IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee/ Cross-Appellant	)	ANSWER ON BEHALF OF APPELLEE/CROSS-APPELLANT
	)	Crim.App. Dkt. No. 201800082
v.	)	USCA Dkt. Nos. 20-0217/NA and 20-0327/NA
Stephen A. BEGANI Chief Petty Officer (E-7) U.S. Navy (Retired) Appellant/ Cross-Appellee	)	

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Issues Presented

I.

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.

II.

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

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a dishonorable discharge and one year or more of confinement. This Court has jurisdiction over this case under Article 67(a)(2)–(3), UCMJ, 10 U.S.C. § 867(a)(2)–(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, 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, UCMJ, 10 U.S.C. §§ 880, 920b (2012). The Military Judge sentenced Appellant to eighteen months of confinement and a dishonorable discharge. Under

a Pretrial Agreement, the Convening Authority approved the adjudged confinement and commuted the dishonorable discharge to a bad-conduct discharge.

On direct appeal, a Navy-Marine Corps Court of Criminal Appeals panel set aside and dismissed Appellant's findings and sentence, holding that Article 2(a)(4) and 2(a)(6), UCMJ, violated the Due Process Clause of the Fifth Amendment. *United States v. Begani*, 79 M.J. 620 (N-M. Ct. Crim. App. 2019).

On September 4, 2019, the United States requested reconsideration, which the lower court granted on October 1, 2019, withdrawing the earlier panel decision. Sitting *en banc*, the lower court affirmed on January 24, 2020.

Appellant timely petitioned this Court for review on April 24, 2020, and this Court granted review on June 25, 2020. The Judge Advocate General of the Navy timely filed a certificate for review on July 23, 2020, and on the same day this Court consolidated the granted and certified issues. Appellant filed his Brief and the Joint Appendix on August 31, 2020.

Statement of Facts

A. The United States charged Appellant, a Member of the Fleet Reserve, with attempted sexual assault and abuse of a child.

The United States charged Appellant with attempted sexual assault and attempted sexual abuse of a child in Iwakuni, Japan, while he was a member of the Fleet Reserve. (Charge Sheet, Sept. 22, 2017; J.A. 297–99.)

B. Appellant pled guilty to all Specifications pursuant to a Pretrial Agreement in which he waived all waivable Motions.

The Convening Authority and Appellant entered into a Pretrial Agreement. (J.A. 359–68.) In the Pretrial Agreement, Appellant agreed to plead guilty to all Specifications and to waive "all motions except those that are otherwise non-waivable pursuant to R.C.M. 705(c)(1)(B), with the express exception of [Appellant's] motion that a punitive discharge is not an authorized punishment." (J.A. 361.) Appellant submitted no other motions at trial.

Appellant elected to be tried by military judge alone. (J.A. 324–25.) Appellant stipulated both that he belonged to the Fleet Reserve and to committing the predicate acts for the charged offenses. (J.A. 334–39.) The Military Judge found Appellant guilty pursuant to his pleas and sentenced him to confinement for eighteen months and a dishonorable discharge. (J.A. 332–33.) The Convening Authority commuted the dishonorable discharge to a bad-conduct discharge pursuant to the Pretrial Agreement. (J.A. 303, 365.)

Argument

I.

FEDERAL COURTS DECLINE TO FIND WAIVER OF SUBJECT MATTER JURISDICTION. THOSE SAME COURTS ROUTINELY PERMIT WAIVER OF CONSTITUTIONAL CLAIMS, LIKE APPELLANT'S, THAT INCIDENTALLY RELATE TO JURISDICTION.

A. Standard of review.

Appellate courts review waiver *de novo,* as a matter of law. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citing *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019)).

B. A limited class of claims implicate subject-matter jurisdiction.

1. Subject-matter jurisdiction involves a court's intrinsic authority to adjudicate and may be challenged at any point of litigation.

Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). For this reason, "no action of the parties can confer subject-matter jurisdiction upon a federal court." *See Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 701 (1982). "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing *Cotton*, 535 U.S. at 630).

2. A majority of federal courts permit waiver of constitutional challenges incidentally relating to subject-matter jurisdiction.

A majority of federal courts do not treat constitutional challenges to criminal statutes as challenges to subject-matter jurisdiction, despite the fact that a violation of law is a necessary prerequisite to original jurisdiction under 18 U.S.C. § 3231.[1]

For example, in *United States v. Feliciano*, the appellant raised a constitutional challenge to the statute of conviction for the first time on appeal. *Feliciano*, 223 F.3d at 125. Noting that there was "no reason why [appellant's] constitutional challenges could not have been raised below," the court found he waived the challenge. *Id.*

Likewise, in *United States v. De Vaughn*, the Tenth Circuit rejected the appellant's claim that either an as-applied attack on the constitutionality of the charged crime, or a claim that the indictment failed to state an offense, are jurisdictional in nature. *United States v. De Vaughn*, 694 F.3d 1141, 1149–53 (10th Cir. 2012). Instead, *De Vaughn* found both arguments waived by the guilty

[1] *See United States v. Dedman*, 527 F.3d 577, 591 (6th Cir. 2008); *United States v. Jimenez*, 323 F.3d 320, 322 (5th Cir. 2003); *United States v. Letts*, 264 F.3d 787, 789–90 (8th Cir. 2001); *United States v. Feliciano*, 223 F.3d 102, 125 (2d Cir. 2000); *United States v. Gray*, 177 F.3d 86, 93 (1st Cir. 1999); *United States v. Lewis*, 115 F.3d 1531, 1539 (11th Cir. 1997); *United States v. Badru*, 97 F.3d 1471, 1476 (D.C. Cir. 1996); *United States v. Cole*, 41 F.3d 303, 307 n.3 (7th Cir. 1994); *United States v. Cupa-Guillen*, 34 F.3d 860, 863 (9th Cir. 1994); *United States v. Easter*, 981 F.2d 1549, 1557 (10th Cir. 1992); *United States v. Mebane*, 839 F.2d 230, 232 (4th Cir. 1988).

plea. *Id.*; *see also id.* at 1149 n.5 (listing circuit split on non-jurisdictional nature of facial and as-applied constitutional challenges).

