No. 25-1086

In the Supreme Court of the United States

KEITH PHARMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Matthew P. Cavedon
Counsel of Record
Dan Greenberg
Samuel Rutzick
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(706) 309-3859
mcavedon@cato.org

April 17, 2026

QUESTION PRESENTED

Whether the Fifth and Sixth Amendments prohibit a sentencing court from increasing a criminal defendant's sentence based on conduct of which a jury acquitted him.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

This case interests Cato because adherence to the Constitution's guarantee of a jury trial in criminal proceedings is essential to individual liberty and government accountability.

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[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Keith Pharms was arrested and charged on five counts involving a gunfight between, among others, Pharms and a police officer. *United States v. Pharms*, No. 24-14191, 2026 WL 311607, at *2 (11th Cir. Feb. 5, 2026). The jury, through a special interrogatory, "was asked, 'as to Count 2 [using a firearm during a crime of violence], was the firearm discharged?' The jury checked the "no" box." *Id.*

Despite this finding, the district judge sentenced Mr. Pharms as if he had discharged a firearm, thereby lengthening the sentencing range by at least four and a half years—nearly double what it would have been. *See id.*; Pet. App'x 25a, 42a, 45a. Sentencing defendants based on conduct for which they were acquitted undermines the critical and historic role that juries play in the American justice system in three ways.

First, the jury embodies the community's moral judgment, and the Constitution assigns the determination of guilt to the jury alone. The jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington,* 542 U.S. 296, 305–06 (2004). Acquitted-conduct sentencing displaces citizens from their constitutionally prescribed role.

Second, the jury protects against wrongful prosecution and conviction. Acquitted-conduct sentencing removes this shield.

Finally, the jury underpins the justice system's legitimacy. Acquitted-conduct sentencing lets judges step over the judgments of ordinary people, thereby undermining community trust in the justice system.

The Court should grant Mr. Pharms's petition, reverse the judgment below, and affirm the Constitution's guarantee of trial by jury.

ARGUMENT

I. THE JURY EMBODIES COMMUNITY JUDGMENT.

Entrusting the determination of criminal responsibility to a jury of ordinary people may be the greatest innovation of the Anglo-American legal system, setting the common law apart from the Roman civil law tradition that dominates much of the world. But acquitted-conduct sentencing downgrades the jury's foundational moral and political role.

The common law emerged from ancient customs and the collective agreement of the community. JOHN LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 6 (2009). Law enforcement was a function of popular consent; a community would not recognize a law that infringed upon ancient freedoms. Community consent retained pride of place as the Norman kingdom rose and the law became formalized. Early English court judgments reflected local unanimity and dissent was rare. *Id.* at 20. Criminal justice was administered summarily through a "hue and cry" raised throughout the community when a malefactor was caught in the act. *Id.* at 22–23.

The 1166 Assize of Clarendon created the ancestor of the modern grand jury—the "jury of presentment." This group of twelve men would bring accusations to royal representatives based on the group's own knowledge of transgressions. *Id.* at 38. These juries were self-informing. *Id.* at 41. The jury of presentment

was not a ministerial body. It spoke for the community, representing its deliberation and judgment. "[T]here was considerable functional overlap between the jury of accusation and what would later develop as the jury of trial." *Id.* at 41–42.

The jury was one of the core constraints the barons placed on King John at Runnymede, with Magna Carta requiring "that he would punish no freeman for a violation of any of his laws, unless with the consent of the peers—that is, the equals—of the accused." LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 23 (John P. Jewett & Co. ed.) (1852); *see also Magna Carta*, NAT'L ARCHIVES (U.K.).[2] The relevant language—*per judicium parium suorum*—translates to "according to the sentence of his peers." SPOONER, *supra*, at 30–31. It implies that "the jury, and not the government, are to fix the sentence." *Id.* at 32–33. Trial by jury has been called "the only real barrier" Magna Carta imposed "against absolute despotism." *Id.* at 24.

This was no mere paper tiger. Medieval juries often acquitted criminal defendants out of "reluctance to impose the death penalty for minor or forgivable offenses." CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 20 (1998). Juries engaged in such "pious perjury" well into the eighteenth century—sometimes with the encouragement of judges. *Id.* at 205; 4 WILLIAM BLACKSTONE, COMMENTARIES *239.

By the early modern period, the Court of Star Chamber was introduced to punish jurors. LANGBEIN ET AL., *supra*, at 420. Its "powers were generously

[2] Available at https://tinyurl.com/34kfruj6.

exercised, especially in libel cases and other cases with political overtones," to retaliate against juries that exercised independent judgment to acquit. CONRAD, *supra*, at 21.

