No. 23-___

IN THE

Supreme Court of the United States

JONATHAN M. MARTINEZ, *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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), this Court held that the Sixth Amendment's right to a "trial . . . by an impartial jury" requires that criminal convictions for serious offenses be unanimous not just in federal civilian courts, but in state courts as well.

Those prosecuted under the Uniform Code of Military Justice (UCMJ), in contrast, can be found guilty—and sentenced to as much as life imprisonment without the possibility of parole—by a 6-2 vote of a panel of servicemembers, even for civilian offenses over which state or federal civilian courts have concurrent jurisdiction.

The Question Presented is:

Whether military convictions for serious offenses must be unanimous.

PARTIES TO THE PROCEEDING

This Rule 12.4 petition consolidates appeals from 16 servicemembers convicted by court-martial.

Petitioners are Jonathan M. Martinez; Roberto Aikanoff, Jr.; Nicholas J. Apgar; Mitchell A. Bentley; Brian C. Docilet; Cory M. Garrett; Jacob W. Johnson; George E. Lopez; Joshua D. McCameron; Margarito Miramontes; Jose Muñoz-Garcia; Brendon D. Rubirivera; Antoine M. Tarnowski; Eric N. Vance; Andrew Y. Veerathanongdech; and Samuel H. Zimmer.

Respondent in each of petitioners' cases is the United States.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

Other than the direct appeals that form the basis for this petition, there are no related proceedings for purposes of S. CT. R. 14.1(b)(iii).

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INTRODUCTION

Petitioners are 16 servicemembers from the Air Force, Army, and Marine Corps convicted of serious offenses by court-martial panels composed of fellow servicemembers. All 16 timely argued that, under *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020), they had a constitutional right to have any conviction be unanimous—under the Sixth Amendment's Jury Trial Clause or the Fifth Amendment's Due Process Clause.

Those claims were rejected by the military judges presiding over each petitioner's court-martial. Petitioners' convictions and sentences were then affirmed by the relevant service branch Court of Criminal Appeals (CCA). After the Court of Appeals for the Armed Forces (CAAF) upheld non-unanimous convictions in *United States* v. *Anderson*, No. 22-0193/AF, 2023 WL 4340526 (C.A.A.F. June 29, 2023), it summarily affirmed each petitioner's conviction.

Military tribunals are thus the *only* courts in the United States today in which the government can still obtain criminal convictions through non-unanimous verdicts. That incongruity cannot be reconciled with *Ramos*. Although the CAAF conceded in *Anderson* that servicemembers have a constitutional right to an *impartial* panel under the Sixth Amendment, it read *Ramos* as not relating unanimity to impartiality. *Id.* at *4. But Justice Gorsuch could not have been clearer that the purpose of his analysis was to ascertain "what a 'trial by an *impartial jury*' entails." 140 S. Ct. at 1395 (quoting U.S. CONST. amend. VI (emphasis added)). *Ramos*'s reasoning would make little sense if unanimous convictions were *not* central to the Sixth Amendment's guarantee of an "impartial jury."

Unanimous convictions are also required by the Due Process Clause of the Fifth Amendment. In holding otherwise, the CAAF distorted the balancing test this Court embraced for military due process claims in *Middendorf* v. *Henry*, 425 U.S. 25 (1976)—holding that whatever interest servicemembers may have in an impartial panel is accounted for by the UCMJ's provisions for secret balloting by panel members and the theoretical availability of factual sufficiency review on appeal. *Anderson*, 2023 WL 4340526, at *6. But secret balloting exists to protect the interests of panel members, not defendants—and is no substitute for the values that unanimous convictions promote. And *because* court-martial panel ballots are secret, factual sufficiency review (which Congress has in any event recently limited) has no way of distinguishing between 6-2 and 8-0 convictions.

Nor does the "historical evidence" on which the CAAF relied bolster its due process analysis. Even if Founding-era courts-martial had the power to render non-unanimous convictions, their jurisdiction was confined to a small class of uniquely military offenses. Whether those limits came from the Constitution or the Articles of War, there is no dispute that the military's jurisdiction to prosecute the overwhelming majority of civilian offenses, especially those with no connection to the defendant's military service, is a modern phenomenon. *See Solorio* v. *United States*, 483 U.S. 435 (1987). Thus, for most of the offenses that contemporary courts-martial try—including most of the offenses for which petitioners were convicted, such as the Title 18 wire fraud offenses in Petitioner Martinez's case—the historical baseline was *unanimous* convictions, not non-unanimous ones.

Finally, in rejecting the argument that non-unanimous convictions also run afoul of equal protection principles, the CAAF drew the wrong comparison—concluding that servicemembers are not "similarly situated" to civilian criminal defendants. *Anderson*, 2023 WL 4340526, at *7–8. But petitioners' equal protection objection is that servicemembers are similarly situated to *each other*—so that, when trying the same defendant for the same offense, the government needs an especially strong justification for having the power to choose between a forum that has a unanimous-conviction requirement and one that does not. After *Ramos*, no such justification exists.

Certiorari is warranted not only because the CAAF thereby failed to take petitioners' claims seriously, but also because resolution of those claims is of exceptional importance to the military justice system. After all, not only do panels serve as the factfinder in roughly one-third of *all* general courts-martial, but the possibility of non-unanimous convictions regularly factors into the advice defense counsel give to their clients regarding whether they should exercise their statutory right to be tried by a panel versus by a "military judge alone." *See* 10 U.S.C. § 816(b)(3). Whether *Ramos* applies to military convictions through either the Sixth Amendment or the Fifth thus has implications for virtually *every* general court-martial convened within the U.S. armed forces.

Moreover, petitioners' appeals are likely to be among the only ones to reach this Court that properly raise the question presented. This Court lacks jurisdiction to review decisions by the CAAF when that court has denied discretionary review. *See* 10 U.S.C. § 867a(a). But the CAAF has granted review of the question presented in only these 16 cases and a

handful of others—and in no new cases since its June 29 decision in *Anderson*. And because military courts have now given "full and fair consideration" to petitioners' claim that they are entitled to unanimous convictions after and in light of *Ramos*, the issue will not be subject to *de novo* consideration on collateral review in Article III courts. *See Burns* v. *Wilson*, 346 U.S. 137 (1953) (plurality opinion). Thus, if *Ramos*'s application to courts-martial merits this Court's intervention, the time for such intervention is now.

