No. 23-242

In the Supreme Court of the United States

JONATHAN M. MARTINEZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 52(a)(3) of the Uniform Code of Military Justice, 10 U.S.C. 852(a)(3), which codifies invariant historical practice since the Founding by providing that conviction by court-martial in a noncapital case requires a vote of fewer than all of its members, is consistent with the Constitution.

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OPINIONS BELOW

In petitioner Martinez's case, the order of the Court of Appeals for the Armed Forces (CAAF) (Pet. App. 1a) is reported at 83 M.J. 439. The opinion of the Air Force Court of Criminal Appeals (CCA) (Pet. App. 2a-36a) is not reported but is available at 2022 WL 1043620.

In petitioner Aikanoff's case, the order of the CAAF (Pet. App. 37a) is reported at 83 M.J. 440. The opinion of the Army CCA (Pet. App. 38a-56a) is not reported but is available at 2022 WL 2161606.

In petitioner Apgar's case, the order of the CAAF (Pet. App. 57a) is reported at 83 M.J. 439. The opinion of the Army CCA (Pet. App. 58a-59a) is not reported.

In petitioner Bentley's case, the order of the CAAF (Pet. App. 60a) is reported at 83 M.J. 442. The opinion of the Army CCA (Pet. App. 61a-62a) is not reported.

In petitioner Docilet's case, the order of the CAAF (Pet. App. 63a) is reported at 83 M.J. 441. The opinion of the Army CCA (Pet. App. 64a-65a) is not reported.

In petitioner Garrett's case, the order of the CAAF (Pet. App. 66a) is reported at 83 M.J. 441. The opinion of the Army CCA (Pet. App. 67a-82a) is not reported but is available at 2022 WL 16579950.

In petitioner Johnson's case, the order of the CAAF (Pet. App. 83a) is reported at 83 M.J. 440. The opinion of the Army CCA (Pet. App. 84a-85a) is not reported.

In petitioner Lopez's case, the order of the CAAF (Pet. App. 86a) is reported at 83 M.J. 444. The opinion of the Air Force CCA (Pet. App. 87a-128a) is not reported but is available at 2023 WL 2401185.

In petitioner McCameron's case, the order of the CAAF (Pet. App. 129a) is reported at 83 M.J. 442. The opinion of the Air Force CCA (Pet. App. 130a-159a) is not reported but is available at 2022 WL 17069657.

In petitioner Miramontes's case, the order of the CAAF (Pet. App. 160a) is reported at 83 M.J. 440. The opinion of the Army CCA (Pet. App. 161a-162a) is not reported.

In petitioner Muñoz-Garcia's case, the order of the CAAF (Pet. App. 163a) is reported at 83 M.J. 442. The opinion of the Army CCA (Pet. App. 164a-167a) is not reported but is available at 2022 WL 1284391.

In petitioner Rubirivera's case, the order of the CAAF (Pet. App. 168a) is reported at 83 M.J. 443. The opinion of the Army CCA (Pet. App. 169a-170a) is not reported.

In petitioner Tarnowski's case, the order of the CAAF (Pet. App. 171a) is reported at 83 M.J. 443. The opinion of the Air Force CCA (Pet. App. 172a-211a) is not reported but is available at 2022 WL 16835520.

In petitioner Vance's case, the order of the CAAF (Pet. App. 212a) is reported at 83 M.J. 441. The opinion of the Navy-Marine Corps CCA (Pet. App. 213a-248a) is not reported but is available at 2022 WL 2236317.

In petitioner Veerathanongdech's case, the order of the CAAF (Pet. App. 249a) is reported at 83 M.J. 439. The opinion of the Air Force CCA (Pet. App. 250a-267a) is not reported but is available at 2022 WL 1125399.

In petitioner Zimmer's case, the order of the CAAF (Pet. App. 268a) is reported at 83 M.J. 443. The opinion of the Army CCA (Pet. App. 269a-299a) is not reported but is available at 2023 WL 149952.

JURISDICTION

The judgments of the Court of Appeals for the Armed Forces were entered in all petitioners' cases on July 18, 2023. The petition for a writ of certiorari was filed on September 8, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trials at general courts-martial, petitioners, members of the United States Armed Forces, were convicted of various offenses in violation of provisions of the Uniform Code of Military Justice (UCMJ), Act of May 5, 1950, ch. 169, 64 Stat. 108 (10 U.S.C. 801 *et seq.*). The service Court of Criminal Appeals (CCA) affirmed in each case in relevant part. The United States Court of Appeals for the Armed Forces (CAAF) affirmed.

1. "The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953). As such, "[i]n the exercise of its authority over the armed forces, Congress has long provided for specialized military courts to adjudicate charges against service

members." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2170 (2018).

