No. 24-_____

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

PETITION FOR A WRIT OF CERTIORARI

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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."

RELATED PROCEEDINGS

United States Court of Appeals (10th Cir.):

United States v. Lesh, No. 23-1074 (July 16, 2024)

United States District Court (D. Colo.):

United States v. Lesh, Crim. No. 20-PO-07016 (Mar. 10, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Lesh respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet. App. 1a-31a) is reported at 107 F.4th 1239. The relevant order of the magistrate judge (Pet. App. 49a-67a) is unpublished but available at 2021 WL 4941013. The order of the district court affirming the magistrate judge's conclusions (Pet. App. 32a-48a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2024. Pet. App. 1a. On September 17, 2024, Justice Gorsuch extended the time in which to file a petition for certiorari until November 13, 2024. *See* No. 24A270. On November 8, 2024, Justice Gorsuch further extended that time to December 13, 2024. *Id.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

Article III, Section 2, Clause 3 of the Constitution states: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."

The Sixth Amendment to the Constitution states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

INTRODUCTION

In recent years, this Court has overruled several cases that mistakenly constricted the right to jury trial. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)); *Hurst v. Florida*, 577 U.S. 92 (2016) (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447 (1984)); *Alleyne v. United States*, 570 U.S. 99 (2013) (overruling *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Harris v. United States*, 536 U.S. 545 (2002)); and *Ring v. Arizona*, 536 U.S. 584 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). This case presents an equally compelling instance in which the Court should do the same.

The Constitution guarantees a right to jury trial in "all" criminal prosecutions not just once but twice—in Article III and in the Sixth Amendment—with no exception for so-called petty offenses. Yet "[m]any years ago this Court, without the necessity of an amendment pursuant to Article V, decided that 'all crimes' did not mean 'all crimes,' but meant only 'all serious crimes.'" *Baldwin v. New York*, 399 U.S. 66, 75 (1970) (Black, J., concurring in the judgment). Worse yet, the Court did so initially in dicta, and without the benefit of meaningful briefing. The Court later justified the exception on grounds of balancing and efficiency. *See Duncan v. Louisiana*, 391 U.S. 145, 160 (1968); *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542-43 (1989). Today, the petty-offense exception denies criminal defendants the right to jury trial when they are charged with crimes punishable by a maximum of six months' imprisonment and that are

not otherwise judicially classified as "serious"— even when charged with multiple counts punishable by six months each. *Lewis v. United States*, 518 U.S. 322, 326 (1996).

This departure from the plain and unambiguous text of the Constitution violates a core promise of the Framers: that, in a criminal case, a jury of one's peers would always stand between the accused and the power of the state to deprive him of liberty or property. It also makes a hash of the Constitution's broader structure, rendering other carefully calibrated language regulating criminal procedure either meaningless or nonsensical. And the petty-offense exception flouts the historical common-law rule the Constitution was meant to render inviolate.

As two of the three judges on the panel below have urged, *see* Pet. App. 26a-31a (Tymkovich, J., joined by Rossman, J., concurring), this Court should take the opportunity to fix this anomaly and restore the original scope of the jury-trial right. In the many decades since the petty-offense exception was minted, no party in a merits case has challenged its validity. And this case presents an ideal vehicle for a long-overdue airing of this issue and attendant stare decisis considerations. The Court should grant the petition.

STATEMENT OF THE CASE

A. Legal background

1. For hundreds of years under the common law of England, before the Founding of this country, all criminal defendants were entitled to trial by jury. Blackstone considered this right "the glory of the English law"—"the most transcendent privilege which

any subject can enjoy." 3 William Blackstone, Commentaries on the Laws of England *379 (1769). That was because the requirement of a jury ensured that no one in a criminal prosecution could be deprived of his liberty or property "but by the unanimous consent of twelve of his neighbours and equals." *Id.*

The Framers agreed the right to jury trial was indispensable. In fact, many viewed it as the "very palladium of free government." The Federalist No. 83, at 467 (Hamilton) (Clinton Rossiter ed., 1961); *see also* John Adams, Diary Entry (Feb. 12, 1771), *in* 2 Works of John Adams 252-53 (C. Adams ed., 1850). So vital was the right at the Founding that it was one of the few individual rights enshrined in the original Constitution. Article III explicitly provides: "The Trial of *all Crimes*, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III, § 2, cl. 3 (emphasis added). And the Bill of Rights reinforced that guarantee, providing in the Sixth Amendment that defendants are entitled to a trial by jury "in all criminal prosecutions." U.S. Const. amend. VI. The upshot of these provisions is simple yet profound: "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." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

Congress likewise sought from the very beginning to safeguard the jury-trial right. The Judiciary Act of 1789—enacted one day before the Bill of Rights was introduced—provided that "the trial of issues in fact, in the district courts, in *all* causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Ch. 20, 1 Stat. 73, § 9 (emphasis added). And for over a century after the Founding, federal courts

afforded all criminal defendants—including those charged with offenses that carried relatively minor punishments—the right to jury trial. *See* Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 Duke L.J. 599, 608-09 (2022).

2. In a smattering of decisions beginning a century after the Founding, this Court—almost offhandedly—fashioned an exception to the unqualified constitutional right to jury trial in all criminal prosecutions.

In *Callan v. Wilson*, 127 U.S. 540 (1888), the defendants were charged with conspiracy to commit extortion and sentenced to 30 days in jail. *Id.* at 540-42. The Court confirmed that the constitutional right to trial by jury applies to misdemeanors, including conspiracy. *Id.* at 549, 555. In dicta, however, the Court suggested that "there are certain minor or petty offences that may be proceeded against summarily, and without a jury." *Id.* at 552.