DECISIONS BELOW

The decision of the Air Force CCA in Petitioner Martinez's case is not reported. It is available at 2022 WL 1043620, and reprinted in the Appendix at Pet. App. 2a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5123321, and reprinted in the Appendix at Pet. App. 1a.

The decision of the Army CCA in Petitioner Aikanoff's case is not reported. It is available at 2022 WL 2161606, and reprinted in the Appendix at Pet. App. 38a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5124877, and reprinted in the Appendix at Pet. App. 37a.

The decision of the Army CCA in Petitioner Apgar's case is not reported or available in a commercial database. It is reprinted in the Appendix at Pet. App. 58a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5123327, and reprinted in the Appendix at Pet. App. 57a.

The decision of the Army CCA in Petitioner Bentley's case is not reported or available in a commercial database. It is reprinted in the Appendix at Pet. App. 61a. The CAAF's summary affirmance is

not yet reported. It is available at 2023 WL 5124896, and reprinted in the Appendix at Pet. App. 60a.

The decision of the Army CCA in Petitioner Docilet's case is not reported or available in a commercial database. It is reprinted in the Appendix at Pet. App. 64a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5124886, and reprinted in the Appendix at Pet. App. 63a.

The decision of the Army CCA in Petitioner Garrett's case is not reported. It is available at 2022 WL 16579950, and reprinted in the Appendix at Pet. App. 67a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5124893, and reprinted in the Appendix at Pet. App. 66a.

The decision of the Army CCA in Petitioner Johnson's case is not reported or available in a commercial database. It is reprinted in the Appendix at Pet. App. 84a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5124870, and reprinted in the Appendix at Pet. App. 83a.

The decision of the Air Force CCA in Petitioner Lopez's case is not reported. It is available at 2023 WL 2401185, and reprinted in the Appendix at Pet. App. 87a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5127079, and reprinted in the Appendix at Pet. App. 86a.

The decision of the Air Force CCA in Petitioner McCameron's case is not reported. It is available at 2022 WL 17069657, and reprinted in the Appendix at Pet. App. 130a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5126996, and reprinted in the Appendix at Pet. App. 129a.

The decision of the Army CCA in Petitioner Miramontes's case is not reported or available in a commercial database. It is reprinted in the Appendix at Pet. App. 161a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5124874, and reprinted in the Appendix at Pet. App. 160a.

The decision of the Army CCA in Petitioner Muñoz-Garcia's case is not reported. It is available at 2022 WL 1284391, and reprinted in the Appendix at Pet. App. 164a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5126946, and reprinted in the Appendix at Pet. App. 163a.

The decision of the Army CCA in Petitioner Rubirivera's case is not reported or available in a commercial database. It is reprinted in the Appendix at Pet. App.169a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5127013, and reprinted in the Appendix at Pet. App. 168a.

The decision of the Air Force CCA in Petitioner Tarnowski's case is not reported. It is available at 2022 WL 16835520, and reprinted in the Appendix at Pet. App. 172a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5126997, and reprinted in the Appendix at Pet. App. 171a.

The decision of the Navy-Marine Corps CCA in Petitioner Vance's case is not reported. It is available at 2022 WL 2236317, and reprinted in the Appendix at Pet. App. 213a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5124885, and reprinted in the Appendix at Pet. App. 212a.

The decision of the Air Force CCA in Petitioner Veerathanongdech's case is not reported. It is available at 2022 WL 1125399, and reprinted in the Appendix at Pet. App. 250a. The CAAF's summary

affirmance is not yet reported. It is available at 2023 WL 5123313, and reprinted in the Appendix at Pet. App. 249a.

The decision of the Army CCA in Petitioner Zimmer's case is not reported. It is available at 2023 WL 149952, and reprinted in the Appendix at Pet. App. 269a. The CAAF's summary affirmance is not yet reported. It is available at 2023 WL 5127034, and reprinted in the Appendix at Pet. App. 268a.

JURISDICTION

As noted above, in each petitioner's case, the CAAF granted discretionary review of either the question presented or a variation thereof. It issued its decisions in petitioners' cases on July 18, 2023. This Court has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Under Article 16 of the UCMJ, a general court-martial may be composed of a military judge alone or a panel of members. 10 U.S.C. § 816(b). In non-capital cases, a general court-martial panel is composed of eight members. *Id.* § 816(b)(1). Article 52(a)(3) of the UCMJ provides that "No person may be convicted of an offense in a general or special court-martial, other than . . . in a court-martial with members under section 816 of this title (article 16), by the concurrence of at least three-fourths of the members present when the vote is taken." 10 U.S.C. § 852(a)(3).

The Jury Trial Clause of the Sixth Amendment provides that "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. The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.* amend. V.

STATEMENT OF THE CASE

Ramos held that the Sixth Amendment's requirement of unanimous convictions applies not only to federal criminal trials, but to state criminal trials as well. *See* 140 S. Ct. 1390. Given *Ramos*'s holding and analysis, numerous servicemembers who had opted to be tried by a panel for non-capital[1] crimes brought timely claims arguing that they could be convicted only if the panel reached a unanimous verdict. 16 of those defendants are petitioners here.

Petitioner Jonathan M. Martinez, an Airman (E-2) in the U.S. Air Force, was convicted by a court-martial panel, contrary to his pleas, of one charge and one specification of wire fraud under 18 U.S.C. § 1343;[2] one charge and one specification of wrongfully communicating a threat in violation of Article 115 of the UCMJ, 10 U.S.C. § 915; one charge and two specifications of attempted wire fraud under 18 U.S.C. § 1343; and one charge and one specification of wrongfully using marijuana in violation of Article 112a of the UCMJ, 10 U.S.C. § 912a. Prior to the panel deliberations, Martinez moved the trial court to instruct the panel that any guilty verdict had to be

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1. A capital-referred court-martial cannot return a sentence of death unless the panel's vote is unanimous as to both the conviction and the death sentence. *See* 10 U.S.C. § 852(b)(2).

