No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LALAKO JONATHAN JOSE,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments guarantee the right to a trial by a twelve-person jury when the defendant is charged with a felony.

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PETITION FOR WRIT OF CERTIORARI

Lalako Jonathan Jose respectfully petitions for a writ of certiorari to review the judgment in this case of the Arizona Court of Appeals.

INTRODUCTION

How many members must a jury have when a criminal defendant is charged with a felony? For hundreds of years—from the signing of Magna Carta until 1970—the answer was the same: "[N]o person could be found guilty of a serious crime unless 'the truth of every accusation … should … be confirmed by the unanimous suffrage of twelve of his equals and neighbors.'" *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020). "A verdict, taken from eleven, was no verdict at all." *Id*. (quotation marks omitted).

By any historical metric, the traditional twelve-person jury requirement falls within "what the term 'trial by an impartial jury' meant at the time of the Sixth Amendment's adoption." *Id*. It was recognized by "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward." *Id*. This Court has stated that because the twelve-person requirement has been accepted since 1215, "[i]t must" have been "that the word 'jury'" in the Sixth Amendment was "placed in the constitution of the United States with reference to [that] meaning

affixed to [it]." *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898).

This Court, however, took a wrong turn when it held, in *Williams v. Florida*, 399 U.S. 78, 86 (1970), that juries as small as six were constitutionally permissible. *Williams* accorded no weight to the historical record, acknowledging that the Framers "may well" have had "the usual expectation" in drafting the Sixth Amendment "that the jury would consist of 12" members. *Id.* at 98-99. Instead, *Williams* rested on its view that the essential "function" of a jury is decision-making made with "community participation and [with] shared responsibility"—a function it thought empirical research suggested could be as easily performed with six jurors as with twelve. *Id.* at 100-02 & n.48. As a result, a half-dozen States—including Arizona—currently permit criminal juries as small as eight or six members,[1] even though this Court subsequently recognized that the empirical studies that formed the basis for *Williams*' holding were badly flawed. *Ballew v. Georgia*, 435 U.S. 223, 232-37 (1978); *see also* ABA, *Principles for Juries and Jury Trials*,

[1] The six States are: Arizona, *see* Ariz. Rev. Stat. § 21-102; Connecticut, *see* Conn. Gen. Stat. § 54-82; Florida, *see* Fla. R. Crim. Proc. § 3.270; Indiana, *see* Ind. Code § 35-37-1-1(b)(2); Massachusetts, *see* Mass. Gen. Laws, ch. 218, § 26A; and Utah, *see* Utah Code § 78B-1-104.

Principle 3 cmt., at 18 (Rev. 2016) ("The shortcomings of [the] studies [relied upon in *Williams*] have been demonstrated by subsequent scholarly analysis").

This Court has declined two prior opportunities to address this issue. *See Khorrami v. Arizona*, 598 U.S. --, 143 S. Ct. 22 (2022) (Mem.) (Gorsuch, J., dissenting from denial of certiorari); *Cunningham v. Florida*, 144 S. Ct. 1287 (2024) (Mem.) (Gorsuch, J., dissenting from denial of certiorari). But the time has come for this Court to discard the ahistorical and unfounded *Williams* rule, just as *Ramos* overturned a similar decision from the same era that permitted conviction of a serious crime by a nonunanimous jury. Indeed, *Ramos*'s reasoning has already effectively overruled *Williams*, as the *Ramos* decision rejected precisely "the same fundamental mode of analysis" as that adopted in *Williams*. *Ramos*, 590 U.S. at 157-58 (Alito, J., dissenting).

This Court should now overrule *Williams*. Its reasoning was egregiously wrong, as it disregarded history in favor of now-discredited empirical research. *Williams*' holding has had real-world negative consequences: It increases the odds of an erroneous conviction and decreases the representative nature of the juries. Any "reliance interest"

those six States might claim in having to "retry a slice of their prior criminal cases … cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Ramos*, 590 U.S. at 110-11 (plurality op.); *id.* at 129 (Kavanaugh, J., concurring in part) (invalidating "limited class" of convictions that violate Sixth Amendment is a "'small price to pay for the uprooting of this weed'").

OPINIONS BELOW

The Arizona Court of Appeals' decision dated May 10, 2024, is unreported but is available at 2024 WL 2118759. Exhibit 1. The Arizona Supreme Court's order denying Mr. Jose's petition for review is unreported. Exhibit 2.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on May 10, 2024. Exhibit 1. The Arizona Supreme Court's order denying discretionary review was entered on December 16, 2024. Exhibit 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]"

Section One of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 2, section 23 of the Arizona Constitution provides as follows:

> The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. 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.