3. Guilty pleas waive most unpreserved constitutional claims.

"'By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.'" *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018) (quoting *United States v. Broce*, 488 U.S. 563, 570 (1989)); *see also De Vaughn*, 694 F.3d at 1152 n.7 ("[A] guilty plea 'foreclose[s] direct inquiry into the merits' of most pre-plea defenses, whether the defendant waived them intentionally or not." (quoting *Tollett v. Henderson*, 411 U.S. 258, 266 (1973))).

A "knowing and voluntary" waiver occurs through a pretrial agreement provision that agrees to waive all motions except those prohibited in R.C.M. 705(c)(1)(B). *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). That waiver includes constitutional rights—such as double jeopardy, *id*. (citations omitted), and equal protection, *see, e.g., United States v. Hampton*, 351 F. App'x. 723, 728 (3rd Cir. 2009) (equal protection waived by plea agreement waiver provision); *United States v. Dixon*, No. 94-5318, 1995 U.S. App. LEXIS 15513, at *2–3 (4th Cir. Jan. 31, 1995) (same).

Equal protection may be waived under R.C.M. 705(c)(1)(B).

C. Appellant explicitly waived his equal protection claim.

1. This Court's jurisdictional analysis should begin and end with the plain language of Articles 2 and 18, UCMJ.

This Court's jurisdiction depends on two statutory requirements. First, jurisdiction relies on "conduct": whether the Uniform Code of Military Justice proscribes the alleged conduct. Article 18, UCMJ, 10 U.S.C. § 818 (2012) (noting that "general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter"); *see also, e.g.*, *Solorio v. United States*, 483 U.S. 435, 450–51 (1987).

Second, jurisdiction relies on "status": whether the Uniform Code of Military Justice governed the individual's conduct at the time of the offense. Article 2, UCMJ, 10 U.S.C. § 802 (2012); *see also, e.g.*, *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020); *United States v. Jordan*, 29 M.J. 177, 184–85 (C.M.A. 1989).

In *Solorio*, the Supreme Court declined to consider a due process challenge to subject-matter jurisdiction, implicitly recognizing that indirect attacks on subject-matter jurisdiction are not insulated from waiver. *See Solorio*, 483 U.S. at 451 n.18. Relying on *O'Callahan v. Parker*, 395 U.S. 258 (1969), the *Solorio* petitioner argued his court-martial "applie[d] a more expansive subject-matter jurisdiction test to him than had previously been announced." *Id.* Because the

petitioner "did not raise his due process claim in the Court of Military Appeals," the Court declined to consider the merits of the claim. *Id.*

Here, Appellant never suggested that Congress lacked the constitutional authority under the Make Rules Clause to make him, a member of the Fleet Reserves, "subject to" the Code at the time of his offense. This distinguishes Appellant's case from Supreme Court precedent involving courts-martial jurisdiction. *Cf., e.g.*, *Reid v. Covert*, 354 U.S. 1, 4–5 (1957); *United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 13 (1955). In each of those cases, the Court's analysis turned exclusively on whether Congress possessed the threshold authority to regulate the appellant's conduct—that is, the "power to adjudicate the case." *Cotton*, 535 U.S. at 630.

Nor has Appellant suggested that Congress could not validly proscribe his conduct as a member of the Armed Forces. This distinguishes Appellant's claim from *Solorio*, where the appellant argued at trial that the court-martial lacked jurisdiction because his crimes "were not sufficiently service connected." *Solorio*, 483 U.S. at 437 (internal quotation marks omitted). The Supreme Court explained that "the Constitution [conditions] the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused." *Id.* at 439 (citations omitted). Describing Congress as having "the primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the

military," the Court held that "the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged." *Id.* at 447, 450–51. Appellant does not dispute his qualifying status. (*See, e.g.*, J.A. 334 (Stipulation of Fact); Appellant's Br. at 2–3, Aug. 31, 2020 (Appellant was a member of the Fleet Reserve).)

Appellant's claim instead turns on a perceived disparity between Congress's exercise of independently legitimate authority over two classes of servicemembers—a disparity that allegedly sounds in equal protection. (*See, e.g.*, Appellant's Br. at 11, Aug. 31, 2020.) But this is no more related to a court-martial's subject-matter jurisdiction than was the due process challenge to subject-matter jurisdiction in *Solorio*. *See* 483 U.S. at 451 n.18.

2. Appellant's indirect challenge of Article 2 does not fall within the scope of constitutional challenges outside of subject-matter jurisdiction but immune from waiver.

The Supreme Court has recognized two exceptions to the general rule that a guilty plea waives all non-jurisdictional claims. *See Broce*, 488 U.S. at 574 (noting *Blackledge v. Perry*, 417 U.S. 21, 30–31 (1974) and *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) are "exception[s] to the rule barring collateral attack on a guilty plea"); *see also De Vaughn*, 694 F.3d at 1153 (referring to these exceptions as a "narrow class of constitutional claims involving the right not to be haled into

court"). Those exceptions are due process claims for vindictive prosecution and double jeopardy claims that are evident from the face of the indictment. *See Blackledge*, 417 U.S. at 30–31; *Menna*, 423 U.S. at 62 n.2.

Here, Appellant pled guilty—unconditionally save one unrelated issue,[2] which is not before this Court—and he does not challenge the voluntariness of his plea. The challenge he now raises does not fit the narrow *Blackledge-Menna* exception for certain constitutional claims, Appellant waived his equal protection claim by pleading guilty.

3. Appellant's Pretrial Agreement explicitly waived all waivable motions, which includes the constitutional claim urged for the first time on appeal. The issue is therefore waived.

In *Class v. United States*, the Supreme Court granted certiorari to answer the narrow question of whether "pleading guilty . . . inherently waives the right to challenge the constitutionality of [a] statute of conviction." *Class v. United States*, 138 S. Ct. 798, 803 (2018). There, the appellant at trial raised a constitutional challenge to the statute under which he was prosecuted but, months later, entered into a plea agreement that neither explicitly waived nor explicitly preserved the

[2] Appellant conditioned his plea on preserving his motion that a punitive discharge is an unauthorized punishment for retirees. (J.A. 361.) Relying on its holding in *United States v. Dinger*, 76 M.J. 552, 559 (N-M. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 447, the lower court denied relief.

constitutional claim. *Id.* at 802 (noting categories of explicit waiver and preservation).

