No. 24-5160

In the Supreme Court of the United States

DUANE LEO EHMER, DARRYL WILLIAM THORN, *and* JAKE RYAN,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY

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PETITIONERS' REPLY

Section 2, clause 3 of Article III of the Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The Sixth Amendment similarly provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Each provision uses categorical language admitting no exceptions: In *all* prosecutions of *all* crimes, a defendant is entitled to a jury trial.

In *Callan* v. *Wilson*, 127 U.S. 540 (1888), this Court recognized an exception nonetheless. Reading the word "crime" in an unusually "limited" way, *Callan* held that the right to trial by jury extends only to "offenses of a serious or atrocious character." *Id.* at 549. According to *Callan*, when the Framers said "all Crimes" in Article III and "all criminal prosecutions" in the Sixth Amendment, they could not have meant "minor or petty offenses," which thus may be adjudicated "summarily, and without a jury." *Id.* at 552. Accord, *e.g.*, *Duncan* v. *Louisiana*, 391 U.S. 145, 160-161 (1968).

That rule is a product of the Fuller Court, the nursery bed of such ignominious cases as *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and *Lochner* v. *New York*, 198 U.S. 45 (1905). It reflects the same malignant judicial policy-making as those other cases, and like them, it warrants reexamination and overruling.

For its part, the government says little in opposition to review of the second question presented in the petition. It describes (at 19-21) the petty offense exception as old and settled. As evidence, it cites (at 21-22) to Blackstone and the nineteenth-century practices of four states. And it insists (at 23-24) that the petty-offense exception is not "unworkable," whereas its overruling portends "destabilizing" and "dramatic consequences."

None of that supports a denial of the petition. *Stare decisis* is not an "inexorable command," and this Court has not hesitated in recent cases to overturn precedents that have unduly constrained core constitutional rights for the protection of criminal defendants. *Ramos* v. *Louisiana*, 590 U.S. 83, 106 (2020) (holding that guilty verdicts must be unanimous, and overruling *Apodaca* v. *Oregon*, 406 U.S. 404 (1972)). See also, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36 (2004) (holding that there is no general reliability exception to the Confrontation Clause, and overruling *Ohio* v. *Roberts*, 448 U.S. 56 (1980)). It should do so here.

A. *Callan* and its progeny are wrong and unworkable, and they should be overruled

"[T]he precedents of this Court warrant * * * deep respect as embodying the considered views of those who have come before." *Ramos*, 590 U.S. at 105. At the same time, *stare decisis* is "at its weakest when [the Court] interpret[s] the Constitution." *Ibid*. In such cases, overruling is warranted when the decision rests on plainly wrong reasoning and has proven damaging and unworkable. Here, those factors counsel clearly in favor of overruling the petty-offense exception.

1.a. Text. *Callan* and its progeny are indefensibly wrong. To start, constitutional holdings are supposed to be grounded in "the language of the instrument." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1, 186-189 (1824). But the Court's focus in *Callan* was openly on the Constitution's "spirit" rather than its text. 127 U.S. at 549. That is a red flag at the starting line.

The Constitution's language addressing jury trials in criminal cases is not difficult to decipher, and "[b]y its terms, the [Sixth] Amendment makes no exception for so-

called 'petty offenses."' *Rules of Procedure for the Trials of Minor Offenses Before Magistrates*, 51 F.R.D. 197, 209 (1971) (Black, J., dissenting). Accord *Baldwin* v. *New York*, 399 U.S. 66, 76 (1970) (Black, J., concurring).

Contemporaneous dictionaries and other authoritative Founding Era sources support that conclusion. See Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 Duke L.J. 599, 638-641 (2022) (collecting sources). They stand for the commonsense conclusion that "a criminal prosecution" is any case "prosecuted in a criminal court, rather than a civil suit." *Ibid.* Although there is some support for a narrower reading of "crime" as referring only to felonies, that was not the more common meaning of the word at the Founding. *Ibid.* And even if that reading were a plausible interpretation of section 2, clause 3 of Article III (it is not), it still would make no sense as applied to the Sixth Amendment's reference to "all criminal prosecutions," which draws a crisp distinction between criminal and civil proceedings, not serious and petty offenses.