Arizona Revised Statute § 21-102(A)-(B) provides as follows:

> A. A jury for trial of a criminal case in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons, and the concurrence of

all shall be necessary to render a verdict.

B. A jury for trial in any court of record of any other criminal case shall consist of eight persons, and the concurrence of all shall be necessary to render a verdict.

STATEMENT OF THE CASE

Mr. Jose was detained for investigation by Officer Rennick near a motel in Tucson, Arizona. Officer Morales arrived as backup and placed Mr. Jose, uncuffed, in the back seat of his patrol vehicle, a Crown Victoria sedan. Mr. Jose was on crutches and bleeding from both hands and asked for medical attention, so while Rennick investigated the police matter, Mr. Jose received treatment from paramedics while Morales stood by. Because Mr. Jose insulted the paramedics, they decided to leave him with the police after bandaging his hands. When Rennick returned, he told Mr. Jose that he was under arrest for a misdemeanor. According to Rennick and Morales, Mr. Jose then became extremely argumentative. Due to staffing shortages and Rennick being the arresting officer, the officers decided to move Mr. Jose from Morales's car (where Mr. Jose was already seated) to Rennick's Chevrolet Tahoe SUV.

Mr. Jose had a broken right leg. In the process of removing him from the Crown Victoria and placing him in the Tahoe, the officers

handcuffed Mr. Jose behind the back, took away his crutches, and made him use the broken leg to climb into the large SUV. The officers testified that Mr. Jose was "dropping his weight" to be uncooperative with the officers, but both admitted that they did not instruct Mr. Jose on how to get into the SUV with a broken leg. The officers decided to pull Mr. Jose into the car by grabbing him under the armpits, with Rennick on the other side by Mr. Jose's head and Morales by his legs. In the process of completing the move, Mr. Jose's head struck Rennick's head.

Mr. Jose was charged with aggravated assault of a peace officer as a class four felony; with the allegation of prior convictions, he faced a maximum prison sentence of fifteen years. Ariz. Rev. Stat. § 13-703(J). The charge was altered during trial such that the charge that the jury considered was a class five felony, for which Mr. Jose faced a maximum sentence of seven and one-half years. *Id*. Mr. Jose was tried to a jury of eight persons pursuant to Arizona law. ARIZ. CONST. art. 2, § 23; Ariz. Rev. Stat. § 21-102(B). He was convicted, and the trial court imposed a minimum term of four years' imprisonment.

On appeal, Mr. Jose argued that the Sixth and Fourteenth Amendments require a felony case to be tried to a jury of twelve persons.

He acknowledged this Court's contrary precedent in *Williams* but argued that this Court's opinion in *Ramos* undercut *Williams*' reasoning. The Arizona Court of Appeals rejected his constitutional arguments and declined to remark on the continued vitality of *Williams*. Mr. Jose filed a petition for review in the Arizona Supreme Court, and that court denied his petition.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S CASE LAW AND RELIES ON PRECEDENT WHOSE REASONING HAS BEEN CONCLUSIVELY REJECTED.

I. The Court of Appeals' Decision Cannot Be Squared With *Ramos*.

A. *Ramos* Established That The Scope Of The Sixth Amendment Jury Trial Right Is Determined By Analyzing The "Original Public Meaning" Of The Right

This Court held in *Ramos* that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious crime. 590 U.S. at 93. Because the text of the Sixth Amendment "says nothing … about what 'a trial by an impartial jury' entails," the Court's analysis focused on "what the term … meant at the time of the Sixth Amendment's adoption." *Id*. at 89-90; *see also Edwards v. Vannoy*, 593 U.S. 255, 266

(2021) (acknowledging that "*Ramos* … adhered to the original meaning of the Sixth Amendment's right to a jury trial").

To determine the "original public meaning" of the jury right, this Court consulted "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward." *Ramos*, 590 U.S. at 90-91. All those authorities pointed to the same "unmistakable" "answer"—the phrase "trial by … jury" referred to a unanimous jury at the time the Sixth Amendment was enacted. *Id*.

Ramos also placed importance on the fact that this Court had "repeatedly and over many years[] recognized that the Sixth Amendment requires unanimity." *Id*. at 91-92 & nn.19-20 (citing *Thompson v. Utah*, 170 U.S. 343, 351 (1898); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Patton v. United States*, 281 U.S. 276, 288 (1930)). The only detour from the Court's adherence to this "simple" and "straightforward principle[]" arose in the 1970s, when *Apodaca v. Oregon*, 406 U.S. 404 (1972), was issued and the Court's jurisprudence "took a strange turn," *Ramos*, 590 U.S. at 93.

