No. 24-678

IN THE

Supreme Court of the United States

THOMAS L. WHEELER, *ET AL.*,
Petitioners,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
University of Texas
School of Law
Supreme Court Clinic
727 E. Dean Keeton St.
Austin, TX 78705

STEPHEN I. VLADECK
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9313
svladeck@gmail.com

MEGAN P. MARINOS
Appellate Defense Division
U.S. Navy
1254 Charles Morris St., SE
Washington Navy Yard, DC
20374

Counsel for Petitioners

May 12, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE PETTY OFFENSE EXCEPTION DOES NOT APPLY TO PETITIONERS' SHORT-MARTIALS 3

II. WHETHER THE SHORT-MARTIAL SATISFIES DUE PROCESS WARRANTS THIS COURT'S IMMEDIATE REVIEW 7

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Ballew v. *Georgia*,
435 U.S. 223 (1978) 9

Blanton v. *City of North Las Vegas*,
489 U.S. 538 (1989) 4

Culley v. *Marshall*,
601 U.S. 377 (2024) 8

Edmond v. *United States*,
520 U.S. 651 (1997) 11

Frank v. *United States*,
395 U.S. 147 (1969) 6

Lewis v. *United States*,
518 U.S. 322 (1996) 4, 5

Loving v. *United States*,
517 U.S. 748 (1996) 6

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 8

Middendorf v. *Henry*,
425 U.S. 25 (1976) 2, 7, 8, 10

Ortiz v. *United States*,
585 U.S. 427 (2018) 11

Ramos v. *Louisiana*,
590 U.S. 83 (2020) 4

SEC v. *Jarkesy*,
603 U.S. 109 (2024) 11

Seila Law LLC v. *CFPB*,
591 U.S. 197 (2020) 9

TABLE OF AUTHORITIES (CONTINUED)

United States v. *Anderson*,
83 M.J. 291 (C.A.A.F. 2023),
cert. denied, 144 S. Ct. 1003 (2024) 4

United States v. *Crawford*,
35 C.M.R. 3 (C.M.A. 1964) 4

United States v. *Deain*,
17 C.M.R. 44 (C.M.A. 1954) 4

Weiss v. *United States*,
510 U.S. 163 (1994) 2, 7, 8, 10

Constitutional Provisions, Statutes, and Rules

U.S. CONST.
amend. V..... 1, 4, 5
amend. VI 1, 3, 4, 5

10 U.S.C. § 816(c)(2)(A) 5

R.C.M. 201(f)(2)(E)..... 6

* * *

INTRODUCTION

The government does not dispute that, from before the Founding through 2018, a servicemember facing a criminal prosecution by a court-martial for any offense had an absolute right to be tried by a panel of fellow servicemembers. Nor does it deny that, since 2019, Congress has authorized *involuntary* bench trials in a large (and growing) class of cases for no reason other than improving "efficiency." Pet. 5a; BIO 4. These "short-martials" are empowered to return convictions not just for "relatively minor infractions," BIO 18, but for military (and civilian) offenses that civilian courts would treat as serious misdemeanors and felonies. And any short-martial conviction carries with it the full suite of collateral consequences, *see* Pet. 7 n.3, a reality that the brief in opposition does not so much as acknowledge, let alone contest.

The question presented in this case is whether, by depriving servicemembers of a right to a panel—the only procedural right that they've always had in military criminal prosecutions—the short-martial violates the Due Process Clause of the Fifth Amendment. As the petition explains, that question is of monumental importance to the military justice system both today and going forward; it is fully and fairly presented here; and there is no reason why this Court must or should wait for some other vehicle to resolve it. Pet. 13–29. The brief in opposition does not dispute any of these points—a telling silence that only reinforces the (already high) stakes of these cases.

Instead, the government claims that petitioners' Fifth Amendment due process objection is somehow obviated by the petty offense exception to the Sixth Amendment Jury Trial Clause. This argument is

doubly flawed. It offers no reason, let alone a compelling one, for why the petty offense exception is even relevant to petitioners' due process claim. And in any event, it misapplies that inapposite exception, insisting that a short-martial doesn't require a panel because it is available only for "low-level military offenses," BIO 12, *i.e.*, "functional analogues of petty offenses in the civilian context." *Id.* at 21. As the petition explained, Pet. 10–12, and as reflected in the cases of two of the three petitioners here, that's just not true. Thus, even if the petty offense exception could somehow be transmogrified into a due process defense, it would support the decision below only if this Court were to raise its long-settled six-month ceiling. At best, that is an argument *for* certiorari, not against it.

