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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Sixth Amendment provides that "[i]n all criminal prosecutions," the accused shall enjoy the right to trial by jury. U.S. Const. amend. VI. Yet the Government never disputes that the proceeding in which petitioner was convicted of "petty offenses" was a "criminal prosecution." For that reason alone, certiorari should be granted. If the Government cannot conjure up any plausible textual defense of the constitutional rule applied in a case, that precedent demands this Court's attention—especially where, as here, the Government does not contest that the case is an ideal vehicle for pinning down the meaning of the Constitution.

Nor are any of the arguments the Government does make convincing. The jury-trial guarantee in Article III for "all Crimes," upon which the Government trains its focus, does not affect the plain meaning of the Sixth Amendment—and, in any event, does not contain an implied "petty offense" proviso either. Contrary to the Government's suggestion, the common law did not sanction prosecuting people for minor crimes without providing juries. Just the opposite: the common-law method of trial *forbade* such proceedings, and the Framers codified that prohibition in the Constitution. Finally, modern cost-benefit analyses cannot limit the scope of the right to trial by jury. The Sixth Amendment expressly guarantees the right in "all" criminal prosecutions, leaving no room for a "petty offense" exception. U.S. Const. amend. VI.

Lacking any persuasive argument on the merits, the Government seeks refuge in *stare decisis*. But that is no help either. The right to trial by jury supplies a

crucial foundation for the legitimacy and justice of the criminal law system, providing a vital bulwark against the "corrupt or overzealous prosecutor" and "the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). It also ensures public participation will counterbalance the government power inherent in prosecutions. *See Erlinger v. United States*, 144 S. Ct. 1840, 1848-49 (2024). Yet the "petty offense" exception is egregiously wrong and (probably not coincidentally) was born from scant briefing and dicta; the exception implicates no valid reliance interest; and it imposes profound harm on defendants and the populace alike. This Court should reconsider and abolish the exception.

I. The "petty offense" exception has no footing in any constitutional interpretive principle

The Government is unable to advance any persuasive defense of the "petty offense" exception.

1. *Text.* It is hard to deny that the proceeding below—in which the Government charged petitioner by information with a misdemeanor, a federal prosecutor sought to convict him at trial, and the judge imposed criminal punishment—was, in the words of the Sixth Amendment, a "criminal prosecution." *See* Pet. 13-15. So hard that the Government does not even try to argue otherwise. Instead, in the only textual argument it advances, the Government maintains that *Article III*'s guarantee of the right to trial by jury for "all Crimes" implicitly excludes petty offenses. BIO 8-10. But this argument is doubly ineffectual.

First, Article III's text does not exclude "petty offenses" from its reach. The Government notes that, in "common usage" or "popular understanding," the

word "crimes" can exclude misdemeanors. BIO 8-10 (citation omitted). But "when the law is the subject" of constitutional or statutory language, "ordinary *legal* meaning is to be expected, which often differs from common meaning." Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 73 (2012) (emphasis added). And as petitioner has made clear and the Government does not dispute, the legal definition of "crimes" has always included misdemeanors. Pet. 15-16; *see also* Amicus Br. of Crim. Law Profs. 12-18. Accordingly, Article III's text does not undercut—but rather reinforces—the case for enforcing the Sixth Amendment as written.[1]

Second, Article III could not undercut the Sixth Amendment anyway. Whenever there is divergence between the original Constitution and an amendment, the amendment controls. Otherwise, the States would not necessarily have sovereign immunity, women could still be denied the right to vote, and Senators

