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 THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers, or NACDL, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was

[1] No counsel for a party authored this brief in whole or in part, and no entity or person other than NACDL, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of NACDL's intent to file this brief at least 10 days before its due date under this Court's Rule 37.2.

founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 attorneys in affiliate organizations. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files many amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases presenting issues important to criminal defendants, criminal defense lawyers, and the criminal legal system as a whole.

SUMMARY OF ARGUMENT

I. The right to trial by jury in criminal prosecutions was a foundational feature of English legal tradition. And at the Founding, it became just as central to the American justice system—and to American democracy more broadly.

The jury-trial right traces back "to Magna Carta" and interposes "the common-sense judgment of a jury" between the criminal defendant whose liberty is at stake and the prosecutor and judge who might deprive him of it. *Duncan* v. *Louisiana*, 391 U.S. 145, 151-56 (1968). That right was front and center as the colonies protested tyranny and built our constitutional system, with early Americans viewing trial by jury as a "birthright and inheritance" that shielded them from "the approaches of arbitrary power." 3 Story, Commentaries on the Constitution of the United States § 1773, at 652-53 (1833 ed.). So the Framers enshrined that vital right in the Constitution "*twice*," *Ramos* v. *Louisiana*, 590 U.S. 83, 89 (2020), providing that "Trial of all Crimes . . . shall be by Jury," U.S. Const. art. III, § 2, cl. 3, and reiterating that defendants have the right to trial by jury "[i]n all criminal prosecutions," U.S. Const. amend. VI.

The jury-trial right received double billing because it is important in so many ways. It acts as a structural constraint on government power, hemming in both the executive and the judiciary. It shields defendants from both "the overzealous or mistaken prosecutor" and "the professional or perhaps overconditioned or biased response of a judge." *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975). It ensures quality decision-making and fair outcomes, requiring unanimity among a diverse pool of jurors before a defendant can be branded as a criminal. And it inspires trust in the legal system and gives people invaluable insight into public officials' exercise of power. Requiring trial by jury thus benefits criminal defendants, democratic society, and everything in between.

II. The Constitution doesn't qualify the jury-trial right it establishes. But over time, this Court has done just that. It has held that "petty" crimes, presumptively those punishable by up to six months in prison, aren't weighty enough to be tried to a jury. That cut-from-whole-cloth exception is wreaking havoc on criminal defendants and on the interests the jury-trial right is meant to protect.

Today, "petty" crimes are ubiquitous and cover virtually every facet of personal and professional life. Some, like the one at issue in this case, are regulatory crimes of recent vintage. Others are analogues of more traditional crimes. But what these wide-ranging offenses have in common are the dramatic consequences that follow conviction. Defendants can be (and often are) imprisoned for months after being convicted by a single judge, without unanimous agreement by any jury. Sentences for petty offenses can be stacked, leaving defendants in jail for well beyond six months, again without a jury. *Lewis* v. *United States*, 518 U.S.

322, 330 (1996). And beyond jail time lies an array of punishments and other consequences of conviction—probation, fines, suspended licenses, loss of employment, disqualification from benefits, loss of firearm rights, immigration consequences, loss of child custody, loss of a home, and more. Calling consequences like these "petty" is an insult to language—and to the criminal defendants facing those consequences.

As a result of the petty-offense exception, defendants are being deprived of their jury-trial right and the benefits and safeguards that come with it. Jury trials hold prosecutors accountable and ensure that one judge's view doesn't substitute for the voice of the broader community. But defendants prosecuted for petty offenses are left without that shield, and as a result, petty-crime convictions don't reflect the sort of reasoned, collaborative deliberation the Framers prized. Worse, shunting petty-crime prosecutions into judge-only proceedings papers over an invaluable window into government power, depriving the people of a tool they need "to rule well." 1 Tocqueville, Democracy in America 339 (1862 ed., Reeve trans.).

III. This Court should overrule the aberrant petty-offense exception. Doing so will yield substantial benefits at minimal cost.

