No. 21-1553

In the Supreme Court of the United States

RAMIN KHORRAMI,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to the Arizona Court of Appeals

BRIEF IN OPPOSITION

MARK BRNOVICH
Attorney General of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN, III
Solicitor General

LINLEY WILSON
Deputy Solicitor General/Section Chief of Criminal Appeals
Counsel of Record
KAREN MOODY
CASEY D. BALL
Assistant Attorneys General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-8584
Linley.Wilson@azag.gov

Counsel for Respondent

QUESTION PRESENTED

In *Williams v. Florida*, this Court held that neither the text nor history of the Sixth Amendment, as incorporated by the Fourteenth Amendment, dictates that criminal juries must be comprised of 12 jurors. 399 U.S. 78 (1970). For more than five decades, States have relied on *Williams* when deciding how to structure their criminal justice systems. The result is that, at any given time, many guilty verdicts still pending appeal in Arizona and five other States were reached by juries comprised of less than 12 persons.

The question presented is:

Whether this Court should overrule *Williams* and its progeny to hold that the Sixth and Fourteenth Amendments require a 12-person jury in every criminal case where the defendant is charged with a serious offense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS AND STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE

I. An Eight-Member Jury Convicts Khorrami Of Fraudulent Schemes And Theft

The State tried Petitioner, Ramin Khorrami, for theft and fraudulent schemes and artifices—probation-eligible, class 2 felonies under Arizona law. Petition Appendix ("Pet. App.") 6a. *See* Arizona Revised Statutes ("A.R.S.") §§ 13-901(A) (authorizing suspension of sentence and probation for eligible defendants); -902(A) (establishing periods of probation for felonies); -1802(A)(3) (theft); -2310 (fraudulent schemes and artifices).

Because these charges did not expose Khorrami to a sentence of death or imprisonment for 30 years or more, he was tried before a jury of eight, as provided by Arizona law. Pet. at 6; *see* Ariz. Const. art. II, § 23; A.R.S. § 21-102(A)-(B); *see also* A.R.S. § 13-702(D) (establishing maximum prison term of 12.5 years for class 2 felony). Khorrami did not object to the eight-member jury. Pet. App. 20a.

The following evidence was presented at Khorrami's trial. Khorrami and the victim, Pearl,[1] began an intimate relationship while Pearl was married. *Id*. at 4a. "Over time, Khorrami became jealous and paranoid," "accus[ing] Pearl of having affairs with other men." *Id*. Pearl chose to remain in her marriage, which angered Khorrami. *Id*. After several arguments, Khorrami threatened to reveal their affair to Pearl's husband. *Id*. at 4a-5a. "Pearl pleaded with him not to do so," and Khorrami

---

[1] As was done in the state courts, *see* Pet. App. 4a, pseudonyms are used to protect the victims' privacy.

eventually promised Pearl he would not reveal the affair "if she paid him $40,000." *Id.* at 5a.

"After Khorrami's money-for-silence proposal, Pearl began secretly recording their phone calls." *Id.* Pearl and Khorrami negotiated the terms; Khorrami agreed to accept $30,000, which Pearl "would pay in multiple installments over a month." *Id.*

Pearl paid Khorrami $30,000, but Khorrami demanded more money and that Pearl continue their relationship. *Id.* at 5a-6a. Although Pearl gave Khorrami another $4,000, she "realized Khorrami's additional demands would never end and he never intended to keep his side of the bargain." *Id.* at 6a. Pearl told her husband about the affair, and Khorrami did the same the next day. *Id.* Pearl's husband reported Khorrami to the police. *Id.*

The jury unanimously convicted Khorrami on both counts. *Id.* The superior court suspended the imposition of sentence, placed Khorrami on supervised probation, and imposed a two-month jail term as a condition of probation. *Id.*

II. The Arizona Court Of Appeals Rejects Khorrami's Belated 12-Member Jury Claim

When he appealed his convictions, Khorrami argued—for the first time—that his eight-person jury violated the Sixth and Fourteenth Amendments, relying on *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Pet. App. 20a. Khorrami argued *Ramos*, which held that the Sixth and Fourteenth Amendments require unanimous jury verdicts for serious offenses, effectively overruled *Williams v. Florida*, 399 U.S. 78, 86 (1970), which held that a 12-person jury "is not a necessary ingredient of 'trial by jury.'" *Id.*

The Arizona Court of Appeals rejected Khorrami's claim, reasoning that *Ramos* "did not address *any* issue of constitutionally permissible jury size, much less overrule *Williams*." *Id.*

The Arizona Supreme Court denied review of the case. *Id.* at 1a. Khorrami now seeks a writ of certiorari.

REASONS FOR DENYING THE PETITION

The Arizona Court of Appeals correctly held that Khorrami's eight-member jury complied with the Sixth and Fourteenth Amendments. Its decision is unpublished and does not conflict with any decisions of lower state or federal courts. This is unsurprising, given that Khorrami's 12-member-jury claim is foreclosed by *Williams*, a 52-year-old decision that this Court has endorsed many times.

Khorrami nonetheless argues the Court should grant certiorari to seize upon *Ramos*, a 2-year-old opinion, to overrule *Williams* and reconsider the scope of the Sixth Amendment's jury trial right, as applied to the States through the Fourteenth Amendment. Pet. at 15-24. But Khorrami's case is a poor vehicle for resolution of the question presented.

