No. 24-654

IN THE

Supreme Court of the United States

DAVID LESH,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* SOUTHERN POLICY LAW INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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]

The Southern Policy Law Institute (SPLI) is a nonprofit, nonpartisan 501(c)(3) public policy educational research organization charged with researching, developing, and promoting public policy alternatives that advance individual liberties, support local self-government, and promote entrepreneurship and job creation. SPLI is substantially supported by contributions. Its activities include publications, public events, media commentary, invited executive and legislative consultation, and community outreach.

In the present action, SPLI urges grant of the Writ of Certiorari because the issue is one basic to our federal and state system of American criminal justice. David Lesh's case provides the Court with an ideal opportunity, through the proper textual and structural analysis, to restore important principles underlying our Nation's Founding.

CONSTITUTIONAL PROVISIONS INVOLVED

"The trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III, § 2.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

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[1] Rule 37 Statement: *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *Amicus*, its members, or its counsel has made monetary contributions to its preparation and submission. Pursuant to the Rule, counsel for both parties have received timely notice of *Amicus's* intent to file this brief in support of the Petition.

SUMMARY OF THE ARGUMENT

Wise men in centuries past considered the Earth to be the center of the solar system, and all other heavenly bodies to orbit the Earth. While we now know this to be untrue, the consensus of successive experts through the ages persisted in error.

As science improved the precision of measurement, the error became apparent. Astronomical calculations would miss the mark and compound error without adjustment. Rather than return to first principles and revise the theory, adherents of the established view devised kludges. Astronomers drew up epicycles of planets and moons orbiting each other at varied distances and speeds, to account for noticeable differences between where the planet was in the sky, and where received wisdom said it should be. It took decades, if not centuries, for accepted wisdom to change, and for the Sun-entered model of Galileo, Copernicus and Kepler to replace the mathematical stratagems contrived to account for retrograde motions of the planets.

Much like the story of celestial models, the history of the Sixth Amendment and the stated constitutional right to jury trial of all crimes — including misdemeanors — has seen errors and accretions compound the distance from the original truth. Despite the text in Article III and in the Sixth Amendment, at one time the Court took upon itself to parse further qualifications upon a right that was meant and stated as a simple absolute. The pronouncement, which sought to manage expertly the perceived pressures of the growing nation's court systems, caused a cascade of successive kludges and epicycles in Sixth Amendment jurisprudence. Each adjustment occasioned further slicing and dicing of

the right to trial by jury. The invented distinctions necessarily led to unguided line drawing, and the resultant arbitrariness fosters uncertainty among both state and federal courts.

The Court now has the opportunity in the case of David Lesh to restore the import of the Framers' text and eliminate confusion over where, how and if the absolute right to jury trial applies as originally intended.

REASONS FOR GRANTING THE PETITION

I. This case presents a fundamental question about the scope of the Sixth Amendment's jury trial right, that has not been definitively settled by the Court. The petty offense exception and its dividing line represent a significant carve-out from constitutional text, that warrants review and correction of a longstanding error.

The right to jury trial of crimes predates the United States, as part of the English common law. *See, e.g.*, 4 Wm. Blackstone, Commentaries on the Laws of England *342-55. Blackstone exhorted us to keep the jury

> not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free

> nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

Id. at *343-44 (emphasis in original).

Even before the Declaration of Independence or the Constitution, Great Britain routinely subjected Americans to trial before admiralty courts or administrators without petit jury. In 1774, the First Continental Congress proclaimed the right to jury trial as the natural right of all Americans: "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." First Continental Congress, Declaration & Resolves, 5th Resolve (Oct. 14, 1774) (unanimously resolved). *See also* Stamp Act Congress, Declaration of Rights, 7th Resolve (Oct. 19, 1765) ("That trial by jury is the inherent and inalienable right of every British subject in these colonies.").

The Declaration of Independence repeated this demand among the list of grievances against the British Crown: "For depriving us, in many Cases, of the Benefits of trial by Jury." The Declaration of Independence para. 20 (U.S. 1776). Concerns arose still during the ratification debates in the States. *See, e.g.*, Jackson Turner Main, The Antifederalists 159-60 (1961) ("Every ratifying convention which considered amendments adopted one or more similar to the present [amendments] V, VI, and VII."). *See also Blakely v.*

Washington, 542 U.S. 296, 305-06 (2004) (collecting historical essays and references).

The Constitution in Article III directly secures the right to jury trial of all crimes before the federal judiciary: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III, § 2. *See also* Leonard W. Levy, Origins of the Bill of Rights 227 (1999) ("At the Philadelphia Constitutional Convention of 1787 the first right recognized was trial by jury.").