The *Apodaca* plurality erred, *Ramos* explained, by "subject[ing] the Constitution's jury trial right to an incomplete functionalist analysis of

its own creation" rather than "grappling with the historical meaning of the Sixth Amendment's jury trial right." 590 U.S. at 106. Specifically, the *Apodaca* plurality "declared that the real question before them was whether unanimity serves an important 'function' in 'contemporary society'" and quickly concluded that "unanimity's costs outweigh its benefits in the modern era." *Id.* at 94. Not only was this "breezy cost-benefit analysis" "skimpy" in its reasoning, but it also "overlook[ed] the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury *included* a right to a unanimous verdict." *Id.* at 99-100. In other words, it is "not [the] role [of judges] to reassess whether" a right "enshrine[d] … in the Constitution" is "'important enough' to retain." *Id.* at 100.

A majority accordingly held that *Apodaca*'s logic was indefensible and not entitled to the protection of *stare decisis*. *See Ramos*, 590 U.S. at 106-07; *id.* at 115 (Sotomayor, J., concurring) ("Today, [*Apodaca* is] rightly[] relegated to the dustbin of history."); *id.* at 132 (Kavanaugh, J., concurring in part) ("*Apodaca* is egregiously wrong… I therefore agree with this Court's decision to overrule *Apodaca*."); *see also id.* at 139 (Thomas, J., concurring) (*Apodaca* "does not bind us" because it did not

address the scope of the Sixth Amendment when viewed in light of the Fourteenth Amendment's Privileges or Immunities Clause).

B. The Original Public Meaning Of "Trial By An Impartial Jury" Included A Right To A Twelve-Person Jury.

Just as in *Ramos*, "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward" all point to the same "unmistakable" "answer" here: The phrase "trial by an impartial jury" historically referred to a "'unanimous verdict of a jury of twelve persons.'" *Ramos*, 590 U.S. at 92 (quoting *Thompson*, 170 U.S. at 351); *see also* ABA, *Principles for Juries and Jury Trials* Principle 3 cmt., at 18, 21 ("colonial and federal constitutional considerations [as well as] long historical experience" support requiring a "twelve-person jury in all non-petty criminal cases").

The twelve-member requirement dates back nearly 900 years to the reign of King Henry II, who "established twelve as the usual number" for a jury. Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 295, 295 (1892). In the early 13th century, this rule was incorporated into Magna Carta. When the document "declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it [too] referred to a trial by twelve jurors." *Thompson*, 170 U.S. at 349. And

"[b]y the middle of the fourteenth century[,] the requirement of twelve had probably become definitely fixed" and had "c[o]me to be regarded with something like superstitious reverence." Scott, *Fundamentals of Procedure in Actions at Law* 75-76 (1922). Indeed, in 1769, Blackstone explained that "no person could be found guilty of a serious crime unless 'the truth of every accusation … [was] … confirmed by the unanimous suffrage of twelve of his equals and neighbors.'" *Ramos*, 590 U.S. at 90 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)). In short, a "'verdict, taken from eleven, was no verdict' at all." *Id.* (quoting Thayer, *A Preliminary Treatise on Evidence at the Common Law* 88-89 n.4 (1898)).

When considered in context of this history, "there can be no doubt" that "a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution." *Maxwell*, 176 U.S. at 586. In particular, in the first few decades after the Sixth Amendment was enacted, a bevy of state courts interpreted the phrase "trial by an impartial jury" to require a twelve-person jury. *See, e.g.*, Miller, *Six Of One Is Not A Dozen Of The Other*, 146 U. Pa. L. Rev. 621, 643 & n.133 (1998) (collecting cases). In 1794, for instance, a South Carolina court

interpreted the jury right enshrined in the state constitution as requiring the "rights of the citizens … to be determined … by 12 men… indiscriminately drawn from every class of their fellow citizens." *Zylstra v. Corporation of City of Charleston*, 1 S.C.L. 382, 389 (1794). Six years later, a North Carolina court explained that the same phrase (which also appears in the North Carolina constitution) referred to the "ancient mode" of a trial, in which a jury must contain twelve members—no more and no less. *Whitehurst v. Davis*, 3 N.C. 113, 113 (1800) (per curiam) ("Any innovation amounting in the least degree to a departure from this ancient mode … may … endanger or pervert this excellent institution from its usual course."). And in the following years, the Supreme Courts of Pennsylvania, Alabama, and Georgia interpreted similar language in their own constitutions to require twelve-person juries. *See Emerick v. Harris*, 1 Binn. 416, 426 (Pa. 1808); *Foote v. Lawrence*, 1 Stew. 483, 483 (Ala. 1828); *Rouse v. State*, 4 Ga. 136, 147 (1848).

