No. 21-1553

IN THE

Supreme Court of the United States

RAMIN KHORRAMI,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

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The Sixth Amendment's "promise of a jury trial" is "fundamental to the American scheme of justice." *Ramos* v. *Louisiana*, 140 S.Ct. 1390, 1395 (2020). The scope of that right is controlled by "what the term 'trial by an impartial jury' … meant at the time of the Sixth Amendment's adoption." *Id.* Mr. Khorrami and his *amici* have presented a mountain of historical evidence establishing the original meaning of the term required a 12-member jury. Arizona has cited nothing to the contrary and concedes the historical record is "littered with … references to 12-member juries." Opp.13.

Rather than address the fundamental right at issue, Arizona tries to shrink the stakes down to one man and six States. As to the former, Arizona makes the frivolous argument that Mr. Khorrami has no cognizable interest in the question presented because he was sentenced to less than six months in prison. The very authority Arizona cites refutes the point: Whether the jury trial right applies depends on the *maximum* possible sentence, not the sentence actually imposed. *See Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 542-543 (1989). Here, Mr. Khorrami was charged with two felonies, both of which could have resulted in twelve-year sentences.

And as to the latter—i.e., the fact that overruling *Williams* v. *Florida*, 399 U.S. 78 (1970), would require a slice of cases to be retried in a half-dozen States—this is the "usual" consequence of adopting a "new rule[] of criminal procedure," *Ramos*, 140 S.Ct. at 1406. This Court vacated "nearly 800 decisions" following *Booker* v. *United States* and "[s]imilar consequences likely followed" other landmark Confrontation Clause and Fourth Amendment rulings. *Id.* In the end, "the competing interests" of a handful of States cannot outweigh "the reliance the American people place in their consti-

tutionally protected liberties"—particularly when, as here, the decision at issue is a "mistaken … outlier" that has "become lonelier with time." *Id.* at 1408 (plurality op.).

ARGUMENT

I. ARIZONA'S VEHICLE ARGUMENTS MISSTATE THE LAW

A. Arizona wrongly argues that Mr. Khorrami was not constitutionally entitled to a jury trial, as he was ultimately sentenced to less than six months in prison. Opp.3-4, 5-8. "[A] defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months." *Blanton*, 489 U.S. at 542. The actual sentence imposed is not dispositive; what matters is the "possibility of a sentence exceeding six months." *Id.*; *accord Duncan* v. *Louisiana*, 391 U.S. 145, 159-162 (1968).

Here, even Arizona admits that Mr. Khorrami's "charges authorized a potential prison sentence longer than six months." Opp.8. More specifically, Mr. Khorrami could have been sentenced to over ten years for each felony charged. *Compare* A.R.S. § 13-2310.A *and* A.R.S. § 13-1802.A(3) *with* A.R.S. § 13-702(D). Accordingly, a jury trial was required under *Blanton* and *Duncan*.

Arizona's contrary authority is inapposite. *Frank* v. *United States* assessed the jury trial right in the specific context of a contempt of court conviction—i.e., where "Congress … has authorized courts to impose penalties but has not placed any specific limits on their discretion." 395 U.S. 147, 149 (1969). *Frank* made clear that "[i]f the statute creating the offense specifies a maximum penalty, then of course that penalty is the relevant criterion." *Id.* at 149 n.2. *Lewis* v. *United*

States, too, reaffirmed that whether the jury trial right attaches depends on "the maximum penalty attached to the offense." 518 U.S. 322, 326 (1996).[1]

B. Arizona relatedly suggests that any error was harmless because Mr. Khorrami would not necessarily be entitled to a new trial under Arizona law. Opp.7. But the only case it cites was predicated on the assumption that a less-than-twelve-person jury does not violate the Sixth Amendment. *State* v. *Soliz*, 219 P.3d 1045, 1047 (Ariz. 2009) (citing *Williams*). *Soliz* thus provides no guidance for whether a new trial would be required if *Williams* is overturned.

In contrast, federal courts have routinely held that "[d]epriving a defendant of the verdict of twelve jurors" is a structural error requiring automatic reversal. *United States* v. *Curbelo*, 343 F.3d 273, 281 (4th Cir. 2003); *accord Webster* v. *United States*, 667 F.3d 826, 833 n.3 (7th Cir. 2011) (collecting cases). This makes good sense, as a court "simply cannot know what affect a twelfth juror might have had on jury deliberations" without diverting into "pure speculation." *Curbelo*, 343 F.3d at 281-282.