The Court ultimately held that the appellant's constitutional claims were not implicitly waived by his intervening guilty plea because (1) the claims were not contradicted by the explicit waiver provisions of his plea agreement; and (2) the claims challenged the Government's power to constitutionally criminalize his conduct. *Id.* at 805–06 (further observing federal rule for conditional pleas does not say whether it is exclusive procedure for preserving constitutional claims). Also critical was that "like the defendants in *Blackledge* and *Menna*, [the appellant sought] to raise a claim which, 'judged on its face' based upon the existing record, would extinguish the government's power to 'constitutionally prosecute' [him]." *Id.* at 806.

Here, three points demonstrate that *Class* is of no moment. First, unlike *Class*, Appellant is not asserting the right "not to be haled into court at all," *Class*, 138 S. Ct. at 803 (quoting *Blackledge*, 417 U.S. at 30), but instead belatedly urges a right to be haled into court equally, (*see* Appellant's Br. at 42, Aug. 31, 2020). Appellant concedes the Government's authority to criminalize his conduct and stipulated both to his status as a Fleet Reservist and to the predicate criminal acts. (*See* Appellant's Br. at 31, Aug. 31, 2020; J.A. 334–39 (Stipulation of Fact)); *see also United States v. Overton*, 24 M.J. 309, 310–11 (C.M.A. 1987) (Article 2(a)(6)

is a constitutional exercise of power by Congress). Appellant's claim is therefore unlike that in *Class*.

Second, *Class* addressed implicit waiver. In contrast, Appellant explicitly waived the issue here. Appellant's Pretrial Agreement explicitly waived the current constitutional claim and affirmatively conceded his status as a Fleet Reservist. (*See* J.A. 361 ("I specifically agree to waive all motions that are otherwise non-waivable . . . with the express exception of my motion that a punitive discharge is not an authorized punishment . . . given my status as a retiree."); *see also* J.A. 334 (Stipulation of Fact).) Thus unlike *Class*, Appellant's "constitutional claims . . . contradict the terms of . . . the written plea agreement" and are waivable. *See Class*, 138 S. Ct. at 804; *see also Broce*, 488 U.S. at 575 (arguments contradicted the plea agreement, waived).

Third, the holding in *Class* applies to a limited subset of cases: those in which the constitutional claim "can be 'resolved without any need to venture beyond [the] Record.'" *See Class*, 138 S. Ct. at 804 (citing *Broce*, 488 U.S. at 575). Unlike *Class*, Appellant did not raise at trial the constitutional challenge now urged, leaving the Record undeveloped. *See Class*, 138 S. Ct. at 802; *cf., e.g.*, *United States v. Goings*, 72 M.J. 202, 207 (C.A.A.F. 2013) (an appellant "must [first] develop facts at trial that show why his interest should overcome the

determination of Congress and the President" in order "to show that a facially constitutional statute is unconstitutional as applied").

In sum, Appellant's belated equal protection challenge at best incidentally implicates subject-matter jurisdiction and, consistent with his Pretrial Agreement, was explicitly waived at trial.

II.

APPELLANT'S CLAIM DOES NOT IMPLICATE EQUAL PROTECTION: FLEET RESERVISTS AND RETIRED RESERVISTS ARE NOT SIMILARLY SITUATED. REGARDLESS, CONGRESS'S DECISION TO SUBJECT FLEET RESERVISTS TO THE UCMJ MORE OFTEN THAN RETIRED RESERVISTS IS RATIONALLY RELATED TO MAINTAINING GOOD ORDER AND DISCIPLINE OVER THOSE WHO ARE SUBJECT TO EARLIER RECALL IN TIME OF NATIONAL EMERGENCY OR WAR.

A. The standard of review is *de novo*.

"The constitutionality of a statute is a question of law; therefore, the standard of review is de novo." *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).[3]

[3] To reach the granted issue, this Court would first have to conclude that Appellant's claim is not waivable. On the facts of this case, that would foreclose plain error review and leave the granted issue to be reviewed *de novo*.

B. The Federal Government is required to provide equal protection of the laws to similarly situated persons.

1. The Fifth Amendment protects against arbitrary legislative classifications.

"[T]he Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'" *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)); *see also United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015) (Fifth Amendment Due Process clause "forbids the Federal Government to deny equal protection of the laws"). "The reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth." *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (plurality); *accord, e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995).

The Fourteenth Amendment prohibits States from "deny[ing] any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Understanding that "most laws differentiate in some fashion between classes of persons," *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)), the "core concern" of equal protection is to protect against "arbitrary classifications," *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008).

2. The threshold question to an equal protection analysis is whether the challenged classification distinguishes between similarly situated groups. If not, no further analysis is required.

"[T]o assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them." *Brown v. Montoya*, 662 F.3d 1152, 1172–73 (10th Cir. 2011) (citation omitted); *accord City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (noting equal protection implicates "all persons similarly situated"); *United States v. Gray*, 51 M.J. 1, 22 (C.A.A.F. 1999) (same). Congress is not required to "engage in gestures of superficial equality." *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981).

Similarly situated means "in all relevant respects alike." *Nordlinger*, 505 U.S. at 8. Two groups are similarly situated if, "under like circumstances and conditions," they are conferred the same privileges and imposed with the same liabilities. *Engquist*, 553 U.S. at 602 (citation and internal quotation marks omitted). Circuit Courts apply a comparable test to evaluate whether two groups are similarly situated. *See, e.g.*, *Kolbe v. Hogan*, 813 F.3d 160, 185 (4th Cir. 2016) ("materially identical"); *LaBella Winnetka, Inc. v. Village of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010) ("identical . . . in all material respects"); *Grider v. City of Auburn*, 618 F.3d 1240, 1264 (11th Cir. 2010) ("prima facie identical in all relevant respects").

In *Schlesinger*, the Court first looked to the unchallenged statutory and regulatory distinctions between two groups before considering the challenged statutory classification. 419 U.S. at 508. The Court noted, *inter alia,* the "demonstrable fact" that women officers' professional service opportunities were restricted by statute and regulation in numerous ways—including restrictions on participation in combat and most sea duty—that were never challenged by the appellee. 419 U.S. at 508.

