

No. _____

IN THE
Supreme Court of the United States

ANTON SOLOSHENKO; LUIS A. TORRES GONZALEZ;
DOMINIC C. HAYMOND, II; DYLLIN V.E. ROBERTS;
JOHN P. MATTI,
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

SAMANTHA M. CASTANIEN
DWIGHT H. SULLIVAN
United States Air Force
Appellate Defense Div.
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
240-612-4770

FREDERICK J. JOHNSON
Counsel of Record
United States Air Force
Appellate Defense Div.
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
frederick.johnson.11@us.af.mil

Counsel for Petitioners

QUESTION PRESENTED

In *Ramos v. Louisiana*, 590 U.S. 83 (2020), this Court held that the Sixth Amendment’s guarantee of a “trial . . . by an impartial jury,” as incorporated by the Fourteenth Amendment’s Due Process Clause, requires that criminal convictions adjudged by juries be unanimous not just in federal civilian courts, but in state courts as well.

Service members and civilians prosecuted under the Uniform Code of Military Justice, in contrast, can be convicted by a three-fourths vote of a court-martial panel of lay members. This rule applies not only to allegations of military-specific offenses, but also to trials for alleged common-law crimes unrelated to military service. Often, the only thing depriving a court-martial defendant of the protection of a unanimous verdict requirement is the sovereign’s choice of the forum in which to prosecute.

The Question Presented is:

Does the Constitution preclude a court-martial panel of lay members from convicting a defendant of a criminal offense by a non-unanimous vote?

PARTIES TO THE PROCEEDING

This Rule 12.4 petition consolidates appeals from five service members convicted by courts-martial. Petitioners are Anton Soloshenko, Luis A. Torres Gonzalez, Dominic C. Haymond, II, Dyllin V.E. Roberts, and John P. Matti. Respondent in all 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 were serving in the United States Air Force or Space Force when they were tried by courts-martial. They challenged their convictions on the ground that they had a constitutional right to be convicted only upon a unanimous vote of the court-martial panel that decided their guilt or innocence. The United States Air Force Court of Criminal Appeals (Air Force Court) addressed the issue in all five cases, ruling against the claim based on the decision of the United States Court of Appeals for the Armed Forces (CAAF) in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). Pet. App. 4a–5a, 49a, 71a–72a, 79a, 81a, 121a. All Petitioners raised the issue before the CAAF, asking it to reconsider *Anderson*. The CAAF declined to address the issue for all Petitioners. Pet. App. 1a, 46a, 68a, 76a, 91a.

American criminal justice systems are nearly unanimous on one procedural requirement: jury verdicts imposing convictions in criminal cases require unanimity. That rule now applies in every civilian criminal justice system operated under the authority of the federal, state, and territorial governments.¹ But outlier systems remain. For example, military commissions at Guantanamo Bay

¹ Every U.S. territory with its own criminal justice system requires that criminal convictions rendered by juries be by unanimous vote. AM. SAM. CODE ANN. § 3.0232(a) (2025); *Pueblo v. Torres-Rivera*, 204 P.R. Dec. 288 (2020); 8 GUAM CODE ANN. § 105.30(a) (2025); N. MAR. I. R. CRIM. PROC. 31(a); V.I. R. CRIM. PROC. 31(a). As this Court has previously noted, the “court-martial system stands on much the same footing as the territorial and [District of Columbia] courts.” *Ortiz v. United States*, 585 U.S. 427, 443 (2018).

may convict by a two-thirds vote of the members. 10 U.S.C. § 949m. Some states operate courts-martial that permit conviction of non-federalized National Guardsmen by a non-unanimous vote.² A three-fourths jury vote is sufficient for a conviction in the Courts of Indian Offences, 25 C.F.R. § 11.314(e); some individual tribal courts may also permit convictions by non-unanimous jury vote. But the largest post-*Ramos* outlier criminal justice system is the Uniform Code of Military Justice (UCMJ) court-martial system. For general and special courts-martial, a vote of three-fourths of the panel's lay members is sufficient to convict. UCMJ art. 52, 10 U.S.C. § 852. Roughly 1.3 million active-duty service members are subject to that system at all times and in all places, as are roughly 1.5 million active component retirees.³

² See generally 32 U.S.C. § 326 (“In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force. They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts.”). Texas law, for example, provides for conviction by a two-thirds vote of general and special court-martial members. TEX. GOV'T CODE ANN. § 432.077 (2025). California law, on the other hand, incorporates the Uniform Code of Military Justice to govern its courts-martial of non-federalized National Guardsmen, thereby adopting a three-fourths conviction threshold. CAL. MIL. & VET. CODE § 102f (Deering 2025); see UCMJ art. 52, 10 U.S.C. § 852. The constitutionality of non-unanimous court-martial convictions for non-federalized National Guardsmen post-*Ramos* appears to remain an open question.

³ Defense Manpower Data Center, *Active Duty Military Strength by Service for January 31, 2026*, available at <https://dwp.dmdc.osd.mil/dwp/api/downloadZ?fileId=142238&groupName=milTop>; Dep't of Defense Office of the Actuary, *Statistical Report on the Military Retirement System, Fiscal Year*

Another roughly 770,000 military reservists are subject to the UCMJ on an intermittent basis.⁴ Together, those groups exceed the individual populations of 21 states, as well as the District of Columbia. This Court should grant certiorari to consider whether the Constitution allows the military to continue to impose criminal convictions that could lead to as much as confinement for life without eligibility for parole based on a three-fourths vote of lay factfinders.

Shortly following the CAAF’s 2023 *Anderson* decision, which found no constitutional right to unanimous verdicts at courts-martial, this Court denied three certiorari petitions challenging that ruling.⁵ However, an important development has occurred since those denials that warrants this Court’s reexamination of whether to review this issue. In responding to one of the certiorari petitions challenging the military justice system’s lack of a unanimity requirement, the Solicitor General called this Court’s attention to “[r]ecently enacted legislation direct[ing] the Department of Defense to study and

Ended September 30, 2022 at 55 (October 2023), available at <https://media.defense.gov/2023/Oct/06/2003315292/-1/-1/0/MRS%20STATRPT%202022%20V999.PDF>. See also UCMJ art. 2(a)(1), (4), (6), 10 U.S.C. § 802(a)(1), (4), (6); UCMJ art. 5, 10 U.S.C. § 805 (“This chapter applies in all places.”).