For decades, courts have been all over the map in trying to determine what offenses punishable by up to six months in prison are nonetheless sufficiently "serious" to warrant a jury trial. They have struggled to determine the point at which monetary and nonmonetary punishments become grave enough to trigger the right. They have struggled just as much with collateral consequences, which present similar line-drawing issues and also require courts to consider subjective, defendant-specific evidence. The resulting

uncertainty isn't going away, and it means endless litigation and wasted resources tinkering with a judge-made category that's nowhere to be found in the Constitution's text or history. All that confusion will disappear if the Court returns to the unqualified right the Framers embraced.

There's also no reason to think that overruling the petty-offense exception will have untoward consequences. About three-quarters of the states already permit jury trials in prosecutions of "petty" offenses. And because most defendants resolve criminal charges through plea bargaining, correcting course on the jury-trial right isn't going to dramatically transform the number of trials. It will, however, ensure that criminal defendants have the option to demand a jury trial precisely where it is most needed—in cases where the government is abusing its power by seeking to imprison a person based on charges and evidence that a jury wouldn't buy.

ARGUMENT

I. The jury-trial right is vital for criminal defendants and society as a whole.

It's hard to overstate the importance of the right to trial by jury in criminal cases. That right has both a long pre-constitutional lineage and the rare distinction of being enshrined in the Constitution not once, but twice. *Ramos* v. *Louisiana*, 590 U.S. 83, 89 (2020); *see* U.S. Const. art. III, § 2, cl. 3; *id.* amend. VI. The Framers were wise to place such importance on the right. It is fundamental to any process through which the government seeks to brand a person as a criminal and deprive him of his liberty. And more broadly, the jury-trial right redounds to the benefit of democratic society. That's why this Court has consistently

safeguarded the right—except with respect to the petty-offense exception at issue here.

A. Even before the Founding, the right to trial by jury in criminal cases "had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta." *Duncan* v. *Louisiana*, 391 U.S. 145, 151 (1968). Blackstone explained that the right ensured that government power could not be exerted "without check or control." 4 Blackstone, Commentaries on the Laws of England 349 (Cooley 3d rev. ed. 1884). By requiring that any criminal charge "afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours," the right imposed a crucial "barrier . . . between the liberties of the people, and the prerogative of the crown." *Id.* at 349-50.

In its common-law beginnings, the jury-trial right reflected a frank acknowledgement of the need for "safeguard[s] against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 156. "[H]istory and experience" had taught that, too often, the government's power to prosecute would be used "to eliminate enemies" and judges would be "too responsive to the voice of higher authority." *Ibid.* In fact, English history was rife with examples of judges who had "acquiesced in government tyranny." Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1185 (1991). So the right to trial by jury in criminal cases "was from very early times insisted on . . . as the great bulwark of [people's] civil and political liberties, and watched with an unceasing jealousy and solicitude." 3 Story, Commentaries on the Constitution of the United States § 1773, at 652 (1833 ed.).

The early American experience taught the same lesson. When the Stamp Act Congress convened in 1765, one of its principal objections was to British interference with "trial by jury," which it called "the inherent and invaluable right of every British subject in the[] colonies." Resolutions of the Stamp Act Congress, art. VIII, *reprinted in* Sources of Our Liberties 270 (Perry ed. 1959). They had seen firsthand that trial by judge had "proved most effective at securing the verdicts" that British authorities sought. *Erlinger* v. *United States*, 602 U.S. 821, 829 (2024) (cleaned up). The colonists repeated that objection in the First Continental Congress, *see* 1 Journals of the Continental Congress, 1774-1789, at 69 (Ford ed. 1904), and ultimately in the Declaration of Independence (¶ 20). And after prevailing in the Revolutionary War, Americans enshrined the right to a jury trial in "every newly enacted state constitution"—the only right to be treated as indispensable across the board. *Erlinger*, 602 U.S. at 829-30.

"Fear of unchecked power" was likewise front and center in the design of the federal Constitution, and that concern "found expression in the criminal law in th[e] insistence upon community participation in the determination of guilt or innocence." *Duncan*, 391 U.S. at 156. The Framers provided that the "Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III, § 2, cl. 3. And they soon reinforced the right, providing that "[i]n all criminal prosecutions" the defendant would have the right to trial "by an impartial jury." *Id.* amend. VI.

