No. 23-242

IN THE

Supreme Court of the United States

JONATHAN M. MARTINEZ, *ET AL.*,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF

JONATHAN F. POTTER
JUSTIN L. WATKINS
TUMENTUGS D. ARMSTRONG
Defense Appellate Division
U.S. Army Legal Servs. Agency
9275 Gunston Road
Fort Belvoir, VA 22060

DAVID L. BOSNER
SAMANTHA P. GOLSETH
Air Force Appellate Defense Div.
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

STEPHEN I. VLADECK
Counsel of Record
727 E. Dean Keeton Street
Austin, TX 78705
(512) 475-9198
svladeck@law.utexas.edu

COLIN W. HOTARD
Appellate Defense Counsel
Code 45
1254 Charles Morris St., S.E.
Suite 100
Washington, DC 20374

Counsel for Petitioners

January 9, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS

The petition asks this Court to resolve whether, in light of *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), military servicemembers have a constitutional right to have convictions for serious offenses by a court-martial panel be unanimous—either under the Jury Trial Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment.[1]

In opposing certiorari, the government does not dispute the importance of the question presented—nor could it. Roughly one-third of all general courts-martial are tried by panels; and the brief in opposition does not contest that the possibility of non-unanimous convictions regularly factors into an accused's exercise of their statutory right to choose between being tried by a panel or by a military judge alone. *See* Pet. 30.

Nor does the government dispute that this petition provides a suitable vehicle for resolving the question presented. Instead, its principal argument against certiorari is on the merits—that the Court of Appeals for the Armed Forces (CAAF) was correct in *United States* v. *Anderson*, 83 M.J. 291 (C.A.A.F. 2023), that unanimous convictions are unrelated to any right servicemembers might have to an impartial jury: "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." U.S. Br. 18.

---

1. In addition to *Anderson* v. *United States*, No. 23-437, *see* U.S. Br. at 11 & n.5, the question presented in this case is also one of the two questions presented in *Cunningham* v. *United States*, No. 23-666. Thus, of the 20 parallel cases described in the petition, *see* Pet. 31, 18 of them are now before this Court.

This Court rejected similarly superficial reasoning in *Ramos*. *See* 140 S. Ct. at 1395 ("[T]he promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down."). The upshot of *Ramos* is not that the Sixth Amendment's Jury Trial Clause now applies to courts-martial; it is the conclusion that unanimity is one of the rights that attaches *once* a jury is impaneled. Servicemembers may not have a *constitutional* right to be tried by a jury, but they have—and have *always* had—an absolute statutory right to have a panel of fellow servicemembers decide their fate. Thus, once *Ramos* established that unanimous convictions are central to what defines the "impartial jury" that the Sixth Amendment requires in civilian cases, it ought to follow that unanimous convictions are also central to the "impartial panel" that the Constitution requires in military prosecutions of servicemembers, as well.

Like the CAAF, the government responds to this argument by asserting that historical practice has been to the contrary—playing up the extent to which non-unanimous court-martial convictions have been a feature of American military justice for most of its history. *See* U.S. Br. 15–17. But also like the CAAF, the brief in opposition never seriously grapples with the implications of the far more limited jurisdiction of pre-1950 courts-martial. *If* historical tradition bears upon whether court-martial convictions must be unanimous, it ought to matter that most of the offenses for which petitioners were tried and convicted could *not* have been tried by Founding-era (or even nineteenth-century) courts-martial. *See, e.g.*, Pet. 2.

Even as it indirectly points to scattershot examples of eighteenth-century courts-martial trying a handful of civilian offenses, U.S. Br. 21, the government does

not actually dispute this point. That courts-martial during the late 1780s could render non-unanimous convictions for mutiny or desertion does not exactly establish a historical tradition of non-unanimous convictions for wire fraud. Indeed, there is no pre-1950 tradition of non-unanimous convictions for the vast majority of offenses that are tried by contemporary courts-martial. The brief in opposition never specifically argues otherwise.

