[ORAL ARGUMENT NOT YET SCHEDULED]

No. 21-5012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEVEN M. LARRABEE,

Plaintiff-Appellee,

v.

THOMAS W. HARKER, in his official capacity as Acting Secretary of the Navy; UNITED STATES,

Defendants-Appellants.

On Appeal from the United State District Court
for the District of Columbia

BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTFF-APPELLEE

A. Richard Ellis
Local counsel for NIMJ
Texas Bar No. 06560400
75 Magee Ave.
Mill Valley, CA 94941
(415) 389-6771
a.r.ellis@att.net
Member, Bar of the DC Circuit

Rachel E. VanLandingham
President, NIMJ
Texas Bar No. 24028184
2558 36th St., N.W.
Washington, DC 20007
213-738-6864
rvanlandingham@swlaw.edu

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and *Amici*

Plaintiff-appellee is Steven M. Larrabee. Defendants-appellants are Thomas W. Harker, in his official capacity as Acting Secretary of the Navy, and the United States. *Amicus curiae* National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation. Pursuant to Rule 26.1, *amicus* certifies that NIMJ is a nonprofit organization and therefore does not have parent corporations. Amicus supports plaintiff-appellee in affirming the district court's decision, and pursuant to District of Columbia Rule 29(d), Amicus certifies that this brief is necessary because it reflects a perspective on this case not found in the parties' briefs or any anticipated amicus briefs.

B. Rulings Under Review

An accurate reference to the ruling at issue appears in Plaintiff-Appellee's brief.

C. Related Cases

This case collaterally attacks a final criminal conviction by a court-martial conducted by the U.S. Navy-Marine Corps Trial Judiciary, which has not previously been before this Court. Plaintiff-Appellee Larrabee's appeal was docketed as No. 201700075 in the U.S. Navy-Marine Corps Court of Criminal Appeals ("NMCCA");

No. 18-0114/MC in the U.S. Court of Appeals for the Armed Forces ("CAAF"); and No. 18-306 in the U.S. Supreme Court. There are no other related cases that satisfy D.C. Cir. R. 28(a)(1)(C). The U.S. Court of Appeals for the Armed Forces heard argument on March 9, 2021, in a pair of consolidated court-martial appeals by a different defendant that raises similar issues to this appeal. *See United States v. Begani*, Nos. 20-0217/NA and 20-0327/NA (C.A.A.F.).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

BRIEFS AND OTHER LEGAL MEMORANDA

SECONDARY SOURCES

GLOSSARY

CAAF	U.S. Court of Appeals for the Armed Forces
NIMJ	National Institute of Military Justice
NMCCA	U.S. Navy-Marine Corps Court of Criminal Appeals

PERTINENT STATUTES AND REGULATIONS

Pertinent materials are contained in Plaintiff-Appellee's brief.

INTEREST OF *AMICUS CURIAE*

The National Institute of Military Justice ("NIMJ") is a nonprofit corporation organized to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty, but many have served as military lawyers. The Department of Defense currently employs no member of the NIMJ board. Amicus supports the plaintiff-appellee, and all parties to this proceeding consented to this filing.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party has contributed money for preparing or submitting this Amicus brief, nor have they authored it in whole or in part. NIMJ board member Eugene Fidell, a named counsel for plaintiff-appellee, returned to the board in April 2021 after a three-year hiatus. He had no participation in drafting this brief, nor did he engage in any discussions or any NIMJ action related to this brief. Mr. Steve Vladeck, also named counsel for plaintiff-appellee, is a NIMJ advisory board member and also had no involvement in drafting this brief.

ARGUMENT

Summary of Argument

The district court correctly concluded that 10 U.S.C. 802(a)(6) (2016) violates Article I, Section 8, Clause 14 of the Constitution by subjecting a Marine Corps Fleet Reserve "retiree" to court-martial jurisdiction. *Larrabee v. Braithwaite*, No. CV 19-654 (RJL), 2020 WL 6822706 (D.D.C. Nov. 20, 2020). The lower court found that such retirees do not fall within the Make Rules Clause's "land and naval forces" and therefore extension of court-martial jurisdiction is invalid. U.S. CONST. art. I, § 8. cl. 14. However, the district court misconstrued case law by also determining that "the ultimate question" is "whether the Government has adequately demonstrated that court-martial jurisdiction over military retirees is *necessary to maintain good order and discipline*." *Larrabee*, 2020 WL 6822706, at *6 (emphasis added).

