No. 24-654

In the Supreme Court of the United States

DAVID LESH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF CRIMINAL LAW PROFESSORS ANDREA ROTH AND J.D. KING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Article III of the Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." And the Sixth Amendment provides that "[i]n all criminal prosecutions," the accused shall enjoy the right to trial by jury.

The question presented is:

Whether the Constitution's dual guarantee of trial by jury contains an unstated exception for "petty" offenses.

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INTEREST OF *AMICUS CURIAE*[1]

Andrea Roth and John D. King are law professors with extensive experience in criminal law and constitutional criminal procedure history.

Professor Roth is Professor of Law and Barry Tarlow Chancellor's Chair in Criminal Justice at the University of California Berkeley School of Law, and has published works concerning criminal procedure and history, including the constitutional right to a jury trial. One such work, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 DUKE L.J. 599 (2022), pertains directly to issues raised in the Petition. Professor Roth is a member of the American Law Institute, has been in academia for more than 15 years and served nearly a decade as a criminal defense attorney in the District of Columbia.

Professor King is Professor of Law at Rutgers Law School. He has published works in criminal law and procedure and specifically about "petty offenses." One such work, Juries, Democracy, and Petty Crime, 24 U. Pa. J. Const. L. 817 (2022), pertains directly to issues raised in the Petition. Prior to joining Rutgers Law School, Professor King was the James P. Morefield Professor of Law at Washington and Lee University School of Law, where he taught for fifteen years. He has been in

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[1] Pursuant to Rule 37.6, *amici* certify no counsel for a party has authored this brief in whole or in part and that no one other than *amici* and their counsel have made any monetary contribution to the preparation and submission of this brief. Pursuant to Rule 37.2, *amici* certify that notice of their intent to file this brief was given to the parties 10 days prior to the filing deadline.

legal academia for more than 20 years and served seven years as a criminal defense attorney in the District of Columbia.

REASONS FOR GRANTING THE PETITION

This case asks whether convictions for federal crimes that are prosecuted by the United States Attorney's Office and that include fines, potential imprisonment, and that can be used at sentencing in subsequent prosecutions, but that carry a maximum jail sentence of six months or less, are exempt from the Constitution's guarantees of a jury trial in criminal prosecutions.

Article III of the Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" while the Sixth Amendment guarantees a right to a jury trial "[i]n all criminal prosecutions."

Despite the Constitution's clear text, a "petty offense" exception emerged in *dicta* from this Court in the nineteenth century that has since been used to preclude jury trials in federal cases involving a maximum sentence of imprisonment for six months or less. *E.g.*, *Schick v. United States*, 195 U.S. 65 (1904).

This Court's prior decisions creating a "petty offense" exception rest on shaky, and ultimately incorrect, constitutional and historical bases that have never received the full consideration and briefing of this Court. Federal offenses that can result in imprisonment for up to six months, and that carry other penalties, are considered "crimes" today. A correct read of history further shows that offenses in this category would have also been considered "crimes" at the founding and thus subject to the jury-trial right twice enumerated in the Constitution.

Certiorari is warranted on this significant issue to permit this Court to correct the mistake of excluding federal crimes with a sentence of imprisonment for up to six months from the right to a jury trial. The "right of trial by jury ranks very high in our catalogue of constitutional safeguards," *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955), and was in fact deemed an "inherent and invaluable right" among the colonies before the Constitution was adopted. *Id.* at 16 n.9. That inherent right has erroneously been denied to many defendants prosecuted for federal crimes. As this Court has emphasized in a variety of contexts, inertia alone is insufficient to justify adherence to a practice that contradicts the text and history of the Constitution. *See, e.g.*, *Ramos v. Louisiana*, 590 U.S. 83 (2020); *Crawford v. Washington*, 541 U.S. 36 (2004).

Certiorari is also warranted because the petty-offense exception has profound implications for the accused. Convictions for any federal offense, including petty offenses, carry lifelong consequences because the offenses are "crimes." Indeed, as Congress refines and expands federal criminal law to address and concern conduct unknown at the founding, adherence to the inherent right to a jury trial is essential.

This Court should grant the writ, consider fulsome briefing the petty-offense exception, and hold the exception has no basis in the Constitution's text, history, or purpose. Though this result is demanded regardless of practicalities, providing a jury trial for federal "petty" offenses will not cause major disruption to the administration of criminal justice. Either way, certiorari is warranted.