And in *Rostker*, the Court held that "[m]en and women . . . are simply not similarly situated for purposes of a draft or registration for a draft." *Rostker*, 453 U.S. at 78. In so holding, the Court looked to the congressional ban in the Air Force and Navy, and the presidential policy for all services, precluding women but not men from combat. *Id*. at 76–77, 87 n.2. The Court held that "[t]he fact that Congress and the Executive have decided that women should not serve in combat"—classifications unchallenged by the *Rostker* petitioner—"fully justifie[d]" the challenged registration classification and supported a finding that the "sexes [were] not similarly situated" within the armed forces for equal protection purposes.[4] The Court noted that Congress was required "to treat

[4] Nor do changes in circumstances, without more, alter the equal protection analysis. *See Nat'l Coalition for Men v. Selective Serv. Sys.*, 969 F.3d 546, 549–50 (5th Cir. 2020) (relying on stare decisis to reject a similar challenge to same statute although the "factual underpinning [of *Rostker*, *i.e.*, women in combat,] has changed").

similarly situated persons similarly," not to ignore the presidential and congressional classifications differentiating women and men for combat purposes and "engage in gestures of superficial equality." *Rostker*, 453 U.S. at 79.

Lower courts have used comparable measures to determine if two groups are similarly situated as to a challenged classification. In *Kolbe*, for example, retired police officers were no longer in the police force but had prior training, took an oath to uphold the law, and could potentially receive threats. 813 F.3d at 185–88. The *Kolbe* court found them not similarly situated with other civilians for purposes of assault weapon ownership. *Id*.; *see also United States v. Green*, 654 F.3d 637, 651 (6th Cir. 2011) (using "prima facie identical" test, finding no violation of equal protection to prosecute active duty co-conspirators in military system and discharged soldier in civilian system); *McMenis v. United States,* 36 Fed. Cl. 534, 540 (1996) (looking to statutory framework in determining that a regular officer and a reserve officer were not similarly situated for purposes of service limitations).

C. The Article 2 classification Appellant challenges does not trigger an equal protection analysis: Fleet Reservists and Retired Reservists are not similarly situated. Fleet Reservists have more military experience and serve a different purpose in the national defense.

Considered on the backdrop of national defense, Fleet Reservists and Retired Reservists are distinguished both by statute and executive action.

The Fleet Reserve, part of the Regular Component, is composed of members of the naval service who voluntarily choose to be transferred after completing at least twenty years of active service. 10 U.S.C. § 8330. The Fleet Reserve "was established . . . to serve as a repository to which enlisted members could voluntarily be transferred upon retirement from active duty until they completed 30 years of service." *United States v. Begani*, 79 M.J. 767, 773 (N-M. Ct. Crim. App. 2020) (citing Pub. L. No. 75-732, 52 Stat. 1175 (1938) ("Naval Reserve Act of 1938")); (J.A. 10, 194–97).

The purpose of the Fleet Reserve is to "serve as a trained body of experienced naval Service Members who [can] be recalled to active duty when needed." *Id.* (citation omitted); *see also United States v. Hooper*, 9 C.M.A. 637, 643 (C.M.A. 1958) (citing *United States ex rel. Pasela v. Fenno*, 167 F.2d 593, 595 (2d Cir. 1948), for the same proposition).

There are seven Reserve Components in the armed forces, including the Navy Reserve.[5] 10 U.S.C. § 10101. Each Reserve Component has three categories: the Ready Reserve (within which is the Selected Reserve and the Individual Ready Reserve), the Standby Reserve, and the Retired Reserve. 10 U.S.C. §§ 10141(a), 10143, 10144. Reserves who are not in an "active status" are

[5] The other six include the Reserve Components of the Army, Marine Corps, Air Force and Coast Guard, as well as the Army National Guard and the Air National Guard. 10 U.S.C. § 10101.

either in an "inactive status" or, if retired, in a "retired status." 10 U.S.C. § 10141(b). When qualified, a reservist may request transfer to the Retired Reserve. 10 U.S.C. § 10146(b).

The purpose of the Reserve Component is, in time of war or national emergency, to provide trained personnel whenever regular components are insufficient to fill the needs of the Armed Forces. 10 U.S.C. § 10102. The Ready Reserve consists of those reservists first subject to recall to active duty without consent. 10 U.S.C. §§ 10102, 12301.

Here, as in *Schlesinger*, *Rostker*, and *McMenis,* the unchallenged legislative and regulatory framework differentiating Fleet Reservists and Retired Reservists creates two distinct groups of servicemembers. This is evidenced by comparing, *inter alia*, their (1) service; (2) pay; and (3) amenability to recall.

1. Service: Fleet Reservists have at least twenty years of full-time military service, and Retired Reservists have at least twenty years of part-time military service.

The Fleet Reserve is composed of "enlisted member(s) of the Regular Navy or the Navy Reserve who ha[ve] completed 20 or more years of *active* service in the armed forces." (J.A. 145); 10 U.S.C. § 8330(a)–(b) (emphasis added).

Retired Reservists, in contrast, have at least twenty years of *qualifying* service. (J.A. 164); 10 U.S.C. § 12731(a) (emphasis added). A qualifying year of service is a year in which a reservist "has been credited with at least 50 points"

under 10 U.S.C. § 12732(a)(2). A "point" is credited for activities including, *inter alia*, a day of active service, attendance at certain drills, and each day on which funeral honors duty is performed. (*See id.*) Reservists earn fifteen points per year due to their "reservist" status. (*Id.*)

Here, Appellant fails to account for the significant differences between Fleet Reservists' and Retired Reservists' "service" in the armed forces. (Appellant's Br. at 20–21, Aug. 31, 2020 (noting simply that both have spent "at least 20 years in the armed forces").) A Fleet Reservist's twenty years of *active* service is different than a Retired Reservist's twenty years of *qualifying* service.

The difference in service requirements for Fleet Reservists and Retired Reservists distinguishes them both by the plain language of the underlying statutes and the service performed to satisfy their requirements. These two groups are therefore not "in all relevant respects alike," *see Nordlinger*, 505 U.S. at 8, and this Court should decline Appellant's invitation to "engage in gestures of superficial equality," *see Rostker*, 453 U.S. at 79.

