**No. _____**

IN THE

# Supreme Court of the United States

BROCK T. ANDERSON & CODY L. KINDRED,
*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


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## QUESTION PRESENTED

Every American prosecuted in state or federal civilian court has the constitutional protection of a unanimous verdict before being convicted of a serious crime. One class of defendants, however, does not receive that protection: those prosecuted before a court-martial. Under Article 52 of the Uniform Code of Military Justice, the federal government may convict a service member of murder, rape, or another serious offense—even one punishable by life imprisonment—based on the votes of only three-fourths of a panel of lay members. This petition asks whether that practice survives this Court's decision in *Ramos v. Louisiana*.

Service members charged with ordinary criminal offenses that have long been tried before civilian juries may be convicted by a non-unanimous military panel, as courts-martial no longer require a military nexus. For many defendants charged with ordinary criminal offenses, including the Petitioners, the only distinction between receiving the protections of a unanimous verdict and conviction by a non-unanimous vote is the government's decision to prosecute before a court-martial rather than an Article III court. That choice alone determines whether an accused enjoys the constitutional protection of a unanimous verdict.

The Question Presented is:

Does the Fifth Amendment's Due Process Clause permit conviction in a court-martial by the non-unanimous vote of a panel of lay members?

## PARTIES TO THE PROCEEDING

This Rule 12.4 petition consolidates appeals from two service members convicted by courts-martial. Petitioners are Brock T. Anderson and Cody L. Kindred. Respondent is the United States.

## CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

## RELATED PROCEEDINGS

The following is a list of all proceedings related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Anderson*, No. 26-0259/AF, U.S. Court of Appeals for the Armed Forces (petition denied August 26, 2026).
- *United States v. Anderson*, No. ACM 40752, Air Force Court of Criminal Appeals (judgment entered June 18, 2026).
- *United States v. Kindred*, No. 26-0204/AF, U.S. Court of Appeals for the Armed Forces (petition denied August 5, 2026).
- *United States v. Kindred*, No. ACM 40607 (f rev), Air Force Court of Criminal Appeals (judgment entered May 26, 2026).

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## INTRODUCTION

Under current law, service members tried by court-martial are deprived of a significant constitutionally guaranteed protection available in all federal and state civilian trials for serious criminal offenses: the right to be convicted only upon a unanimous vote of lay factfinders. The Court should grant certiorari to determine whether service members enjoy the constitutional right this Court recognized in *Ramos v. Louisiana*, 590 U.S. 83 (2020), or whether, by volunteering to protect and defend the United States Constitution, they forfeited its protection. Alternatively, the Court should hold this petition pending its resolution of *Kian v. Florida*, No. 25-6623 (cert. granted June 15, 2026), and then grant, vacate, and remand Petitioners' cases for further consideration in light of that case's outcome. *Kian* asks whether a conviction by a six-member jury is constitutionally permissible. Here, both of Petitioners' convictions could have been rendered by a vote of just six of the eight court-martial members. Hence, *Kian* will likely provide guidance concerning the due process implications of the military justice system's panel size and voting requirements.

## DECISIONS BELOW

The Air Force Court's decision in Petitioner Anderson's case is not reported. It is available at 2026 CCA LEXIS 295 or 2026 WL 1763204, and is reprinted in the Appendix at Pet. App. 2a. The CAAF's order denying review is not yet reported. It is available at 2026 CAAF LEXIS 716 or 2026 WL 2643261 and is reprinted in the Appendix at Pet. App. 1a.

The Air Force Court's decision in Petitioner Kindred's case is not reported. It is available at 2026 CCA

LEXIS 244 or 2026 WL 1469940, and is reprinted in the Appendix at Pet. App. 33a. The CAAF's order denying review is not yet reported. It is available at 2026 CAAF LEXIS 655 or 2026 WL 2641764 and is reprinted in the Appendix at Pet. App. 32a.

