No. 23-437

IN THE
**SUPREME COURT OF THE UNITED STATES**

ANTHONY A. ANDERSON,
*Petitioner*,

v.

UNITED STATES,
*Respondent.*

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

# PETITIONER'S REPLY TO BRIEF IN OPPOSITION


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## CORPORATE DISCLOSURE STATEMENT

This proceeding does not involve any nongovernmental corporation.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Other Authorities**

## ARGUMENT

Even in the area of military affairs, it is this Court's "ultimate responsibility" to decide "constitutional question[s]." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). The Government conspicuously does not claim this Court has ever *held* the Constitution permits non-unanimous court-martial convictions. The Court has never decided whether *any* provision of the Constitution requires that court-martial guilty verdicts be unanimous. While the Government's arguments on the merits are ultimately unavailing, the Court should grant the Petition to decide this important issue. The Court's review is especially vital given the question has been decided below by an arm of the executive branch, not an Article III court. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

### I. The Court Should Decide Whether the Sixth Amendment Permits Non-Unanimous Court-Martial Convictions

The Government does not contend *no* Sixth Amendment rights apply to courts-martial—only that the Amendment's "jury-trial right does not apply at all." *Martinez* BIO 12, 14-15.[1]

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[1] The Government filed a Brief in Opposition ("BIO") to the petition in *Martinez v. United States*, No. 23-242, contemporaneous with the filing of its BIO in this case. The BIO in this case incorporates parts of the *Martinez* BIO. *Anderson* BIO 6, 8, 10, 11.

When defending that claim the Government has little to say about the Sixth Amendment's text. *See* Pet. 11. Unlike the Fifth Amendment, which exempts from the Grand Jury Clause "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," the Sixth Amendment contains no such limitation. The Government does not dispute the expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*). *See* Pet. 12. The Government's textual argument begins and ends with its insistence that a court-martial panel is not a "jury." Anderson BIO 8.[2] But whatever differences exist between a "jury" in a civilian trial and a court-martial panel lacks constitutional significance when it comes to whether determinations of guilt require unanimity. *See* Pet. 15; *see also* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266, 280 (1958) (The Sixth Amendment "as a matter of language alone includes prosecutions by courts-martial.").

The Government's Sixth Amendment arguments instead focus on (1) prior statements by this Court,

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[2] The Government misstates Petitioner's Sixth Amendment argument, citing to a footnote in the CAAF decision. *See Anderson* BIO 7 (citing Pet. App. 9a n.3); *see also id*. at 8 (inaccurately referring to "threshold acknowledgement"); *id*. at 11. The Petition states: "[I]s a court-martial panel actually or effectively a 'jury' for purposes of the Sixth Amendment's unanimity requirement? This Court has not yet decided that question, but the best answer is 'yes.'" Pet. 14.

and (2) "historical practice." Neither line of argument is availing.

The Government cannot claim the Court has ever *held* the Sixth Amendment is inapplicable in courts-martial—let alone decided the subsidiary issue of whether the right to a unanimous verdict applies in a court-martial. The Government instead deploys a variety of words—*e.g.*, "observing," "recognized," and "understanding"—to characterize the Court's prior statements upon which it relies. For example, the Government (like the CAAF) relies heavily on *Ex parte Milligan*, 71 U.S. (4 Wall.), 2, 123 (1866), pointing to a passage in the opinion as evidence of the Court's "understanding" that the Sixth Amendment jury trial right does not apply to courts-martial. *Martinez* BIO 13. While the Government blows by the fact that *Milligan* involved a military commission, not a court-martial—and that the two types of tribunals are distinct, *Ortiz v. United States*, 138 S. Ct. 2165, 2179-80 (2018)—the Government also ignores *Milligan* involved prosecution of a person "never in the military or naval service," and the "controlling question in the case" was whether the military commission had jurisdiction. 71 U.S. at 118. The Court's statement about the Sixth Amendment's application to members of the military was quintessential dicta. This Court has called "dicta" that statement in *Milligan*, *see Middendorf v. Henry*, 425 U.S. 25, 33–34 (1976)—a point made in the Petition, but disregarded by the Government. *See* Pet. 10.