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[1] Contrary to the Government's suggestion (BIO 9), the "drafting history" of Article III does not indicate otherwise. "[R]ather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language . . . the States ratified." *Ramos v. Louisiana*, 590 U.S. 83, 98 (2020). Where, as here, there is no recorded explanation or even discussion regarding the change in wording, sticking to ratified text makes all the more sense. *See id.*; 2 Records of the Federal Convention of 1787, 438 (Max Farrand ed. 1911). Besides, not even the Government defends the full implication of its drafting-history argument, which would be that the Framers changed the phrase "all criminal offenses" to "all Crimes" to exclude *all* "misdemeanors"—and thus that the Constitution does not require jury trials for prosecution of any misdemeanor, even if punishable by a full year in prison. *See Schick v. United States*, 195 U.S. 65, 69-70 (1904).

would still be chosen by state legislatures. Therefore, even if it were unclear whether Article III guarantees jury trials in criminal prosecutions for petty offenses, there is no doubt the Sixth Amendment does, and that puts an end to the matter.

2. *Structure*. Nor does the Government provide any real answer to petitioner's point that there is no basis for giving the Sixth Amendment's phrase "all criminal prosecutions" a different, less categorical meaning with respect to the right to jury trial than it has with respect to all of the other rights spelled out in the Amendment. *See* Pet. 18-20. The Government points out that the right established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), to appointed counsel does not apply in certain criminal prosecutions. BIO 15. But that is because *Gideon* is based on a modern judicial assessment of the essentials for a fair trial, not the Sixth Amendment "as originally drafted by the Framers of the Bill of Rights." *Scott v. Illinois*, 440 U.S. 367, 370-72 (1979).

Here we deal with the Sixth Amendment's original public meaning. And even when it comes to the original public meaning of the right to counsel—that of the accused "to employ a lawyer to assist in his defense"—there is no doubt that right applies in *all* criminal prosecutions, just like all the other rights the Framers enshrined in the Sixth Amendment. *Scott*, 440 U.S. at 370; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006) (right to retained counsel is the "root meaning of the constitutional guarantee"). Hence, it would surely violate the Sixth Amendment to bar defendants from retaining counsel to assist in their defense in misdemeanor proceedings. The right to trial by jury is cut from the same cloth.

3. *History.* Lacking any foothold in text or structure, the primary refrain throughout the Government's brief is that "summary adjudications" were tolerated in "pre-revolutionary English and colonial practice," as well as in some states after the Founding even when those states' constitutions required jury trials in all criminal prosecutions. BIO 11-12. That being so, the Government postulates that the Sixth Amendment must also be understood—despite its unequivocal language—to condone this practice. The Government's conclusion, however, does not follow from its historical premise.

To start, it is true that summary adjudications were occasionally conducted for criminal offenses. BIO 12-13. But summary adjudications in England and early America were not—in the words of the Sixth Amendment—"criminal *prosecutions*." That is because, "[a]t the founding, a 'prosecution'" "referred to 'the *manner* of formal accusation'" and proceeding. *United States v. Haymond*, 588 U.S. 634, 641 (2019) (plurality opinion) (quoting 4 William Blackstone, Commentaries on the Laws of England *298 (1769)). And a "prosecution" meant "'instituting a criminal suit' by filing a formal charging document—an indictment, presentment, or information—upon which the defendant was tried by a court with the power to punish the alleged offense." *Rothgery v. Gillespie County*, 554 U.S. 191, 221 (2008) (Thomas, J., dissenting) (quoting 4 Blackstone, Commentaries *309); *see also* Pet. 14-15. The same is true today: A "prosecution" under the Sixth Amendment is an "adversary judicial criminal proceeding[]—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *United*

States v. Gouveia, 467 U.S. 180, 188 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

Summary adjudications were something else entirely: They did not require any "indictment or information." 4 Blackstone, Commentaries *283; *see also* William Paley, The Law and Practice of Summary Convictions 46 (1814) (explaining that, in summary adjudications, "the ancient course of indictment, &c is dispensed with"); J.A. Sharpe, Crime in Early Modern England: 1550-1750, 127 (1999) (same). They were managed by justices of the peace, not judges. 4 Blackstone, Commentaries *281-82. And they were inquisitorial, rather than adversarial, in practice; the justices of the peace, not the parties, examined witnesses. *Id.* *283 There was no right to confrontation or compulsory process. It was not even "necessary to summon the party accused before he [was] condemned." *Id.* *282-83.