## JURISDICTION

The CAAF issued its order denying review of Petitioner Anderson's case on August 26, 2026. Pet. App. 1a. The CAAF issued its order denying review of Petitioner Kindred's case on August 5, 2026. Pet. App. 32a. This Court's jurisdiction rests on 28 U.S.C. § 1259(3).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of the following is set forth in the Appendix, starting at 103a.

- Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V.
- Jury Trial Clause of the Sixth Amendment, U.S. CONST. amend. VI.
- Article 16, Uniform Code of Military Justice, 10 U.S.C. § 816.
- Article 51(a), Uniform Code of Military Justice, 10 U.S.C. § 851(a).
- Article 52(a), Uniform Code of Military Justice, 10 U.S.C. § 852(a).
- Rule for Courts-Martial 501(a), *Manual for Courts-Martial, United States* (2024 ed.).
- Rule for Courts-Martial 921(c), *Manual for Courts-Martial, United States* (2024 ed.).

## STATEMENT OF THE CASE

Petitioner Anderson was an airman first class (E-3) in the United States Air Force at the time of his conviction. At a general court-martial, a panel of lay members (members) convicted him, contrary to his pleas, of one specification[1] of sexual assault of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. Pet. App. 3a. The military judge sentenced Petitioner Anderson to a dishonorable discharge, eight years of confinement, and reduction to the grade of E-1. Pet. App. 3a-4a. The Air Force Court affirmed the findings and sentence. Pet. App. 31a. The Air Force Court expressly rejected Petitioner Anderson's argument that he could not be convicted by a non-unanimous vote of the members. Pet. App. 4a-5a. Petitioner Anderson sought further review from the CAAF, and the CAAF denied review. Pet. App. 1a.

Petitioner Kindred was an airman (E-2) in the United States Air Force at the time of his conviction. At a general court-martial, a panel of lay members convicted him, contrary to his pleas, of one specification of wrongfully communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915; one specification of rape and two specifications of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920; one specification of kidnapping, in violation of Article 125, UCMJ, 10 U.S.C. § 925; one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928; six specifications of domestic violence, in violation of Article 128b,

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[1] 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). It is the equivalent of a count in civilian criminal practice.

UCMJ, 10 U.S.C. § 928b; and one specification of obstructing justice, in violation of Article 131b, UCMJ, 10 U.S.C. § 931b. Pet. App. 34a-35a. The military judge sentenced Petitioner Kindred to a dishonorable discharge, twenty years and three months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. Pet. App. 35a. The Air Force Court set aside the specification of kidnapping and the specification of assault consummated by a battery, reduced the adjudged confinement by three months, and affirmed the remaining findings and sentence. Pet. App. 101a-02a. The Air Force Court expressly rejected Petitioner Kindred's argument that he could not be convicted by a non-unanimous vote of the members. Pet. App. 36a-37a. Petitioner Kindred sought further review from the CAAF, and the CAAF denied review. Pet. App. 32a.

In both 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, Rule for Courts-Martial (R.C.M.) 922(e), and the "deliberations of courts and juries" privilege, MIL. R. EVID. 509, MCM, 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 unanimity is an essential feature of the Sixth Amendment right to trial by jury. 590 U.S. at 92. 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 long recognized that the Fifth Amendment's Due Process Clause applies to courts-martial, although its application may differ from that in civilian criminal proceedings. *Weiss v. United States*, 510 U.S. 163, 177-78 (1994); *Middendorf v. Henry*, 425 U.S. 25, 43-44 (1976). Petitioners do not contend that the Sixth Amendment's Jury Trial Clause applies directly to courts-martial. Rather, they contend that the Fifth Amendment guarantees those procedural protections that are fundamental to the fairness and reliability of criminal adjudication. *Ramos* held that unanimity is an essential attribute of criminal adjudication by lay factfinders. 590 U.S. at 92. Congress has repeatedly modernized military justice by adopting civilian procedural protections that remain subject to the Fifth Amendment's constraints.