⁴ Defense Manpower Data Center, *Selected Reserves by Rank/Grade* (Jan. 31, 2026), available at <https://dwp.dmdc.osd.mil/dwp/api/downloadZ?fileId=142235&groupName=resRankGrade>. See also UCMJ art. 2(a)(1), (3), 10 U.S.C. § 802(a)(1), (3).

⁵ *Cunningham v. United States*, 144 S. Ct. 1096 (2024) (mem.); *Anderson v. United States*, 144 S. Ct. 1003 (2024) (mem.); *Martinez v. United States*, 144 S. Ct. 1000 (2024) (mem.).

report to Congress within a year on the ‘feasibility and advisability’ of requiring unanimous verdicts in courts-martial.” Brief for the United States in Opposition 24, *Martinez v. United States*, 144 S. Ct. 1000 (2024) (No. 23-242) (filed Dec. 27, 2023) (citing National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2024, Pub. L. No. 118-31, § 536, 137 Stat. 136, 263 (2023)). The Solicitor General argued, “The possibility of further legislative action in this area counsels against granting certiorari *at this time*.” *Id.* (emphasis added).⁶

The Department of Defense has now issued that report, recommending against adopting a unanimous verdict requirement for courts-martial.⁷ The NDAA for FY 2026 did not include any provisions regarding unanimous court-martial verdicts. NDAA for FY 2026, Pub. L. No. 119-60, 139 Stat. 718 (2025). Thus, the factor that the Solicitor General identified in December 2023 as “counsel[ing] against granting certiorari at this time” has been overtaken by events. Granting certiorari to review the constitutionality of

⁶ The Solicitor General made similar arguments when opposing the other two certiorari petitions raising the court-martial unanimous verdicts issue. Brief for the United States in Opposition 2, *Cunningham v. United States*, 144 S. Ct. 1096 (No. 23-666) (filed Feb. 20, 2024); Brief for the United States in Opposition 11, *Anderson v. United States*, 144 S. Ct. 1003 (2024) (No. 23-437) (filed Dec. 27, 2023).

⁷ Dep’t of Defense, *Joint Service Committee’s Report on the Adoption of Unanimous Verdicts in the Uniform Code of Military Justice in Accordance with Section 536 of the National Defense Authorization Act for Fiscal Year 2024* (Nov. 2024), available at <https://www.nimj.org/caaflog/jsc-on-unanimous-verdicts#/> [hereinafter DoD Unanimous Verdicts Report].

the military justice system's departure from *Ramos* is appropriate at *this* time.

Non-unanimous convictions are inconsistent with court-martial defendants' Fifth Amendment right to due process. In assessing Due Process Clause challenges to military justice procedures, this Court asks "whether the factors militating in favor of [a procedure departing from the civilian norm] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss v. United States*, 510 U.S. 163, 177–78, 181 (1994) (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)). Here, the right recognized by this Court's "momentous and consequential" *Ramos* decision, *Edwards v. Vannoy*, 593 U.S. 255, 271 (2021), stands in counterpoise to a court-martial procedure of recent vintage that fails to protect the interests of not only criminal defendants, but also crime victims, good order and discipline, and society at large.

Under a system that took effect on January 1, 2019,⁸ a three-fourths vote is required for a court-martial conviction; any lesser vote results in a finding of not guilty to which jeopardy attaches not only for court-martial purposes, but also for purposes of all federal

⁸ The Military Justice Act of 2016, which was enacted as part of the NDAA for FY 2017, changed the law governing court-martial panel size and the voting requirements for a conviction. Pub. L. No. 114-328, §§ 5161, 5187, 5235, 130 Stat. 2000, 2897, 2902, 2916 (2016) (codified as amended at 10 U.S.C. §§ 816, 829, 852). That act generally delegated to the President the authority to establish the effective date of its military justice reforms, "which date shall be not later than the first day of the first calendar month that begins two years after" the act's December 23, 2016, enactment date. *Id.*, § 5542(a), 130 Stat. at 2967. The president prescribed an effective date of January 1, 2019. Exec. Order No. 13825 of Mar. 1, 2018, § 3(a), 83 Fed. Reg. 9889, 9889 (Mar. 8, 2018).

criminal tribunals. UCMJ arts. 44, 52, 10 U.S.C. §§ 844, 852; Rule for Courts-Martial (R.C.M.) 921(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.); *Grafton v. United States*, 206 U.S. 333 (1907). That system deprives service members and civilians tried by court-martial of the fundamental protection of a unanimity requirement. But it also leads to the irrational result that a general court-martial panel's vote of, for example, 5-2 to convict produces an acquittal to which jeopardy attaches for purposes of every federal criminal justice forum. This Court should grant certiorari to consider whether that irrational system of recent vintage passes constitutional muster.

DECISIONS BELOW

The Air Force Court's decision in Petitioner Soloshenko's case is not reported. It is available at 2025 CCA LEXIS 358, 2025 WL 2172224, and is reprinted in the Appendix at Pet. App. 2a. The CAAF's order denying review is not yet reported. It is available at 2025 CAAF LEXIS 935, 2025 WL 3545485, and is reprinted in the Appendix at Pet. App. 1a.

The Air Force Court's decision in Petitioner Torres Gonzalez's case is not reported. It is available at 2025 CCA LEXIS 412, 2025 WL 2490763, and is reprinted in the Appendix at Pet. App. 47a. The CAAF's order denying review is not yet reported. It is available at 2025 CAAF LEXIS 950, 2025 WL 3625634, and is reprinted in the Appendix at Pet. App. 46a.

The Air Force Court's decision in Petitioner Haymond's case is not reported. It is available at 2025 CCA LEXIS 450, 2025 WL 2701609, and is reprinted in the Appendix at Pet. App. 69a. The CAAF's order denying review is not yet reported. It is available at

2026 CAAF LEXIS 19, 2026 WL 373357, and is reprinted in the Appendix at Pet. App. 68a.

The Air Force Court's decision in Petitioner Roberts's case is not reported. It is available at 2025 CCA LEXIS 476 and is reprinted in the Appendix at Pet. App. 77a. The CAAF's order denying review is not yet reported. It is available at 2026 CAAF LEXIS 78, 2026 WL 375613, and is reprinted in the Appendix at Pet. App. 76a.

The Air Force Court's decision in Petitioner Matti's case is not reported. It is available at 2025 CCA LEXIS 72, 2025 WL 687025, and is reprinted in the Appendix at Pet. App. 119a. The CAAF's opinion addressing issues unrelated to unanimous verdict and affirming the Air Force Court's decision is not yet reported. It is available at 2026 CAAF LEXIS 189, 2026 WL 468928, and is reprinted in the Appendix at Pet. App. 90a.