The trial-level military court is the court-martial, "an officer-led tribunal convened to determine guilt or innocence and levy appropriate punishment, up to lifetime imprisonment or execution." *Ortiz*, 138 S. Ct. at 2171. There are three types of court-martial: summary, which "adjudicates only minor offenses"; special, which "has jurisdiction over most offenses under the UCMJ, but * * * may impose" only relatively minor punishments; and general, which "has jurisdiction over all offenses under the UCMJ and may impose any lawful sentence, including death." *Weiss* v. *United States*, 510 U.S. 163, 167 (1994); see 10 U.S.C. 816-820.

A general or special court-martial consists of a military judge and a panel of "members." *Weiss*, 510 U.S. at 167; cf. UCMJ Art. 16(d), 10 U.S.C. 816(d) ("A summary court-martial consists of one commissioned officer."). The members are "analogous to * * * civilian jurors" in that they hear the evidence, receive the military judge's instructions, and "decide guilt or innocence." *Weiss*, 510 U.S. at 167-168 & n.1. But they are different from civilian jurors in various respects.

For example, rather than reflecting a fair cross-section of the community, see *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), court-martial members are subject to eligibility requirements based on their rank and are selected using such factors as their "age, education, training, experience, length of service, and judicial temperament." UCMJ Art. 25(e)(2), 10 U.S.C. 825(e)(2); see Art. 25(a)-(c) and (e)(1), 10 U.S.C. 825(a)-(c) and (e)(1); *United States* v. *Riesbeck*, 77 M.J. 154, 162-163 (C.A.A.F. 2018). A general court-martial also typically includes eight members in noncapital cases (12 in

capital cases), and a special court-martial typically includes four. UCMJ Art. 29(b)(2) and (3), 10 U.S.C. 829(b)(2) and (3). The members may call and examine witnesses, Military Rule of Evidence 614,[1] and in some cases directly sentence the accused, UCMJ Art. 53(b)(1) and (c)(1), 10 U.S.C. 853(b)(1) and (c)(1). And when deciding upon the defendant's guilt and sentence, the members vote "by secret written ballot." Art. 51(a), 10 U.S.C. 851(a).

In addition, and in contrast to the longstanding requirement that a civilian jury's verdict in a federal criminal case be unanimous, see, *e.g.*, *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1395-1397 (2020), conviction by general or special court-martial in a noncapital case requires "the concurrence of at least three-fourths of the members," UCMJ Art. 52(a)(3), 10 U.S.C. 852(a)(3).[2] If the three-fourths threshold is not reached, "a finding of not guilty" is entered, Rule for Courts-Martial (R.C.M.) 921(c)(3); there is no analogue to a hung jury in the court-martial system.

2. Petitioners are members of the Armed Forces who were tried by general courts-martial and convicted of serious offenses under the UCMJ. At their trials, most of them requested instructions that they could be found guilty only by a unanimous vote of the court-martial panel, and those requests were denied. Because polling the members of a court-martial is generally

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[1] All references to the Rules for Courts-Martial and the Military Rules of Evidence are to the versions contained in the 2019 edition of the Department of Defense's *Manual for Courts-Martial United States*.

[2] A court-martial sentence of death requires a unanimous vote as to both guilt and sentence. See UCMJ Art. 52(b)(2), 10 U.S.C. 852(b)(2).

prohibited, R.C.M. 922(e), the precise votes in petitioners' cases are unknown.

Petitioner Martinez engaged in a "scheme to trick three female enlisted Airmen * * * into sending him nude digital photographs of themselves." Pet. App. 9a. The judge at his court-martial rejected his "request for an instruction that a guilty verdict required unanimity," and he was convicted of wire fraud and other offenses. *Id.* at 4a; see *id.* at 3a-4a. He was sentenced to a dishonorable discharge, 36 months of confinement, reduction in grade, and a reprimand. *Id.* at 3a-4a.

Petitioner Aikanoff sexually abused his adopted daughter on multiple occasions. Pet. App. 38a-42a. The judge at his court-martial denied his request for a unanimous-verdict instruction, Pet. CAAF Supp. 25,[3] and he was convicted of sexual abuse of a child, Pet. App. 38a-39a. He was sentenced to a dishonorable discharge, 20 years of confinement, forfeiture of all pay and allowances, and reduction in grade. *Id.* at 39a.