2. A military accused may be charged with a violation of a non-capital federal or state offense through Article 134 (the "General Article") of the UCMJ, 10 U.S.C. § 934.

unanimous under both the Due Process Clause of the Fifth Amendment and the Jury Trial Clause of the Sixth Amendment. The trial judge denied the motion, and ultimately sentenced Martinez to a reprimand, reduction to the grade of E-1, 36 months of confinement, and a dishonorable discharge. After the Convening Authority took no action in Martinez's case, the Air Force CCA affirmed the findings and the sentence—expressly rejecting Martinez's argument that he was entitled to a unanimity instruction. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Roberto Aikanoff, Jr., a Sergeant First Class (E-7) in the U.S. Army, was convicted by a court-martial panel, contrary to his pleas, of seven specifications of sexual abuse of a child, in violation of Article 120b of the UCMJ, 10 U.S.C. § 920b. Prior to panel deliberations, Aikanoff moved the trial court to instruct the panel that any guilty verdict had to be unanimous. The trial judge denied the motion, and the panel members sentenced Aikanoff to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for twenty years, and a dishonorable discharge. After the Convening Authority approved the sentence in Aikanoff's case, the Army CCA affirmed the findings and the sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Nicholas J. Apgar, a Private (E-1) in the U.S. Army, was convicted by a court-martial panel, contrary to his pleas, of three specifications of rape and three specifications of sexual assault, in violation of Article 120 of the UCMJ, 10 U.S.C. § 920. Prior to panel deliberations, Apgar moved the trial court to instruct the panel that any guilty verdict had to be unanimous, and to instruct that the President must announce whether any finding of guilty was or was not

the result of a unanimous vote without stating any numbers or name. The trial judge denied the motion, and sentenced Apgar to be confined for forty-nine months and a dishonorable discharge. After the Convening Authority approved the sentence in Apgar's case, the Army CCA affirmed the findings and the sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Mitchell A. Bentley, a Staff Sergeant (E-6) in the U.S. Army, was convicted by a court-martial panel, contrary to his pleas, of one specification of sexual assault, in violation of Article 120 of the UCMJ, 10 U.S.C. § 920. Prior to panel deliberations, Bentley filed a motion requesting a unanimous verdict in his case. The trial judge denied the motion, and sentenced Bentley to reduction to the grade of E-3, confinement for 12 months, and a dishonorable discharge. After the convening authority took no action in the case, the Army CCA affirmed the findings and the sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Brian C. Docilet, a Private First Class (E-3) in the U.S. Army, was convicted by a court-martial panel, contrary to his pleas, of one specification of sexual assault, in violation of Article 120 of the UCMJ, 10 U.S.C. § 920. Prior to panel deliberations, Docilet requested the judge to poll the panel on whether it reached a unanimous verdict, should the panel return any findings of guilty. The military judge denied the request, on the basis that there were no military rules permitting such polling. The trial judge sentenced Docilet to be reduced to the grade of E-1, confined for 180 days, and discharged from the service with a dishonorable discharge. After the convening authority took no action in the case, the

Army CCA affirmed the findings and the sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Cory M. Garrett, a Staff Sergeant (E-6) in the U.S. Army, was convicted by a court-martial panel, contrary to his pleas, of one specification of assault consummated by a battery on a spouse, one specification of aggravated assault on a spouse, one specification of assault with a loaded firearm on a spouse, and one specification of communicating a threat, in violation of Articles 115 and 128 of the UCMJ, 10 U.S.C. §§ 915, 928. The trial judge sentenced Garrett to reduction to the grade of E-1, to be confined for four years, and to a bad-conduct discharge. The convening authority took no action in the case. The Army CCA rejected Garrett's unanimous conviction claims on the merits and affirmed the court-martial's findings and sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Darrick E. Johnson, Specialist (E-4) in the U.S. Army, was convicted by a court-martial panel, contrary to his pleas, of one specification each of negligent dereliction of duty and wrongful use of a controlled substance, in violation of Articles 92 and 112a of the UCMJ, 10 U.S.C. §§ 892, 912a. He was acquitted of one specification of willfully disobeying a noncommissioned officer, in violation of Article 91 of the UCMJ, 10 U.S.C. § 891. Prior to trial, Johnson moved the court to require a unanimous vote for conviction, pursuant to the Supreme Court's decision in *Ramos*. The trial judge denied the motion, and ultimately sentenced appellant to be reduced to the grade of E-1, confined for a total term of two months and fifteen days, and discharged from the service with a bad conduct discharge. The convening authority elected to take no action on the findings or sentence.

The Army CCA affirmed Johnson's conviction and sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner George E. Lopez, Technical Sergeant (E-6) in the U.S. Air Force, was convicted by a court-martial panel, contrary to his pleas, of sexual assault, assault consummated by a battery (six specifications), child endangerment, and kidnapping (two specifications), in violation of Articles 120, 128, and 134 of the UCMJ, 10 U.S.C. §§§ 920, 928, 934. The panel acquitted Lopez of wrongfully communicating a threat in Specification 4 of Charge III. In Specification 1 of Charge I, the panel excepted the word "forearm" and substituted the words "upper extremity" in convicting Appellant of assault consummated by a battery. Finally, the military judge dismissed Specification 5 of Charge I as an unreasonable multiplication of charges with Charge II and its Specification, subject to the finding of guilty for Charge II and its Specification surviving appellate review. The panel sentenced Lopez to reduction to the grade of E-1, confinement for nine years and six months, and a dishonorable discharge. The convening authority took no action on the findings or sentence. After the Air Force CCA affirmed the conviction and sentence, the CAAF summarily affirmed in light of *Anderson*.

