No. 25-166

In The
Supreme Court of the United States

JOSE JOYA PARADA, OSCAR ARMANDO SORTO ROMERO, MILTON PORTILLO RODRIGUEZ, AND JUAN CARLOS SANDOVAL RODRIGUEZ,
Petitioners,

v.

UNITED STATES,
Respondent.

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

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The centrality of the jury to the Framers cannot be overstated. "[A] paradigmatic image underlying the original Bill of Rights," the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96-97 (1998).

The Founding generation's focus on the jury as a central feature of a system of ordered liberty was strongly rooted in English common law. Sir William Blackstone, for example, called the jury a "sacred bulwark" of liberty. 4 William Blackstone, *Commentaries on the Laws of England* 344 (1769) [hereinafter *Blackstone's Commentaries*]. To Blackstone, "the

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

most transcendent privilege which any subject can enjoy, or wish for, [is] that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 *id.* at 379 (1768).

Drawing on that history, this Court has held that the Sixth Amendment, as incorporated by the Fourteenth Amendment, guarantees criminal defendants in both state and federal courts the right to a unanimous jury verdict. *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020). This Court looked to "the common law, state practices at the founding era, [and] opinions and treatises written soon after," and concluded that at the time of the Sixth Amendment's adoption, "trial by an impartial jury" meant that "[a] jury must reach a unanimous verdict in order to convict." *Id.* at 89.

In so holding, this Court overruled a 1972 decision, *Apodaca v. Oregon*, 406 U.S. 404 (1972), which permitted states to convict criminal defendants on the basis of non-unanimous jury verdicts. *Apodaca* was premised on the view that the unanimity requirement did not serve "an important function in contemporary society." *Ramos*, 590 U.S. at 94 (quotation marks omitted). In abrogating that decision, this Court took the *Apodaca* plurality to task for "subject[ing] the ancient guarantee of a unanimous jury verdict to its own functionalist assessment," an analysis that was also deeply flawed on its own terms. *Id.* at 100.

The same history and reasoning that led this Court to overrule *Apodaca* and hold that the Sixth Amendment requires jury unanimity compels the conclusion that the Sixth Amendment also requires that a jury consist of at least twelve people. When

the Framers drafted the Constitution, "the twelve-person unanimous criminal jury was an institution with a nearly four-hundred-year-old tradition in England." Robert H. Miller, Comment, *Six of One Is Not a Dozen of the Other: A Re-Examination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. Pa. L. Rev. 621, 643 (1998). Indeed, at the same time the Sixth Amendment was being ratified by the states, Justice James Wilson wrote that "[t]o the conviction of a crime, the undoubting and the unanimous sentiment of the *twelve* jurors is of indispensable necessity." 2 James Wilson, *Works of the Honourable James Wilson* 350 (1804) (emphasis added). Thus, the jury right that the Framers enshrined in the Bill of Rights was the right to a jury composed of twelve people.

Significantly, many of the same sources this Court relied on for its holding in *Ramos* also instruct—often in the very same passage—that juries must consist of no fewer than twelve people. For example, one source stated that "'the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of *twelve* of his equals and neighbors.'" *Ramos*, 590 U.S. at 90 (quoting 4 Blackstone, *Commentaries* at 343) (alterations adopted) (emphasis added). Another provided that "a 'verdict, taken from eleven, was no verdict' at all." *Id.* (quoting James Thayer, *Evidence at the Common Law* 88-89 n.4 (1898)). And yet another instructed 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 *twelve* persons.'" *Id.* at 92 (emphasis added) (quoting *Thompson v. Utah*, 170 U.S. 343, 351 (1898)).

Despite this long history confirming that juries consisted of at least twelve people at the time of the Framing, Petitioners were convicted of serious crimes by a jury composed of only eleven members. Pet. 5-6. This was possible only because this Court in *Williams v. Florida*, 399 U.S. 78 (1970), allowed juries composed of as few as six people to convict criminal defendants. But the same problems that doomed *Apodaca* plague *Williams*. Decided only two years before *Apodaca*, *Williams* dismissed the long history confirming that the size of a jury has been fixed at twelve for some seven hundred years as a "historical accident," *id.* at 89, and rejected what it termed the "easy assumption" that "if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution," *id.* at 92. *Williams* then conducted a functionalist analysis of the jury right, concluding that there was "little reason to think" that the goals of the Sixth Amendment "are in any meaningful sense less likely to be achieved when the jury numbers six." *Id.* at 100.