Over time, the jury-trial right has become synonymous not just with American criminal law, but also with the American democratic experiment. Alexis de Tocqueville marveled that the jury-trial

right's influence on criminal law is "subordinate to the powerful effects which it produces on the destinies of the community at large." 1 Tocqueville, Democracy in America 333 (1862 ed., Reeve trans.). As he put it, "the Jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well." *Id.* at 339. By incorporating the jury-trial right into the Constitution, the Framers solidified a "great privilege" that Americans had come to view "as their birth-right and inheritance" and a core protection "against the approaches of arbitrary power." Story, *supra*, § 1773, at 652-53.

B. This Court has long worked to protect the jury-trial right the Framers enshrined. And in doing so, the Court has identified five related and mutually reinforcing interests that the right serves.

First, the jury-trial right is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely* v. *Washington*, 542 U.S. 296, 305-06 (2004). "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 306. The people, in other words, get the final say on whether a member of the community can be labeled as a criminal and punished as such—a check that is "essential to prevent a slide back toward regimes like the vice-admiralty courts [the Framers] so despised." *Erlinger*, 602 U.S. at 832. Like all structural features of our Constitution, that "fundamental decision about the exercise of official power" warrants respect. *Duncan*, 391 U.S. at 155-56.

Second, the jury acts as a "circuitbreaker," protecting against arbitrary prosecutions and judicial overreach. *Blakely*, 542 U.S. at 306. As this Court has

explained, the jury-trial right serves "as a hedge against the overzealous or mistaken prosecutor" and "the professional or perhaps overconditioned or biased response of a judge." *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975); *see Erlinger*, 602 U.S. at 832 (juries "mitigate the risk of prosecutorial overreach and misconduct, including the pursuit of 'pretended offenses' and 'arbitrary convictions'"). The government and the judge are both "repeat player[s] in the criminal justice process," and as a result they can "become desensitized to the enormity of what is at stake in a criminal proceeding." Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 72 (2003). Requiring trial by jury ensures that criminal cases are seen "with a fresh set of eyes" and with "no institutional bias." *Ibid.*

Third, the jury-trial right ensures quality decision-making. This Court has recognized "empirical data" showing that "[w]hen individual and group decision-making were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted." *Ballew* v. *Georgia*, 435 U.S. 223, 232-33 (1978) (plurality opinion). And requiring trial by jury does more than just prevent outlier or unreasoned decisions. It also injects into the criminal process "the common-sense judgment of a jury," which the Framers preferred over "the more tutored but perhaps less sympathetic reaction of the single judge." *Duncan*, 391 U.S. at 156. Juries drawn from a fair cross-section, in other words, are more likely to "represent the community's perception of the facts than [single] trial judges." Barkow, *supra*, at 72 (cleaned up); *see Ballew*, 435 U.S. at 233-34; *see also Khorrami* v. *Arizona*, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting from denial of certiorari)

(citing research showing that conviction rates vary depending on racial composition of jury).

Fourth, juries inspire trust in the legal system. "Community participation in the administration of the criminal law," this Court has recognized, "is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Taylor*, 419 U.S. at 530. Juries are the public's window into criminal prosecutions, and that visibility into scrupulously fair proceedings "ensures continued acceptance of the laws by all of the people." *Powers* v. *Ohio*, 499 U.S. 400, 407 (1991); *see McClinton* v. *United States*, 143 S. Ct. 2400, 2402-03 (2023) (Sotomayor, J., respecting denial of certiorari) ("the public's perception that justice is being done" is "a concern that is vital to the legitimacy of the criminal justice system").

Fifth, jury trials feed back into our democratic system. Tocqueville called the jury trial a "gratuitous public school ever open, in which every juror learns to exercise his rights . . . and becomes practically acquainted with the laws of his country." Tocqueville, *supra*, at 337. And if the government is overreaching with its prosecutorial power, jurors will carry those concerns out into the community—and to the ballot box when evaluating public officials based on the criminal laws they enact and enforce.