Next, the government falls back on the deference to which it claims Congress is entitled in deciding how much process is due to military defendants. BIO 18–20. Again, though, this argument only underscores the need for this Court's review. The government isn't arguing merely that Congress should receive the benefit of the doubt; it's arguing that due process for courts-martial means whatever Congress says it does. That argument is inconsistent with both the letter and spirit of *Middendorf* v. *Henry*, 425 U.S. 25 (1976), and *Weiss* v. *United States*, 510 U.S. 163 (1994). Congress may be entitled to more deference with respect to the rules for courts-martial than for civilian criminal prosecutions. But if "efficiency" alone is enough of a reason to eliminate a procedural right that has always been central to courts-martial without providing adequate alternative safeguards, it's hard to imagine what Congress *could* do to violate due process on the government's view.

Shifting focus away from its arguments, the government closes by mischaracterizing the petition—suggesting that it "would set military procedure in stone, tie the hands of Congress, and preclude any number of Congress's subsequent statutory modifications to court-martial procedures." BIO 19. Petitioners argue nothing of the kind. Congress is certainly allowed to alter the procedural rules for courts-martial. The question is whether it needs an especially good reason before eliminating an essential procedural protection that U.S. soldiers have enjoyed since the days of the Continental Army—and thereby fundamentally transforming the nature of military justice in the United States.

The petition explains why this Court needs to answer that question—and why it can and should do so here. The arguments the government musters in opposing certiorari only support those conclusions.

I. THE PETTY OFFENSE EXCEPTION DOES NOT APPLY TO PETITIONERS' SHORT-MARTIALS

The brief in opposition rests on two false premises: That the petty offense exception to the Jury Trial Clause of the Sixth Amendment also applies to due process claims; and that the jurisdiction of short-martials is effectively limited to trying offenses that are analogous to those civilian courts would classify as "petty." Thus, the government argues, if short-martials are limited to trying offenses to which there would be no constitutional right to a jury trial in civilian courts, they must not violate due process. This reasoning fails as a matter of both logic and long-settled constitutional law.

A. The petty offense exception reflects this Court's interpretation of the Sixth Amendment—and, more

specifically, the types of offenses to which the Jury Trial Clause does not apply. *See, e.g.*, *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 541–42 (1989). At the core of this understanding is the proposition that a defendant charged with a "petty offense" in a civilian court has no constitutional right to be tried by a jury—meaning that involuntary bench trials are permissible in such cases. *See, e.g.*, *Lewis* v. *United States*, 518 U.S. 322, 328 (1996).

As the petition noted, Pet. 21 n.11, and the brief in opposition agrees, BIO 12–13, this Court has repeatedly held that the Jury Trial Clause does not apply to courts-martial. Indeed, the inapplicability of the Jury Trial Clause is exactly why non-unanimous court-martial convictions remain constitutional after *Ramos* v. *Louisiana*, 590 U.S. 83 (2020). *See United States* v. *Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024).

And although CAAF and its predecessor have long identified constitutional rights that military accused have vis-à-vis the court-martial panel, those rights have regularly been rooted in the Due Process Clause of the Fifth Amendment—not the Jury Trial Clause of the Sixth. *See, e.g.*, *United States* v. *Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964); *United States* v. *Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954). None of those cases recognized any due process-based distinction between petty and serious offenses in a court-martial—and the government hasn't identified any case that does. *See, e.g.*, BIO 21 ("The UCMJ . . . does not categorize military offenses as felonies or misdemeanors.").[1]

1. The pending petition in *Lesh* v. *United States*, No. 24-654, asks this Court to revisit the petty offense exception. As noted above, petitioners' claims do not turn on that exception. But

B. Even if the petty offense exception to the Jury Trial Clause of the Sixth Amendment could be relevant to the scope of the Fifth Amendment's Due Process Clause, there is no plausible argument that short-martials are limited to offenses that civilian courts would characterize as "petty." The brief in opposition never quite brings itself to argue otherwise, although it repeatedly uses language that might leave readers with that (mis)impression.[2]

As this Court has repeatedly made clear, the petty offense exception to the Jury Trial Clause turns not on the actual punishment that is (or can be) imposed in an individual case, but on the maximum punishment authorized for the charged offense. *See, e.g.*, *Lewis*, 518 U.S. at 328. The reason for this focus is because the seriousness of the offense turns not on the facts of a specific case, but on the *legislature*'s determination of seriousness—as reflected in the maximum punishment authorized for any offense that includes the same elements. *See id.* ("The maximum authorized penalty provides an 'objective indicatio[n] of the seriousness with which society regards the offense,' and it is that indication that is used to determine

---

insofar as the government's opposition *does* depend upon its continuing vitality, a grant of certiorari in that case would necessarily provide only further support for plenary review here.