Not long thereafter, again without substantial briefing or adversarial disagreement on the issue, the Court turned this dicta into law. In *Schick v. United States*, 195 U.S. 65 (1904), the defendants were charged with purchasing unbranded oleomargarine, an offense punishable only by a fine of $50. *Id.* at 67. The defendants had waived their right to a jury trial and did not challenge the validity of that waiver. *Id.* The Court nevertheless considered whether the waivers were valid. *Id.* The Court held that they were, on the ground that when it comes to "petty offenses" such as the charge at issue, "there is no constitutional requirement of a jury" at all. *Id.* at 68; *see also District of Columbia v. Clawans*, 300 U.S. 617, 624-25 (1937)

(holding that an offense punishable by a 90-day maximum sentence was also "petty" and could therefore be tried without a jury).

When this Court incorporated the right to jury trial against the states, it carried forward the petty-offense exception. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the defendant was charged with an offense punishable by two years in prison. *Id.* at 146. The Court held that the jury-trial right applies to the states and that the Sixth Amendment entitled the defendant to a jury trial. *Id.* at 149-50. Though unnecessary to this decision, the Court added that "[s]o-called petty offenses" were "exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions." *Id.* at 160. In subsequent cases, the Court applied the petty-offense exception to condone denials of jury trials to defendants charged with crimes punishable by up to six months in prison. *See Blanton v. City of North Las Vegas*, 489 U.S. 538, 542-44 (1989); *Lewis v. United States*, 518 U.S. 322, 326-27 (1996).

Most states nevertheless have continued to guarantee the right to jury trials for all criminal charges, including minor crimes punishable by minimal or no prison time. *See* Memorandum #31 from the D.C. Crim. Code Reform Comm'n to the Code Revision Advisory Grp.: App. A (Feb. 25, 2020), https://perma.cc/V8UP-SPS2. Yet some states have exceptions to this guarantee for low-level offenses, and Congress has created a category of "petty offenses" that are punishable without providing a right to jury trial. *See id.*; 18 U.S.C. § 19.

3. Against this modern backdrop, the Court has acknowledged that its approach departs from the "common law," which applied the right to jury trial even to so-called petty offenses. *Blanton*, 489 U.S. at 541; *see also* 4 William Blackstone, Commentaries *280-82, *300. And the Court has "recognized that [a prison term of up to six months] will seldom be viewed by the defendant as 'trivial' or 'petty.'" *Blanton*, 489 U.S. at 542 (citation omitted). But the Court has concluded that "the disadvantages of such a sentence, 'onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.'" *Id.* at 543 (quoting *Baldwin*, 399 U.S. at 73); *see also Duncan*, 391 U.S. at 160.

Beyond the departure from the common law, several Justices over the years have objected to the entire enterprise of determining whether the defendant has a right to jury trial according to "whether the offense charged is a 'petty' or 'serious' one." *Baldwin*, 399 U.S. at 74 (Black, J., joined by Douglas, J., concurring in the judgment); *see also Clawans*, 300 U.S. at 633-34 (McReynolds & Butler, JJ., concurring in the judgment). These Justices have called this approach a "judicial mutilation of our written Constitution"—an impermissible substitution of judicial "balancing" for the plain text of our Charter's jury-trial provisions. *See Baldwin*, 339 U.S. at 75 (Black, J., joined by Douglas, J., concurring in the judgment) (internal quotation marks omitted). In their view, the Framers "engaged in all the balancing necessary. They decided that the value of a jury trial far outweighed its costs for 'all crimes' and in 'all criminal prosecutions.'" *Id.*

Numerous scholars have similarly decried the petty-offense exception. *See, e.g.*, Roth, 72 Duke L.J.; John D. King, *Juries, Democracy, and Petty Crime*, 24 U. Pa. J. Const. L. 817 (2022); 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 (2013); Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wis. L. Rev. 133 (1997); Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 Kan. J. L. & Pub. Pol'y 7 (1994); George Kaye, *Petty Offenders Have No Peers!*, 26 U. Chi. L. Rev. 245 (1959).

B. Factual and procedural background

1. Petitioner David Lesh is a former professional skier, outdoor enthusiast, and owner of an outdoor apparel brand called Virtika. Pet. App. 2a, 4a. He is also something of a social media "influencer" and often promotes his brand through his Instagram account. *Id.* 16a. His overall approach is that of a rebel, defying convention and decrying the corporatization and overregulation of public lands.

In 2020, petitioner posted photos to his Instagram account of a person driving a snowmobile over a jump in a winter terrain park while another individual in the foreground watches. Pet. App. 34a. The driver is covered head-to-toe in winter gear; there is no way to make out the driver's face or any other identifying features.[1] The caption reads: "Solid park sesh, no lift ticket needed." *Id.* 33a. That same day, employees at

[1] Photos involved in this case can be viewed here: https://perma.cc/9RM7-6E2H.

the Keystone Resort in Colorado discovered someone had ridden a snowmobile around the resort's terrain park. *Id.* 34a. At that time, Keystone was closed due to the COVID-19 pandemic. *Id.*

A few months later, petitioner posted two more provacative images he later revealed were "photoshopped"—that is, not real. The first appeared to be a photo of himself standing in Hanging Lake, a hiking spot near Glenwood Springs, Colorado, where people are forbidden from entering the pristine turquoise water. Pet. App. 4a. The second appeared to show petitioner defecating in Maroon Lake near Aspen, another iconic location. *Id.*

In the wake of these photos, petitioner became the subject of media coverage. *See, e.g.*, Nick Paumgarten, *Trolling the Great Outdoors*, The New Yorker (Jan. 11, 2021). While some were offended by petitioner's behavior, others flocked to his company's website, increasing his sales by 30 percent. *Id.* Still others praised him as a "trolling aficionado" whose "free spirit" "promot[ed] freedom." *See* David Lesh (@davidlesh), Instagram, https://perma.cc/9RM7-6E2H.