Petitioner Apgar raped another member of his Army unit. Apgar Gov't Army CCA Br. 2. The judge at his court-martial denied his request for a unanimous-verdict instruction, *id.* at 2-3, and he was convicted of rape and sexual assault, *id.* at 2. He was sentenced to a dishonorable discharge and 49 months of confinement. *Ibid.*

Petitioner Bentley sexually assaulted a fellow Army medic after a night of drinking. Bentley Gov't Army CCA Br. 2-4. The judge at his court-martial denied his request for a unanimous-verdict instruction, *id.* at 21, and he was convicted of sexual assault, *id.* at 2. He was

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[3] "Pet. CAAF Supp." refers throughout this brief to the relevant petitioner's supplement to his petition for review in the CAAF. See CAAF R. Prac. & P. 21 (2023).

sentenced to a dishonorable discharge, reduction in grade, and 12 months of confinement. *Ibid.*

Petitioner Docilet had nonconsensual sex with a woman after attending a music festival. Docilet Gov't Army CCA Br. 1-4. The judge at his court-martial rejected his request that the panel be polled on whether it was unanimous, Pet. CAAF Supp., App. B at 1, and he was convicted of sexual assault, Pet. CAAF Supp. 2. He was sentenced to a dishonorable discharge, 180 days of confinement, and reduction in grade. *Ibid.*

Petitioner Garrett repeatedly assaulted his wife. Pet. App. 67a-72a. He did not raise the unanimous-verdict issue at his trial, Garrett Army CCA Br. 30, and he was convicted of aggravated assault on a spouse and other offenses, Pet. App. 67a-68a. He was sentenced to a bad-conduct discharge, four years of confinement, and reduction in grade. Pet. App. 68a.

Petitioner Johnson used a controlled substance to the point of impairment while serving as an armed guard during an escort mission. Johnson Gov't Army CCA Br. 1-5. The judge at his court-martial denied his request for a unanimous-verdict instruction, *id.* at 21-22, and he was convicted of negligent dereliction of duty and wrongful use of a controlled substance, *id.* at 1. He was sentenced to a bad-conduct discharge, 75 days of confinement, and reduction in grade. *Ibid.*[4]

Petitioner Lopez, after a dispute with his wife, attacked and sexually assaulted her. Pet. App. 90a-98a. The judge at his court-martial denied his request for a unanimous-verdict instruction, Pet. CAAF Supp. 3-4,

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[4] The petition for a writ of certiorari refers (at ii) to a Jacob W. Johnson, but the rest of the petition and its appendix indicate that the relevant petitioner is Darrick E. Johnson. See Pet. 11-12; Pet. App. 83a-84a.

and he was convicted of assault, sexual assault, kidnapping, and child endangerment, Pet. App. 88a. He was sentenced to a dishonorable discharge, nine years and six months of confinement, and reduction in grade. *Id.* at 88a-89a.

Petitioner McCameron, after a dispute with his wife, "smashed her phone into her face" and threatened her with a gun. Pet. App. 134a; see *id.* at 133a-135a. The judge at his court-martial denied his request for a unanimous-verdict instruction, *id.* at 132a, and he was convicted of assault and damaging property, *id.* at 131a. He was sentenced to a dishonorable discharge, 27 months of confinement, reduction in grade, a fine, and a reprimand. *Ibid.*

Petitioner Miramontes sexually assaulted two other Army personnel. Miramontes Gov't Army CCA Br. 1-6. The judge at his court-martial denied his request for a unanimous-verdict instruction, *id.* at 41, and he was convicted of sexual assault and abusive sexual contact, *id.* at 1. He was sentenced to a dishonorable discharge, 18 months of confinement, and reduction in grade. *Ibid.*

Petitioner Muñoz-Garcia sexually assaulted a work acquaintance. Muñoz-Garcia Gov't Army CCA Br. 2-6. The judge at his court-martial denied his request for a unanimous-verdict instruction, Pet. CAAF Supp. 3, and he was convicted of sexual assault, *id.* at 1. He was sentenced to six months of confinement and a dishonorable discharge. *Id.* at 1-2.

Petitioner Rubirivera raped two women. Rubirivera Gov't Army CCA Br. 1-8. The judge at his court-martial denied his request for a unanimous-verdict instruction, *id.* at 41-42, and he was convicted of rape and sexual assault, *id.* at 1. He was sentenced to a dishonorable discharge and 14 years of confinement. *Ibid.*

Petitioner Tarnowski threatened a fellow airman with a loaded pistol while intoxicated. Pet. App. 175a-176a. The judge at his court-martial denied his request for a unanimous-verdict instruction, Pet. CAAF Supp. 3-4, and he was convicted of assault, drunk and disorderly conduct, and unlawfully carrying a concealed weapon, Pet. App. 173a. He was sentenced to a bad-conduct discharge, 18 months of confinement, forfeiture of all pay and allowances, and reduction in grade. *Ibid.*

Petitioner Vance "made sexual advances to an individual who he believed was a 13-year-old girl, but was actually a law enforcement agent." Pet. App. 215a. The judge at his court-martial denied his request for a unanimous-verdict instruction, *id.* at 247a, and he was convicted of attempted sexual assault of a child, attempted sexual abuse of a child, and attempted extramarital sexual conduct, *id.* at 214a. He was sentenced to a dishonorable discharge, 15 months of confinement, and reduction in grade. Pet. CAAF Supp. 3.

