No. 24-654

IN THE

Supreme Court of the United States

DAVID LESH,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include constitutionally limited government, the separation of powers, and due process of law. AFPF advocates for an array of improvements to the criminal justice system that enhance public safety and ensure the protection of constitutional rights. As part of this mission, it appears as *amicus curiae* before federal and state courts.

In this country, due process requires that a person who is charged with a crime is presumed innocent until proven guilty beyond a reasonable doubt. A person charged with a criminal offense also has a fundamental constitutional right to be tried by a jury of his peers that cannot be abrogated by fiat. Basic

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[1] All parties have received timely notice of *amicus curiae*'s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

fairness to the accused demands no less. And the Constitution brooks no exception.

SUMMARY OF ARGUMENT

One might be forgiven for thinking that in this country, a person charged with a crime has a right to have his guilt ascertained by a jury of his peers. After all, the Constitution unequivocally promises—*twice*—that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," U.S. Const. amend. VI, and that "[t]he Trial of all Crimes . . . shall be by Jury," U.S. Const. art. III, § 2. But today people charged with so-called "petty offenses" are routinely denied this fundamental right and found guilty of crimes carrying a sentence of up to six months in prison by a single judge.

How is this constitutionally dubious practice possible? To be sure, a criminal defendant may knowingly waive his right to a jury trial and choose a bench trial. This poses no constitutional problem. And in some circumstances, it makes good sense for a defendant to do so. But "[m]any years ago this Court, without the necessity of an amendment pursuant to Article V, decided that 'all crimes' did not mean 'all crimes,' but meant only 'all serious crimes.'" *Baldwin v. New York*, 399 U.S. 66, 75 (1970) (Black, J., concurring in the judgment). And today this "Court['s] precedents limit the jury trial right to 'serious' infractions punishable by six or more months of imprisonment." Pet. App. 24a (citing *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. 538, 542 (1989)).

Under the modern judge-made "petty offense" doctrine, a person charged with a criminal offense

carrying less than a six-month maximum prison term does not have a federal constitutional right to be tried by a jury of his peers. This doctrine applies even when the accused is charged with multiple "petty offenses," so that his maximum exposure to imprisonment is, in the aggregate, much longer than six months. This means that someone can be sentenced to years in prison without even having a right to a jury trial.

This modern doctrine has no basis in the Constitution's text, structure, and history. Indeed, in its current form it is divorced even from the common law. It is instead supported by what is essentially a form of judicial cost-benefit analysis based on policy considerations. As Justice Black put it, this mode of "constitutional adjudication" is "little more than judicial mutilation of our written Constitution." *Baldwin*, 399 U.S. at 75 (concurring). It is also wildly unjust, elevating government efficiency over a core constitutional right of an individual whose liberty is on the line. This state of affairs should not stand.

"The right to trial by jury is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care." *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024) (cleaned up). So too here. To be sure, there is some scholarly debate about how the common law conceived "petty offenses" subject to adjudication by summary proceedings. And the extent to which the common law recognized an exception to the jury trial right for petty offenses, if at all, is likewise subject to some scholarly debate. But what is clear is that the judge-made "petty offense" doctrine in its current form is not only unfair to criminal defendants but

incompatible with originalism. *See* Pet. App. 29a–30a. And whatever the proper constitutional scope of the jury trial right, a judge-made rule that arbitrarily draws the constitutional line at six months imprisonment for policy reasons is not it. As Judge Tymkovich, joined by Judge Rossman, observed in the decision below, "the correct scope of the Constitution's right to a trial by jury may warrant a closer examination by the Supreme Court." Pet. App. 26a (concurring). *Amicus* respectfully submits that this case is an ideal vehicle to do so.

For the foregoing reasons, this Court should grant Mr. Lesh's Petition.