The same understanding among state high courts throughout the rest of the nineteenth century. For example:

- The Ohio Supreme Court wrote that its state constitutional provision protecting "[t]he right of trial by jury" required that "[t]he number [of jurors] must be twelve," explaining that "diminishing the number impairs [the jury trial] right, lessens

the security of the accused, and increases the danger of conviction." *Work v. State*, 2 Ohio St. 296, 304-305 (1853).

- The New York Court of Appeals warned that "allow[ing] … any number short of a full panel of twelve jurors" "would be a highly dangerous innovation" that "ought not to be tolerated" "in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution … establishing and securing that mode of trial." *Cancemi v. People*, 18 N.Y. 128, 138 (1858).

- The Supreme Court of Missouri held that the Missouri Constitution, which "adopted" the "term 'trial by jury'" from "the common law," referred to a trial "of twelve men." *Vaughn v. Scade*, 30 Mo. 600, 603-04 (1860).

- The Supreme Court of New Hampshire ruled that its state's legislature could not allow for juries of fewer than twelve because "[t]he term[]… 'trial by jury' [is], and for ages ha[s] been well known in the language of the law"—and was thus "used at the adoption of the constitution"—to refer to "a body of twelve men." *Opinion of Justices*, 41 N.H. 550, 551 (1860).

Numerous scholars in the 18th and 19th centuries came to the same conclusion. For example, Justice James Wilson explained shortly after the Sixth Amendment was drafted that "[t]o the conviction of a crime, the undoubting and unanimous sentiment of the twelve jurors is of indispensable necessity," 2 Wilson, *The Works of the Honourable James Wilson* 350 (1804). Justice Joseph Story echoed that view: "trial by jury is generally understood to mean … a trial by a jury of twelve men, impartially selected[.]" 1 Story, *Commentaries on the Constitution of the*

United States § 1779, at 541 n.2 (4th ed. 1873). Other treatises from that era agreed, explaining that (1) "in a case in which the Constitution guarantees a jury trial," a statute allowing "a verdict upon any thing short of the unanimous consent of the twelve jurors" is "void" and (2) "a trial by jury is understood to mean—generally—a trial by a jury of twelve men." 1 Bishop, *Commentaries on the Law of Criminal Procedure* § 897, at 546 (2d ed. 1872); Tiffany, *A Treatise on Government and Constitutional Law* § 549, at 367 (1867).

This Court, too, has "repeatedly and over many years," *Ramos*, 590 U.S. at 92, recognized that the Sixth Amendment requires a twelve-member jury—and in many of the same cases that *Ramos* relied upon to show the consensus over the unanimous jury requirement. The Court first addressed the twelve-person requirement in 1898, when it overturned a conviction issued by an eight-person jury in Utah. *Thompson*, 170 U.S. at 349. The Court explained that "the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less." *Id*. *Thompson* relied on the Amendment's original public meaning, determining that "the words 'trial by jury' were placed in the constitution

of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument." *Id.* at 350.

In the years following *Thompson*, this Court repeatedly noted the twelve-person requirement. For example, just one year later, it said that "'[t]rial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is … a trial by a jury of 12 men." *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899). Again in 1900, it stated that "there can be no doubt" "[t]hat a jury com-posed, as at common law, of twelve jurors was intended by the Sixth Amendment." *Maxwell*, 176 U.S. at 586. Five years later, it recited *Thompson's* holding that the Sixth Amendment guarantees "the right to be tried by a jury of twelve persons." *Rassmussen v. United States*, 197 U.S. 516, 527 (1905).

As the twentieth century rolled on, this Court's statements about the twelve-person jury right became even more unqualified. By 1930, it stated that it was "not open to question" "[t]hat … 'trial by jury'" "mean[t] a trial by jury as understood and applied at common law," including the element "[t]hat the jury should consist of twelve men, neither more nor less," *Patton*, 281 U.S. at 288. And in 1968, this Court emphasized that

"the right to trial by jury guaranteed by the Sixth Amendment … is fundamental to the Ameri-can scheme of justice" and quoted Blackstone for the proposition that "'the truth of every accusation … should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.'" *Duncan v. Louisiana*, 391 U.S. 145, 149-52, 155 & n.23 (1968) (quoting 4 Blackstone, *Commentaries on the Laws of England* 343).