Petitioner Joshua D. McCameron, Senior Airman (E-4) in the U.S. Air Force, was convicted by a court-martial panel, consistent with his pleas, of one charge and two specifications of damage to property other than military property of the United States in violation of Article 109 of the UCMJ, 10 U.S.C. § 909, and one charge and one specification of assault in violation of Article 128 of the UCMJ, 10 U.S.C. § 928.

McCameron was also convicted by a court-martial panel, contrary to his pleas, of simple assault with an unloaded firearm in violation of Article 128. Prior to trial, McCameron moved the court to require a unanimous vote for conviction, pursuant to the Supreme Court's decision in *Ramos*. The trial judge denied the motion, and ultimately sentenced McCameron to a dishonorable discharge, three months of confinement for Specification 1 of Charge II, twenty-four months of confinement for Specification 2 of Charge II (with terms of confinement running consecutively), a $100.00 and $500.00 fine for Specifications 1 and 2 of Charge I respectively, a reduction to the lowest enlisted grade, and a reprimand. The trial judge also recommended clemency in the form of the waiver of automatic forfeitures for sixth months for the benefit of Appellant's minor children. After the convening authority took no action in McCameron's case, the Air Force CCA set aside the finding of guilty as to Specification 1 of Charge 1, dismissed Specification 1 of Charge 1, reassessed McCameron's sentence to a dishonorable discharge, confinement for 27 months, reduction to the grade of E-1, a $500.00 fine, and a reprimand; and affirmed the remaining findings and sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Margarito Miramontes, a Specialist (E-4) in the U.S. Army, was convicted by a court-martial panel, contrary to his pleas, of five specifications of sexual assault and three specifications of abusive sexual contact in violation of Article 120 of the UCMJ, 10 U.S.C. § 920. Prior to panel deliberations, Miramontes moved the trial court to instruct the panel that any guilty verdict had to be unanimous,

and to instruct that the president must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or name. The trial judge denied the motion, and ultimately sentenced Miramontes to be reduced to the grade of E-1, confined for 18 months, and discharged with a dishonorable discharge. After the Convening Authority approved the sentence in Miramontes's case, the Army CCA affirmed the findings and the sentence. The CAAF summarily affirmed in light of Anderson.

Petitioner Jose A. Muñoz-Garcia, a Specialist (E-4) in the U.S. Army, was convicted by a court-martial panel, contrary to his pleas, of two specifications of sexual assault, in violation of Article 120 of the UCMJ, 10 U.S.C. § 920. Prior to panel deliberations, Muñoz-Garcia raised a motion to require a unanimous vote for conviction pursuant to the Fifth Amendment, Sixth Amendment, and *Ramos*. The trial judge denied the motion, and ultimately sentenced Muñoz-Garcia to no confinement for Specification 1 of the Charge, six months of confinement for Specification 2 of the Charge, and a dishonorable discharge. After the convening authority took no action in Muñoz-Garcia's case, the Army CCA remanded it for a new convening authority action and modified judgment. After the convening authority completed a new action and the military judge issued a modified judgment of the court, the Army CCA affirmed the findings and sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Brendon D. Rubirivera, Private (E-1) in the U.S. Army, was convicted of three specifications of rape and one specification of sexual assault, in violation of Article 120 of the UCMJ, 10 U.S.C. § 920.

Rubirivera was sentenced to 14 years confinement and a dishonorable discharge. The Convening Authority approved the findings and sentence as adjudged. After the Army CCA summarily affirmed the findings and sentence, the CAAF summarily affirmed in light of *Anderson*.

Petitioner Antoine M. Tarnowski, Senior Airman (E-4) in the U.S. Air Force, was convicted by two separate court-martial panels, contrary to his pleas, of one charge and specification of unlawfully carrying a concealed firearm on divers occasions in violation of Article 114 of the UCMJ, 10 U.S.C. § 914, and one charge and specification of drunk and disorderly conduct in violation of Article 134, 10 U.S.C. § 934. Prior to panel deliberations, Tarnowski raised a motion for members to be instructed that a guilty verdict must be unanimous. The trial judge failed to instruct the panel accordingly, and the panel sentenced Tarnowski to a bad conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. After the convening authority declined to take action, the Air Force CCA affirmed the charges and specifications and the sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Eric N. Vance, a Lance Corporal (E-3) in the U.S. Marine Corps, was convicted by a court-martial panel, contrary to his pleas, of attempted sexual assault of a child, attempted sexual abuse of a child, and attempted extramarital sexual conduct, in violation of Article 80 of the UCMJ, 10 U.S.C. § 880, for communicating indecent language to and attempting to have sex with a person Vance believed was thirteen years old. Prior to panel deliberations, Vance raised a motion to require a unanimous vote for

conviction. The trial judge denied the motion, and ultimately sentenced Vance to a reduction to E-1, confinement for 15 months, and a dishonorable discharge. After the convening authority took no action in Vance's case, the Navy-Marine Corps CCA affirmed the findings and sentence. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Andrew Y. Veerathanongdech, a Captain in the U.S. Air Force, was convicted by a court-martial panel, contrary to his pleas, of one charge and specification of wrongful use of a controlled substance (MDMA), in violation of Article 112a of the UCMJ, 10 U.S.C. § 912a; one charge and one specification of solicitation regarding a controlled substance (Percocet); and one specification of obstruction of justice, both in violation of Article 134, 10 U.S.C. § 934. Prior to panel deliberations, Veerathanongdech raised a motion based on the Fifth Amendment's Due Process and Equal Protection Clauses, and the Sixth Amendment, requesting the military judge instruct the panel members that any conviction must be unanimous. The military judge denied the motion, instead instructing the panel it could convict Veerathanongdech based on the concurrence of at least three-fourths of the members present. The panel sentenced Veerathanongdech to thirty days' confinement and dismissal from the service. After the convening authority took no action in Veerathanongdech's case, a divided Air Force CCA affirmed the findings and the sentence—with Judge Meginely dissenting on the unanimous conviction issue. The CAAF summarily affirmed in light of *Anderson*.