Consequently, it does not matter whether or when the Constitution might tolerate modern-day summary adjudications for petty offenses. (The legitimacy of such non-prosecutorial adjudications would depend on how one interprets the Due Process Clause, which governs all deprivations of liberty, not just criminal prosecutions.) The question at issue here is whether the Sixth Amendment allows the Government to conduct a *prosecution* for a petty offense (or any other crime) without respecting the right to trial by jury. The answer is plainly no. The Sixth Amendment left room for justice-of-the-peace proceedings by excluding non-prosecutorial proceedings, not by differentiating between different levels of offense.

Lest there be any doubt, this Court itself has recognized time and again that the Sixth Amendment and Article III guarantee a "trial by jury" as understood under "the common law." Pet. 20 (citing cases). The Government asserts that the historical, "common law" concept of trial by jury embraces "the full scope of English legal tradition," including "the permissibility of statutory exceptions for petty offenses." BIO 14. But the Government could not be more wrong. It is elementary that English common law consisted of judge-made law, not statutory exceptions in opposition to it. And English commentators and others since have been particularly emphatic that the inquisitorial practice of summary adjudication was a "stranger" to the common law. 4 Blackstone, Commentaries *280; *see also* Pet. 21-22 (citing numerous other sources).

In short, the Framers of the Sixth Amendment insisted that "all criminal prosecutions" proceed per the common-law method of right to trial by jury. The Government overlooks the fact that summary adjudications were not "criminal prosecutions." Once that misconception is corrected, the Government's historical argument collapses.

And once the Government's historical argument collapses, it is left with no argument at all. The only other potential argument in defense of the judicially created "petty offense" exception to the Sixth Amendment would be naked cost-benefit balancing. But the Government studiously avoids making any such argument here. BIO 15-16. Rightly so. The Sixth Amendment's Jury Trial Clause permits no such judicial "cost-benefit analyses" based on "efficiency" or any similar atextual consideration. Pet. 23-24 (quoting

Ramos, 590 U.S. at 100, and *Erlinger v. United States*, 144 S. Ct. 1840, 1859 (2024)); *see also* Amicus Br. of Americans for Prosperity Found. 19-20. The Clause guarantees a right to jury trial in "all" criminal prosecutions. That word conveys a categorical guarantee that must be enforced according to its terms. Pet. 17.

II. The Court should grant review to reconsider the petty-offense exception

Given that the "petty offense" exception to the Sixth Amendment right to jury trial has no basis in law, this Court should reconsider the exception. "The force of *stare decisis* is at its nadir in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections." *Ramos*, 590 U.S. at 113 (Sotomayor, J., concurring) (quoting *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013)); *see also* Amicus Br. of Southern Policy Law Inst. 14-15. All the more so here, where the rule has never fully been tested in an adversarial setting. *See* Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 Duke L.J. 599, 614-17, 632 (2022).

The Government's arguments to the contrary lack force. The Government first defends the jurisprudential origins of the "petty offense" exception, suggesting that the exception emerged from "extensive briefing" in *Callan v. Wilson*, 127 U.S. 540 (1888), and *District of Columbia v. Clawans*, 300 U.S. 617 (1937). BIO 16. Not so. This Court adopted the exception in *Schick v. United States*, 195 U.S. 65 (1904), not *Callan* (in which the Court merely suggested in dicta that the exception might exist) or *Clawans* (in which the Court took the holding of *Schick* as a given). And the

Government does not contest that neither party in *Schick* briefed the petty-offense exception. Pet. 26. That fact alone should dispel any suggestion that the exception is the product of meaningful adversarial testing.