JURISDICTION

The CAAF issued its order denying review of Petitioner Soloshenko's case on November 10, 2025. Pet. App. 1a. The CAAF issued its order denying review of Petitioner Torres Gonzalez's case on November 17, 2025. Pet. App. 46a. The CAAF issued its order denying review of Petitioner Haymond's case on January 6, 2026. Pet. App. 68a. The CAAF issued its order denying review of Petitioner Roberts's case on January 23, 2026. Pet. App. 76a. The CAAF issued its decision affirming the Air Force Court's decision in Petitioner Matti's case on February 17, 2026. Pet. App. 90a. This Court's jurisdiction rests on 28 U.S.C. § 1259(3).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of the following constitutional, statutory, and regulatory provisions is set forth in the Appendix, starting at 201a.

1. Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V.
2. Jury Trial Clause of the Sixth Amendment, U.S. CONST. amend. VI.
3. Article 16, UCMJ, 10 U.S.C. § 816.
4. Article 51(a), UCMJ, 10 U.S.C. § 851(a).
5. Article 52(a), UCMJ, 10 U.S.C. § 852(a).
6. R.C.M. 501(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.).
7. R.C.M. 921(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.).

Statement of the Case

Petitioner Anton Soloshenko was a Space Force specialist (E-4) at the time of his conviction. At a general court-martial, a panel of members convicted him, contrary to his pleas, of one charge and one specification⁹ of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920. Pet. App. 3a. The

⁹ In military practice, each charge is supported by one or more specifications. “A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged.” R.C.M. 307(c)(3).

members sentenced Soloshenko to a dishonorable discharge, hard labor without confinement for fifteen days, and reduction to E-3. *Id.* The Air Force Court affirmed the findings and the sentence—expressly rejecting Soloshenko’s argument that he could not be convicted by a non-unanimous vote of the members. Pet. App. 4a–5a. Soloshenko sought the CAAF’s review of his case, and the CAAF denied review. Pet. App. 1a.

Petitioner Luis A. Torres Gonzalez was an Air Force master sergeant (E-7) at the time of his conviction. At a special court-martial, a panel of members convicted him, contrary to his pleas, of one charge and one specification of failure to obey a lawful general regulation, and one charge and one specification of wrongful use of a controlled substance (cocaine), in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. Pet. App. 48a. The members sentenced Torres Gonzalez to confinement for three days, reduction to the grade of E-6, and a reprimand. *Id.* The Air Force Court affirmed the findings for wrongful use of a controlled substance but set aside the findings for failure to obey a lawful general regulation and reassessed the sentence. Pet. App. 49a. The Air Force Court expressly rejected Torres Gonzalez’s argument that he could not be convicted by a non-unanimous vote of the members. *Id.* Torres Gonzalez sought the CAAF’s review of his case, and the CAAF denied review. Pet. App. 47a.

Petitioner Dominic C. Haymond, II was an Air Force airman (E-2) at the time of his trial. At a general court-martial, a panel of members convicted him, contrary to his pleas, of one charge and one specification of sexual assault in violation of Article

120, UCMJ, 10 U.S.C. § 920. Pet. App. 70a. The military judge sentenced Haymond to a dishonorable discharge, confinement for one year and eight months, total forfeitures of all pay and allowances for a period of twenty months, reduction to the grade of E-1, and a reprimand. Pet. App. 71a. The Air Force Court affirmed the findings and the sentence—expressly rejecting Haymond’s argument that he could not be convicted by a non-unanimous vote of the members. Pet. App. 71a–72a, 75a. Haymond sought the CAAF’s review of his case, and the CAAF denied review. Pet. App. 68a.

Petitioner Dyllin V.E. Roberts was an Air Force senior airman (E-4) at the time of his conviction. At a general court-martial, a panel of members convicted him, contrary to his pleas, of one charge with four specifications of sexual abuse of a child, two specifications of sexual assault of a child, and one charge with one specification of attempting to make an indecent recording, in violation of Articles 80 and 120b, UCMJ, 10 U.S.C. §§ 880, 920b. Pet. App. 78a. The military judge sentenced Roberts to a dishonorable discharge, confinement for fourteen years, reduction to the grade of E-1, and a reprimand. *Id.* The Air Force Court affirmed the findings and the sentence—expressly rejecting Roberts’s argument that he could not be convicted by a non-unanimous vote of the members. Pet. App. 81a, 89a. Roberts sought the CAAF’s review of his case, and the CAAF denied review. Pet. App. 76a.

Petitioner Matti was an Air Force airman first class (E-3) at the time of his conviction. At a special court-martial, a panel of members convicted him, contrary to his pleas, of one charge and two

specifications of assault consummated by a battery in violation of Articles 128, UCMJ, 10 U.S.C. § 928. Pet. App. 120a. The military judge sentenced Matti to confinement for seventy-five days, forfeiture of \$1,222.00 pay per month for two months, reduction to the grade of E-1, and a reprimand. *Id.* The Air Force Court affirmed the findings and the sentence—expressly rejecting Matti’s argument that he could not be convicted by a non-unanimous vote of the members. Pet. App. 121a. Matti sought the CAAF’s review, and the CAAF granted review of the propriety of statements in the prosecutor’s closing argument and affirmed the Air Force Court’s decision. Pet. App. 92a.

In all five cases, the court of first instance exercised federal jurisdiction pursuant to Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1). Because of the military justice system’s prohibition against polling the court-martial members, R.C.M. 922(e), and the “deliberations of courts and juries” privilege, MIL. R. EVID. 509, it is unknown and unknowable whether Petitioners were convicted of any offenses by unanimous or non-unanimous votes.

REASONS FOR GRANTING THE PETITION

In *Ramos*, this Court held that the Fourteenth Amendment’s Due Process Clause requires unanimity for a jury verdict of guilty. This Court should grant review to determine whether the Fifth Amendment’s Due Process Clause similarly requires that a finding of guilty by a lay panel of court-martial members be by a unanimous vote.

This Court has held that the Fifth Amendment’s Due Process Clause applies to the military justice system, while noting that its application may be different than in a civilian context. *Weiss*, 510 U.S. at

177–78; *Henry*, 425 U.S. at 44. On the other hand, this Court has held that the Sixth Amendment’s Jury Trial Clause does not apply at courts-martial. *Kahn v. Anderson*, 255 U.S. 1, 8 (1921). Petitioners do not argue otherwise. Rather, Petitioners maintain that they have a Fifth Amendment due process right to the protection of those attributes of a jury that are crucial to a criminal trial’s fairness. As *Ramos* establishes, one of those key protections is a requirement for a unanimous vote of lay members to convict.