Petitioner Veerathanongdech used illegal drugs and impeded investigators' efforts to unlock his cell phone. Pet. App. 255a-259a. The judge at his court-martial denied his request for a unanimous-verdict instruction, *id.* at 267a, and he was convicted of wrongful use of a controlled substance, solicitation of others to provide him a controlled substance, and obstruction of justice, *id.* at 251a. He was sentenced to dismissal from the service and 30 days of confinement. *Ibid.*

Petitioner Zimmer assaulted his wife and another woman on numerous occasions over the course of about four years. Pet. App. 270a-276a. The judge at his court-martial denied his request for a unanimous-verdict instruction, Pet. CAAF Supp., App. B at 1-3, and he was convicted of simple assault, aggravated assault by

strangulation, kidnapping, communicating a threat, and other offenses, Pet. App. 270a. He was sentenced to dismissal from the service and ten years of confinement. *Ibid.*

3. The relevant service's CCA affirmed in pertinent part in each petitioner's case. *E.g.*, Pet. App. 2a-36a (opinion of the Air Force CCA affirming petitioner Martinez's convictions and sentence). In petitioners' and several other cases, the CAAF's review included review of the contention that the Constitution requires courts-martial to convict defendants of serious offenses only by unanimous vote of their members. *E.g.*, *United States* v. *Anderson*, 82 M.J. 440 (2022); *United States* v. *Martinez*, 83 M.J. 8 (2022).

The month before deciding petitioners' cases, the CAAF unanimously recognized in *United States* v. *Anderson*, 83 M.J. 291 (2023), petition for cert. pending, No. 23-437 (filed Oct. 23, 2023), that court-martial defendants do not "have a right to a unanimous guilty verdict under the Sixth Amendment, the Fifth Amendment Due Process Clause, or the Fifth Amendment component of equal protection." *Id.* at 293.

With regard to the Sixth Amendment, the CAAF's decision in *Anderson* observed that "[n]onunanimous verdicts have been a feature of American courts-martial since the founding of our nation's military justice system," 83 M.J. at 294; highlighted decisions in which this Court has "repeatedly stated that the Sixth Amendment right to a jury trial does not apply to courts-martial," *ibid.*; and rejected the defendant's argument that a right to an impartial court-martial necessarily subsumes a right to panel unanimity, see *id.* at 296-298. With regard to due process, the CAAF applied this Court's standard for assessing such a "challenge to a

statutory court-martial procedure" and explained that "the factors militating in favor of unanimous verdicts are not so extraordinarily weighty as to overcome the balance struck by Congress" in the UCMJ. *Id.* at 298-299 (citing *Weiss*, 510 U.S. at 177-178). And with regard to equal protection, the CAAF principally observed that "servicemember and civilian defendants" are not "similarly situated." *Id.* at 301.

The CAAF affirmed in each petitioner's case in a summary order, citing its decision in *Anderson*. *E.g.*, Pet. App. 1a.

ARGUMENT

Petitioners renew their contention (Pet. 17-28) that Article 52(a)(3) of the UCMJ, which requires a vote of three-fourths of the court-martial's members to convict the accused in a noncapital case, is unconstitutional. The CAAF correctly rejected that contention in *United States* v. *Anderson*, 83 M.J. 291 (2023), petition for cert. pending, No. 23-437 (filed Oct. 23, 2023), the case that preceded its summary affirmances of petitioners' convictions.[5] That decision follows from invariant historical practice since the Founding and this Court's many precedents observing that the Sixth Amendment jury-trial right—the source of the unanimous-verdict requirement in the civilian criminal justice system, see *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020)—does not apply to the military. The question presented is therefore settled by precedent, implicates no division within the CAAF or the other courts of appeals, and may be

[5] The petition in *Anderson* presents the same issue. In conjunction with this brief, the government is at the same time filing a brief in opposition in *Anderson*.

stripped of prospective significance by legislative action. No further review is warranted.

