No. 23-437

In the Supreme Court of the United States

ANTHONY A. ANDERSON, PETITIONER

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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
KEVIN J. BARBER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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 the court-martial's members, is consistent with the Constitution.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-23a) is reported at 83 M.J. 291. The opinion of the Air Force Court of Criminal Appeals (Pet. App. 24a-80a) is not reported but is available at 2022 WL 884314.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on June 29, 2023. On September 7, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 30, 2023. The petition for a writ of certiorari was filed on October 23, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trial by general court-martial, petitioner was convicted on two specifications of attempted sexual abuse of a child, in violation of Articles 80 and 120b of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880 and 920b. Pet. App. 2a, 25a, 44a. He was sentenced to 12 months of confinement, reduction to grade E-1, and a dishonorable discharge. *Id.* at 2a. The Air Force Court of Criminal Appeals affirmed. *Id.* at 24a-80a. The United States Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 1a-23a.

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, 2171 (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 2170. 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 UCMJ Arts. 16-20, 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 UCMJ Art. 25(a)-(c), (e)(1), 10 U.S.C. 825(a)-(c), (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, Mil. R. Evid. 614, 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." UCMJ 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).[1] 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. In late 2018 and early 2019, petitioner was a master sergeant (E-7) in the United States Air Force stationed at Ramstein Air Base in Germany. During this period, petitioner sent sexually explicit messages and images through an Internet application to someone he believed to be a 13-year-old girl living on the base. Pet. App. 26a-31a. In reality, petitioner was interacting with an undercover investigative agent for the Air Force. *Id.* at 26a-27a, 30a. Petitioner was charged with two specifications of attempted sexual abuse of a child, in violation of Articles 80 and 120b of the UCMJ, 10 U.S.C. 880 and 920b. Pet. App. 2a, 25a, 44a. The convening authority referred the charges to a general court-martial for trial. *Id.* at 76a.

Before trial, petitioner requested that the military judge either "require a unanimous verdict for any finding of guilty" or require the presiding member of the court-martial panel to "announce whether any finding of guilty was the result of a unanimous vote." Pet. App. 2a. The military judge denied that request, and the court-martial convicted petitioner on both specifications. *Id.* at 68a-69a, 105a-109a. Because polling the members of a court-martial is generally prohibited, see R.C.M. 922(e), the votes by which petitioner was convicted are unknown. Petitioner elected to be sentenced by the judge, who sentenced him to 12 months of

[1] 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).

confinement, reduction to grade E-1, and a dishonorable discharge. Pet. App. 2a.

3. The Air Force Court of Criminal Appeals affirmed. Pet. App. 24a-80a. In doing so, the court explained that neither the Sixth Amendment, due process, nor equal protection require "a unanimous verdict by the court-martial panel in order to convict." *Id.* at 73a; see *id.* at 73a-76a. The CAAF then granted review on that issue and likewise affirmed in an undivided decision recognizing 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 1a-2a; see *id.* at 1a-23a.

With regard to the Sixth Amendment, the CAAF noted that petitioner "d[id] not contend that a court-martial panel is a 'jury' within the meaning of the Sixth Amendment, nor that he was entitled to a jury trial—and all that that would require under the Sixth Amendment—as opposed to a trial by a court-martial panel." Pet. App. 9a n.3. And it observed that "[n]onunanimous verdicts have been a feature of American courts-martial since the founding of our nation's military justice system," *id.* at 3a; highlighted decisions in which this Court has "repeatedly stated that the Sixth Amendment right to a jury trial does not apply to courts-martial," *id.* at 5a; and rejected petitioner's argument that a right to an impartial court-martial panel necessarily subsumes the right to panel unanimity, see *id.* at 9a-13a.

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. Pet. App. 16a-17a (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 19a-23a.

4. After deciding petitioner's case, the CAAF summarily affirmed in a series of other cases in which servicemembers had challenged their convictions on the ground that their court-martial panels had not been required to reach a unanimous verdict. *E.g.*, *United States* v. *Martinez*, 83 M.J. 439 (2023) (affirming "in view of" the decision in petitioner's case); see Pet. 6 n.3. Sixteen of those defendants filed a petition for a writ of certiorari on September 8, 2023. See *Martinez* v. *United States*, No. 23-242.

ARGUMENT

Petitioner renews his contention (Pet. 8-24) that Article 52(a)(3) of the UCMJ, which permits a court-martial to convict the accused in a noncapital case by a vote of three-fourths of the court-martial's members, is unconstitutional. That contention is incorrect, and this Court's review is unwarranted, for the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in *Martinez* v. *United States*, No. 23-242 (filed December 27, 2023) (*Martinez* Opp.), a copy of which the government is serving on petitioner, and for the additional reasons set forth below.