Ramos makes clear that the right to a unanimous conviction is an essential assurance of a jury panel’s impartiality—a concern that is equally important in a court-martial as in civilian courts.

From its beginning, the American military justice system considered impartiality an essential attribute of court-martial members. *See, e.g.*, Article XXXV, Rules and Regulations of the Continental Army, 2 J. CONT’L CONG. 111, 117 (1775) (1906 ed.) (“All the members of a court-martial, are to behave with calmness, decency, and impartiality . . .”); Articles of War, § XIV, Art. 3, 5 J. CONT’L CONG. 788, 801 (1776) (1906 ed.) (requiring court-martial members to swear to “administer justice . . . without partiality, favor, or affection”) (italics omitted); An Act for the Government of the Navy of the United States, Art. 48, ch. 24, 1 Stat. 709, 713 (1799); An Act for the better government of the Navy of the United States, Art. 36, ch. 33, 2 Stat. 45, 50 (1800); An Act for establishing Rules and Articles for the government of the Armies of the United States, Art. 69, ch. 20, 2 Stat. 359, 368 (1806). The CAAF itself—in a decision in considerable tension with its later *Anderson* opinion—stated that “[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); accord *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). Thus, in courts-martial for which Congress has extended a right to be tried by a panel, the accused has a due process right to fairness and impartiality—requirements that, after *Ramos*, can no longer be satisfied by non-unanimous convictions.

The CAAF therefore erred in *Anderson* by refusing to extend *Ramos* to courts-martial. Because that error has profound implications for the vast majority of general and special courts-martial going forward, the petition for a writ of certiorari should be granted.

I. COURT-MARTIAL DEFENDANTS’ RIGHT TO UNANIMOUS CONVICTIONS FOLLOWS FROM THEIR RIGHT TO A “FAIR AND IMPARTIAL” PANEL

A venerable 1960 report by a committee chaired by Lieutenant General Herbert B. Powell, United States Army, emphasized the imperative that the American military justice system both be fair and appear fair: “In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice—the two are inseparable. An unfair or unjust correction never promotes that development of discipline.” Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, *Report to Honorable Wilber M. Brucker, Secretary of the Army* 11 (Jan. 18, 1960) (commonly known as the Powell Report), available at https://tile.loc.gov/storage-services/service/l1/l1mlp/Powell_report/Powell_report.pdf. The

imperative that a military justice system be perceived as both fair and effective is even more crucial in the current all-volunteer armed forces context, in which a perception of either railroading court-martial defendants or failing to deliver justice to victims of offenses such as intra-military sexual assault risks harming recruiting. Yet the military justice system's current court-martial member voting requirements degrade both actual fairness and the perception of fairness.

A. As *Ramos* makes clear, unanimous convictions are central to impartiality.

“Courts-martial must not only be fair but must appear fair to effectively further the cause of good order and discipline in the armed forces.” *United States v. Jones*, 37 M.J. 321, 324 (C.M.A. 1993) (quoting *United States v. Berry*, 34 M.J. 83, 88 (C.M.A. 1992)).¹⁰ An impartial tribunal is a prerequisite for such fairness and, consequently, for due process. *United States v. Crawford*, 15 C.M.A. 31, 34 (1964); *United States v. Deain*, 5 C.M.A. 44, 49 (1954) (“Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice.”). *Ramos* recognized that unanimous convictions are essential to ensure impartiality, 590 U.S. at 90; accordingly, a court-martial defendant who elects to be tried by a panel has a Fifth Amendment due

¹⁰ These cases are CAAF precedents. The NDAA for FY 1995 renamed the United States Court of Military Appeals (C.M.A.) the United States Court of Appeals for the Armed Forces (C.A.A.F.). Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994).

process right to be convicted only upon a unanimous vote.

The CAAF rejected this argument in *Anderson* not by repudiating its longstanding case law regarding the imperative for court-martial members' impartiality, but by reading *Ramos* to not implicate it. According to the CAAF, *Ramos* did not *really* link unanimous convictions to impartiality. *See, e.g., Anderson*, 83 M.J. at 298 (disagreeing that *Ramos* held that unanimity is “an essential element of an impartial factfinder”).

The CAAF's reading of *Ramos* strips it of analytical force. “[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*, 590 U.S. at 89. Because unanimity is, as *Ramos* held, central to that meaning, the CAAF's effort to untether the two concepts fails.

Nor did the CAAF (or the United States in its *Anderson* 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. Such defenses include the *possibility* that unanimous convictions open the door to rank disparity among court-martial panel members influencing verdicts and deference to Congress. *Anderson*, 83 M.J. at 298–99, 302; DoD Unanimous Verdicts Report, *supra* note 7, at 29–30; *United States v. Mayo*, No. ARMY 20140901, 2017 CCA LEXIS 239, at *20-22 (A. Ct. Crim. App. Apr. 7,

2017). Neither concern warrants insulating courts-martial from the unanimous conviction requirement.

Current military appellate case law already risks rank influencing cases' outcomes by permitting panels to hold straw votes before taking the one vote by secret written ballot that decides the verdict. *E.g.*, *United States v. Lawson*, 16 M.J. 38 (C.M.A. 1983). Thus, rank can already influence court-martial members' deliberations, but without a unanimity requirement to help constrain it.

Nor is deference to Congress sufficient to depart from the civilian norm. For courts-martial in which members are the factfinder, the procedures that govern their decisions must comport with fundamental notions of procedural fairness—because criminal trials necessarily implicate the defendant's liberty. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221–24 (2005). Congress could not, for example, rely upon a court-martial defendant's lack of a constitutional right to a trial by jury to provide that a panel will reach 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 *Henry*, 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 does 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. Because unanimous verdicts are an essential aspect of an impartial jury, *Ramos*, 590 U.S. at 91, unanimity is equally necessary to achieve an impartial court-martial panel. And ensuring impartiality in the imposition of either civilian or military convictions is an extraordinarily weighty concern.

If anything, unanimous convictions are even more important in those criminal justice systems, including the military's, that utilize panels with fewer than twelve members in non-capital cases. *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). Such is the case here, where Petitioners' panels had either four or eight members. R.C.M. 501(a)(1)(A)(i), (a)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.)

