settled their amenability to court-martial jurisdiction. *See, e.g.*, *id.* at 439–40. Where other classes of individuals who are outside any active chain of command are subjected to military jurisdiction, however, not only does *Solorio* not govern, but its reasoning militates in favor of the opposite conclusion. *See Larrrabee*, 2020 WL 6822706, at *4; *see also* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-22.30 (5th ed. Matthew Bender & Co. 2020) ("Rather than demonstrating the need for general jurisdiction over retired personnel, *Hooper* suggests a need for a limited jurisdiction contingent upon a strong 'service connection' test similar to that which was required under the Supreme Court's now-abandoned decision in *O'Callahan v. Parker*[, 395 U.S. 258 (1969)].").

After all, even if Mr. Begani remains a member of the "land and naval forces" for purposes of the Make Rules Clause, the dispute must still "arise[] in the land or naval forces" for purposes of the Fifth Amendment's Grand Jury Indictment Clause, U.S. CONST. amend. V, for the military to exercise jurisdiction. And whichever offenses are encompassed in the specific context of retired servicemembers, it does not extend to the crimes at issue here. Mr. Begani was convicted for

conduct that took place after he retired from active duty. His offenses were not military-specific crimes and bore no connection to either his prior active-duty service or his future amenability to recall. Thus, unless the Constitution allows for the exercise of military jurisdiction over all retirees in all cases, Mr. Begani's offenses did not "arise in the land or naval forces," and the Fifth Amendment forbade his trial by court-martial separate and apart from the limits intrinsic to the Make Rules Clause of Article I.[24] Whether Article 2(a)(6) of the UCMJ is therefore unconstitutional on its face or only as applied to Mr. Begani's offenses, the result here is the same: Mr. Begani is entitled to dismissal of his military convictions.

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24. Nor is there any argument that the exercise of military jurisdiction over Mr. Begani was constitutional because he *chose* to be transferred to the Fleet Reserve rather than be discharged and forego his pension. Even if a party to a civil case can consent to an otherwise unconstitutional exercise of jurisdiction by a non-Article III federal court, *see Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U.S. 665 (2015), the same is not true of criminal defendants before military tribunals. *See Al Bahlul*, 840 F.3d at 760 n.1 (Kavanaugh, J., concurring); *see also Larrabee*, 2020 WL 6822706, at *6 (rejecting the argument that members of the Fleet Reserve "do, or even *could*, 'consent' to an otherwise unconstitutional exercise of jurisdiction over them" (emphasis added)).

D. The Factors This Court Considers in Deciding Whether to Overrule Prior Precedent Support Doing So Here

This Court has identified four factors to consider when deciding whether to overrule a prior precedent: "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers and the risk of undermining public confidence in the law." *Dinger*, 77 M.J. at 452 (quotations and citations omitted). Although the invalidation of Article 2(a)(6) would require this Court to overrule its predecessor's holding in *Overton*, these factors only *support* such a result here.

First, as discussed above, *Overton* was poorly reasoned. Even when it was decided, it clashed with Supreme Court precedent emphasizing that courts-martial were "intended to be only a narrow exception to the normal and preferred method of trial in courts of law." *Covert*, 354 U.S. at 19 (plurality opinion). And *Overton*'s actual analysis of the constitutional issue barely runs a full (conclusory) paragraph, relying largely on *Hooper*'s own (flawed) analysis. *See* 24 M.J. at 311.

Second, as both the NMCCA held in *Dinger* and Judge Leon concluded in *Larrabee*, the Supreme Court's intervening decision in *Barker* eviscerates the premise on which *Overton* rests—that the

continuing pay received by Fleet Reservists like Mr. Begani suffices to justify their continuing amenability to the UCMJ. Thus, to whatever extent *Overton was* correctly decided, it has been fatally undermined by the Supreme Court's subsequent clarification that retainer and retired pay is deferred compensation for past services, not a current salary.

Finally, holding that the Constitution precludes constant court-martial jurisdiction over Fleet Reservists bears little "risk of undermining public confidence in the law";[25] if anything, the opposite is true. Like Mr. Begani, who never received notice that he could be subject to the UCMJ (and court-martial) for non-military offenses committed while retired, Fleet Reservists, other retirees, and the public at large will surely be less surprised by the *elimination* of constant jurisdiction over Fleet Reservists than by the fact that it ever existed in the first place. *See, e.g.*, Maria Perez, *Michael Flynn Could Commit Murder and Still Keep Military Rank, Experts Say*, NEWSWEEK, Dec. 2, 2017, https://www.newsweek.com/michael-flynn-could-commit-murder-

25. As discussed, Congress has passed statutes with extraterritorial reach which apply to retirees in retirement even (or in one case, only) if they are not subject to the UCMJ. *E.g.*, Opening Br. at 33 n.15 (citing 18 U.S.C. § 2423(c)); Reply Br. at 24 n.8 (citing Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261(d)).

and-still-keep-military-rank-experts-say-729407 ("[P]rosecution of military retirees is disapproved of internationally and it is uncommon, except in the U.S[.] and a few other countries.").

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 30, 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.

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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 8,252 words. This brief complies with the typeface and type-style requirements of Rule 37.

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