

No. 23-666

In the Supreme Court of the United States

JAMES T. CUNNINGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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Petitioner, a member of the Air Force who was convicted at general court-martial of murder, in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, renews his claim (Pet. 14-31) that the court-martial's members were unconstitutionally permitted to convict him by a nonunanimous vote. See Art. 52(a)(3), 10 U.S.C. 852(a)(3) (requiring "the concurrence of at least three-fourths of the members" to convict). The United States Court of Appeals for the Armed Forces rejected that claim based on its earlier decision in *United States v. Anderson*, 83 M.J. 291 (2023), cert. denied, No. 23-437 (Feb. 20, 2024). See Pet. App. 50a n.1.

As explained in the government's briefs in opposition to the petitions for writs of certiorari in *Martinez v. United States*, cert. denied, No. 23-242 (Feb. 20, 2024), and *Anderson v. United States*, cert. denied, No. 23-437

(Feb. 20, 2024), the court of appeals' decision in *Anderson* is correct. Neither the Sixth Amendment's Jury Trial Clause, the Fifth Amendment's Due Process Clause, the equal-protection component of due process, nor this Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), calls into question the military's tradition, predating the Founding, of permitting nonunanimous court-martial verdicts. See Gov't Br. in Opp. at 11-23, *Martinez*, *supra* (No. 23-242); Gov't Br. in Opp. at 6-11, *Anderson*, *supra* (No. 23-437).¹ As the government's prior briefs further explain, this Court's review is also unwarranted because, among other reasons, the constitutionality of nonunanimous court-martial verdicts is settled by this Court's precedent; implicates no conflict in the courts of appeals; and may be deprived of any prospective significance based on legislative action. See Gov't Br. in Opp. at 12-14, 23-24, *Martinez*, *supra* (No. 23-242).

This Court has repeatedly and recently denied petitions for writs of certiorari raising this issue, including this Term. See *Martinez*, *supra* (No. 23-242); *Anderson*, *supra* (No. 23-437). It should follow the same course here.²

¹ The government has served petitioner with copies of its briefs in opposition in *Martinez* and *Anderson*, which are also available on this Court's online docket.

² The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.

Respectfully submitted.

ELIZABETH B. PRELOGAR
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