No. 24-5594

IN THE

Supreme Court of the United States

SELDRICK CARPENTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Historical documents show that the Framers would have understood the jury right to apply to forfeitures of recognizance, a proceeding similar to revocations of supervised release in form, function, and purpose. In light of this historical record, should this Court's holding in *United States v. Haymond*, 139 S. Ct. 2369 (2019), be expanded to hold that the Sixth Amendment, including the right to a trial by jury, applies to all revocations of federal supervised release?

II. Does Article III, Section 2, Clause 3 of the Constitution, which guarantees that "all Crimes" shall be tried by jury, create an additional jury right for revocation proceedings when revocation is based on an allegation that the supervisee committed new crimes?

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ARGUMENT

I. The government's arguments about the merits of Carpenter's claims are not a reason to deny certiorari.

This case represents an opportunity for course correction. As multiple members of this Court have explained, the jury trial right is derived from "historical practices that existed at the founding and soon afterward." *United States v. Haymond*, 588 U.S. 634, 676 (2019) (Alito, J. dissenting) (collecting cases). But the Seventh Circuit did not reject Carpenter's Sixth Amendment claim because it disagreed with his historical arguments. Instead, the Seventh Circuit concluded that it was bound by its own circuit precedent holding that revocations of supervised release fall outside the Sixth Amendment. (App. 4a.) That precedent was not rooted in historical analysis. And, as the Seventh Circuit recognized, its precedent also conflicts with the plurality opinion in *Haymond*. (App 6a.).

This Court has never held that supervised-release revocations fall outside the Sixth Amendment. This Court has not previously considered the question of whether the Sixth Amendment applies to ordinary supervised-release revocations. But the question needs resolution. And because lower courts like the Seventh Circuit are failing to conduct the necessary historical analysis, this Court needs to step in.

No surprise then that the government's mains argument in opposition to certiorari are an attack on the merits of Carpenter's claims. The government's arguments are half-hearted, however, and they do not show that the legal issues presented are so straightforward that certiorari is unnecessary. Carpenter

exhaustively addressed the problems with the government's historical analysis in the lower court briefing. But here is a brief overview of why the government's counterarguments fall short.

A. The Sixth Amendment provides a jury right to federal supervisees at revocation.

The government insists that revocations under 18 U.S.C. § 3583(e)(3) are not "criminal prosecutions" within the meaning of the Sixth Amendment because a revocation merely modifies an already imposed sentence. (Gov't Br. at 12.) But the government makes the same mistake as government counsel made in *Haymond*: It assumes that supervised release is the same as parole or probation, and so it imports the reasoning used in parole and probation decisions like *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Justice Gorsuch explained in *Haymond* why that assumption is wrong. *Haymond*, 139 S. Ct. at 2381. The creation of supervised release was a fundamental shift from a balance-owed system (as in traditional parole and probation) to a no-balance system. "[U]nlike parole, supervised release wasn't introduced to replace a portion of defendant's prison term." *Id.* at 2382.

The government is also wrong that Justice Gorsuch's opinion in *Haymond* somehow supports the government's position. (Gov't Br. at 13–14.) All the government can accurately say is that *Haymond*'s holding was narrow. And to be sure, the ultimate holding *was* narrow. This Court decided only the constitutionality of 18 U.S.C. § 3583(k), not the constitutionality of revocations more broadly.

Haymond, 139 S. Ct. at 2379–2380; id. at 2369 (Breyer, J., concurring). Justice Gorsuch's plurality opinion accordingly included some language noting the limited nature of that holding. *Id.* at 2379–2380. Carpenter does not contest the narrowness of *Haymond*'s holding, nor does he contend that *Haymond*'s holding as to § 3583(k) bound the Seventh Circuit to conclude that revocations under § 3583(e) are also unconstitutional.

But at the same time, *Haymond* did not shut the door on challenges like Carpenter's. This Court merely followed judicial best practices. When faced with a narrow question, it decided only the narrow issue before it without addressing broader constitutional concerns. Nonetheless, the reasoning of Justice Gorsuch's opinion points in a clear direction: it "lay[s] the groundwork for later decisions of much broader scope." *Id.* at 2386 (Alito, J., dissenting). The *Haymond* plurality recognized for the first time that supervised release marked a clean break from parole, and that the constitutional analysis that applied to parole and probation revocations was no longer relevant. The potential effect of this reasoning is clear: "the plurality opinion strongly suggest[s] that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding." *Id.* at 2387 (Alito, J., dissenting).