* * *

The jury-trial right is so important, and so ingrained in American law, that it hardly makes sense to speak about criminal prosecutions *without* trial by jury. As this Court put it, in the federal system as in every state, "the structure and style of the criminal process—the supporting framework and the subsidiary

procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial." *Duncan*, 391 U.S. at 150 n.14; *see Schick* v. *United States*, 195 U.S. 65, 82 (1904) (Harlan, J., dissenting). Conducting criminal prosecutions *without* a jury is thus an affront to the American justice system.

II. The petty-offense exception does real harm to the core values the jury-trial right is meant to protect.

For too long, this Court has sanctioned a departure from the unqualified right to a jury trial in criminal cases. When it comes to the jury-trial right, the Constitution does not "hint of any difference between 'petty' offenses and 'serious' offenses." *Baldwin* v. *New York*, 399 U.S. 66, 74 (1970) (Black, J., concurring in the judgment). Even so, this Court decided, initially in dicta and then in a smattering of policy-oriented decisions, that "'all crimes' did not mean 'all crimes,' but meant only 'all serious crimes.'" *Id.* at 75. The Court thus held that "petty" crimes—later defined as those punishable by up to six months in prison, unless other circumstances suggest the offense is sufficiently "serious"—need not be tried to a jury. *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 542-43 (1989).

This Court's petty-offense detour not only was ill advised, but also is doing serious damage to criminal defendants, defense lawyers, and society as whole. The number and variety of petty crimes punishable by up to six months in prison are staggering. So are the consequences facing defendants charged with petty offenses. Every day, countless defendants risk being labeled as criminals and stripped of their liberty

without any of the vital protections and benefits that the jury-trial right offers.

A. Perhaps there was a time, when codebooks were thin and crimes practically always carried severe punishments, when petty offenses would have represented only a minor asterisk on the Constitution's jury-trial right. But if there was such a time, it's long gone. Gorsuch & Nitze, Over Ruled: The Human Toll of Too Much Law 108 (2024).

Now, petty offenses are everywhere. In the federal system alone, tens of thousands of prosecutions for petty offenses are brought each year.[2] And the crimes swept under the label of "petty" involve everything under the sun. As this case illustrates, Pet. 8-10, some are zany—not just operating an "[o]ver-snow vehicle" in the wrong place, 36 C.F.R. § 261.14(e), but also walking a dog off-leash, *id.* § 261.8(d), failing to re-close a gate, *id.* § 261.7(c), possessing a hang glider, *id.* § 261.18(b), deigning to use the image of Smokey the Bear, *id.* § 261.22(a), playing baseball on a wet field, *id.* § 7.96(b)(2), fortune-telling, N.Y. Penal Law § 165.35, or making an "unreasonable noise" while horses are passing on a park trail, 36 C.F.R. § 2.16(f). But behind those unusual examples are countless others, including (for instance) assault, *e.g.*, 18 U.S.C. § 113(a)(5); D.C. Code § 22-404(a), battery, *e.g.*, Nev. Rev. Stat. § 200.481(2)(a), domestic violence, *e.g.*, Kan. Stat. Ann. § 21-5414, sexual abuse, *e.g.*, N.Y. Penal Law § 130.55; Ky. Rev. Stat. Ann. § 510.130, threatening mass harm, *e.g.*, N.Y. Penal Law § 240.78, stalking, *e.g.*, Nev. Rev.

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[2] *E.g.*, Table M-2A: U.S. District Courts—Petty Offense Defendants Disposed of by U.S. Magistrate Judges, by Disposition, During the 12-Month Period Ending September 30, 2023, at 1, U.S. Courts (2023), https://tinyurl.com/4upa2jdx (almost 26,000 petty offenses over a 12-month period).

Stat. § 200.575, theft, *e.g.*, D.C. Code § 22-3212(b), driving under the influence, *e.g.*, 36 C.F.R. § 4.23(a), possessing a controlled substance, *e.g.*, D.C. Code § 48-904.01(a)(2)(B), elder abuse, *id.* § 22-933, and animal cruelty, *id.* § 22-1001(a)(1).