2. For example, the government suggests that "[t]he limited authority conferred in Article 16(c)(2)(A) tracks the rule that applies in civilian courts." BIO 12. It argues that "Congress reasonably determined . . . that similar proceedings for the trial of low-level military offenses are appropriate." *Id.* It suggests that short-martials may try only "low-level crimes in the military system." *Id.* at 18. And it describes the offenses short-martials can try not as "petty offenses," but as their "functional analogues," *id.* at 21, whatever that means.

whether a jury trial is required, not the particularities of an individual case." (quoting *Frank* v. *United States*, 395 U.S. 147, 148 (1969)) (alteration in original)). To that end, "the Sixth Amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months." *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 512 n.4 (1974).

Here, the relevant policymaker—the President, *see Loving* v. *United States*, 517 U.S. 748, 759–69 (1996)—has authorized short-martials to try almost any offense for which the maximum term of imprisonment is up to two years. *See* R.C.M. 201(f)(2)(E); Pet. 9 n.5. That necessarily includes offenses that would trigger a right to a jury trial in a state or federal civilian court; indeed, two of the three petitioners here were convicted of such offenses. Petitioner Wheeler was convicted of an offense punishable by imprisonment for up to one year;[3] Petitioner Martin was convicted of an offense punishable by imprisonment for up to two years. *See* Pet. 10–12.[4]

The brief in opposition does not dispute any of these points. Nor does it offer any other argument for why civilian courts would treat these offenses as "petty." Nor does it contend that R.C.M. 201(f)(2)(E) permissibly moves the line between petty and serious

---

3. The government wrongly identifies Wheeler as a Master-at-Arms First Class (E-6). *See* BIO 5. He was, in fact, a Master-at-Arms Third Class (E-4), as CAAF noted below. *See* Pet. 1a.

4. Congress or the President certainly *could* have reduced the maximum authorized punishments for these offenses when Congress created the short-martial or when the President promulgated R.C.M. 201(f)(2)(E). But neither did so—and the government does not suggest otherwise.

offenses from six months to two years—or that the petty offense line in the military should be based upon context-specific imprisonment limits. Instead, the government attempts—and fails—to elide these constitutionally significant distinctions. Thus, the government's first argument against certiorari would still undermine two of the three convictions here—and countless more short-martials going forward.

II. WHETHER THE SHORT-MARTIAL SATISFIES DUE PROCESS WARRANTS THIS COURT'S IMMEDIATE REVIEW

Other than its misbegotten invocation of the petty offense exception, the brief in opposition offers no real response to the two distinct due process questions the petition identifies. Specifically, the petition argues that the short-martial is a poor fit for the framework this Court articulated in *Middendorf* and refined in *Weiss*—because those cases involved claims that due process requires *more* than what has historically been available. Here, Congress has departed *downward* from the historical baseline. *See* Pet. 14–16. And in any event, the petition explains why, even applying *Middendorf* and *Weiss*, the short-martial violates due process. *See id.* at 16–23.

The brief in opposition notably fails to respond to the first argument. As for the second, its response rests on a single (and limitless) theme: deference. *See, e.g.*, BIO 9, 10, 15. The government insists that, because Congress is entitled to deference regarding the procedures for courts-martial, it shouldn't matter that the only justification Congress provided when it created the short-martial was "efficiency."

But *Middendorf* and *Weiss* already account for the additional deference to which Congress is entitled

when regulating courts-martial. Indeed, this Court in *Middendorf* deliberately declined to adopt the more favorable (and more familiar) framework it had articulated for civilian due process claims just one month earlier in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).[5] *See Weiss*, 510 U.S. at 176–77 (noting the relationship between *Middendorf* and *Mathews*). By arguing for limitless deference above and apart from *Middendorf* and *Weiss*, the brief in opposition implicitly argues for a dramatic reduction in the due process available to all court-martial defendants—another argument that only reinforces the importance of this Court's intervention.

Nor does the brief in opposition persuade in its attempt to refute petitioners' analyses of *Middendorf* and *Weiss* themselves. The government concedes—as it must—that historical practice militates in favor of a right to a panel. *See* BIO 9. It offers no argument other than "efficiency" for why the pre-2019 right to a panel for all special courts-martial negatively impacted the military. Nor does it dispute the petition's observation that the total number of courts-martial (and, thus, the military resources they consume) has continued to decline. *See* Pet. 18 & n.9. And with respect to the existence of other procedural safeguards, the brief in opposition does nothing more than simply reassert CAAF's analysis from below, *see* BIO 18—analysis that the petition thoroughly debunks. *See* Pet. 18–21.