In any event, because the magnitude of the constitutional error was necessarily "not addressed by the Court of Appeals," the proper course would be to grant the petition and then allow the court below to address the structural error issue in the first instance on remand. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see McCoy* v. *Louisiana*, 138 S.Ct. 1500, 1517-1518 (2018) (Alito, J., dissenting) (whether structural error applies should be decided on remand).

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[1] Arizona's remaining case, *Alabama* v. *Shelton*, 535 U.S. 654 (2002), does not address the jury right issue.

C. Finally, Arizona contends that the *Ramos/Williams* issue should be allowed "to percolate in lower courts." Opp.3-4. But "[i]t is this Court's prerogative alone to overrule one of its precedents." *Bosse* v. *Oklahoma*, 137 S.Ct. 1, 2 (2016) (per curiam) (collecting cases). Any future, lower court confronted with the question presented will presumably take the same approach as the Court of Appeals did here and refuse to reject the *Williams* rule. This Court alone can correct the "strange turn," *Ramos*, 140 S.Ct. at 1397, taken by *Williams* fifty-two years ago.[2]

II. *WILLIAMS* IS NOT BINDING

A. *Ramos* Effectively Overruled *Williams*

Ramos held that the scope of the Sixth Amendment jury right is defined by its "original public meaning," which is determined from *inter alia* "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward." Pet.7-9 (citing *Ramos*, 140 S.Ct. at 1396). All of those sources establish that the original public meaning of "trial by an impartial jury" included a right to a 12-person jury. Pet.9-15. Accordingly, *Williams* cannot stand, as it (1) acknowledged "the usual expectation" was that a "jury would consist of 12" members" but (2) rejected a test governed by "purely historical considerations." Pet.15-18 (citing *Williams*, 399 U.S. at 98-99).

Arizona does not dispute *Ramos* imposes precisely the kind of "purely historical" test that *Williams* declined to adopt. Nor does Arizona identify a scrap of

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[2] Arizona notes this Court has denied certiorari on the question presented once before. Opp.4. But as explained, this Court likely denied review because the issue had not been preserved. Pet.15 n.5. Arizona has no response.

historical evidence regarding the Sixth Amendment's scope that contradicts the reams set forth in the petition and accompanying *amicus* briefs. Pet.9-15; *accord* ACLU/Rutherford Br.2-16 (discussing English common law, public meaning when the Constitution was ratified, and post-ratification cases and treatises); CAC Br.6-10 (similar).[3] The arguments Arizona does make (at 9-16) for why *Ramos* can be "harmonized" with *Williams* are unavailing.

First, Arizona argues that *Williams* "evaluate[d]" the historical evidence and concluded "that not all common law traditions have been grafted upon the word 'jury' in the Sixth Amendment." Opp.10-11. *Ramos* rejected precisely this approach when it refused Louisiana's invitation to distinguish between "the historic features of common law jury trial that (we think) serve 'important enough' functions to migrate silently into the Sixth Amendment and those that don't." 140 S.Ct. at 1400-1401. Instead, the question is simply what "the right to trial by jury included" "at the time of the Sixth Amendment's adoption." *Id.* at 1402

Arizona relatedly contends that Mr. Khorrami has failed to identify historical evidence where the Framers "expressed concern for the preservation of the traditional number 12." Opp.12. But Arizona identifies nothing in *Ramos* that imposes this kind of clear-statement

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[3] The lone historical authority Arizona cites (at 11) is a sentence fragment from James Wilson, which says nothing more than that a jury could be *larger* than twelve. *See* 2 *Collected Works of James Wilson* 954 (2007 ed.) ("I feel no peculiar predilection for the number twelve: a grand jury consists of more, and its number is not precisely fixed."), tinyurl.com/46s6rx9p. Wilson later makes clear that twelve is the bare minimum: "To the conviction of a crime, the undoubting and unanimous sentiment of the twelve jurors is of indispensable necessity." *Id.* at 985, *cited in* Pet.9.

rule. To the contrary, *Ramos* determined the scope of the Sixth Amendment by looking to the same sources discussed in the petition and *amicus* briefs (e.g., the common law, state practices, opinions and treatises written shortly after the founding). *See* Pet.7-15. Even Arizona concedes that those materials are "littered" with references to 12-member juries. Opp.13.

Second, Arizona argues *Williams* is "consistent" with how this Court has interpreted the Seventh Amendment. Opp.12-13, 21. But that says nothing about whether *Williams* can be squared with *Ramos*. In any event, the Seventh Amendment's express reference to "Suits at common law"—which this Court has explained "is not directed to jury characteristics, such as size, but rather the kind of cases for which jury trial is preserved," *Colgrove* v. *Battin*, 413 U.S. 149, 152 (1973)—could well preclude wholesale adoption of other attributes of the common-law jury in that context, *see U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 793 n.9 (1995) (applying *expressio unius* canon). There is good reason for the Sixth Amendment to be more protective than the Seventh: It protects "human liberty" rather than "property." *Stogner* v. *California*, 539 U.S. 607, 632 (2003).