I. UNDER THIS COURT'S PRECEDENTS, CERTIORARI IS APPROPRIATE WHERE A PRACTICE DENYING A FUNDAMENTAL RIGHT CONTRADICTS CONSTITUTIONAL TEXT AND HISTORY

Particularly in the criminal-law context, this Court's recent precedents demonstrate that certiorari is warranted where current practice denying a fundamental right cannot be reconciled with, or at least appears to contradict, the text or history of the Constitution. Put differently, many of this Court's recent decisions demonstrate that departure from constitutional text and historical practice is a compelling reason that warrants review under Supreme Court Rule 10.

1. This Court's recent decision in *Ramos v. Louisiana* demonstrates this Court's commitment to using the Constitution's text and history as a guide in correcting precedent. 590 U.S. 83 (2020). *Ramos* held the right to a jury trial within the Sixth Amendment requires criminal verdicts to be unanimous in light of the Constitution's text and historical context at founding. In reaching this conclusion, the *Ramos* Court first looked to "[t]he text and structure of the Constitution" to ascertain "*some* meaning about the content and requirements of a jury trial." *Id.* at 89. After that, although the text itself does not call for a unanimous verdict, *Ramos* held "a jury must reach a unanimous verdict" given the text's historical context. *Id.* at 83.

The same approach invoked in *Ramos* is warranted here. There, this Court pointed to

historical sources to inform the Court's interpretation of the right to a jury trial including "the common law, state practices in the founding era, [and] opinions and treatises." *Id.* at 90. To that effect, this Court looked to Blackstone, six early State Constitutions and treatises from 1824 and 1833. *Id.* at 90-91.

This Court in *Ramos* had no trouble concluding that *stare decisis* did not limit this Court from correcting errors of constitutional interpretation. *Id.* at 105 (explaining that "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true").

2. Beyond *Ramos*, this Court has likewise found adherence to constitutional text and history constitutes a compelling reason to grant certiorari.

For example, also construing the Sixth Amendment, *Crawford v. Washington*, 541 U.S. 36 (2004), accepted review to determine whether doctrine concerning the Confrontation Clause needed to be revisited to make the law conform to the text and history behind that clause. In so doing, *Crawford* held the Confrontation Clause's "text does not alone resolve" its meaning, so this Court additionally turned "to the historical background of the Clause." *Id.* at 42-43. *Crawford* also considered Blackstone; sixteenth and seventeenth century political trials; and text from state Declaration of Rights because "[m]any declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation." *Id.* at 48. These, among other historical examples, convinced the *Crawford* Court to overrule precedent in favor of

an accurate historical understanding of the Confrontation Clause. *Id.* at 43-44.

This Court has granted certiorari and issued decisions that similarly turned on a correct understanding of history when deciding whether current federal law requires revision. *See, e.g.*, *United States v. Rahimi*, 602 U.S. 680, 691 (2024) (finding the scope of a right depends on the "constitutional text and history" and that a regulation is lawful where it fits within "historical tradition"); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (finding the Fourteenth Amendment's Due Process Clause "has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 25 (2022) (finding "reliance on history to inform the meaning of constitutional text—especially text meant to codify a pre-existing right—is . . . more legitimate, and more administrable.").

In short, as in *Crawford*, after examining the "historical underpinnings" of the relevant constitutional provisions, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009), this Court should grant certiorari and provide that the text and history of the Sixth Amendment require a jury trial in all criminal cases, without a petty-offense exception.

II. THERE IS NO BASIS IN THE CONSTITUTION'S TEXT OR HISTORY TO EXCLUDE PETTY OFFENSES FROM THE RIGHT TO A JURY TRIAL

This Court should grant the petition because current law disallowing a right to jury trial for petty offenses has no basis in either the plain text or history of the Constitution.

A. The Right to a Jury Trial In the Constitution's Text Includes No Exception for Petty Offenses

This Court has repeatedly emphasized its commitment to adhering to constitutional text when interpreting the meaning of a right. *See Dobbs*, 597 U.S. at 235 (2022) ("Constitutional analysis must begin with the language of the instrument.'" (quoting *Gibbons v. Ogden*, 22 U.S. 1, 186-89 (1824)); *Rahimi*, 602 U.S. at 715 (Kavanaugh, J., concurring) ("The first and most important rule in constitutional interpretation is to heed the text—that is, the actual words of the Constitution—and to interpret that text according to its ordinary meaning as originally understood.").