As a preliminary matter, Khorrami's framing of the issue is incorrect. He asks for a rule that would apply only in felony cases, Pet. at (i), but that application of the Sixth Amendment is inconsistent with the Court's precedent holding the jury-trial right is triggered by a serious offense, not a felony offense. *See Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968); *Baldwin v. New York*, 399 U.S. 66, 69-70 (1970) (plurality opinion) (refusing to "draw the line between 'petty' and 'serious' to coincide with the line between

misdemeanor and felony" for Sixth Amendment purposes). Indeed, the two principal cases at issue here involved application of the Sixth Amendment's jury-trial right to serious offenses. *See Williams*, 399 U.S. at 86; *Ramos*, 140 S. Ct. at 1393-94.

More importantly, unlike the defendants in *Williams* and *Ramos*, Khorrami did not receive any prison sentence for his crimes. He received probation—a punishment that corresponds with a petty crime, not a serious offense. Even if Khorrami prevails on the question presented, there would be no risk of a constitutional violation, and Khorrami would not be entitled to any relief, unless and until several things occur: he must violate probation, his probation must be revoked, and the State must seek a term of imprisonment that exceeds six months. Because this type of contingent relief is based on hypothetical facts that would make the Court's opinion merely advisory, Khorrami's case does not justify review.

As Khorrami acknowledges, the Court has already denied certiorari on this "*Ramos/Williams* issue" once, in *Phillips v. Florida*, No. 21-6059. Pet. at 15 n.5. Before the Court takes the monumental step of considering whether to overrule *Williams*, it should allow the issue to percolate in lower courts. Khorrami cites only two decisions suggesting that *Ramos* affects *Williams*' continuing viability, both providing little analysis. Pet. at 15 n.5 (citing *Wofford v. Woods*, 969 F.3d 685, 707 n.27 (6th Cir. 2020) (single statement citing Justice Alito's dissent in *Ramos*), and *Phillips v. State*, 316 So.3d 779, 788 (Fla. Dist. Ct. App. 2021) (Makar, J., concurring)). Allowing the *Ramos/Williams* issue to percolate will promote well-reasoned decisions that are better suited for this Court's review.

In any event, Khorrami's claim ultimately fails. The Arizona Court of Appeals correctly decided that *Ramos* did not disturb *Williams*' holding that the Constitution does not require 12-member juries. *Ramos* addressed the jury-unanimity requirement—a qualitatively different issue with its own historical background, including "racist origins of Louisiana's and Oregon's laws." 140 S. Ct. at 1405. *Ramos* thus overruled a plurality opinion that "spent almost no time grappling with" this important background. *Id*.

Here, however, the *stare decisis* doctrine overwhelmingly defeats Khorrami's argument that *Williams* should be overruled. *Williams* was correctly decided, so Khorrami cannot show it is wrong, much less egregiously wrong. And revisiting *Williams* would jeopardize other precedents, including this Court's holding "that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases." *Colgrove v. Battin*, 413 U.S. 149, 158-160 (1973) (relying on and adhering to *Williams*). Khorrami also minimizes the enormous impact that disturbing *Williams*' holding would have in Arizona, Connecticut, Florida, Indiana, Massachusetts, and Utah. Announcing a new 12-member jury requirement in criminal cases would invalidate constitutional provisions and laws (that have no racist origins) in these six States, and could force the States to retry thousands of cases pending on direct appeal.

This Court should deny certiorari.

I. This Case Is A Poor Vehicle

Khorrami's case is a poor vehicle to consider whether the Sixth and Fourteenth Amendments should now require 12-member-juries for serious offenses in the States. Because resolution of that

question is not likely to change the outcome of Khorrami's case, the Court risks issuing an advisory opinion.

Khorrami received two years' supervised probation and a mere two-month jail term as a condition of probation. Pet. App. 6a. For Sixth Amendment purposes, his punishment corresponds to a petty offense, not a serious offense. *See Blanton v. City of North Las Vegas*, 489 U.S. 538, 542-43 (1989). Khorrami's minimal punishment renders his constitutional claim premature. *If* Khorrami prevails on his 12-member jury claim, and *if* he violates probation, and *if* his probation is revoked, these hypothetical facts would still fail to show that a constitutional violation has occurred. This Court's precedent demonstrates there is no risk of a Sixth Amendment violation (again, assuming Khorrami prevails on the merits) unless the State later seeks a prison term exceeding six months. *See Frank v. United States*, 395 U.S. 147, 150 (1969) (agreeing Sixth Amendment does not require a jury trial when the "actual penalty is one which may be imposed upon those convicted of otherwise petty offenses"); *Lewis v. United States*, 518 U.S. 322, 330-35 (1996) (Kennedy, J., concurring) (applying "retroactive consideration of the punishment a defendant receives" to determine whether defendant was deprived of Sixth Amendment jury-trial right).

In *Frank*, for example, the defendant received three years' probation, and if he violated the terms of his probation, the maximum sentence that could be imposed was six months' imprisonment. 395 U.S. at 148, 150. This Court held that because the defendant's "sentence is within the limits of the congressional

definition of petty offenses," the Sixth Amendment did not guarantee him a jury trial. *Id.* at 152.

Similarly, in *Alabama v. Shelton*, this Court held that when a State fails to provide court-appointed counsel to a defendant charged with a crime punishable by imprisonment, the Sixth Amendment does not "permit activation of a suspended sentence upon the defendant's violation of the terms of probation." 535 U.S. 654, 662 (2002). This Court further reasoned that it was "for the Alabama Supreme Court to consider before this Court does whether the suspended sentence alone is invalid, leaving Shelton's probation term freestanding and independently effective." *Id.* at 674. Importantly, the Court's review in *Shelton* was confined to the state supreme court's ruling that a "defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel." *Id.* (cleaned up).