*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 courts-martial as in civilian courts. *Id.*

From the Nation's founding, Congress recognized that court-martial panels must serve as fair and impartial bodies charged with determining an accused's guilt. The earliest military codes required court-martial members to deliberate and decide cases "with calmness, decency, and impartiality." Art. XXXV, Rules and Regulations of the Continental Army, 2 J. CONT'L CONG. 111, 117 (1775) (1906 ed.). Members likewise swore to "administer justice . . . without partiality, favor, or affection." Articles of War, § XIV, Art. 3, 5 J. CONT'L CONG. 788, 801 (1776) (1906 ed.) (italics omitted); *see also* 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). Congress retained those guarantees when it enacted the UCMJ, reflecting its intent to modernize military justice while preserving the fairness and integrity of court-martial proceedings.

Consistent with that history, this Court has recognized that the Fifth Amendment's Due Process Clause applies to courts-martial, even if its application differs from the civilian context. And the CAAF has repeatedly held 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). When Congress elects to entrust the determination of guilt to a panel of lay members, the Fifth Amendment requires that panel to possess those fundamental attributes of reliability and fairness that the Constitution demands of lay criminal factfinding. *Ramos* confirms that unanimity is one of those indispensable attributes. 590 U.S. at 92.

The decisions below squarely present an important and recurring constitutional question left unresolved by *Ramos*: whether the Fifth Amendment permits the federal government to obtain criminal convictions before panels of lay members through non-unanimous verdicts. In *United States v. Anderson*, the CAAF answered that question in the affirmative without meaningfully addressing *Ramos*' conclusion that unanimity is an essential feature of criminal adjudication by lay factfinders. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024).

That question is exceptionally important to the administration of military justice and warrants this Court's review.

## 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://www.loc.gov/item/2011525391/. 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)).[2] 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."). Unanimous convictions are essential to ensure impartiality, *see Ramos*, 590 U.S. at 90; accordingly, a court-martial defendant who elects to be tried by a members panel has a Fifth Amendment due 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. "The 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. One of these requirements was unanimity." *Ramos*, 590 U.S. at 89-90 (par-

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[2] These cases are CAAF precedents. The National Defense Authorization Act (NDAA) for Fiscal Year (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).

agraph break omitted). Because unanimity is, as *Ramos* held, central to that meaning, the CAAF's effort to untether the two concepts fails. *Id.* at 92.

Further the CAAF's concern that unanimous verdicts invite improper influence due to rank disparity is overblown. *Anderson*, 83 M.J. at 298-99, 302. As discussed below, non-unanimous verdicts do not protect service members from such influence. Nor does this concern warrant depriving service members of their constitutional right to due process.

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. *See, e.g.*, *United States v. Lawson*, 16 M.J. 38 (C.M.A. 1983). Or the court-martial's president can call for multiple votes even if the first vote should have resulted in an acquittal and the military justice system's appellate courts consider themselves powerless to redress the error. *See, e.g.*, *United States v. RosarioMartinez*, No. 25-0102/MC, 2026 CAAF LEXIS 485 (C.A.A.F. June 2, 2026), *cert. denied*, 2026 U.S. LEXIS 3897 (Oct. 5, 2026). Thus, rank can already influence court-martial members' deliberations, but without the 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 on a court-martial defendant's lack of a constitutional right to a trial

by jury to require 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 90-91, 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.

Unanimous convictions are even more important in criminal justice systems that utilize lay 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 eight members. R.C.M. 501(a)(1)(A)(i).

This Court's recent grant of certiorari in *Kian v. Florida* further demonstrates that *Ramos*' significance extends beyond the narrow question of state non-unanimous verdicts. In *Kian*, the Court agreed to decide whether the Sixth Amendment (as incorporated by the Fourteenth Amendment) permits conviction of a defendant by a six-person jury, thereby reconsidering another procedural feature long thought settled under pre-*Ramos* precedent—jury size. If *Ramos* calls into question whether six jurors satisfy the constitutional guarantee of trial "by an impartial jury," it also raises the analogous question presented here: whether the Constitution permits the federal government to obtain criminal convictions before an eight-member panel where only six votes are necessary to convict. The decisions below effectively foreclosed that inquiry by treating *Ramos* as irrelevant to military justice. This Court's grant in *Kian* confirms that the constitutional implications of *Ramos* remain unresolved.