1. Petitioners do not contend that they are entitled to a "jury" trial as such. See Pet. 30 (describing a court-martial panel as "jury-like"). They nevertheless contend that the Sixth Amendment bars a court-martial from convicting a defendant of serious offenses by a nonunanimous vote of its members. As the CAAF correctly recognized in *Anderson*, that contention lacks merit.

a. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. Amend. VI; see also *id.* Art. III, § 2, Cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury[.]"). Because unanimity was regarded "as an essential feature of the jury trial" at common law and during the Founding era, this Court "has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity" in federal criminal trials. *Ramos*, 140 S. Ct. at 1396; see *id.* at 1396-1397 & nn.19-22 (collecting cases).

Throughout that period, the Court has also repeatedly recognized that the jury-trial right does not apply at all in the military justice system. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court explained, in holding that trying a civilian by military commission when the civil courts were open violated the Sixth Amendment, that the constitutional "right of trial by jury" is "preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service." *Id.* at 123. The Court invoked the Fifth Amendment's exception for military cases, see U.S. Const. Amend. V (requiring indictment by grand jury

"except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"), and observed that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Milligan*, 71 U.S. (4 Wall.) at 123.

Milligan is consistent with the text of the Sixth Amendment, which explicitly focuses on preserving the right to trial by a "jury." A court-martial panel, though "analogous" to a civilian jury in some respects, *Weiss* v. *United States*, 510 U.S. 163, 167 n.1 (1994), has never been considered a "jury" within the meaning of the Sixth Amendment. The longstanding distinction between court-martial panels and juries all but defeats petitioners' argument that the Sixth Amendment textually applies.

The Court's understanding in *Milligan* also matches the Framers' own understanding of the Sixth Amendment. See Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293, 313 (1957) ("Th[e] history demonstrates quite clearly that [the Framers] thought * * * that courts-martial would be excluded * * * from the grand- and petit-jury guarantees."). And it coheres with the Court's earlier analysis in *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65 (1858), which cited the Fifth Amendment and other constitutional provisions in holding that Congress's "power to provide for the trial and punishment of military and naval offences" is "entirely independent" of Article III. *Id.* at 79; see, *e.g.*, U.S. Const. Art. I, § 8, Cl. 14 (authorizing Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces").

The Court has also repeatedly reaffirmed *Milligan*'s understanding that the Sixth Amendment jury-trial right does not extend to military courts. See *Kahn* v. *Anderson*, 255 U.S. 1, 8 (1921) (describing the claim of a jury-trial right in military court as "without foundation"); *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (military cases "are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth"); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions."); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955) ("[T]here is a great difference between trial by jury and trial by selected members of the military forces.").[6]

Petitioners' reliance on CAAF decisions applying certain other Sixth Amendment rights to courts-martial (Pet. 20-21) is misplaced. Even assuming those decisions are correct, but see *Ortiz* v. *United States*, 138 S. Ct. 2165, 2200 (2018) (Alito, J., dissenting) (court-martial "proceedings are not criminal prosecutions within the meaning of the Constitution"), and that those rights apply to courts-martial by virtue of the Sixth Amendment rather than a statute or another source, the application of some Sixth Amendment rights in

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[6] See also *Reid* v. *Covert*, 354 U.S. 1, 37 n.68 (1957) (plurality opinion) ("in cases subject to military trial * * * the requirements of jury trial are inapplicable"); *O'Callahan* v. *Parker*, 395 U.S. 258, 262 (1969) ("If the case does not arise 'in the land or naval forces,' then the accused gets * * * a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2."), overruled on other grounds by *Solorio* v. *United States*, 483 U.S. 435 (1987); *Middendorf* v. *Henry*, 425 U.S. 25, 53 n.2 (1976) (Marshall, J., dissenting) (describing "the jury-trial issue with regard to the military" as "settl[ed]").

courts-martial does not dictate application of them all. See Henderson 316-321 (discussing the historical case for applying the non-jury provisions of the Sixth Amendment to courts-martial). For example, the Sixth Amendment's Vicinage Clause (requiring trial by a "jury of the State and district wherein the crime shall have been committed") has never been applied to courts-martial. See *Quirin*, 317 U.S. at 39.

b. The understanding that the jury-trial right does not apply in courts-martial finds strong support in historical practice—including with specific regard to the unanimity issue. Although Congress has over time raised the threshold for a court-martial panel to convict, it has never required what petitioners advocate: a unanimous vote to convict for all serious offenses. Non-unanimous court-martial verdicts have instead been an "open, widespread, and unchallenged" practice "since the early days of the Republic" and before. *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2567 (2019) (quoting *NLRB* v. *Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment)). "Our whole experience as a Nation," *Noel Canning*, 573 U.S. at 557 (citation and internal quotation marks omitted), thus strongly supports the conclusion that the Constitution permits courts-martial to convict defendants of serious offenses by nonunanimous votes.

