No. 25-166

IN THE

Supreme Court of the United States

JOSE JOYA PARADA, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

David B. Smith
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1600 L St., NW
Washington, DC 20036

Arjun Ogale
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Ave., Ste. 2100
Dallas, TX 75201

Matt Aidan Getz
Counsel of Record
Kahn A. Scolnick
Patrick J. Fuster
Paige H. Petrashko
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
(213) 229-7754
mgetz@gibsondunn.com

T. Hunter Mason
GIBSON, DUNN & CRUTCHER LLP
1700 M St., NW
Washington, DC 20036

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT 4

I. The historical record establishes that the right to trial by jury meant a right to a jury of twelve.....4

II. *Williams* wrongly overrode the jury-trial right's original meaning.....7

A. *Williams* improperly balanced away a key constitutional guarantee.....8

B. A jury of twelve better serves the purposes of the jury-trial right.....11

III. Overruling *Williams* would not have undue consequences.....18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Apodaca v. *Oregon*,
406 U.S. 404 (1972).....3, 10, 11

Baldwin v. *New York*,
399 U.S. 66 (1970).....21

Ballew v. *Georgia*,
435 U.S. 223 (1978).....12

Blakely v. *Washington*,
542 U.S. 296 (2004).....12

Cancemi v. *People*,
18 N.Y. 128 (1858).....6

Capital Traction Co. v. *Hof*,
174 U.S. 1 (1899).....7

Carpenter v. *State*,
5 Miss. 163 (High Ct. Err. & App. 1839).....6

Danforth v. *Minnesota*,
552 U.S. 264 (2008).....21

Duncan v. *Louisiana*,
391 U.S. 145 (1968).....4, 7, 12, 18, 19

Edwards v. *Vannoy*,
593 U.S. 255 (2021).....4, 20

Emerick v. *Harris*,
1 Binn. 416 (Pa. 1808).....6

Foote v. *Lawrence*,
1 Stew. 483 (Ala. 1828).....6

Ex parte Grossman,
267 U.S. 87 (1925).....5

Kahler v. *Kansas*,
589 U.S. 271 (2020).....5

Khorrami v. *Arizona*,
143 S. Ct. 22 (2022).....3, 9, 18, 19

Maxwell v. *Dow*,
176 U.S. 581 (1900).....7

N.Y. State Rifle & Pistol Ass'n v. *Bruen*,
597 U.S. 1 (2022).....9

Patton v. *United States*,
281 U.S. 276 (1930).....2, 7, 19

People v. *Hampton*,
96 Cal. App. 5th 965 (2023).....20

Ramos v. *Louisiana*,
590 U.S. 83 (2020).....3, 4, 5, 8, 9, 10, 11, 21

Rassmussen v. *United States*,
197 U.S. 516 (1905).....7

Smith v. *Alabama*,
124 U.S. 465 (1888).....8

Teague v. *Lane*,
489 U.S. 288 (1989).....20

Thompson v. *Utah*,
170 U.S. 343 (1898).....5, 7

United States v. *Brown*,
996 F.3d 1171 (11th Cir. 2021).....14

United States v. *Smith*,
18 U.S. (5 Wheat.) 153 (1820).....3, 8

United States v. *Symington*,
195 F.3d 1080 (9th Cir. 1999).....15

Wesberry v. *Sanders*,
376 U.S. 1 (1964).....7

Wheaton v. *Peters*,
33 U.S. (8 Pet.) 591 (1834).....3, 10

Williams v. *Florida*,
399 U.S. 78 (1970).....2, 3, 7, 8, 9, 10, 11, 12,
..... 13, 14, 15, 17, 18, 20, 21

Work v. *State*,
2 Ohio St. 296 (1853) 6

Zylstra v. *Corp. of Charleston*,
1 S.C.L. 382 (Ct. Com. Pl. 1794).....6

Constitutional Provisions

U.S. Const. art. III, § 2.....4

U.S. Const. amend. VI.....4, 7, 9, 10, 11, 18, 19

U.S. Const. amend. XIV 19

Rules

Fed. R. Crim. P. 23 .....13, 14, 19

Fed. R. Crim. P. 23(b)(2) 19

Fed. R. Crim. P. 23(b)(3) 3, 4, 13, 14, 15, 19, 20

Fed. R. Crim. P. 24 20

Sup. Ct. R. 37.2.....1

Historical Materials

Bacon, A New Abridgment of the Law
(4th ed. 1778).....5

Bishop, Commentaries on the Law of Criminal Procedure (1866) 7

Blackstone, Commentaries on the Laws of England (1768).....2, 5

Cooley, Constitutional Limitations (1868).....7

N.Y. Charter of Liberties & Privileges (1683), *in* Lincoln, Constitutional History of New York (1906).....6