Any doubt on this front is resolved by other contemporaneous sources of law. To begin with, the Fifth Amendment demonstrates that the Framers knew how to limit constitutional rights only to felonies when that was their intent. The Grand Jury Clause provides for indictment by grand jury only for a "capital, or otherwise infamous crime." As this Court held three terms before *Callan*, that means felonies. *Ex parte Wilson*, 114 U.S. 417, 423 (1885). If *Callan* were rightly decided, the modifiers preceding "crime" in the Fifth Amendment's Grand Jury Clause would be surplusage.

Beyond that, the Judiciary Act of 1789—enacted just one day before the Bill of Rights was introduced—expressly granted the federal district courts jurisdiction to

adjudicate crimes with punishments of less than six months. At the same time, it provided that "the trial of issues in fact, in the district courts, *in all causes except civil causes of admiralty and maritime jurisdiction*, shall be by jury." 1 Stat. 73, ch. 20, § 9 (emphasis added).

It would beggar belief to suppose that the Members of the First Congress—among them, the Framers of the Constitution and drafters of the Sixth Amendment—meant to enshrine a only a limited jury trial right in the Constitution fewer than 24 hours after enacting a statute mandating jury trials in all criminal prosecutions in the federal district courts.

Put simply, the words "all Crimes" and "all criminal prosecutions" must be taken to mean exactly what they say—*all and every one*, without regard for whether a judge perceives the crime to be serious or petty.

b. History. The government attempts (at 21-22) a defense of *Callan* based upon history, but the historical justification for the petty-offense exception is not sustainable. *Callan* itself eschewed much "reference to authorities," instead simply "conceding that there is a class of petty or minor offenses not usually * * * triable [at] common law by a jury." 127 U.S. at 555. The principal justification for the petty-offense exception came later during the Fuller Court, in *Schick* v. *United States*, 195 U.S. 65 (1904). There, the Court relied on Blackstone to draw a supposed distinction between "criminal offenses" and "crimes," the former apparently including misdemeanors and the latter not. *Id.* at 70.

But as academics have since noted (*e.g.*, Roth, *supra*, at 605), Blackstone himself expressly rejected the crux of *Schick*'s holding, concluding that summary convictions for crimes deemed petty by Parliament were unjust devia-

tions from the right to jury in criminal cases. See 4 William Blackstone, *Commentaries on the Laws of England* *280-281 (1769). And as Justice Harlan explained from the start, *Schick*'s reasoning is nonsense: plainly enough, "[a] crime is a criminal offense and a criminal offense is a crime." 195 U.S. at 98 (Harlan, J., dissenting).

It is also hard to imagine that the Framers—escaping Colonial England and adopting a Constitution to foreclose its many tools of oppression—would have intended to incorporate a controversial and "mischievous" exception to the "admirable and truly English trial by jury." 4 William Blackstone, *Commentaries* *280-281. Indeed, it was well understood at the Founding that summary criminal adjudications were an exercise of "dictatorial power." John M. Beattie, *Garrow and the Detectives, Lawyers, and Policemen at the Old Bailey in the Late Eighteenth Century*, 11 Crime, Hist. & Societies 5, 21 (2007).[1]

The petty-offense exception was never adequately justified. From the beginning through today, it has been the object of withering critiques. As noted in the petition (at 10), academics have recently revived those criticisms, supporting them with the kind of rigorous historical work that the issue demands. See John D. King, *Juries, Demo-*

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[1] For contrary support, the government repeats (at 22 & n.3) the same few state laws cited by *Callan*, 127 U.S. at 552. But those sources do not reflect Founding Era consensus. See, *e.g.*, *Geter* v. *Commissioners for Tobacco Inspection*, 1 S.C.L. (1 Bay) 354, 356 (1794) ("[T]hese kind of summary jurisdictions, without the intervention of a jury, are in restraint of the common law: that nothing shall be construed in favour of them; but the intendment of law is always against them."); *Barter* v. *Commonwealth*, 3 Pen. & W. 253, 253 (Pa. 1831) ("If the charter did give the right to confer a power to imprison on summary conviction, and without appeal to a jury, it would be so far unconstitutional and void.").

