No. 24-654

IN THE

Supreme Court of the United States

DAVID LESH,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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

Clark M. Neily III
Counsel of Record
Matthew Cavedon
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 425-7499
cneily@cato.org

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QUESTION PRESENTED

Whether the Constitution's dual guarantee of trial by jury contains an unstated exception for "petty offenses."

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INTEREST OF *AMICUS CURIAE*[1]

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

Cato's interest in this case arises from its opposition to plea-driven mass adjudication and its institutional commitment to resurrecting the constitutionally prescribed jury trial as the default mechanism for resolving criminal charges in America.

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

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Article III explicitly commands that the trial of "all" federal crimes be by jury, and the Sixth Amendment underscores that command by repeating that "in all criminal prosecutions" the defendant has the right to a public trial by an impartial jury. The petty offense exception to this imperative lacks any historical foundation. Eliminating it is not only feasible but vital to the rule of law.

Charged with the misdemeanor of unlawfully operating a vehicle on federal lands, social media influencer and outdoorsman David Lesh requested a jury trial.[2] The Government successfully opposed that request, and the case was tried to a U.S. magistrate judge, who convicted Mr. Lesh and then imposed the maximum fine of $5,025 and 160 hours of community service.[3]

The district court affirmed, though it noted that but for this Court's recognition of a "petty offense exception," Mr. Lesh's argument that he was constitutionally entitled to be tried by a jury was "not unpersuasive."[4] The Tenth Circuit likewise affirmed, with two members of the panel noting that the petty offense exception arose in "disregard of the text of Article III and the Sixth Amendment," and cautioning that it may well be "incompatible with the original public understanding of the Constitution." Pet. 28a–29a (Tymkovich, J., concurring).

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[2] Pet. at 9–10.

[3] *Id.*

[4] Pet. App'x 36a–37a.

If anything, that understates the case.

ARGUMENT

I. THE PETTY OFFENSE EXCEPTION IS HISTORICALLY BASELESS.

The petty offense exception arose through neglect of the Constitution's unambiguous text and original meaning. Article III commands that the "Trial of all Crimes . . . shall be by jury," and the Sixth Amendment guarantees the right to a jury trial in "all criminal prosecutions."[5]

The petty offense exception to these straightforward provisions had seemingly innocuous origins. In the late 19th century, Congress created a police court to try District of Columbia municipal offenses and misdemeanors.[6] Defendants in that court had no right to a jury trial, although those who could afford to appeal could demand one upon conviction at a bench trial.[7] One such defendant was James Callan, who appealed his conviction based on the Article III jury-trial requirement and the Sixth Amendment right to a jury trial.[8] This Court's decision in his case explained that the word "crime" in Article III, "in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character."[9] Thus, the word

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[5] U.S. CONST. art. III, § 2; *id.* amend. VI.

[6] Andrea Roth, *The Lost Right to Jury Trial in "All" Criminal Prosecutions*, 72 DUKE L.J. 599, 610 (2022).

[7] *Id.* at 611.

[8] *Id.*; *Callan v. Wilson*, 127 U.S. 540, 547–48, 555 (1888).

[9] *Callan*, 127 U.S. at 549.

"crime" included "some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen," and categorically excluding these from its scope would be too "narrow" a reading.[10] However, in dictum, *Callan* also supposed the existence of certain "petty offences, which, according to the common law," could be tried summarily, without a jury.[11]

This dictum became the basis of the Court's decision sixteen years later in *Schick v. United States*.[12] *Schick* noted also that Blackstone distinguished the singular word "crime"—which included felonies and misdemeanors—from the plural "crimes," which "denote such offenses as are of a deeper and more atrocious dye."[13] Additionally, Article III as initially drafted covered "all criminal offenses," but that term was changed to "all crimes" in the final, ratified version of the Constitution.[14] *Schick* thus concluded that the Framers "obvious[ly]" intended a petty offense exception.[15]

Schick erred. First, it cherry-picked from Blackstone. In discussing summary convictions, he said "[t]he truth of every accusation" should be tested by a jury.[16] Blackstone further wrote that Magna

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[10] *Id*. at 549–50.

[11] *Id*. at 557.

[12] 195 U.S. 65, 70 (1904).

[13] *Id.* at 69–70.

[14] *Id.* at 70.

[15] *Id.*

[16] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *343.