ARGUMENT

I. The Jury Trial Right Is a Key Check Against Arbitrary Government Power.

"The trial by jury is justly dear to the American people." *Parsons v. Bedford*, 28 U.S. (3 Peters) 433, 446 (1830) (Story, J.). The jury-trial right has been described as "the spinal column of American democracy." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part). As Justice Story put it: "The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers[.] . . . . So long, indeed, as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fall." 3 Joseph Story, Commentaries on the Constitution of the United States § 1774 (1833). Blackstone likewise considered "trial by jury" a "grand" defense of liberty. 4 William Blackstone, Commentaries on the Laws of England, A Facsimile

of the First Edition of 1765–1769, at 342 (1789) (University of Chicago Press 1979). Rightfully so.

"The primary purpose of the jury in our legal system is to stand between the accused and the powers of the State." *Lewis v. United States*, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring in the judgment). It "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (Scalia, J.). The jury-trial right is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The jury acts as "the final check to hold all three branches accountable." Vikrant P. Reddy & Jordan Richardson, *Why the Founders Cherished the Jury*, 31 Fed. Sent. R. 316 (2019).

"Prominent among the reasons colonists cited in the Declaration of Independence for their break with Great Britain was the fact Parliament and the Crown had 'depriv[ed] [them] in many cases, of the benefits of Trial by Jury.'" *Erlinger v. United States*, 602 U.S. 821, 829 (2024) (quoting Decl. of Independence ¶ 20). For that matter, "[e]ven before the Declaration of Independence, the First Continental Congress's Declaration of Rights of 1774 had proclaimed the right to jury trial." Albert Alschuler & Andrew Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 870 (1994) (citations omitted). Going back further still, the Magna Carta likewise promised this right:

"No freeman shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta ¶ 39 (1215).

Unsurprisingly, "the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights."[2] *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). As Alexander Hamilton wrote: "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." Federalist No. 83. Indeed, the Framers "considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." *United States v. Haymond*, 588 U.S. 634, 640–41 (2019) (plurality) (citation omitted).

II. The Scope of the Constitution's Jury Trial Guarantee Warrants Reexamination.

The modern "petty offense" exception to the jury-trial right eviscerates a core check against overreaching criminal prosecutions and wrongful convictions. "Additionally, multiple scholars have

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[2] "Twelve states had enacted written constitutions prior to the Constitutional Convention, and the only right that these twelve constitutions declared unanimously was the right of a criminal defendant to jury trial." Alschuler & Deiss, 61 U. Chi. L. Rev. at 870; *see Duncan*, 391 U.S. at 153 ("The constitutions adopted by the original States guaranteed jury trial.").

argued the Court's doctrine is incompatible with the original public understanding of the Constitution." Pet. App. 29a (collecting scholarship). These scholars appear to have a point.

"Constitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824); 1 J. Story, Commentaries on the Constitution of the United States § 399, p. 383 (1833)). Here, the jury-trial right flows from the Constitution's plain text. That text forecloses the modern judge-made "petty offense" balancing test.

The Constitution guarantees the right to a jury trial in two places.[3] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]"[4] U.S. Const. amend. VI. The jury-trial right is also textually guaranteed in Article III

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[3] This constitutional guarantee is unique because it is "the only one to appear in both the body of the Constitution and the Bill of Rights[.]" *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part, dissenting in part). Indeed, "[o]ne indication of the importance with which the founders regarded the jury trial guarantee is that it was one of the few rights mentioned in the original, unamended Constitution." Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 Kan. J. L. & Pub. Pol'y 7, 8 (1994).

[4] "The text of the Sixth Amendment makes clear that this is 'a right of the "accused" and only the "accused."'" *Haymond*, 588 U.S. at 669 (Alito, J., dissenting) (quoting Akhil Amar, The Bill of Rights 111 (1998)).

itself: "The Trial of all Crimes . . . shall be by Jury[.]" U.S. Const. art. III, § 2. Those textual commands must be followed. For "the text of the Constitution always controls," including "over contrary historical practices." *United States v. Rahimi*, 602 U.S. 680, 718 n.2 (2024) (Kavanaugh, J., concurring).

"Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34 (2022) (cleaned up). The Constitution's "[w]ords must be given the meaning they had when the text was adopted[.]" Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 78 (2012).