Finally, the government closes with a plea to this Court to stay its hand because Congress has recently chartered a study of whether it should require unanimous convictions by statute. *Id.* at 24. In *Ramos*, this Court brushed quickly past the fact that Louisiana had *already* ended the practice of non-unanimous convictions—recognizing the obvious point that forward-looking legislative reforms provide little benefit to criminal defendants with prior or pending non-unanimous convictions. *See* 140 S. Ct. at 1407–08. If a forward-looking state constitutional amendment didn't counsel against review and reversal in *Ramos*, the possibility that a study *might* one day lead to a forward-looking statutory reform is, quite obviously, even less persuasive.

Ultimately, if this Court believes that it ought to resolve whether court-martial accused are the only criminal defendants in the United States *without* a constitutional right to a unanimous conviction, then it ought to resolve that issue now. And the brief in opposition offers no reason why it could not do so here.

I. *RAMOS* UPENDS THE DOCTRINAL DEFENSES OF NON-UNANIMOUS COURT-MARTIAL CONVICTIONS

The brief in opposition opens with the remarkable claim that "[t]he question presented is . . . settled by precedent." U.S. Br. 11. But no decision of this Court has ever addressed—let alone resolved—whether military defendants have a right to unanimous convictions when they are tried by a court-martial panel.[2] Instead, the government's argument appears to be that, because this Court has previously concluded that court-martial accused lack a Sixth Amendment right to jury trial in general, it necessarily follows that they also lack a right to unanimous convictions by court-martial panels under any constitutional provision. *See id.* at 12–14.

This argument runs into three problems, all of which only reinforce both the errors made by the CAAF in *Anderson* and the reasons for this Court to grant certiorari. First, it fails to engage—at all—with Congress's decision, dating all the way back to the Founding, to bestow upon servicemembers an absolute statutory right to have serious offenses tried by a panel. *See* 10 U.S.C. § 816(b). As the CAAF has long understood, even if court-martial accused had no constitutional right to be tried by a jury, their *statutory* right to a panel necessarily triggers a host of constitutional limits on how that panel is selected; how it deliberates; and how it renders a verdict. *See* Pet. 20–21 (citing cases). Thus, no one seriously contends that the Constitution would allow a court-

2. The government does not dispute that an active-duty servicemember tried in a civilian state of federal court would be entitled to a unanimous conviction for any serious offense.

martial panel to render a verdict by flipping a coin simply because the accused had no constitutional right to the panel in the first place. Instead, as decades of rulings by the CAAF make clear, the Constitution has a lot to say about how a court-martial panel plays its role—even if it doesn't require such a panel *ab initio*.

So long as *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), was still good law, it was difficult to argue that unanimous convictions were among the Constitution's requirements for court-martial panels—since the Constitution did not require them even for state civilian criminal prosecutions. But *Ramos* upended that understanding—not just *by* overruling *Apodaca*, but in *why* it did so. The gravamen of Justice Gorsuch's analysis for the Court was the centrality of a unanimous conviction to the entire point of the right to a jury in the first place. Regardless of the *source* of a defendant's right to be tried by a jury, it makes no sense that unanimous convictions would be central to the jury's function in one context, and completely unnecessary (except, apparently, in capital cases?) in the other. Like the CAAF, the government traces this lacuna to the inapplicability of the Jury Trial Clause. But that response only begs the question of which rights an accused still retains vis-à-vis the panel.

Second, and related, even if there is no Sixth Amendment argument for unanimous convictions in courts-martial, the Due Process Clause requires the very kind of "impartiality" from the panel that *Ramos* demands from a civilian jury. *See id*. at 23–27. Again, parroting the CAAF, the brief in opposition simply asserts that a panel can be impartial even while handing down a 6-2 conviction. U.S. Br. 18. But the government offers little more than *ipse dixit* (and an

awkward analogy to *this* Court's non-unanimity in many cases) in support of its conclusion. And even though the petition explained at length why the "alternatives" to unanimous convictions proffered by the CAAF are woefully insufficient to protect the accused's interest in an impartial panel (one of them doesn't protect the accused's interest *at all*), *see* Pet. 26–27, the brief in opposition simply repeats those alternatives, U.S. Br. 21, without responding in any way to the petition's account of their inadequacy.