In sum, the same considerations this Court identified in *Ramos* as establishing that the Sixth Amendment requires a unanimous jury verdict also require a twelve-person jury. Indeed, after reviewing many of the sources discussed above, *Ramos* itself approvingly quoted *Thompson's* holding that "a defendant enjoys a 'constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.'" *Ramos*, 590 U.S. at 92 (quoting *Thompson*, 170 U.S. at 351).

II. *Williams*' Holding That A Six-Person Jury Is Constitutionally Permissible Either Was Effectively Overruled By *Ramos* Or Is Non-Binding Under The Privileges or Immunities Clause.

The Court of Appeals' only stated reason for disregarding the history and precedent supporting a twelve-person jury requirement was

that it was bound by this Court's holding in *Williams*. Exhibit 1. While the decision below was understandable, this Court is not bound by *Williams*, for two reasons.

First, this Court's ruling in *Ramos* "repudiated the reasoning on which" the Court of Appeals relied in *Williams*, meaning that *Williams* "must be regarded as retaining no vitality." *Herrera v. Wyoming*, 587 U.S. 329, 342 (2019); *see also South Carolina v. Baker*, 485 U.S. 505, 524 (1988) (confirming "that subsequent case law has overruled the holding" in prior decision); *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.,* 451 U.S. 648, 664 n.16 (1981) (similar).

Williams cannot stand in light of *Ramos's* holding that the Sixth Amendment's scope is determined by its original public meaning. The *Williams* Court openly acknowledged that the Framers "may well" have had "the usual expectation" in drafting the Sixth Amendment "that the jury would consist of 12" members. 399 U.S. at 98-99. But *Williams* took the view that such "purely historical considerations" were not dispositive. *Id*. at 99. Rather, the Court focused on the "function" that the jury plays in the Constitution. *Id*. at 100-01. It concluded that "the essential feature" of a jury is that it leaves justice to the "commonsense judgment

of a group of laymen" and thus allows "guilt or innocence" to be determined via "community participation and [with] shared responsibility." *Id*. With this understanding of the jury right in mind, the *Williams* Court concluded that "[w]hat few experiments have occurred—usually in the civil area" "suggest[ed]" that that function could just as easily be performed with six jurors as with twelve. *Id*. at 101-02 & n.48.

As Justice Harlan explained at the time, this reading "stripp[ed] off the livery of history from the jury trial" and ignored both "the intent of the Framers" and the Court's long held understanding that constitutional "provisions are framed in the language of the English common law, and … read in light of its history." *Baldwin v. New York*, 399 U.S. 117, 122-23 (1970) (Harlan, J., concurring in the result in *Williams*). And three times during that same decade, this Court reaffirmed that *Williams* had "departed from the strictly historical requirements of jury trial." *Burch v. Louisiana*, 441 U.S. 130, 137 (1979); *accord Ballew*, 435 U.S. at 229 ("[C]ommon-law juries included 12 members."); *Apodaca*, 406 U.S. at 407-08 ("[T]he requirement that juries consist of 12 men … arose during the Middle Ages and had become an accepted feature of the common law jury by the 18th century.").

More broadly, in overruling *Apodaca*, *Ramos* rejected the "same fundamental mode of analysis as that in *Williams*." *Ramos*, 590 U.S. at 157 (Alito, J., dissenting). *Apodaca* expressly recognized that *Williams* "consider[ed] a related issue" and used *Williams* as a lodestone for its reasoning. *Apocada*, 406 U.S. at 406-14; *accord Ramos*, 590 U.S. at 152 (Alito, J., dissenting) (noting that *Apodaca* "built on the analysis in *Williams*"). All told, the *Apodaca* plurality cited *Williams* no less than eleven times in a seven-page opinion. Its reliance included: (1) "cast[ing] considerable doubt on the easy assumption … that if a given feature existed in a jury at common law in 1789, it was necessarily preserved in the Constitution"; (2) concluding that "[o]ur inquiry [in determining the scope of the Sixth Amendment] must focus upon the function served by the jury in contemporary society"; and (3) holding that the only "'essential feature of a jury'" guaranteed by the Sixth Amendment is that it must "consist[] of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate[.]" 406 U.S. at 408-10 (quoting *Williams*, 399 U.S. at 92-93, 99-100). *Ramos* repudiated precisely this *Williams*-inspired reasoning as an improperly "muddy yardstick" for safeguarding "the right to jury trial" that the

"American people chose to enshrine … in the Constitution." 590 U.S. at 99-100 (majority op.).

