No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA FLORES,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Article III's guarantee of the right to a jury trial for "all Crimes, except in Cases of Impeachment," and the Sixth Amendment's guarantee of the right to a jury trial "in all criminal prosecutions" includes so-called "petty" misdemeanors.

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OPINION BELOW

The Ninth Circuit's decision (Pet. App. 1–6) is unreported, but available at 2024 WL 4036580.

JURISDICTION

The Ninth Circuit issued its decision on September 4, 2024. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article III, section 2, clause 3 of the United States Constitution provides, in relevant part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." U.S. Const. art. I, § 2, cl. 3.

The Sixth Amendment of the Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend VI.

STATEMENT OF THE CASE

In the summer of 2019, Joshua Flores spent the day at Baker Beach in San Francisco, California, which was part of the Golden Gate National Recreation Area. After an encounter with the United States Park Police, Flores was charged with three federal misdemeanors: interference with agency functions, in violation of 36 C.F.R. § 2.32(a)(1) (Count 1); being present in a park area under the influence of alcohol, in violation of 36 C.F.R. § 2.35(c) (Count 2); and disorderly conduct, in violation of 36 C.F.R. § 2.34(a)(1) (Count 3). (Excerpts of Record (ER) 594–96.) The maximum penalty for each of these three offenses was 6 months' imprisonment, a fine, or both. *See* 18 U.S.C. § 1865(a).

Flores moved in limine for a jury trial under Article III and the Sixth Amendment. (ER 343–61.) The magistrate judge denied his motion. (ER 70.) The magistrate judge later found Flores guilty on all counts following a bench trial. (ER 73–82.) The magistrate imposed a time-served custodial sentence, a $100 fine, and 12 months of supervised release. (ER 38–44.) Flores appealed his conviction to the district court under 18 U.S.C. § 3402. (ER 72.) Flores argued on appeal, inter alia, that he was denied his right to a jury trial under the Constitution. (District Court Docket No. 133.) The district court affirmed Flores's conviction. (ER 2.) Flores then appealed to the Ninth Circuit, again raising, among other issues, his jury-trial claim. (ER 597.) The Ninth Circuit affirmed his conviction, finding that Flores had no right to a jury trial because he was charged only with "petty" offenses. (Pet. App. 5–6.)

REASONS FOR GRANTING THE WRIT

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), however, this Court recognized an exception. 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 Duncan v. Louisiana*, 391 U.S. 145, 160–61 (1968). But the Court's reasoning in *Callan* defies the plain text of the Constitution, and recent scholarship demonstrates that the Founding era understanding of the phrases "all crimes" and "all criminal prosecutions" did not admit of any exceptions for so-called "petty" offenses. *See, e.g.,* Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 Duke L.J. 599, 635–61 (2022).

I. The Constitution's guarantee of the right to a jury trial extends to all criminal prosecutions, including so-called "petty" offenses.

A. This Court's decision in *Callan* is wrong and should be overruled.

1. The text of Article III and the Sixth Amendment speak categorically and do not admit of any petty-offense exception.

Callan and its progeny should be overruled. First, constitutional holdings are supposed to be grounded in "the language of the instrument." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 186–89 (1824). But the Court's focus in *Callan* was openly on the Constitution's "spirit" rather than its text. 127 U.S. at 549. The Constitution's language addressing jury trials in criminal cases is straightforward, 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* Roth, *supra*, at 638–41 (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." *Id.* 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. *Id.* And even if that reading were a plausible interpretation of section 2, clause 3 of Article III, it still would make no sense as applied to the Sixth Amendment's reference to "all criminal prosecutions," which draws a 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 Fifth Amendment's Grand Jury Clause's use of the phrase "capital, or otherwise infamous" to modify the word "crime" would be surplusage.

Beyond that, the Judiciary Act of 1789, passed 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). Surely Members of the First Congress—among them, the Framers of the Constitution and drafters of the Sixth Amendment—could not have meant to enshrine only a limited jury trial right in the Constitution immediately after enacting a statute mandating jury trials in all criminal prosecutions in the federal district courts.

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

2. The petty-offense exception is not rooted in history.

The historical justification for the petty-offense exception is likewise 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, 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 deviations from the right to jury in criminal cases. *See* 4 William Blackstone, *Commentaries on the Laws of England* 280–81 (1769). And as Justice Harlan explained, *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 would have intended to incorporate a controversial and "mischievous" exception to the "admirable and truly English trial by jury." Blackstone, *supra*, at 280–81. 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).

The petty-offense exception has never been adequately justified, and the subject of much criticism from the very outset. *See, e.g., Schick*, 195 U.S. at 98 (Harlan, J., dissenting). Academics have recently revived those criticisms, supporting them with the kind of rigorous historical work that the issue demands. *See* John D. King, *Juries, Democracy, 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) ("[T]he 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) (calling the petty-offense exception 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) (calling the elimination of bench trials "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) ("There 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.]").

Further, lower court judges have also recently weighed in, calling on the Court to reconsider the petty-offense exception. *See United States v. Lesh*, 107 F.4th 1239, 1251–54 (10th Cir. 2024) (Tymkovich, J., joined by Rossman, J., concurring) (noting "criticism [of the petty-offense exception] for its disregard of the text of Article III and the Sixth Amendment" and its incompatibility "with the original public

understanding of the Constitution").[1] This Court previously has granted review to overturn precedent where federal jurists "and academics have suggested that [the Court] revise [its] doctrine to reflect more accurately the original understanding of the [Constitution]." *Crawford v. Washington*, 541 U.S. 36, 60 (2004). The same outcome is warranted here.

3. The petty-offense exception is unworkable.

In addition to being atexual and not rooted in history, the petty-offense exception is also unworkable because courts are left to guess at which offenses are petty and which are serious according to a shifting, 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 541–42. But even there, the Court has declined to draw clear, predicable lines. *Id.* For instance, it is now the

[1] This Court's docket in *Lesh* suggests that a petition for a writ of certiorari raising this same issue is forthcoming; it is currently due on December 13, 2024. (*Lesh v. United States*, No. 24A270.) The Court may wish to consider this petition at the same conference as *Lesh*.

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 may still be denied a jury trial. *Id.*

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.

B. This case represents an excellent vehicle to address the question presented, which is exceptionally important.

This case is an ideal vehicle to address the question presented. Flores consistently preserved the jury-trial issue before the magistrate judge, during his initial appeal to the district court, and at his subsequent appeal to the Ninth Circuit. And the Ninth Circuit's decision expressly invoked the petty-offense exception as the basis for affirming the magistrate's denial of his request for a jury trial. Pet. App. 5–6 (citing *United States v. Clavette*, 135 F.3d 1308, 1309 (9th Cir. 1998)). Further, the denial of "[t]he right to trial by jury . . . unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993). Accordingly, if this Court were to agree with the position Flores advances in this petition, automatic reversal of his three misdemeanor convictions would be

mandatory, without regard to whether Flores suffered any specific prejudice. *See id.*

Finally, the question presented is an important one. 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* 256–58 (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 Article III or the Sixth Amendment. The Court should thus overturn *Callan*.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,
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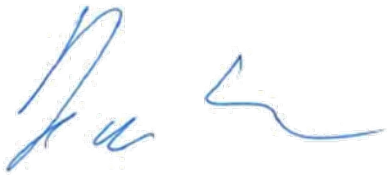
December 3, 2024



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