B. Convictions for petty offenses carry serious consequences. Take simple assault, a petty offense in Washington, D.C. *Fretes-Zarate* v. *United States*, 40 A.3d 374, 378 (D.C. 2012). In the 2010s, there were over 6,000 convictions for simple assault; the median prison sentence imposed was three months, and over 25% of convicted defendants received six months in prison.[3] Or take possession of a controlled substance, another petty offense. *Mitchell* v. *United States*, 683 A.2d 111, 114 (D.C. 1996). In that same period, there were over 9,000 convictions; the median sentence was two months, and over 25% of those convicted received more than four months in prison.[4] For just those two offenses, then, *thousands* of people spent months and months incarcerated—all without having had the criminal charges against them put to a jury of their peers.

The jail time defendants face in petty-offense prosecutions also isn't capped at six months. This Court has held that there is no right to a jury trial even where a defendant is charged with multiple petty offenses for which terms of incarceration can be made consecutive. *Lewis* v. *United States*, 518 U.S. 322, 330 (1996). Defendants have thus had to stare down the possibility of jail time extending well beyond six months, but without the protections that the jury-trial

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[3] Appendix D to Advisory Group Memo #40—Last in Time Data, D.C. Crim. Code Reform Comm'n (2021), https://tinyurl.com/4pewf9s5.

[4] *Ibid.*

right affords. *See, e.g.*, *United States* v. *Webster*, 2009 WL 2366292, at *3 (D. Md. July 30, 2009) (potential aggregate sentence of five years); *United States* v. *Lambert*, 594 F. Supp. 2d 676, 678, 681 (W.D. Va. 2009) (two and a half years); *United States* v. *Thornton*, 2000 WL 732929, at *1 (9th Cir. June 5, 2000) (same); *State* v. *Perkins*, 2008 WL 4416656, at *10 (Ohio Ct. App. Sept. 30, 2008) (same).

Judge-only convictions for petty offenses also can subject defendants to a host of restrictions on their liberty and other onerous conditions. Among them are forced confinement to rehab facilities, *e.g.*, *United States* v. *Chavez*, 204 F.3d 1305, 1309, 1315 (11th Cir. 2000), supervised release or probation, *e.g.*, *United States* v. *LaValley*, 957 F.2d 1309, 1312 (6th Cir. 1992), substantial fines, *e.g.*, *United States* v. *Clavette*, 135 F.3d 1308, 1310 (9th Cir. 1998), restitution orders, *e.g.*, *United States* v. *Wallen*, 874 F.3d 620, 626 (9th Cir. 2017), and suspended licenses, *e.g.*, *State* v. *Denelsbeck*, 137 A.3d 462, 464 (N.J. 2016).

The collateral consequences of petty-offense convictions can be equally, or even more, devastating. Criminal convictions are transformational, affecting everything from employment opportunities, *e.g.*, *Smith* v. *United States*, 768 A.2d 577, 580 (D.C. 2001); *People* v. *Cathlin*, 2022 WL 10818359, at *1 (N.Y. App. Term Oct. 12, 2022), to child custody, *e.g.*, *Amezcua* v. *Eighth Jud. Dist. Ct.*, 2012 WL 439405, at *1 (Nev. Feb. 9, 2012), to the right to keep and bear firearms, *e.g.*, *Chavez*, 204 F.3d at 1314, to mandatory sex-offender registration, *e.g.*, *Rauch* v. *United States*, 2007 WL 2900181, at *3 (E.D. Cal. Sept. 28, 2007), to immigration consequences, *e.g.*, *United States* v. *Mouret-Romero*, 2019 WL 1166951, at *3 (S.D. Cal. Mar. 13, 2019), to eligibility for benefits, *e.g.*, *Foote* v. *United*

States, 670 A.2d 366, 372 (D.C. 1996), to exposure to harsher sentences for future offenses, *e.g.*, *United States* v. *Thomas*, 833 F. App'x 782, 788 (11th Cir. 2020) (per curiam).

Nothing about this Court's presumptive six-month line tracks those dramatic consequences. *Blanton*, 489 U.S. at 542-43. Even a few weeks in prison can spell the difference when it comes to keeping an apartment, holding down a job, or maintaining child custody. And many of the most serious consequences for defendants convicted in judge-only trials stem from the judgment of conviction, not from the exact length of time a person may spend in prison.