Third, Arizona asserts that Mr. Khorrami has not "refut[ed]" *Williams*'s conclusion that the Sixth Amendment's drafting history shows that the Framers did not intend the Amendment to encompass "common law jury traditions." Opp.13 (citing 399 U.S. at 97). *Ramos* itself refuted this argument, explaining that the "snippet of drafting history" that *Williams* relied upon "could just as easily support the opposite inference"—i.e., certain language that was ultimately omitted was unnecessary "surplusage." 140 S.Ct. at 1400; *accord* Pet.20-21. In any event, *Ramos* explained, this argu-

ment "proves too much" because ignoring entirely the history of the common-law jury right when interpreting the Sixth Amendment would "leave the right to a 'trial by jury' devoid of meaning." 140 S.Ct. at 1400.

Fourth, Arizona attempts to distinguish *Ramos* because it overruled a plurality decision that garnered only four votes, while the *Williams* holding garnered five. Opp.15-16. But this distinction does nothing to explain why *Ramos*'s holding—which garnered six votes—can be squared with *Williams*'s. The *Ramos* majority explained that to the extent *Apodaca* established binding precedent, it should be formally overruled. 140 S.Ct. at 1404-1405. Notably, the portion of Justice Gorsuch's opinion suggesting that *Apodaca* could be discarded because it was a plurality opinion received just three votes. *Id.* at 1402-1404.

Fifth, Arizona suggests *Ramos* turned on the fact that the underlying state laws had racist origins. Opp.15. In reality, *Ramos* stated that "a jurisdiction adopting a nonunanimous rule … for benign reasons would still violate the Sixth Amendment." 140 S.Ct. at 1401 n.44; *see also id.* at 1426 (Alito, J., dissenting) ("the origins of the [state] rules have no bearing on the broad constitutional question"). Moreover, Arizona does not dispute that the *Williams* rule significantly increases odds that a jury will not have any Black and Hispanic members (or, indeed, members of any minority religion, nationality, or political perspective). *See* CAC Br.18-20; *accord* Utah Defenders Br.9-16; Pet.23-24.

Finally, Arizona contends that *Williams* is on "stronger footing" than *Apodaca* because *Williams* purportedly conducted a more "extensive historical analysis." Opp.16. To be clear, the reason why *Apodaca*'s reasoning was thin is the decision relied on

cross-references to *Williams*' flawed analysis. Pet.17. Once again, Arizona has no answer.

B. *Williams* Has No Bearing On The Privileges-Or-Immunities Clause

Because the historical evidence and pre-*Williams* case law suggests that the Sixth Amendment imposes a 12-member jury requirement, this Court could permissibly hold that the right has been extended to the States through the Privileges-or-Immunities Clause. *Cf. Ramos*, 140 S.Ct. at 1421-1425 (Thomas, J., concurring in the judgment).

Arizona does not take specific issue with any of Justice Thomas's *Ramos* analysis. Instead, it insists that this approach would require overruling this Court's case law on the Privileges-or-Immunities Clause. Opp.28-29. To the contrary, this Court has indicated that a constitutional-rights analysis can be considered under either the Fourteenth "Amendment's Due Process Clause or its Privileges Or Immunities Clause." *Dobbs* v. *Jackson Women's Health Org.*, 142 S.Ct. 2228, 2248 n.22 (2022). Arizona also contends that the Privileges-or-Immunities Clause does not apply to "unenumerated rights." Opp.29. Regardless of whether this is true, the right to a 12-person jury—like the right to unanimous jury—is part and parcel of the enumerated Sixth Amendment right to an impartial jury. *See Ramos*, 140 S.Ct. at 1421-1425.

III. If *Williams* Is Binding, It Should Be Formally Overruled

Williams is egregiously wrong both because of its inconsistency with history and *Ramos* and because the empirical studies it relied upon were almost immediate-

ly undermined. Pet.20-24. *Williams* has had significant negative consequences (e.g., juries with less than 12-members are less likely to be representative of minority viewpoints and are more likely to convict). Pet.24-25. And overruling *Williams* affects only limited reliance interests—i.e., it necessitates retrials of a finite number of pending cases. Pet.19-27. These considerations justify overruling *Williams*, especially given "the force of *stare decisis* is at its nadir" in cases "concerning [criminal] procedur[e] rules that implicate fundamental constitutional protection." *Alleyne* v. *United States*, 570 U.S. 99, 116 n.5 (2013).

