IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ANTHONY A. ANDERSON,
Master Sergeant (E-7),
United States Air Force,
Appellant.

USCA Dkt. No. 22-0193/AF

Crim. App. Dkt. No. 39969

REPLY BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	REPLY TO FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	Crim. App. Dkt. No. 39969
Master Sergeant (E-7) **ANTHONY A. ANDERSON**, United States Air Force, Appellant	USCA Dkt. No. 22-0193/AF

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW, Appellant, Master Sergeant [MSgt] Anthony A. Anderson, by and through his undersigned counsel pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, and hereby replies to the Government's Final Brief on Behalf of the United States filed on September 21, 2022 [Appellee Br.]. Appellant relies on the facts, law, and arguments filed with this Court on August 24, 2022 [Opening Br.], and provides the following additional arguments for this Court's consideration.

Argument

1. The Government fails to acknowledge that the Supreme Court did not issue an advisory opinion.

At the outset, the Government insists that because "the *Ramos* majority made no mention of military courts-martial," the holding – that the Fourteenth Amendment requires unanimous verdicts in state criminal convictions just as the

Sixth Amendment requires unanimous convictions under the Jury Trial Clause – does not apply to courts-martial. (Appellee Br. at 3). Later, the Government notes that "the Supreme Court pointed out that 'only two states are potentially affected by our judgment.'" (Appellee Br. at 17) (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020)).

As discussed in the Opening Brief, the question of whether courts-martial require unanimous verdicts was not before the Supreme Court; the question there was whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous jury verdict against the states. *Ramos*, 140 S. Ct. 1394. The Supreme Court, like this Court, does not issue advisory opinions, such that the Supreme Court's lack of discussion of a case or controversy not before that court, is not dispositive of the granted issue in this case. The Government fails to acknowledge that any discussion of the military justice system's non-unanimous verdict scheme by the Supreme Court in *Ramos* would amount to an impermissible advisory opinion.

2. The Government misconstrues the granted issue.

The Government maintains that Appellant, and by extension all servicemembers tried by court-martials with members, "did not have a Sixth or Fifth Amendment right to a unanimous verdict at his court-martial" because "[m]ilitary members have never had a Sixth Amendment right to a jury trial."

(Appellee Br. at 3) (citing *Ex parte Milligan*, 71 U.S. (4 Wall.), 2, 123 (1886).[1] The Government's reliance on *Milligan* is misplaced. Milligan was a civilian tried by a military commission and not by a court-martial and the question before the Supreme Court was whether a civilian court had jurisdiction over a military tribunal. While the Government insists that *Milligan* held that the Sixth Amendment Jury Trial Clause is inapplicable to courts-martial, the Supreme Court has never squarely held as such. This oft-quoted statement, from a case whose posture is inapposite to the instant case, was dicta.

In addition to relying on dicta from *Milligan*, the Government also relies on *Ex parte Quirin*, 317 U.S. 1, 40 (1972), and *Whelchel v. McDonald*, 340 U.S. 122 (1950), two cases that are inapposite to the granted issue. (Appellee Br. at 8-9). The question before the Court in *Quirin* was whether the President exceeded his authority in ordering a trial by military commission for German saboteurs, in violation of their Fifth and Sixth Amendment rights. In *Ortiz v. United States*, the Supreme Court explained that "not every military tribunal is alike." 138 S. Ct. 2165, 2179 (2018). Milligan's and Quirin's military tribunals were so dissimilar to

[1] The Government also cites *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012), for the proposition that this Court has held that there is no Sixth Amendment right to trial by jury in courts-martial. (Appellee Br. at 3). This proposition is dicta because the constitutional question in *Easton* concerned when jeopardy attached in the military context under Article 44, UCMJ. (Opening Brief. at 24, n.4).

the granted issue that the Government's reliance on those cases is inapt. Furthermore, *Whelchel* did not squarely hold that the Sixth Amendment Jury Trial Clause is inapplicable to courts-martial. The issue in that case, which involved an alleged violation of the Articles of War, arrived by means of a writ of habeas corpus and solely focused on whether or not there was jurisdiction. 340 U.S. at 123. The Supreme Court expressly noted that its consideration of the issue was limited to the question of jurisdiction and affirmatively declined to consider a due process challenge because the appellant had an opportunity to raise an insanity defense, such that there was no denial of due process. *Id*. at 124. The Supreme Court concluded that "[a]ny error by the military in evaluating the evidence on the question of sanity would not go to jurisdiction, the only issue before the court in habeas corpus proceedings." *Id*. at 126.