Also unpersuasive are the government's arguments about the history of recognizance forfeitures. As an initial matter, the government does not dispute that recognizance forfeitures required juries. And for good reason: founding-era court opinions cite juries. *See, e.g., Brumme v. State*, 39 Tex. 538, 543 (1873) (recognizing

jury trial on recognizance forfeiture); *Respublica v. Cobbett*, 3 U.S. 467, 472–73 (Pa. 1798) (same); *Commonwealth v. Davies*, 1 Binn. 97, 99–100 (Penn. 1804) (same). Nonetheless, the government argues that recognizances are a poor analogue for supervised release for two main reasons. Neither is persuasive.

First, the government argues that founding-era courts used the "generalized power" of recognizances in cases outside the criminal context. (Gov't Br. at 16.) The government's argument misses the point. Although recognizances sometimes issued for purposes other than postconviction supervision,[1] the government does not (and cannot) dispute that founding-era courts also used them as a form of postconviction community supervision. *See* Jacob Schuman*, Revocation at the Founding*, 122 Mich. L. Rev. 1381, 1411–12 (2024) (collecting cases). Indeed, "[c]ertain features of the peace bond bear a striking resemblance to the bureaucratized supervision" of modern defendants. Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1848 n.183 (2024). And forfeiture of those postconviction recognizances required a jury trial, just like any other recognizance forfeiture proceeding. *See, e.g., Brumme v. State*, 39 Tex. 538, 543 (1873) (forfeiture jury when recognizance taken as punishment for convicted offender).

Second, the government argues that, unlike supervised release, forfeitures of recognizance were a civil matter akin to an action to recover a civil debt. (Gov't Br. at 16.) The government is right only insofar that the process was formally framed as

[1] For example, recognizance was used as a form of pretrial bail. *See Ex parte Milburn*, 34 U.S. (9 Pet.) 704, 710 (1835).

a debt. "When a recognizor violated a condition of their recognizance, the court could forfeit their bond and require them to pay the promised sum." Schuman, 122 Mich. L. Rev. at 1416. But judges could manipulate the process by requiring impossible amounts that the violator could not afford to pay, allowing the judge to jail the violator. *Id*. at 1416–17. The end result was the same as a supervision revocation: a loss of liberty. *Haymond*, 139 S. Ct. at 2396 (Alito, J., dissenting). Thus, early American courts recognized that recognizance of forfeiture could be "of a criminal nature" in certain contexts. *Cobbett*, 3 U.S. at 475. *See also* Paul Lermack, *Peace Bonds and Criminal Justice in Colonial Philadelphia*, 100 Pa. Mag. of Hist. & Biography 173, 178 (1976) (recognizances were "denials of liberty" and "modern due process concepts would require that a peace bond could not be imposed until after the criminal trial").

To emphasize the supposed civil nature of recognizances, the government further argues that recognizances were enforced through a writ of *scire facias*. (Gov't Br. at 16.) The government's point here is not clear. As the government explains, *scire facias* was an order for the defendant to show cause why a penalty should not be imposed. *See* Funk, 137 Harv. L. Rev. at 1831. That procedure is remarkably similar to how supervision revocations operate today, in which the supervisee is entitled to written notice of his alleged violations and given an opportunity to respond. FED. R. CRIM. P. 32.1(b)(2); *United States v. Lee*, 795 F.3d 682, 686 (7th Cir. 2015). Modern courts do not immediately revoke supervision upon mere allegation of a violation. The fact that founding-era court gave recognizors a

similar opportunity to respond to allegations of breach only strengthens the two systems' similarities.

Carpenter does not need to show that recognizances were a "historical twin" for supervised release, only that they were "a well-established and representative historical analogue." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133 (2022). Nothing in the government's response suggests that Carpenter will be unable to meet that bar if this Court grants certiorari. Although the government nitpicks a couple minor differences, postconviction recognizances and supervised release remain similar in form, function, and purpose.