Here, Article III of the Constitution provides that "[t]he Trial of all Crimes, *except in Cases of Impeachment*, shall be by Jury." U.S. CONST. ART. III, § 2. (emphasis added). By specifically exempting impeachment proceedings from the otherwise unqualified adjudication of "all crimes," Article III necessarily proscribes a right to a jury trial for the trial of *all* other federal offenses. That is as basic as the principle of *expressio unius est exclusio alterius*,

which dictates that the expression of one thing implies the exclusion of others. In short, as has been discussed in scholarship, "because the word 'Crimes' in Article III's jury trial mandate is expressly modified to exclude impeachment trials it necessarily includes all other trials." Stephen A. Siegel, *Textualism on Trial: Article III's Jury Trial Provision, the "Petty Offense" Exception, and Other Departures from Clear Constitutional Text*, 51 HOUS. L. REV. 89, 119 n.149 (2013).

The Sixth Amendment likewise provides that "[i]n *all* criminal prosecutions," the accused shall enjoy the right to trial by jury. U.S. CONST., AMD. VI (emphasis added). No text in the amendment alludes to an abridgment of this right in certain types of criminal prosecutions. The prerequisite for the right to a jury is straightforward—a criminal prosecution.

To hold that Article III does not cover at minimum all federal criminal offenses would result in giving the same word in the Constitution two different meanings in the very same provision. The word "crime" appears in Article III's venue clause, which directly follows the jury-trial clause. U.S. CONST. ART. III, § 2, cl.3. The Constitution reads: "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." The petty-offense exception rests upon the notion that crimes (outside of impeachment), for the purpose of the right to a jury, carry an alternate meaning than a different clause in the very prior

provision, as there is no separate "petty offense" exception for the venue requirement in this Article. The notion that the word "crime" changes meaning within the same clause is an absurd result that should be resolved. *Cf.* Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 ("Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce 'absurd' results."); Siegel, *supra*, at 114-120 ("The absurdity that follows from giving the word "crime" a narrow meaning in the venue clause is so glaring that it should settle that the word "crime" in the venue clause carries the broad, all-encompassing meaning.").

The unequivocal meaning of these provisions is confirmed by the consistent use of the word "crime" elsewhere in the Constitution. Unlike the Sixth Amendment, other references to crime or criminal prosecutions in the Constitution include modifications, none of which would exclude relatively minor offenses from being considered "crimes" altogether. For instance, Article II, Section 4 provides: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. ART. II, § 4. Of course, neither Article III nor the Sixth Amendment refer solely to "high crimes" or exclude misdemeanors from being federal offenses subject to criminal prosecution. Likewise, the Fifth Amendment provides that no "person shall be held to answer for

a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. CONST. AMD. V (emphasis added). Again, neither Article III nor the Sixth Amendment limit their reach to a certain class of crimes or criminal prosecutions as the Fifth Amendment does with "capital or otherwise infamous" crimes.

As a final example, the Extradition Clause requires extradition of "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State". U.S. CONST. ART. IV, § 2, cl. 2. There is no question that this provision would permit extradition of a criminal defendant charged with a petty offense to accommodate the venue clause in Article III. Perhaps more important, Article IV confirms that the Constitution, including with Article III and the Sixth Amendment, address *all* crimes subject to criminal prosecution, venue, extradition, other than those specifically exempt (*i.e.* for impeachment).

B. Federal Petty Offenses Are Crimes Now, and the Jury Right's History Does Not Support the Claim That They Would Have Been Denied a Jury at the Founding

What are considered petty offenses are crimes now and would have been considered crimes covered by Article III and the Sixth Amendment at founding.

1. As currently defined and understood, federal petty offenses are "crimes." Federal criminal law provides that petty offenses include Class B and Class C misdemeanors. 18 U.S.C. § 19. These are crimes for which the penalty of incarceration can be up to six months or less but more than 30 days (for Class B misdemeanors) or up to thirty days or less but more than five days (Class C misdemeanors). 18 U.S.C. § 3559. Petty offenses can be subject to fines and restitution pursuant to federal law, 18 U.S.C. § 3571, 18 U.S.C. § 3556, and the Federal Criminal Rules of Procedure govern the adjudication of petty offenses. FED. R. CRIM. P. 58. And, by definition, the nature of these offenses is considered at sentencing. 18 U.S.C. § 3553.