The Government also insists that "[h]istorically, courts-martial in the American military have never required unanimous verdicts of guilt as the general rule. . . ." (Appellee Br. at 6).[2] This argument ignores that historically, as early as

[2] After discussing the '[h]istorical records from the time of the Founding," the Government incorrectly asserts that "Appellant has cited no scholarship or case law that draws conclusions to the contrary." (Appellee Br. at 12). Aside from the fact that *Ramos* included a discussion of what "trial by impartial jury" meant at the time of the Sixth Amendment's adoption, *see* 140 S. Ct. at 1395, Appellant indeed cited scholarship. (Appellee Br. at 28) (quoting *United States v. Westcott*, 2022 CCA LEXIS 156 at *17 (Meginley, J., dissenting) (quoting Capt. Nino Monea, Reforming Military Juries in the Wake of *Ramos v. Louisiana*, 66 Naval L. Rev. 67, 72 (2020)). Should the Government be interested in additional scholarship, the

the pre-Founding Articles of War, only military offenses were tried by courts-martial. *See* Winthrop, *Military Law and Precedents*, 953 (2d. ed., 1920 Reprint ed.). Serious offenses such as rape, murder, robbery, burglary, etc., were tried by civilian courts – not the military – with the requirement of a unanimous verdict. *Id*. Because servicemembers can be tried at a court-martial "for a vast swath of offenses, including garden-variety crimes unrelated to military service,"[3] under the UCMJ, the Government's failure to consider the evolution of courts-martial, the offenses that can be tried at courts-martial, and the comportment of statutory rights under the UCMJ with the Constitution cannot be condoned. *See also Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history. . . .").

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amicus curiae discusses scholarship regarding nonunanimous verdicts in non-capital courts-martial by Monea (Amicus Br. at 24) and by Professor Larkin, who argues that "[i]f [unanimity] is held to be an integral part of the constitutional guarantees of a jury trial, how can the military less-than-unanimous verdict be permitted?" (Amicus Br. at 14-15) (quoting Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt be Retained?*, 22 Hastings L.J. 237 (1971).

[3] *Ortiz*, 138 S. Ct. at 2174.

The Government appears to misunderstand the issue in this case. The issue is not whether Appellant has a constitutional right to a jury trial; rather, the issue is whether Article 52(a)(3), UCMJ, which permits non-unanimous verdicts by the concurrence of three-fourths of the members in non-capital courts-martial involving serious offenses, is unconstitutional under the Sixth Amendment following *Ramos*, or under the Due Process and/or Equal Protection Clauses of the Fifth Amendment.[4] In other words, following *Ramos*, in which the Supreme Court applied the Sixth Amendment unanimity requirement to the states via the Fourteenth Amendment, Appellant is entitled to a unanimous verdict under the Sixth Amendment via reverse incorporation and he is also entitled to a unanimous verdict under the Fifth Amendment.

3. Under the Sixth Amendment, Appellant's constitutional right to a fair and impartial panel requires that guilty verdicts be unanimous.

The Government posits that "Appellant alleges that he has a Sixth Amendment right to an *impartial* panel and that *Ramos* held that a unanimous verdict is required to ensure impartiality. But that claim extends the holding of *Ramos* well beyond what the Supreme Court actually said." (Appellee Br. at 3). (emphasis in original). The Government's premise is faulty.

[4] The Government later acknowledges the central issue of the case, albeit in its recitation of the standard of review. (Appellee Br. at 6).

Ramos makes clear that the right to a unanimous verdict is an essential feature of the Sixth Amendment right to an impartial jury – a right that, as recognized by this Court, the UCMJ and the Constitution provide to an accused at a court-martial. *See, e.g, United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005); *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). Following *Ramos*, impartiality requires unanimity. Despite the clarity of the Supreme Court's opinion, the Government desperately tries to convince this Court that, because the word "unanimous" does not appear in the Sixth Amendment, then impartiality does not require unanimity. (Appellee Br. at 13-14). As discussed in the Opening Brief, the majority opinion – penned by Justice Gorsuch – examined the text and structure of the Constitution and what the term "trial by an impartial jury" meant at the time of the Sixth Amendment's adoption. (Opening Br. at 19). The Government openly questions whether Justice Gorsuch meant what he said, claiming Appellant hangs his hat on a "*solitary* sentence in the *Ramos* opinion" mentioning "trial by impartial jury". (Appellee Br. at 12-13). It bears emphasizing that the *Ramos* opinion mentioned "trial by impartial jury" three times in a two-page span. 140 S. Ct. at 1395, 1396. The first time, Justice Gorsuch noted that the Sixth Amendment did not explain what "trial by impartial jury" entailed. *Id*. at 1395. The subsequent two times he clarified that "trial by impartial jury" included

the requirement of unanimity (*id*. at 1395), and that this phrase "surely included a requirement as long and widely accepted as unanimity." *Id*. at 1396.