If any emphasis were necessary, to address the public concerns during ratification, the Sixth Amendment underscored the the criminal jury trial right: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. The Court has deemed the Sixth Amendment right to jury trial applicable to the State courts through incorporation in the Due Process Clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

"When this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).

The Court has imposed the petty offense exception as an extra-textual qualification on the right to jury trial: "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses." *Duncan*, 391 U.S. at 159

(citing *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). *But see id.* at 160 ("Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory."); *Bloom v. Illinois*, 391 U.S. 194, 198-99 (1968) (companion opinion handed down same day as *Duncan*, holding that "considerations of necessity and efficiency" do not "justify denying a jury trial in serious criminal contempt cases."); *id*. at 208-209 (we "are not persuaded that the additional time and expense possibly involved in submitting serious contempts to juries will seriously handicap the effective functioning of the courts.").

A. The petty offense exception undermines other constitutional protections in criminal procedure beyond jury trial.

The petty offense exception creates anomalies where the Constitution explicitly guarantees defendants multiple rights in the text, yet of those rights, only the jury trial right is cut short. Neither the text or reasoning of the Constitution warrants this exception. *Ramos v. Louisiana*, 590 U.S. 83, 89 (2020) ("the promise of a jury trial surely meant *something* — otherwise, there would have been no reason to write it down.") (emphasis original).

The Sixth Amendment explicitly protects the defendant's right to counsel, *Argersinger v. Hamlin*, 407 U.S. 25, 37-38 (1972). The amendment mandates the right to confront witnesses, *Samia v. United States*, 599 U.S. 635, 655 (2023); *Crawford v. Washington*, 541 U.S. 36, 68 (2004), and bars double jeopardy, *Yeager v. United States*, 557 U.S. 110, 117 (2009) — which protection covers both misdemeanors and felonies, *Ex parte Lange*, 85 U.S. 163, 169-70 (1873). The Fifth Amendment protects all persons against coerced self-incrimination. U.S. Const. amend V; *Vega v. Tekoh*,

597 U.S. 134, 141 (2022); *Fisher v. United States*, 425 U.S. 391, 409 (1976); *see also Miranda v. Arizona*, 384 U.S. 436, 446-50 (1967) (Fifth Amendment protection against self-incrimination extends to pretrial settings).

The fundamental jury trial right, disfavored, mysteriously lacks full protection and enforcement — despite the Constitution's explicit language stating "**all** criminal prosecutions" without further qualification. U.S. Const. Art. III, § 2 (emphasis added). *Cf. Muniz v. Hoffman*, 422 U.S. 454, 476-77 (1975) ("In determining the boundary between petty and serious contempts for purposes of applying the Sixth Amendment's jury trial guarantee, … the Court has referred to the relevant rules and practices followed by the federal and state regimes …. But in referring to that definition, the Court accorded to it no talismanic significance.").

This dangerous disconnect implicates broader separation of powers concerns, now familiar to this Court. *Blakely*, 542 U.S. at 305-06 (the jury trial "right is no mere formality, but a fundamental reservation of power in our constitutional structure. … [The] jury trial is meant to ensure [the people's] control in the judiciary."). Congress may decide which acts constitute federal crimes. U.S. Const. art. I, § 8. *But see United States v. Nachtigal*, 507 U.S. 1, 4-5 (1993) (upholding law and regulation permitting Secretary of the Interior to legislate a criminal penalty which did not merit jury trial).

The Constitution does not give Congress the power to amend or override a provision of the Constitution, nor does it give the power to the judiciary and the Court to amend the congressional statute or the constitutional provision. *Compare Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) (permitting a "legislative determination" of which crimes merit the

jury trial right). Congress may or may not deem an act a crime — but having done so, Congress may not decide which crimes do or do not get tried to a jury: The Framers made that decision for us, and now the Constitution says "all" crimes. U.S. Const. Art. III, § 2; *Blakely*, 542 U.S. at 308 ("the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."); *Bloom*, 391 U.S. at 209 ("considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power. .. to some extent we sacrifice efficiency, expedition and economy, but the choice in favor of the jury trial has been made, and retained, in the Constitution.").

Selective application of constitutional protections in criminal law lacks a coherent constitutional theory or rationale. *See Blakely*, 542 U.S. at 308 ("the Sixth Amendment by its terms is not a limitation on the judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury."). If the right to jury trial can be modified or curtailed outside the Constitution's text, what prevents such trimming or reduction of all the other protections in criminal cases? "When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses." *Ramos*, 590 U.S. at 100. *See International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 831-32 (1994) (because the "fusion of legislative, executive, and judicial powers summons forth … the prospect of the most tyrannical licentiousness," there exists "a right to jury trial as a protection against the arbitrary exercise of official power.") (cleaned up).