Disciplinary necessity is no longer "the ultimate question." The Founders asked and answered it by limiting Article I's "Make Rules" authority to individuals whose continued obedience to military orders they needed: those serving in "the land and naval forces." U.S. CONST. art. I, § 8. cl. 14. Thus, the operative question today is whether plaintiff-appellee, or any military retiree, is continually subject to a legal duty to obey a military superior's orders. If they are, they are amenable to military jurisdiction because the duty of obedience functionally places them "in" the armed forces. "The fundamental necessity for obedience, and the consequent necessity for

imposition of discipline may render permissible within the military that which would be constitutionally impermissible outside it." *Parker v. Levy*, 417 U.S. 733, 758 (1974). This specific relationship of continuous military fealty, not an *ad hoc* balancing of the necessity of military jurisdiction for the maintenance of military discipline, limits the reach of the Make Rules Clause.

Amicus urges this Court to clarify that the status of being "in" the armed forces is distinct from the "necessity" of military jurisdiction for purposes of maintaining good order and discipline. Status presumes necessity, necessity does not trigger status. Thus, whether someone is in the armed forces does not hinge on whether a military prosecution for plaintiff-appellee or those similarly situated (such as active-duty retirees receiving pay, 10 U.S.C. 802(a)(4) (2016)), benefits good order and discipline. Instead, status in the armed forces rests on whether plaintiff-appellee had a legal duty to obey military orders at the time of his court-martial, thereby placing him "in" the land and naval forces.

Enforcing obedience to orders is the ancient raison d'etre of distinct military justice systems and the motivation behind the Make Rules Clause's authority for military criminal jurisdiction over those actually serving.[1] Arguments that necessity

[1] *See generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17–18 (2d ed. 1920) (describing ancient militaries' disciplinary measures); John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 3 (2000) ("[u]nder the Articles of War

can be used to further extend personal jurisdiction to those who never owed, or no longer owe, a legal duty to follow military orders are misplaced. "The Constitution does not say that Congress can regulate 'the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces.'" *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality opinion).

I. Necessity for Good Order and Discipline Not the Operative Rule

The district court was wrong in determining that the "ultimate question" in plaintiff-appellee's constitutional challenge to military personal jurisdiction is "whether the Government has adequately demonstrated that court-martial jurisdiction over military retirees *is necessary to maintain good order and discipline*."[2] *Larrabee*, 2020 WL 6822706, at *6 (emphasis added). The government repeats this analytical error by arguing that the necessity of military jurisdiction for good order and discipline "is a framework for military jurisdiction over *non*-servicemembers." Brief for Appellants, *Larrabee* No. 21-5012, 2021 WL 1630539

---

military justice was a command-dominated system" created to guarantee "obedience to the commander").

[2] The U.S. Navy-Marine Corps Court of Criminal Appeals (CCA) also utilized a disciplinary necessity argument in its decision in the related case of *United States v. Dinger*, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017), relied upon by the military appellate courts in denying plaintiff-appellee's direct appeal; the *Dinger* CCA concluded that because a retiree could be recalled to active duty, that Congress possesses a "continued interest in enforcing good order and discipline amongst those in a retired status." *See Larrabee v. Braithwaite* No. CV 19-654 (RJL), 2020 WL 6822706, at *1 (D.D.C., Nov. 20, 2020).

at 41 (emphasis added). It is neither. The only appropriate consideration regarding whether 10 U.S.C. 802(a)(6) (2016) complies with, versus impermissibly expands, Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces" is whether plaintiff-appellee was *in* those forces when he subjected to court-martial. U.S. CONST. art. I, § 8, cl. 14; *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240–41 (1960). This functional classification (the actual ultimate question in this case) hinges on whether plaintiff-appellee had a duty to follow military orders when court-martial proceedings commenced.