Petitioner Samuel H. Zimmer, a Chief Warrant Officer Two (W-2) in the U.S. Army, was convicted by

a court-martial panel, contrary to his pleas, of one specification of willfully disobeying a superior commissioned officer, one specification of destruction of nonmilitary property, two specifications of communicating a threat, two specifications of kidnapping, one specification of simple assault, one specification of assault consummated by battery, five specifications of battery on a spouse or intimate partner, one specification of aggravated assault by strangulation, two specifications of obstruction of justice, one specification of disorderly conduct, and one violation of a federal crime an offense not capital (interstate violation of a protection order), in violation of Articles 90, 109, 115, 125, 128, 131b, and 134 of the UCMJ, 10 U.S.C. §§ 890, 909, 915, 925, 928, 934. The panel sentenced Appellant to a dismissal and confinement for ten years. The convening authority approved the adjudged sentence, and the Army CCA affirmed the findings and sentence. The CAAF summarily affirmed in light of *Anderson*.

REASONS FOR GRANTING THE PETITION

In *Ramos*, this Court "repudiated [its] 1972 decision in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1551 (2021). Instead, *Ramos* held that the Due Process Clause of the Fourteenth Amendment required applying the same jury-unanimity rule to state convictions for criminal offenses that already applied to federal (civilian) convictions under the Jury Trial Clause of the Sixth Amendment. 140 S. Ct. at 1397. As this Court later noted, *Ramos* unequivocally broke "momentous and consequential" new ground in so holding. *Edwards*, 141 S. Ct. at 1559.

For decades, the prevailing assumption had been that, as was true for state courts until 2020, the U.S. Constitution does *not* require unanimous convictions for non-capital courts-martial. This understanding purportedly followed from this Court's recognition in cases such as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and *Ex parte Quirin*, 317 U.S. 1 (1942), that the Sixth Amendment's jury-trial right does not extend to military tribunals at all. *See, e.g.*, *United States* v. *Lebron*, 46 C.M.R. 1062, 1068–69 (A.F.C.M.R. 1973); *see also United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986) ("[C]ourts-martial have never been considered subject to the jury-trial demands of the Constitution.").[3]

Ramos turned that assumption on its head. It did so not by applying the Sixth Amendment Jury Trial Clause to courts-martial, but by reaffirming the interests that unanimous convictions vindicate—which military trials also implicate, whether through the Sixth Amendment or the Due Process Clause of the Fifth: First, *Ramos* makes clear that the right to a unanimous conviction is an essential aspect of the Sixth Amendment's right to an *impartial* jury—a right that both the UCMJ and the Constitution provide to the accused with respect to a court-martial panel. *See, e.g.*, *United States* v. *Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005).

Second, *Ramos* recognizes that unanimity is central to the fundamental *fairness* of a jury verdict—

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3. Although Article III also confers a jury-trial right, *see* U.S. CONST. art. III, § 2, cl. 3, this Court has long construed that constitutional provision to do the same work as the Sixth Amendment's Jury Trial Clause—including with regard to unanimous convictions. *See, e.g.*, *Ramos*, 140 S. Ct. at 1395 & n.8.

as opposed to a verdict rendered by a judge. Under *Milligan* and *Quirin*, Congress may not have been under a constitutional obligation to provide petitioners with the right to be tried by a panel in the first place. But "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States* v. *Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). Thus, whether under the Sixth Amendment or the Fifth, Congress's choice to provide a statutory right to trial by a panel necessarily triggered constitutional requirements of panel fairness and impartiality—requirements that, after *Ramos*, can no longer be satisfied by non-unanimous convictions.

The CAAF therefore erred in *Anderson* in refusing to extend *Ramos* to courts-martial. Because that error has profound implications for virtually *all* general courts-martial going forward, and because petitioners' cases present an ideal (and evanescent) vehicle through which to resolve the question presented, the petition for a writ of certiorari should be granted.

I. SERVICEMEMBERS' RIGHT TO UNANIMOUS CONVICTIONS FOLLOWS FROM THEIR RIGHT TO A "FAIR AND IMPARTIAL" PANEL

The CAAF's analysis in *Anderson* is not only superficial, but it disregards this Court's analyses—of the Sixth Amendment in *Ramos*, and of the Fifth Amendment in *Middendorf* and *Weiss* v. *United States*, 510 U.S. 163 (1994). Petitioners believe that the Constitution requires court-martial convictions to be unanimous. But even if this Court were to disagree, the CAAF's thin analysis in *Anderson* provides scant basis for that disagreement.

A. As *Ramos* Makes Clear, Unanimous Convictions Are Central to Impartiality

Since shortly after the UCMJ was enacted, military courts have recognized that, even if servicemembers do not have a constitutional right to be tried by a petit jury, "[c]onstitutional due process includes the right to be treated equally with all other accused in the selection of *impartial* triers of the facts." *United States* v. *Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964) (emphasis added); *see also United States* v. *Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice."). Indeed, the CAAF has held that the right to an impartial court-martial panel comes not only from the Due Process Clause of the Fifth Amendment, as in *Crawford*, but from the Sixth Amendment *itself*. *See United States* v. *Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("[T]he Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations.").

Lambert is hardly the only case in which the CAAF has extended Sixth Amendment protections to courts-martial. To the contrary, the CAAF has also held that court-martial accused are entitled under the Sixth Amendment—and not just the UCMJ—to:

(1) a speedy trial, *see United States* v. *Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014);

(2) a public trial, *see United States* v. *Hershey*, 20 M.J. 433, 435 (C.M.A. 1985);

(3) the ability to confront witnesses, *see United States* v. *Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010);

(4) notice of the factual and legal bases for the charges, *see United States* v. *Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011);

(5) the ability to compel testimony that is material and favorable to the defense, *see United States* v. *Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016);

(6) counsel, *see United States* v. *Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985); and

(7) the effective assistance thereof, *see United States* v. *Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011).