2. Fed up with petitioner's antics, the Government decided to investigate him. Federal prosecutors then charged petitioner with operating an "over-snow vehicle" off designated routes on lands administered by the National Forest Service, in violation of 36 C.F.R. § 261.14. Pet. App. 4a. (Keystone Resort is located within the White River National Forest.) The Government also alleged five separate criminal violations related to his photo purporting to show him standing in Hanging Lake. *Id.* 4a-5a.

After it came to light that Petitioner had fabricated the images of himself in Hanging and Maroon Lakes, the Government dropped the charges related to activity purportedly represented in the photos. Pet. App. 4a-5a.

At the same time, the Government doubled down on its prosecution related to petitioner's alleged snowmobiling within Keystone Resort. Pet. App. 5a. In addition to pressing ahead with its charge of operating a snowmobile off a designated route, the Government next alleged that Mr. Lesh conducted "work activity" on national forest land without a permit, in violation of 36 C.F.R. § 261.10(c). *Id.* Each of these crimes is punishable by up to six months in prison and a financial penalty of up to $5,000. *Id.* 27a-28a n.3.

As the case proceeded toward trial before the magistrate judge, petitioner asked to be tried by a jury of his peers. Petr. C.A. Br. 5-6. The Government opposed this request and the magistrate judge denied it, instead holding a bench trial. *See id.*; Pet. App. 5a.

At the one-day trial, petitioner maintained that he was not the person depicted in the snowmobiling photos—and he even presented two witnesses saying they were the individuals in the photos. Petr. C.A. Br. 8-9. Petitioner also contended that the photos did not depict criminal activity in any event. In particular, he argued that the photos did not depict any "work activity" because, referring to the words of the relevant regulation, no commercial "merchandise" was sold or being "offered for sale." *Id.* 8 (quoting 36 C.F.R. § 261.10(c)). As to the "off designated route" count, petitioner contended that no evidence showed the

Forest Service had made known where snowmobiling was and was not permitted in the Keystone area. *Id.*

The magistrate judge found petitioner guilty on both counts. Pet. App. 66a. The judge found that the photos, coupled with cryptic statements petitioner later made on social media, established beyond a reasonable doubt that he was the snowmobiler in the photos. *Id.* 61a. The judge also concluded that the photos depicted "work activity" because they were designed to draw attention to petitioner's outdoor clothing business—and did, in fact, increase sales. *Id.* 64a-65a. Finally, after apparently conducting his own research on the internet, the judge took "judicial notice" of a "winter motor vehicle use map" that the Forest Service had posted online, and he found that the map, plus testimony the Government submitted regarding on-site signage, adequately established that petitioner was "outside of the roads, trails, and areas designated for over-snow vehicle use." *Id.* 61a n.5.

After a sentencing hearing, the judge ordered petitioner to pay $10,050—the maximum permissible penalty for each count, plus two $25 special assessments. Pet. App. 5a. The judge also sentenced petitioner to 160 hours of community service. *Id.*

The district judge affirmed the magistrate judge's decision. Pet. App. 32a-48a. The district judge observed that "as a matter of first principles," petitioner's argument for a jury trial was "not unpersuasive." *Id.* 36a. But the judge acknowledged that "here in an inferior court, first principles must yield to binding precedent." *Id.* 36a-37a. The district court thus upheld petitioner's convictions. *Id.* 48a.

3. The Tenth Circuit affirmed in part and reversed in part. Pet. App. 2a. The court of appeals concluded that there was insufficient evidence to find the snowmobiling at issue was a "work activity or service" under Section 261.10(c). *Id.* 24a. The court, however, upheld petitioner's conviction for improperly using an over-snow vehicle on national forest land. *Id.* 11a.

The court also rejected petitioner's argument that he was deprived of his constitutional right to trial by jury. Pet. App. 24a-25a. The Tenth Circuit acknowledged that the Constitution guarantees a jury trial for "all crimes," U.S. Const. art. III, § 2, cl. 3, and "[i]n all criminal prosecutions," *id.* amend. VI. Pet. App. 24a. Yet because petitioner faced no more than six months in prison for either of the counts with which he had been charged, the court considered itself bound by this Court's petty-offense exception to hold petitioner was not entitled to trial by jury. *Id.*

Judge Tymkovich, joined by Judge Rossman, issued a concurrence. Pet. App. 26a-31a. They recognized that "prevailing precedent" required the court to reject petitioner's jury-trial claim. *Id.* 26a. But they called for this Court to conduct "a closer examination" of "the correct scope of the Constitution's right to a trial by jury." *Id.*

In particular, the concurring judges observed that the petty-offense doctrine appears to "disregard [] the text of Article III and the Sixth Amendment." Pet. App. 28a. They also cited recent scholarship demonstrating that the doctrine "is incompatible with the original public understanding of the Constitution." *Id.* 29a. Finally, the judges stressed that the doctrine—which "directs the judiciary to rely

primarily on the legislative branch's 'judgment'" about when the right to jury trial is necessary—"abdicate[s]" "the judicial imperative" of enforcing the right to jury trial. *Id.* 30a.

REASONS FOR GRANTING THE WRIT

The petty-offense exception flouts the text, structure, and history of the Constitution's jury-trial provisions. What's more, it stands on shaky precedent reached with sparse briefing and has never been subjected to serious adversarial testing. This petition provides an ideal vehicle for the Court to fully address this important and recurring issue.