"[C]onsistent with [this Court]'s approach to the Sixth Amendment," the Arizona Supreme Court has followed a similar approach to the 12-member-jury requirement in article II, § 23 of the Arizona Constitution. *State v. Soliz*, 219 P.3d 1045, 1048, ¶ 15 (Ariz. 2009). In Arizona, reversal for a new trial does not automatically follow when fewer than 12 jurors are impaneled in a case that requires 12 jurors. Instead, the State "effectively waive[s] its ability to obtain a sentence of thirty years or more" (because the prison term that triggers a 12-member jury under article II, § 23 is 30 years). *Id.* at 1049, ¶ 16. When a jury with fewer members has rendered a guilty verdict, "as long as a lesser sentence may legally be imposed for the crime alleged," the 12-person-jury guarantee in article II, § 23 of the Arizona

Constitution "is not triggered" and has not been violated. *Id*.

Here, even if Khorrami prevails, he would not be entitled to the windfall of another jury trial merely because his *original* charges authorized a potential prison sentence longer than six months. Consistent with *Frank*, and applying the Arizona Supreme Court's rationale in *Soliz*, the Sixth and Fourteenth Amendments would not be implicated unless the State decided to seek a prison sentence of six months or more if Khorrami's probation is ever revoked. *See Frank*, 395 U.S. at 150; *Soliz*, 219 P.3d at 1049, ¶ 16. In the unlikely event that the State ever revoked Khorrami's probation and sought a prison sentence in excess of six months, Khorrami could then assert his constitutional claim in defense. *See Shelton*, 535 U.S. at 675-76 (Scalia, J., dissenting) ("In the future, *if and when* the State of Alabama seeks to imprison [Shelton] on the previously suspended sentence, we can ask whether the procedural safeguards attending the imposition of that sentence comply with the Constitution."). Until then, Khorrami's claim is academic and speculative. *See Frank*, 395 U.S. at 150.

Because any newly-minted constitutional right will very likely never impact Khorrami's case, the Court should refrain from granting certiorari to issue an advisory opinion. If the Court is inclined to grant certiorari at some point on the issue Khorrami presents, it makes better sense to wait for a case like *Ramos*, where a defendant's sentence undoubtedly reflects punishment for a serious offense. *See* 140 S. Ct. at 1394 (noting Ramos "was sentenced to life in prison without the possibility of parole").

II. The Decision Below Is Correct

Putting aside the vehicle issue with Khorrami's petition, the Court should deny review because the Arizona Court of Appeals correctly rejected Khorrami's 12-member-jury claim.

Khorrami argued below, as he does here, Pet. at 3, 15-18, that *Ramos* has already effectively overruled *Williams*. The Arizona Court of Appeals swiftly rejected that argument, reasoning that *Ramos* "did not address *any* issue of constitutionally permissible jury size, much less overrule *Williams*." Pet. App. 20a. Rather, *Ramos* held that "due process requires unanimous verdicts in criminal trials." *Id.* (citing *Ramos*, 140 S. Ct. at 1397). The court further reasoned, "We cannot conclude the Supreme Court silently changed a fundamental feature of its Sixth Amendment jurisprudence, particularly given the issue was neither raised nor litigated in *Ramos*." *Id.*

Ramos has not effectively overruled *Williams*. Khorrami admits the decision below "was understandable," but maintains that *Ramos* "'repudiated the reasoning on which' the Court of Appeals relied in *Williams*, meaning that *Williams* 'must be regarded as retaining no vitality.'" Pet. at 15 (quoting *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019)). In *Herrera*, this Court decided prior precedent had been overruled by a later decision where it was "impossible to harmonize" the reasoning of the two cases. 139 S. Ct. at 1697. *Williams* and *Ramos*, however, can easily be harmonized.

1. The Sixth Amendment's historical backdrop, as well as the Court's other precedents, led the Court to decide in *Ramos* that "trial by an impartial jury" requires a unanimous verdict to convict a defendant

of a serious offense. 140 S. Ct. at 1394-95. But *Ramos*' reasoning is distinct from the historical evidence *Williams* considered. And this Court's precedent further confirms that *Williams* correctly held the Sixth Amendment's jury-trial right does not require 12-member juries.

Ramos reasoned, *inter alia*, that "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward" led to an "unmistakable" answer that "[a] jury must reach a unanimous verdict in order to convict." *Id.* at 1395. The Court also noted it had "commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years." *Id.* at 1397.

The same cannot be said for the 12-member jury issue the Court analyzed in *Williams*. 399 U.S. at 86. Whether the Sixth Amendment requires 12-member juries is a qualitatively different question that does not share the same history as the unanimity requirement. In fact, *Williams* itself highlighted the importance of jury unanimity. 399 U.S. at 100 & n.46. Although *Williams* had no reason to opine on "whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial," the Court recognized that unanimity, unlike a "12-man requirement," "may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof." *Id.* at n.46.

Williams correctly reasoned that not all common law traditions have been grafted upon the word "jury" in the Sixth Amendment. *See id.* at 96-99; *cf. Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436 n.20 (1996) ("If the meaning of the Seventh

Amendment were fixed at 1791, our civil juries would remain, as they unquestionably were at common law, 'twelve good men and true.'") (quoting 3 W. Blackstone, Commentaries, *349). The Court also delved into the history of the Sixth Amendment's drafting, evaluating conflicting inferences from the removal of language from the original draft. *Williams*, 399 U.S. at 92-98.