Accordingly, *Ramos*'s decision to "reject [the plurality] opinion in *Apodaca*" and hold that "the Fourteenth Amendment incorporates the Sixth Amendment right to a unanimous jury against the States," *Vannoy*, 593 U.S. at 262, had the necessary result of effectively overruling *Williams* as well. And because "*Ramos* is the law," it should be "give[n] … all the consequence it deserves." *Vannoy*, 593 U.S. at 295 n.1 (Kagan, J., dissenting); *see Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 497 (2020) (Alito J., concurring) ("I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here.").

Second, at a minimum, *Williams*—which considered only the Fourteenth Amendment's Due Process Clause—does not impede this Court from recognizing a right to a twelve-person jury under the Privileges or Immunities Clause. As Justice Thomas explained in an analogous situation when concurring in the judgment in *Ramos*: (1) this Court's "decisions have long recognized [that a twelve-person jury] is required," (2) "[t]here is … considerable evidence that this understanding

persisted up to the time of the Fourteenth Amendment," and (3) the only contrary ruling (here, *Williams*) was decided under the Due Process Clause. *Ramos*, 590 U.S. at 132-40 (Thomas, J., concurring in the judgment). Thus, even if *Williams* remained good law under the Due Process Clause, it has no bearing on whether "the Privileges or Immunities clause" "protect[s]" the right to a twelve-person jury "against the States." *Id.* at 137-38. And because all other evidence beyond *Williams* suggests that the Sixth Amendment imposes a twelve-member jury requirement, this Court should hold that this right has been extended against the States, if not under the Due Process Clause, then under the Privileges or Immunities Clause.

III. To The Extent *Williams* Is Binding On The Twelve-Member Jury Issue, This Court Should Formally Overrule It.

"[T]he force of *stare decisis* is at its nadir" in cases like this one—i.e., those "concerning [criminal] procedur[e] rules that implicate fundamental constitutional protection." *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013). *Stare decisis*'s "role is … reduced … in the case of a [criminal] procedural rule" because such rules "do[] not serve as … guide[s] to lawful behavior." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). Moreover, because this Court's interpretation of the Constitution

"can only be altered by constitutional amendment or by overruling … prior decisions," *Agostini v. Felton*, 521 U.S. 203, 235 (1997), the strength of *stare decisis* considerations is "reduced all the more when the rule is not only procedural but rests upon an interpretation of the Constitution." *Gaudin*, 515 U.S. at 521.

With this point in mind, this Court's *stare decisis* analysis considers factors that "fold into three broad considerations": (1) whether the precedent is "egregiously wrong as a matter of law," taking into account "the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors"; (2) whether "the prior decision caused significant negative jurisprudential or real-world con-sequences"; and (3) whether "overruling the prior decision [would] unduly upset reliance interests." *Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring in part); *see also Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 248 (2019) (laying out similar factors). Each consideration suggests that *Williams* should be overruled.

A. *Williams* Is Egregiously Wrong

As explained above, *Williams* is flawed for the same reason as *Apodaca*. That is, the *Williams* Court spent little time "grappling with

the historical meaning of the Sixth's Amendment's jury trial right [or] this Court's long-repeated statements that it demands [a jury of twelve members]" and "[i]nstead … subjected the Constitution's jury trial right to an incomplete functionalist analysis of its own creation." *Ramos*, 590 U.S. at 106. This error in approach was "not just wrong"—it was "egregiously wrong." *Id.* at 121, 132 (Kavanaugh, J., concurring in part).

Even at the time it was decided, *Williams* (like *Apodaca*) was "already an outlier in the Court's jurisprudence," *Ramos*, 590 U.S. at 125 (Kavanaugh, J., concurring in part), as it was plainly inconsistent with centuries of related decisions and history. It contradicted ancient common-law guarantees and hundreds of years of precedent from state high courts and this Court alike. In 1900—seventy years before *Williams* was decided—this Court already expressed "no doubt" that "the Sixth Amendment" "intended" "a jury composed … of twelve jurors." *Maxwell*, 176 U.S. at 586. And within a decade after *Williams* issued, three other decisions from this Court—*Baldwin*, *Burch*, and *Ballew*—recognized that it had departed from the traditional historical understanding of the jury trial right.