The first American Articles of War—which predate the Constitution—provided, consistent with their British antecedents, that a regimental court-martial (which adjudicated minor offenses, see *Anderson*, 83 M.J. at 298 n.5) "shall give judgment by the majority of voices." Articles of War of 1775, art. XXXVII, *reprinted in* William Winthrop, *Military Law and Precedents* 956 (2d ed. 1920) (Winthrop); see British Articles of War of

1765, § XV, art. XII, *reprinted in* Winthrop 943. "Although the early Articles of War did not specify the required votes to convict in a *general* court-martial," for a more serious offense, the same majority-vote rule applied in practice, even for offenses punishable by death. *Anderson*, 83 M.J. at 298 (emphasis added); see also *Stout* v. *Hancock*, 146 F.2d 741, 742 (4th Cir. 1944) ("At that time, action in courts-martial was by majority vote."), cert. denied, 325 U.S. 850 (1945).

Shortly thereafter, "[w]hen it came time to draft a new charter, the Framers 'recognized and sanctioned existing military jurisdiction'" by, among other things, exempting military cases from the Grand Jury Clause and "authoriz[ing] Congress" under the Make Rules Clause "to carry forward courts-martial" as they then existed. *Ortiz*, 138 S. Ct. at 2175 (quoting Winthrop 48) (brackets omitted); accord *id.* at 2199 (Alito, J., dissenting) ("when the Constitution and the Bill of Rights were adopted, no one suggested that this required any alteration of the existing system of military justice"). And "[t]he very first Congress continued the court-martial system as it then operated." *Id.* at 2175 (opinion of the Court).

Apart from capital cases, the nonunanimity rule has persisted throughout the Nation's history. In 1916, Congress approved amendments to the Articles of War that required a two-thirds vote, rather than a majority vote, of the court-martial's members to convict the defendant "of an offense for which the death penalty is made mandatory by law," but otherwise left the majority-vote rule intact. Act of Aug. 29, 1916, ch. 418, sec. 3, Rev. Stat. § 1342, art. 43, 39 Stat. 657. In 1920, Congress required unanimity to convict a defendant of a mandatory-death offense and increased the threshold

for conviction of all other offenses to two-thirds. Act of June 4, 1920, ch. 227, ch. II, art. 43, 41 Stat. 795-796. The UCMJ, enacted in 1950, took the same approach in its Article 52. 64 Stat. 125. Not until 2016 did Congress amend Article 52 to raise the default threshold to three-fourths, Military Justice Act of 2016, Pub. L. No. 114-328, Div. E, Tit. LVII, § 5235, 130 Stat. 2916, where it remains today, UCMJ Art. 52(a)(3), 10 U.S.C. 852(a)(3).

c. This Court's decision in *Ramos* does not call that longstanding and oft-recognized practice into question.

Consistent with long-standing precedent, *Ramos* located the constitutional requirement of jury unanimity in the Sixth Amendment's Jury Trial Clause. 140 S. Ct. at 1395-1397. As discussed, however, that Clause does not apply to military courts, but has instead long coexisted with the practice of nonunanimous court-martial panels. Although *Ramos* held that the unanimity requirement is applicable in *state* courts under the Fourteenth Amendment, see *id.* at 1397, the incorporation of a constitutional right against the States does not extend it to the military as well, see *Sanford* v. *United States*, 586 F.3d 28, 35 (D.C. Cir. 2009). Indeed, if *Ramos* had any implications for the validity of the military's practices, the Court's depiction of Louisiana's and Oregon's provisions for nonunanimous verdicts as "unconventional" outliers, 140 S. Ct. at 1397, would rest on unsteady ground, given the long history of nonunanimous court-martial verdicts.

Petitioners nevertheless contend that they enjoy a Sixth Amendment right to a unanimous verdict on the theory that (1) they have a Sixth Amendment right to an impartial court-martial panel, and (2) this Court held in *Ramos* that "unanimous convictions are essential to ensure impartiality." Pet. 21; see Pet. 20-22. Both

premises are faulty. Servicemembers have always been entitled to impartial treatment in courts-martial. See *Anderson*, 83 M.J. at 297 (citing the early American Articles of War); R.C.M. 912(f)(1)(N) (providing for removal of members on partiality grounds). That does not mean such right comes from the Jury Trial Clause, however. Nor could it: As explained, see p. 13, *supra*, a court-martial panel is not a "jury" within the meaning of the Sixth Amendment.