2. Pay: Fleet Reservists are immediately entitled to higher "retainer pay" upon transfer from active duty; Retired Reservists are entitled to lower reserve component "retired pay" at the age of sixty.

While not on active duty, members of the Fleet Reserve are entitled to "retainer pay." (J.A. 145, 148); 10 U.S.C. §§ 8330(c)(1), 8332; *see also, e.g.*,

Overton, 24 M.J. at 311 (Fleet Reservists receive retainer pay based on basic pay at time of transfer and years of active service).

A Retired Reservist, in contrast, is "entitled to retired pay" once reaching sixty years of age and having "performed at least 20 years of service," provided the person is not entitled to "retired pay . . . or retainer pay" under any other provision of law. (J.A. 164–65); 10 U.S.C. § 12731(a), (f); *see also, e.g.*, *United States v. Begani*, 79 M.J. 767, 778 (N-M Ct. Crim. App. 2020) (retired pay received once Retired Reservists leave "gray zone" between retirement and sixty years of age).

Observing simply that Fleet Reservists and Retired Reservists receive "retired pay at some point in their retired years," Appellant ignores the significant difference between Fleet Reservists' and Retired Reservists' pay. (*See* Appellant's Br. at 21, Aug. 31, 2020.) Fleet Reservists' immediate receipt of retainer pay at the end of active duty reflects another unchallenged statutory benefit and distinction with Retired Reservists, who generally must wait until the age of sixty to receive their pay. *Compare* (J.A. 145), *and* 10 U.S.C. § 8330, *with* (J.A. 164–65), *and* 10 U.S.C. §§ 12731(a), (f). Moreover, Fleet Reservists' retainer pay exceeds Retired Reservists' retired pay. *Compare* 10 U.S.C. §§ 1405(a)–(b), *and* 1407(c)(1), 1409(a)–(b) (computation of retainer pay), *with* 10 U.S.C. §§ 1407(d)(1), 12731(a), 12731(f), 12733(1)–(2), 12739 (computation of retired pay).

The unchallenged statutory differences which entitle Fleet Reservists, like Appellant, to immediate, greater, and different pay than Retired Reservists demonstrate these two groups are not "in all relevant respects alike." *See Nordlinger*, 505 U.S. at 8; *see also Engquist*, 553 U.S. at 602 (groups are similarly situated if they are alike "in privileges conferred"). This Court should decline Appellant's invitation to "engage in gestures of superficial equality" by disregarding the unchallenged statutory and regulatory framework, and underlying active duty experience, which entitles Fleet Reservists and Retired Reservists to distinct pay. *See Rostker*, 453 U.S. at 79.

3. Recall to Active Duty: Fleet Reservists may be recalled to active duty "at any time," and Retired Reservists may only be recalled under limited circumstances.

Generally, a Fleet Reservist "may be ordered to active duty by the Secretary of the military department concerned at any time." (J.A. 118–19); 10 U.S.C. § 688(a)–(b); *see also* (J.A. 119); 10 U.S.C. § 688(c) (noting secretarial authority to assign such members "in the interest of national defense"); *Hennis*, 79 M.J. at 380 ("interests of national defense" includes recalling retiree for court-martial).

A member of the Fleet Reserve "may be ordered by competent authority to active duty without his consent . . . (1) in time of war or national emergency declared by Congress for the duration of the war or national emergency and for six months thereafter . . . (2) in time of national emergency declared by the President

. . . or (3) when otherwise authorized by law." (J.A. 152); 10 U.S.C. § 8385(a). During peacetime, "any member of the Fleet Reserve . . . may be required to perform not more than two months' active duty for training in each four-year period," (J.A. 152); 10 U.S.C. § 8385(b), and may be ordered to active duty service for up to twelve months within a twenty-four-month period, (J.A. 118–19); 10 U.S.C. §§ 688(a), (b)(3), (e)(1).

A Retired Reservist, on the other hand, may only be ordered to active duty, without consent, "as provided in [10 U.S.C. §§ 688 or 12301(a)]." 10 U.S.C. § 12307. That includes recall "[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." 10 U.S.C. § 12301(a). Even then, it must first be "determine[d] 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.* If a Retired Reservist has at least twenty years of active duty service, he may also be ordered to active duty at any time. *See* 10 U.S.C. § 688(b)(2) (specifying requirements across different categories and branches).

Given this statutory framework, it is clear that the two groups are not similarly situated: 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. *See Taussig v. McNamara*, 219 F. Supp. 757,

762 (D.D.C. 1963); (*compare* J.A. 118–19 (10 U.S.C. § 688(a)–(b)), *and* J.A. 152 (10 U.S.C. § 8385(b)), *with* J.A. 159–60 (10 U.S.C. § 12301(a)).

Appellant nonetheless dismisses this distinction of amenability to recall in three equally flawed ways. First, Appellant glosses over the differences by noting merely that both are "subject to recall." (Appellant's Br. at 21, Aug. 31, 2020.) And Appellant dismisses as mere technicality distinctions like 10 U.S.C. § 8385(b), which allows recall of Fleet Reservists, not Retired Reservists, "[i]n time of peace." (Appellant's Br. at 7 n.7, Aug. 31, 2020.)

Second, Appellant incorrectly claims Department of Defense Instruction 1352.01 functionally repealed the explicit differences in amenability to recall. (Appellant's Br. at 39 n.18, Aug. 31, 2020 (arguing the Instruction "makes clear, those distinctions are no longer extant today).) This, however, fails to account for the Instruction's purpose: to "[i]mplement[]" the very statutes that establish the disparate degrees of recallability. (J.A. 253.) This purpose is also echoed in the portions of the Instruction that Appellant omits. (*Compare* J.A. 253 ("Regular retired members and members of the retired Reserve may be ordered to active duty (AD) . . . *as described in Sections 688 and 12301 of Title 10*") (emphasis added), *with* Appellant's Br. at 22, Aug. 31, 2020 (citing the same, omitting italicized portion).)

Additionally, Appellant mistakenly overlooks the fact that the Instruction explicitly provides different procedures for mobilizing Active Duty Retirees and Reserve Retirees. *Compare* Dep't of Defense Instruction 1352.01, § 3.3(b)(1) (describing involuntary order to active duty for Retired Reservists), § 3.3(b)(2) (same, for Active Duty retirees), *with* (Appellant's Br. at 23, Aug. 31, 2020) ("[*N*]*one* of the Department of Defense's formal criteria for recalling retired military personnel take into account whether the retirees at issue retired from an active-duty or a reserve component when considering whether to subject them to involuntary recall.").