As *Williams* explained, "[w]hile sometime in the 14th century the size of the jury at common law came to be fixed generally at 12, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place." *Id*. at 89-90 (footnote omitted). The Court found "absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id*. at 99. Notably, this conclusion comports with the writings of at least one prominent member of the constitutional convention, James Wilson of Pennsylvania, who stated, "When I speak of juries, I feel no peculiar predilection for the number twelve…" *Colgrove*, 413 U.S. at 156 n.10 (quoting 2 The Works of James Wilson 503 (R. McCloskey ed. 1967)).

The Court further reasoned that the purpose of the jury is to prevent oppression by the government, as the "right to be tried by a jury of his peers gave [the accused] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Williams*, 399 U.S. at 100 (quoting *Duncan*, 391 U.S. at 156). Building on *Duncan*'s previous explanation of the "essential role" of a jury, *Williams* stated that "the essential feature of a jury obviously lies in the interposition between

the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Id*. The Court correctly concluded that "[t]he performance of this role is not a function of the particular number of the body that makes up the jury." *Id*.

Notably, *Williams*' approach is consistent with this Court's approach to the Seventh Amendment's jury-trial right in civil cases. *See Galloway v. United States*, 319 U.S. 372, 392 (1943) (holding that "the [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions"). Three years after *Williams*, the Court held that the Seventh Amendment does not require 12-member juries, concluding that "what was said in *Williams* with respect to the criminal jury is equally applicable here: constitutional history reveals no intention on the part of the Framers 'to equate the constitutional and common-law characteristics of the jury.'" *Colgrove*, 413 U.S. at 156 (quoting *Williams*, 399 U.S. at 99). Thus, as in *Williams*, the Court concluded that "the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury." *Id.*

Khorrami fails to produce constitutional history revealing instances where the Framers expressed concern for the preservation of the traditional number 12. Instead, he relies on the tradition of 12-member juries in English Common law and assumes that the

Framers *must* have intended to permanently affix the number at 12. Pet. at 1. *Williams* rightly rejected this premise, recognizing that the real issue was not whether the "usual expectation was that the jury would consist of 12," but instead, whether there was any "indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." 399 U.S. at 98-99. Thus, while Khorrami and Amicus cite quotations from Framers littered with passing references to 12-member juries, the historical evidence does not reveal an intent to affix a constitutional minimum number of jurors at 12. As *Williams* explains, and Khorrami does not refute, the drafting history of the Sixth and Seventh Amendments more plausibly support the opposite conclusion—provisions tying the constitutional jury requirement with common law jury traditions were eliminated. *See id.* at 97. And "contemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect." *Id.*

Unlike the jury-unanimity issue in *Ramos*, neither the original public meaning of the jury-trial right nor this Court's precedent compels a conclusion that *Williams* was wrong when it decided that the Sixth Amendment does not require 12-member juries.

2. Another obvious distinction between *Williams* and *Ramos* arises from *Ramos*'s application of *stare decisis* to overrule a plurality opinion: *Apodaca v. Oregon*, 406 U.S. 404 (1972). *See Ramos*, 140 S. Ct. at 1410 (Kavanaugh, J., concurring).

Apodaca was a badly split decision, in which four justices concluded that the Sixth Amendment did not require jury unanimity at all, while the fifth vote in support of the judgment came from Justice Powell, who concluded that the Sixth Amendment *did* require unanimity; it simply was not a "fundamental" element of jury trials binding on the States. 406 U.S. at 406; *see also Johnson v. Louisiana*, 406 U.S. 366, 369-80 (1972) (Powell, J., concurring in that case and *Apodaca v. Oregon*, 406 U.S. 404 (1972)). In *Ramos*, three justices agreed that *Apodaca* supplied no governing precedent at all. *Ramos*, 140 S. Ct. at 1402-04. Justice Thomas cited *Apodaca* not for its understood holding, but as one among a list of precedential cases "reaffirm[ing] the Sixth Amendment's unanimity requirement." 140 S. Ct. at 1421 (Thomas, J., concurring).

Apodaca's unusual outcome was a key aspect of this Court's decision to overrule it in *Ramos*. Justice Gorsuch began the historical analysis by noting that not only had the Court repeatedly stated that the Sixth Amendment required unanimity, but that "five justices in *Apodaca* said the same." *Ramos*, 140 S. Ct. at 1399. But Justice Powell "refused to follow this Court's incorporation precedents," resulting in a decision "unmoored from the start." *Id.* at 1405; *see also id.* at 1409 (Sotomayor, J., concurring) (emphasizing "*Apodaca* is a universe of one").

Apodaca's analysis was decidedly problematic for several other reasons. *Apodaca* devoted a brief paragraph to conclude it could "perceive no difference between juries required to act unanimously" and those that did not, but offered no counter to the argument that an 11–1 conviction in Oregon could be a hung jury in any other state. 406 U.S. at 410-11.

Apodaca also dismissed the critical observation the Court made in *Williams*—that a non-unanimous jury verdict called into question the State's burden of proving an offense beyond a reasonable doubt. *Compare Apodaca*, 406 U.S. at 411-12, *with Williams*, 399 U.S. at 100 n.46.

The racist origins of Louisiana's and Oregon's laws that allowed non-unanimous juries also significantly contributed to *Ramos*' overruling of *Apodaca*. *See Ramos*, 140 S. Ct. at 1405 ("[I]t's just an implacable fact that the plurality spent almost no time grappling with … the racist origins of Louisiana's and Oregon's laws"); *id*. at 1408 (Sotomayor, J., concurring) ("[T]he racially biased origins of the Louisiana and Oregon laws uniquely matter here"); *id*. at 1417 (Kavanaugh, J., concurring) ("[S]ignificant to my analysis of this case, the origins and effects of the non-unanimous jury rule strongly support overruling *Apodaca*").