Not least among the costs of this Court's petty-offense exception is the opprobrium facing those convicted by lone judges. A criminal conviction, even for a petty offense, carries real social stigma, which the internet has made inescapable and permanent. King, *Juries, Democracy, and Petty Crime*, 24 U. Pa. J. Const. L. 817, 836-37 (2022). And there's no reason to think that a defendant convicted in a petty-offense prosecution, which "bears all the indicia" of traditional criminal process *except for* the lack of a jury, *Baldwin*, 399 U.S. at 76 n.2 (Black, J., concurring in the judgment), would escape that stigma. Whether for a petty or a serious crime, a conviction becomes part of a defendant's record and follows him in all personal and professional endeavors.

In embarking on its petty-offense experiment, the Court posited that some minor offenses would have a "moral quality [that] is relatively inoffensive." *District of Columbia* v. *Clawans*, 300 U.S. 617, 625 (1937). Maybe "selling secondhand property without a license," *ibid.*, or hawking unstamped oleomargarine, *Schick*, 195 U.S. at 67, fit that description. But assault,

sexual abuse, driving under the influence, domestic violence, drug possession, or any other of the untold offenses lumped under the "petty" label don't. *Supra* pp. 12-13. Across the country, defendants face the life-altering possibility of being branded as a criminal based on the decisions of a single judge.

C. Carving out petty offenses from the Constitution's unqualified language undermines each of the values that the jury-trial right serves.

For one thing, the structural limitation the right imposes on government power is no less vital when it comes to petty offenses. The Framers weren't concerned only with *major* or *sufficiently serious* oppression; they set out to "prevent oppression," full stop. *Duncan*, 391 U.S. at 155-56. And given this Court's decision in *Lewis* and the considerable flexibility the government enjoys in crafting criminal charges, 518 U.S. at 336 (Kennedy, J., concurring in the judgment), prosecutors often will be able to use multiple petty charges to put the same amount of pressure on criminal defendants as would result from a traditional "serious" charge.

For another, the "hedge" that the jury-trial right provides against overzealous prosecutors and desensitized judges, *Taylor*, 419 U.S. at 530, is just as (if not more) vital when it comes to petty offenses. Petty offenses capture an enormous range of professional and personal conduct, leaving fertile ground for boundary-pushing charges. *See, e.g.*, D.C. Crim. Code Reform Comm'n, First Draft of Report #51—Jury Demandable Offenses 9 (2020), https://tinyurl.com/4bb47x4w (non-jury petty offenses "distort[] charging practices by incentivizing the prosecution of lower charges that do not fully account for the facts of a case"); *see also Erlinger*, 602 U.S. at 832 (discussing concern with

"'pretended offenses'"). And because they are so frequently prosecuted and capped at six months, petty crimes likewise raise a serious possibility of judicial desensitization.

For still another, the salutary benefits of the jury-trial right apply equally to prosecutions for petty offenses. Collaborative decision-making by members of the community remains a sounder basis on which to convict and imprison a defendant than "the more tutored but perhaps less sympathetic reaction of the single judge." *Duncan*, 391 U.S. at 156. If anything, petty-offense prosecutions especially benefit from a jury's common-sense view. Many petty offenses involve conduct that is expressive, controversial, or likely to be undertaken by vulnerable or disfavored groups. *See, e.g.*, D.C. Code § 22-405.01 (resisting arrest); 40 U.S.C. § 5104(e)(2)(G) (demonstrating in a Capitol building); N.Y. Penal Law § 240.10 (unlawful assembly); D.C. Code § 22-2302 (panhandling); *id.* § 22-3302(a)(1) (unlawful entry on property); *id.* § 22-3312.01 (defacing property). To protect against government overreach in the way the Framers intended, such crimes should be tried to a jury, which can draw from a broader set of views and experiences.

Plus, if jury participation is democratic participation, then it's all the more vital to protect the right, because petty offenses now span virtually every arena of government regulation. *Supra* pp. 12-13. Continuing to rope off these offenses in judge-only prosecutions will only keep people in the dark and undermine public faith in the criminal law.