cracy, and Petty Crime, 24 U. Pa. J. Const. L. 817, 844 (2022) ("Supreme Court doctrine on the petty offense exception is on a collision course with itself"); Roth, *supra*, at 606 (2022) ("the doctrine's ostensible justifications * * * are baseless"); Stephen A. Siegel, *Textualism on Trial: Article III's Jury Trial Provision, the Petty Offense Exception, and Other Departures from Clear Constitutional Text*, 51 Hous. L. Rev. 89, 94 (2013) (the petty-offense exception is a "departure from clear and concrete constitutional command"); Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 Ind. L.J. 397, 399 (2008) (eliminating bench trials would "be a return to original common-law and constitutional meaning"); Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 Kan. J.L. & Public Policy 7, 7 (1994) ("[t]here is little evidence to support the notion that the framers of the Constitution would have approved the Supreme Court's departure from the unequivocal provisions they carefully drafted" in the Sixth Amendment).

Lower court judges have also recently weighed in, calling on the Court to overrule the petty-offense exception. See Pet. 11 (citing *United States* v. *Lesh*, 107 F.4th 1239, 1251-1254 (10th Cir. 2024) (Judge Tymkovich, joined by Judge Rossman, concurring)).

This Court previously has granted review to overturn precedent where "Members of this Court and academics have suggested that [the Court] revise [its] doctrine to reflect more accurately the original understanding of the [Constitution]." *Crawford*, 541 U.S. at 60. That same outcome is warranted here.

2. That is especially so because the petty-offense exception has proven unworkable. Courts are left to guess at which offenses are petty and which are serious according

to a constantly shifting and amorphous standard.

As the Court explained in *Blanton* v. *City of North Las Vegas*, 489 U.S. 538 (1989), early twentieth-century formulations of the distinction called for "recourse of the judge to his own sympathy and emotions," which of course was no standard at all. *Id.* at 541 n.5. Later twentieth-century decisions "focused on the nature of the offense and on whether it was triable by a jury at common law." *Id.* at 541. But "adherence to a common-law approach has been undermined" in recent years "by the substantial number of statutory offenses lacking common-law antecedents." *Id.* at 541 n.5.

More recently, the Court has attempted to establish "objective indications of the seriousness with which society regards the offense," relying principally on "the maximum authorized period of incarceration." *Id.* at 541-542. But even there, the Court has declined to draw clear, predicable lines. *Ibid.* For instance, it is now the general rule that "[a]n offense carrying a maximum prison term of six months or less is presumed petty," but that standard is qualified by the potential for unidentified legislative indications that the offense is "serious." *Lewis* v. *United States*, 518 U.S. 322, 326 (1996). And yet a defendant who faces *years* of prison for multiple consecutively sentenced "petty" offenses still may be denied a trial. *Ibid.* See, *e.g.*, Philip P. Pan, Landlord Faces Criminal Charges, *Washington Post* (April 1, 2000) (available at wapo.st/48xvMwk) (defendant charged with 12,948 "petty" offenses, carrying the possibility of $3.9 million in fines and 3,192 years' imprisonment).

With due respect to the Court, there is no predictable standard to be gleaned from these cases—and certainly none grounded in the Constitution's text or original

meaning. "The Constitution prescribes" when jury trials are required in criminal cases, and this Court, no less than any other, "lack[s] authority to replace [that rule] with one of [its] own devising." *Crawford*, 541 U.S. at 67.

On the other side of the scale, it is simply wrong to say (BIO 24) that overturning the petty-offense exception would be destabilizing. In fact, 19 states that are home to 47% of the nation's population—Alabama, California, Colorado, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Michigan, Missouri, Montana, Nebraska, Ohio, Oklahoma, Oregon, Texas, Vermont, and West Virginia—have rejected the petty-offense exception in all or nearly all misdemeanor cases, as a matter of state law.[2] There is no evidence that those states' criminal justice systems are overly burdened or destabilized as a result.