Crimes for which a sentence may include imprisonment of up to six months—Class B misdemeanors—are enumerated in the criminal part of the U.S. Code and are prosecuted by the United States Attorney's Office. They are crimes, and a prosecutor's pursuit of convictions in federal court for these offenses are criminal prosecutions. Federal petty offenses embrace issues as serious as the security of federal property and trespass into sensitive locations, as well as classic *malum in se*

offenses like theft and assault (under the Assimilative Crimes Act, 18 U.S.C. § 13).

For example, an individual who unlawfully enters a military base—like the Pentagon—or who reenters a military reservation, post, fort, or other place after removal commits a Class B misdemeanor. 18 U.S.C. § 1382. Committing acts of violence, vandalism, property damage, or threats of violence against animal enterprises is a Class B misdemeanor. 18 U.S.C. § 43. Wearing a military, naval, or police uniform of an official at peace with the United States with "intent to deceive or mislead" and trespassing on federal Bureau of Prisons land are both Class B misdemeanors. 18 U.S.C. §§ 703, 1793. Attempting to tamper with or influence grand or petit jurors of any court of the United States is likewise a Class B misdemeanor. 18 U.S.C. § 1504.[2]

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[2] As a result of the U.S. Capitol breach on January 6, 2021, though many were also charged with additional felony and misdemeanor offenses, defendants were also charged and convicted of "petty" federal crimes for their actions. *See, e.g.*, *United States v. Chrestman*, 525 F. Supp. 3d 14, 18 (D.D.C. 2021); *United States v. Stedman*, No. CR 21-383, 2024 WL 3967389, at *1 (D.D.C. Aug. 28, 2024); *United States v. Lyons*, No. CR 21-00079, 2024 WL 3898550, at *1 (D.D.C. Aug. 22, 2024). Hundreds of people were eventually charged for offenses related to January 6 and "most of the charges have been for petty offenses." Alan Feuer, *In Capitol Attack, Over 900 People Have Been Criminally Charged*, N.Y. Times (Dec. 19, 2022). The Government also agreed to plea deals for Class B misdemeanors in some early January 6 Capitol prosecutions. *See* United States Attorney's Office, District of Columbia, Capitol Breach Cases, *Sentences Imposed in Cases Arising Out*

In addition, though the potential sentences are relatively short for a single petty-offense conviction, the consequences of being convicted continue after the term of imprisonment. For example, petty offenses constitute criminal history used at any subsequent sentencing, which can add substantial "points" to a federal defendant's criminal sentence pursuant to the Sentencing Guidelines. *See* UNITED STATES SENTENCING COMMISS'N, GUIDELINES §4A1.1 (2024) (providing for 2 points for a prior sentence of imprisonment for at least sixty days, and 1 point for any prior sentence even if less than sixty days).

2. There is no historical basis for claiming that the Founders intended to deny a jury for crimes with a potential punishment of up to six months' imprisonment, fines, and lifelong impacts as a convicted criminal. Instead, petty offenses subject to criminal punishment appear to have always been understood, at the time of founding and now, to be criminal prosecutions. *See generally* Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 DUKE L.J. 599, 637 (2022); John D. King, *Juries, Democracy, and Petty Crime*, 24 U. PA. J. CONST. L. 817, 821 (2022).

The Founders saw the criminal jury as a protection against corruption. King, *supra*, at 821. Historical sources make clear that, at the time of the founding, the understanding of a "criminal prosecution" and "crime" included petty crimes. Among the colonies, a declaration of rights adopted

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of the Events of January 6, 2021, 1 n.1 (Jan 6. 2025), *available at* https://www.justice.gov/usao-dc/media/1331746/dl?inline (last visited January 15, 2025).

by nine colonies in 1765 declared the right to a trial by jury as an "inherent and invaluable right" *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 16 n.9 (1955). Indeed, the Declaration of Independence provides that "one of the grievances of the colonies" was being deprived the right to trial by jury. *Id.* As a result, the need to protect the right to trial by jury was one of the most uniformly agreed-on rights at the time of founding. THE FEDERALIST NO. 83, at 432–33 (Alexander Hamilton) (George W. Carey & James McClellan, eds., 2001) ("The friends and adversaries of the [proposed constitution], if they agree in nothing else, concur at least in the value they set upon the trial by jury."). This right was the only one that every single state constitution drafted during the Revolutionary period had in common, reflecting consistency in the goal of protecting individual liberty while engaging in democratic governance to check the judiciary. *See Duncan v. State of La.*, 391 U.S. 145, 153 (1968). The Founders would surely not have agreed to abridge a right that was so universally supported and implemented, in a federal criminal prosecution carrying potential jail time.