Here, *Williams* did not produce a "badly fractured set of opinions." *Id*. at 1397. Justice White's Sixth Amendment analysis received five out of eight votes. *See Williams*, 399 U.S. at 79, 86; *id*. at 105 (Burger, J., concurring); *id*. at 106 (Black, J., concurring in part). Justices Harlan, Stewart, and Marshall would have adhered to *Thompson v. Utah*, 170 U.S. 343, 349 (1898), which stated that the Sixth Amendment's jury-trial right guaranteed exactly "twelve persons, neither more nor less." *See Williams*, 399 U.S. at 117 (Harlan, J., concurring); *id.* at 143 (Stewart, J., concurring) (agreeing with Justice Harlan's concurrence); *id*. at 116-17 (Marshall, J., dissenting in part). However, Justices Harlan and Stewart proposed a looser incorporation of the Sixth Amendment to the States to allow for smaller juries without reducing the jury size for federal cases. *See id*.

at 117 (Harlan, J., concurring); *id*. at 143 (Stewart, J., concurring) (agreeing with Justice Harlan). Thus, all but one Justice in *Williams* agreed that the Constitution does not require States to provide 12-member juries, even when (unlike this case) a criminal defendant receives a sentence reflecting a serious offense.[2]

Also unlike *Apodaca*, *Williams* engaged in an extensive historical analysis that revealed no agreed-upon reason for 12-member juries. *See supra*, pp. 10-13. That analysis led the Court to conclude that Congress and the States should not have to adhere to a precise number due to that "historical accident." *Williams*, 399 U.S. at 100-03. And unlike the laws that allowed non-unanimous juries in *Ramos*, the six States here were not driven by racism when they set jury trials for certain offenses at less than 12 people. In fact, Arizona and three other States adopted smaller juries *after Williams*. *See infra*, pp. 25-27.

Contrary to Khorrami's assertion, Pet. at 20, *Williams* is on much stronger footing than *Apodaca*. Because the decision below correctly resolved the *Ramos/Williams* issue, the Court should deny review.

---

[2] Nearly 40 years ago, while amending Federal Rule of Criminal Procedure 23(b)(3), this Court's Advisory Committee observed: "Though the alignment of the Court and especially the separate opinion by Justice Powell in *Apodoca* [] makes it at best uncertain whether less-than-unanimous verdicts would be constitutionally permissible in federal trials, it hardly follows that a requirement of unanimity of a group slightly less than 12 is similarly suspect." Fed. R. Crim. P. 23(b), Advisory Committee Note to 1983 Amendments; *see infra*, p. 23.

III. The *Stare Decisis* Doctrine Compels Adherence To *Williams*

Khorrami also invites the Court to grant certiorari to overrule *Williams*, Pet. at 19-27, but the Court should decline that invitation.

"[E]ven in constitutional cases, a departure from precedent demands special justification" and requires "something more than ambiguous historical evidence" before overruling this Court's major decisions. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (cleaned up). The *stare decisis* doctrine generally implicates consideration of several factors, including: "the nature of [the decision's] error, the quality of the[] reasoning, the 'workability' of the rules [the decision] imposed on the country, [the decision's] disruptive effect on other areas of law," and the extent of any "reliance" interests. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2265 (2022); *see also Ramos*, 140 S. Ct. at 1405 (similar); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478-79 (2018) (similar).

These factors weigh strongly in favor of adhering to *Williams*.

A. *Williams* Correctly Held The Sixth Amendment Does Not Require 12-Member Juries In The States

"An important factor in determining whether a precedent should be overruled is the quality of its reasoning[.]" *Janus*, 138 S. Ct. at 2479. *Williams*' reasoning is sound.

The Sixth Amendment's text does not contain a 12-member jury requirement. U.S. Const. amend. VI. And the history of the Sixth Amendment, as

incorporated by the Fourteenth Amendment, does not suggest that state criminal juries must be composed of 12 members. *See supra*, pp. 10-13. *Williams* rightly decided that—in the face of an ambiguous historical record—the best course of action was to leave considerations about the proper number of jurors "to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." 399 U.S. at 103.

Williams' holding comports with the settled proposition that States should be given flexibility to administer their criminal justice systems. *See Oregon v. Ice*, 555 U.S. 160, 170 (2009) ("Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status."); *Ludwig v. Massachusetts*, 427 U.S. 618, 630 (1976) ("The modes of exercising federal constitutional rights have traditionally been left, within limits, to state specification."). Khorrami emphasizes that some state courts have decided their state constitutions guarantee 12-member juries. Pet. at 11-12. But that does not show that *Williams* was wrong; that outcome is a logical consequence of *Williams*' holding. In Arizona, *Williams* has enabled the people and the Legislature to "reserve[] the twelve-person jury only for the most serious offenses." *Soliz*, 219 P.3d at 1047, ¶ 7; *see also* Ariz. Const. art. II, § 23; A.R.S. § 21-102.