I. The petty-offense exception flouts the text, structure, and history of the Constitution's jury-trial provisions

A. Text

The Constitution guarantees a right to jury trial for "all criminal prosecutions" and for "all crimes" (save cases of impeachment). U.S. Const. amend. VI; *id.* art. III, § 2, cl. 3. Petty offenses fall squarely within this categorical language.

1. To state what should be obvious: Prosecutions for crimes punishable by six months in prison are "criminal prosecutions." U.S. Const. amend. VI. Founding-era dictionaries defined "criminal" to mean merely "[n]ot civil."[2] And Blackstone's discussion of the

[2] 1 Samuel Johnson, A Dictionary of the English Language (1773) (defining "criminal" as "Not civil; as a *criminal* prosecution."), https://perma.cc/7JSM-KSTN; *see also* Noah Webster, American Dictionary Of The English Language (1828)

"criminal" law commences by distinguishing the prior discussion of "civil injuries." 4 William Blackstone, Commentaries *1.

Moreover, dictionaries and treatises defined "prosecution" as "the institution or commencement and continuance of a criminal suit."[3] There was no carve-out for minor charges; "the term 'prosecution' typically include[d] any criminal proceeding, whether serious or minor." Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 Duke L.J. 599, 638 (2022); *see also* 4 William Blackstone, Commentaries *300-01 (classifying "presentments of petty offenses" as a mode of "prosecution").

Accordingly, the Framers understood the phrase "criminal prosecutions" as simply a way to differentiate criminal trials (the subject of the Sixth Amendment) from civil trials (the subject of the Seventh Amendment). *See* Roth, 72 Duke L.J. at 638; *see also, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 441

[hereinafter Webster] (defining "criminal" as "opposed to civil"), https://perma.cc/RT4F-6B9W.

[3] Webster (defining "prosecution"), https://perma.cc/5L3U-28DJ; *see also id.* (defining "criminal" as "a person indicted or charged with a public offense, and one who is found guilty"), https://perma.cc/RT4F-6B9W); *id.* (explaining that "Crimes and misdemeanors" are "punishable by indictment, information, or public prosecution" while defining "crime"), https://perma.cc/Z6CX-PQDN; II John Bouvier, A Legal Dictionary 382 (2d ed. 1843) (defining "prosecution" as a case initiated by "indictment" and "by an information" "to bring a supposed offender to justice and punishment by due course of law"); 4 William Blackstone, Commentaries *301-12 (explaining that a "prosecution" begins with an indictment, presentment, or information and is a "step towards the punishment of offenders").

(2011) ("[T]he Sixth Amendment does not govern civil cases."). That historical definition controls here. The Government charged petitioner by information with committing crimes and sought to convict him at trial and impose criminal punishment. Pet. App. 4a-5a. No one would call this anything other than a "criminal prosecution."

2. Article III independently dictates that the jury-trial right encompasses petty offenses. The Jury Trial Clause of Article III covers trials in federal court "of all *crimes.*" U.S. Const. art. III, § 2, cl. 3 (emphasis added). Founding-era dictionaries and treatises defined the word "crime" broadly to include the full range of criminal offenses, "includ[ing] petty crimes." Roth, 72 Duke L.J. at 637.

In *Schick v. United States*, 195 U.S. 65 (1904) this Court questioned the applicability of that broad definition, suggesting that Blackstone's treatise supported a more limited definition of "crime." *Id.* at 69. In the passage the Court quoted, Blackstone noted that in "common usage," the term "crimes" was sometimes used to mean "offenses . . . of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence" were referred to "under the gentler name of 'misdemeanors' only." *Id.* (quoting 4 William Blackstone, Commentaries *5). But the Court's reference to this isolated passage was misguided thrice over.

First, Blackstone explained in the very same sentence that the "general *definition*" of "crime" "comprehends both crimes and misdemeanors; which properly speaking, are mere synonymous terms." 4 William Blackstone, Commentaries *5 (emphasis

added). In other words, Blackstone's point about "common usage" was simply a point about colloquial speech: Sometimes, people speak of "crimes" and "misdemeanors" separately. But in actuality, no one has ever doubted that—as a legal matter—misdemeanors, too, are crimes. Lest there be any doubt, Blackstone presumed that in any prosecution by information—including for "misdemeanors"—the defendant was entitled to a "trial by jury." *Id.* at *309-10.

Second, even the *Schick* Court did not hold that misdemeanors are not "crimes." To the contrary, the Court emphasized it was "not go[ing] beyond" its previous decision in *Callan v. Wilson*, 127 U.S. 540 (1888), which expressly held that the category of jury-demandable "crimes" "embraces as well some classes of misdemeanors." *See Schick*, 195 U.S. at 70; *Callan*, 127 U.S. at 549. Nor has the Court ever suggested since that its test for "petty offenses" encompasses all misdemeanors. To the contrary, the Court's current test does not reach any offense punishable by more than six months in prison, *see infra* at 29, even though certain misdemeanors can be punishable by up to one year's imprisonment, 18 U.S.C. § 3559(a).[4]

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[4] Holding that the term "crimes" in Article III excludes misdemeanors would also be inconsistent with the Constitution's Interstate Extradition Clause. That Clause empowers states to demand the return of any person charged "with Treason, Felony, or other Crime" who has since fled its jurisdiction. U.S. Const. art. IV, § 2, cl. 2. And the Court has held that the phrase "other Crime" encompasses "every offense against the laws of the demanding state, without exception as to the nature of the crime." *Ex parte Reggel*, 114 U.S. 642, 650 (1885).