Consider *Bushell's Case*. In 1670, William Penn and William Mead were tried for various charges that related to the practice of their Quaker religious beliefs. LANGBEIN ET AL., *supra*, at 426. The trial was a sham: "On several occasions . . . Penn and Mead were gagged, bound, or put into the 'baledock' for making legal arguments displeasing to the bench." CONRAD, *supra*, at 25. The trial judge directed the jurors to convict, but they found Penn and Mead guilty of only a lesser offense. The judge then fined the jurors. LANGBEIN ET AL., *supra*, at 426. Bushell and several other jurors refused to pay and were imprisoned. *Id.*

After the case met with public outcry, judges surrendered the power to punish jurors for their verdicts. *Id.* at 429. The law came to deem it "impossible for a judge, or any other, to know the law relating to that fact or direct concerning it" in the absence of fact-finding by the jury. CHARLES GRANT ROBERTSON, SELECT STATUTES, CASES, AND DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660–1832, WITH A SUPPLEMENT FROM 1832–1894 226 (1904). Hence in finding facts the jury could not contradict any legal direction from the judge. *Id.* Were the judge to supersede the jury's fact-finding power, "what either necessary or convenient uses can be fancied of juries, or to continue trials by them at all?" *Id.*

Jury independence persisted in colonial America. In a well-known case from the early eighteenth century, John Peter Zenger published letters critical of the governor of New York. The governor failed three

times to have a grand jury indict Zenger for seditious libel, and the Attorney General needed to file an information, an archaic method of securing an indictment without a jury. LANGBEIN ET AL., *supra*, at 475–77. The defense produced by Zenger's attorney, Andrew Hamilton, centered on the independent jury: "I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so." JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 78 (Stanley Nider Katz ed., Belknap Press 1972) (1736). Zenger was acquitted.

Acquitted-conduct sentencing is a relatively new deviation from jury independence. While there were some antecedents, its modern catalyst was the 1970 passage of 18 U.S.C. § 3577. Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 ST. JOHN'S L. REV. 1415, 1427 (2010). The longstanding judgment of the legal tradition has been that those "who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety." BENJAMIN FRANKLIN, THE WORKS OF BENJAMIN FRANKLIN, VOL. VII LETTERS AND MISC. WRITINGS 1775–1779 58–59 (G. P. Putnam's Sons ed. 1904). Despite numerous attempts to curb juror power over the past millennium, the jury has retained its independence. Its unique moral power rests in its ability to channel the judgment of the people—not that of the government. With respect to matters of conviction and acquittal, the jury is supposed to have the last word. As a British lawyer at the time of Zenger's case wrote, if Hamilton's argument regarding the supremacy of the jury "is not law, it is better than law, it ought to be law, and will always be law

wherever justice prevails." CONRAD, *supra,* at 37 (citation omitted).

II. ACQUITTED-CONDUCT SENTENCING UNDERMINES THE JURY'S POWER TO COUNTER GOVERNMENT MISCONDUCT.

"A right to jury trial is granted to criminal defendants in order to prevent oppression by the government." *Duncan v. Louisiana,* 391 U.S. 145, 155 (1968). The people's complete control—their decisive negative—was manifested in the jury trial. "Its preservation and proper operation as a protection against arbitrary rule was among the major objectives of the revolutionary settlement which was expressed in the [post-Glorious Revolution] Declaration [of Right of 1689]." *Id.* at 151.

This was true for both the Constitution's drafters and their Anti-Federalist critics. Alexander Hamilton wrote that the Federalists and Anti-Federalists "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." THE FEDERALIST No. 83 (Alexander Hamilton). The jury's role as safeguard was most crucial in the criminal-trial context; Hamilton considered "arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions" to be "the great engines of judicial despotism." *Id.* For this reason, John Adams insisted that juries composed of ordinary citizens "should have as complete a control, as decisive a negative, in every judgment of a court." LANGBEIN ET AL., *supra*, at 483.

In the words of nineteenth-century abolitionist and legal philosopher Lysander Spooner: Without juries' ability to acquit, the government would be unleashed to "punish disobedience," "compel obedience and submission," and hold exclusive "responsibility for the character of its laws." SPOONER, *supra*, at 12–13. Our government would devolve into "a despotism." *Id.* Spooner thus argued that jurors should refuse to convict defendants who had been prosecuted for resisting the Fugitive Slave Act. CONRAD, *supra*, at 80. He argued that juries had "both right and duty" to hold "all persons guiltless in violating, or resisting the execution of" laws that were "unjust or oppressive." SPOONER, *supra*, at 5–6. Jurors of his day agreed. Northern juries often acquitted abolitionist defendants, so much so that federal judges began admonishing them. CONRAD, *supra*, at 82. The moral judgment of juries of ordinary Americans helped erode racial tyranny.