Story, Commentaries on the Constitution of the United States (1833).....12

Wilson, Of Juries, *in* Collected Works of James Wilson (Hall & Hall eds. 2007).....7

Other Authorities

Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169 (1995) 17

Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1 (1993).....16, 17

Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33 (2003).....12

Bellin, *An Inestimable Safeguard Gives Way to Practicality: Eliminating the Juror Who "Refuses to Deliberate" Under Federal Rule of Criminal Procedure 23(b)(3)*, 36 U. Mem. L. Rev. 631 (2006).....14

Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. Chi. Legal F. 33 ..... 15, 16, 18

Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 Calif. L. Rev. 1004 (1980) 15, 16

Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. Pa. L. Rev. 621 (1998) 5, 13, 16, 18

Offit, *Reimagining the Inclusive Jury*, 57 U.C. Davis L. Rev. 2691 (2024) 20

Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. Mich. J.L. Reform 569 (2007) 14

Rossner & Tait, *Virtual Technology and the Changing Rituals of Courtroom Justice*, 98 Chi.-Kent L. Rev. 251 (2023) 20

Saks & Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 Law & Hum. Behav. 451 (1997) 15, 16, 17

Su & Goravara, *What Is a Jury?*, 103 N.C. L. Rev. 969 (2025) 6, 16

Valenti & Downing, *Six Versus Twelve Member Juries: An Experimental Test of the Supreme Court Assumption of Functional Equivalence*, 1 Personality & Soc. Psychol. Bull. 273 (1974) 13

Webster, *Preserving Fundamental Rights in the Realm of Mid-Deliberation Juror Removal*, 52 U. Mem. L. Rev. 1069 (2022) 14, 15

Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710 (1971).....12, 13, 17

IN THE

Supreme Court of the United States

No. 25-166

JOSE JOYA PARADA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE*

The National Association of Criminal Defense Lawyers, or NACDL, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was

* No counsel for a party authored this brief in whole or in part, and no entity or person other than NACDL, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of NACDL's intent to file this brief at least 10 days before its due date under this Court's Rule 37.2.

founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 attorneys in affiliate organizations. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files many amicus briefs each year in this Court and other federal and state courts, seeking to assist in cases presenting issues important to criminal defendants, criminal defense lawyers, and the criminal legal system as a whole.

SUMMARY OF ARGUMENT

I. Few rights were as cherished or as well settled at the time of the Founding as the right to a trial by jury in criminal cases. And when that right was twice written into the Constitution, it carried with it established characteristics—including that conviction required "the unanimous consent of twelve." 3 Blackstone, Commentaries on the Laws of England 379 (1768). The rule that trial by jury meant a trial by twelve was so firmly cemented at common law and recognized by Founding-era sources that this Court once called the constitutional requirement of a twelve-member criminal jury "not open to question." *Patton* v. *United States*, 281 U.S. 276, 288 (1930).

II. But the Court lost its way in *Williams* v. *Florida*, 399 U.S. 78 (1970). There, the Court recognized the historical and constitutional heritage of the twelve-member jury—but discarded that evidence in favor of a functionalist analysis of whether a jury of twelve was worth requiring. *Williams* was grievously wrong in two respects.

First, *Williams* erred in discarding history and deciding for itself whether the size of the jury required at common law was an "important enough" right to

preserve. *Ramos* v. *Louisiana*, 590 U.S. 83, 100 (2020). When the Framers preserved a common-law right in the Constitution, the settled contents of that right were "necessarily included, as much as if they stood in the text." *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820). Centuries of common-law lessons warrant respect because they reflect "the wisdom, counsel, experience and observation of many ages." *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 672 (1834). *Williams* was wrong to discard those lessons in favor of its own functionalist analysis. *Ramos*, 590 U.S. at 99-100.

Second, the functionalist analysis in *Williams* undermined the jury's proper functioning. Even "[b]efore the ink dried on the decision," and especially "in the years since," social science and experience have confirmed the wisdom of the twelve-member jury—and the dangers of permitting trial by fewer than twelve. *Khorrami* v. *Arizona*, 143 S. Ct. 22, 26-27 (2022) (Gorsuch, J., dissenting from denial of certiorari). Juries of twelve counteract prosecutorial and judicial overreach, produce accurate and sensible decisions, and facilitate broad community participation in the criminal adjudication process. Downward departures from twelve, conversely, threaten all those core functions of the jury-trial right. Federal Rule of Criminal Procedure 23(b)(3) squarely implicates those concerns, especially because the rule is easily susceptible to abuses in the form of excluding holdout jurors who might otherwise produce a mistrial.