B. *Ramos's* protection of impartiality is equally important in courts-martial as in civilian courts.

In *Anderson*, the CAAF offered two responses to these arguments. First, the CAAF relied on the long history of non-unanimous convictions in courts-martial. *See Anderson*, 83 M.J. at 298 ("[H]istorical evidence establishes that for more than two centuries,

courts-martial verdicts have not been subject to a unanimity requirement”). Second, the CAAF evoked other “safeguards” that, in its view, adequately protect the interests that unanimous convictions would otherwise serve. *Id.* at 299. Neither justification survives scrutiny.

1. History does not justify the current military justice system, which substantially departs from founding-era courts-martial.

The historical analysis fails to justify the status quo for five reasons. First, court-martial jurisdiction over most common law offenses other than in time of war is largely a modern phenomenon. Colonel Frederick Bernays Wiener, the great mid-twentieth century military justice scholar and frequent Supreme Court advocate,¹¹ observed that “the scope of offenses triable by courts-martial has been steadily broadened.” Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 11 (1958). Some eighteenth and nineteenth century courts-martial tried common law offenses under the Articles of War’s “general article.”¹² See *Solorio v. United States*, 483 U.S. 435, 444–45 (1987). But, significantly, the general article “excluded from its scope all capital crimes, which

¹¹ See generally Andrew S. Effron, *Military Justice: The Continuing Importance of Historical Perspective*, ARMY LAW., June 2000, 1, 4.

¹² *E.g.*, Articles of War, § XVII, Art. 5, 5 J. CONT’L CONG. 788, 807 (1776) (1906 ed.) (criminalizing “crimes not capital, and all disorders and neglects . . . to the prejudice of good order and military discipline” not otherwise mentioned in the articles of war).

were, of course, considerably more numerous in the eighteenth century than at the present time.” Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 447 (1960). Further constricting offenses subject to trial by court-martial, “when a crime was committed against a person wholly unconnected with a military service, and no military order or rule of discipline was violated in and by the act itself, such act would not constitute a military offense.” Wiener, 72 HARV. L. REV. at 11–12.

It was not until 1863 that Congress amended the Articles of War to make “common-law felonies, including capital ones, . . . punishable *in time of war*.” *Id.* at 12 (emphasis added). “Next, beginning in 1916, common-law felonies were made military offenses at all times, except that murder and rape committed within the continental United States in time of peace could not be tried by court-martial.” *Id.* (internal footnotes omitted). But “[i]n time of peace, soldiers accused of civilian offenses were still required to be turned over to the civil authorities on request.” *Id.* (citing Article of War 74 of 1916, Pub. L. No. 64-242, 39 Stat. 619, 662). “Finally, in 1951, the Uniform Code of Military Justice removed all existing limitations so that even murder and rape committed by military personnel in the United States were made triable by court-martial at all times . . .” *Id.*

The UCMJ now includes ninety-two punitive articles that establish one or more criminal offenses,¹³ supplemented by eighteen presidentially prescribed

¹³ UCMJ arts. 78–134, 10 U.S.C. §§ 878–934.

offenses under Article 134, UCMJ, the “General Article.”¹⁴ Many of those offenses are of a type long tried by courts-martial, such as desertion, willfully disobeying a superior commissioned officer, and mutiny. UCMJ arts. 85, 90, 94(a)(1), 10 U.S.C. §§ 885, 890, 894(a)(1). But many others are of a sort that would typically have been tried in civilian court if allegedly committed by a Legion of the United States soldier, such as murder, manslaughter, rape, and kidnapping. UCMJ arts. 118, 119, 120, 125, 10 U.S.C. §§ 918, 919, 920, 925. Yet all those offenses may now be prosecuted by court-martial whether they occur on or off a military installation, regardless of whether the defendant was on duty, on leave, or even retired from active service. *See generally* UCMJ art. 2, 10 U.S.C. § 802. And all those offenses may now be prosecuted by court-martial even if neither the alleged offense nor the alleged victim had any connection to the military. *See Solorio*, 483 U.S. 435 (holding that the defendant’s military status alone determines a court-martial’s subject-matter jurisdiction). Thus, for many allegations tried by general or special courts-martial today, the defendant would have had a right to a civilian jury trial, with its attendant unanimity requirement, for most of this nation’s history.¹⁵

Second, court-martial convictions now often have consequences that persist long after the criminal defendant returns to civilian life. *See generally* Major

¹⁴ Pt. IV, ¶¶ 92–108, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.).

¹⁵ Other than in Louisiana from 1898 to 2020 and Oregon from 1934 to 2020, the unanimity requirement applied in U.S. federal civilian and state criminal jury trials. *See Ramos*, 590 U.S. at 87; *id.* at 127 n.86 (Kavanaugh, J., concurring).

Emma K. Fowler, *A “Civil Death” of the Military Accused: The Vast Impacts of Collateral Consequences of Court-Martial Convictions and the Need to Reform Military Sentencing Practice*, 232 MIL. L. REV. 1 (2025). For example, Petitioners Soloshenko, Haymond, and Roberts are subject to sex offender registration requirements¹⁶ and the accompanying deprivations of liberty. A majority of states restrict where registered sex offenders may live, such as prohibiting them from residing within a certain distance of schools, parks, playgrounds, or day-care centers. *See generally* Jill S. Levenson, Alissa R. Ackerman, Kelly M. Socia & Andrew J. Harris, *Where for Art Thou? Transient Sex Offenders and Residence Restrictions*, 26 CRIM. JUST. POL’Y REV. 319, 320 (2013). A Department of Justice study found that such restrictions “can create exclusion zones that make it difficult, if not impossible, for sex offenders to find housing.” National Institute of Justice, *Sex Offender Residency Restrictions: How Mapping Can Inform Policy* (July 2008), available at <https://www.ojp.gov/pdffiles1/nij/222759.pdf>.

Additionally, under 18 U.S.C. § 922(g)(1), some convictions result in a lifetime forfeiture of the Second Amendment right to possess or acquire firearms. Such lifelong deprivation of constitutional rights following return to civilian status was not a feature of founding-era courts-martial.

Third, while the court-martial panel was originally a command tool, it has evolved into a far more jury-

¹⁶ *See* Military Sex Offender Reporting Act of 2015, Pub. L. No. 114-22, §§ 501–02, 129 Stat. 227, 258; 34 U.S.C. § 20911 (establishing tier levels of sexual offenders); 34 U.S.C. § 20915 (prescribing duration of sex offender registration requirements).

like entity. This Court has observed that court-martial “members’ responsibilities are analogous to, but somewhat greater than, those of civilian juries.” *Weiss*, 510 U.S. at 167 n.1. But for much of American history, court-martial members’ actual authority was far less than that of jurors. Court-martial panels’ findings were originally little more than advisory. Convening authorities could disapprove a court-martial’s result and return the case for a do-over—even when the court-martial members voted to acquit. Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act’s Tricentennial*, 126 MIL. L. REV. 1, 20 (1989). Military justice reforms gradually reduced that authority until a 2013 statute eliminated the convening authority’s power to set aside court-martial findings in most cases. NDAA for FY 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 954 (2013).