In any era, "there are no oppressions which the government may not authorize by law." SPOONER, *supra*, at 9. Spooner contended that juries must forever retain the "right to judge of the justice of a law of the government" in order to fulfill their mandate "to protect the people against the oppressions of the government." *Id.*

Acquitted-conduct sentencing neutralizes this power. When a jury acquits a defendant of certain conduct—out of a belief that the law is unjust or because it is not satisfied of his guilt beyond a reasonable doubt—yet a court punishes him for it anyway, "the jury has not authorized the resulting sentences in any meaningful sense." *United States v. Mercado,* 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting). Rather, the judge

> thwarts the express will of the jury . . . and imposes a punishment based on conduct for which the government tried, but failed, to get a conviction. Such a sentence has little relation to the actual conviction, and is based on an accusation that failed to receive confirmation from the defendant's equals and neighbors.

Id. at 662. The jury is left without the effective voice that the Constitution provides to protect liberty.

III. ACQUITTED-CONDUCT SENTENCING UNDERMINES TRUST IN THE JUDICIAL SYSTEM.

The judicial system's legitimacy depends on popular trust. It is the jury that impresses "upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio,* 499 U.S. 400, 426 (1991). The jury "preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people." *Id.* at 407. By diminishing the role of the jury, acquitted-conduct sentencing erodes public confidence in the courts.

There is noted "tension" between the "narrower conception of an acquittal" that acquitted-conduct sentencing exploits "and the manner in which juries historically used acquittals." *McClinton v. United States,* 143 S. Ct. 2400, 2401 (2023) (Sotomayor, J., respecting the denial of certiorari). The Fifth and Sixth Amendments require that "any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence

. . . must be either admitted by the defendant or found by the jury. It *may not* be found by a judge." *Jones v. United States*, 574 U.S. 948, 948 (2014) (Scalia, J., dissenting). Acquitted-conduct sentencing exposes "the defendant to a second mini-trial on conduct underlying the count of acquittal in contravention of principles underlying the Fifth and Sixth Amendments." Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 180 (1996). Disregard for juries' constitutional role impairs the "confidence" that "every individual going about his ordinary affairs" is entitled to have "that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *In re Winship*, 397 U.S. 358, 364 (1970).

If the jurors' decisions become anything less than determinative, then the fundamental legitimacy that they give the system vanishes. Public "faith in the jury system is of vital importance to the legitimacy of the entire Anglo-American legal system." Orhun Hakan Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-esque," "Repugnant," "Uniquely Malevolent," and "Pernicious"?,* 54 SANTA CLARA L. REV. 675, 722 (2014). The jury is supposed to provide "the collective judgment of the community [and] an element of needed finality." *United States v. Powell,* 469 U.S. 57, 67 (1984). The justice system puts a high bar on conviction. "[W]hen a jury acquit[s] a defendant based on that standard, one . . . [expects] no additional criminal punishment would follow." Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 433 (1999). The justice system emphasizes the "sanctity of the jury's power to

determine the defendant's fate in the case before it." Mark T. Doerr, *Not Guilty*? *Go To Jail. The Unconstitutionality of Acquitted-Conduct Sentencing,* 41 COLUM. HUM. RTS. L. REV. 235, 255 (2009). In this light, acquitted-conduct sentencing is sacrilegious.

Admittedly, there is a family resemblance between the sentencing practices that this Court previously approved in such cases as *United States v. Watts,* 519 U.S. 148 (1997), and those in the case at hand. However, *Watts*'s holding rested, at least in part, on a particular characterization of the defendant's sentencing. The Court appears to have understood the judicial decision to consider at sentencing information about a defendant's character and conduct conceptually separable from the judicial decision to punish acquitted behavior. *Id.* at 155. This case presents an exceptionally clean vehicle for the Court to address acquitted-conduct sentencing per se. A jury specifically found that Pharms did not fire a weapon. *Pharms*, No. 24-14191, 2026 WL 311607, at *2. Yet the trial court lengthened his sentence based squarely on its own contrary finding. The conceptual separation in *Watts* is absent here.

CONCLUSION

"One worries about the lesson jurors learn from acquitted-conduct sentencing." *McClinton,* 143 S. Ct. at 2403 (Sotomayor, J., respecting the denial of certiorari). The practice certainly implies that ancient traditions enshrined as constitutional rights do not matter and that the law no longer belongs to ordinary Americans. The public could draw from these messages doubts about the legitimacy of the legal system.

Granting Pharms's petition and reversing would convey the opposite lesson: that the right to trial by jury won at Runnymede yet endures.

Respectfully submitted,

Matthew P. Cavedon
Counsel of Record
Dan Greenberg
Samuel Rutzick
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(706) 309-3859
mcavedon@cato.org

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