The *Williams* Court rejected the common law history underlying the Sixth Amendment just like the *Apodaca* Court did, and it was just as wrong to do so. Applying this Court's reasoning in *Ramos*, it is inappropriate to conduct a "functionalist analysis" that "overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury" meant a jury of twelve people. *Ramos*, 590 U.S. at 100, 106.

Further, just like the empirical evidence the *Apodaca* Court relied on in justifying its decision, the evidence the *Williams* Court pointed to drastically understated the deficiencies of smaller juries. According to *Williams*, smaller juries engage in

deliberations that are just as good as those of larger juries, smaller juries are just as capable of representing a fair cross-section of the community as larger ones, and smaller juries produce verdicts that are just as reliable. *Williams*, 399 U.S. at 101-02. But as this Court recognized as early as 1978 in *Ballew v. Georgia*, 435 U.S. 223 (1978), and as empirical research since then has confirmed, all of these claims are wrong. *Id.* at 239 (examining empirical research and concluding that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree" by progressively smaller juries).

Williams relied on the "few experiments" it could find on the effect of jury size on the quality and reliability of verdicts, *Williams*, 399 U.S. at 101, but these so-called experiments "were not empirical studies," Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better By the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 47, 52 (2020). Instead, they were merely "conclusory statements . . . supported at best by limited experience and anecdote." *Id.* And those conclusory statements are belied by "well established elementary statistical theory" that was known at the time. Hans Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 715 n.32 (1971).

Moreover, numerous empirical studies have been conducted since then confirming that twelve-member juries are markedly better along every measure *Williams* found critical: they provide for more considered jury deliberations by improving dissenting jurors' ability to withstand pressure to conform to the majority, Alisa Smith & Michael J. Saks, *In Honor of Walter O. Weyrauch: The Case for*

Overturning Williams v. Florida *and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441, 457 (2008); they more accurately discuss facts in deliberations and rely on more probative information, *id.* at 465; they better represent a cross-section of the community, *see, e.g.*, Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. Empirical Legal Stud. 425, 434-35 (2009); and they produce more reliable verdicts, *see, e.g.*, Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 J. Applied Psych. 121, 126 (2002).

In short, "*Williams* was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation's courts." *Khorrami v. Arizona*, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from denial of certiorari). This Court should grant *certiorari*.

ARGUMENT

I. At the Founding, Juries Were Composed of Twelve People.

The jury has always been "justly dear to the American people, . . . an object of deep interest and solicitude." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830). Featured expressly in three of the first ten amendments to the Constitution, it is "a paradigmatic image underlying the original Bill of Rights," Amar, *supra*, at 96; *see* Miller, *supra*, at 643; U.S. Const. amends. V, VI, VII.

The Founding generation's belief in the jury had its foundation in English common law, which had

long recognized the jury as critical to the preservation of liberty. *See, e.g.*, Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1, 13 (1993) ("By the 1600s, when the thirteen colonies were founded, jury trial had become one of the great palladiums of English liberty."); Larry T. Bates, *Trial by Jury After* Williams v. Florida, 10 Hamline L. Rev. 53, 53 (1987) ("[B]y the end of the thirteenth century the jury had become an important element in English criminal procedure."). As Sir William Blackstone emphasized, "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." 3 *Blackstone's Commentaries* 379 (1768). To Blackstone, trial by jury was "the most transcendent privilege which any subject can enjoy, or wish for." *Id.*