"At the founding, a 'prosecution' of an individual simply referred to 'the manner of [his] formal accusation.'" *Haymond*, 588 U.S. at 641 (plurality) (quoting 4 W. Blackstone, Commentaries on the Laws of England 298 (1769)); *see also* Noah Webster, American Dictionary of the English Language (1828) [hereinafter "Webster"] (defining "prosecution" as "[t]he institution or commencement and continuance of a criminal suit").[5] "'Prosecution,' as Blackstone used the term, referred to 'instituting a criminal suit' by filing a formal charging document—an indictment, presentment, or information—upon which the defendant was to be tried in a court with power to punish the alleged offense." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 221 (2008) (Thomas, J., dissenting) (quoting 4 Blackstone *309).

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[5] https://webstersdictionary1828.com/Dictionary/prosecution

And the evidence is at least mixed on the original meaning of the word "crime."[6] Although Founding-era dictionaries indicate that in some contexts it could be used in a narrower sense to "denote[] an offense, or violation of public law, of a deeper and more atrocious nature; a public wrong," such as "treason, murder, robbery, theft, arson, etc.,"as distinct from "minor wrongs against public rights" characterized as "misdemeanors," Webster, *supra* (defining "crime"),[7] the term also carried a general meaning. Founding-era dictionaries likewise indicate that the word "criminal" could carry a broad meaning. *See, e.g.,* 1 Samuel Johnson, A Dictionary of the English Language (1773) [hereinafter "Johnson"] (defining "criminal, adj." as "3. Not civil: as a *criminal* prosecution; the *criminal* law.");[8] Webster, *supra* (defining "criminal, *adjective*" as "4. Relating to crimes; opposed to civil; as a *criminal* code; *criminal* law"). *Cf. Apprendi*, 530

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[6] "[P]re-Founding and Founding-era dictionaries generally take the following approach: the term crime can be used in both broad and narrow ways, like in Blackstone; the term misdemeanors is sometimes colloquially referred to as separate from crimes (crimes and misdemeanors) and other times as crimes themselves (minor crimes lower than felonies); and the term prosecution typically includes any criminal proceeding, whether serious or minor." Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 Duke L.J. 590, 638 (2022); *see* George Kaye, *Petty Offenders Have No Peers*!, 26 U. Chi. L. Rev. 245, 248 n.26 (1959) ("[T]he occasional restriction in meaning noted by Blackstone is far from conclusive when that author himself regularly employs the word 'crimes' in its broad sense.").

[7] https://webstersdictionary1828.com/Dictionary/crime.

[8]https://johnsonsdictionaryonline.com/views/search.php?term=criminal

U.S. at 501 (Thomas, J., concurring) ("a 'crime' includes every fact that is by law a basis for imposing or increasing punishment"); *Haymond*, 588 U.S. at 641 (plurality).

Founding-era dictionaries also appear to suggest that "all" means "all." *See* Johnson, *supra* (defining "All, adj." as "1. Being the whole number; every one.");[9] Webster, *supra* (defining "All" as "1. Every one, or the whole number of particulars.").[10] "[N]ot an unspecified subset." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). *Cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (Sixth Amendment uses "language broad enough to embrace all persons and cases"). In short, although Founding-era "dictionaries offer less than dispositive evidence against the petty offense doctrine, they certainly do not offer strong support for it," Roth, 72 Duke L.J. at 638; at a minimum, these sources do not appear to support this Court's modern approach.

Nor does the Constitution's structure appear to lend support to the modern doctrine. For example, when the Framers wanted to exempt categories of cases from the jury trial guarantee, they knew how to do so. *See, e.g.,* U.S. Const. art. III, § 2, cl. 3 ("the Trial of all crimes, *except* in Cases of Impeachment, shall be by Jury"); *see also* U.S. Const. amend. V (grand jury required for "capital, or otherwise infamous crime[s]" "except in cases arising in the land or naval forces").

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[9] https://johnsonsdictionaryonline.com/views/search.php?term=all

[10] https://webstersdictionary1828.com/Dictionary/all

Cf. Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 9 ("[T]he trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.").