The conflation of status with military necessity is dangerous. American history is replete with inglorious examples of the politically-expedient rationale of "good order and discipline of the uniformed forces" used to subject American civilians to inappropriate military criminal jurisdiction, and to trample civil rights of ordinary citizens.[3] Extreme caution must be exercised when the vaunted good order and discipline rationale is given by a federal court as an appropriate litmus test for

[3] *See, e.g.*, *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864) (Vallandigham, believed to be a distant relative of one of this brief's authors, was convicted in a military commission during the Civil War for criticizing President Lincoln and the war, despite being a civilian and despite the civilian courts being open); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Decades after the Civil War, the now reviled Sedition Act of 1918 ran roughshod over the freedom of expression by criminalizing, *inter alia*, those who used scurrilous language about the military; such speech was criminalized in part out of concern for the good order and discipline of the military. *See generally* GEOFFRY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERROR 186-191 (W. W. Norton & Company, New York & London, 2004).

determining the contours of a constitutional provision. It is dangerous here, when interpreting just whom the Constitution allows to be prosecuted in a military court in peacetime.[4] The general necessity of military jurisdiction for the maintenance of good order and discipline in the armed forces belongs in the background as the issue's *mise en scene*, versus the governing approach for military jurisdiction.

Disciplinary necessity is not the operative rule for determining the scope of the Make Rules Clause because the good order and discipline question was already answered by the Founders. The nexus between well-disciplined troops and military criminal jurisdiction informs this Court, in part, as to why the Founders granted Congress sweeping authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," as well as their choice to exempt those cases from fundamental constitutional protections found in the 5th and by extension 6th Amendments. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17–18 (2nd ed. 1920). The drafters of the Constitution plainly believed that good order and

[4] While there may be circumstances when necessity justifies military jurisdiction over civilians, those are exceptional cases of (1) civilians on the battlefield in war and (2) martial law. *See Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion) (noting that military jurisdiction over civilians accompanying the force on the battlefield in times of declared war involves congressional war powers); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (providing functional test for martial law, hence military jurisdiction over civilians in the United States, involving operability of civilian courts).

discipline of those in uniform was enabled by a distinct military law.[5] *See Chappell v. Wallace*, 462 U.S. 296, 301 (1983) ("the Framers of the Constitution had recently experienced the rigors of military life and were well aware of the differences between it and civilian life. In drafting the Constitution, they anticipated the kinds of issues raised in this case. Their response was an explicit grant of plenary authority to Congress including the Make Rules clause.")

By giving Congress the authority to make rules for those in the armed forces while explicitly excluding military prosecutions from the grand jury requirement – provisions crafted in the shadow of a distinct military justice system continuously operating since the 1775 Articles of War – the Founders demonstrated their belief that military criminal jurisdiction over service members was required to ensure good order and discipline. *United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) ("[c]ourt-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order.") *See also Toth*, 350 U.S. at 24 (Reed, S., dissenting) ("Congress was granted authority to regulate the armed forces in order to enforce obedience by members of

[5] John Adams, when advocating for the 1776 Articles of War (that he helped draft) wrote, "Discipline, Discipline had become my constant topick of discourse and even declamation in and out of Congress and especially in the Board of War. I saw very clearly that the Ruin of our Cause and Country must be the Consequence if a thoughrough Reformation and strict Discipline could not be introduced." *See John Adams Autobiography*, Massachusetts Historical Society (1776) http://www.masshist.org/digitaladams/archive/doc?id=A1_48.

the military establishment to military regulation during their service to the end that order may be ensured.")

Indeed, the Supreme Court has noted of the Founders, "many were themselves veterans of the Revolutionary War, however, they also knew the imperatives of military discipline." *Loving v. United States*, 517 U.S. 748, 775 (1996). Swift and effective punishment was necessary to ensure obedience to orders; this obedience then and now forms the core of military discipline. The Founders left it to Congress to fashion the structure of such a system. *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857). In doing so, the Founders did not leave any good order and discipline rationale on the table to, in piecemeal fashion, justify expanding the Make Rules Clause to those not subject to a duty to obey military orders. This is so, regardless of hypothetical disciplinary benefits such rules might bestow.