There is no reason unanimity cannot be required for court-martial verdicts. Like their American counterparts, Canadian courts-martial descended from the British articles of war. Since 2008, Canadian general court-martial panels' verdicts must be unanimous. *See* National Defence Act, R.S.C., 1985, c. N-5, § 192(2). That unanimity requirement is consistent with the voting percentage required for a conviction in Canadian civilian criminal jury trials. *See R. v. Pan*, [2001] 2 S.C.R. 344 (Can.). The unanimity requirement has not prevented Canadian courts-martial from operating effectively over the past eighteen years. The same

should be true for the United States' military justice system.

### B. Instances of confusion in military verdict voting procedures are not unprecedented.

The guardrails supposedly in place to offset the lack of a unanimous verdict are not fail-safe.

A recent Coast Guard case, *United States v. Kelley*, presented an issue of confusion by the court members where they mistakenly believed they were required to reach a consensus in voting on a verdict. *United States v. Kelley*, No. 1495, 2025 CCA LEXIS 181, at *5-6 (C.G. Ct. Crim. App. Apr. 25, 2025). In *Kelley*, the court members faced a decision about which individual digital image files of child pornography they would find the accused guilty of possessing. *Id.* After some deliberations, the panel president informed the trial judge via written note, "We've voted on both spec[ification]s. But we don't have 3/4 majority on any individual files. We weren't clear on how to come to consensus on each file [] or if that's required." *Id.* at *5 (alteration in original).

But despite the fact the members already "voted" and failed to achieve the threshold for conviction, the *Kelley* trial judge did not clarify whether those votes were formal secret ballot votes or "an informal non-binding vote." *Id.* at *8. Instead, he denied the defense motion for a finding of not-guilty, re-instructed the members that they needed "at least three-fourths of the members to vote guilty on any [specific image] to result in a finding of guilty to it," and sent them back to the deliberation room. *Id.* at *5-6. The accused was ultimately convicted even though he was initially effectively acquitted. *See id.* at *6.

The Coast Guard Court of Criminal Appeals (CGCCA) affirmed the conviction in *Kelley* relying primarily on a "logical inference" about what transpired in the deliberation room to hold that the members had not yet acquitted the accused. *Id.* at *7-8. The CGCCA relied on the Navy-Marine Corps Court of Criminal Appeals' decision in *United States v. RosarioMartinez* to justify the trial judge's refusal to inquire whether the vote was formal or not. *Id.* at *10 (citing *United States v. RosarioMartinez*, 85 M.J. 535, 541 (N-M. Ct. Crim. App. 2024), *aff'd*, 2026 CAAF LEXIS 485 (C.A.A.F. 2026), *cert. denied*, 2026 U.S. LEXIS 3897 (Oct. 5, 2026)). The CAAF then denied review. *United States v. Kelley*, No. 25-0227/CG, 2025 CAAF LEXIS 947, at *1 (C.A.A.F. Nov. 17, 2025).

A recent Marine Corps case, *United States v. RosarioMartinez*, presented another issue of confusion by the court members where they did not understand how many votes were required to acquit. *RosarioMartinez*, 2026 CAAF LEXIS 485, at *21. After the trial, the panel president swore in an affidavit that the members misunderstood the number of votes required for an acquittal in a court-martial—a vote with only five votes for conviction would be an acquittal. *Id.* at *21-22; *see* R.C.M. 921(c)(3), *Manual for Courts-Martial, United States* (2024 ed.) [hereinafter MCM] ("If fewer than three-fourths of the members present vote for a finding of guilty, a finding of not guilty has resulted as to the charge or specification on which the vote was taken."). It was the members' understanding that "in order to reach a verdict [they] needed either 6 votes in favor of guilty or 6 votes in favor of not guilty for both specifications." *RosarioMartinez*, 2026 CAAF LEXIS 485, at *21. Because of this misunderstanding,

the court-martial members called for a vote "at least 5-6 times" using secret written ballots. *Id.* at *21-22.