As explained above, *Williams*' reasoning and holding have also been

fatally undercut by *Ramos*. To give one additional example, *Ramos* demolished *Williams'* brief attempt at historical analysis. Specifically, *Williams* placed weight on the fact that, in enacting the Sixth Amendment, the Senate chose not to include language that had been proposed by James Madison to clarify that "trial by jury" included the "requisite of unanimity for conviction, of the right to challenge, and other accustomed requisites." 399 U.S. at 94 (quoting 1 Annals of Cong. 435 (1789)). That omission suggested to the *Williams* Court that the Sixth Amendment was not intended to include a jury's "accustomed requisites," such as the common law practice of including twelve members. *Id*. at 95-97. *Ramos*, however, explicitly rejected this precise argument, albeit in considering unanimity. 590 U.S. at 97-98 (noting that the "snippet of drafting history could just as easily support the … inference" that the language was deleted because it was "so plainly included in the promise of a 'trial by an impartial jury'").

Even taking the *Williams* functionalist approach as valid, the decision suffers from another significant flaw: It was based on "suggest[ions]" from a "few experiments" that were undermined shortly after the opinion issued. 399 U.S. at 101. Specifically, the *Williams* Court

"f[ou]nd little reason to think" that the goals and traditional function of the jury—including, among others, "to provide a fair possibility for obtaining a representative[] cross-section of the community"—"are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12." *Id.* at 100. The Court theorized that "in practice the differences between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible." *Id.* at 102.

Empirical research issued shortly after *Williams* undermined this speculation, as this Court recognized eight years later in *Ballew*. *See* 435 U.S. at 232-37. *See also Cunningham*, 144 S. Ct. at 1288 (Gorsuch, J., dissenting from denial of certiorari) ("But almost before the ink could dry on the Court's opinion, the social science studies on which it relied came under scrutiny."). *Ballew*, which concluded that the Sixth Amendment barred the use of a five-person jury, noted that post-*Williams* research showed that (1) "smaller juries are less likely to foster effective group deliberation[s]," *id.* at 232; (2) smaller juries may be less accurate and cause "increasing inconsistency" in verdict results, *id.* at 234; (3) the chance for hung juries decreases with smaller juries, disproportionally

harming the defendant, *id*. at 236; and (4) decreasing jury sizes "foretell[] problems … for the representation of minority groups in the community," undermining a jury's likelihood of being "truly representative of the community," *id*. at 236-37. Moreover, the *Ballew* Court "admit[ted]" that it "d[id] not pretend to discern a clear line between six members and five," effectively concluding that the studies it relied on also cast doubt on the effectiveness of the six-member jury. *Id*. at 239; *see also id*. at 245-46 (Powell, J., concurring) (observing that "the line between five- and six-member juries is difficult to justify").

Although *Ballew* declined to overrule *Williams* outright, the bench, bar, and scholars have all recognized that it cast serious doubt on the strength of *Williams*' reasoning. As the American Bar Association summarized, *Ballew* "acknowledged the empirical findings pointing to the superiority of twelve member juries … when it concluded that juries of fewer than six are unconstitutional." ABA, *Principles for Juries and Jury Trials Principle* 3 cmt., at 18.

Research post-dating *Ballew* further undermines *Williams*' view that a small jury can provide a representative cross-section of the community. Current empirical evidence indicates that "reducing jury size

inevitably has a drastic effect on the representation of minority group members on the jury." Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. of Empirical Legal Stud. 425, 427 (Sept. 2009); *see also* Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 47, 52 (Summer 2020) ("Larger juries are also more inclusive and more representative of the community. … In reality, cutting the size of the jury dramatically increases the chance of excluding minorities."). Because "the 12-member jury produces significantly greater heterogeneity than does the six-member jury," Diamond et al., *Achieving Diversity*, 6 J. of Empirical Legal Stud. at 425, 449, it increases "the opportunity for meaningful and appropriate representation" and helps ensure that juries "represent adequately a cross-section of the community." *Ballew*, 435 U.S. at 237.

Other important considerations also weigh in favor of the twelve-member jury. For instance, studies indicate that twelve-member juries deliberate longer, recall evidence better, and are less likely to rely on irrelevant factors during deliberation. Alisa Smith & Michael J. Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury*,

60 Fla. L. Rev. 441, 465 (April 2008). Minority views are also more likely to be considered in a larger jury, as "having a large minority helps make the minority subgroup more influential," and, unsurprisingly, "the chance of minority members having allies is greater on a twelve-person jury." *Id*. at 466. And larger juries deliver more predictable results. In the civil context, for example, "[s]ix person-juries are four times more likely to return extremely high or low damage awards compared to the average." Higginbotham, 104 Judicature at 52.