Unable to genuinely dispute its argument hinges on dicta, the Government attempts to compensate by

observing the Court has repeated *Milligan*'s "understanding" in subsequent cases. *Martinez* BIO 14; *see also Anderson* BIO 7.[3] But "the Court's dicta, even if repeated, does not constitute precedent . . . ." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022).

Simply put, the Government's representation that the Question Presented is "settled by this Court's precedent" is wrong. *Anderson* BIO 11.

The Government's other principal Sixth Amendment argument is based on "historical practice." While consideration of historical practices can be relevant to constitutional interpretation, the Government's reliance on it here is overdone.

First, historical practice alone is insufficient to decide constitutional questions. *See, e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 371 (1977) ("habit

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[3] None of the other opinions cited by the Government to demonstrate this "understanding" actually decided the Sixth Amendment's application to a court-martial. Like *Milligan*, *Ex parte Quirin*, 317 U.S. 1 (1942), involved a military commission, not a court-martial. *Whelchel v. McDonald*, 340 U.S. 122, 123 (1950), concerned "whether the military tribunal that tried petitioner was deprived of Jurisdiction by reason of the treatment of the insanity issue tendered by petitioner," and the Court's observation about the Sixth Amendment was in response to an "analogy" to the Amendment. *See* Pet. 9. *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), concerned the constitutionality of subjecting "civilian ex-servicemen" to trial by court-martial. *O'Callahan* v. *Parker*, 395 U.S. 258, 261 (1969), subsequently overruled by *Solorio* v. *United States*, 483 U.S. 435 (1987), concerned the constitutionality of trial by court-martial "for nonmilitary offenses committed off-post while on an evening pass."

and tradition are not in themselves an adequate answer to a constitutional challenge."). Were historical practice itself sufficient, or even close to it, numerous cases concerning entrenched practices later deemed constitutionally-deficient would have turned out differently. *See*, *e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (one-house legislative veto unconstitutional); *id.* at 968, 1002 (White, J., dissenting) (observing "over the past five decades, the legislative veto has been placed in nearly 200 statutes"); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Second, the supposed "historical practice" invoked by the Government is illusory. Courts-martial can try service members and others within their jurisdiction "for a vast swath of offenses, including garden-variety crimes unrelated to military service." *Ortiz*, 138 S. Ct. at 2174. The breadth of that regime—the offenses and persons covered, and its imposition outside of wartime—departs from the more limited nature of courts-martial at common law and the Founding. *See* Pet. 16-17, 19, 25-27.

The Government contends its view comports with "the Framers' own understanding of the Sixth Amendment." *See Martinez* BIO 13. But its thin account of that understanding rests on a single law review article, published the same year the author graduated from law school. *See id.* and *Anderson* BIO 8 (citing Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957)). That article was criticized by another author in a pair of articles published the following year by the same journal. *See* Frederick Bernays Wiener, *Courts-Martial and the Bill of*

*Rights: The Original Practice I*, 72 Harv. L. Rev. 1, 8 (1958) ("We are seeking to discover common understanding at a time when the scope of federal military law was exceedingly limited . . . for the most part it denounced only offenses that were not punishable in courts of common law."); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 Harv. L. Rev. 266. The Government has not come close to establishing any pertinent view of the Framers.

Third, much of the "historical practice" relied on by the Government predates decisions by this Court making clear that rules governing courts-martial are subject to constitutional constraints. *See* Pet. 7-8. Historical practice from periods when the Constitution was presumed irrelevant to courts-marital provides limited utility in deciding the Question Presented.

## II. The Court Should Decide Whether Due Process Principles Permit Non-Unanimous Court-Martial Convictions

The Court has already determined that due process protections apply in courts-martial. Pet. 18. The Government concedes as much, *Martinez* BIO 19, but argues that court-martial unanimity is not required under the "demanding standard" set out in *Weiss v. United States*, 510 U.S. 163 (1994). *Id.* The Government is wrong—but in any event the Court should decide this important, unresolved question.