Third, with respect to petitioners' claim that equal protection principles require the government to offer at least some justification when it declines to prosecute civilian offenses by servicemembers in a civilian forum (where they *would* be entitled to a unanimous conviction) in favor of courts-martial (where, on the government's view, they would not), *see* Pet. 27–28, the brief in opposition responds with a non-sequitur. Instead of offering any justification for choosing courts-martial, the government contends that this argument "would appear to necessitate eradicating . . . distinctions between federal and state (or tribal) systems, for civilian defendants triable by more than one sovereign." U.S. Br. 23.

But the point of this Court's equal protection case law is that the *same* sovereign ought to be held to a high bar when it makes arbitrary choices among similarly situated defendants that implicate their fundamental rights—such as choosing whether Petitioner Martinez's Title 18 wire fraud offenses would be tried before a civilian jury or a court-martial. Needless to say, those cases have no bearing on how *different* sovereigns might act against similarly situated (or the same) individuals.

Simply put, *Ramos* may not settle if petitioners were entitled to have their court-martial convictions be unanimous. But it clearly *unsettles* the doctrinal principles on which non-unanimous court-martial convictions previously rested—and thus underscores the need for this Court's plenary review.

II. HISTORICAL PRACTICE DOES NOT SUPPORT NON-UNANIMOUS CONVICTIONS FOR PETITIONERS' OFFENSES

In addition to its misleading claim that the question presented is settled by judicial precedent, the brief in opposition also contends that it is settled by "invariant historical practice." U.S. Br. 20. But as the petition explained, even assuming that "historical practice" could settle the question, the history here is hardly "invariant." *See* Pet. 25–26.

Instead, the government's brief repeats the same conclusory assertions the CAAF made in *Anderson*—that Founding-era court-martial panels could render convictions by a "majority" vote, and that court-martial jurisdiction at that time extended to at least some civilian offenses. U.S. Br. 15–17. These responses deflect from the critical and undisputed fact that jurisdiction over civilian offenses without a military nexus was the exception, not the rule, at least until this Court's decision in *Solorio* v. *United States*, 483 U.S. 435 (1987). If there is no historical tradition of courts-martial trying, for instance, the Title 18 wire fraud offenses for which Petitioner Martinez was convicted, then it does not follow that "invariant historical practice" supports non-unanimous convictions *for* those offenses.

The government responds by trying to move the goalposts. *See* U.S. Br. 21–22 ("Petitioners do not

identify any constitutional mechanism through which changes in the UCMJ's jurisdictional scope, upheld by this Court as constitutional, would have triggered a due-process requirement of unanimity." (citation omitted)). This assertion overstates the petitioners' claim and misapprehends the imperative for this Court's intervention here.

Petitioners do not (and the petition did not) contend that historical practice, properly understood, *requires* unanimous convictions. The argument is merely that historical practice does not clearly support *non*-unanimous convictions for petitioners' offenses. Thus, if *Ramos* undermines the doctrinal predicate for non-unanimous military convictions, the jurisdictional limits on pre-*Solorio* courts-martial undermine the historical predicate. That more nuanced historical understanding doesn't prove that the Constitution *requires* unanimous convictions; it simply proves, contra the brief in opposition, that the question presented is settled neither by this Court's precedents nor by historical practice. And if the question presented is *unsettled*, its undisputed importance to contemporary courts-martial is why this Court should settle it.

III. THIS PETITION IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The brief in opposition closes with a series of "additional reasons" that, in the government's view, "counsel against further review." U.S. Br. 23. None are persuasive.

First, the government points to the absence of a circuit split—and (with no sense of irony) the fact that the CAAF's decision in *Anderson* was unanimous. *See id*. Of course, no circuit court currently has the ability

to even *hear* this issue on de novo review. *See* Pet. 32. As for the lack of internal division on the CAAF, the last time that this Court conducted plenary review of the CAAF, it reversed *two* unanimous decisions by the court of appeals—and it did so unanimously. *See United States* v. *Briggs*, 141 S. Ct. 467 (2020).[3]

Second, the brief in opposition does not identify any reason why this Court could not reach and resolve the question presented in this case. Unlike in its oppositions to other petitions by servicemembers in recent years, the government has not argued that this Court lacks subject-matter jurisdiction under 28 U.S.C. § 1259(3)—nor could it. In each of petitioners' cases, the CAAF granted review of, and decided, a materially analogous variant of the question presented here. Nor does the government contend that any of the petitioners failed to timely raise or preserve their constitutional claims either in their court-martial or on appeal.[4]

---

3. Justice Barrett had not yet been appointed to the Court at the time of oral argument, and did not participate in the decision.