Taken to its logical conclusion, the district court's approach finds that whenever military disciplinary necessity exists for court-martial jurisdiction (leaving necessity undefined), the person in question is magically transformed into being "in" the armed forces, hence properly subject to the Make Rules Clause's reach. If the district court had clearly defined disciplinary necessity as the Founders did – existing only when a duty to obey military orders exist – the district court's necessity approach could be reconciled with the Make Rules Clause. But the district court did not delineate just what disciplinary necessity entails. Such ambiguous

"necessity" could lead to constructively clothing anyone in a military uniform, regardless of their functional connection to the military (regardless of duty of obedience to orders). Once clothed, court-martial might be allowed. This puts the cart so far before the horse that the horse is rendered irrelevant. And it is inconsistent with the Supreme Court's key cases in this area, despite their various references to military discipline, as explained *supra*.

II. The Misunderstood Disciplinary Necessity Dicta

A. Toth Doctrine

The district court correctly holds that "[i]n evaluating the proper scope of court-martial jurisdiction, the Supreme Court has instructed that the relevant test 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.'" *Larrabee*, 2020 WL 6822706, at *9-10 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240–41 (1960)). The lower court then rejected the government's reasons why plaintiff-appellee is a service member (the receipt of retainer pay and retirees' theoretical amenability of involuntary recall) without satisfactorily explaining just why those factors were insufficient for military status. *Id*. at 12-15. "Neither factor . . . suffices to demonstrate why military retirees *plainly* fall within the 'land and naval forces.'" *Id.* at 12.

The district court failed to give *Kinsella's* military status rule substance, resorting instead to open-ended disciplinary necessity. It noted that "the Supreme Court has looked to whether 'certain overriding demands of discipline' necessitate court-martial jurisdiction over a certain class of individuals." *Larrabee* 2020 WL 6822706, at *4 (quoting *Solorio v. United States*, 483 U.S. 435, 440 (1987)). The district court failed to appreciate that the only disciplinary necessity (*Solorio's* "overriding demands of discipline") is an obedience to orders obligation, which would reconcile such a membership status test with the Founder's rationale for the Make Rules Clause.

The district court failed to appreciate the dispositive factor of obedience because it looked to *Toth v. Quarles* to derive its necessity test, instead of later cases that put *Toth* dicta in its appropriate context. *Larrabee*, 2020 WL 6822706, at *6 (quoting *Toth*, 350 U.S. at 22) (("[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."). The district court transformed *Toth's* dicta into the conclusion that "Congress's Article I power to extend court-martial jurisdiction must be limited to that necessary for good order and discipline." *Larrabee*, 2020 WL 6822706, at *7. The lower court again leaves open the meaning of "necessary," other than to give an equally vague "principled basis promoting good order and discipline." *Id.*

In crafting its vague test of disciplinary necessity for status (membership in the military), the district court confused *Toth*'s musings regarding the link between necessity of court-martial jurisdiction and the maintenance of discipline. *Toth*, 350 U.S. at 22. Amicus demonstrates here that there is nothing more to *Toth's* dicta than a description of the driving rationale of the Make Rules clause plus a mollification of policy concerns. Furthermore, the Supreme Court, only a few years later, clearly indicated that *Toth* cannot properly be read to require a case-by-case general necessity test to determine constructive membership in the military for personal jurisdictional purposes. Finally, Amicus argues that the district court's reading of *Toth* to provide a general disciplinary necessity test – without limiting necessity to its essential factor of duty to obey military orders – suggests, *reductio ad absurdum*, a need to subject almost all citizens to military jurisdiction. The Make Rules Clause is not that sweeping.

Toth held unconstitutional the court-martial of ex-service members for crimes committed while on active duty in the armed forces. 350 U.S. at 23. Rather than establish a necessity test of good order and discipline, *Toth* hews to the limited reach of the Make Rules Clause on status: "[f]or given its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *Id.* at 15. *Toth* does not explain how to determine

membership in (or how to evaluate being "part of") the armed forces. The Court did not have to be explicit on this point, given that Mr. Toth had been discharged from the military (and clearly was no longer subject to military orders) when the decision was made to court-martial him. *Id.*

While *Toth* discusses the need for discipline of those in the armed forces, *Toth* resists the argument that precluding court-martial of those discharged from the military would allow them to escape accountability. *Toth* did not claim that this potential for impunity allowed for extension of military jurisdiction over such discharged service members because it saw no such impunity. *Toth*, 350 U.S. at 20 ("[f]ear has been expressed that if this law is not sustained, discharged soldiers may escape punishment altogether for crimes they commit while in the service.") The Court's direct answer was that "[w]e are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause. It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians." *Toth*, 350 U.S. at 21-22.