III. Just as in *Ramos* this Court corrected the aberration of *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), and restored the jury-trial right's long-recognized unanimity requirement, in this case the Court should correct the aberration of *Williams* and restore the

jury-trial right's equally well-settled requirement of a twelve-member jury. Doing so will ensure that criminal defendants receive the vital protections the Framers intended but will not have undue consequences. The enormous majority of the states already comply with the Constitution's original meaning. And in the federal system (and in states that mirror that system), there are plenty of acceptable alternatives for the problem that Rule 23(b)(3) was designed to address. Plus, as in *Ramos*, a decision restoring the Constitution's original meaning will not yield any path to collateral attacks in cases involving final convictions by fewer than twelve jurors. *Edwards* v. *Vannoy*, 593 U.S. 255, 272 (2021). Ultimately, any disruption from correcting course will be minor—and a fair price to pay for re-enshrining one of the most vital rights on which the Framers insisted.

ARGUMENT

I. The historical record establishes that the right to trial by jury meant a right to a jury of twelve.

Jury trials weren't a new idea in 1791. When the "Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta." *Duncan* v. *Louisiana*, 391 U.S. 145, 151 (1968). The Framers valued that right so much that they enshrined it in the Constitution twice over. U.S. Const. art. III, § 2 ("Trial of all Crimes . . . shall be by Jury"); *id.* amend. VI (criminal defendants shall have the right to trial by an "impartial jury" in "all criminal prosecutions"). And when the Framers twice insisted on trial by jury in criminal cases, they were drawing from centuries of inherited "meaning about

the content and requirements of a jury trial." *Ramos* v. *Louisiana*, 590 U.S. 83, 89 (2020); *accord, e.g.*, *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925) (the "language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted").

Prominent among those historical features was that trial by "jury" meant trial by twelve—not by eleven or any lower number. That understanding spanned 600 years, from its common-law origins to early American practice through this Court's precedents up until 1970.

Start with the common law. The "twelve-person unanimous criminal jury was an institution with a nearly four-hundred-year-old tradition in England" before the Sixth Amendment's ratification. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. Pa. L. Rev. 621, 643 (1998). Leading English authorities equated the jury-trial right with a right to trial by twelve jurors. *See Kahler* v. *Kansas*, 589 U.S. 271, 279 (2020) (in assessing "'historical practice,'" this Court "look[s] primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like)"). Blackstone, for instance, explained that a person couldn't be "affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, Commentaries on the Laws of England 379 (1768). Another influential treatise observed that a jury consists of "twelve, and can be neither more nor less." 3 Bacon, A New Abridgment of the Law 234 (4th ed. 1778); *see Thompson* v. *Utah*, 170 U.S. 343, 350 (1898) (citing Bacon's Abridgment to underscore that trial by

jury was one of "the principal excellencies of our constitution" and required a "verdict of twelve").

The colonists brought that common-law tradition to this side of the Atlantic. Several of the colonies' foundational documents used "twelve men" as a proxy for the word "jury." In its first legislative session, the New York General Assembly provided that "Tryalls shall be by the verdict of twelve men." N.Y. Charter of Liberties & Privileges § 17 (1683), *in* Lincoln, Constitutional History of New York 101 (1906). The Pennsylvania Frame of Government likewise stated that "all trials shall be by twelve men." *See* Su & Goravara, *What Is a Jury?*, 103 N.C. L. Rev. 969, 998 (2025).

Even where state constitutions didn't specify that the right to trial by "jury" meant a trial by twelve, there was no confusion about what "jury" meant. A South Carolina court, for example, understood "jury" to mean "12 men . . . indiscriminately drawn from every class of their fellow citizens." *Zylstra* v. *Corp. of Charleston*, 1 S.C.L. 382, 389 (Ct. Com. Pl. 1794). The Supreme Court of Pennsylvania similarly explained that the unadorned term "trial by jury" in its 1777 constitution preserved the requirement "'that all trials shall be by twelve men.'" *Emerick* v. *Harris*, 1 Binn. 416, 426 (Pa. 1808). And state high courts in later decades continued the tradition of reading "jury" in criminal cases to mean twelve people. *See, e.g.*, *Cancemi* v. *People*, 18 N.Y. 128, 138 (1858); *Work* v. *State*, 2 Ohio St. 296, 304 (1853); *Carpenter* v. *State*, 5 Miss. 163, 166-67 (High Ct. Err. & App. 1839); *Foote* v. *Lawrence*, 1 Stew. 483, 483 (Ala. 1828).