The panel president made clear that the first vote concluded with "3 or more members" voting "not guilty for both specifications." *Id.* at *22. The panel president swore that the members "incorrectly did not complete the findings worksheet after each finding that would have resulted in a not guilty verdict because [they] did not believe [they] had reached the required number of votes for a finding of not guilty." *Id.* Further, the panel president wrote that "[h]ad [they] known the proper procedure [they] would have filled out the findings worksheet correctly to return a finding of not guilty." *Id.* Because of this mistake, the panel president sought to correct the findings worksheet "to accurately reflect the correct findings of the panel." *Id.* But the military judge held he could not consider the affidavit and on appeal, the Navy-Marine Corps Court and CAAF agreed and affirmed the findings and the sentence. *Id.* at *21.

*Kelley* and *RosarioMartinez* present consistent, alarming examples of court-martial panels disregarding the military judge's voting instructions and convicting service members without realizing they had already acquitted them. In light of these cases, it is evident that the current military justice system is failing to achieve both fairness and the appearance of fairness. Thus, Petitioners' cases present "an important question of federal law that has not been, but should be, settled by this Court." *See* SUP. CT. R. 10(c).

### C. *Ramos*' 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 four reasons. First, court-martial jurisdiction to try service members for most common law offenses outside wartime is largely a modern phenomenon. Colonel Frederick Bernays Wiener, the great mid-twentieth century military justice scholar and frequent Supreme Court advocate,[3] 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

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

common law offenses under the Articles of War's "general article."[4] *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 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

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[4] *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).

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,[5] supplemented by eighteen presidentially prescribed offenses under Article 134, UCMJ, the "General Article."[6] Many of those offenses are of a type long tried by courts-martial, such as desertion, willfully disobeying a superior commissioned officer, and mutiny. Arts. 85, 90, 94(a)(1), UCMJ, 10 U.S.C. §§ 885, 890, 894(a)(1) (2024). 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. Arts. 118, 119, 120, 125, UCMJ, 10 U.S.C. §§ 918, 919, 920, 925 (2024). 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* Art. 2, UCMJ, 10 U.S.C. § 802 (2024). 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.[7]

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[5] Arts. 78-134, UCMJ, 10 U.S.C. §§ 878-934 (2024).

[6] Pt. IV, ¶¶ 92-108, MCM.

[7] Other than in Louisiana from 1898 to 2020 and Oregon from 1934 to 2020, the unanimity requirement applied in U.S. federal

Second, court-martial convictions now often have consequences that persist long after the criminal defendant returns to civilian life. *See generally* Major 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 are subject to sex offender registration requirements[8] 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 court-martial convictions—including those adjudged against Petitioners—result in a lifetime forfeiture of the Second Amendment right to possess or acquire firearms. Such lifelong deprivation of constitutional

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civilian and state criminal jury trials. *See Ramos*, 590 U.S. at 87; *id.* at 127 n.86 (Kavanaugh, J., concurring).

[8] *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).

rights following return to civilian status was not a feature of founding-era courts-martial. Yet today, a service member's constitutional right to bear arms may be deprived by a three-fourth's vote.

Third, while the court-martial panel was originally a command tool, it has evolved into a far more jury-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 (or at any time since).

Fourth, the current military justice system produces anomalous results. It permits conviction by less than a unanimous vote while simultaneously providing for acquittal in many instances where a majority of the panel voted to convict. 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. *See Grafton v. United States*, 206 U.S. 333 (1907). 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 (83.3%) 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).[9]

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

[9] Oregon continues to allow acquittals by a 10-2 vote. OR. REV. STAT. § 136.450(2) (2025).

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 majority of panel members voted to convict—which did not exist under the military justice system's simple-majority verdict rule at the time of the founding and for most of the United States' 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 that irrational voting scheme of recent vintage.