The Government begs this Court to focus on the distinction between "jury" and "panel" rather than on the holding that impartiality requires unanimity. (Appellee Br. at 13). As discussed in the Opening Brief, even if Appellant did not have a constitutional right to a trial by petit jury, the Constitution nonetheless required that, once he was tried by the factfinder that Congress chose to provide him, any conviction must be unanimous to guarantee a fair and impartial trial. (Opening Br. at 27-28) (citation omitted). In the due process context, this means that while Congress may not have been required to provide Appellant with the option of trial by jury, once Congress provided Appellant with a trial by panel, that choice must comport with the Constitution because criminal trials necessarily implicate the accused's liberty. *See, e.g, Wilkinson v. Austin*, 545 U.S. 209, 221-24 (2005). If Congress had authorized that an impartial panel could reach its verdict by flipping a coin, that choice would not have guaranteed the accused's constitutional rights. *See also Weiss*, 510 U.S. at 176 ("Congress . . . is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings.")

The Government then asks this Court to give greater weight to Justice Kavanaugh's concurrence which describes "the requirements of unanimity and impartial selection" as complementary, but not inseparable, guarantees. (Appellee Br. at 14) (citing *Ramos*, 140 S. Ct. at 1418) (Kavanaugh, J., concurring) (citation and quotation marks omitted). Appellant maintains that while the concurrence explores the concepts of impartiality and unanimity, the majority opinion inextricably links the concepts and makes clear that impartiality requires unanimity.

Next, the Government hopes that this Court finds its list of dictionary definitions more persuasive than the *Ramos* majority opinion. (Appellee Br. at 15-16, Appendix). Appellant trusts that this Court finds Justice Gorsuch's examination of "what the term 'trial by an impartial jury' meant at the time of the Sixth Amendment's adoption – whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward. . . ." more persuasive than a list of dictionary definitions. *Ramos*, 140 S. Ct. at 1395.

In its final discussion of the Sixth Amendment, the Government insists that because *Ramos* does not address courts-martial, "Appellant must extrapolate his argument from subtext and concurring and dissenting opinions." (Appellee Br. at 17). Because a servicemember's non-unanimous conviction was not before the *Ramos* Court, Appellant asks this Court to use the holding and reasoning of *Ramos*

and apply it to trials by courts-martial with members. This request is founded in the holdings of this Court and its predecessor that, where servicemembers elect to be tried by a panel, they have a constitutional right to a panel that is impartial. *See Richardson*, 61 M.J. at 118; *United States v. Carter*, 25 M.J. 471, 473 (C.M.A. 1988) (citations omitted) ("Although an accused tried by a court-martial has no Sixth Amendment right [to a jury trial], he does possess a due process right to a fair and impartial factfinder. Statutes and rules of procedure must be interpreted in the light of – and, if necessary, must yield to – this guarantee."); *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964). Thus, by extrapolation, Article 52(a)(3), a statute, must be interpreted in the light of – and must yield to – the constitutional guarantee of a right to a fair and impartial factfinder. Once an accused elects to be tried by a panel, he has a constitutional right to impartiality under the Sixth Amendment regarding both how the panel members are selected and how they deliberate their verdict. *See United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("[T]he Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of jurors, but also their conduct during the trial proceedings and the *subsequent deliberations*.") (emphasis added). These deliberations necessarily include voting on the findings and sentence. Thus, by extrapolation, if, as *Ramos* makes clear, unanimous convictions

are necessary to impartiality, then it follows that an accused who elects to be tried by a panel has a Sixth Amendment right to a unanimous verdict.

4. Appellant is entitled to a unanimous verdict under the Fifth Amendment Due Process Clause.

The Government maintains that there is no Fifth Amendment right to a unanimous verdict because the words "Fifth Amendment" "are mentioned in passing . . . ." in *Ramos* and they do not appear in *Edwards v. Vannoy*, 141 S. Ct. 1457 (2021). (Appellee Br. at 18). This reasoning misapprehends Appellant's position, as articulated above, that Appellant is entitled to a unanimous verdict under both the Sixth and Fifth Amendments. Even if it is true that the words "Fifth Amendment" do not literally appear in *Ramos*, due process mandates that the right to a unanimous verdict applies to courts-martial. Military law has long recognized that an accused has a right to a "fair and impartial panel" which is a "matter of due process" under the Fifth Amendment. *Wiesen*, 56 M.J. at 174. That is because "[i]mpartial court-members are a *sine qua non* for a fair court-martial." *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995). *See also United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("[A] military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right of due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial.").