The upshot of the CAAF's Sixth Amendment holdings is that, once an accused elects to be tried by a panel, he has a constitutional right to impartiality under the Sixth Amendment with respect to both how the panel members are selected and how they deliberate their verdict—a right that the government did not dispute, and the CAAF reaffirmed, in *Anderson*. *See* 2023 WL 4340526, at *3. But if, as *Ramos* held, unanimous convictions are essential to ensure impartiality, then a court-martial accused who elects to be tried by a panel should therefore have a Sixth Amendment right to a unanimous conviction.

The CAAF rejected this argument in *Anderson* not by repudiating its longstanding Sixth Amendment precedents, but by reading *Ramos* to not implicate them. According to the CAAF, *Ramos* didn't *really* link unanimous convictions to impartiality. *See, e.g.*, *id.* at *4–5. Thus, although the CAAF "agree[d] . . . that *Ramos* held that unanimity is an essential element of a Sixth Amendment jury trial," it "disagree[d] that it further held that it is also an essential element of an impartial factfinder." *Id.* at *5.

The CAAF's reading of Justice Gorsuch's opinion for the Court in *Ramos* is not just parsimonious; it denudes that opinion (and its precursors) of analytical force. If "[t]he text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the content and requirements of a jury trial," *Ramos*, 140 S. Ct. at 1395, and if unanimity is, as *Ramos* held, central to that meaning, then the CAAF's effort to untether the two concepts fails at its inception.

Nor did the CAAF (or the government, in its briefs) offer any good reason *why* unanimous convictions might have different ramifications for the impartiality of a civilian jury versus a court-martial panel. Instead, defenses of the practice have focused on unrelated justifications for a *lesser* standard in courts-martial—including the need for deference to Congress and the possibility that unanimous convictions might open the door to unlawful command influence during panel deliberations.[4] But the only case in which this Court had ever suggested that the Sixth Amendment's right to "trial by an impartial jury" could mean different things in different forums was *Apodaca*. And *Ramos* overruled *Apodaca*.

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4. The unlawful command influence concern rings hollow given that the UCMJ already requires unanimous convictions in capital cases. *See ante* at 8 n.1. It is not at all obvious why the possibility of unlawful command influence on the panel is more of an issue in *non*-capital cases—and it is quite obviously not an issue at all when the panel returns a non-unanimous *acquittal*, the context in which a panel member is most likely to be concerned with potential reprisal for failing to vote as his commanding officer might have wished.

B. Servicemembers Are Also Entitled to Unanimous Convictions Under the Due Process Clause

The above analysis demonstrates why, after and in light of *Ramos*, servicemembers have a right to a unanimous guilty verdict as part of their right to an impartial panel under the Sixth Amendment. But they also have a right to a unanimous guilty verdict as part of the right to due process under the Fifth Amendment—because "[i]mpartial court-members are a *sine qua non* for a fair court-martial." *United States* v. *Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995); *see also United States* v. *Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("[A] military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial." (citations omitted)). As the CAAF's predecessor held in *United States* v. *Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988), if a right applies by virtue of due process, "it applies to courts-martial, just as it does to civilian juries." *Id.* at 390. In *Santiago-Davila*, that meant extending *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to courts-martial. Similar logic applies here.

As in many due process analyses, Congress may not have been obliged to offer servicemembers the option of being tried by a panel in the first place. But once it chose to provide that option, it had to do so in a manner consistent with fundamental notions of procedural fairness—because criminal trials necessarily implicate the accused's liberty. *See, e.g.*, *Wilkinson* v. *Austin*, 545 U.S. 209, 221–24 (2005). Indeed, Congress could hardly rely upon an accused's lack of a constitutional right to a trial by jury to

provide a panel that reaches its verdict by flipping a coin. *Cf. Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985).

As this Court reiterated in *Weiss*, when it comes to an accused's procedural rights in a court-martial, the relevant question under the Due Process Clause is "'whether the factors militating in favor of [the right] are so extraordinarily weighty as to overcome the balance struck by Congress.'" 510 U.S. at 177–78 (quoting *Middendorf*, 425 U.S. at 44). In *Weiss*, the petitioners challenged whether they had a right to have their courts-martial presided over by military judges with fixed terms in office. In holding that the Due Process Clause did not require fixed terms, this Court expressly tied its analysis to the lack of a connection between fixed terms and impartiality, rejecting petitioners' claim that "a military judge who does not have a fixed term of office lacks the independence necessary to ensure impartiality." *Id.* at 178.

Ramos, in contrast, establishes the precise connection that the *Weiss* petitioners could not. Indeed, it is impossible to read *Ramos*—or this Court's subsequent discussion of it in *Edwards*—and not come away with the conclusion that "the factors militating in favor of [unanimous convictions] are . . . extraordinarily weighty." *Id.* at 177. If, as *Ramos* held, unanimous verdicts are necessary in the civilian criminal justice system "to ensure impartiality," *id.* at 178, it ought to follow that they are equally necessary to achieve the same result in a court-martial.

When *Apodaca* was the law of the land, there was at least a plausible argument that this understanding applied only in federal civilian courts—because the gravamen of Justice Powell's solo opinion (filed in the

companion case, *Johnson* v. *Louisiana*, 406 U.S. 366 (1972)), was that the unanimity right did not have the same valence in all courts—and that other tribunals retained "freedom to experiment with variations in jury trial procedure." *Id.* at 376 (Powell, J., concurring in the judgment); *see also Mendrano* v. *Smith*, 797 F.2d 1538, 1543, 1547 (10th Cir. 1986) (rejecting the "close and troubling question[]" of whether non-unanimous court-martial convictions violate the Sixth Amendment by reference to *Johnson* and *Apodaca*). But that is the precise reasoning that *Ramos* rejected.

If anything, unanimous convictions are even more important in trial courts, such as courts-martial, that utilize panels with fewer than twelve members. *See Ballew* v. *Georgia*, 435 U.S. 223, 234 (1978) (plurality opinion) ("Statistical studies suggest that the risk of convicting an innocent person . . . rises as the size of the jury diminishes."); *see also Burch* v. *Louisiana*, 441 U.S. 130 (1979) (six-member juries must be unanimous notwithstanding *Johnson* and *Apodaca*). As noted above, though, petitioners' panels in these cases all had no more than eight members.