The Framers likewise knew how to differentiate between grades of crimes. Consider the Impeachment Clause, which refers to "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. Or the Piracy and Felonies Clause, which grants Congress the power to "define and punish Piracies and Felonies committed on the high Seas and Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. "Those provisions suggest that when the Convention delegates wished to distinguish between the grades of various offenses, they knew how to do so." Lynch, 4 Kan. J. L. & Pub. Pol'y at 12 . So too the Fifth Amendment's Grand Jury Clause, which, with exceptions, limits that right to "capital, or otherwise infamous crime[s.]" U.S. Const. amend. V.

It is also worth noting that the Constitution, as originally understood, gave Congress limited power to create federal crimes. *Cf.* Lynch, 4 Kan. J. L. & Pub. Pol'y at 21 n.106 (suggesting "[i]t is safe to say that the Constitution of 1787 would not have been ratified if the state delegates had apprehended such broad federal powers"). "These provisions" "were written at a time when the Federal Government exercised only a limited authority to provide for federal offenses 'very grave and few in number.'" *Baldwin*, 399 U.S. at 76 (Burger, J., dissenting) (citing Felix Frankfurter & Thomas Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 975–76 (1926)).

There were no federal petty offenses when the Sixth Amendment was ratified.[11] *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. Pa. J. Const. L. 487, 549–50 (2009) (Appendix A) (listing federal crimes and punishments); An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790). Indeed, "[f]or most of the country's first century, the question of whether a defendant charged with a petty crime has a Sixth Amendment right to jury did not arise."[12] Roth, 72 Duke L.J. at 608. "[T]hose few federal crimes with potential sentences of six months or less appear to have been generally tried by jury until . . . 1888." *Id.* at 608–09 (citations omitted)

In sum, whatever the proper scope of the jury-trial right as a matter of first principles, the Constitution's text, structure, and history do not appear to lend support to the modern doctrine, including the aggregation principle. Nor does the common law appear to justify this Court's modern approach, to the

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[11] At the Founding there "were divergent traditions about of the right to a jury in criminal cases: There was the traditional right to a jury in all cases, as guaranteed by Magna Carta and the common law, but there was also the modified version of the right, as adjusted by the recent statutes on petty offenses." Philip Hamburger, Is Administrative Law Unlawful? 244 (2014).

[12] "Even as a matter of state law, the petty crime jury trial issue arose infrequently before the twentieth century. By the late 1800s, only two states . . . appear to have allowed nonjury trials by justices of the peace in criminal cases, both in cases of petty larceny." Roth, 72 Duke L.J. at 609–10.

extent it informs the analysis.[13] Worse, as Petitioner explains, the Court's modern doctrine flows from "precedent reached with sparse briefing and has never been subjected to serious adversarial testing." Pet. 13. Whatever the answer to the question presented, this constitutional anomaly warrants this Court's attention with the benefit of full merits briefing.

III. The Modern Petty Offense Doctrine Cannot be Squared With the Constitution.

"For well over a century, the Supreme Court has read into the federal constitutional jury trial guarantee an extra-textual limitation that exempts from its coverage the majority of criminal prosecutions." John D. King, *Juries, Democracy, and*

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[13] To be sure, "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *S. Union Co. v. United States*, 567 U.S. 343, 353 (2012) (cleaned up). But the Sixth Amendment does not neatly track the common law in all cases. *Cf.* Lynch, 4 Kan. J. L. & Pub. Policy at 13–14 (addressing argument that "the Sixth Amendment must be interpreted in light of the common law, which recognized a petty offense exception to the right to a jury trial"). For example, "the Sixth Amendment appears to have been understood at the time of ratification as a rejection of the English common-law rule that prohibited counsel[.]" *Garza v. Idaho*, 586 U.S. 232, 260 (2019) (Thomas, J., dissenting). In any event, it appears "[t]here is some disagreement about how the common law defined the category of petty offenses." Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097, 1125 n.208 (2001). And at a minimum "it is far from evident that the common law recognized a petty offense exception to the right to trial by jury." Lynch, 4 Kan. J. L. & Pub. Policy at 13 (citing Kaye, 26 U. Chi. L. Rev. at 246–47); *see* Hamburger, *supra*, 244; Pet. 21–23.