The Government's argument based on the "historical pedigree of non-unanimous court-martial verdicts," *Martinez* BIO 19, fails for the same reasons discussed above with respect to the Sixth

Amendment. Although trial by court-martial is supposed to be "the exercise of an exceptional jurisdiction," *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234, 237 (1960), that vision is incompatible with the contemporary court-martial system, in which jurisdiction "overlaps substantially with that of state and federal courts." *Ortiz*, 138 S. Ct. at 2170. Today, *millions* of citizens are subject to conviction and punishment based on the finding of a non-unanimous court-martial panel. *See* Pet. 25-26.

The Government contends that "so long as the statutory system, as a whole, comports with due process, the Court should defer to the judgments made by Congress . . . ." *Anderson* BIO 9. "[The court-martial is strictly a criminal court" and "[i]ts judgment is a criminal sentence." William Winthrop, MILITARY LAW AND PRECEDENTS 63 (2d ed. 1920). Other procedural protections cannot substitute for long-recognized safeguards afforded by the unanimity requirement. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) ("juror unanimity . . . [is] a vital right protected by the common law."). "[T]he Court in *Ramos* termed the Sixth Amendment right to a unanimous jury 'vital,' 'essential,' 'indispensable,' and 'fundamental' to the American legal system." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 (2021) (Kagan, J., dissenting). "[T]he court-martial is . . . bound, like any court, by the fundamental principles of law . . . ." Winthrop, MILITARY LAW AND PRECEDENTS at 61-62.

The Government balks at the relationship between non-unanimous verdicts and racial injustice, suggesting what matters is the original motivation for

the practice. *See Anderson* BIO 9. But the fact that non-unanimous court-martial verdicts were employed before the racial integration of the military does not mean that race has no impact on its maintenance, or that its effects are race-neutral. "Racial injustice haunts the military justice system like any other. A recent study found that Black servicemembers faced court-martial action and nonjudicial punishment at a substantially higher rate." Captain Nino C. Monea, *Reforming Military Juries in the Wake of* Ramos v. Louisiana, LXVI Naval L. Rev. 67, 86 (2020); *see also* Pet. 21.

The Government next contends due process does not require court-martial unanimity because the military is a "distinct society" and "specialized community." *Martinez* BIO 20; *Anderson* BIO 2. Whatever those concepts mean in today's American military and polity, they do not imply that service members or others within the ambit of court-martial jurisdiction lack constitutional protections. Their entitlement to at least certain constitutional safeguards is no longer in doubt. Moreover, the Government noticeably does not contend that a court-martial unanimity requirement would interfere with the operation or efficacy of the military, or any material aspect of its distinctiveness.

The unanimity requirement is so important for ensuring that a guilty verdict results only from a fair

proceeding that due process requires general court-martial convictions be unanimous.[4]

## III. The Court Should Decide Whether Equal Protection Principles Permit Non-Unanimous Court-Martial Convictions

The CAAF rejected Petitioner's argument that equal protection principles require unanimous guilty verdicts in general courts-martial. The Government quotes *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021), apparently suggesting there can be no equal protection problem with subjecting persons within the jurisdiction of the court-martial regime to non-unanimous guilty verdicts, while others charged with essentially the same offense under civilian criminal laws can only be convicted with a unanimous verdict. *Anderson* BIO 10.[5] But *TransUnion* has nothing to do

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[4] The Court has read the Fifth Amendment's language "in actual service in time of War or public danger" to refer only to the militia. *Anderson* BIO 8 n.2 (citing *Johnson v. Sayre*, 158 U.S. 109, 115 (1895)). Petitioner, like Justice Marshall, is "not convinced this reading of the Fifth Amendment is correct." *Solorio*, 483 U.S. at 453 n.2 (1987) (Marshall, J., dissenting). Even *Johnson* itself notes that a contrary reading of the Fifth Amendment "is grammatically possible." 158 U.S. at 114. In any event, whether *Johnson* is correct about the Grand Jury Clause is of no moment here.

[5] The Government complains that this precise equal protection argument was not addressed below, but does not dispute it is properly before the Court. *Anderson* BIO 10-11. The Government knows that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534–35 (1992). It would disserve the Court if parties' arguments to it were frozen

with either equal protection or prosecution of criminal offenses.