In *Anderson*, the CAAF offered two responses to these arguments. Neither is compelling. First, the CAAF fell back on the long history of non-unanimous convictions in courts-martial. *See* 2023 WL 4340526, at *5 ("[H]istorical evidence establishes that for more than two centuries, courts-martial verdicts have not been subject to a unanimity requirement."). That historical claim is true so far as it goes, but it misses the rather critical point that military jurisdiction over civilian offenses is a modern phenomenon. Congress did not give courts-martial the power to try most offenses over which civilian courts could exercise concurrent jurisdiction until it enacted the UCMJ in

1950. And even then, this Court, for a time, required those offenses to also be connected to the defendant's military service. *See O'Callahan* v. *Parker*, 395 U.S. 258 (1969), *overruled by Solorio*, 483 U.S. 435.

It is only since *Solorio* that courts-martial have had the settled power to try servicemembers for civilian offenses unconnected to military service and convict them through non-unanimous verdicts. Against that backdrop, pointing to the availability of non-unanimous convictions in Founding-era courts-martial hardly compares apples to apples—especially in cases, like most of petitioners', in which the serious offenses at issue were not only civilian offenses triable in civilian courts, but were likely *not* triable by Founding-era courts-martial. *See Solorio*, 483 U.S. at 467 (Marshall, J., dissenting) (underscoring the implications of *Solorio*'s expansion of jurisdiction).

Second, and more fundamentally, the CAAF evoked other "safeguards" that, in its view, adequately account for the interests that unanimous convictions would otherwise promote. Specifically, the CAAF highlighted the secret-ballot requirement in Article 51 of the UCMJ, "which protects junior panel members from the influence of more senior members." 2023 WL 4340526, at *6 (citing 10 U.S.C. § 851(a)). And it also flagged the availability of "factual sufficiency review on appeal, ensuring panel verdicts are subject to oversight." *Id.*

But these "safeguards" hardly do anything to vindicate military defendants' interest in unanimous convictions. As *Anderson* itself all-but conceded, the UCMJ's secret-ballot requirement exists to protect panel members from outside influence, not to protect

the rights of the accused.[5] And in any event, the secret-ballot requirement means that CCAs have no way of knowing whether the conviction under review came from a unanimous panel or not. Put simply, there is *no* mechanism in the court-martial system that attempts to fill the specific gap created by the specter of non-unanimous convictions. Insofar as *Middendorf* and *Weiss* contemplate some kind of balancing analysis, that analysis has only one outcome when there's nothing on one side of the scale—no matter how useful it might be to the government to be able to secure convictions for serious offenses by a 6-2 vote.[6]

C. Non-Unanimous Military Convictions Also Run Afoul of Equal Protection

Finally, the CAAF also rejected the argument that non-unanimous convictions raise equal protection concerns—by concluding that servicemembers are not "similarly situated" to civilian criminal defendants for purposes of equal protection analysis. *See Anderson*, 2023 WL 4340526, at *7–8. Here, the CAAF missed the point. The equal protection issue arises not from comparing civilian defendants to servicemembers; it arises from comparing servicemembers to *themselves*.

Consider, in this regard, Petitioner Martinez—who, after an investigation in which civilian law

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5. The secret-ballot requirement is also not necessarily inconsistent with unanimous *convictions*, since there could still be a secret ballot that results in a non-unanimous *acquittal*. *See State* v. *Ross*, 481 P.3d 1286, 1293 (Or. 2021).

6. Nor is factual sufficiency review by the CCAs some kind of talisman—especially given recent amendments to the UCMJ that further constrain when such review is available. *See* 10 U.S.C. § 866(d)(1)(B).

enforcement authorities played a key part, was convicted by a court-martial of, among other things, violating the civilian wire fraud statute, 18 U.S.C. § 1343. The federal government had the choice to try Martinez in a court-martial or a civilian federal court (in which, all agree, he would have had a constitutional right to a unanimous conviction). Thus, even if Martinez is not similarly situated to civilian criminal defendants, he is, at the very least, similarly situated to *himself*.

In such a circumstance, the government's ability to control whether or not the same defendant can vindicate his fundamental constitutional right to a unanimous conviction raises equal protection concerns of the first order—all the more so when the government's only defense of the practice is that it is "necessary to promote efficiency in the military justice system and to guard against unlawful command influence in the deliberation room." *Anderson*, 2023 WL 4340526, at *8.

Just as this Court concluded with regard to *Apodaca*, "Our real objection here isn't that [this] cost-benefit analysis was too skimpy. The deeper problem is that [it] subject[s] the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place." 140 S. Ct. at 1401–02.

II. WHETHER CONVICTIONS BY COURT-MARTIAL PANELS MUST BE UNANIMOUS IS A QUESTION OF EXCEPTIONAL IMPORTANCE

In *Ramos*, this Court agreed to resolve whether the Constitution requires unanimous convictions even though, by the time certiorari was granted, only a single state (Oregon) still authorized non-unanimous

guilty verdicts.[7] If the unanimous conviction claim merited this Court's attention in that context, it necessarily merits the same scrutiny here. If anything, the unanimity issue is even more acute in the court-martial setting—where a servicemember can face life imprisonment without the possibility of parole by a 6-2 vote—a meaningfully lower threshold than the 11-1 and 10-2 margins at issue in *Ramos*.

And in *Ramos*, the crux of the dispute was not over the *merits* of the unanimity question, but rather whether principles of stare decisis nevertheless justified retention of *Apodaca*—the judgment of which allowed non-unanimous convictions by state courts. *Compare Ramos*, 140 S. Ct. at 1408–10 (Sotomayor, J., concurring); *id.* at 1410–20 (Kavanaugh, J., concurring in part); and *id.* at 1420–23 (Thomas, J., concurring in the judgment), *with id.* at 1427–40 (Alito, J., dissenting). Here, in contrast, there is no stare decisis constraint; not only has this Court never considered whether *military* convictions must be unanimous, but *Apodaca* is, quite obviously, no longer good law.