Likewise, Blackstone's treatment of petty offenses confirms that, at common law, they were considered crimes within the meaning of Article III and that legal adjudication of such offenses were "criminal prosecutions" within the meaning of the Sixth Amendment. *See* Roth, *supra*, at 637. Blackstone "dedicates an entire section in his volume 'public wrongs' to summary convictions for petty offenses" which he describes in "criminal terms" distinct from civil violations of public law in that they involve "conviction of offenders" and

accused parties who are "acquitted or condemned" in summary proceedings. *Id.* (further citation omitted). Blackstone included "petty session[s]" in his section on "Courts of Criminal Jurisdiction" and "presentments of petty offences" in his section on "Modes of Prosecution." *Id.* Notably, Blackstone indicates that what sets petty offenses apart from other crimes is "not that they are not criminal, but that they are 'small misdemeanors.'" *Id.*[3]

Consistent with the Constitution's broad reach and rejection of an abridgment of the right to a trial by jury, founding-era dictionaries made no room for "petty offenses" to be considered non-crimes and recognized that lower-level offenses (*e.g.* misdemeanors) were still *criminal prosecutions.* For example, Samuel Johnson's 1755 English dictionary defines "criminal" generally: "1. Faulty; contrary to right; contrary to duty; contrary to law. . . .2. Guilty; tainted with crime; not innocent. . . .3. Not civil; as a *criminal* prosecution." 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 515 (London, W. Strahan, 1755). According to this definition, a criminal prosecution would encapsulate anything that is not tried as a civil case. Additionally, Johnson's dictionary defines both "felony" and "misdemeanor" as crimes, just of differing degrees. A "felony" is "[a] crime denounced capital by the law; an enormous crime." *Id* at 797. A "misdemeanor" is "an [o]ffense; ill behavior; something less than an atrocious crime." *Id*. at 1329.

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[3] Blackstone considered summary adjudications—those without a jury trial—as deviations from the common law. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *278-84.

Merriam-Webster's first comprehensive dictionary, published in 1828, defines "criminal" equally broadly: "relating to crimes; opposed to civil; as a *criminal* code; *criminal* law; " [a] person who has committed an offense against public law" or "[m]ore particularly, a person indicted or charged with a public offense, and who is found guilty by verdict, confession[,] or proof." *Criminal*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), https://webstersdictionary1828.com/Dictionary/crime.

Once again, the definition distinguishes public criminal wrongs from private civil wrongs. Further evidence of this is that the 1828 dictionary explicitly differentiates "misdemeanors" from "trespassing" in that "crimes and misdemeanors" are "punishable by indictment, information, or public prosecution," whereas "trespasses or private injuries" are generally dealt with in civil court. WEBSTER, *supra*, at *Crime*.

Finally, founding-era treatises and cases frequently refer to petty offenses as crimes. *See generally* Roth, *supra*, at 641. Just as dictionary definitions describe misdemeanors in criminal terms, commentators on the adjudication of petty offenses in England similarly described such offenses in criminal terms. *Id*. As Professor Roth's research has shown, "several early and late nineteenth century treatises also described petty offenses as explicitly criminal." *Id*. (citing, among other authorities, 5 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 180 (Henry Gwyllim, Bird Wilson & John Bouvier eds., 3d ed. 1852) (1768),

LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 586 n.70 (1956) (quoting AN ALPHABETICAL ARRANGEMENT OF MR. PEEL'S ACTS BY A BARRISTER 53 (2D ED. 1830))).