1. The CAAF correctly rejected petitioner's claims that the Sixth Amendment, the Due Process Clause, and equal-protection principles prohibit nonunanimous convictions in courts-martial.

a. As the government has explained, this Court has repeatedly recognized that the Sixth Amendment jury-

trial right—the source of the unanimous-verdict requirement in the civilian criminal justice system, see *Ramos*, *supra*—does not apply to the military. *Martinez* Opp. at 12-17. Petitioner accordingly "does not contend that a court-martial panel is a 'jury' within the meaning of the Sixth Amendment, nor that he was entitled to a jury trial—and all that that would require under the Sixth Amendment—as opposed to a trial by a court-martial panel." Pet. App. 9a n.3. And his efforts to nonetheless apply the Sixth Amendment procedures for "jury" trials are misplaced.

Petitioner's characterization of the Court's statements on that issue as irrelevant dicta is unsound. He notes (Pet. 8-9), for example, that two of the relevant cases, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and *Ex parte Quirin*, 317 U.S. 1 (1942), involved military commissions rather than courts-martial. But those cases stated that the jury-trial right is inapplicable in all "cases arising in the land or naval forces," not just cases adjudicated in the particular kinds of military court then at issue. *Milligan*, 71 U.S. (4 Wall.) at 123 (quoting U.S. Const. Amend. V); *Quirin*, 317 U.S. at 40 (same). Moreover, petitioner does not address other cases in which, as the CAAF explained, this Court has explicitly identified courts-martial when discussing the absence of the jury-trial right. Pet. App. 6a-8a (discussing, *e.g.*, *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955), and *O'Callahan* v. *Parker*, 395 U.S. 258, 262 (1969), overruled on other grounds by *Solorio* v. *United States*, 483 U.S. 435 (1987)). As Justice Marshall observed in *Middendorf* v. *Henry*, 425 U.S. 25 (1976), "the jury-trial issue with regard to the military" is "settl[ed]" by this Court's precedent. *Id.* at 53 n.2 (dissenting opinion).

Petitioner's textual arguments likewise lack merit; indeed, his threshold acknowledgment that he is not entitled to a "jury" all but defeats his argument that the Sixth Amendment textually applies. Although he contends that the Fifth Amendment's explicit carveout for military cases means the Sixth Amendment must apply in its entirety to courts-martial, Pet. 11-12, this Court's contrary understanding (see, *e.g.*, *Milligan*, 71 U.S. (4 Wall.) at 123) finds strong support in the Sixth Amendment's focus on a "jury," Founding-era practice, and the drafting history of the Bill of Rights. See Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293, 303-315, 319 (1957).[2] Petitioner's view (Pet. 13-14) that court-martial proceedings are "criminal prosecutions" for all purposes under the Sixth Amendment therefore cannot withstand historical examination, either—the Amendment's Vicinage Clause, for instance, like the Jury Trial Clause, has never been applied to military courts. See U.S. Const. Amend. VI (requiring trial by a "jury of the State and district wherein the crime shall have been committed"); cf. *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").

b. The CAAF also correctly recognized that the Due Process Clause does not require unanimous verdicts in courts-martial. As the government has explained, see *Martinez* Opp. at 18-22, courts-martial have

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[2] Petitioner mistakenly claims that the proviso in the Fifth Amendment applies only when the Armed Forces are "in actual service in time of War or public danger." Pet. 17 (quoting U.S. Const. Amend. V). The quoted language applies only to the militia. See *Johnson* v. *Sayre*, 158 U.S. 109, 115 (1895).

continuously rendered nonunanimous verdicts since the Founding (and before), and "the factors favoring" a unanimity requirement are not nearly "so extraordinarily weighty as to overcome the balance achieved by Congress" in Article 52(a)(3) of the UCMJ. *Weiss* v. *United States*, 510 U.S. 163, 177, 181 (1994) (citing *Middendorf*, 425 U.S. at 44).

Petitioner objects to "the CAAF's reliance" in its due-process analysis "on 'several unique safeguards in the military justice system'" that address the risk of wrongful convictions. Pet. 19 (quoting Pet. App. 16a). Petitioner contends that those protections are entitled to less weight because they are "merely statutory." *Id.* at 20 (quoting *Reid* v. *Covert*, 354 U.S. 1, 37 (1957) (plurality opinion)). But the same was true of the various safeguards the Court relied on in *Weiss* in upholding the UCMJ's lack of fixed terms of office for military judges. 510 U.S. at 179-181. And so long as the statutory system, as a whole, comports with due process, the Court should defer to the judgments made by Congress, which "has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio*, 483 U.S. at 447. Petitioner's piecemeal approach to engrafting a novel and unprecedented procedure is unsound.