III. There are no sound reasons to maintain the petty-offense exception.

The petty-offense exception has no place in our law and deprives defendants of essential protections. Overruling the exception as petitioner requests will restore those protections, with massive benefits and minimal costs beyond those the Constitution requires.

A. Dispensing with the petty-offense exception will prove invaluable not only by restoring the rights of criminal defendants, but also by bringing an end to endless, wasteful litigation. This Court has called the standard governing petty offenses "somewhat imprecise." *Blanton*, 489 U.S. at 543. That's an understatement: identifying which offenses are petty and thus beyond the Constitution's jury-trial right has proved "unworkable." *Janus* v. *Am. Fed'n of State, Cnty. & Mun. Emps.*, 585 U.S. 878, 922 (2018).

Because the six-month line this Court drew is only presumptive, courts have been sucked into endless line-drawing exercises to determine whether the circumstances surrounding a crime punishable by six months or less "reflect a legislative determination that the offense in question is a 'serious' one." *Blanton*, 489 U.S. at 543. Courts have debated, for instance, whether a license-suspension punishment tips a crime into the "serious" bucket depending on how long the suspension lasts. *See, e.g.*, *Landry* v. *Hoepfner*, 840 F.2d 1201, 1216 (5th Cir. 1988) (en banc) (60 days); *Denelsbeck*, 137 A.3d at 464 (10 years); *Richter* v. *Fairbanks*, 903 F.2d 1202, 1205 (8th Cir. 1990) (15 years). They've similarly grappled with the point at which fines become sufficiently hefty to warrant a jury trial. *See, e.g.*, *United States* v. *Soderna*, 82 F.3d 1370, 1379 (7th Cir. 1996) ($10,000); *Clavette*, 135

F.3d at 1310 ($25,000); *United States* v. *Donovo*, 2002 WL 1874838, at *1 (D. Alaska Aug. 7, 2002) ($100,000).

Courts have struggled not just with the penalties for each offense, but also with the circumstances of each defendant who asserts a jury-trial right. Some, for instance, have determined that a defendant's non-citizen status can trigger the right when conviction would subject him to removal. *E.g.*, *People* v. *Suazo*, 118 N.E.3d 168, 182 (N.Y. 2018); *Bado* v. *United States*, 186 A.3d 1243, 1252 (D.C. 2018). And more broadly, the Court's test for determining what constitutes a "petty" offense has come under fire as a "subjective, defendant-specific inquiry" that provides little in the way of clarity or predictability. *E.g.*, King, *supra*, at 818, 841.

Again and again, the current petty-offense standard—itself the Court's best effort to bring order to an "ill-defined, if not ambulatory," category, *Duncan*, 391 U.S. at 160—has "defied consistent application." *Payne* v. *Tennessee*, 501 U.S. 808, 830 (1991). Courts have disagreed, for instance, about whether the following consequences are enough to tip the scales from "petty" to "serious":

- Sex-offender registration: *compare Fallen* v. *United States*, 290 A.3d 486, 499 (D.C. 2023) (yes), *and People* v. *Wrighton*, 918 N.Y.S.2d 724, 725 (App. Div. 2011) (yes), *with Rauch*, 2007 WL 2900181, at *3 (no), *and Ivy* v. *United States*, 2010 WL 1257729, at *2 (W.D. Ky. Mar. 26, 2010) (no).
- Deportation: *compare Suazo*, 118 N.E.3d at 175 (yes), *and Bado*, 186 A.3d at 1252 (yes), *with Mouret-Romero*, 2019 WL 1166951, at *3

(no), *and United States* v. *Singh*, 2020 WL 5500232, at *4 (S.D. Cal. Sept. 11, 2020) (no).

- Loss of firearm rights: *compare United States* v. *Smith*, 151 F. Supp. 2d 1316, 1318 (N.D. Okla. 2001) (yes), *and Andersen* v. *Eighth Jud. Dist. Ct.*, 448 P.3d 1120, 1124 (Nev. 2019) (yes), *with United States* v. *Snow*, 2011 WL 5025535, at *3 (D. Or. Oct. 21, 2011) (no), *Chavez*, 204 F.3d at 1309, 1315 (no), *and United States* v. *Combs*, 2005 WL 3262983, at *3 (D. Neb. Dec. 1, 2005) (no).