Moreover, as the CAAF explained in *Anderson*, 83 M.J. at 297-298, *Ramos* does not treat unanimity as an invariant subcomponent of impartiality. In interpreting the Sixth Amendment's right to "trial by an impartial jury" to include unanimity of state civilian juries, the Court relied on "what the term 'trial by an impartial jury' meant at the time of the Sixth Amendment's adoption," *Ramos*, 140 S. Ct. at 1395—a historical analysis that dictates precisely the opposite conclusion here, see pp. 15-17, *supra*. Furthermore, while "the 'requirements of unanimity and impartial selection * * * complement each other'" in the civilian context, *id.* at 1418 (Kavanaugh, J., concurring in part) (citation omitted), the latter concept does not subsume the former. Just as no one would contend that a 7-2 decision of this Court is any less impartial than a 9-0 decision, a nonunanimous court-martial verdict is no less impartial than a unanimous one.

2. The CAAF also correctly recognized that the Due Process Clause is not a viable avenue for petitioners' unanimity claim.

a. As a threshold matter, this Court has explained that "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-

ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina* v. *California*, 505 U.S. 437, 443 (1992). The inapplicability of the Sixth Amendment's jury-trial right thus in itself undermines petitioners' effort to substitute the Due Process Clause.

In any event, as this Court explained in *Weiss*, although "Congress * * * is subject to the requirements of the Due Process Clause when legislating in the area of military affairs," "[j]udicial deference * * * 'is at its apogee' when reviewing congressional decisionmaking in this area," including Congress's decisions about "rules relating to the rights of servicemembers." 510 U.S. at 176-177 (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)). *Weiss* accordingly instructed that "a due process challenge to a facet of the military justice system" turns on whether "the factors favoring" the desired additional process "are so extraordinarily weighty as to overcome the balance achieved by Congress" in the UCMJ. *Id.* at 177, 181 (citing *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976)).

Looking to *Weiss*, in which this Court rejected the claim that "the Due Process Clause requires that military judges must have a fixed term of office," 510 U.S. at 176, the CAAF correctly found in *Anderson* that petitioners cannot satisfy that demanding standard. See 83 M.J. at 298-300. First, the historical pedigree of non-unanimous court-martial verdicts, see pp. 15-17, *supra*, is in itself a compelling indication that adherence to that tradition does not raise a due-process problem. See *Weiss*, 510 U.S. at 178-179; see also *id.* at 197 (Scalia, J., concurring in part and concurring in the judgment) ("That which, in substance, has been immemorially the

actual law of the land . . . is due process of law") (quoting *Hurtado* v. *California*, 110 U.S. 516, 528 (1884)) (brackets omitted). The absence of a unanimity requirement for courts-martial parallels, as a historical matter, the lack of tenure for military judges upheld in *Weiss*: while both unanimous verdicts and judicial tenure are "traditional component[s] of the Anglo-American civilian judicial system," Congress has never seen fit to apply those features in toto to the military justice system. *Id.* at 178.

Petitioners cannot show that "factors favoring" their unanimity claim are "so extraordinarily weighty as to overcome" invariant historical practice and the "balance achieved by Congress," *Weiss*, 510 U.S. at 181, in Article 52 of the UCMJ. Although not the choice that the Framers made for civilians under the Sixth Amendment, even in the civilian context, "one could * * * justify a non-unanimous jury rule by resort to neutral and legitimate principles," as "England * * * and various legal organizations in the United States * * * at times" have done. *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part). And Congress had special reasons for taking that approach in the military context.

This Court has recognized that the military is a distinct society that could not "function without strict discipline and regulation that would be unacceptable in a civilian setting," *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty," *Parker* v. *Levy*, 417 U.S. 733, 743-744 (1974) (citation omitted). Congress accordingly may, for example, have viewed the existence of a single holdout panel member to be an insufficient basis for avoiding military discipline. See *Reid* v.

Covert, 354 U.S. 1, 36 (1957) (plurality opinion) ("[T]here has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts").

Furthermore, other "provisions of the UCMJ," *Weiss*, 510 U.S. at 179, provide safeguards against the risk of wrongful conviction in military court—including safeguards to which civilian criminal defendants are not entitled. See *Sanford*, 586 F.3d at 29. For example, the requirement that the members vote "by secret written ballot," UCMJ Art. 51(a), 10 U.S.C. 851(a), mitigates the risk that "junior panel members" will be pressured to vote against the accused, *Anderson*, 83 M.J. at 299. After trial, defendants "are also entitled to factual sufficiency review" in the relevant Court of Criminal Appeals under a more favorable standard than a defendant in civilian courts receives. *Ibid.*; see UCMJ Art. 66(d)(1), 10 U.S.C. 866(d)(1); compare UCMJ Art. 66(d)(1)(B), 10 U.S.C. 866(d)(1)(B), with *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). Congress was entitled to view those, and other, court-martial protections as sufficient to maintain the tradition of nonunanimous courts-martial.