In the end, "from the early days after the Constitution's ratification to the present day, both the Supreme Court and Congress have routinely acknowledged that nonjury-demandable petty offenses are still crimes." *Id.* In their courts, former colonies-turned-states following ratification of the Constitution likewise refer to petty offenses as criminal proceedings. *Id.*

3. The contra-textual petty-offense exception grew out of *dicta* from this Court's early cases rather than a fulsome consideration of constitutional text or history, resulting in an erroneous doctrine. To begin, *Callan v. Wilson* introduced the petty-offense exception into constitutional law, by suggesting a category of crimes for which a right to a jury trial did not apply if they were deemed "petty." 127 U.S. 540 (1888). The *Callan* Court did not reference the text when claiming "that there is a class of petty or minor offenses not usually embraced in public criminal statutes, and not of the class or grade triable [at] common law by a jury." *Id.* at 555. The *Callan* Court reasoned that the word "crime" has an "extended sense" and a "limited sense," and the limited sense "embraces [only] offences of a serious or atrocious character." *Id.* at 549. And, for some reason still unclear, *Callan* reasoned only the "limited sense" of crimes is governed by the Constitutional right to a jury trial in criminal cases. Without further analysis, the Court assumed throughout the

remainder of the opinion that the word "crime" in Article III was used in its "limited sense" and therefore, the right to a jury trial was restricted to serious criminal prosecutions.

The Court continued along these underdeveloped, but path-dependent lines in *Schick v. United States*, 195 U.S. 65, (1904). There, this Court reiterated the lack of textual interpretation in *Callan*, admitting that "the body of the Constitution does not include a petty offense like the present." It must be read in the light of the common law." *Id*. at 69.

But, as the foregoing shows, the Court at the time appears to have misunderstood the common law. In addition, the Court also misinterpreted Blackstone's comment that "misdemeanors" as a *class* of different offenses by reasoning that this class of offenses were not *crimes*. *Id*. at 69-70. The Court had an opportunity to avoid this misstep at the time. Justice Harlan states the following in his dissent:

> I am not aware of, nor has there been cited, any case in England in which, after *Magna Charta*, and prior to the adoption of our Constitution, a court, tribunal, officer, or commissioner has, without a jury, even in the case of a petty offense, determined the question of crime or no crime, when the defendant pleaded not guilty, *unless the authority to do so was expressly conferred by an act of Parliament*.

Id. at 80-81 (Harlan, J., dissenting). Justice Harlan's comment was accurate then and has been further elucidated by research since.

Nonetheless, despite being incomplete and inaccurate, the reasoning underpinning *Callan* and *Schick* has been repeated over the next few decades. *E.g.*, *Frank v. United States*, 395 U.S. 147, 150 (1969) (concluding that petitioner convicted of criminal contempt was not entitled to a jury trial because three-year probationary sentence was "petty"); *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970) (holding that offenses under six months are petty and federal courts are thus justified in denying defendants the right to a jury trial); *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543–45 (1989) (holding that offenses with a maximum prison term of six months or less are presumed "petty" under the Sixth Amendment, granting a jury trial only if additional penalties, combined with incarceration, clearly indicate the offense is "serious"); *Lewis v. United States*, 518 U.S. 322, 327–28 (1996) (similar).

However, as far as *amici* can tell, none of these subsequent cases has fully considered—or been presented with the opportunity to consider—whether the right to a jury trial in Article III and the Sixth Amendment should cover federal crimes that may impose life-long consequences beyond six-months in prison in light of the text and history of these provisions. This Court should grant certiorari to answer that question and find that the Constitution includes a right to a jury trial for all criminal prosecutions, as the text indicates and history confirms was contemplated at founding.

4. In addition to embracing what are well and truly crimes, the right to a jury trial in petty offenses

is important. A single misdemeanor conviction often carries lifelong impacts, including "collateral consequences" that continue to impact someone's life for years to come even if the original sentence of imprisonment was only a handful of weeks or months. *See, e.g.*, Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 296-97 (2011) (explaining that "collateral consequences loom larger in misdemeanor cases, because they often overshadow any potential direct criminal sentence"); Kevin Davis, *No Small Matter: Even a Wrongful Misdemeanor Conviction Can Change Someone's Life Forever*, ABA JOURNAL (Oct. 1, 2024). Regardless of whether they face any time incarcerated, convicted people face serious, often lifetime difficulties in employment, housing, and family contexts. AMERICAN BAR ASSOCIATION, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK (Mar. 2018). Because criminal records are now widely available electronically, employers, landlords, and others can access them. Roberts*, supra*, at 277. These collateral consequences disproportionately impact people of color. AMERICAN BAR ASSOCIATION*, supra,* at 4. Additionally, a misdemeanor conviction can frequently serve as a gateway to future criminal prosecutions, especially for people of color. J.D. King and Andrea Roth, *Anything but Petty*, INQUEST, Oct. 25, 2022, https://inquest.org/anything-but-petty/.