Prominent legal thinkers at the Founding and in later decades took no different view. In lectures delivered in Philadelphia "drawing on his experience as one of the most active members of the Constitutional

Convention," *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964), Justice Wilson expressed the view that "[t]o the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity." Wilson, Of Juries, *in* 2 Collected Works of James Wilson 985 (Hall & Hall eds. 2007). Later treatises echoed the same view that "[a] jury of less than twelve men is not a jury" at all, so "a statute authorizing a jury of less, in a case in which the constitution guarantees a jury trial, is void." 1 Bishop, Commentaries on the Law of Criminal Procedure § 761, at 532 (1866); *accord, e.g.*, Cooley, Constitutional Limitations 319 (1868).

Before 1970, this Court consistently recognized 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." *Thompson*, 170 U.S. at 349; *accord Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13 (1899); *Maxwell* v. *Dow*, 176 U.S. 581, 586 (1900); *Rassmussen* v. *United States*, 197 U.S. 516, 527 (1905); *Patton* v. *United States*, 281 U.S. 276, 288 (1930); *Duncan*, 391 U.S. at 151-52. So clear was the historical record on this point that the Court declared the constitutional requirement of a trial by twelve jurors "not open to question." *Patton*, 281 U.S. at 288.

II. *Williams* wrongly overrode the jury-trial right's original meaning.

In *Williams* v. *Florida*, 399 U.S. 78 (1970), this Court took an unwarranted detour from that rich common-law and constitutional tradition—and in the process seriously undermined the jury-trial right. *Williams*'s error unfolded in two steps. First, the Court improperly dismissed as irrelevant the extensive historical foundations of the jury-trial right. Second, the Court

dismissed the requirement of a twelve-person jury based on a smattering of since-debunked social-science studies and its own views about the importance of jury size. Both errors cry out for correction—and in fact, this Court recently corrected similar errors in another aberrational case that clipped the wings of the jury-trial right.

A. *Williams* improperly balanced away a key constitutional guarantee.

Williams got off on the wrong methodological foot. Instead of stopping after observing that the common-law jury of twelve was a core feature of what trial by jury meant at the Founding, the Court in *Williams* tried to weigh for itself whether the jury's size was "important enough" to preserve. *Ramos*, 590 U.S. at 98. This Court has since rejected that functionalist approach, re-emphasizing that the meaning of the jury-trial right turns on "what the term 'trial by an impartial jury' meant at the time of the Sixth Amendment's adoption." *Id.* at 90.

1. *Williams*'s disregard for the twelve-member jury is out of step with how this Court interprets the Constitution. As Justice Story explained in 1820, references to legal terms "as they are found in our treatises of the common law" indicate that their common-law "definitions are necessarily included" in their meaning "as much as if they stood in the text." *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820). For many decades, this Court faithfully applied that lesson. As the Court explained near the end of the nineteenth century, "[t]he interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Smith* v. *Alabama*, 124 U.S.

465, 478 (1888). And after a limited number of free-wheeling detours, this Court in recent years has "focus[ed] on history"—along with text, tradition, and well-reasoned precedent—to understand what the Constitution guarantees. *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 25 (2022).

Sometimes discerning the Constitution's original meaning is hard. This isn't one of those times. Here, "plenty of evidence exists about the original public meaning of the Sixth Amendment." *Khorrami* v. *Arizona*, 143 S. Ct. 22, 25 (2022) (Gorsuch, J., dissenting from denial of certiorari).

Nor is there any true alternative to defining the institution of the jury by reference to history. Unlike "broad guarantees of the Constitution whose proper scope is to be determined in a given instance by a blend of historical understanding and the adaptation of purpose to contemporary circumstances," "[t]he right to a trial by jury . . . has no enduring meaning apart from historical form." *Williams*, 399 U.S. at 14-25 (Harlan, J., dissenting in part and concurring in part). That historical form was a panel of twelve. *See supra* pp. 4-7. So trial by twelve is what the Constitution requires—plain and simple.