Petty Crime, 24 U. Pa. J. Const. L. 817, 818 (2022). In essence, the Court has "replace[d] the Constitution's text with a new set of judge-made rules to govern" the scope of criminal defendants' right to a jury trial. *NLRB v. Noel Canning*, 573 U.S. 513, 614 (2014) (Scalia, J., concurring in the judgment). How did this happen?

This drift away from the Constitution's text began in *Callan* v. *Wilson*, 127 U.S. 540 (1888). "The notion of a class of 'petty offenses' for which prosecution would carry no right to jury trial first surfaced in this Court in the dicta of *Callan* . . . , which held that a conspiracy offense did not belong in the 'petty' class." *Johnson v. Nebraska*, 419 U.S. 949, 949 (1974) (Douglas, J., dissenting from denial of certiorari). This dicta limited the jury-trial right to "serious" crimes, which were determined by reference to the "common law." *Callan*, 127 U.S. at 549. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 417–23, 441–48 (2024) (Gorsuch, J., concurring) (discussing role of dicta in judicial decisionmaking and using now-overruled *Chevron* doctrine as a cautionary tale against overreliance on stray remarks in past decisions).

Next came *Schick v. United States*, 195 U.S. 65 (1904), where "the Court reaffirmed the petty offense exception in yet another case in which doing so was not necessary to the result and in which no party argued against the exception." Roth, 72 Duke L.J. at 616. "Schick was charged with violating a provision of the Oleomargarine Act which subjected the offender to a $50 penalty. *He waived jury trial*." Kaye, 26 U. Chi. L. Rev. at 274. And "the holding of that case was that the defendant's waiver of jury trial in the District Court did not invalidate his conviction." *Johnson*, 419

U.S. at 950 (Douglas, J., dissenting from denial of certiorari). Nonetheless, "the *Schick* Court not only reached the petty offense issue but significantly expanded upon *Callan*'s dictum."[14] Roth, 72 Duke L.J. at 617; *see Schick*, 195 U.S. at 68–70.

Justice Harlan—who authored *Callan*—dissented. As he explained:

> I am not aware of, nor has there been cited, any case in England in which, after *Magna Charta* and prior to the adoption of our Constitution, a court, tribunal, officer, or commissioner has, without a jury, even in the case of a petty offense, determined the question of crime or no crime, when the defendant

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[14] The *Schick* Court cited Blackstone's "definition of the word 'crimes'" to support this expansion of the petty-offense doctrine. *See* 195 U.S. at 69–70. But the majority's discussion of Blackstone appears incomplete. As Professor Roth observed:

> [T]he Court acknowledged that Blackstone defined both crimes and misdemeanors as "act[s] committed, or omitted, in violation of a public law" and described them as, "properly speaking, . . . mere[ly] synonymous terms." But the Court highlighted Blackstone's subsequent observation that, in common usage, the term crime "denote[s] offenses . . . of a deeper and more atrocious dye; while smaller faults and omissions of less consequence" are misdemeanors only.

72 Duke L.J. at 617 (citations omitted). This overlooks that "Blackstone elsewhere in the volume declared that summary convictions for crimes deemed petty by Parliament were unjust deviations from the common right to jury in criminal cases." *Id.*

> pleaded not guilty, *unless the authority to do so was expressly conferred by an act of Parliament.*[15]

Schick, 195 U.S. at 80 (Harlan, J., dissenting). "No court at common law assumed, without a jury, to try any offense, however trivial or petty, except under the authority of a statute conferring authority to that end." *Id.* at 97 (Harlan, J., dissenting); *see* Melissa Hartigan, *Creatures of the Common Law: The Petty Offense Doctrine and 18 U.S.C. 19*, 59 Mont. L. Rev. 343, 354–56 (1995) (surveying historical evidence).