Third, even if the word "crimes" in Article III were somehow ambiguous, the Sixth Amendment is not. As explained above, the Sixth Amendment applies in all "criminal prosecutions"—a phrase that indisputably includes prosecutions for petty offenses. *See supra* at 13-15. "Given that the requirement of a jury in 'all Crimes' in Article III was restated as 'all criminal prosecutions' in the Sixth Amendment, any relevance of Blackstone's note of the colloquial use of 'crime' to mean particularly atrocious acts seems strained." Roth, 72 Duke L.J. at 618 (footnotes omitted).

3. The word "all" in the phrases "*all* criminal prosecutions" and "*all* crimes" confirms beyond debate that the Constitution's jury-trial guarantee applies to petty offenses. At the Founding, as now, *all* meant "the entire quantity, without reference to relative importance." *Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140, 146 (2017); *see also* Samuel Johnson, A Dictionary of the English Language (1773) (defining "all" as "[b]eing the whole quantity; every part"), https://perma.cc/6QC8-5NMS. If the Framers had intended to allow legislatures or courts to provide juries only in some criminal prosecutions, they would not have included the word "all." The only function of the word "all" is to ward off any suggestion that the right to jury trial could be limited to only a subset of more serious "criminal prosecutions" or "crimes." Alexander Hamilton said as much: Because "arbitrary punishments upon arbitrary convictions" fuel "the great engines of judicial despotism," the Constitution "amply provided for" the "trial by jury in criminal cases." The Federalist No. 83, at 467 (Hamilton) (Clinton Rossiter ed., 1961).

B. Structure

1. The structure of the Sixth Amendment further undermines the petty-offense exception. The Sixth Amendment enumerates a total of nine rights, including the right to jury trial, that apply in "all criminal prosecutions." Those rights are: (1) a speedy trial, (2) a public trial, (3) a trial by jury, (4) an impartial jury, (5) a jury drawn from the vicinity of the crime (vicinage), (6) notice of accusation, (7) confrontation, (8) compulsory process for obtaining witnesses, and (9) aid of counsel. *See* U.S. Const. amend. VI.

If the phrase "all criminal prosecutions" contains an unstated exception for petty crimes, it should follow that every other Sixth Amendment right is similarly cabined. That would mean that the Constitution would have allowed the magistrate judge here to deny petitioner all of the other rights enumerated in the Sixth Amendment as well. The judge, for example, could have denied him any right to the assistance of retained counsel, refused to allow him to confront and cross-examine the witnesses against him, and precluded him from issuing subpoenas for witnesses to testify in his favor.

But, in fact, the magistrate could not have done so. This Court has "never limited" the reach of any of these other rights to non-petty or otherwise "serious offenses." *Argersinger v. Hamlin*, 407 U.S. 25, 27-31 (1972) (rejecting petty-offense exception for the right to the assistance of retained counsel; discussing public trial, notice of accusation, confrontation, and compulsory process rights). Rather, "the right to jury trial [is] the only Sixth Amendment right applicable to

the States that ha[s] been held inapplicable to 'petty offenses.'" *Scott v. Illinois*, 440 U.S. 367, 378 n.5 (1979) (Brennan, J., dissenting).[5]

This makes no sense. As a matter of grammar, the phrase "all criminal prosecutions" modifies the entire sentence and thus should have a consistent meaning across it. Equally important, it makes sense to apply all nine rights uniformly because all the rights are designed to effect the same goal: "to ensure a fair trial" under a set of minimum safeguards. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006).

2. The structure of the Constitution beyond the Sixth Amendment further confirms that the right to jury trial applies to "all criminal prosecutions," with no exception for petty offenses.

For one thing, the Framers knew how to limit the reach of constitutional provisions to subsets of "crimes" or "criminal prosecutions." The Constitution, for example, singles out "felonies" to delineate the scope of certain provisions. *See, e.g.*, U.S. Const. art. I, § 8, cl. 10 ("To define and punish Piracies and Felonies committed on the high Seas"). Similarly, the Fifth Amendment attaches the right to presentment or indictment by a grand jury to "capital, or otherwise infamous crime[s]." If "crime" applied only to "offenses

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[5] In *Scott*, the Court held the right to appointed counsel does not apply to defendants who are not sentenced to jail time. *See* 440 U.S. at 373-74. But this restriction on the right the Court created in *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963), does not apply to the Sixth Amendment's explicit guarantee of the right to assistance of retained counsel. *See Scott*, 440 U.S. at 370. And even the *Gideon* right applies to petty offenses where, as here, the defendant faces jail time. *Id.* at 373-74.

of a deeper or more atrocious dye," *supra* at 15, then this specification would be meaningless. "Crimes" would have sufficed.

C. History

Nor can the petty-offense exception be squared with history.

1. The Court has made clear that the right to jury trial, like other Sixth Amendment rights, codified a common-law right and should therefore be construed in accordance with the common law. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1395-96 (2020) (unanimous jury); *Holland v. Illinois*, 493 U.S. 474, 481 (1990) (impartial jury); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (right to confrontation); *Giles v. California*, 554 U.S. 353, 358 (2008) (same). Consequently, the Court has repeatedly recognized that the right to jury trial extends to the "class of cases" that were so adjudicated at "common law." *See Callan*, 127 U.S. at 549; *accord Schick*, 195 U.S. at 69; *Duncan*, 395 U.S. at 151-52, 160.

The right to jury trial at common law covered prosecutions for petty offenses. As Blackstone put it, when the Crown sought to impose "punishment [upon] the subject" by way of indictment or presentment, the "ancient" rule was that the defendant was entitled to "our admirable and truly English trial by jury." 4 William Blackstone, Commentaries *280-82. This included trial following "presentment of petty offenses." *Id.* at *300.