By taking note of the lack of any disciplinary effects in the military due to the Court's refusal to extend military jurisdiction to ex-service members, *Toth* was simply assuaging Cold War government's concerns. It is important to recognize that the *Toth* Court never went further to say that if indeed a lack of military jurisdiction

would produce negative military disciplinary effects, then the Make Rules Clause would, *ipso facto*, actually allow such jurisdiction.

Toth merely states the obvious, that military jurisdiction was not actually needed for the maintenance of good order and discipline in Mr. Toth's particular circumstances. It did not go further to state that such necessity is the operative test for determining status. In that vein, the *Toth* doctrine – that military jurisdiction has long been limited to that "absolutely essential" for the maintenance of discipline – simply acknowledged the Founders' fundamental calculus for the Make Rules Clause. *Toth*, 350 U.S. at 22. *Toth*'s emphasis on the essentiality of discipline actually points to the dispositive issue of amenability to orders, given that preserving obedience to said orders is *the* essential value that animated the Founders to grant the constitutional authority for the military justice system in the first place.

So, in summary, *Toth* highlights that Congress wields authority to make rules for those "in" the land and naval forces, at least in peacetime, despite the Government's claims to this Court to the contrary. Brief for Appellants, *Larrabee* at 41 (arguing that while disciplinary necessity can support extending military jurisdiction to civilians under the Make Rules clause, since Congress said petitioner-appellee is not a civilian, the district court should not have engaged in said disciplinary necessity analysis). Yet the *Toth* Court never claimed that such necessity would be sufficient to create status in the land and naval forces; it simply concluded

that it did not exist in that case. "Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently, considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury." *Toth*, 350 U.S. at 22-23.

B. *Reid v. Covert*

Not only has *Toth* been misconstrued. Additionally, the district court's disciplinary necessity approach – the concept that vague considerations of military discipline can transform a civilian into a member of the armed forces for purposes of personal jurisdiction – ignores the Court's opposite conclusion reached just a few years later. In *Reid v. Covert*, the Court found unconstitutional the extension of military jurisdiction over service members' civilian dependents accused of capital crimes while accompanying service members overseas (this holding was later extended to noncapital crimes in *Kinsella v. United States ex rel Singleton*). *Reid*, 354 U.S. at 39-41.

The *Reid* Court dealt with a similar government argument as in *Toth*: that "civilian dependents are an integral part of our armed forces overseas and that there is substantial military necessity for subjecting them to court-martial jurisdiction." *Reid*, 354 U.S. at 46 (Frankfurter, F., concurring). The *Reid* Court disagreed, finding

that "if the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians—even though they may be dependents living with servicemen on a military base. The term 'land and naval Forces' refers to persons who are members of the armed services and not to their civilian wives, children and other dependents." *Reid,* 354 U.S. at 37-38.

The *Reid* Court, like the *Toth* Court before it, limited military jurisdiction to "members of the armed services" and, again like *Toth,* did not define membership. The Court in *Reid* did, however, recognize "that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." *Reid*, 354 U.S. at 23. It is clear from subsequent cases that only those with an ongoing legal duty to obey military orders, such as military prisoners and navy paymaster's clerks, fall into such unique "circumstances" contemplated by *Reid*. *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. at 285 (explaining that paymaster's clerks on navy vessels were subject to navy orders and commanders' discipline, hence within *Reid's* special circumstances). Furthermore, the *Reid* Court, noting that military jurisdiction *may* be constitutional over individuals accompanying the military on the battlefield in time of war, concluded that any potential constitutionality would be based on Congress's broad war powers, not the Make Rules clause. *Reid v. Covert*, 354 U.S. at 33.