In its haste to escape the common law's wisdom, *Williams* overlooked that "the right to trial by jury *included* a right" to trial by twelve when the Sixth Amendment was adopted. *Ramos*, 590 U.S. at 100. *Williams* did not second-guess the extensive history underlying the twelve-member jury. *Williams*, 399 U.S. at 93-96. But in the Court's view, that historical tradition amounted to little more than "mystical or superstitious insights" supporting an "accidental feature" of the jury trial. *Id.* at 88, 90. And finding no "explicit decision" in the text governing the size of

criminal juries, the Court in *Williams* then threw in the towel, deciding that it should "turn[] to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution." *Id.* at 99.

The lack of express textual specification is not a license to cast off "everything history might have taught us about what it means to have a jury trial." *Ramos*, 590 U.S. at 98 (emphasis omitted). After all, the common-law tradition "is not the product of the wisdom of some one man, or society of men, in any one age, but of the wisdom, counsel, experience and observation of many ages of wise and observing men." *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 671-72 (1834). Long-held traditions like the twelve-person jury "may serve purposes evading our current notice." *Ramos*, 590 U.S. at 100. *Williams* was wrong to dismiss those traditions out of hand.

2. Worse than *Williams*'s abandonment of original meaning was the alternative to which it resorted. The Court subjected core aspects of the jury-trial right to a reweighing of "the function that the particular feature performs and its relation to the purposes of the jury trial." *Williams*, 399 U.S. at 99-100. Under that functionalist framework, the Court relied on a handful of (now-debunked) "experiments" and concluded that "the particular number of the body that makes up the jury" was not an "essential feature" of the right. *Id.* at 100.

This Court has already corrected a similar mistake. In *Ramos*, the Court overruled *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), which had held that the Sixth Amendment did not require a unanimous verdict. *Id.* at 406 (plurality opinion). *Apodaca* was *Williams*'s sequel and billed itself as such. *Ibid.* (reaching

"the same conclusion" as in *Williams* "with regard to the requirement of unanimity"). Relying on *Williams*, *Apodaca* too performed an open-ended functionalist inquiry into "the function served by the jury in contemporary society"—an inquiry that ended in the Court's jettisoning the unanimity requirement for criminal trials. *Id.* at 410.

Ramos rightly rebuffed the "muddy yardstick" approach that *Apodaca* borrowed from *Williams*. 590 U.S. at 99. The Court explained that such a "breezy cost-benefit analysis" cannot inspire "confidence" because no one can objectively measure the costs and benefits of a particular feature of the common-law tradition. *Id.* at 99-100. Relying on such unmoored balancing, the Court continued, creates an unacceptably high risk that courts will "balance . . . away" time-honored rights based on little more than their own views about whether the right is "important enough" to merit ongoing fealty. *Id.* at 100.

Williams erred no less than *Apodaca* in balancing away the right to a jury of twelve. As this Court recognized in *Ramos*, "[w]hen the American people chose to enshrine [the Sixth Amendment right to jury trial] in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses." 590 U.S. at 100. Instead, "[t]hey were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed." *Ibid.* That hard-won liberty "*included* a right" to be judged by a jury of twelve peers. *Ibid.*; *see supra* pp. 4-7.

B. A jury of twelve better serves the purposes of the jury-trial right.

Williams should be overruled not only because it undertook an improper functionalist analysis, but also

because that analysis yielded the wrong result. This Court has identified three primary goals that the jury-trial right serves: (1) "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen," *Williams*, 399 U.S. at 100; (2) "promot[ing] group deliberation," *Ballew* v. *Georgia*, 435 U.S. 223, 230 (1978) (plurality opinion); and (3) "provid[ing] a representative cross-section of the community," *ibid.* Social science and common sense show how a jury of twelve better serves each of these goals as compared to juries with fewer members.

1. Juries are an essential democratic check against prosecutorial and judicial overreach. 3 Story, Commentaries on the Constitution of the United States § 1774, at 541 (1833). Because juries are outside the government, they "function as [the] circuit-breaker in the [government's] machinery of justice." *Blakely* v. *Washington*, 542 U.S. 296, 306 (2004). The government and the judge are both "repeat player[s] in the criminal justice process," and as a result they can "become desensitized to the enormity of what is at stake in a criminal proceeding." Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 72 (2003).

Requiring trial by jury ensures that criminal cases are seen "with a fresh set of eyes" and with "no institutional bias." Barkow, *supra*, at 72. Juries impose their own sense of fair play and are not desensitized to the stakes of one prosecution for having seen so many other prosecutions. In short, wherever a defendant "preferred the common-sense judgment of a jury," he "was to have it." *Duncan*, 391 U.S. at 156.