It was not until 1948 that an enlisted service member could serve on a court-martial panel. Wiener, 126 MIL. L. REV. at 30. A 2022 statute took yet another step toward making a court-martial panel more closely resemble a jury. The James M. Inhofe NDAA for FY 2023 required convening authorities to detail court-martial members “under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.” Pub. L. No. 117-263, § 543(a), 136 Stat. 2395, 2582 (2022) (codified as amended at 10 U.S.C. § 825(e)). To carry out that provision, the president modified R.C.M. 503(a)(1), which governs the court-martial selection process, to enhance randomization. Exec. Order No. 14130 of Dec. 20, 2024, at § 2 and Annex, § 1(r), 89 Fed. Reg. 105343, 105343, 105355–56 (Dec. 27, 2024). As a result of those collective

reforms, the court-martial panel now serves a far more jury-like function and more closely resembles a civilian jury than at the time of the founding.

Fourth, over time, American military justice has devolved into an irrational system that fails to provide defendants with the protection of unanimous verdicts while also acquitting some accused criminals and protecting them from retrial in any federal forum based on a minority vote of a court-martial's members. At the time of the Constitution's adoption, general courts-martial consisted of five to thirteen commissioned officers and verdicts were rendered by a simple majority vote. Articles of May 31, 1786, 30 J. CONT'L CONG. 316 (1906 ed.)¹⁷; *Anderson*, 83 M.J. at 298. For Army courts-martial, that continued to be the rule until 1920, when a two-thirds' vote was required for findings of guilty other than for offenses with a mandatory death sentence. Article of War 43, Pub. L. No. 66-242, 41 Stat. 758, 795 (1920). For naval courts-martial, a simple majority vote continued to decide a court-martial's outcome until 1951. *Anderson*, 83 M.J. at 298 n.6. When the UCMJ took effect in 1951, all military services came under a two-thirds conviction rule for any offense for which a death sentence was not mandatory. UCMJ, art. 52, Pub. L. No. 81-506, 64 Stat. 107, 125 (1950). Any vote of two-thirds or more of the members produced a conviction while any vote less than two-thirds resulted in an acquittal. MANUAL

¹⁷ The first Congress under the U.S. Constitution kept the 1786 articles of war in force. An Act to recognize and adapt to the Constitution of the United States the establishment of the Troops raised under the Resolves of the United States in Congress assembled, and for other purposes therein mentioned, ch. 25, § 4, 1 Stat. 95, 96 (1789).

FOR COURTS-MARTIAL, UNITED STATES, ¶ 74d(3) (1951 ed.). That changed in 2019, when the Military Justice Act of 2016’s reforms took effect. Under the new provision, a three-fourths vote of the members produces a conviction while any lesser vote results in an acquittal to which jeopardy attaches as to all criminal tribunals deriving their authority from the federal government. NDAA for FY 2017, Pub. L. No. 114-328, § 5235, 130 Stat. at 2916 (codified at UCMJ art. 52(a)(3), 10 U.S.C. § 852(a)(3)). So, for example, a general court-martial’s vote of 5-2 to convict—a 71.4% vote for guilty—results in an acquittal and bar to retrial in any federal forum. That is a far different regime than the pre-2019 Louisiana or pre-*Ramos* Oregon systems, in which a vote of at least 10-2 was necessary to produce either a conviction or an acquittal. LA. CODE CRIM. PROC. ANN. art. 782(A) (2013); OR. REV. STAT. § 136.450 (2013).¹⁸

Many commentators have criticized the military justice system’s high acquittal rate in sexual assault cases. *E.g.*, Judicial Proceedings Panel Subcomm., *Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases* 21 (May 12, 2017), available at <https://perma.cc/3HXZ-72K7> (“The low conviction rate tends to discredit the entire military justice system in the eyes of Service members and the general public.”); Major David Thompson, *Supporting Victims of Sexual Misconduct: Three Judge Advocate General’s Corps-Driven Solutions to Three Problems Revealed by the Fort Hood Independent Review Committee Report*, 101 TEX. L. REV. 653, 655 (2023). Acquittals in cases where a

¹⁸ Oregon continues to allow acquittals by a 10-2 vote. Or. Rev. Stat. § 136.450(2) (2025).

majority of panel members voted to convict—which did not exist in the U.S. military justice system for most of its history—are probably a significant factor in that high acquittal rate. Thus, the current system fails to protect court-martial defendants by exposing them to conviction based on a non-unanimous vote. It also fails to protect victims, good order and discipline, and society at large by producing acquittals that bar retrial in any federal forum in some cases where most of the factfinders determined that the defendant was guilty beyond a reasonable doubt. This Court should grant review to evaluate whether a court-martial defendant’s constitutional rights prevail over the current irrational voting scheme.

Fifth, a recent military justice reform also suggests that the history of non-unanimous court-martial convictions is irrelevant to the current statutory scheme. For almost the entire history of the U.S. military justice system, prosecutorial discretion was exercised by military commanders or certain prescribed senior Executive Branch officials who exercise civilian control of the military. *See, e.g., Swaim v. United States*, 165 U.S. 553, 558 (1897) (holding that the President may convene a court-martial); UCMJ art. 22(a), 10 U.S.C. § 822(a). But now, for certain military justice offenses committed after December 27, 2023—including murder, manslaughter, rape, sexual assault, stalking, and kidnapping—prosecutorial discretion is exercised by military prosecutors known as “special trial counsel.” *See* UCMJ art. 24a, 10 U.S.C. § 824a. Unlike traditional commander convening authorities—who may not unilaterally refer a charge for trial by a general court-martial—such special trial counsel exercise unfettered prosecutorial discretion. *Contrast*

UCMJ art. 34(a), 10 U.S.C. § 834(a), *with* UCMJ art. 34(c), 10 U.S.C. § 834(c). Thus, the need for those subject to trial by court-martial to be protected against an overzealous prosecutor—which had never been a danger in the court-martial system when military prosecutors were vessels for exercising the convening authority’s will—has now arisen for the first time. The Fifth Amendment’s Due Process Clause guarantees procedural protection against abuses by these newly established unfettered military prosecutors. As this Court indicated in *Ramos*, a unanimity requirement is one such important procedural protection. *See* 590 U.S. at 99–100.