III. PROVIDING A RIGHT TO A JURY TRIAL FOR PETTY OFFENSES WILL NOT UPEND FEDERAL CRIMINAL ADJUDICATIONS

Certiorari is warranted here because the petty offense exception appears to squarely contradict the right to a jury trial embodied in Article III and the Sixth Amendment. That result is warranted regardless of practical consequence. Nonetheless, it may be worth noting that available evidence shows that eliminating the exception will not upend federal prosecutions generally or for misdemeanors that carry a maximum of six-months imprisonment.[4]

1. The vast majority of federal criminal prosecutions are resolved through plea bargains, resulting in very few actual jury trials. Despite the number of federal criminal defendants more than doubling between 1962 and 2002, federal criminal trials dropped by 30%. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, J. EMPIRICAL LEGAL STUDS. 459, 501 (2004). This Court recognized over a decade ago that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Those numbers still hold today. According to the U.S. Sentencing Commission, it remains the case that over 97% of federal convictions are a result of a guilty plea. U.S. SENTENCING COMMISSION,

[4] The Petition does not concern or address the petty-offense exception as applied to the States but concerns federal prosecutions alone.

SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, GUILTY PLEAS AND TRIALS IN EACH CIRCUIT AND DISTRICT, TABLE 11 (2023). Only 2.8% of cases across all federal districts went to trial in 2023. *Id.* The prevalence of plea agreements ensures that restoring the jury trial right for petty offenses will not dramatically increase the number of trials, since most defendants in petty offense cases are also likely to resolve their cases through negotiated pleas.

2. In addition, state practice shows that criminal adjudication will not be upended by the elimination of an exception to the right to a jury trial for petty offenses. Most states already guarantee a jury trial, either by statute or constitutional amendment, beyond the federal constitutional minimum and have been able to successfully manage their dockets without a petty-offense exception. Twenty states provide for a jury trial to essentially anyone who is charged with a criminal offense. Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, WIS. L. REV. 133. 172. (1997). Only ten states do not protect the right to a jury trial beyond the current federal minimum. *Id.*

Texas, for instance, guarantees the right to a jury trial for all criminal prosecutions, including traffic violations and other minor offenses. Despite being the second most populous state in the Union, Texas has managed its criminal dockets effectively. In fiscal year 2023, Texas courts reported hundreds of thousands of criminal filings, yet the system accommodated defendants' rights without undue strain. Annual Statistical Report for the Texas Judiciary FY 2023, https://www.txcourts.gov/media/1459429/ar-

statistical-fy23.pdf (2024). Similarly, in Colorado "a defendant possesses the right to a jury in municipal court if charged with the commission of a petty offense," which excludes traffic offenses. *Bradford v. Longmont Municipal Court*, 830 P.2d 1135, 1136 (Colo. App. 1992). Colorado's judiciary is able to manage their dockets. *See* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, WIS. L. REV. 133. 172 N.178 (1997) (collecting citations to state constitutional provisions and other authorities that provide for criminal jury trial rights for all criminal offenses).

The right to a jury trial was intended to ensure against prosecution that was unfair, an overreach, or beyond what (very wide) prosecutorial discretion would otherwise counsel. Extending this right, then, may actually decrease the number of such prosecutions. But, even assuming recognizing the jury trial right for petty offenses could hypothetically introduce additional costs in the very few cases that a jury trial is actually sought, such costs are vastly outweighed by the constitutional and societal benefits of ensuring fair and consistent application of criminal justice. The right to a jury trial serves as a critical check on government power via community participation in determining guilt or innocence. Roth, *supra*, at 677. By reinforcing this safeguard, the justice system gains legitimacy and fairness, particularly for individuals accused of offenses that carry significant collateral consequences.

CONCLUSION

The Petition should be granted, and this Court confirm federal criminal prosecutions to the text and history of the Constitution by eliminating the petty-offense exception to the right to a jury trial in criminal prosecutions.

Respectfully submitted,

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