B. Article III of the Constitution creates a jury right, distinct from the Sixth Amendment, which applies in this case.

The government is wrong when it says that this Court has never drawn a distinction between the Sixth Amendment's and Article III's jury clauses. More than a century ago, this Court rejected the notion that "the [sixth] amendment was intended to supplant that part of the third article which relates to trial by jury." *Callan v. Wilson*, 127 U.S. 540, 549 (1888). Indeed, the *Callan* Court described the same distinction between the jury clauses that Carpenter furthers in this case: Article III provides a broad jury right whenever one is accused of a "crime," with that word "interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury." *Id* at 549. But Article III only "implie[s] a trial in that mode"; it does not preserve the individual procedural rules of how a jury trial should function. *Id*. The

Sixth Amendment provides a separate "declaration of what those [procedural] rules were" *Id*.

In other words, Article III says when a defendant gets a jury trial: when accused of a "crime," or any time "the general government can be a party against a citizen." Records of the Federal Convention of 1787, p. 163 (M. Farrand ed. 1911) (James Wilson in the Pennsylvania Convention). The Sixth Amendment dictates additional features of a jury trial, such as the vicinage requirement—but instead of all "crimes," it applies only to a smaller class of "criminal prosecutions". *See Ex Parte Quirin*, 317 U.S. 1, 39 (1942) (the Sixth Amendment protects "certain incidents of trial by jury" but does not modify Article III's declaration of when a defendant has "the right to a jury trial"). Related but distinct protections.

The government is correct that some stray sources suggest that Article III's and the Sixth Amendment's jury clauses mean the same thing. Most significantly, at the height of the *Lochner* era, this Court briefly held that both clauses should be construed as coterminous. *See Patton v. United States*, 281 U.S. 276, 298 (1930), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970). But this Court later backtracked from this position, and modern precedent considers the two clauses as distinct. *See Williams*, 399 U.S. at 92; *Smith v. United States*, 599 U.S. 236, 248 (2023). And as explained in Carpenter's petition, founding-era sources corroborate the modern precedent, not the views of the *Lochner* Court.

At this stage, Carpenter will not belabor the merits of his arguments. He wishes to emphasize only that, even if reasonable jurists could agree with the government's points, Carpenter has strong authority behind his position. The questions presented are not so weak as to render resolution of them unnecessary. And because lower courts are failing to grapple with the historical record, this Court should step in.

II. This case is an excellent vehicle for this Court to address the issue.

Carpenter's revocation hearing looked a lot like a criminal trial. He was accused of committing arson. He denied the accusation. Both sides put in evidence. When the government proved that Carpenter committed the crime, the district court put Carpenter in prison. To an outside observer, this revocation had all the hallmarks of a criminal proceeding. *See United States v. Peguero*, 34 F.4th 143, 167 (2d Cir. 2022) (Underhill, D.J. dissenting.)

This procedural history is what makes his case a good vehicle to review the questions raised. Because, although superficially similar to a trial, Carpenter's revocation lacked the procedural protections of a jury trial under the Constitution. Key to the government's ability to prove guilt was a lower burden of proof and the use of hearsay evidence that would have been inadmissible in a jury trial. The questions presented thus go to the heart of the district court's finding of guilt.

The government notes that several pending petitions (unrelated to this case or the companion case of *Smith v. United States*, 24-5608) raise similar Sixth

Amendment challenges to revocations of supervised release. (Gov't Br. at 8.) But the availability of these other petitions does not warrant against granting certiorari in this case. Most significantly, the other petitions cited by the government are all brought on plain-error review, and thus the petitioners in those cases concede that they face "vehicle problem[s]." *Stradford v. United States*, No. 24-5943 (filed Nov. 6, 2024) at 7; *Reyes v. United States*, No. 24-5944 (filed Nov. 5, 2024) at 8; *Sevier v. United States*, No. 24-5679 (filed Sept. 27, 2024) at 6. Neither this case nor Jason Smith's companion case face similar vehicle problems. Carpenter's and Smith's cases are ideal bellwethers for this Court to assess the future of supervised-release revocations post-*Haymond*.

The government also suggests that this Court should pass on the presented issue for now so that other courts can have an opportunity to review the historical evidence that was first presented in this case. (Gov't Br. at 17.) But as explained in Carpenter's petition, the number of challenges to § 3583(e)'s constitutionality will rapidly dwindle without this Court's intervention. Like the Seventh Circuit, virtually every circuit has "thirty years of contrary precedent" holding that supervised-release revocations fall outside the Sixth Amendment. (App. 4a.) Litigants are unlikely to risk the ire of judges by continuing to raise this claim after it has already been soundly foreclosed by circuit law. Unless this Court signals that the issue due for reconsideration, Sixth Amendment challenges to revocations of supervised release will fade away.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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