4. The *Anderson* petition describes itself as a better vehicle because, according to Anderson, only one of these petitioners fully preserved his equal protection claim. *Anderson* Pet. 30–31. That is incorrect as a factual matter (12 petitioners specifically raised equal protection claims), and, in any event, irrelevant. Between them, petitioners raised the non-unanimity objection in every viable format—both procedurally and substantively. Indeed, the reason why these 16 cases were consolidated into a single Rule 12.4 petition is to ensure that, *if* this Court is inclined to resolve the question presented, it has every possible avenue for doing so. The government apparently does not disagree; contra the *Anderson* petition's speculation, the brief in opposition does not identify *any* "yet-unsurfaced vehicle problems with one or more of the appeals covered by [this] petition." *See id*. at 31.

Third, the government offers a single, 38-year-old citation for the proposition that, because this issue has previously been addressed by at least one civilian court, it might also be addressed by civilian courts going forward. *See* U.S. Br. 23 (citing *Mendrano* v. *Smith*, 797 F.2d 1538, 1543 (10th Cir. 1986)). The brief in opposition neglects to note, however, that *Mendrano* expressly *departed* from the highly deferential standard of review that normally applies to non-jurisdictional collateral challenges to courts-martial. *See id.* at 1541–42 & n.6. There is no reason to believe that contemporary courts of appeals would similarly neglect the limits on the scope of collateral review—or that the government would acquiesce if they did so. And because the CAAF now appears to consider the question settled, *see* Pet. 31 ("The CAAF has not granted review of a single additional unanimous conviction issue since its ruling in *Anderson*."), the three pending petitions raising the question presented may be this Court's last opportunity to address the matter for a long time.

Fourth, and finally, the government encourages this Court to sit on the sidelines now that Congress has commissioned a study on the "feasibility and advisability" of requiring unanimous verdicts in courts-martial. U.S. Br. 24 (citing FY2024 National Defense Authorization Act, 118th Cong. § 536(a)). This Court resisted a similar invitation in *Ramos*—in which Louisiana had *already* required unanimous

---

Instead, just like the last time this Court reviewed multiple servicemembers' appeals raising the same issues, it should grant all three petitions raising the question presented and consolidate them for briefing and argument. *See Dalmazzi* v. *United States*, 582 U.S. 966 (2017) (mem.) (granting and consolidating three petitions covering eight servicemembers' court-martial appeals).

convictions for all prospective offenses. *See* 140 S. Ct. at 1407–08. Waiting to see if a congressionally ordered study helps to provoke similar forward-looking reforms, which all agree would be of no benefit to the petitioners here, is even harder to defend.

* * *

The most remarkable feature of the brief in opposition is the argument it never makes: that non-unanimous convictions are in any way important—or even useful—to the functioning of today's military justice system. Unlike the CAAF, which at least claimed (albeit without any support) that non-unanimous convictions help to reduce the specter of unlawful command influence over panel members, *see Anderson*, 83 M.J. at 302, the government's defense of the practice in its brief in opposition reduces to little more "than that so it was laid down in the time of Henry IV." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

There may be better arguments in support of non-unanimous court-martial convictions after *Ramos*. The central reason why this Court should grant the petition is because neither the CAAF's decision in *Anderson* nor the brief in opposition here makes them.

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record
727 East Dean Keeton St.
Austin TX 78705
(512) 475-9198
svladeck@law.utexas.edu

JONATHAN F. POTTER
JUSTIN L. WATKINS
TUMENTUGS D. ARMSTRONG
Defense Appellate Division
U.S. Army Legal Servs. Agency
9275 Gunston Road
Fort Belvoir, VA 22060

DAVID L. BOSNER
SAMANTHA P. GOLSETH
Air Force Appellate Defense Div.
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

COLIN W. HOTARD
Appellate Defense Counsel
Code 45
1254 Charles Morris St., S.E.
Suite 100
Washington, DC 20374

Counsel for Petitioners

January 9, 2024