Carta protected "every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."[17] *Schick* also misconstrued *Callan*. Justice Harlan—*Callan*'s author—noted in dissent in *Schick* that "a crime is a criminal offense and a criminal offense is a crime," and the Sixth Amendment's reference to "all criminal prosecutions" is "clear and explicit," affording "no room for interpretation."[18]

Next, *Schick*'s strained distinction between "crime" and "crimes" conflicted with the Constitution's original public meaning. *Cf. Ramos v. Louisiana*, 590 U.S. 83, 97 (2020) (dismissing an argument based on a minor wording change to the Sixth Amendment as a mere "snippet of drafting history"). "Crime" was a general term.[19] Samuel Johnson's 1755 English dictionary "appears to treat both a felony and misdemeanor as crimes, albeit of differing degrees."[20] His contemporary, Matthew Bacon, said minor offenses must rise to the same level of suspicion as any other crime to be charged by information.[21] Other constitutional provisions confirm that the word "crime" should be read straightforwardly. After all,

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[17] *Id.* at *417.

[18] *Schick*, 195 U.S. at 78 (Harlan, J., dissenting).

[19] *See* Roth, *supra*, at 638–41.

[20] *See id.* at 638 (discussing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 515, 797 (W. Strahan, 1755); 2 JOHNSON, *supra*, at 1329).

[21] *See id.* at 642 (discussing 5 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 180 (Henry Gwyllim, Bird Wilson & John Bouvier eds., 3d ed. 1852) (1768)).

there is no petty offense exception to the rights to a public trial, jury impartiality, vicinage, and confrontation, nor the rights against double jeopardy and self-incrimination. U.S. CONST. amends. V, VI.

Finally, *Schick* erred in overreading and over-relying on state decisions.[22] Many states never recognized a petty offense exception.[23] *Callan* itself noted disagreement among lower courts.[24] Perhaps most importantly, Justice Harlan's dissent explained, common law is relevant only if the Constitution's text is unclear.[25] Article III and the Sixth Amendment are free of ambiguity.[26] In any event, the common law did not even contain a petty offense exception—English exceptions to the jury trial were statutory only.[27]

Justice Harlan's view did not carry the day. Instead, the *Schick* majority bifurcated "historic features of common law" into those it thought "important enough" to import into the Sixth Amendment and those that did not make the cut. *Ramos*, 590 U.S. at 98 (criticizing another ahistorical abridgement of the jury trial found in this Court's

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[22] *Callan*, 127 U.S. at 552–53.

[23] *See* Part II.B *infra*.

[24] *Callan*, 127 U.S. at 552–55.

[25] *Schick*, 195 U.S. at 80 (Harlan, J., dissenting).

[26] *Id.*

[27] *Id.*; *see also* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 933 (1926) (criticizing Blackstone as the "high priest of the obsolete common law," but acknowledging that he "deplored the growth" of statutory exceptions to the jury trial right).

precedent). Thus, *Callan*'s dictum became *Schick*'s ahistorical error.

II. THE JURY TRIAL IS ESSENTIAL.

A properly historical approach instead confirms the categorical availability of jury trials for all crimes, however defined or characterized. The Constitution's Framers prized trial by jury, and many states historically tried petty offenses using it.

A. THE FRAMERS PRIZED THE JURY TRIAL.

The jury trial was deemed indispensable at the Founding. As noted above, Blackstone read Magna Carta to require a jury trial before a person could be deprived of liberty.[28] He called the jury trial "the glory of the English law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases!"[29] It was nothing less than "the bulwark of our liberties."[30] Jefferson described the jury trial as "the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's constitution."[31] Madison called the jury trial "as essential to secur[ing] the liberty of the people as any one of the pre-existent rights of nature."[32] In The

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[28] 4 BLACKSTONE, *supra*, *417.

[29] 3 BLACKSTONE, *supra*, *379.

[30] *Id.* *350.

[31] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789),https://founders.archives.gov/documents/Jefferson/01-15-02-0259.

[32] Hon. Kathleen M. O'Malley, *Foreword: Trial by Jury: Why It Works and Why It Matters*, 68 AM. U. L. REV. 1095, 1098 (2019)

Federalist No. 83, Alexander Hamilton boasted that criminal jury trials are "provided for in the most ample manner in the plan of the convention."[33] Chancellor Kent described the jury trial as ensuring that "no person should suffer" without full due process.[34] He considered it an "undeniable right[.]"[35]

The jury trial was preserved in practice as well, including for cases akin to so-called petty offenses. It was available for those accused of violating "the fine-only prohibitions of Thomas Jefferson's Embargo Laws."[36] Congress respected the jury trial even in cases when it "may have had a compelling reason to fear local resistance to unpopular federal policy, such as in prosecutions for the six-month misdemeanor of impeding recovery of enslaved persons under the Fugitive Slave Act of 1850."[37] In this regard, it is also noteworthy that the jury trial was available for "the one-year misdemeanor for violations of the 1866 Civil Rights Act."[38]

This Court's precedents have continued to recognize jury trials' importance. Chief Justice Rehnquist wrote that the Founders "considered the

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(citing Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005) (quoting 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789) (discussing civil cases))).