Third, Appellant seeks to minimize the importance of this difference by characterizing involuntary recall as an "illusory specter." (Appellant's Br. at 24, Aug. 31, 2020.) But the possibility of war or national emergency is not illusory, and as has been clear since the Founding, "it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them." *Solorio*, 483 U.S. at 441 (quoting Alexander Hamilton, The Federalist No. 23, pp. 152–54 (E. Bourne ed. 1947) (internal quotes omitted)); *see also* 10 U.S.C. § 10208(a) (requiring Secretary of Defense to conduct "at least one major mobilization exercise each year" that is "as comprehensive and realistic as possible" and includes both "active component and reserve component units"); *Dinger*, 76 M.J. at 557 n.21 (noting

recent Army policy "of issuing recall orders to selected retired personnel with the orders to be effective in case of national emergency" (citation omitted)). Despite Appellant's dismissal of future threats to national security, Congress's constitutional obligation is to ensure the military is ready. *See* U.S. Const., Art. I, § 8, cls. 13–14; *Schlesinger,* 419 U.S. 510 (Congress and the President are responsible for making this determination); *Toth,* 350 U.S. at 17 (noting "primary business . . . to fight or be ready to fight wars"). This underscores the importance of the distinction between Fleet Reservists' amenability to recall at any time and Retired Reservists' back-up role.

The difference in Fleet Reservists' and Retired Reservists' amenability to recall reflects their dissimilar military experience. These two groups are not "in all relevant respects alike." *See Nordlinger*, 505 U.S. at 8; *see also Engquist*, 553 U.S. at 602 (noting groups are similarly situated if, *inter alia*, they are alike "in the liabilities imposed"). This Court should decline Appellant's invitation to "engage in gestures of superficial equality." *See Rostker*, 453 U.S. at 79.

D. Even assuming Fleet Reservists and Retired Reservists are similarly situated, Appellant's equal protection claim fails. Article 2's distinction is rationally related to Congress's legitimate interest in maintaining good order and discipline among retirees.

1. Courts have developed three tiers of scrutiny to determine if a challenged classification denies equal protection of the laws. Legislative classifications are generally presumed valid if rationally related to a legitimate government interest.

Courts typically rely on one of three standards to weigh disparate treatment of similarly situated groups: (1) rational basis, which requires the classification be "rationally related to a legitimate state interest"; (2) intermediate scrutiny, which requires classifications based on gender be "substantially related to a sufficiently important governmental interest"; and (3) strict scrutiny, which requires classifications be "suitably tailored to serve a compelling state interest" where they "impinge on personal rights protected by the Constitution" or impact suspect classes. *City of Cleburne*, 473 U.S. at 440–41.

When reviewing the state interest involved in legislation governing the military, under any standard of review, judicial deference "is at its apogee." *See Solorio*, 483 U.S. at 447; *see also United States v. Hennis*, 79 M.J. 370, 378 (C.A.A.F. 2020) (noting the "'primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military,'" belongs to Congress "and the exercise of that responsibility is entitled to judicial deference" (quoting *Solorio*, 483 U.S. at 447–48)).

"[R]ational-basis review . . . 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). A classification is presumed valid under rational-basis review "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* (citations omitted). Further, Congress "need not 'actually articulate at any time the purpose or rationale supporting its classification.'" *Id.* at 320 (quoting *Nordlinger*, 505 U.S. at 15).

"Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (quoting *Beach Communications*, 508 U.S. at 313); *see also*, *id.* (noting the government need not produce evidence to support rationality because a classification "may be based on rational speculation unsupported by evidence or empirical data" (internal quotation marks and citations omitted)). "A statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Id.* (citations omitted).

Legislative classifications are subjected to strict scrutiny "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Ret. v.*

Murgia, 427 U.S. 307, 312 (1976); *see also, e.g.*, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 (1973).

2. Congress has broad authority to govern the military, a task unsuited for courts.

The Constitution empowers Congress "[t]o provide and maintain a Navy" and "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8, cls. 13–14. The Supreme Court "has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" *Rostker*, 453 U.S. at 70–71 (citing *Toth*, 350 U.S. at 17). "The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress . . . and with the President." *Rostker*, 453 U.S. at 71 (citing U.S. Const., Art. I, § 8, cls. 12–14; Art. II, § 2, cl. 1) (describing Congress's constitutional power here as "broad"); *accord United States v. Marcum*, 60 M.J. 198, 204 (C.A.A.F. 2004) ("[T]he interests in military readiness, combat effectiveness, or national security arguably would qualify as either rational or compelling governmental interests.").

The Supreme Court contrasts Congress's "broad" constitutional power to regulate the military with courts' "lack of competence" in that area. *Rostker*, 453 U.S. at 65–66 (declaring it difficult to conceive a governmental activity in which courts have less competence). This is due to "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force

are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Id.*

3. Maintaining good order and discipline among retirees to ensure the military is able to respond in a time of war or national emergency is a legitimate government interest.

As the Supreme Court noted in *Solorio*, the Framers granted Congress significant power to regulate the Armed Forces because "'it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.'" *Solorio*, 483 U.S. at 441 (quoting Alexander Hamilton, The Federalist No. 23, pp. 152–54 (E. Bourne ed. 1947)). Since "'[t]he original act establishing the retired list of the Army'" in 1861, *Hooper*, 9 C.M.A. at 643 (quoting Statement by Presidential Woodrow Wilson, 53 Cong. Rec. 12844–45 (1916)); *see also* Act of Aug. 3, 1861, ch. 42, 12 Stat. 287, Congress has considered servicemembers in retired status to continue as members of the Armed Forces because they are "'an effective reserve of skilled and experienced [individuals] and a potential source of military strength,'" *Hooper*, 9 C.M.A. at 644 (quoting Statement by President Woodrow Wilson, 53 Cong. Rec. 12844–45).