Here, the Government concedes that "[u]nder this Court's prior precedent, Appellant had a constitutional right to an impartial panel." (Appellee Br. at 16) (citing *Wiesen*, 56 M.J. at 174). Curiously, the Government fails to include the other crucial words from Wiesen – that *"[a]s a matter of due process*" Appellant is entitled to a "*fair*" and impartial panel. *Wiesen*, 56 M.J. at 174. (emphasis added). Given the significance of these words in *Wiesen*'s holding, the Government's oversight is telling.

The Government insists that *Ramos* does not apply to courts-martial because "[t]he Fourteenth Amendment does not apply to courts-martial." (Appellee Br. at 18). In the Opening Brief, Appellant clearly articulated that *Ramos* applies to courts-martial through reverse incorporation. (Opening Br. at 33 n.7). The Government fails to acknowledge, much less respond to, the applicability of the Fourteenth Amendment to the military through the Fifth Amendment. *See United States v. Meakin*, 78 M.J. 396, 401 n.4 (C.A.A.F. 2019).

The Government posits that Appellant has not met his burden "to show that the right to a unanimous verdict is so 'extraordinarily weighty' that it overcomes the balance struck by Congress." (Appellee Br. at 4, 20). In *Courtney v. Williams*, this Court's predecessor explained, "[e]ven though the Bill of Rights applies to persons in the military, 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.' 1 M.J.

267, 270 (C.M.A. 1976) (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)). The Court continued, "[h]owever, the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Id*. (citing *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970) ("We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule.") Thus, the burden belongs to the Government. Should this Court disagree and require Appellant to bear the burden, Appellant has articulated that the factors militating in favor of unanimous verdicts are so extraordinarily weighty as to overcome the balance struck by Congress. (Opening Br. at 39-46).

The Government insists that *Ramos* did not overrule or undermine *Johnson v. Louisiana*, 406 U.S. 356 (1972). (Appellee Br. at 4). Yet, the Government later states, "[a]fter *Ramos*, the Supreme Court's ultimate conclusion in *Johnson* – that non-unanimous juries are permitted in state criminal trials – is no longer applicable." (Appellee Br. at 41) (citation omitted). Subsequently, the Government argues that "*Johnson*'s reasoning remains on solid ground." (Appellee Br. at 41). These are conflicting positions. Furthermore, contrary to the Government's position, *Johnson*'*s* very foundation was toppled by the Supreme

Court's holding in *Ramos*. In *Johnson*, the Court stated, "We note at the outset that this Court has never held jury unanimity to be a requisite of due process of law." 406 U.S. at 358. Yet that is precisely what *Ramos* did – it applied the Sixth Amendment's right to a unanimous verdict to state courts vis-à-vis the Fourteenth Amendment's *Due Process Clause*.

Pre-*Ramos*, when *Apodaca v. Oregon*, 406 U.S. 404 (1972), was still good law, it was possible to argue that the due process requirement of proving guilt beyond a reasonable doubt did not require a unanimous verdict and that the Fifth Amendment right was not so extraordinarily weighty to overcome the balance struck by Congress in determining what constitutional rights servicemembers have when considering the interests of military necessity. *Apodaca* was overruled by *Ramos* and so was *Johnson* by extension.

If doubt exists as to whether *Johnson* survives *Ramos*, Appellant asserts that it does not. In *Johnson*, the Supreme Court did not consider a traditional due process claim like Appellant asserts in the instant case. As Justice Powell observed at the time, "in *Johnson v. Louisiana*, appellant concedes that the nonretroactivity of *Duncan*[5] prevents him from raising his due process argument in the classic 'fundamental fairness' language adopted there" and was instead left only with the ability to raise the limited argument on appeal that a non-unanimous

[5] *Duncan v. Louisiana*, 391 U.S. 145 (1968).

verdict was a violation of the requirement to prove guilt beyond a reasonable doubt. *Johnson*, 406 U.S. at 367-68 (Powell, J., concurring). Stated differently, the due process argument *Johnson* dismissed prior to *Ramos* is a narrow and specific one, not a general rejection of any due process challenge to non-unanimous convictions.

Next, the Government makes the surprising argument that unanimity and the requirement to prove guilt beyond a reasonable doubt are not inextricably linked. (Appellee Br. at 42). Indeed, the most shocking sentence of the Government's entire brief is that the reasonable doubt standard is not a protection for the accused, but a "moral comfort provision for the juror." (Appellee Br. at 44, 45) (citations omitted). The Government doubles down on this argument by approvingly citing to scholarship claiming that "the reasonable doubt concept 'was originally a theological doctrine, intended to reassure jurors that they could convict the defendant without risking their own salvation, so long as their doubts about guilt were not 'reasonable.'" (Appellee Br. at 44) (quoting James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* 204, 6, 25 (2008). Requiring the Government to prove its case against a defendant or an accused is the bedrock upon which the entire criminal justice system, whether civilian or military, is built. In *United States v. Simmons*, 82 M.J. 134, 140 (C.A.A.F. 2022), this Court "pointedly rejected" the Government's contention that

they were free to amend the charged time frame in a specification after evidence was adduced at trial. Just as in *Simmons*, Appellant urges this Court to "pointedly reject" the Government's proposition that proof beyond a reasonable doubt is not a fundamental right afforded to an accused, but instead is only a "moral comfort provision for the juror."