The attempt to parse and subdivide the crimes meriting jury trial has proven ad hoc and imprecise. "[I]t is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little." *Duncan*, 391 U.S. at 160-61; *see Bagwell*, 512 U.S. at 839 (Scalia, J., concurring) ("our cases have employed a variety of not easily reconcilable tests").

One line of cases gives an example of the arbitrary inconsistency. Once the Court set the dividing line at maximum penalty of six months, the question arose of multiple charges against any single defendant. Would a defendant, denied a jury with one sole count of lower penalty offense, aggregate multiple such offenses and thereby reclaim his right to jury trial?

In *Cotispodi v. Pennsylvania*, 418 U.S. 506 (1974), a contemnor facing multiple counts of contempt claimed his right to a jury trial, based on the aggregation of the respective penalties for each count. The Court, following *Duncan* and *Bloom*, upheld the court of appeals that permitted the jury trial. "The jury-trial guarantee reflects a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." 418 U.S. at 515. *See id*. at 526 (aggregated offenses "equivalent to a serious offense and was entitled to a jury trial."); *see also id*. at 519-20 (Marshall, J., concurring) (petty offense exception "encourages the very arbitrary action which it is the purpose of the Sixth Amendment to eliminate. … [multiple offenses] should be treated as a single

serious offense for which the Sixth Amendment requires a jury trial.").

But the various circuits diverged after this ruling, with some circuits aggregating multiple offenses, *e.g.*, *United States v. Coppins*, 953 F.2d 86, 90 (4th Cir. 1991) ("there is no apparent reason why the Court's holding in *Codispoti* should not apply also to require aggregation of any maximum sentences authorized by statute") (cleaned up); *United States v. Bencheck,* 926 F.2d 1512, 1518 (10th Cir. 1991); *Rife v. Gobehere*, 814 F.2d 563, 565 (9th Cir. 1987); and others ruling the opposite way, *United States v. Lewis*, 65 F.3d 252, 254 (2d Cir. 1995), *aff'd*, 518 U.S. 322 (1996). Ultimately the Court imposed uniformity by affirming the Second Circuit to bar aggregation of smaller penalties to restore a jury trial right, in *Lewis v. United States*, 528 U.S. 322 (1996). *But see id.* at 331 (Kennedy and Breyer, JJ., concurring in judgment) (the petty offense exception "is one of the most serious incursions on the right to jury trial in the Court's history"); *id*. at 339 (Stevens and Ginsburg, JJ., dissenting) ("the right to a jury trial attaches when the prosecution begins.").

The Court's decision in *Lewis* could have gone either way yet still appeared to be principled — such was the equipoise of the matter. But the circuit splits and issue indeterminacy could have been avoided in the first place, by not qualifying the clear text of the Sixth Amendment, preserving the right to jury trial in prosecution of all crimes. This is the error the Court should now redress.

B. The petty offense doctrine impairs Our Federalism.

The loosening of constitutional requirements expands federal criminal enforcement power beyond constitu-

tional bounds. *Blakely*, 542 U.S. at 308 ("the very reason the framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."); *Frank v. United States*, 395 U.S. 147, 152-53 (1969) (Douglas, J., dissenting) ("The inescapable effect [is that] freed from checks and restraints of the jury system, local judges can achieve, for a term of years, significant control over groups with unpopular views through the simple use of the injunctive and contempt power").

Expansion of federal criminal enforcement power creates tension with State authority over local criminal matters. *See Younger v Harris*, 401 U.S. 37, 45 (1971) ("Ordinarily, there should be no [federal] interference with [state criminal] officers").

Federal expansion undermines traditional state roles in criminal law enforcement. Many States separately preserve the right to jury trial for crimes in their own state constitutions. *E.g.*, Cal. Const. art. I, § 16; Conn. Const. art. I, § 19; Fla. Const. art. I, § 16; Ill. Const. art. I, § 8; Mass. Const. part I, art. 12; Mich. Const. tit. I, art. I, § 20; N.Y. Const. art. I, § 2 (trial "by jury in all cases in which it has heretofore been guaranteed by the constitutional provision shall remain inviolate forever."). *Neder*, 527 U.S. at 31 ("The right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention and it has appeared in the constitution of every State to enter the Union thereafter.").