[33] THE FEDERALIST NO. 83 (Alexander Hamilton).

[34] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, Part IV, Lect. 24, 2 (1827).

[35] *Id.*

[36] Roth, *supra*, at 609.

[37] *Id.*

[38] *Id.*

right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."[39] Just last year, this Court in *Erlinger v. United States* held that there is "no efficiency exception to the . . . Sixth Amendmen[t]."[40] In *Ramos v. Louisiana*, this Court revived the unanimous-verdict requirement by overturning longstanding precedent, holding: "When the American people chose to enshrine [the jury trial] right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed."[41] In *SEC v. Jarkesy*, Justice Gorsuch affirmed that despite "its weaknesses and the potential for misuse, we continue to insist that [the jury trial] be jealously preserved."[42]

The constitutional requirement of criminal jury trials demands "fidelity to its roots," which reach as deep as the Anglo-American legal tradition and—apart from the misguided exception for petty offenses—retain much of their vitality.[43]

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[39] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

[40] 602 U.S. 821, 842 (2024).

[41] 590 U.S. at 100.

[42] 144 S. Ct. 2117, 2150 (2024) (Gorsuch, J., concurring) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *Patton v. United States*, 281 U.S. 276, 312 (1930)) (internal quotation marks omitted); *see also Ramos*, 590 U.S. at 110–11 (plurality opinion).

[43] Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J.L. & PUB. POL'Y 53, 61 (2011).

B. STATES HAVE HISTORICALLY TRIED "PETTY OFFENSES" BY JURY.

Considering text and history similar to that undergirding the federal Constitution's provisions, many states have rejected any petty offense exception.[44] In an 1827 case, the Virginia Supreme Court held that the jury trial is available "in all criminal cases without exception."[45] In 1857, the Supreme Court of Massachusetts held that while minor and petty offenses may indeed carry fewer procedural protections, "in all cases the party accused should have a right to a trial by jury, if he should desire it."[46]

Modern state decisions have also rejected the petty offense exception.[47] The Alaska Constitution provides that the right to a jury trial applies "in any criminal prosecution,"[48] language which the state supreme court has understood to include any incarcerable offense.[49] The Idaho Constitution provides for trial by jury for all incarcerable offenses.[50] Tennessee

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[44] *Cf. Ramos*, 590 U.S. at 134–35 (Thomas, J., concurring in the judgment) (looking to early state practices in assessing the jury-trial right).

[45] *Commonwealth v. Garth*, 30 Va. 761, *prior hist.* & 769–70 (1827).

[46] *Jones v. Robbins*, 74 Mass. 329, 347 (1857).

[47] *See State v. Bennion*, 112 Idaho 32, 39–40 (1986) (collecting cases); Robert P. Connolly, Note, *The Petty Offense Exception and the Right to a Jury Trial*, 48 FORDHAM L. REV. 205, 226 nn.165–66 (1979).

[48] ALASKA CONST. art. I, § 11.

[49] *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970).

[50] *Bennion*, 112 Idaho at 45.

recognizes a "small offense" exception, but—based on the law at the time it became a state—this is limited to crimes punishable by no more than a $50 fine and no imprisonment.[51] North Dakota recognizes the availability of jury trials even for ordinance violations because that was the state of the law when its constitution was adopted in 1889.[52] The Oklahoma Constitution mirrors the Sixth Amendment, providing for jury trials "[i]n all criminal prosecutions."[53] However, Oklahoma courts do not distinguish "between a felony or misdemeanor as the person charged may be deprived of his liberty under either."[54]

Thus, the petty offense exception has proven unpersuasive and unappealing to many state courts examining similar legal history and constitutional text—and for good reason.

III. ELIMINATING THE PETTY OFFENSE EXCEPTION IS FEASIBLE.

The jury trial is vital regardless of perceived practical difficulties it may pose, though state examples also show that judicial administration does not depend on the petty offense exception. First, practical considerations should not justify maintaining a rule that leads to unconstitutional criminal convictions. *Ramos*, 590 U.S. at 126 (Kavanaugh, J., concurring). This is especially so because part of the jury trial's very rationale is to serve as a hurdle to conviction. It shields defendants from

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[51] *State v. Dusina*, 764 S.W.2d 766, 768 (Tenn. 1989).