A. Egregiously Wrong

Arizona asserts that *Williams*'s ruling is understandable in light of the "ambiguous historical record" on the 12-person jury right. Opp.17-18. To the contrary, the historical record is clear that—as even *Williams* acknowledged—"the size of the jury at common law [was] fixed generally at 12." 399 U.S. at 89. Moreover, there is a mountain of unrebutted historical evidence showing that this understanding governed until *Williams* was decided 52 years ago. *See supra* pp. 1, 4.

Arizona also argues that *Williams*'s functionalist reasoning is proper and has the policy benefit of giving States "flexibility." Opp.18-20. But *Ramos* is clear that the Sixth Amendment does not permit courts to make such "cost-benefit analys[e]s" to determine whether a particular aspect of the traditional trial-by-jury right is protected. 140 S.Ct. at 1401-1402. In any event, Arizona has no answer to the slew of post-*Williams* empirical studies that have undermined that decision's reasoning—beyond the unexplained assertion that such research is "speculative." *Compare* Pet.21-24 *and* CAC Br.16-22 *with* Opp.24.

B. Significant Negative Consequences

Arizona does not appear to dispute that the *Williams* rule statistically increases the likelihood of an erroneous conviction and decreases the representativeness of the jury. Pet.3, 23-25. Instead, Arizona takes issue with the use of empirical evidence itself. Opp.24. But this Court has previously considered such evidence as part of the *stare decisis* analysis. *E.g.*, *Janus* v. *American Fed'n*, 138 S.Ct. 2448, 2466, 2483 (2018).

Arizona also contends that this Court has been "[]consistent" in applying the *Williams* rule. Opp.20-21. But the cases cited mention *Williams* in passing or rely on the functionalist reasoning that *Ramos* rejected. Indeed, two of them—*Burch* and *Ballew*—expressly note that *Williams* departed from the common-law tradition. Pet.16-17. In any event, a trio of subsequent, 21st century decisions have created confusion by reaffirming the traditional 12-member requirement. *See* CAC Br.11-12 (citing *United States* v. *Booker*, 543 U.S. 220, 238-239 (2005); *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004); *Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000)).

Finally, Arizona argues that the fact that a quorum of Arizona voters approved the eight-person-jury rule in 1972 means that the rule necessarily enjoys popular support today. Opp.24. Even if that were true, it ignores that "[t]he very purpose of a Bill of Rights was … to place [certain subjects] beyond the reach of majorities." *West Virginia* v. *Barnette*, 319 U.S. 624, 638 (1943). Such fundamental rights "may not be submitted to vote; they depend on the outcome of no elections." *Id.*

C. Reliance

Arizona argues that the reliance interests here "stand[] in stark contrast to the effect of the Court's jury-unanimity holding in *Ramos*." Opp.26-28. To the contrary, the chief reliance interest asserted is the same: The need to try a discrete number of non-final felony convictions. Almost any new rule of criminal procedure will "affect[] significant numbers of pending cases across the whole country." *Ramos*, 140 S.Ct. at 1406.

Arizona also contends that the sheer number of convictions that will be affected by overturning *Williams* distinguishes this case from *Ramos*. Opp.27-28. To be clear, this case would affect only those felony proceedings where a trial has been held and the case is not yet final on appeal. Arizona provides no guidance on what those numbers would be, beyond unsourced speculation that "hundreds, if not thousands" of cases *could* be retried. Opp.27. But as Arizona admits in the next breath, that number is comparable to the rough estimates of how many cases were affected by *Ramos*. *Id.* ("several hundred to more than one thousand pending cases affected").[4] Moreover, this Court vacated "nearly 800 decisions" following *Booker* and a "similar consequence[] likely followed when *Crawford* v. *Washington* overturned prior interpretations of the Confrontation Clause or *Arizona* v. *Gant* changed the law for searches incident to arrests." *Ramos*, 140 S.Ct. at 1406 (citations omitted).

In the end, Arizona ignores "the most important" "reliance interest" of all—that "of the American peo-

[4] This Court granted certiorari despite Louisiana's similar argument that requiring jury unanimity "could upset" "[t]housands of final convictions." Opp.4, *Ramos*, No. 18-5924 (U.S.).

ple" "in the preservation of our constitutionally promised liberties." *Ramos*, 140 S.Ct. at 1408 (plurality op.). This Court alone has the authority to vindicate that interest—to review Arizona's "clear and simple statute" permitting eight jurors in a felony case and to "judge[] [it] against a pure command of the Constitution." *Texas* v. *Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring). It should do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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