In some cases the State constitution expressly preserves the right to jury trial as it existed in the times prior to the petty offense doctrine, when the right was unequivocally applicable to all offenses. *E.g., Mitchell v. Super. Ct.*, 783 P.2d 731 (Cal. 1989)

(right to jury trial for any offense threatening imprisonment); *Swanson v. Boschen*, 120 A.2d 546, 548 (Conn. 1956) (right to a jury trial when "the issue raised in the action is substantially of the same nature or is such an issue as prior to 1818 would have been triable to a jury"); *People v. Ford*, 196 N.E.2d 1 (Ill. App. Ct. 1963) (right to jury applies to both felonies and misdemeanors); *In re Opinion of the Justices*, 130 N.E. 685 (Mass. 1921); *Cahill v. Fifteenth Dist. Judge*, 245 N.W.2d 381, 384 (Mich. Ct. App. 1976) (whenever a defendant may receive a jail sentence, he is entitled to a jury trial). By New York statute, anyone charged with a misdemeanor must be given a jury trial regardless of the length of the potential sentence, but in New York City criminal courts, people have this right only for misdemeanors with an authorized sentence of over six months. N.Y. Crim. Proc. Law § 340.40.

Yet this Court's constitutional rulings have profound effect on the development of State jurisprudence. The years since the Court's proclamation of the petty offense exception have seen States loosen their requirements and otherwise adjust their laws to take advantage of the opening provided by the Court's ruling. *E.g., State v. Wheeler*, 37 Conn. Supp. 693 (1981); *State v. Anonymous*, 275 A.2d 618 (Conn. Cir. Ct. 1971) (per curiam); *Whirley v. State*, 450 So. 2d. 836 (Fla. 1984) (adopting federal petty offense exception).

The propensity of multiple states to diverge from their prior principles, following this Court's interpretations of the federal constitution can spawn widely divergent standards of what should otherwise be a uniform, nationwide principle set by the Framers. The Court should accordingly reexamine the petty offense exception, to forestall this dilution of a longstanding

fundamental right. *See also* Philip Hamburger, Is Administrative Law Unlawful? 244 & n. *k* (2014) ("The concept of petty offenses therefore cannot justify any federal denial of a jury in any criminal proceedings, let alone in administrative proceedings.") (collecting state experiences).

II. The Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. The Tenth Circuit's adherence to the petty offense exception expressly calls for review of the Court's precedents in this area.

Principles of statutory interpretation apply to the provisions of the Constitution. Antonin Scalia & Bryan A. Garner, Reading Law 51 (2012). The Constitution is law, and the Court has the province and the duty to interpret both law and the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). So too, the Court has the duty to render "decisions that respect the constitutional text and provide the foundation on which the other two branches of the federal government, the states and the people can build the legal system." Bryan A. Garner, et al., The Law of Judicial Precedent § 40 at 357 (2016).

The Court has not prioritized any specific provisions of the Constitution and its amendments over any others. Much as each provision of a statute should be given effect and not be read as superfluous, *see* Reading Law § 26, at 174, so too should every provision of the Constitution merit equal value and weight.

For this reason, the Court should bring to its Sixth Amendment line of cases, the textual analysis it has demonstrated to date in evaluating protections

afforded to Americans by the Second Amendment, *see, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022); the Fourth Amendment, *see Caniglia v. Strom*, 593 U.S. 194 (2021); and the Confrontation Clause of the Sixth Amendment, *see Crawford*, 541 U.S. 36 (2004).

The two concurring judges of the Tenth Circuit declared themselves regretfully bound by this Court's precedent. Pet. 12. Were they not bound, they stated they would have ruled for David Lesh. Pet. App.26a. Their declaration calls for the Court to take this case for review.

Stare decisis applies less rigidly in constitutional cases because the correction of an erroneous constitutional decision by the Congress is well-nigh impossible. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("correction through legislative action is practically impossible"). *See also Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013) ("The force of stare decisis is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections."); Law of Judicial Precedent § 40, at 352 & n.2.

Considerations of stare decisis are weakest when considering the Constitution's text; procedural matters are less concerning to review than settled expectations in property and reliance interests. "Revisiting precedent is particularly appropriate where … a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). *See also Ramos*, 590 U.S. at 105 ("*stare decisis* isn't supposed to be the art of

methodically ignoring what everyone knows to be true."); Law of Judicial Precedent § 41, at 370; *Bagwell*, 512 U.S. at 840 (Scalia, J., concurring) ("Only the clearest of historical practice could establish that such a departure from the procedures that the Constitution normally requires is not a denial of due process of law."); *id*. at 844 (Ginsburg, J., concurring) ("if those proceedings were 'criminal,' then the unions were entitled to a jury trial").

The Court should take up the case of David Lesh, in response to the Tenth Circuit's request for review and reversal of the precedents. Pet.App.26a.

III. This case presents an ideal vehicle to reconsider the petty offense exception.

The present case has a clean record focused on core constitutional issues. The case's posture offers the straightforward legal question in a well-defined context, without dispute of material facts, but resting instead on the accepted face of the Constitution's text.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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