2. The Court and the Government have resisted this straightforward analysis. When creating the petty-offense exception, the Court claimed that in

England before the Founding, as well as in the colonies, adjudications for certain minor crimes were handled "summarily," without juries. *See Callan*, 127 U.S. at 552, 555; *Schick*, 195 U.S. at 70; *see also* Felix Frankfurter & Thomas Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 922-965 (1926) (further documenting this historical practice). And the Government has taken this reliance on summary adjudications one step further, arguing that the Framers must have intended to allow legislatures to dispense with juries in criminal prosecutions for petty offenses because a handful of states in the post-Founding era tolerated summary adjudications for such offenses despite having Declarations of Rights that "expressly guaranteed a jury trial in all criminal 'prosecutions.'" BIO at 22, *Ehmer v. United States*, 145 S. Ct. ___ (2024) (No. 24-5160).

These arguments misapprehend what summary adjudications were. Most were "in [their] nature not criminal but *civil*" proceedings in which the presiding justice of the peace could impose nothing more than a *civil* fine—as opposed to criminal punishment. *Ex parte Marx*, 9 S.E. 475, 478 (Va. 1889) (emphasis added); *see also In re Glenn*, 54 Md. 572, 599, 605-06 (Md. 1880) (such proceedings were not an exercise "of criminal jurisdiction"). Even when a justice of the peace was empowered to impose some form of criminal punishment, the proceeding was not considered a criminal "prosecution" because it did not proceed by way of indictment or involve a prosecutor. *Marx*, 9 S.E. at 476; *Glenn*, 54 Md. at 605-06.

That being so, summary adjudications were "in *derogation of* the common law," not a reflection of it.

Roth, 72 Duke L.J. at 654; *see also* Philip Hamburger, Is Administrative Law Unlawful? 244 (2014). In the words of Blackstone, the "common law [wa]s a stranger to" summary adjudications in which "there is no intervention of a jury." 4 William Blackstone, Commentaries *280; *see also* 3 Richard Burn, The Justice of the Peace, and Parish Officer 159 (1756) ("The power of a justice of the peace is in restraint of the common law, and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man shall be tried by his equals; which also was the common law of the land long before the great charter."). The same understanding prevailed on this side of the Atlantic. As Justice Harlan explained, the allowance of summary adjudication "was contrary to the genius of the common law." *Schick*, 195 U.S. at 97 (Harlan, J., dissenting); *see also Geter v. Comm'rs for Tobacco Inspection*, 1 S.C.L. (1 Bay) 354, 356 (S.C. 1794) ("summary adjudications" were "in restraint of the common law").

Put another way, not even the English themselves understood the occasional legislative allowances for summary adjudications to suggest that a *court* could dispense with trial by jury in an actual criminal *prosecution*. *Compare* 4 William Blackstone, Commentaries *280-82 ("Of Summary Convictions") *with id.* at *301 ("Of the Several Modes of Prosecution"). Such legislatively approved deviations from the common law were like the deviations from the right to confrontation that sometimes crept into criminal prosecutions. It was one thing for "[j]ustices of the peace" to engage in inquisitorial practices; it was wholly another for such examinations to be "read in *court* in lieu of live testimony." *Crawford*, 541 U.S. at

43 (emphasis added). The latter was inconsistent with the common-law right to confrontation. *Id.* at 50. This Court, therefore, has understood such historical deviations to illustrate what the constitutional right to confrontation *forbids*, not what it allows. *See id.* at 43, 50.

The Court should follow the same course here. There can be no doubt that petitioner's case is a criminal "prosecution": It was commenced by information and instituted and litigated by a federal *prosecutor* on behalf of the United States. That should be the end of the matter.

II. The stare decisis factors support reconsidering the petty-offense exception

When deciding whether to overturn precedent, this Court considers the quality of the decision's reasoning, the jurisprudential and practical consequences of the decision, and any societal reliance on the decision. *See*, *e.g.*, *Ramos*, 140 S. Ct. at 1405-07; *id.* at 1414-15 (Kavanaugh, J., concurring); *Gamble v. United States*, 587 U.S. 678, 718 (2019) (Thomas, J., concurring). All of these factors point towards abrogating the petty-offense exception.

A. Egregiously wrong

1. For all of the reasons just stated, the petty-offense exception flouts the text, structure, and history of the Constitution. But that is not all; it is also flatly inconsistent with this Court's modern methodology for construing the Sixth Amendment.

This Court has recently and repeatedly made clear that judicial balancing and related "functionalist assessment[s]" are off-limits when it comes to the right

to jury trial. *Ramos*, 140 S. Ct. at 1401-02. "When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses." *Id.* at 1402. Nor were they licensing this Court to suspend the right to jury trial where inefficient or administratively inconvenient. To the contrary, "arguments from efficiency cannot alter the demands" of the constitutional right to jury trial. *See Erlinger v. United States*, 144 S. Ct. 1840, 1859 (2024); *see also id.* at 1856 ("There is no efficiency exception" to the right to jury trial); *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (same). The whole point of guaranteeing the right to jury trial in "all" criminal prosecutions is to *preclude* dispensing with the procedure on the basis of such expediency.

Yet instead of adhering to the original public meaning of the right to jury trial, the Court has grounded its petty-offense exception in a balancing of policy considerations. The Court has opined that "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." *Duncan*, 391 U.S. at 160. And when creating the six-month cutoff for petty offenses, this Court "weigh[ed] the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial and magically conclud[ed] that the scale tips at six months' imprisonment." *Baldwin v. New York*, 399 U.S. 66, 75 (1970) (Black, J., concurring in the judgment); *see also Blanton v. City of North Las Vegas*, 489 U.S. 538, 542-43 (1988).