It's easy to see why a jury of fewer than twelve provides less of a bulwark. *See* Zeisel, *And Then There*

Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 721 (1971). "To obtain a conviction under the unanimity rule, the prosecutor must persuade the juror with the highest standard" of reasonable doubt. *Ibid.* In polling fewer members of the community, the prosecutor's job is made easier because she can more likely avoid "the class of jurors who are most difficult to convince." *Ibid.* With fewer jurors, in other words, it becomes less likely prosecutors will encounter the "representatives of [the doubtful] minority" on which our criminal legal system depends. *Ibid.*

Empirical studies have proven, even under experimental conditions designed to engender reasonable doubt, that smaller juries favor conviction at higher rates. In one such experiment, six-member juries voted to convict nine out of ten times, while twelve-person juries did so in only two. Valenti & Downing, *Six Versus Twelve Member Juries: An Experimental Test of the Supreme Court Assumption of Functional Equivalence*, 1 Personality & Soc. Psychol. Bull. 273, 274 (1974). "[B]y permitting criminal juries to be reduced in size," *Williams* "quiets voices of reasonable doubt, potentially leading to more unjust convictions." Miller, *supra*, at 674.

The jury's role as check against overreach is especially undermined in the context of Federal Rule of Criminal Procedure 23(b)(3) and its state analogs. Rule 23(b)(3) allows courts to "excuse a juror" for "good cause" after "the jury has retired to deliberate" so that "a jury of 11 persons [may] return a verdict." Before *Williams*, the Rules had codified this Court's consistent view that conviction required the unanimous vote of twelve jurors, at least absent the defendant's consent to the contrary. Fed. R. Crim. P. 23 advisory

committee's notes to 1944 amendments. But after *Williams*, the Rule was amended to allow a verdict by eleven jurors without consent when the court finds "good cause" to dismiss a juror after deliberations begin. *Id.* advisory committee's notes to 1983 amendments. That procedure is prone to abuse, permitting courts—often at the behest of jurors in the majority—to target jury holdouts and secure a conviction where a mistrial otherwise would be required. *See* Bellin, *An Inestimable Safeguard Gives Way to Practicality: Eliminating the Juror Who "Refuses to Deliberate" Under Federal Rule of Criminal Procedure 23(b)(3)*, 36 U. Mem. L. Rev. 631, 636 (2006).

"Without distinguishing the type of conduct necessary to satisfy the good cause standard, courts can remove jurors for conduct that is slight in comparison to a defendant's constitutional rights to a fair trial and unanimous verdict." Webster, *Preserving Fundamental Rights in the Realm of Mid-Deliberation Juror Removal*, 52 U. Mem. L. Rev. 1069, 1099, 1101-02 (2022); *see* Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. Mich. J.L. Reform 569, 584 (2007) ("[T]he identification of a holdout juror is accompanied by allegations of misconduct, refusals to deliberate, or other behavior opposed by the overwhelming majority of the jury.").

Jurors dismissed under Rule 23(b)(3) for the oft-cited "refusal to deliberate" may well be dissenters forced out to reach artificial unanimity. Bellin, *supra*, at 638. After all, the line between stymying deliberation and disagreeing on the merits of the government's case is "'vanishingly thin.'" *United States* v. *Brown*, 996 F.3d 1171, 1184 (11th Cir. 2021).

Such circumvention of the jury's protective function cannot be corrected, or even identified, in many

cases. The deferential abuse-of-discretion standard, coupled with the typical dearth of a record on jury deliberations, means appellate review of Rule 23(b)(3) juror dismissals is superficial at best. *See* Webster, *supra*, at 1103; *United States* v. *Symington*, 195 F.3d 1080, 1088 n.7 (9th Cir. 1999) (because courts must avoid "compromising the secrecy of the jury's deliberations," the "evidence available to the district court" will be "necessarily limited"). And because jurors are discouraged from discussing deliberations after trial, many defendants will never even discover that such impropriety took place. Undoing *Williams*—and, with it, Rule 23(b)(3)—would reduce the risk of these grave and often undetectable abuses.

2. The jury's truth-seeking function is also better served by having twelve jurors as opposed to fewer. In the half-century since *Williams*, studies have shown that the traditional twelve-person jury is better able to process the evidence, arguments, and instructions in a lengthy or complex trial. More jurors mean more resources to improve reasoning, whether through "recollection of testimony, recognition of inconsistencies, or comprehension of the court's instructions." Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 Calif. L. Rev. 1004, 1020 (1980); *accord* Saks & Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 Law & Hum. Behav. 451, 458 (1997) ("the larger the decision-making group, the better the decisions will be because of the increased resources provided by having more group members"); Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. Chi. Legal F. 33, 54 ("larger groups such as full juries have greater resources of memory and cognitive understanding . . . and for these reasons make more accurate factual determinations").