Putting aside this argument, for which the Government offered no caselaw from this Court or the Supreme Court to buttress the proposition, the Government has no response to Appellant's argument that unanimity is central to an accused's due process right to have the Government prove its case beyond a reasonable doubt. (Opening Br. at 35). Instead, the Government spills much ink on the irrelevant issue of reasonable doubt for an individual juror versus reasonable doubt for "the jury's verdict as a whole." (Appellee Br. at 41-45).

5. Non-unanimous verdicts violate the equal protection guarantee of the Fifth Amendment.

The Government argues that servicemembers and civilian defendants are not similarly situated, regardless of what offense they are charged with. (Appellee Br. at 46, 48). According to the Government, "[n]o matter how a servicemember is charged under the UCMJ"—with a miliary-specific offense, a non-miliary specific offense, or a federal offense charged under Clause 3 of Article 134, UCMJ – "he or she is part of 'a specialized society separate from civilian society.'" (Appellee Br. at 49) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

While the miliary is a "specialized society," the offenses in *Parker* were military-specific offenses. 417 U.S. at 737. As such, the Supreme Court's references to "military law . . . [being] a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment,"[6] and "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty,"[7] make perfect sense. However, this is not true for "[the] vast swath of offenses, including garden-variety crimes unrelated to military service"[8] that servicemembers are now commonly charged with.[9] These offenses do not implicate "military law" but instead implicate "laws governed by our federal [and/or state] judicial establishment." *Id*. at 744.

Indeed, often the military's only connection to the alleged offense(s) is the servicemember's active-duty status. *See O'Callahan v. Parker*, 395 U.S. 258, 273 (1969) (noting "[t]here was no connection – *not even the remotest one* – between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military.") (emphasis added), *overruled by*, 483 U.S. 435

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[6] *Parker*, 417 U.S. at 744.
[7] Appellee Br. at 47 (quoting *Parker*, 417 at 744).
[8] *Ortiz*, 138 S. Ct. at 2174.
[9] As stated previously, Appellant, Capt Veerathanongdech, and Amn Martinez were charged and convicted of non-miliary specific offenses. (Opening Br. at 52-57.

(1987). In *O'Callahan*,[10] the Supreme Court limited the military's jurisdiction to cases involving a "service connection." 395 U.S. at 272. In coming to this conclusion, it is apparent our High Court was cognizant that expanding the military's jurisdiction over cases lacking a "service connection" would "*deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers*." *Id*. (emphasis added).

The Court continued:

> The power of Congress to make "Rules for the Government and Regulation of the land and naval Forces," Art. 1, § 8, cl. 14, need not be sparingly read in order to preserve those two constitutional guarantees. *For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights*.

395 U.S. at 273 (emphasis added).

However, the Supreme Court later overturned *O'Callahan*'s "service connection" requirement, reaffirming that "[t]he test for jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.' . . ."

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[10] *Parker* was decided five years after *O'Callahan*, when a "service connection" was still required. Therefore, the military-specific nature of the appellee's offenses was of supreme importance to his case. If his offenses had not been military-specific offenses, or if the offenses he was charged with had lacked the required "service connection," the military would have been unable to exercise jurisdiction over him.

Solorio v. United States, 483 U.S. 435, 439 (1987) (citation omitted) (emphasis in original).

Following *Solorio*, miliary members may be tried for *any* UCMJ offense, including offenses brought pursuant to Article 134, clause 3. This includes noncapital federal crimes and offenses, as well as state criminal offenses, which are assimilated through the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See Manual for Courts-Martial, United States* (2019 ed.) [2019 MCM], pt. IV, ¶91.c.(4). To grant the military virtually limitless jurisdiction over military members – by virtue *solely* of their active-duty status – but not provide them an essential constitutional guarantee, that, following *Ramos*, all federal and state defendants possess, violates a military member's right to equal protection of the laws.

Furthermore, while the Government emphasizes that "the military's system of laws has the distinct purpose 'to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States,'"[11] not all offenses involving servicemembers are tried before a court-martial panel. Federal or state authorities may not cede jurisdiction to the military

[11] Appellee Br. at 49 (quoting Part I, *Preamble*, Manual for Courts-Martial, United States, 2019).

in a variety of situations, such as when the offense(s) took place off-base, and/or when the federal or state interests in prosecuting the case are strong. Other factors may also control whether the military exercises jurisdiction over the servicemember's alleged offense(s).[12] If tried in federal or state court, these same servicemembers would be entitled to a unanimous verdict.