"Not until *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937), did the Court squarely rule that certain prosecutions are outside the constitutional guarantee." *Johnson*, 419 U.S. at 950 (Douglas, J., dissenting from denial of certiorari). In *Clawans*, this Court held that the scope of the petty offense exception should be determined "by objective standards such as may be observed in the laws and

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[15] "[T]o Blackstone's American students it would have been only natural to regard the right to a criminal jury as a protection generally in existence under Magna Carta except where the positive law of Parliament or the colonial legislatures made explicit inroads upon it." Kaye, 26 U. Chi. L. Rev. at 247. And according to Blackstone, "[e]xcept in cases of contempt, the common law . . . was a stranger to the summary proceedings authorized by acts of Parliament." *Schick*, 195 U.S. at 80 (Harlan, J., dissenting) (citation omitted); *see* 4 Blackstone, Commentaries c.20, 277 ("By a *summary* proceeding, I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament.").

practices of the community taken as a gauge of its social and ethical judgments." 300 U.S. at 628. The Court assumed that "objective standard" is the maximum prison length authorized by Congress. *See id.* This reasoning thereby severed any necessary link with the common law. *See Lewis*, 518 U.S. at 325–26.

It also defies common sense. As Justice McReynolds, joined by Justice Butler, observed:

> In a suit at common law to recover above $ 20.00, a jury trial is assured. . . . [I]t seems improbable that while providing for this protection in such a trifling matter the framers of the Constitution intended that it might be denied where imprisonment for a considerable time or liability for fifteen times $ 20.00 confronts the accused.

Clawans, 300 U.S. at 666 (dissenting).

This Court subsequently "abandoned any attempt to define petty offenses in terms of the common law, instead redefining the category to include only those crimes punishable by six months' imprisonment or less." Bibas, 110 Yale L.J. at 1125 n.208 (citing *Lewis*, 518 U.S. at 325–28; *Blanton*, 489 U.S. at 543). Worse still, in *Lewis*, this Court held that the petty offense doctrine applies even when the accused is charged with multiple petty offenses, so that his maximum

exposure to imprisonment is in the aggregate much longer than six months. *See* 518 at 330.[16]

This means that "a criminal defendant may be convicted of innumerable offenses in one proceeding and sentenced to any number of years' imprisonment, all without benefit of a jury trial, so long as no one of the offenses considered alone is punishable by more than six months in prison." *Id.* at 330–31 (Kennedy, J., concurring in the judgment). "In many cases, a prosecutor can choose to charge a defendant with multiple petty offenses rather than a single serious offense, and so prevent him . . . from obtaining a trial by jury while still obtaining the same punishment." *Id.* at 336 (Kennedy, J., concurring in the judgment). *Cf.* Philip P. Pan, Landlord Faces Criminal Charges, Washington Post (April 1, 2000) (defendant "charged with 12,948" petty offenses exposed to maximum sentence of "3,192 years in prison" and "nearly $3.9 million" fine).[17]

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[16] This poses a grave threat to the liberty of "millions of persons in agriculture, manufacturing, and trade who must comply with minute administrative regulations, many of them carrying a jail term of six months or less." *Lewis*, 518 U.S. at 337 (Kennedy, J., concurring). That is because "[v]iolations of these sorts of rules often involve repeated, discrete acts which can result in potential liability of years of imprisonment." *Id.* (Kennedy, J., concurring). And there are an untold number of such administrative rules. "By one estimate, there are over 300,000 federal regulations that may be enforced criminally." John C. Coffee Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. Rev. 193, 216 (1991).

[17] https://www.washingtonpost.com/wp-srv/WPcap/2000-04/01/032r-040100-idx.html.