Thus, the question the petition presents implicates the same fundamental constitutional issue that this Court deemed worth its attention in *Ramos*, but in a context in which the issue arises on a blank slate. Petitioners do not ask this Court to revisit whether servicemembers have a constitutional right to be tried by a jury; the question presented is a more modest—but no less important—one: Given that Congress has

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7. Although the petitioner in *Ramos* had been convicted by a 10-2 verdict in Louisiana, Louisiana's voters had amended the state constitution to require unanimous convictions for offenses committed on or after January 1, 2019. LA. CONST. art. I, § 17(A).

provided servicemembers with a near-absolute statutory right to be tried by a jury-like panel, and given that military courts have consistently applied constitutional principles of fairness and impartiality *to* those panels, *Ramos*'s understanding of the role unanimous convictions play in ensuring fair and impartial juries should also apply to military panels. After all, if unanimous convictions are necessary to ensure the fairness and impartiality of civilian criminal convictions, as *Ramos* held, why would they not be similarly necessary for military courts to return convictions for the same offenses?

Whatever the answer to that question, it has enormous implications for the entire military justice system. It is axiomatic that non-unanimous convictions are easier to obtain than unanimous convictions—and that the specter of a 6-2 or 7-1 panel will thereby inform a defendant's statutory choice as between trial by a panel and trial by a "military judge alone," as authorized by Article 16 of the UCMJ, 10 U.S.C. § 816(b)(3).

The question presented therefore has implications not just for the roughly one-third of general courts-martial tried to a panel, but for *all* general court-martial proceedings. Nor have those implications been lost on military judges and practitioners. As one Air Force CCA judge put it, "There can be no doubt that when *Ramos* was decided, most military practitioners considered this case a watershed moment in the administration of justice; the language Justice Gorsuch uses is unequivocal." *United States* v. *Westcott*, No. ACM 39936, 2022 WL 807944, at *44 (A.F. Ct. Crim. App. Mar. 17, 2022) (Meginley, J., dissenting in part and in the result).

It is rare for this Court to be presented with such a ubiquitous and fundamental constitutional question of military criminal procedure—much less one provoked by a debate over the applicability of one of this Court's own recent decisions. That would be enough to satisfy this Court's criteria for certiorari even if the CAAF had not misread those decisions. That the CAAF *has* done so, *see supra* Part I, only makes the need for this Court's intervention that much more compelling.

III. THIS COURT IS UNLIKELY TO HAVE FUTURE OPPORTUNITIES TO RESOLVE THE QUESTION PRESENTED

If the question presented warrants this Court's attention, this petition is likely to be one of the only vehicles properly raising it. Between *Ramos* and its June 29 ruling in *Anderson*, the CAAF granted petitions for review raising unanimous-conviction objections in 21 cases—subsequently dismissing one of the grants as improvident. *See United States* v. *Causey*, 83 M.J. 25 (C.A.A.F. 2022) (mem.). Of the remaining 20 cases, 18 have now been resolved, and this petition consolidates 16 of those 18 appeals. The CAAF has not granted review of a single additional unanimous conviction issue since its ruling in *Anderson*—suggesting that these 20 cases will comprise the full universe of cases in which the CAAF formally rules on the matter.

These details would be irrelevant to this Court's review of any other lower court. But under 28 U.S.C. § 1259(3), they are critical. As relevant here, this Court may grant certiorari to review decisions by the CAAF only in cases in which the CAAF *itself* granted discretionary review. *See* 10 U.S.C. § 867a(a) ("The

Supreme Court may not review by a writ of certiorari under this section any action of the United States Court of Appeals for the Armed Forces in refusing to grant a petition for review.").

Moreover, the federal government has consistently argued that, even when the CAAF has granted review on *other* issues, this Court's jurisdiction under § 1259(3) runs only to the issues on which the CAAF granted review in that case. *See, e.g.*, Brief for the United States in Opposition at 10–16, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (No. 18-306), 2019 WL 157946. Assuming the CAAF continues to deny new petitions for review challenging the constitutionality of non-unanimous convictions, these 20 cases thus present a closed universe for this Court's opportunity to review that issue on direct appeal.

Nor is the issue likely to reach this Court on appeal from collateral review. As this Court has long made clear, collateral review of military convictions by Article III federal courts is generally unavailable with respect to claims to which the military courts gave "full and fair consideration." *See Burns*, 346 U.S. at 144 (plurality opinion). Although claims implicating the subject-matter jurisdiction of military courts remain subject to *de novo* collateral review, petitioners' claims here do not fall into that category. Thus, insofar as this Court is inclined to resolve if and how *Ramos* applies to courts-martial, direct review of the CAAF in some or all of the 20 cases in which the CAAF granted discretionary review is likely to be the only means by which the Court could reach the matter *de novo*.

* * *

Five years ago, this Court trumpeted the fact that "[m]ilitary courts . . . afford virtually the same procedural protections to service members as those given in a civilian criminal proceeding." *Ortiz* v. *United States*, 138 S. Ct. 2165, 2168 (2018). And although the right to jury trial is often held up as a long-extant counterexample, the reality is that servicemembers charged with serious offenses have had at least a statutory right to be tried by a panel since the first American Articles of War, *see* Rules and Regulations of the Continental Army, art. XXXIII (1775)—and that an unbroken line of precedent has interpreted the Constitution to require that jury-like panel to deliver a verdict that is both fair and impartial. *See, e.g.*, *Wiesen*, 56 M.J. at 174.

So framed, the question for this Court is not whether servicemembers are protected by the Sixth Amendment. It is whether, when servicemembers are tried for offenses over which civilian courts could also exercise jurisdiction, a "fair and impartial" conviction somehow requires *less* from a military panel than it does from a civilian jury. This Court might ultimately decide that the answer is "yes." But given the CAAF's skimpy analysis in *Anderson* and the importance of the question to the future of the military justice system, this Court ought to have the last word on the matter. And these 16 cases are among the only opportunities through which it can provide it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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