The Supreme Court has also implicitly recognized the importance of the ability to periodically recall retired servicemembers in response to a variety of national exigencies. *See Solorio*, 483 U.S. at 441. In both Iraq wars, for instance,

"retired personnel of all services were actually recalled[.]" *Dinger*, 76 M.J. at 557 (citation omitted). Just this year, the President issued an Executive Order providing authority to the Secretaries of Defense and Homeland Security to order up to 1,000,000 members of the Reserve Component to active duty in response to the coronavirus national emergency. Proclamation No. 13912, 85 Fed. Reg. 18407, 18407–08 (Mar. 27, 2020).[6] Both instances demonstrate that the skills and experience retired servicemembers possess continue to play a vital role in the Armed Forces' ability to augment its manpower to meet the Nation's exigencies, *Solorio*, 483 U.S. at 441, and "demonstrat[e] Congress's continued interest in enforcing good order and discipline amongst those in a retired status," *Dinger*, 76 M.J. at 557.

It 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 discipline. Notably, President Woodrow Wilson "veto[ed] a measure which would have terminated amenability of retired personnel to trial by court-martial" and explained that "'[o]fficers on the retired list . . . [are] members of the Military Establishment distinguished by their long service, and, as such, examples of discipline to the officers and men in the active [military].'"

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[6] Though this Executive Order is not in the Record, "the Court may take judicial notice of an indisputable adjudicative fact." C.A.A.F. R. 30A(b); *accord United States v. Paul*, 73 M.J. 274, 278 (C.A.A.F. 2014).

Hooper, 9 C.M.A. at 424 (quoting Statement by President Woodrow Wilson, 53 Cong. Rec. 12844–45).

4. Article 2(a)(5)–(6) is rationally related to a legitimate government interest: it maximizes jurisdiction over those who, in time of national emergency or war, are first subject to recall.

In *McNamara*, a regular retired Navy officer challenged Article 2 on equal protection grounds claiming "it is invidiously discriminatory to subject the regular retired officer to [constant UCMJ jurisdiction], while providing that only those retired reservists who 'are receiving hospitalization from an armed force' are also subject to the provisions of the Code." *McNamara*, 219 F. Supp. at 762 (quoting Article 2, UCMJ). Applying rational basis review, the court determined "there is clearly a rational distinction between the careerist, who is subject to recall at any time during war or national emergency . . . and the reservist, who is subject to recall only as a second-line of manpower." *Id.* The court denied the equal protection challenge because Article 2's disparate treatment of regular retirees and reserve retirees was "completely proper." *Id.*

In *Vance v. Bradley*, the Supreme Court upheld the constitutionality of a statute that distinguished Foreign Service officers and Civil Service employees on the basis of age for mandatory retirement. *Vance v. Bradley*, 440 U.S. 93, 95 (1979). There, reviewing an equal protection challenge, the Supreme Court held the challenged classification survived rational basis review, relying on: (1) the

special context of foreign relations, *id.* at 98–99; (2) the complexity of the retirement systems, *id.* at 108–09; (3) Congress's discretionary authority to draw statutory lines, *id.* at 108; and (4) the deference Congress receives when legislation is challenged under equal protection, *id.* at 110–12.

Regarding complexity, the Court factored into its analysis legislative convenience when faced with complex statutory schemes. *Id.* 108–09. "The Foreign Service retirement system and the Civil Service retirement system are packages of benefits, requirements, and restrictions serving many different purposes." *Id.* at 109. "When Congress decided to include groups of employees within one system or the other, it made its judgments in light of those amalgamations of factors." *Id.*

As to Congress's discretion, it was argued "that some Foreign Service personnel may not be subject to the rigors of overseas service or that some Civil Service employees serve in various hardship positions in foreign lands." *Id.* at 108–09. Still, the Court pointed out that "[e]ven if the classification . . . [was] to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that . . . 'perfection is by no means required.'" *Id.* at 108 (quoting *Phillips Chemical Co.* v. *Dumas School Dist.*, 361 U.S. 376, 385 (1960)).

Here, just as in *McNamara*, Congress's jurisdictional distinction between members of the Fleet Reserve and the Retired Reserve is rationally related to national security: the former are "careerist[s] . . . subject to recall at any time during war or national emergency"; the latter are subject to recall in only more restrained circumstances. *Compare McNamara*, 219 F. Supp. at 762 (regular retiree more amenable to recall than retired reservists), *with* 10 U.S.C. § 688(a)–(b) (Fleet Reservists recallable any time), 10 U.S.C. § 8385(b) (Fleet Reservists recallable even in time of peace), *and* 10 U.S.C. § 12301(a) (Retired Reservists recallable in more limited circumstances).

While Appellant acknowledges that *McNamara* addresses "the same equal protection argument" at issue here, the distinction he urges fails because it rests on the erroneous notion that an executive department instruction can expand statutory limits on recalling Retired Reserves. *Compare* (Appellant's Br. at 39 n.18) (stating *McNamara* was based on "far-more-different recall standards" and citing Department of Defense Instruction 1352.1 as reason "those distinctions" no longer exist today), *with* 10 U.S.C. § 12301(a) (limiting circumstances under which retired reservists may be recalled), *and* Dep't of Defense Instruction 1352.1 (implementing 10 U.S.C. § 12301).

Further, like the compulsory retirement statute in *Vance*, Article 2's constant court-martial jurisdiction for Fleet Reservists is rationally related to maintaining

good order and discipline among retirees that serve as the principal source of supplementary manpower during times of war or national emergency.

The context of Article 2 is similar to the challenged statute in *Vance* in two important ways. First, the military is of paramount importance to national defense and Congress's authority in this area is therefore great. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 756–57 (1974) (Congress may legislate in military with "greater breadth and with greater flexibility" than would be permitted in civilian society).

Second, like the compulsory retirement statute in *Vance*, Article 2(a)(5)–(6) has remained unchanged since enacted. *See* 10 U.S.C. § 802 (showing in seventy years since enacted, Congress has amended Article 2, UCMJ, fifteen times—most recently in 2016—but left untouched Articles 2(a)(5)–(6)). Appellant dubs this "legislative inertia," (Appellant's Br. at 41, Aug. 31, 2020), but cites no authority to rebut the notion that the *Vance* Court implicitly endorsed: a lack of amendment evidences Congress's continued approval. *See Vance*, 440 U.S. at 98–99, 105–06; *accord United States v. Begani*, 79 M.J. 767, 772 (N-M. Ct. Crim. App. 2020) (noting that since 1950 Congress has "left untouched the jurisdictional difference between Reservist retirees and active duty retirees").