Those five factors quiet history as a determinative consideration in deciding whether a court-martial defendant has a constitutional right not to be convicted by a non-unanimous verdict.

2. Other procedural safeguards in the military justice system do not make up for the possibility of conviction by a non-unanimous verdict.

The CAAF also sought to justify its result in *Anderson* by noting other “safeguards” that, in its view, adequately protect the same interests that unanimous convictions are designed to achieve. 83 M.J. at 299. Specifically, the CAAF highlighted the secret-ballot requirement in Article 51, UCMJ, “which protects junior panel members from the influence of more senior members.” *Id.* (citing UCMJ art. 51(a), 10 U.S.C. § 851(a)). 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’ interests that would be

served by a unanimous verdict requirement. While secret ballots facilitate court-martial members voting as their consciences dictate, it still leaves the accused subject to conviction where one or (in a non-capital general court-martial) two members' consciences dictate an acquittal. It is not apparent how the secret ballot compensates for allowing a defendant to be convicted despite some factfinders determining that the prosecution failed to prove its case beyond a reasonable doubt. Rather, the secret ballot merely provides some limited protection against a uniquely military problem—the threat of the influence of rank in the deliberation room. (And, as noted above, because of military appellate courts' authorization of straw votes, it does not even do a particularly good job of that.) It does not compensate for the loss of the protections that a civilian criminal defendant enjoys through the unanimous verdict requirement.

Nor is factual sufficiency review by the Court of Criminal Appeals a meaningful substitute for a unanimous conviction requirement. First, as the CAAF's *Anderson* decision acknowledges, 83 M.J. at 299 n.9., a 2021 statute curtailed the availability of factual sufficiency review in the military justice system. William M. (Mac) Thornberry NDAA for FY 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021). Particularly significant was an amendment of the statute governing factual sufficiency review requiring a Court of Criminal Appeals to accord “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.” *Id.* (codified at UCMJ art. 66(d)(1)(B)(ii)(I), 10 U.S.C. § 866(d)(1)(B)(ii)(I)). Thus, the Courts of Criminal Appeals must now give deference to a possibly non-unanimous verdict below.

Second, a Court of Criminal Appeals' determination that a finding of guilty is factually sufficient need not be unanimous. Rather, it makes a simple majority determination that the evidence supporting a finding of guilty is factually sufficient to prove guilt beyond a reasonable doubt.¹⁹ A procedure under which a non-unanimous verdict may be affirmed by a non-unanimous appellate court according "appropriate deference" to the non-unanimous trial-level factfinders does not place court-martial defendants on equal footing with their counterparts in federal and state civilian tribunals. *Ramos* would not authorize a state to provide such "factual sufficiency" review in lieu of a unanimity requirement for convictions by juries. There is no reason why it should suffice in the court-martial context.

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

The permissibility of court-martial convictions by a non-unanimous vote of a panel of lay members is one of the most significant issues to service members and civilians who have been—or may in the future be—tried by general or special courts-martial.²⁰

¹⁹ The CAAF has left open the question of whether an evenly divided Court of Criminal Appeals vote on factual sufficiency results in an affirmance. *United States v. Ohrt*, 28 M.J. 301, 303 (C.M.A. 1989); see also *United States v. Acevedo*, 50 M.J. 169, 170 (C.A.A.F. 1999).

²⁰ During FY 2024, the military services combined held 632 general courts-martial, 382 standard special courts-martial, and 79 Article 16(c)(2)(A) special courts-martial. Dep't of Defense, *Combined Service FY 24 146a Reports*, available at

The question this petition presents implicates the same fundamental constitutional issue that this Court deemed necessary to resolve in *Ramos* but, unlike in that case, arises in a manner unconstrained by *stare decisis*. Petitioners do not ask this Court to revisit whether court-martial defendants have a constitutional right to be tried by a jury. The question presented is more modest, but no less important: Whether *Ramos*'s requirement for unanimous convictions applies as a matter of due process when defendants have a *statutory right* to be tried by a jury-like panel.²¹ After all, if unanimous convictions are vital to fairness and impartiality of civilian criminal convictions, they are equally essential in military courts, which often (as in Petitioners' cases) adjudicate allegations of the same kinds of offenses tried in civilian criminal courts.

The applicability of a unanimity requirement to convictions rendered by court-martial panels has enormous implications for the entire military justice system. It is axiomatic that non-unanimous convictions are easier to obtain than unanimous convictions. The possibility of a 6-2 or 7-1 conviction by a non-capital general court-martial or 3-1 conviction by a special court-martial will often affect a defendant's statutory choice between trial by a panel and trial by a "military judge alone," as authorized by

https://jsc.defense.gov/Portals/99/Combined%20Service%20FY24%20146a%20Reports_1.pdf.

²¹ There is only one special or general court-martial forum that does not allow defendants to demand trial by panel members: a special court-martial convened under UCMJ art. 16(c)(2)(A), 10 U.S.C. § 816(c)(2)(A).

Article 16(b)(3) and (c)(2)(B), UCMJ, 10 U.S.C. § 816(b)(3), (c)(2)(B).

The question presented therefore has implications not just for the roughly one-third of general courts-martial tried to a panel, but for *all* non-capital general court-martial proceedings, as well as all special court-martial proceedings other than those under Article 16(c)(2)(A).

This issue is also compelling because it affects not only the rights of service members, but also civilians tried by courts-martial. From its inception, the UCMJ applied to civilians “serving with or accompanying an armed force in the field” during a “time of declared war.” UCMJ art. 2(10), 64 Stat. at 109 (codified as amended at 10 U.S.C. § 802(a)(10)). The John Warner NDAA for FY 2007 expanded that provision to also apply to contingency operations. Pub. L. No. 109-364, § 551, 120 Stat. 2083, 2217 (2006) (codified at 10 U.S.C. § 802(a)(10)). Such contingency operations occur with far greater frequency than declared wars.²² Contingency operations include any “military operation” that “is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force,” as well as any military operation that results in the call or order to, or retention on, active duty of service members during a national emergency

²² The Court of Military Appeals held that the version of Article 2(a)(10), UCMJ, that applied to civilians accompanying U.S. forces in the field in time of war was limited to “a war formally declared by Congress.” *United States v. Averette*, 19 C.M.A. 363, 365 (1970).

declared by the President or Congress. 10 U.S.C. § 101(a)(13). Compared to five declared wars in our nation's history,²³ the U.S. conducted more than 50 contingency operations just between the end of Operation Desert Storm in 1991 and July 2000. U.S. GENERAL ACCOUNTING OFF., GAO/NSIAD-00-164, CONTINGENCY OPERATIONS: PROVIDING CRITICAL CAPABILITIES POSES CHALLENGES 3 (2000). In 2012, the Court of Appeals for the Armed Forces rejected a challenge to the court-martial conviction of a civilian (albeit a non-U.S. citizen) under UCMJ article 2(a)(10). *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012).