IV. The Modern Petty Offense Doctrine Both Exceeds and Abdicates the Judicial Role.

This modern precedent cannot be squared with the Constitution's text, structure, or history. It is instead the product of judicial cost-benefit analysis and atextual line drawing. *See, e.g.*, *Blanton*, 489 U.S. at 542–43 ("As for a prison term of six months or less, we recognized that it will seldom be viewed by the defendant as 'trivial' or 'petty.' But we found that the disadvantages of such a sentence, 'onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.'" (quoting *Baldwin*, 399 U.S. at 73)). The line is drawn "by weighing the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial and magically concluding that the scale tips at six months' imprisonment." *Baldwin*, 399 U.S. at 75 (Black, J., concurring in the judgment).

As Justice McReynolds observed in *Clawans*, "Constitutional guarantees ought not to be subordinated to convenience, nor denied upon questionable precedents or uncertain reasoning." 300 U.S. at 634 (dissenting). Courts simply "are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with [their] findings." *Maryland v. Craig*, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting). But that is exactly what happened here.

This policymaking project exceeds the judicial role of "say[ing] what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), as opposed to what judges think it should be. "Such constitutional

adjudication, whether framed in terms of 'fundamental fairness,' 'balancing,' or 'shocking the conscience,' amounts in every case to little more than judicial mutilation of our written Constitution." *Baldwin v*, 399 U.S. at 75 (1970) (Black, J., concurring in the judgment). "[T]he Constitution forbids th[is] kind of line drawing[.]" *Johnson*, 419 U.S. at 952 (Douglas, J., dissenting from denial of certiorari).

"When the American people chose to enshrine [the jury trial] right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses." *Ramos v. Louisiana*, 590 U.S. 83, 100 (2020). The jury-trial right "has never been efficient; but it has always been free." *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). The Constitution contains "no efficiency exception to" this right. *Erlinger*, 602 U.S. at 842. To the contrary, "[t]hose who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary. They decided that the value of a jury trial far outweighed its costs for 'all crimes' and 'in all criminal prosecutions.'" *Baldwin*, 399 U.S. at 75 (Black, J., concurring in the judgment). In so doing, "the Framers foreclosed any judicial freedom to decide that in certain prosecutions trial by jury is unwarranted." *Johnson*, 419 U.S. at 952 (Douglas, J., dissenting from denial of certiorari).

Perversely, the petty offense doctrine not only exceeds but also abdicates the judicial role, ceding to the legislative and executive branches the power to control the metes and bounds of the jury trial right with respect to certain crimes. This "Court's doctrine directs the judiciary to rely primarily on the legislative branch's 'judgment' about the severity of an offense, and, in turn, that judgment completely

defines the scope of the Article III and Sixth Amendment right to a trial by jury." Pet. App. 30a (Tymkovich, J., concurring); *see, e.g., Lewis*, 518 U.S. at 326 ("The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task[.]" (cleaned up)).

"Unique among constitutional doctrines of interpretation, the petty offense doctrine calls for direct legislative involvement in the determination of a criminal defendant's constitutional right to trial by jury." Hartigan, 59 Mont. L. Rev. at 348. *But cf.* Federalist No. 83 ("[I]f nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases[.]"). This means that "the judicial imperative of interpreting the fundamental-to-liberty jury right has been abdicated to the legislative branch, or in this case even the executive branch." Pet. App. 30a (Tymkovich, J., concurring).

This judicial abdication should not stand. As Justice Gorsuch has explained:

> Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn't about protecting judicial authority for its own sake. It's about ensuring the people today and tomorrow enjoy no fewer rights against

> governmental intrusion than those who came before.

Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 356 (2018) (dissenting). That observation resonates here.

"It is high time . . . to wipe out root and branch the judge-invented and judge-maintained" modern petty offense doctrine. *United States v. Barnett*, 376 U.S. 681, 727 (1964) (Black, J., dissenting). Government efficiency should never trump individual liberty. And this Court should enforce the Constitution's promise that a person accused of a crime has a right to be tried by a jury of his peers and jettison this judicial policymaking project. "It will be a fine day for the constitutional liberty of individuals in this country when that at last is done." *Id.* at 727–28 (Black, J., dissenting).

CONCLUSION

This Court should grant Mr. Lesh's Petition.

Respectfully submitted,

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