While the Government also attempts to minimize the significance of the Supreme Court's analysis of the structure and function of courts-martial in *Ortiz*,[13] this Court should be loath to do the same. The Supreme Court deliberately equated the procedural protections afforded to servicemembers with those of civilian federal and state defendants, going so far to state they were "virtually the same." *Ortiz*, 138 S. Ct. at 2174.

In *United States v. Begani*, this Court considered "whether it violates the equal protection component of the Fifth Amendment to subject members of the Fleet Reserve, but not retired reservists, to military jurisdiction." 81 M.J. 273, 280 (C.A.A.F. 2021), *cert. denied*, 142 S. Ct. 711 (2021). As noted by the

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[12] *See* Dan Belson, "Navy midshipman acquitted in Anne Arundel sexual assault jury trial." *Capital Gazette*, September 21, 2022. https://www.capitalgazette.com/news/crime/ac-cn-usna-midshipman-rape-verdict-20220921-kfs35q2qp5ebjg3g4efbm24uiy-story.html) (last accessed Sep. 26, 2022) (noting that the case was prosecuted outside the military "out of respect for [the woman's] wishes." The alleged victim was a fellow Navy midshipman, though the alleged offense took place at an off-campus party. *Id*.

[13] Appellee. Br. at 47.

Government, this Court "reject[ed] Appellant's contention that the Sixth Amendment right to a jury trial is implicated. . . . [Because] neither [Fleet Reserve or regular retirees] have a Sixth Amendment right to a jury trial[,] . . . no fundamental right is implicated by their disparate treatment." (Appellee Br. at 50) (quoting *Begani*, 81 M.J. at 280 n.2). At its core, the appellant's argument in *Begani* was centered around whether the military properly exercised jurisdiction over him. 81 M.J. at 280. That issue is separate and distinct from Appellant's argument before this Court.

In the instant case, Appellant maintains that his Sixth Amendment right to an *impartial* panel, his Fifth Amendment right to due process, and his Fifth Amendment right to equal protection are all implicated because Article 52, UCMJ, failed to require that his conviction resulted from a panel's unanimous verdict. The fundamental right espoused by *Ramos* and *Edwards* is not the right to a trial by jury,[14] but the right to a unanimous verdict for serious offenses. While unanimity is a component of a "trial by jury," if unanimity was directly synonymous with "trial by jury," the Supreme Court's decision in *Ramos* would have been unnecessary and superfluous. Instead, according to the Supreme Court itself, *Ramos* was a "momentous and consequential decision." *Edwards*, 141 S. Ct. at 1559. Additionally, while certain aspects of the Sixth Amendment jury right are

[14] *Duncan*, 391 U.S. 145.

inapplicable to servicemembers – as they cannot be tried by a jury of their peers – this Court has held that other aspects of the Sixth Amendment jury trial right are applicable to servicemembers. *Lambert*, 55 M.J. at 294. As such, this Court has not yet opined on whether the right to a unanimous verdict is a fundamental right. In making this determination, this Court should be guided by the Supreme Court's references to this right being "vital," "essential," "indispensable," and as being "fundamental to the American scheme of justice." *Edwards*, 141 S. Ct. at 1573 (Kagan, J., dissenting); *Ramos*, 140 S. Ct. at 1397.

In the Opening Brief, Appellant discussed the consequences resulting from a non-unanimous conviction. (Opening Br. at 60-63). The Government argues that "Appellant provides no authority to support the suggestion that collateral consequences of a law can render the law itself constitutionally invalid." (Appellee Br. at 49-50). First, this statement is inaccurate, as Appellant cited to Judge Meginley's dissenting opinion in *United States v. Westcott*, No. ACM39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. Mar. 17, 2022) (unpub. op.), *rev. denied*, 2022 CAAF LEXIS 522 (C.A.A.F. Jul. 21, 2022). (Opening Br. at 60-63). Second, these consequences, including sex offender registration – which this Court has deemed a "particularly severe penalty"[15] – only arise *after* a servicemember is convicted. These consequences are a direct result of his or her conviction – a

[15] *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013).

conviction which must be unanimous in *every* other state court and in federal court. Even if these collateral consequences "call[] into question the fairness of the collateral consequences that flow from a military conviction," the Government's answer is that Congress or the States must change their systems, rather than "fundamentally reshap[ing] the military system to exactly mirror its civilian counterpart." (Appellee Br. at 50).