This brand of reasoning will not fly anymore. Worse yet, under the petty-offense exception, "the judicial imperative of interpreting the fundamental-to-liberty jury right has been abdicated to the legislative branch, or in this case even the executive branch"—all in the name of "efficient government." Pet. App. 30a (Tymkovich, J., concurring) (quoting *Oil States Energy Servs. v. Greene's Energy Grp.*, 584 U.S. 325, 356 (2018) (Gorsuch, J., dissenting)). That is because the doctrine requires courts to defer to legislatures—or, more accurately here, administrative agencies—as to whether an offense is serious enough to require jury trial. *Blanton*, 489 U.S. at 541-43; *see also* Pet. App. 30a (Tymkovich, J., concurring).

The judiciary must not cede to the political branches its core "province and duty" to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Just as this Court recently clarified that administrative agencies may not curtail the Seventh Amendment right to jury trial by regulatory fiat, *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127-28 (2024), neither may agencies deprive criminal defendants of their Sixth Amendment right to jury trial in "all criminal prosecutions" by creating crimes punishable by up to "only" six months in prison. *See* Pet. App. 26a, 28a, 30a (Tymkovich, J., concurring).

2. The Court is even "less constrained to follow precedent" here because this Court has never had the benefit of "full briefing or argument on [the] issue." *Johnson v. United States*, 576 U.S. 591, 606 (2015) (citation omitted).

This Court first suggested in *Callan v. Wilson*, 127 U.S. 540 (1888), that the right to jury trial

contained a petty-offense exception. The *Callan* defendant had been summarily tried and convicted in a District of Columbia "police court." 127 U.S. at 547; *see* Roth, 72 Duke L.J. at 610-11. In briefing, the defendant assumed his offense—conspiracy to commit extortion—was jury-demandable because it was a crime. Petr. Br. at 15-18, *Callan*, 127 U.S. 540 (No. 1318). The Government did not disagree, instead arguing that the Sixth Amendment did not apply to D.C. courts, and that if it did, the regime at issue satisfied that requirement by providing for jury trial on appeal. Resp. Br. at 5-16, *Callan*, 127 U.S. 540 (No. 1318). Only at the end of the Government's brief—in all of one sentence—did it quip that "the guaranty of trial by jury has never been understood to embrace petty offenses." *Id.* at 16.

The Court ruled for the defendant, holding that the limited right to a jury in prosecutions commenced in the District's police court was a violation of the Sixth Amendment and Article III's jury-trial guarantee. *Callan*, 127 U.S. at 556-57. But the Court did not stop there. In dicta, the Court also distinguished the defendant's offense from "petty or minor offences," and it suggested that the latter could "be tried by the court and without a jury." *Id.* at 555.

When the Court turned this dicta into law in *Schick*, the parties did not brief the validity of the petty-offense exception either. *See* Roth, 72 Duke L.J. at 616-17. Nor was the issue ever squarely presented in any post-incorporation case applying the jury-trial guarantee to the states. *Id.* at 615, 632. All told, "in none of these later cases did a party present and brief the argument that a petty federal crime is still a 'crime' and a 'criminal prosecution' and should thus be

jury demandable under Article III and the Sixth Amendment." *Id.* at 615.

Nor has this Court ever considered the modern scholarship making clear that the Court's prior cursory historical analysis was decidedly incorrect. *See* Kaye, 26 U. Chi. L. Rev. at 245-46; Lynch, 4 Kan. J. L. & Pub. Pol'y at 7; King, 24 U. Pa. J. Const. L. at 817-822; Roth, 72 Duke L.J. at 601-08. As with past cases, this upswell of scholarship warrants reconsidering the Court's precedent. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 60-61 (2004).

B. Consequences

The petty-offense exception also has pernicious consequences. And in cases where, as here, a criminal procedure requirement "implicate[s] fundamental constitutional protections," stare decisis is "at its nadir." *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013); *see also Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring).

1. Perhaps most notably, the petty-offense exception contravenes the Jury Trial Clause's purpose. The Founders insisted upon "[t]rial by jury in criminal cases" to guard against "arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions." The Federalist No. 83, at 467 (Hamilton) (Clinton Rossiter ed., 1961). This Court has likewise recognized that the right to jury trial "protect[s] against unfounded criminal charges brought to eliminate enemies . . . and against the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 156. In light of these functions, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of

the commonsense judgment of a group of laymen." *Williams v. Florida*, 399 U.S. 78, 100 (1970). Without a jury, agents of the state—prosecutors and judges—could unilaterally brand someone a "criminal" and strip him of his liberty without any say whatsoever from the general citizenry.

This fundamental restraint on prosecutorial and judicial power is just as vital when dealing with offenses punishable by a maximum of six months in prison. *Any* amount of time in prison is seriously damaging: Spending months behind bars separates people from their families and communities, typically costs them their jobs, imposes a psychological toll, and places them at risk for physical harm while incarcerated. *See, e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1322–23, 1325, 1371 (2012). Monetary penalties can also impose major hardship. *See, e.g.*, Bridget McCormack, *Economic Incarceration*, 25 Windsor Y.B. of Access to Just. 223, 228 (2007). And the stigma of being branded a "criminal" is the same regardless of how steep the resulting punishment might be.

What's more, the modern proliferation of substantive criminal law exposes pretty much the entire populace to these potential consequences. The range of crimes that might be classified as "petty" involves not just legislative prohibitions such as littering and assault, but also an "alarming" array of crimes created by "minute administrative regulations." *See Lewis v. United States*, 518 U.S. 322, 337 (1996) (Kennedy, J., concurring in the judgment). These regulations apply to, among others, "millions of persons in agriculture, manufacturing, and trade"—implementing everything from "migratory bird

treaties" to employment laws and recreational conduct on public lands. *Id.* at 337 (citation omitted); *see also* Neil Gorsuch & Janie Nitze, Over Ruled: The Human Toll of Too Much Law 108 (2024) ("Nor does anyone have a clue how many federal regulatory crimes are out there . . . the best anyone can do is guess that they number over 300,000.").