As a result, the traditional twelve-person jury is "more sensitive to the 'ambiguities in the case'" that could produce reasonable doubt. Miller, *supra*, at 671. Thus, "[s]tudies have demonstrated that seating twelve jurors will result in a verdict that is a more reliable reflection of the statistical community average." Su & Goravara, *supra*, at 1020. Jurors with fewer members, conversely, "are more likely to produce outlier verdicts inconsistent with community values." *Ibid.*

Relatedly, "numerous recent studies have demonstrated that the quality of the jury's discussion and deliberation is better in larger groups than in smaller ones." Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1, 31 & n.216 (1993) (collecting studies). Twelve-member juries subject the jurors' initial impressions, memories, and conclusions to "more viewpoints, types of expertise, and mutually cancelling biases." Kaye, *supra*, at 1020; *accord* Saks & Marti, *supra*, at 458 (observing "more substantive deliberation" among twelve jurors, involving "the sharing of more facts, more ideas, and more challenges to the tentative conclusions of others"). In short, because of the greater variety of views present, "twelve-person juries facilitate minority resistance to conformity pressure from the majority, promote a more vigorous deliberation of the issues, and deter immediate decisions in all but the most clear-cut cases." Miller, *supra*, at 673.

The traditional jury's capacity for "better testing of ideas and reactions" yields "more accurate factual determinations." Carrington, *supra*, at 54. And improved accuracy shields the innocent from erroneous conviction—without making conviction of the guilty unduly difficult.

3. Finally, juries of twelve better achieve "community participation and shared responsibility" in deciding the guilt of the accused. *Williams*, 399 U.S. at 100.

Williams itself recognized that a jury must be sizeable enough that it "provide[s] a fair possibility for obtaining a representative cross-section of the community." 399 U.S. at 100. Yet the Court satisfied itself with speculation that "the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented" was "likely to be negligible." *Id.* at 102. That speculation has been proven wrong many times over.

"[I]f we want individual juries to be cross-sectional, . . . we should want each jury to be of substantial size." Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1188 (1995) (emphasis omitted). Twelve-member juries are better able to "draw citizens from different backgrounds," *ibid.*, improving the deliberative process and ensuring a broader check on government abuses. Meanwhile, "the smaller the size of the jury, the less frequently it even approaches community representation." Zeisel, *supra*, at 716. As jury size decreases, the odds that a jury will not include a juror representing a minority population—racial, ideological, or otherwise—increases considerably. Saks & Marti, *supra*, at 457 ("12-person juries are more likely than 6-person juries to contain at least one member of whatever minority group is under consideration."); Arnold, *supra*, at 30 (discussing a study showing that 72% of twelve-person juries included minority jurors as compared to 47% of six-person juries).

Excluding minority views undermines the jury's representative function in stark ways. With homogeneity, the jury's deliberative capacities weaken because there is less "competition among views" putting "ideas

and reactions" to a rigorous test. Carrington, *supra*, at 54. Lone dissenters—more likely in smaller juries—are more easily pressured to conform with the majority. *See* Miller, *supra*, at 673. Any reduction from twelve jurors weakens the bulwark against "unfounded criminal charges brought to eliminate enemies," both because it is easier to exclude sympathetic community members from a smaller panel and because potential dissenters are less likely to resist the majority. *Duncan*, 391 U.S. at 156.

* * *

Williams represented both a departure from sound constitutional methods and a "misapplication of social-science research." Miller, *supra*, at 622. These errors combined to "trigger[] the 'unthinkable' dismantling of an irrevocable constitutional cornerstone." *Ibid.* "Before the ink dried on the decision" and even more "in the years since," social science and experience have confirmed *Williams*'s errors—and demonstrated how the twelve-person jury passed down from the common law serves the important goals of the jury system far better than does a jury of fewer. *Khorrami*, 143 S. Ct. at 26-27 (Gorsuch, J., dissenting from denial of certiorari). The Court should overrule *Williams* to restore the jury to its full constitutional vigor.

III. Overruling *Williams* would not have undue consequences.

Re-enshrining the twelve-member jury as a constitutional requirement would be minimally disruptive to the state and federal criminal systems.