As highlighted in Appellant's Opening Brief, the military justice system has already been fundamentally reshaped by "the application of numerous constitutional trial rights to the courts-martial system." *Westcott*, 2022 CCA LEXIS 156, at *117-119, *121 (Meginley, J., dissenting); *see* Opening Br. at 29-31. The Government's argument also discounts the myriad ways the military justice system already mirrors the civilian justice system, particularly the federal system. For example, the Military Rules of Evidence (Mil. R. Evid.) were based on the Federal Rules of Evidence. Mil. R. Evid. 101(b) provides, "In the absence of guidance in this Manual or these rules, courts-martial will apply: (1) First, the Federal Rules of Evidence and the case law interpreting them. . . ." Mil. R. Evid. 1102 provides:

> (a) *General Rule*. Amendments to the Federal Rules of Evidence – other than Articles III and V – will amend parallel provisions of the Military Rules of Evidence by operation of law 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.

Another example of how the military justice system takes its lead from federal practice involves the military's voir dire procedures. In 2005, significant changes were made to the military's peremptory challenge process. The change to Rule for Courts-Martial [RCM] 912(f)(4) was predicated on conforming "military practice to federal practice . . . and [to] plac[e] before the accused the hard choice faced by defendants in federal district courts – to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and to ensure an impartial jury."[16] 2012 MCM, Analysis, *2005 Amendment*, RCM 912(f)(4). Moreover, even if requiring unanimous verdicts would fundamentally reshape the military justice system, this result is to be expected. Landmark decisions "fundamentally reshape[] criminal procedure throughout the United States and significantly expand[] the constitutional rights of criminal defendants." *Edwards*, 141 S. Ct. at 1559.

While the Government admonishes Appellant for "seeking a remedy that is more favorable than any right given to defendants in federal and state courts,"[17] Appellant was clear that "the issue before the Court is that there is no other court in the country where a non-unanimous verdict results in a conviction." (Opening Br.

[16] The reference to "impartial" here is a reference to having unbiased jurors serve on a court-martial panel. Notably, the analysis analogizes the military servicemember's choice with that of a civilian federal defendant's and itself references "an impartial jury." Analysis, RCM 912(f)(4) (2012 MCM).
[17] Appellee Br. at 51.

at 45). In deciding *Ramos*, the Supreme Court did not instruct Louisiana and Oregon how to restructure their jury's deliberative processes to ensure unanimity in the verdict. Instead, the logistics were left to these states. *See* Appellee Br. at 51 (discussing Oregon's supermajority vote for an acquittal and noting Louisiana "has not squarely addressed the issue."). While there are significant reasons to allow non-unanimous acquittals in the military, this is a logistical concern beyond the granted issue, which this Court need not decide to render its opinion in Appellant's case.

For the sake of argument, Appellant will propound several of these reasons. First, a jury is composed of twelve members, while a general court-martial panel is composed of only eight members and may be reduced to just six members after the exercise of challenges. *See* Dept of the Army Pamphlet 27-9, Military Judges Benchbook (Feb. 29, 2020), para. 2-1-3. While these differences in size alone might not justify a rule allowing for non-unanimous acquittals, other significant differences concerning the composition of a court-martial panel are relevant and material to the discussion.

Article 41, UCMJ, 10 U.S.C. § 841, provides an accused with just *one* peremptory challenge, regardless of the punishment imposed. Rule 24(b) of the Federal Rules of Criminal Procedure provides a defendant with *ten peremptory challenges* when the offense charged is punishable by imprisonment for one year

or more. Moreover, jurors serving on federal criminal trials are drawn from the community, while court-martial panel members are selected by the convening authority pursuant to Article 25(d)(2), UCMJ. Essentially, the Government – through the sole discretion of the convening authority – possesses the functional equivalent of an unlimited number of peremptory challenges before a servicemember's trial even begins. *See also* RCM 505(c) (permitting a convening authority to change members of the court-martial without cause).

Furthermore, all members of a court-martial panel must generally be senior in rank to the accused.[18] And unless requested by an enlisted accused, a panel of officer members will serve on his court-martial panel. *See* Opening Br. at 41-43 (discussing panel composition and statistics of the military officer population). Therefore, the population that is qualified to serve on a court-martial panel is already a small subsection of the entire military population, and not necessarily as reflective as the community at large utilized in federal trials.