Those four factors quiet history as a determinative consideration in deciding whether a court-martial defendant has a constitutional right to be convicted of a serious crime only upon a 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 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.

Further, as seen in *RosarioMartinez*, this "unique safeguard" was no safeguard at all where the members voted to first *acquit* him instead of convict. *RosarioMartinez*, 2026 CAAF LEXIS 485, at *21-22. In *RosarioMartinez*, the panel president wrote in his affidavit, "I would like to correct the findings worksheet to accurately reflect the correct findings of the panel." *Id.* at 22. This was a mistake that the military justice system's appellate courts refused to correct.

Nor is factual sufficiency review by the Courts of Criminal Appeals (the military justice system's intermediate appellate courts) 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 that departs from the previous de novo review and now requires 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 Art. 66(d)(1)(B)(ii)(I), UCMJ, 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.[10] Moreover, the CAAF's jurisdiction is limited to questions of law; the CAAF does not possess independent factfinding authority and may not reassess the evidence to determine whether guilt was proven. *See* 10 U.S.C. § 867(c). Thus, once a possibly

[10] 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).

non-unanimous panel conviction is affirmed by a possibly non-unanimous Court of Criminal Appeals, no appellate court exists with authority to revisit the factual determination of guilt that *Ramos* recognized must be made unanimously by lay factfinders. 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[11] who have been—or may in the future be—tried by general or special courts-martial.[12]

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[11] Civilians may sometimes be tried by court-martial, such as when they accompany the U.S. military in the field during a contingency operation. *See* Art. 2(a)(10), UCMJ, 10 U.S.C. § 802(a)(10) (2024); *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012).

[12] During FY 2025, the military services combined tried 561 general courts-martial, 433 standard special courts-martial, and 55 Article 16(c)(2)(A) special courts-martial. Dep't of Defense, *Combined Service FY 25 146a Reports*, *available at* https://jsc.defense.gov/Portals/99/JSC%20-%20FY25%20Art%20146a%20Reports%20-%20Combined%20-%20with%20USCG.pdf.

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*' 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.[13] After all, if unanimous convictions are vital to the fairness, impartiality, and reliability 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 will often affect a defendant's statutory choice between trial by a panel and trial by a "military judge alone," as authorized by Article 16(b)(3), UCMJ, 10 U.S.C. § 816(b)(3) (2024). The question presented therefore has implications not just for the roughly one-third of general courts-martial

[13] 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). That is the least used court-martial forum. *See supra* note 12.

tried before a panel, but for *all* non-capital general court-martial proceedings.

The question presented affects not only roughly 1.35 million active-duty service members[14] (who are subject to the UCMJ at all times) and about 770,000 military reservists[15] (who are subject to the UCMJ intermittently), but also approximately 1.5 million active component retirees.[16] *See* Art. 2(a)(4), UCMJ, 10 U.S.C. § 802(a)(4) (2024). Retirees tried by courts-martial are deprived of the constitutional right to a unanimous verdict that would apply if tried in a civilian court by virtue of having served their country in uniform for at least twenty years.

## 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 collateral

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[14] Defense Manpower Data Center, *Active Duty Military Strength by Service for March 31, 2026*, *available at* https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports.

[15] Defense Manpower Data Center, *Selected Reserves by Rank/Grade (Mar. 31, 2026)*, *available at* https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports. *See also* UCMJ art. 2(a)(1), (3), 10 U.S.C. § 802(a)(1), (3).

[16] Dep't of Defense Office of the Actuary, *Statistical Report on the Military Retirement System, Fiscal Year Ended September 30, 2022* at 55 (Oct. 2023), *available at* https://media.defense.gov/2023/Oct/06/2003315292/-1/-1/0/MRS%20STATRPT%202022% 20V999.PDF.

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).

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. 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.

## CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should hold this case pending resolution of *Kian v. Florida*, 25-6623, and then grant, vacate, and remand Petitioners' cases for further consideration in light of that case's outcome.

Respectfully submitted,

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