No one benefits from this never-ending uncertainty—not the defendants whose rights are on the line, not the governments whose prosecutions get tied up in threshold questions, and not the courts struggling to weave their way through a standardless morass. Correcting course and overruling the petty-offense exception will eliminate all need for these petty-or-serious detours.

B. Despite this Court's petty-offense misadventure, states around the country have long guaranteed jury trials even for petty offenses—with no indication that doing so has proved unmanageable.

Most states are already doing what the Constitution requires. Thirty-five states provide jury trials for virtually all offenses even when they're "petty."[5] Three more provide the right to a *de novo* jury trial on appeal.[6] And three more on top of that provide jury trials for at least some offenses that would be petty

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[5] Memorandum from D.C. Crim. Code Reform Comm'n to Code Revision Advisory Grp. app. A (Feb. 25, 2020), https://tinyurl.com/yr8t7z4c.

[6] *Ibid.*

under federal law.[7] From California to Texas, Florida to New York, Michigan to Alabama, Tennessee to Washington—all are permitting petty offenses to be tried to a jury. "The experience of the majority of states" shows that providing jury trials for all crimes, as the Constitution demands, "is workable and affordable." King, *supra*, at 851.

Part of the reason the sky hasn't fallen in those states is that the jury-trial right doesn't produce an actual jury trial in many or even most cases. The vast majority of cases, of course, end by plea bargaining. Defendants are leery of the "trial tax"—a harsher sentence for anyone "who insists on empaneling a jury" and is later convicted, King, *supra*, at 851—and are eager to secure a favorable deal rather than face the risks and humiliations of trial. And there's no indication that the rate of plea bargaining would change if petty-offense prosecutions moved from bench to jury trials. For instance, over the 12-month period ending in September 2023, of nearly 26,000 prosecutions for petty offenses resolved by federal magistrate judges, just under 200 (about 0.8%) were resolved through a bench trial.[8] Over the same period, magistrate judges disposed of over 3,500 Class A misdemeanor prosecutions involving crimes punishable by over six months (and thus subject to the jury-trial right under current law), 18 U.S.C. § 3559(a)(6)—yet only 8 (about 0.2%) of those prosecutions resulted in a jury trial.[9]

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[7] *Ibid.*

[8] Table M-2A, *supra*, at 1.

[9] Table M-1A: U.S. District Courts—Class A Misdemeanor Defendants Disposed of by U.S. Magistrate Judges, by Type of Disposition, During the 12-Month Period Ending September 30, 2023, at 1, U.S. Courts (2023), https://tinyurl.com/2tkjcyhd.

But even though jury trials would be rare for petty offenses, the *right* to a jury trial would remain paramount. For cases resolved by plea, the jury-trial right wouldn't stand in the way—but it would ensure that criminal defendants get appropriate value for what they are bargaining away. And trial by jury would be available precisely where it's most needed: close cases, situations involving government overreach or arbitrary abuses of power, and circumstances where prevailing community standards may not support a conviction. That is the role the Framers intended the jury-trial right to play.

* * *

Ultimately, whatever minor disruptions result from overruling the petty-offense exception are the necessary result of the balance the Framers struck long ago. "[A]dministrative conveniences" and free-flowing balancing of the "disadvantages" of criminal convictions against "the benefits that result from speedy and inexpensive nonjury adjudications," *Baldwin*, 399 U.S. at 73 (plurality opinion), are no justification for flagrant violations of one of the Constitution's most cherished rights, *Ramos*, 590 U.S. at 89; *see id.* at 94, 99 (rejecting "breezy cost-benefit analysis" about whether "unanimity's costs outweigh its benefits"). As Justice Black put it, "[t]hose who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary." *Baldwin*, 399 U.S. at 75 (opinion concurring in the judgment). Here, too, there is no reason to "perpetuate something we all know to be wrong" based on the potential "consequences of being right." *Ramos*, 590 U.S. at 111 (plurality opinion).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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