In short, prosecutors can almost always charge virtually anyone with a petty offense. Are we really content, in this day and age, to sacrifice for mere efficiency's sake the jury's role in protecting against vengeful prosecutors and eccentric or compliant judges?

2. The Court also recognized years ago that the "boundaries of the petty offense category [were] ill-defined, if not ambulatory." *Duncan*, 391 U.S. at 160. The Court later responded to its own critique by drawing the line—at least in general—between "petty" and "serious" crimes at six months' imprisonment. *See Baldwin*, 399 U.S. at 69 (internal quotation marks omitted). But that line remains fuzzy insofar as it is still possible for a defendant to "demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Blanton*, 489 U.S. at 543.

This modern jurisprudence points to a more fundamental problem, though. When courts make up rules of constitutional law that flout constitutional text, structure, and history, they have no neutral criteria to undergird their jurisprudence. The petty-offense exception represents just such an aberration—

to the detriment not only of criminal defendants but also the public's trust in the Court itself.

C. Reliance interests

Abrogating the petty-offense exception would upset no legitimate reliance interests. No one "has signed a contract, entered a marriage, purchased a home, or opened a business based on the expectation that, should a crime occur, at least the accused may be sent away" without a jury trial. *Ramos*, 140 S. Ct. 83 at 1406.

Nor would abrogating the petty-offense exception implicate any interest in the finality of criminal judgments. As the Court recently held, "new procedural rules do not apply retroactively on federal collateral review." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021). So even individuals who objected to bench trials for petty offenses will not be able to attack such final convictions based on anything the Court holds here.

Granted, some trials in the future for minor crimes would need to be conducted in front of juries instead of judges. Yet the vast majority of states—from Texas to California—already protect the right to a jury trial for some or all petty offenses. *See* Memorandum #31 from the D.C. Crim. Code Reform Comm'n to the Code Revision Advisory Grp.: App. A (Feb. 25, 2020) (35 states), https://perma.cc/V8UP-SPS2. And there is no evidence that they have incurred any significant burden in doing so. *See id.* at 1-6. Among other things, most such cases end in plea bargains regardless.

At any rate, any incremental burden incurred by providing the right to jury trial for petty offenses cannot outweigh the long-term "interest we all share

in the preservation of our constitutionally promised liberties." *See Ramos*, 140 S. Ct. at 1408. Once precedent is shown to be egregiously wrong, a constitutional right should not be interred forever. *Id.*

III. This case provides an excellent vehicle for reconsidering the petty-offense exception

Petitioner recognizes that this Court recently denied certiorari in another case challenging the legitimacy of the petty-offense exception. *See Ehmer v. United States*, 145 S. Ct. ___ (2024) (No. 24-5160). But that denial should not influence the Court's consideration of this petition. The petitioner in *Ehmer* devoted only two pages in a second question presented to the issue, and he restricted his argument to the Sixth Amendment only. *Ehmer* Pet. for Cert. at i, 9-11. This petition, by contrast, provides this Court a comprehensive treatment of the constitutional and stare decisis issues involved, and it challenges the petty-offense exception under both the Sixth Amendment *and* Article III.

At any rate, this Court has often granted review after previously denying other petitions asking it to reconsider precedent limiting the reach of criminal procedure rights. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1428 (2020) (Alito, J., dissenting) (referencing multiple previous denials on question presented); BIO at 6, *Alleyne v. United States*, 570 U.S. 99 (2013) (No. 11-9335) (same); BIO at 5, *Gamble v. United States*, 587 U.S. 678 (2019) (No. 17-646) (same). And this case provides an ideal opportunity to reconsider the petty-offense exception. Petitioner preserved his constitutional claim at every stage of his proceedings—before the magistrate judge,

district court, and Tenth Circuit. Petr. C.A. Br. 48, 71-72. And the Tenth Circuit squarely addressed the issue, with two of the three judges on the panel urging this Court to do the same. Pet. App. 24a; *id.* 26a-31a (Tymkovich, J., joined by Rossman, J., concurring).

The facts of this case also place the question presented in stark relief because a jury may well have made a difference to the outcome at trial. Petitioner engaged in what some might think is flamboyant or provocative behavior, allegedly recreating in the Colorado backcountry to the consternation of government officials. Pet. App. 3a-5a. He posted various provocative photos and videos on social media, arguably daring the government to charge him with a crime. *Id.* 4a. At the same time, petitioner presented two witnesses who "stated that they were the individuals anonymously depicted riding snowmobiles in pictures posted on [petitioner's] Instagram account." Petr. C.A. Br. 18. It is quite possible that at least some members of a jury might have believed those witnesses or otherwise responded to the prosecution in general differently from "one judge" who, after all, also works for the government, *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

Indeed, the district court convicted petitioner of one offense—unauthorized work activity on public lands, in violation of 36 C.F.R. § 261.10(c)—for which the Tenth Circuit found insufficient evidence on appeal. *See* Pet. App. 21a-24a. Put another way, the Tenth Circuit found that "no rational jury" could have found that petitioner committed one of the two crimes the Government charged petitioner with committing here. *Carella v. California*, 491 U.S. 263, 266 (1989) (reciting standard for insufficient evidence); *see also*

Pet. App. 21a-22a. So, if this trial had included a jury, petitioner might have been able to obtain an acquittal on the other charge too. He should have that opportunity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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