And even if Appellant were correct that the policy animating enactment of Article 2 no longer has the same force, (Appellant's Br. at 41–42, Aug. 31, 2020), "it is for Congress, and not for the courts, to decide when the policy goals sought

to be served . . . are no longer necessary," *Schlesinger*, 419 at 510 n.13 (dismissing the relevance to its equal protection analysis of pending legislation that would moot the challenged classification); *see also Vance*, 440 U.S. at 102 (noting if a policy decision is deemed broken, "under our constitutional system, ordinarily [it] is to be 'fixed only by the people acting through their elected representatives'" (citation omitted)).

A legislative classification is permissible so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller*, 509 U.S. at 320. Even assuming Appellant were correct that "lack of administrative control" over Army retired reservists was the anachronous justification for Article 2(a)(5)–(6), the argument is of no moment. (*See* Appellant's Br. at 30, Aug. 31, 2020.) It 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. That, or any other "reasonably conceivable state of facts," is enough for the challenged classification to survive. *See Heller*, 509 U.S. at 320.

Appellant's assertion to the contrary echoes the failed arguments of the appellee in *Rostker*, claiming that the impact of constant military jurisdiction over Fleet Reservists is only indirect and attenuated. *Compare Rostker*, 453 U.S. at 68,

with (Appellant's Br. at 24, 31, Aug. 31, 2020). Appellant's argument reduces to little more than an effort "to divorce" military jurisdiction over Fleet Reservists "from the military and national defense context," which given "all the deference called for in that context[] [is] singularly unpersuasive." *Rostker*, 453 U.S. at 68. This pursuit should fare no better now than it did in *Rostker* nearly four decades ago. *See id.*

E. Appellant's claim does not implicate a "fundamental right," as servicemembers do not have a Sixth Amendment right to a jury trial. Strict scrutiny therefore does not apply.

1. Members of the land and naval forces do not have the Sixth Amendment right to a jury trial in a court-martial.

It is undisputed that "[c]ases arising in the land or naval forces . . . are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth." *Ex parte Quirin,* 317 U.S. 1, 40 (1942) (internal quotation marks omitted); *accord Reid*, 354 U.S. at 37 (same); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 12 (1866) (same).

This Court has affirmed that constitutional reality for almost fifty years. *See, e.g.*, *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2017); *United States v. Leonard*, 63 M.J. 398, 399 (C.A.A.F. 2006); *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004); *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988); *United States v. Kemp*, 22 C.M.A. 152, 154 (C.M.A. 1973).

2. By choosing to transfer to the Fleet Reserve, Appellant chose to remain a member of the land and naval forces.

An enlisted Sailor with at least twenty years of active-duty service but less than thirty "may . . . request[] [to] be transferred to the Fleet Reserve." (J.A. 145) 10 U.S.C. § 8330(b). Like other enlisted Sailors, members of the Fleet Reserve are subject to the Uniform Code of Military Justice and may be tried by court-martial. *See* (J.A. 120); 10 U.S.C. §§ 801 *et seq*.; 802(a)(1), (4), (6). The Supreme Court has long recognized that "[m]ilitary retirees unquestionably remain in the service . . . subject to restrictions and recall." *Barker v. Kansas*, 503 U.S. 594, 599 (1992); *see also United States v. Tyler*, 105 U.S. 244, 246 (1882) (officers on the retired list are "by law a part of the army").

Here, when faced with the choice to be discharged from the Navy or to remain, Appellant chose to remain. (*See* J.A. 340 (Appellant's DD 214, Appellant transferred to the Fleet Reserve).)

3. Appellant's equal protection claim challenges Congress's determination of when cases arise in the land and naval forces under Article 2(a)(5) and Article 2(a)(6). Because neither statute implicates a fundamental right, strict scrutiny cannot apply.

Legislative classifications are subject to strict scrutiny "only when the classification impermissibly interferes with the exercise of a fundamental right." *Murgia*, 427 U.S. at 312.

But Appellant's equal protection claim, at base, challenges Congress's determination of when a case arises in the land and naval forces—for Retired Reservists under Article 2(a)(5) and Fleet Reservists under Article 2(a)(6). The relevant constitutional comparison, therefore, is between two groups that each lack a Sixth Amendment right to a jury trial. *Cf. Reid*, 354 U.S. at 22 (the Fifth Amendment's exception for "cases arising in the land and naval forces was undoubtedly designed to correlate with" authority conferred by the Make Rules Clause); *Ex parte Quirin,* 317 U.S. at 40. Appellant concedes that even if he prevails on the merits, Congress could constitutionally continue to deny both groups the right that he decries as fundamental. (*See* Appellant's Br. at 42, Aug. 31, 2020 (acknowledging possibility of expanding jurisdiction over Retired Reservists as a "remedial alternative").)

Appellant nonetheless seeks to avail himself of strict scrutiny by incorrectly inviting this Court to assume he can prevail on the merits—a task that first requires resolving the proper tier of scrutiny—in order to bootstrap the hypothetical, incidental consequence of success: a jury trial as opposed to a court-martial. This analysis is inappropriate.

The same logic would justify a host of equal protection challenges to well-settled constitutional distinctions—*e.g.*, the right to deny non-citizens the right to vote, *Sugarman v. Dougall*, 413 U.S. 634, 648–49 (1973) ("This Court has never

held that aliens have a constitutional right to vote . . . under the Equal Protection Clause."); to allocate different degrees of judicial review to non-citizens, *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982) (continuously present permanent resident aliens guaranteed due process when threatened with deportation, but undocumented alien only entitled to a "fair hearing"); and so on, *see generally Demore v. Kim*, 538 U.S. 510, 521 (2003) ("In the exercise of its broad power of naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (citation omitted)).

In sum, Appellant's conscious decision to remain a part of the "naval forces" foreclosed any claim to the Sixth Amendment right on which he inappropriately predicates heightened scrutiny. Appellant's claim therefore fails.

Conclusion

The United States respectfully requests that this Court affirm.

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