Khorrami asks the Court to revive *Thompson*, Pet. at 10, 13-15, but that is asking too much. In *Thompson*, the Court failed to consider whether the Framers intended "every feature of the jury as it existed at common law—whether incidental or essential to that institution—[to be] necessarily

included in the Constitution wherever that document referred to a 'jury.'" *Williams*, 399 U.S. at 91. Instead, *Thompson* simply assumed, without citation to any authority, that the "wise men who framed the constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors." 170 U.S. at 353.[3]

A clear majority of the Court has already found *Thompson*'s reasoning to be flawed. *Williams*, 399 U.S. at 90-92; *id*. at 107 (Black, J., concurring in part) ("The broad implications in early cases indicating that only a body of 12 members could satisfy the Sixth Amendment requirement arose in situations where the issue was not squarely presented and were based, in my opinion, on an improper interpretation of that amendment."). And later cases reaffirming *Thompson*, "often in dictum," failed to engage in any meaningful analysis to discern whether the number of jurors was, in fact, an "essential element" of the jury-trial right. *Id.* at 91-92 (citing *Patton v. United States*, 281 U.S. 276, 288 (1930), *Rasmussen v. United States*, 197 U.S. 516, 519 (1905), and *Maxwell v. Dow*, 176 U.S. 581, 586 (1900)).

Significantly—20 years after *Williams*—the Court expressly overruled *Thompson*'s Ex Post Facto Clause analysis because it was inconsistent "with the understanding of the term '*ex post facto* law' at the time the Constitution was adopted." *Collins v. Youngblood*, 497 U.S. 37, 47 (1990). While overruling

---

[3] Because the question before the Court in *Thompson* could have been resolved purely on statutory grounds, no Sixth Amendment analysis was even necessary. *Williams*, 399 U.S. at 90 & n.26.

Thompson, the Court reaffirmed *Williams*. *Id*. at 52 n.4 (noting that *Thompson*'s holding "that the Sixth Amendment requires a jury panel of 12 persons" is "obsolete" in light of *Williams*).

The mere fact that *Ramos* has now cited *Thompson* for a *different* proposition (that the Sixth Amendment requires jury unanimity), *see* Pet. at 8, does not justify using *Thompson* to upend decades of precedent that firmly establishes 12-member juries in criminal cases are not required in the States. *Williams* is not "egregiously wrong,"[4] as Khorrami contends. Pet. at 20.

B. This Court Has Repeatedly Affirmed *Williams* Throughout The Past Half-Century

Khorrami argues that *Williams* is an outlier, Pet. at 20, but this Court's precedent shows the opposite. Unlike *Apodaca*, this Court has not been "studiously ambiguous" or "inconsistent" about what *Williams* held. *Ramos*, 140 S. Ct. at 1399.

In the 52 years since *Williams* was decided, this Court has reaffirmed *Williams*' holding on several occasions. *See Collins*, 497 U.S. at 52 n.4; *see also United States v. Gaudin*, 515 U.S. 506, 510 n.2 (1995) (endorsing *Williams*' analysis while emphasizing jury's determination of guilt, not the number of jurors, is an indispensable element of a jury); *Burch v. Louisiana*, 441 U.S. 130, 136-37 (1979) (detailing development of *Williams* and related cases); *Ballew v. Georgia*, 435 U.S. 223 (1978) (expressly reaffirming *Williams* while holding constitutional minimum jury

---

[4] *Williams* is also not "demonstrably incorrect." *See Gamble v. United States*, 139 S. Ct. at 1981 (Thomas, J. concurring).

size is six); *Ludwig*, 427 U.S. at 625-26 (discussing *Williams* and upholding constitutionality of Massachusetts' two-tiered jury system).

As discussed, *supra*, pp. 5, 10-13, the Court followed *Williams* while interpreting the scope of the Seventh Amendment's jury-trial right in *Colgrove*. *See* 413 U.S. at 153. Given *Colgrove*'s heavy reliance on *Williams*, overruling *Williams* would compel overruling *Colgrove*, too.

Then in *Ballew* (five years after *Colgrove*), the Court restated *Williams*' holding and endorsed it again: "Rather than requiring 12 members, [] the Sixth Amendment mandate[s] a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community." *Ballew*, 435 U.S. at 230 (citing *Williams*, 399 U.S. at 100). The Court then noted that *Williams* and *Colgrove* "generated a quantity of scholarly work on jury size." *Id*. at 231. But those writings did not "draw or identify a bright line below which the number of jurors would not be able to function as required by the standards announced in *Williams*." *Id*. at 231-32. However, "they raise[d] significant questions about the wisdom and constitutionality of a reduction below six." *Id*. at 232. The Court thoroughly examined those concerns, "reaffirm[ed] [its] holding in *Williams*," and decided the post-*Williams* studies compelled a conclusion that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." *Id*. at 232-39.

Because *Williams* is consistent with these related decisions, this *stare decisis* factor does not support overruling *Williams*. *See Ramos*, 140 S. Ct. at 1405.

C. *Williams* Has Not Caused Significant Negative Jurisprudential or Real-World Consequences

Khorrami contends *Williams* has caused jurisprudential difficulties and negative real-world consequences, Pet. 24-26, but these arguments fail. In conducting this inquiry, courts "may consider jurisprudential consequences," such as "workability," "consistency and coherence with other decisions," and "the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring).

As an initial matter, *Williams*' holding that 12-member juries are not mandated by the Sixth Amendment is workable, which Khorrami does not dispute. *Williams* and its progeny allow states to be flexible in their criminal jury trials by deciding whether to empanel 6, 8, or 12 jurors, or some other number of jurors. *Williams*' rule is clear and "can be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272.

Indeed, both the states and federal courts have readily adapted to *Williams* in a manner that leads to predictable jury sizes. For example, Arizona amended its state constitution to designate jury sizes in accordance with the severity of the potential sentence a defendant faces. Ariz. Const. art. II, § 23 (approved 1972). Statutes and court rules effectuate this constitutional amendment. A.R.S. § 21-102; Ariz. R. Crim. P. 18.1(a).