[52] *Smith v. Isakson*, 962 N.W.2d 594, 598, 601 (N.D. 2021).

[53] OKLA. CONST. art. II, § 20.

[54] *Hunter v. State*, 288 P.2d 425, 428 (Okla. Crim. App. 1955).

"arbitrary enforcement of laws." *Duncan,* 391 U.S. at 62–63. In particular, jury trials are more transparent and publicly accountable than plea bargaining.[55] "Our modern criminal justice system is verging on an assembly line—a machinery that is all too often built to process cases and convictions with minimal adversarialism."[56] Jury trials properly interdict this lamentable trend.

The absence of jury trials can also "result in an 'adversarial deficit' . . . that allows police and prosecutorial practices to go unchecked."[57] As this Court explained in *Duncan v. Louisiana*: "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." 391 U.S. at 155. Jury trials also assure the public that "the punishments courts issue are not the result of a judicial 'inquisition' but are premised on laws adopted by the people's elected representatives and facts found by members of the community." *Erlinger*, 602 U.S. at 832. Inefficiencies that jury trials pose to conviction are an intended feature, not a bug.

That said, eliminating the petty offense exception need not overburden trial courts. During the COVID-19 pandemic, Alaska courts surmounted great difficulties: there were over "8,000 pending misdemeanors in January of 2019, more than 13,000 in January of 2022 and 9,312 in January of 2024."[58]

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[55] Connolly, *supra*, at 209.

[56] Fisher, *supra*, at 62.

[57] John D. King, *Juries, Democracy, and Petty Crime*, 24 U. PA. J. CONST. L. 817, 835 (2022).

[58] Claire Stremple, *Alaska's Courts are Mired in Cases, with Gradual Progress on Pandemic Backlog*, ANCHORAGE DAILY NEWS

Backlogs fell thanks to the state "adapting pandemic-era use of video technology."[59] North Carolina, too, improved court efficiency using technology.[60] Its case backlog dropped by a quarter as of 2023, and dockets "are in better shape now th[a]n they were even before COVID."[61] Backlogs are better addressed through administrative innovation than deprivation of a constitutional right.

CONCLUSION

Under the petty offense exception, a guarantee "mentioned twice in the Constitution [is] reduced to an

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(Feb. 11, 2024), https://www.adn.com/alaska-news/crime-courts/2024/02/10/alaskas-courts-are-mired-in-cases-with-gradual-progress-on-pandemic-backlog/.

[59] Claire Stremple, *Alaska Chief Justice Touts Increased Accessibility of Courts, Progress on Case Backlog in Annual Speech*, ALASKA BEACON (Feb. 7, 2024), https://alaskabeacon.com/briefs/chief-justice-touts-increased-accessibility-of-courts-progress-on-case-backlog-in-annual-speech/.

[60] Jessica Smith, *Virtual Court Proceedings—North Carolina Court Actors Weigh In*, N.C. CRIM. L. (Mar. 22, 2021), https://nccriminallaw.sog.unc.edu/virtual-court-proceedings-north-carolina-court-actors-weigh-in/.

[61] Press Release, *All Things Judicial Highlights Case Backlog Reduction Strategies and Successes*, N.C. JUD. BRANCH (Aug. 30, 2023), https://www.nccourts.gov/news/tag/press-release/all-things-judicial-highlights-case-backlog-reduction-strategies-and-successes; *cf.* Kathleen Maloney, *Supreme Court Cuts Backlog of Judicial Assignment Requests*, COURT NEWS OHIO (June 12, 2024), https://www.courtnewsohio.gov/happening/2024/judAssignReport_061224.asp (noting that Ohio cut its court backlog by over a quarter through resource management, surveying local courts, and implementing new procedures).

empty promise. That can't be right."[62] *Schick* created the petty offense exception by misconstruing this Court's own precedent and earlier law. The jury trial right was unequivocally important at common law and to the Founders, as many states have continued to recognize, and that right can be restored without undue difficulty.

This Court should grant Mr. Lesh's petition and reverse the judgment of the court below.

Respectfully submitted,

Clark M. Neily III
Counsel of Record
Matthew Cavedon
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1414
cneily@cato.org

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[62] *Ramos*, 590 U.S. at 98 (addressing jury unanimity).