At the state level, the enormous majority of criminal trials already comport with the historical demands of the Sixth Amendment. Forty-four states generally

require a twelve-person jury for serious offenses. *Khorrami*, 143 S. Ct. at 23 (Gorsuch, J., dissenting from denial of certiorari). So even though a ruling on the Sixth Amendment jury-trial right would apply to offenses in the states through the Fourteenth Amendment, *Duncan*, 391 U.S. at 156-58, the criminal justice systems in the states would be little disturbed.

In the federal system (and in states with rules analogous to those in the federal system), the only departures from the twelve-person jury are (1) those to which the defendant consents and (2) those authorized by the court for "good cause" under Rule 23(b)(3). The former are uncontroversial; a defendant with a right to a jury also has the corresponding ability to "consent to be tried by a less number than twelve." *Patton*, 281 U.S. at 290; *see* Fed. R. Crim. P. 23(b)(2) (stipulation to reduced jury size). That leaves only cases like this one, in which a court authorizes an eleven-person jury to return a verdict without the defendant's consent under Rule 23(b)(3).

Rule 23(b)(3) serves little practical purpose that couldn't be served by alternatives that comport with the historical jury-trial right. Rule 23(b)(3) was intended to prevent mistrial when, "after the jury has retired to consider its verdict and any alternate jurors have been discharged, one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the jury." Fed. R. Crim. P. 23 advisory committee's notes to 1983 amendments. At the time, alternate jurors were discharged the minute the jury retired to deliberate, leaving no mechanism for substituting jurors who became incapacitated after deliberations began. *See ibid.*

Since 1999, however, courts have been able to retain alternates so that they can substitute jurors even

after deliberations begin. *See* Fed. R. Crim. P. 24 advisory committee's notes to 1999 amendments. Because a juror can be substituted during deliberations, any practical justification for authorizing an eleven-juror verdict without a defendant's consent has evaporated.

There's yet another option to avoid mistrial in the circumstances contemplated by Rule 23(b)(3) that didn't exist when it was first adopted: remote deliberations. In the wake of the COVID-19 pandemic, states began allowing individual jurors to participate in deliberations remotely when public health or other compelling reasons prevent them from being present. *See, e.g.*, *People* v. *Hampton*, 96 Cal. App. 5th 965, 981-82 (2023) (denying new-trial motion where juror appeared remotely for one day of deliberations due to COVID-19 exposure); *see also* Offit, *Reimagining the Inclusive Jury*, 57 U.C. Davis L. Rev. 2691, 2721 (2024) (virtual platforms "can facilitate confidential deliberation among jurors who are not gathered in a single physical space"); Rossner & Tait, *Virtual Technology and the Changing Rituals of Courtroom Justice*, 98 Chi.-Kent L. Rev. 251, 277 (2023) (discussing feasibility of virtual deliberations). When defendants consent to such a procedure, there is little reason to sacrifice the pivotal right to trial by a jury of twelve.

Overruling *Williams* also would not subject final state or federal convictions by fewer than twelve jurors to belated attack. Any rule reversing *Williams* and restoring the twelve-member jury-trial right "will not be applicable to those cases which have become final before the new rules are announced." *Teague* v. *Lane*, 489 U.S. 288, 310 (1989). This Court has also clarified that there is no exception for "watershed" rules, *Edwards* v. *Vannoy*, 593 U.S. 255, 272 (2021), even when a case restores "the original meaning" of a

constitutional provision, *Danforth* v. *Minnesota*, 552 U.S. 264, 270 (2008).

Ultimately, whatever minor disruptions may result from overruling *Williams* are the necessary result of the balance the Framers struck long ago. "[A]dministrative conveniences," *Baldwin* v. *New York*, 399 U.S. 66, 73 (1970) (plurality opinion), are no justification for flagrant violations of one of the Constitution's most cherished rights, *Ramos*, 590 U.S. at 89. Granting review in this case is the first step to stop "perpetuat[ing] something we all know to be wrong" based on the potential "consequences of being right." *Id.* at 111 (opinion of Gorsuch, J.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

David B. Smith
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1600 L St., NW
Washington, DC 20036

Arjun Ogale
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Ave., Ste. 2100
Dallas, TX 75201

Matt Aidan Getz
Counsel of Record
Kahn A. Scolnick
Patrick J. Fuster
Paige H. Petrashko
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
(213) 229-7754
mgetz@gibsondunn.com

T. Hunter Mason
GIBSON, DUNN & CRUTCHER LLP
1700 M St., NW
Washington, DC 20036

Counsel for Amicus Curiae

September 10, 2025