In sum, whether *Williams*' reasoning is analyzed under the historical test laid out in *Ramos* or under the functionalist test that *Williams* itself created, it is egregiously, incontrovertibly wrong.

B. *Williams* Causes Significant Negative Jurisprudential And Real-World Consequences

Decisions following *Williams* have illustrated the jurisprudential difficulties it created: in *Ballew*, a split Court struggled to apply the functionalist approach, with multiple members acknowledging that the line being drawn had little foundation in law or fact. And, of course, this Court fundamentally rejected its approach in *Ramos*.

Jurisprudential conflict aside, the *Williams* Court's conclusion that a six-member jury is no different than a twelve-member jury has "caused

significant negative … real-world consequences." *Ramos*, 590 U.S. at 123-24 (Kavanaugh, J., concurring in part). As noted above, juries of less than twelve are less likely to include members of minority groups, spend less time deliberating, recall less evidence, are more likely to rely on irrelevant fac-tors, are less likely to consider minority viewpoints, and are less predictable than twelve-member juries. *Williams* thus permits "the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule," a drastic "consequence [that] has traditionally supplied some support for overruling an egregiously wrong criminal-procedure precedent." 590 U.S. at 126 (Kavanaugh, J., concurring in part) (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)).

Even beyond the individual defendants affected by the *Williams* rule, permitting six- or eight-person juries in felony cases does real harm to public perception of the jury as a legitimate, representative body. As this Court has explained, "[o]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government," and, to fulfill that function, the jury must "be a body *truly representative of the community*." *Taylor v. Louisiana,*

419 U.S. 522, 527 (1975) (emphasis added and quotation marks omitted). The *Williams* rule increases the odds that in the six States that continue to permit juries of less than twelve, the jury will not include a true cross-section of the community—and that the members who do belong to a racial, religious, or cultural minority will be given less of an opportunity to express their views. Put slightly differently, *Williams* threatens the vitality of one of the "most essential" constitutional protections, *Ramos*, 590 U.S. at 113 (Sotomayor, J., concurring): America's "deep commitment … to the right of a jury trial … as a defense against arbitrary law enforcement," *Codispoti v. Pennsylvania*, 418 U.S. 506, 515-16 (1974) (quotation marks omitted).

C. Any Reliance On *Williams* Is Limited And Outweighed By The Importance Of The Sixth Amendment Right

Much like in *Ramos*, overruling *Williams* would not implicate the kind of "prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke." 590 U.S. at 107. Nor can Arizona reasonably argue that juries with less than twelve members "have 'become part of our national culture,'" as twelve-member juries are required for felony trials in 44 States and federal court. *Id.* at 107-08. And while the six States that permit smaller juries in criminal cases may

well have to retry some cases that are pending on direct appeal, "new rules of criminal procedures … often affect[] significant numbers of pending cases across the … country." *Id.* at 108.

At the same time, allowing *Williams* to remain in place harms "the most important" "reliance interest[]"—that "of the American people" "in the preservation of our constitutionally promised liberties." *Ramos*, 590 U.S. at 110-11 (plurality op.). That a few States might have "to retry a slice of their prior criminal cases … cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties." *Id.*; *accord* 590 U.S. at 129-30 (Kavanaugh, J., concurring in part); *see also Vannoy*, 593 U.S. at 298 (Kagan, J., dissenting) (recognizing "the need to ensure" that the Sixth Amendment "keep[s] with the Nation's oldest traditions" so that defendants are provided "fair and dependable adjudications of [their] guilt"). Indeed, there does not appear to be a single "case in which a one-time need to retry defendants has ever been sufficient to inter a constitutional right forever." *Ramos*, 590 U.S. at 111. The *Williams* rule should not be the first.

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"This Court has long explained that the Sixth Amendment right to

a jury trial is 'fundamental to the American scheme of justice.'" *Ramos*, 590 U.S. at 93 (quoting *Duncan*, 391 U.S. at 149). That right is diminished by the continuing use of juries smaller than twelve, since "any [] reduction [in jury size] that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that pre-vents juries from truly representing their communities, attains constitutional significance," *Ballew*, 435 U.S. at 239. Absent intervention from this Court, defendants in six States will continue to be denied their right to a twelve-member jury—one that adequately represents a cross-section of their communities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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