

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Petitioner

**SUPPLEMENT TO THE WRIT  
OF PROHIBITION**

v.

Case No. ARMY Misc. 20220001

Colonel (O-6)  
**CHARLES L. PRITCHARD,**  
Military Judge,  
Respondent

Lieutenant Colonel (O-5)  
**ANDREW J. DIAL,**  
U.S. Army  
Real Party in Interest

**TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

**Facts Relevant to the Issue Presented**

The facts relevant to the issue presented are adopted from the government's writ of prohibition.

**Statement of the Issue**

The statement of the issue is adopted from the government's writ of prohibition.

**Jurisdictional Basis for Relief Sought**

The jurisdictional basis for relief sought is adopted from the government's writ of prohibition.

## Reasons for Granting the Requested Relief

The reasons for granting the requested relief are adopted from the government's writ of prohibition and supplemented as follows:

### **A. The threshold question to an equal protection analysis is whether the challenged law treats similarly situated groups differently.**

Additional case law demonstrates how the military judge incorrectly analyzed whether servicemembers and civilians are similarly situated. “[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) (stating); 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). “Similarly situated” means “in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 8 (1992). Two groups are similarly situated if, “under like circumstances and conditions,” they are conferred the same privileges and imposed with the same liabilities. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 602 (2008) (citation and internal quotation marks omitted). As identified in the government’s writ of prohibition, the military judge erroneously narrowed the similarly situated analysis to the point of “civilian criminal trials and military courts-martial.” (Gov’t App. Ex. 7, p. 8). This is far too slender of a scope in light of case law’s much broader starting point.

The military judge’s analysis also conflicts with circuit courts, who apply a comparison-contrast 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”). 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. Despite the similarities between retired police officers and civilians, the *Kolbe* court found them not similarly situated—persuasively demonstrating that two categories are not automatically “similarly situated,” albeit having several similarities. *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). Here, the military judge engaged in a comparison and contrast that only looked at a portion of the

criminal proceedings, in conflict with this persuasive federal case law. (Gov't App. Ex. 7, pp. 8–10).

**B. The challenge to non-unanimous verdicts does not trigger an equal protection analysis: servicemembers and civilians are not similarly situated.**

In the body of the government's brief, it stated that accused servicemembers and civilian defendants are not similarly situated "for the purpose of criminal trials." (Pet'r Br. 11–12). In a footnote, the government also noted that "servicemembers are differently situated than civilians in aspects outside of their respective criminal justice systems." (Pet'r Br. 13 n.3). The government takes this opportunity to address these additional distinctions between servicemembers and civilians, as all differences are relevant for a similarly situated analysis.

It is axiomatic that servicemembers are subject to a statutory liabilities and privileges not applicable to civilians. *See, e.g.* 10 U.S.C. § 771 (prohibiting non-servicemembers from wearing a military uniform); 10 U.S.C. § 651 (requiring those who join the military to serve for certain periods of time); 10 U.S.C. §§ 504, 505, 532 (requiring servicemembers to meet certain physical and character standards in order to enlist or commission); 10 U.S.C. § 704 (allowing servicemembers to take leave "to the extent consistent with military requirements and other exigencies"); 10 U.S.C. § 991 (managing requirements for the deployment of servicemembers); 10 U.S.C. § 1074 (entitling all members of the uniformed services to medical and dental care); 10 U.S.C. § 2171 (providing

education loan repayment programs to enlisted members on active duty); 10 U.S.C. § 701 (providing members of the armed forces two and a half calendar days of leave each month); *United States v. Begani*, 81 M.J. 273, 280 (C.A.A.F. 2021) (assessing “benefits and obligations” as part of a similarly situated analysis); *see also Engquist* , 553 U.S. at 602 (noting groups are similarly situated if, inter alia, they are alike “in the liabilities imposed”).

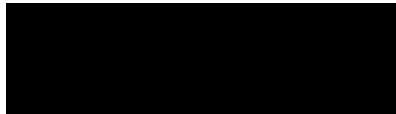
Because of the vastly different liabilities and privileges between the two bodies, servicemembers and civilians are not “in all relevant respects alike.” *See Nordlinger*, 505 U.S. at 8. Consequently, no further analysis is required under our equal protection jurisprudence, and the military judge incorrectly decided that accused servicemembers and civilian defendants are similarly situated.

## Conclusion

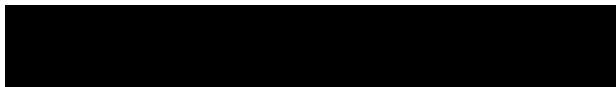
WHEREFORE, the United States respectfully asks that this court grant petitioner's writ of prohibition, preventing the military judge from issuing his unanimous verdict instruction.



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**CERTIFICATE OF SERVICE, U.S. v. COL PRITCHARD, CHARLES L., (Respondent); MSG DIAL, ANDREW J. (Real Party in Interest) (Misc 20220001)**

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [REDACTED]

[REDACTED] this 29th day of January 2022.

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