B. This is a perfect vehicle for reconsidering *Callan*, which is a matter of tremendous practical importance

1. The government does not contend that this case is an unsuitable vehicle for reexamining *Callan*, because it is not. Each petitioner was charged with and found guilty of multiple petty offenses in a trial by judge rather than

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[2] See Ala. Code § 15-14-30; Cal. Const. art. I, § 16; Colo. Rev. Stat. Ann. § 16-10-109; Ga. Code Ann. §15-12-125; Idaho Const. art. I, § 7; *In re Marriage of Betts*, 558 N.E.2d 404, 420 (Ill. App. Ct. 1990); *Marzen* v. *Klousia*, 316 N.W.2d 688, 691 (Iowa 1982); Kan. Stat. Ann. § 22-3404; Ky. Rev. Stat. Ann. § 29A.270; *State* v. *Sklar*, 317 A.2d 160, 165 (Me. 1974); *People* v. *Goodwin*, 245 N.W.2d 96, 97 (Mich. Ct. App. 1976); Mo. Ann. Stat. § 543.200; Mont. Code Ann. § 46-17-201; *State* v. *Kennedy*, 396 N.W.2d 722, 727 (Neb. 1986); Ohio Rev. Code Ann. § 2945.17; Okla. Const. art. II, § 19; Or. Rev. Stat. Ann. §§ 136.001, .210; *Franklin* v. *State*, 576 S.W.2d 621, 623 (Tex. Crim. App. 1978); *State* v. *Peterson*, 41 Vt. 504, 511 (1869); *Champ* v. *McGhee*, 270 S.E.2d 445, 446 (W. Va. 1980).

jury. Pet. App. 6. Petitioners objected to the denial of a jury trial for those offenses, an argument they renewed on appeal and the Ninth Circuit expressly addressed and rejected. Pet. App. 17. And all agree (BIO 19-20) that the petty-offense exception is the only reason petitioners were denied a jury trial for those offenses.

The denial of "[t]he right to trial by jury * * * unquestionably qualifies as 'structural error'" warranting reversal without evidence of specific prejudice. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993). There is accordingly no doubt that reversal on the second question presented would affect the outcome here—at minimum, the misdemeanor convictions would have to be vacated, and the case would have to be remanded for a jury trial.[3]

Moreover, clean presentations of the question presented are rare. Far more often than not, individuals charged with so-called petty offenses are unrepresented and would not demand a trial to begin with. Even among those who, like petitioners, are charged with misdemeanors alongside felonies, it is unusual for counsel to

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[3] The district court's denial of a jury trial on the misdemeanor charges likely also affected the trial on the felony charges, albeit in unprovable ways. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) ("Harmless-error analysis in [a structural error case is] a speculative inquiry into what might have occurred in an alternate universe."). The felony charges were tried to a jury and resulted in compromise verdicts for Ehmer (guilty on one of two counts) and Ryan (guilty on one of three counts). Pet. App. 5. If the misdemeanors had been tried with the felonies, the jury would have seen evidence of less serious crimes and may have compromised for all three petitioners on a lesser guilty verdict for the misdemeanors alone, carrying six-month jail terms rather than the lengthier terms they received. *Cf. Ulster County Court* v. *Allen*, 442 U.S. 140, 168 (1979) (Burger, C.J., concurring) (juries, "not unlike negotiators, are permitted the luxury of verdicts reached by compromise").

press for the overruling of this Court's precedents beginning in the district court. But because petitioners here preserved their jury-trial claim at every possible stage—as the government acknowledges (BIO 10)—there are no factual or procedural obstacles to the Court's consideration of the second question presented.

2. Finally, the second question presented is tremendously important. Millions of misdemeanors are charged every year throughout the United States. See Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* 256-258 (2018).

"Petty offenses" are anything but petty for those convicted. Aside from the prospect of many months or even years of imprisonment (*Lewis*, 518 U.S. at 337 (Kennedy, J., concurring)), misdemeanor convictions can mean losing a job, driver's license, public benefits, housing, or child custody. Natapoff, *supra*, at 20. They also can mean deportation or limitations on the right to carry firearms. King, *supra*, at 844.

The Framers anticipated that *all* criminal defendants in *all* criminal prosecutions would have the right to trial by jury before facing such life-altering deprivations of liberty. The judge-made exception for "petty offenses" cannot be squared with the text or history of section 2, clause 3 of Article III or the Sixth Amendment. The time has come for the Court to reconsider *Callan* and overturn it. The petition accordingly should be granted.

CONCLUSION

The Court should grant the petition, if not on both questions, then limited to the second question.[4]

Respectfully submitted.

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[4] As to the first question presented, petitioners submit on the arguments made in the petition. See Pet. 4-9.