There are compelling reasons why this Court has long been wary of leaving significant decisions in the

5. Under *Mathews*, courts reviewing due process claims must balance "the private interests at stake, the value of added procedures, and the burdens on the government from the added procedures." *Culley* v. *Marshall*, 601 U.S. 377, 382 (2024).

hands of single adjudicators. One of those reasons is the increased risk of error with fewer decisionmakers. *See id.* at 19–20 (citing *Ballew* v. *Georgia*, 435 U.S. 223, 232–38 (1978)).[6] But this Court has also traced such wariness to the structure of the Constitution, which "scrupulously avoids concentrating power in the hands of any single individual." *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 223 (2020).

Whatever the reasons for skepticism of single adjudicators in the abstract, they are necessarily at their zenith in the context of criminal convictions—especially those that produce collateral consequences. Rather than responding to this concern (which, again, the brief in opposition does not acknowledge), the government points to limits on the offenses that short-martials can *currently* try. Insofar as this is a due process argument (as opposed to an argument about the inapposite and inapplicable petty offense exception to the Sixth Amendment), it, too, fails.

Indeed, in response to the petition's concern that, under CAAF's analysis in this case, Congress could impose mandatory bench trials even in capital courts-martial, all the government can offer is that this isn't the law yet. BIO 21–22. But the brief offers no persuasive "circumstance-specific analysis," *id.* at 22, to explain what would prevent Congress from doing exactly that. In that respect, the brief in opposition unintentionally underscores that the question presented is not just about the right to a court-martial panel in some cases, but in all of them.

---

6. The brief in opposition asserts that the risk-of-error claim is "incorrect[]," BIO 20, but it offers no explanation as to *why*.

Rather than explaining why petitioners are wrong about the grave implications of its position, the government tries to shift attention to what it claims are the implications of petitioners' argument. *See id.* at 19 ("Petitioners' position would set military procedure in stone, tie the hands of Congress, and preclude any number of Congress's subsequent statutory modifications to court-martial procedures."). But a faithful application of *Middendorf* and *Weiss* would do no such thing. *See* Pet. 16–23.

The question isn't whether Congress may *modify* court-martial procedures; it's whether changes to those procedures strike the right balance between improved efficiency and the rights of the accused. *See Weiss*, 510 U.S. at 177–78. And whatever deference Congress is entitled to in calibrating that balance, the central problem in this case is that the weight of the short-martial falls entirely on one side of that scale. Thus, even though the brief in opposition attempts a treatise-like recitation of court-martial procedures, *see* BIO 16–18, one would search that discussion in vain for any procedural safeguards that actually make up for the removal of a right to a panel—the one procedural protection on which servicemembers had always been able to rely.

* * *

For all of the arguments advanced in the petition and not addressed in the brief in opposition, perhaps the most telling omission is the government's neglect of how the short-martial erodes the constitutional limits on non-Article III adjudication. *See* Pet. 3–4, 25–26. This Court has been clear for generations that the exception to Article III for courts-martial has been sustained *because* Congress has maintained them "in

all their essentials." *Ortiz* v. *United States*, 585 U.S. 427, 439 (2018). Eliminating a right to a panel, even in a subset of cases, reflects a fundamental change to those "essentials"—and to what the Founders would have understood a court-martial to be. *Cf. SEC* v. *Jarkesy*, 603 U.S. 109, 131 (2024) ("Without such close attention to the basis for each asserted application of the doctrine, the exception would swallow the rule.").

The short-martial isn't just a modest, technical tweak to court-martial procedures. Rather, it reflects a fundamental reconceptualization of the cornerstone of the military justice system. Until 1968, the panel wasn't just a *part* of the court-martial; there could not be a criminal prosecution in a court-martial *without* one. *See* Pet. 6–7. That is all the more reason for this Court to conduct plenary review of the due process question petitioners present—and to insist that the government provide a defense of short-martials that is more robust than "because Congress said so."

Indeed, it is hard to imagine a petition with broader implications for the current and future structure of military justice in the United States—or a better set of consolidated cases for addressing it. In the 28 years since *Edmond* v. *United States*, 520 U.S. 651 (1997), this Court has conducted plenary review of only a single court-martial appeal brought by servicemembers. *See Ortiz*, 585 U.S. 428. This petition should be the second.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20016
(202) 662-9313
svladeck@gmail.com

MEGAN P. MARINOS
Appellate Defense Division
U.S. Navy
1254 Charles Morris St., SE
Washington Navy Yard, DC 20374

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
University of Texas School of Law
Supreme Court Clinic
727 East Dean Keeton St.
Austin, TX 78705

Counsel for Petitioners

May 12, 2025