Neither *Toth* or *Reid* or any of the Court's military jurisdiction cases created a disciplinary necessity test for membership in the armed forces. On the contrary, the *Reid* Court found that "[t]he Constitution does *not* say that Congress can regulate 'the land and naval Forces *and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces*.'" *Reid,* 354 U.S. at 30 (emphasis added). If it did, then seemingly everyone could come within its reach.

Further evincing its confusion, the district court pointed to the Court's language in *Solorio*: "[t]o answer this question, the Supreme Court has looked to whether 'certain overriding demands of discipline' necessitate court-martial jurisdiction over a certain class of individuals." *Larrabee* at *10, quoting *Solorio,* 483 U.S. at 440. Yet *Solorio* cannot be read as giving a disciplinary necessity test for personal jurisdiction, because *Solorio* was a case about *subject matter* jurisdiction (offenses). The *Solorio* Court itself explicitly limited its "certain overriding demands of discipline" consideration to offenses, not to any "class of individuals," a fact missed by the lower court here. "Implicit in the military status test was the principle that determinations concerning the scope of court-martial jurisdiction *over offenses* committed *by servicemen* was a matter reserved for Congress." *Solorio,* 483 U.S. at 440 (1987) (emphasis added).

CONCLUSION

The test for membership "in" the armed forces for purposes of military jurisdiction must be limited to the Founder's animating purpose of such jurisdiction: to reinforce the duty of obedience to orders. When such a fealty relationship exists, it is *a priori* necessary for good order and discipline that obedience to said orders be enforced through military criminal jurisdiction. A duty to obey military orders indicates status in the armed services for purposes of military jurisdiction, and no general necessity due to disciplinary reasons should obscure this operative principle.

Respectfully submitted,

//s// A. Richard Ellis

A. Richard Ellis
Local Counsel for NIMJ
Texas Bar No. 06560400
75 Magee Ave.
Mill Valley, CA 94941
(415) 389-6771 a.r.ellis@att.net
Member, Bar of the DC Circuit

Rachel E. VanLandingham
Professor of Law
Southwestern Law School
President
National Institute of Military Justice
2558 36th St., N.W.
Washington, DC 20007
213-738-6864
rvanlandingham@swlaw.edu

Brenner M. Fissell
Associate Professor of Law
Hofstra University Law School
Vice-President
National Institute of Military Justice

516-463-5874
brenner.m.fissell@hofstra.edu

Philip D. Cave
Director, NIMJ
Cave & Freeburg, LLP
1629 K. St., NW, Ste 300
Washington, DC 20006
703-298-9562
mljucmj@court-martial.com

June 1, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), I hereby certify that this brief contains 4,015 words, as calculated by the word count function in Microsoft Word, and excluding the items that may be excluded under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Cir. Local R. 32(e)(1). This brief uses a proportionally spaced typeface, Times New Roman, with 14-point typeface, in compliance with Federal Rules of Appellate Procedure 32(a)(5)(A) and 32(a)(6).

Respectfully submitted,

//s// A. Richard Ellis

A. Richard Ellis
Local Counsel for NIMJ
Texas Bar No. 06560400
75 Magee Ave.
Mill Valley, CA 94941
(415) 389-6771 a.r.ellis@att.net
Member, Bar of the DC Circuit

June 1, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2021, a true and correct copy of the foregoing Brief for Appellee was served on all counsel of record in this appeal via the D.C. Circuit's CM/ECF utility.

//s// *A. Richard Ellis*

A. Richard Ellis
Local counsel for NIMJ
Texas Bar No. 06560400
75 Magee Ave.
Mill Valley, CA 94941
(415) 389-6771 a.r.ellis@att.net
Member, Bar of the DC Circuit

Rachel E. VanLandingham
Professor of Law
Southwestern Law School
President, NIMJ
2558 36th St., N.W.
Washington, DC 20007
213-738-6864
rvanlandingham@swlaw.edu

Brenner M. Fissell
Associate Professor of Law
Hofstra University Law School
Vice-President, NIMJ
516-463-5874
brenner.m.fissell@hofstra.edu

Philip D. Cave
Director, NIMJ
Cave & Freeburg, LLP
1629 K. St., NW, Ste 300
Washington, DC 20006
703-298-9562
mljucmj@court-martial.com