b. Petitioners dismiss (Pet. 25) the historical tradition of nonunanimous court-martial verdicts on the ground that "military jurisdiction over civilian offenses is a modern phenomenon." But that is inconsistent with the historical record, which "reflect[s] trials by court-martial during the late 18th century for offenses against civilians and punishable under civil law, such as theft and assault." *Solorio* v. *United States*, 483 U.S. 435, 444 (1987); see *id.* at 442-445 (surveying related historical evidence). It also has little force as a legal matter. Petitioners do not identify any constitutional mechanism

through which changes in the UCMJ's jurisdictional scope, upheld by this Court as constitutional, see *id.* at 450-451, would have triggered a due-process requirement of unanimity. And petitioners' approach would have the apparent effect of requiring unanimity even in cases involving military offenses of the sort that they acknowledge have always been triable through non-unanimous court-martial.

Petitioners also object (Pet. 27) that the procedural safeguards of the UCMJ do not "fill the specific gap created by the specter of non-unanimous convictions." That kind of nondeferential reasoning is inconsistent with *Weiss*, however, and cannot establish that petitioners' procedural concerns are so "extraordinarily weighty" as to invalidate Article 52(a)(3) of the UCMJ. 510 U.S. at 181; see *id.* at 179-181.

3. Finally, the equal-protection component of due process does not offer petitioners a basis for imposing a requirement of unanimity in courts-martial.

As the CAAF recognized in *Anderson*, the touchstone of an equal-protection claim is an allegation that the government has subjected similarly situated groups to disparate treatment. See *Anderson*, 83 M.J. at 300; see also *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 601 (2008). Petitioners acknowledge (Pet. 28) that they are not similarly situated to civilian criminal defendants. They assert only that they are similarly situated "to *themselves*," in a hypothetical scenario in which they were tried in civilian court. Pet. 27; see UCMJ Art. 134, 10 U.S.C. 934 ("General article" incorporating non-capital federal civilian offenses) (emphasis omitted). Petitioners identify no authority supporting that novel legal theory.

This Court "has repeatedly emphasized the differences between the military and civilian societies and justice systems," *Anderson*, 83 M.J. at 301 (citing cases), and petitioners' approach would appear to necessitate eradicating those distinctions—as well as distinctions between federal and state (or tribal) systems, for civilian defendants triable by more than one sovereign. And to the extent that petitioners might seek to distinguish their equal-protection claim by asserting that it has constitutional underpinnings, that would unequivocally reveal the claim to be an impermissible end-around to the nonviability of their principal Sixth Amendment and Due Process Clause claims.

4. Even beyond the merits, additional reasons counsel against further review.

First, there is no disagreement in the courts of appeals—or even among the judges on the CAAF, who all joined the decision in *Anderson*—on the constitutionality of nonunanimous court-martial verdicts. Notwithstanding petitioners' suggestion (Pet. 32) that the issue is unlikely to arise in other courts, several circuits have confronted it or related questions when servicemembers have collaterally attacked their convictions by court-martial and reached results in accord with *Anderson*. See *Mendrano* v. *Smith*, 797 F.2d 1538, 1543 (10th Cir. 1986) ("[M]embers of the military forces subject to the jurisdiction of courts-martial are not entitled to a jury trial and therefore to its unanimity requirement"); see also *Sanford*, 586 F.3d at 29 (rejecting a due-process challenge to conviction by a court-martial comprising fewer than six members); *Betonie* v. *Sizemore*, 496 F.2d 1001, 1007 (5th Cir. 1974) ("[I]t is accepted that the right to a jury trial does not apply to courts-martial, and never has"); *Daigle* v. *Warner*, 490 F.2d 358, 364 (9th

Cir. 1973) ("the right to jury trial was not intended to apply to military courts"); *Owens* v. *Markley*, 289 F.2d 751, 752 (7th Cir. 1961) ("Military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments.").

Second, the prospective significance of the question presented is uncertain. As noted, Congress has from time to time raised the proportion of votes required to convict in general and special courts-martial. See pp. 16-17, *supra*. Recently enacted legislation directs the Department of Defense to study and report to Congress within a year on the "feasibility and advisability" of requiring unanimous verdicts in courts-martial. National Defense Authorization Act for Fiscal Year 2024, H.R. 2670, 118th Cong., 1st Sess., Div. A, Tit. V, § 536(a) (Dec. 14, 2023); see *id.* § 536. The possibility of further legislative action in this area counsels against granting certiorari at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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