In addition to that authority to court-martial civilians accompanying the military in the field during a contingency operation, *all* civilians are subject to trial by court-martial for certain offenses. While most UCMJ offenses apply only to those subject to the UCMJ, three punitive articles apply to “[a]ny person:” article 103 (“Spies), 10 U.S.C. § 903; article 103b (“Aiding the enemy”), 10 U.S.C. § 903b; and article 104a (“Fraudulent enlistment, appointment, or separation”), 10 U.S.C. § 904a. Aiding the enemy, in particular, is subject to potentially expansive application. While trial of civilians by court-martial in the UCMJ era has thus far been rare, historical

²³ “Technically, there have been eleven declarations of war, because both the world wars involved multiple declarations against multiple enemies, but there have been only five declared wars.” David B. Sentelle, *National Security Law: More Questions than Answers*, 31 FLA. ST. U.L. REV. 1, 5 (2003). Those five are: “(1) the War of 1812 against Great Britain; (2) the 1846 war with Mexico; (3) the 1898 Spanish-American War; (4) World War I beginning in 1917; and (5) World War II beginning in 1941.” *Id.*

prudential self-restraint is no guarantee of future forbearance.

Another notable group that is subject to trial by court-martial is military active-duty retirees. UCMJ art. 2(a)(4), 10 U.S.C. § 802(a)(4). Recently, there have been high profile examples of this group's susceptibility to military jurisdiction, such as a Cabinet-level official suggesting the possible court-martial of a sitting United States Senator as the result of his public statements.²⁴ The issues arising from any such court-martial would be compounded by the fact that any defendant could be convicted by a less-than-unanimous vote. A retiree tried at court-martial would not have the safeguard of impartiality that would apply if tried in a civilian court. This Court should consider the constitutionally required procedural protections that attach to the court-martial system before any uptick in its use to prosecute military retirees or civilians.

III. THERE IS NO REASONABLE PROSPECT THAT THIS ISSUE WILL BE FURTHER DEVELOPED WITHIN THE FEDERAL JUDICIARY.

While there is no split among the circuits, which is often a precursor to this Court's decision to review an issue, there is no reasonable prospect that this issue will be developed further within the federal judiciary. With all signs pointing to Article III courts merely deferring to the CAAF's *Anderson* ruling upon

²⁴ Konstantin Toropin and Ben Finley, *Pentagon says it's investigating Sen. Mark Kelly over video urging troops to defy 'illegal orders,'* Associated Press (Nov. 24, 2025, at 18:49 ET), <https://apnews.com/article/pentagon-mark-kelly-troop-investigation-4882f76b05dcdfa3060c284c2c84dd12> (highlighting potential court-martial proceedings).

collateral review of court-martial convictions, this Court's assessment of whether *Anderson* was correctly decided becomes even more imperative.

Since *Anderson* was decided, some convicted service members have sought habeas relief from U.S. district courts on the ground that their constitutional rights were infringed by the possibility that their court-martial convictions were adjudged by non-unanimous votes. Consistent with *Burns v. Wilson*, 346 U.S. 137 (1953) (plurality opinion), however, those courts have held that because the issue was fully and fairly considered within the military justice system, it was not subject to relitigation upon habeas review. *E.g.*, *Livingston v. Curtis*, No. 24-3128, 2025 LX 434304, 2025 WL 2814422 (10th Cir. Oct. 3, 2025); *Edwards v. Villalpando*, No. 24-CV-1502, 2025 LX 161187, 2025 WL 874785 (S.D. Cal. Mar. 19, 2025); *Emas v. Roman*, No. 23-cv-2194, 2024 U.S. Dist. LEXIS 193806, 2024 WL 4573755 (S.D. Cal. Oct. 24, 2024).

One possibility exists of a related issue being resolved by an Article III court of appeals on direct review. The United States Court of Appeals for the District of Columbia Circuit hears direct appeals of military commission cases. 10 U.S.C. § 950g. It is, therefore, foreseeable that that court might decide a *Ramos*-based challenge to the military commissions' authorization of convictions by a two-thirds vote of a military commission's members. *See* 10 U.S.C. § 949m. But military commission cases are subject to unique issues concerning the U.S. Constitution's applicability to trials of non-U.S. citizens outside U.S. territory. It is certainly possible that the alien unprivileged enemy belligerents tried by military

commissions, *see* 10 U.S.C. § 948c, do not enjoy a Fifth Amendment due process right to unanimous verdicts while service members and civilians tried by court-martial do. Conversely, to the extent that a due process right to unanimous verdict might apply to the military commissions, a decision on the matter in this case would help inform potential litigation of this issue as at least one military commission case nears trial.²⁵

Thus, there are no reasonable prospects of further development of the constitutionality of allowing court-martial convictions by a non-unanimous vote of the panel members. As previously discussed, the Department of Defense has recommended against any change, and the issue is not the subject of ongoing congressional deliberation. This Court should use this case as its vehicle for resolving that significant issue.

The military justice system paradoxically makes it too easy to obtain both a conviction and an acquittal. This Court should grant certiorari to review the constitutionality of the former. This Court's consideration of that issue would also likely have the salutary effect of leading Congress and the President to reconsider the wisdom of the latter.

²⁵ *Military Commissions Media Invitation Announced for United States v. Abd al-Rahim al-Nashiri Trial*, U.S. Dep't of War (Mar. 10, 2026) <https://www.war.gov/News/Advisories/Advisory/Article/4430112/military-commissions-media-invitation-announced-for-united-states-v-abd-al-rahi/> (describing a military commission trial scheduled to begin on June 1, 2026).

CONCLUSION

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

Respectfully submitted,

FREDERICK J. JOHNSON
Counsel of Record
Air Force Appellate Defense Div.
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
frederick.johnson.11@us.af.mil

SAMANTHA M. CASTANIEN
DWIGHT H. SULLIVAN
Air Force Appellate Defense Div.
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762

Counsel for Petitioners