Similarly, in 1983, this Court—relying on *Williams*—approved Federal Rule of Criminal Procedure 23(b)(3), which is still on the books and allows a jury of 11 to return a verdict if there is good cause to excuse a juror during deliberation. *See* Fed. R. Crim. P. 23(b), Advisory Committee Note to 1983 Amendments. The Advisory Committee specifically stated that "[t]he alignment of the Court and especially the separate opinion by Justice Powell in *Apodoca* [] makes it at best uncertain whether less-than-unanimous verdicts would be constitutionally permissible in federal trials," but "it hardly follows that a requirement of unanimity of a group slightly less than 12 is similarly suspect." *Id*. Consistent with Rule 23(b)(3), federal courts have routinely upheld 11-person verdicts. *See United States v. Paulino*, 445 F.3d 211, 225-26 (2d Cir. 2006) (upholding 11-person verdict under Rule 23(b)(3)); *United States v. Hively*, 437 F.3d 752, 766-67 (8th Cir. 2006) (same); *United States v. Geffrard*, 87 F.3d 448, 450-52 (11th Cir. 1996) (same); *United States v. Acker*, 52 F.3d 509, 515-16 (1995) (same); *United States v. Glover*, 21 F.3d 133, 135-36 (6th Cir. 1994) (same); *United States v. Egbuniwe*, 969 F.2d 757, 760-63 (9th Cir. 1992) (same); *United States v. O'Brien*, 898 F.2d 983, 986 (5th Cir. 1990) (same).

Williams also did not create other jurisprudential difficulties. Khorrami points to *Ballew*, Pet. at 21-22, 24, but acknowledges that "*Ballew* declined to overrule *Williams*," *id*. at 22. The only concern with *Ballew*'s approach was that three concurring justices noted that the validity and methodology of the statistical studies the Court considered had not been subjected to the adversarial process, and questioned the wisdom of relying on them at all. 435 U.S. at 245-

46 (Powell, J., concurring). Notably, the same justices maintained the Sixth Amendment should not have been fully incorporated anyway. *Id.*

Further, Khorrami cannot show that *Williams* has resulted in other negative real-world consequences. *See Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring). The non-unanimous juries permitted by *Apodaca* clearly allowed for convictions where juries in other States would have hung or at least deliberated more, essentially "sanction[ing] the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule." *Id.* at 1417 (Kavanaugh, J., concurring). No study was necessary to illustrate that real-world consequence. Here, Khorrami points to academic studies, and to *Ballew*, in an attempt to show Arizona's eight-person jury trials must have the same effect, Pet. at 25-26, but his arguments are speculative at best.

Khorrami alleges *Williams* "does real harm to public perception of the jury as a legitimate, representative body," Pet. at 25, but fails to recognize that it was the Arizona voters who approved the reduction in jury sizes in 1972. Moreover, Khorrami relies heavily on *Ballew* for his representative-body argument, but that argument ignores *Ballew*'s conclusion that a six-member jury was sufficient to be representative of the community. *See Ballew*, 435 U.S. at 239 ("adher[ing] to" and "reaffirm[ing]" its holding in *Williams*, and finding "substantial doubt about the reliability and appropriate representation" only in "panels *smaller* than six") (emphasis added).

In sum, neither jurisprudential nor real-world consequences exist to support overruling *Williams*.

D. Arizona And Five Other States' Significant Reliance Interests Support Adherence To *Williams*

Finally, *stare decisis* counsels against overruling *Williams* because doing so would upset significant reliance interests of Arizona and five other States—Connecticut, Florida, Indiana, Massachusetts, and Utah. *See Ramos*, 140 S.Ct. at 1425-26 (Alito, J., dissenting) (reasoning that *Apodaca* "elicited enormous and entirely reasonable reliance" where the decision impacted only two States).

1. Revisiting *Williams* and imposing a 12-member jury requirement in every criminal case involving a serious offense would invalidate state constitutional provisions in Arizona, Utah, and Connecticut, as well as the state laws in Florida, Massachusetts, and Indiana.

To start, *Williams* upheld Florida's long-established six-member jury system used in all non-capital cases. 399 U.S. at 79-80, 86; *see* Fla. Stat. § 913.10; Fla. Const. art. I, § 22 (requiring "number of jurors, not fewer than six," to be "fixed by law"). Meanwhile, Utah has provided criminal juries composed of less than 12 members in noncapital cases ever since it was admitted into the Union in 1896. *See* Utah Const. art. I, § 10 ("In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons."); Utah Code § 78B-1-104; *Collins*, 497 U.S. at 50-51.

Arizona has cemented *Williams*' holding into its state constitution. At statehood, the Arizona Constitution guaranteed the right to a jury trial and allowed for juries composed of less than 12 members only in "courts not of record." Ariz. Const. art. II, § 23

(1912). Just two years after the Court decided *Williams*, however, Arizona voters amended this provision to require 12-member juries only in "criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law." Ariz. Const. art. II, § 23 (1972). "In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law." *Id.*; *see also* A.R.S. § 21-102 (providing for eight-person juries in all cases except those in which 12 jurors are mandated by article II, § 23).

Three other states—Connecticut, Massachusetts, and Indiana—which currently allow criminal juries of less than 12 in non-capital cases, followed a similar path post-*Williams*. Two years after *Williams*, Connecticut, like Arizona, modified its state constitution to provide at least a six-member jury in criminal cases and a 12-member jury in capital cases. Conn. Const. art. I, § 19 (1972). Six years later, Massachusetts passed a state law establishing six-member juries. Mass. Gen. Laws Ch. 218, § 26A (1978). Indiana modified its state laws not long after that. Ind. Code § 35-37-1-1 (1981) (exempting certain crimes from 12-member jury requirement).