Petitioner also errs (Pet. 20-21) in attempting to link the longstanding tradition of nonunanimous court-martial verdicts to the Louisiana and Oregon laws invalidated by *Ramos*. This Court viewed those laws, which permitted nonunanimous verdicts in criminal cases in civilian court, as having originally been motivated by a desire to limit the influence of racial and other minority groups on juries. *Ramos*, 140 S. Ct. at 1394. Courts-martial rendered nonunanimous verdicts long before

the Armed Forces were integrated, however, and there is no evidence that Congress has retained the policy for discriminatory reasons. And precisely because nonunanimity has been the consistent practice since before the Framing, petitioner—unlike the petitioner in *Ramos*, *id.* at 1395-1397—cannot identify any more recent deviation from historical understandings.

c. Petitioner's equal-protection claim is likewise mistaken. He posits (Pet. 22) an equal-protection problem arising from the government's discretion to prosecute one servicemember by court-martial and another in civilian court, with only the latter proceeding subject to a unanimous-verdict requirement. The CAAF never passed upon that theory, however, see Pet. App. 19a-23a, and this Court should not consider it in the first instance, consistent with its role as "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). In any event, "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2207 (2021). That discretion includes not only the choice of *whether* to bring charges, but also the decision of *where* to bring the charges.

The CAAF did address petitioner's claim that Article 52(a)(3) of the UCMJ discriminates against him vis-à-vis civilian defendants. See Pet. App. 19a-23a. But the court correctly rejected that contention on the grounds that military and civilian defendants are not similarly situated and that Article 52(a)(3) withstands rational-basis review in any event. *Ibid.*; see *Martinez* Opp. at 22-23. Petitioner urges application of strict scrutiny, apparently because the Sixth Amendment right to a unanimous jury verdict, when it applies, is a

fundamental right. Pet. 23; cf. *Ramos*, 140 S. Ct. at 1397 (deeming this right fundamental for purposes of incorporation under the Fourteenth Amendment). As he acknowledged in the CAAF, however, Pet. C.A. Reply Br. 26, the pertinent right is not the right to a unanimous jury verdict—because a court-martial panel is not a jury, see pp. 6-7, *supra*—but instead a more general right to a unanimous verdict even outside the jury-trial context. See *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (requiring a "careful description" of asserted fundamental rights) (citation omitted). Since no such fundamental right exists, there is no basis for applying strict scrutiny even if military and civilian defendants were similarly situated.

2. This case does not warrant further review for additional reasons as well. The question presented, as the government has explained, is settled by this Court's precedent, implicates no disagreement in the courts of appeals or the CAAF, and may be stripped of prospective significance by legislative action. See *Martinez* Opp. at 23-24. This case thus does not satisfy the Court's traditional criteria for certiorari. See Sup. Ct. Rule 10.

Petitioner also contends (Pet. 4, 27-29) that this Court, not the CAAF, must have the last word on all questions of broad legal significance. See, *e.g.*, Cert. Reply Br. at 11, *Willman* v. *United States*, 142 S. Ct. 2811 (2022) (No. 21-920); Pet. at 18, *Begani* v. *United States*, 142 S. Ct. 711 (2021) (No. 21-335); Pet. at 4-5, *Behenna* v. *United States*, 133 S. Ct. 2765 (2013) (No. 12-802). But this Court regularly denies petitions for writs of certiorari in military cases involving important constitutional questions. *E.g.*, *Larrabee* v. *Del Toro*, 144 S. Ct. 277 (Oct. 10, 2023) (No. 22-1082); *Bess* v. *United*

States, 141 S. Ct. 2792 (2021) (No. 20-489), *Hennis* v. *United States*, 141 S. Ct. 1052 (2021) (No. 20-301). Doing so is especially appropriate in light of the military's status as a community that stands "apart from civilian society," *Parker* v. *Levy*, 417 U.S. 733, 744 (1974), and whose oversight is committed principally to Congress and the President, see U.S. Const. Art. I, § 8, Cl. 14 (authorizing Congress to "make Rules for the Government and Regulation of the land and naval Forces"); Art. II, § 2, Cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States.").

Petitioner's claim has been fully considered and rejected without dissent at all three levels of the military justice system, including by the independent civilian judges of the CAAF. See pp. 4-6, *supra*; *Ortiz*, 138 S. Ct. at 2187 (Thomas, J., concurring). It would be consistent with the constitutional and statutory design to leave the CAAF's well-reasoned opinion in this case as "the authoritative answer" (Pet. 27) to the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Acting Assistant Attorney General
KEVIN J. BARBER
Attorney

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