At any rate, the Court did not receive "extensive briefing" on the subject in *Callan* or *Clawans*. The defendant in *Callan* did not discuss whether the Sixth Amendment contained any carve-out for minor offenses. Instead, he argued that his ability to appeal to a jury after his bench trial did not cure the Sixth Amendment problem that he assumed would otherwise have existed in his case. Petr. Br. at 7-9, 15-17, *Callan*, 127 U.S. 540 (1888) (No. 1318); *see also* Pet. 26. In *Clawans*, the parties contested whether the defendant's crime fell within the "petty offense" exception that *Schick* had created, not whether *Schick* itself was right. *See* Resp. Br. at 5-21, *Clawans*, 300 U.S. 617 (1937) (No. 103); Petr. Br. at 6, 43-45, *Clawans*, 300 U.S. 617 (1937) (No. 103). And regardless of the briefing this Court received a century ago, the fact that the "petty offense" exception is egregiously wrong provides reason enough to overcome *stare decisis.*

The Government is also wrong to suggest that the "petty offense" exception remains consistent with recent advances in constitutional interpretation. No doubt mindful that judicial balancing is no longer a permissible way to approach the right to jury trial, the Government asserts that the "petty offense" exception does not "giv[e] undue weight to 'policy considerations.'" BIO 15-16. But the Government makes no effort to explain the policy-driven reasoning of *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968),

Baldwin v. New York, 399 U.S. 66, 75 (1970), and *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 542-43 (1989). That silence speaks volumes. *See* Pet. 24. Nor does the Government offer any way to reconcile the new insight in *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127-28 (2024), that administrative agencies may not curtail the Seventh Amendment right to jury trial by regulatory fiat with the fact that the "petty offense" exception allows agencies to deprive people of their parallel Sixth Amendment right. *See* Pet. 25.

The Government next asserts that the federal government and many states "have substantial reliance interests in adherence to this Court's precedent on the subject." BIO 17. Certainly they cannot be related to how "burdensome" in future prosecutions it might be to honor the full scope of the right to jury trial. *Id.* That is not only a *forward-looking* interest, but also a consideration that is inappropriate when the right to jury trial is at stake. *See supra* at 7-8. At any rate, the experience of the numerous states from Texas to California that provide jury trials for "petty offenses" confirms that it is not overly difficult to provide jury trials in such prosecutions. *See* Pet. 30; Amicus Br. of Crim. Law Profs. 22-24; Amicus Br. of Cato Inst. 12-13.

Meanwhile, the "petty offense" exception inflicts real harm upon criminal defendants and society in general. Convictions for such offenses can carry "serious consequences" for "tens of thousands" of individuals each year, yet the exception deprives defendants of a vital protection against "overzealous prosecutors and desensitized judges." Amicus Br. of NACDL 12-16. It also denies the public the opportunity to bring its own common sense to bear in

these prosecutions. *Id.* at 17. Those consequences were bad enough in years gone by, but they are intolerable now that "crimes swept under the word 'petty' include everything under the sun." *Id.* at 12.[2]

In sum, the Court is confronted here with a judicially authorized deprivation of rights within the judicial system—in "disregard" of the plain text of the Sixth Amendment. Pet. App. 28a (Tymkovich, joined by Rossman, JJ., concurring). That makes this case one of the utmost seriousness, not only for defendants but also for the reputation of the courts. It is long past time for the Court to face up to this problem of its own creation and consider the arguments on the merits.

CONCLUSION

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

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[2] The Government also says that petitioner "provide[s] no evidence" that applying the Court's test for distinguishing petty from non-petty offenses "has proven difficult to apply in practice." BIO 17. But the Government ignores this Court's own admission years ago that "the boundaries of the petty offense category [were] ill-defined, if not ambulatory." *Duncan*, 391 U.S. at 160. The Government also turns a blind eye to the modern reality that courts continue to be "sucked into endless line-drawing exercises" in this regard. Amicus Br. of NACDL 18-20 (providing examples). Abrogating the "petty offense" exception would rescue courts from this "never-ending uncertainty." *Id.*

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May 23, 2025