The effect that overruling *Williams* would have in these six States stands in stark contrast to the effect of the Court's jury-unanimity holding in *Ramos*—which impacted only two states, Louisiana and Oregon. *See Ramos*, 140 S. Ct. at 1407. Even then, Louisiana had already abolished non-unanimous verdicts and "Oregon seemed on the verge of doing the same until the Court intervened." *Id*. But the States here have long relied on *Williams*. If the Court now holds the Constitution requires 12-member juries in all state criminal trials, that holding would eviscerate

the constitutional provisions in Arizona, Utah, and Connecticut, as well as the laws prescribing jury size in non-capital criminal trials in Florida, Indiana, and Massachusetts.[5]

2. The real-world impact of a departure from *Williams*' holding would also be enormous. Florida, the third most-populous state in the nation with roughly 22 million people, has approximately 3,500 criminal cases awaiting finality at any given time. Florida employs a six-member jury for *all* non-capital cases, while Arizona provides 12-member juries to defendants whose crimes expose them to at least 30 years' imprisonment. Consequently, Florida could be forced to retry thousands of non-capital cases involving serious offenses if the Court were to overrule *Williams*.

And hundreds, if not thousands, of other cases in Arizona, Utah, Connecticut, Indiana, and Massachusetts could have to be retried. The Court's opinion in *Ramos* compelled retrial only in Louisiana and Oregon, and only in those cases where a jury was non-unanimous—a potentially small subset of all non-final convictions in those States. *See* Brief of Amicus Curiae State of Oregon in Support of Respondent at 12, *Ramos v. Louisiana* (No. 18-5924), 2019 WL 4013302 (estimating several hundred to more than one thousand pending cases affected in Oregon); Brief of Respondent at 39, *Ramos v. Louisiana* (No. 18-5924), 2019 WL 3942901 (noting that offenses committed after January 1, 2019 required unanimous juries in Louisiana, but offering no estimate of non-unanimous jury cases before that date still pending).

---

[5] Overruling *Williams* would also necessitate revision of Federal Rule of Criminal Procedure 23(b).

Establishing a new floor for the constitutionally-permissible jury size, however, would have a drastic impact on non-final convictions in six States here.

These substantial reliance interests further weigh against overruling *Williams*.

IV. Khorrami's Other Fourteenth Amendment Arguments Do Not Warrant Review

Finally, Khorrami argues this Court should grant certiorari to recognize a right to a 12-member jury under the Privileges or Immunities Clause. Pet. at 18. This argument is not meritorious.

The Court has narrowly applied the Privileges or Immunities Clause of the Fourteenth Amendment to "protect[] only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws.'" *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 754 (2010) (quoting *Slaughter-House Cases*, 16 Wall. 36, 79 (1873)). Under that narrow reading, "other fundamental rights—rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure'—[are] not protected by the Clause." *Id.* at 755. Khorrami makes no attempt to explain how any purported right to a 12-member jury owes its existence to the Federal government and is thus binding on the States under the Court's current interpretation of the Privileges or Immunities Clause.

Instead, Khorrami relies exclusively on Justice Thomas's concurring opinion in *Ramos*, which advocated incorporation of the jury-unanimity right via the Privileges or Immunities Clause. Pet. at 18. Khorrami does not explain, however, why the Court

should use this case as a vehicle to (1) overrule the Court's long-standing interpretation of the Privileges or Immunities Clause, (2) hold that the Privileges or Immunities Clause extends to unenumerated rights, and (3) explain how to identify those unenumerated rights. *See Dobbs*, 142 S. Ct. at 2302 (Thomas, J., concurring). "[E]ven if the Clause does protect unenumerated rights," *Williams* and its progeny have already firmly established that a 12-member jury "is not one of them under any plausible interpretive approach." *See id*.

Moreover, reframing Khorrami's argument under the Due Process Clause does not make the argument any more compelling. *See Ramos*, 140 S.Ct. at 1424 (Thomas, J., concurring in judgment) (stating the Court's narrow construction of the Privileges or Immunities Clause "has made the Due Process Clause serve the function that the Privileges or Immunities Clause should serve"). Khorrami acknowledges that *Williams* already rejected a 12-member jury requirement under the Due Process Clause. Pet. at 18. And "beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling v. United States*, 493 U.S. 342, 352 (1990).

The Court's decisions rightly allow States to retain flexibility in determining whether to empanel a jury of six or more in their criminal cases. *Ballew*, 435 U.S. at 232-39; *Williams*, 399 U.S. at 103. This settled rule does not violate the core value of "fundamental fairness" that is "embodied in the Due Process Clause." *In Re Winship*, 397 U.S. 358, 369 (1970) (Harlan, J., concurring). Finding otherwise now—after endorsing the rule for over five decades—would lead to an erroneous expansion of the Bill of Rights'

"constitutional guarantees under the open-ended rubric of the Due Process Clause." *Medina v. California*, 505 U.S. 437, 443 (1992). The Court should not "invite[] undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Id.*

CONCLUSION

The petition for writ of certiorari should be denied.

August 10, 2022

Respectfully submitted,

MARK BRNOVICH
Attorney General

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN, III
Solicitor General

LINLEY WILSON
Deputy Solicitor General/Section Chief of Criminal Appeals
Counsel of Record
KAREN MOODY
CASEY D. BALL
Assistant Attorneys General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-8584
Linley.Wilson@azag.gov

Counsel for Respondent