The unanimity requirement is crucial for ensuring that a guilty verdict results only from a fair proceeding. Depriving only court-martial defendants of the protections afforded by the unanimity requirement—a vital right predating the Constitution, enshrined in it by the Founders—should trigger strict scrutiny. The CAAF erroneously applied only rational basis scrutiny, but even if the CAAF selected the appropriate test, its rational basis analysis does not hold up (Pet. 23-24)—and the Government offers no defense of it.

## IV. The Court Should Not Defer Consideration of the Question Presented

The Court should reject the Government's suggestion that it defer consideration of the Question Presented.

The Government implies this Court *might* have future opportunities to consider the constitutionality of non-unanimous court-martial verdicts, claiming "several circuits have confronted it or related questions" in collateral attacks on service member convictions. *See Martinez* BIO 23-24. But the Government's purported substantiation for this claim gives away the game. Of the five cases the Government cites as support, only *one* involved a challenge to a non-unanimous court-martial verdict—

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based on their presentations to lower courts. The Solicitor General routinely presents to the Court arguments which are refined or modified versions of arguments below.

a nearly-four-decade-old decision by the Tenth Circuit. *Mendrano* v. *Smith*, 797 F.2d 1538, 1543 (10th Cir. 1986). In that case, the court of appeals called the constitutional issues presented "substantial," posing "close and troubling questions." *Id*. at 1542 n.6, 1547. The court also observed that "the modern military court-martial proceeding bears a considerable resemblance to a civilian jury trial." *Id*. at 1541.

The Government also looks past the limited scope of collateral review, *Burns v. Wilson*, 346 U.S. 137 (1953), and the prevailing "assum[ption]" by reviewing courts that "the military court system will vindicate servicemen's constitutional rights." *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975). As for the substance of future collateral review, an Article III court will evaluate any challenge concerning a non-unanimous court-martial verdict in light of the CAAF's holding in this case, binding on military tribunals, that there is no constitutional impediment to non-unanimous verdicts.

In view of the foregoing, it is difficult to take seriously the Government's suggestion that there will be future opportunities for this Court to consider the constitutionality of non-unanimous court-martial verdicts. And in the unlikely event such a case arrives at this Court in the coming years or decades, the Government ignores the possibility that a collateral attack reaching the Question Presented here would pose a vehicle problem making it unsuitable for review by this Court—in contrast with this Petition, which presents none.

The Government also seeks to dissuade the Court

from review because "[t]he question presented . . . *may* be stripped of *prospective* significance by legislative action." *Anderson* BIO 11 (emphasis added). In support, the Government points to recent legislation directing the Department of Defense to "study and report" on the feasibility of making future court-martial verdicts unanimous. *Id.* (citing *Martinez* BIO 24). But the Government is wrong that the mere possibility of future legislative action warrants denying the Petition.

To state the obvious, there is no reason to believe Congress will soon or ever enact a unanimity requirement. The recent legislation merely directs study and report. What the result will be, and how Congress and the President will respond, is a matter of conjecture. The chance that Congress will do something in the future is no reason to deny review. In fact, the converse may be true: if the Court grants review and agrees with the executive branch (the CAAF and the Department of Justice) that there is no constitutional right, that outcome may impel legislative action to create a statutory right.

The Government also ignores the important distinction between the constitutional question at issue and legislative action. Even if Congress were to enact a statutory unanimity requirement, it could be rescinded at any time, or made inapplicable under certain circumstances—potentially even by an Executive Order. The Court should not decline to decide an important constitutional question based on the theoretical prospect that Congress *might*, in the *future*, confer by statute prospective protection that overlaps with constitutional safeguards. *Cf. Ramos*,

140 S. Ct. at 1419 (noting Louisiana had already amended its constitution to require unanimity).

The Government's invocation of theoretical future action by Congress also disregards the rights of Petitioner, the *Martinez* petitioners, and others who preserved their legal arguments concerning the constitutionality of non-unanimous verdicts but were convicted and sentenced under the current regime. *See Ramos*, 140 S. Ct. at 1419 (new constitutional rules do not apply retroactively).

## CONCLUSION

The important Question Presented warrants the Court's consideration, and this Petition is the ideal vehicle to do so.

Respectfully submitted,

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