Also compounding the problem, unlike a civilian juror who returns to his everyday life after completing jury duty, panel members return to their command. Panel members are identified and selected by the convening authority, and their immediate command is aware of their service on a court-martial panel because of

[18] Article 25(d)(1), UCMJ, states: "When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade."

their authorized absence. While the Government posits, "[t]he court-martial system has other safeguards unavailable in state or federal jury trials,"[19] the Government ignores that these safeguards – including voting by secret written ballot and *de novo* factual sufficiency review – are in place because, unlike their civilian counterparts, servicemembers are not tried by a jury *of their peers*. In claiming these safeguards provide a "lopsided windfall"[20] to a military accused, the Government misapprehends the purpose of these safeguards. A court-martial panel votes by secret written ballot requirement *because* of the potential for unlawful command influence within the deliberation room. This Court has previously expounded the purpose behind the CCAs' fact-finding power, and it is *not* to provide a military accused with a "lopsided windfall":

> The CCAs are intended to not only uphold the law, but *provide a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility*. For this reason, Congress endowed the CCAs with the authority to find facts as well as address questions of law.

United States v. Jenkins, 60 M.J. 27, 29 (C.A.A.F. 2004) (footnote omitted) (emphasis added).

[19] Appellee Br. at 52.
[20] *Id.*

In discussing the protections afforded to servicemembers, the Government omits that Congress has modified the CCAs' factual sufficiency review for all cases occurring on or after January 1, 2022.[21] It is unclear whether this change will meaningfully affect a CCA's determination of whether a servicemember's conviction is factually insufficient. It seems clear, however, that servicemembers accused of crimes are no longer are entitled to the "awesome, plenary, de novo power of review" of the CCAs. *See United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Therefore, the significant differences in panel composition – detailed above – in addition to the already small size of a court-martial panel, militate in favor of a requiring unanimity for convictions, but allowing non-unanimous acquittals.

In arguing that this Court should apply rational basis review to Appellant's Fifth Amendment equal protection claim, the Government contends "[t]here are several rational reasons why Congress would have chosen a different rule for the

[21] *See* National Defense Authorization Act for Fiscal Year 2022 [FY22 NDAA], Pub. L. No. 116-283, § 542(b)(1)(B), 134 Stat. 3612 (CCAs may consider factual sufficiency if the accused makes a specific showing of a deficiency in proof and after deferring to the trial court's observations of the witnesses and evidence and the military judge's findings of fact; the court may dismiss, set aside, modify the finding, or affirm a lesser finding if the court is clearly convinced that the finding of guilt was against the weight of the evidence).

military." (Appellee Br. at 53). According to the Government, these reasons include "military efficiency and concerns for unlawful influence." *Id*. As discussed above, secret written ballot procedures and the CCA's factual sufficiency review are in place to protect against unlawful command influence. Judge Meginley squarely addressed these concerns, emphasizing that the "law concerning unlawful command influence is – supposedly – in place to protect an accused. '[T]o say that one protection for an accused servicemember is a reason to diminish another protection is a non-sequitur.'" *Westcott*, 2022 CCA LEXIS 156, at *129 (Meginley, J., dissenting) (citation omitted). With regards to military efficiency, "cases take much longer to get to trial than they did in 1950," such that "it is not uncommon for proceed to trial a year after the offense was committed." *Id*. at *131. However, if by military efficiency, the Government means the possibility of non-unanimous verdicts resulting in hung juries, "these are only issues 'if either the Constitution or congressional legislation requires a unanimous vote to acquit.'" *Id*. at *131 (citation omitted). As the logistics following a unanimous conviction at a court-martial have not yet even been contemplated, a concern over hung juries is not yet ripe. If, however, the military continues its practice of non-unanimous acquittals, military efficiency will be unaffected.

In conclusion, if this Court accepts the Government's arguments concerning Appellant's Fifth Amendment equal protection claim, *no servicemember* will ever

be able to successfully mount an equal protection claim in *any* case unless his or her case is compared to another servicemember's. This is because any claim that a servicemember is similarly situated to a federal or state defendant will always fail when the Government – as they have done in this case – can merely argue that the military's "specialized society" justifies the failure to provide equal protection of the laws. (Appellee Br. at 49). Considering there are only "about 1.3 million active-duty personnel, or less than one-half of 1 percent of the U.S. population,"[22] a servicemember's right to equal protection has been effectively eviscerated by the servicemember's decision to take an oath to serve his or her country.

[22] Demographics of the U.S. Military, Council on Foreign Relations, https://www.cfr.org/article/demographics-us-military (last visited September 26, 2022).

Prayer for Relief

WHEREFORE, for the foregoing reasons and those previously stated, Appellant respectfully requests this Honorable Court set aside and dismiss the findings and sentence and restore all rights, property, and privileges to Appellant.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Appellate Defense Division, the Appellate Government Division, and the Air Force Court of Criminal Appeals on September 30, 2022.

CERTIFICATE OF COMPLIANCE WITH RULES 21(B) AND 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 6,986 words, not including the index and authorities and the certificates of counsel.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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