A defining attribute of the jury as it existed at common law was that it consisted of twelve people. *See* Bates, *supra*, at 55 (an "essential characteristic[] of the petit jury at common law [was] the number of persons which comprised the jury—twelve"). As Blackstone explained it, a person could not 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's Commentaries* 379 (1768). Expanding on this point, Blackstone later commented that it was important that a trial by jury include "the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion." 4 *id.* at 343 (1769). Other prominent legal thinkers of the time similarly embraced the twelve-member jury. *See, e.g.*, 2 Sir Matthew Hale, *The History of the Common Law* 256 (1713) (stating that a jury should be composed of "[t]welve, and no less, of such as are

indifferent"); Bates, *supra*, at 64 ("In 1736 Bacon wrote that the petit jury must consist of twelve 'and can be neither more nor less.'" (citation omitted)).[2]

The Framers shared this belief that a "jury"—as that term was used in the Sixth Amendment's guarantee of a right to trial by jury in criminal cases—was composed of twelve people. *See* Arnold, *supra*, at 5 ("[I]t was a scholarly axiom at the time the Bill of Rights was drafted that a jury was composed of twelve. This clearly was the understanding of the Founding Generation . . . ."). Indeed, many colonial charters required that criminal juries be composed of 12 members. Miller, *supra*, at 640 n.115 (New Hampshire, New York, Pennsylvania, Plymouth Plantation, Virginia, and West Jersey "specified that trial by jury in criminal cases meant trial by a panel of 12 indifferent members of the community reaching a unanimous verdict"); *see also* Wanling Su & Rahul Goravara, *What is a Jury*, 103 N.C. L. Rev. 969, 984 (2025) (the "Fundamental Constitutions of Carolina," adopted in 1669, required that "[e]very

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[2] Although the precise origins of the number twelve remain unknown, *see* Arnold, *supra*, at 5, there is widespread agreement that the number was well-established prior to the Framing, s*ee, e.g.*, *id.* at 3 ("For over six hundred years, Western civilization took it for granted that a jury must be composed of twelve persons."); *id.* at 8 ("[A]ny variation in number ended during the reign of Edward IV (1461-1483) when the unanimous verdict of twelve unquestionably and invariably became the law of England, absent consent of the parties."). And just because the reason for this number remains unknown, that does not mean it was an accident. *See* Zeisel, *supra*, at 712 (noting that it "might be more than an accident that after centuries of trial and error the size of the jury at common law came to be fixed at twelve," and hypothesizing that "twelve would be the number that optimizes the jury's two conflicting goals—to represent the community and remain manageable").

jury shall consist to twelve men"); Bates, *supra*, at 66 (surveying charters of the colonies and concluding that the delegates to the Constitutional Convention understood that "trial by jury in criminal cases meant trial by a body of twelve persons all of whom agreed to the verdict").

During the ratification debates, Governor Edmund Randolph questioned the need for a Bill of Rights, noting with respect to the jury right that "the 3d article provide[s] that the trial of all crimes shall be by jury," and "[t]here is no suspicion that less than twelve jurors will be thought sufficient." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 467 (Jonathan Elliot ed., 1836). And as the Sixth Amendment was being debated and ratified by the states, Justice James Wilson wrote in his 1790-91 *Lectures on Law* that "[t]o the conviction of a crime, the undoubting and the unanimous sentiment of the *twelve* jurors is of indispensable necessity." Wilson, *supra*, at 350 (emphasis added).

Moreover, much like the unanimity requirement, the twelve-person requirement was not "lost to time and only recently recognized." *Ramos*, 590 U.S. at 92. Throughout the nineteenth century, this Court, state supreme courts, and influential legal thinkers all recognized that "[t]he term *jury* is well understood to be twelve men." *Foote v. Lawrence*, 1 Stew. 483, 483 (Ala. 1828). In *Thompson v. Utah*, for example, this Court asked whether "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," and answered that question in the affirmative. 170 U.S. at 349; *cf. Baldwin v. New York*, 399 U.S. 117, 122 (1970) (Harlan, J., dissenting) ("[B]efore

[*Williams*] it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by a jury of six."). Similarly, the New Hampshire Supreme Court explained that the term "jury" has been "well known in the language of the law," and it was "used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men." *Opinion of Justices*, 41 N.H. 550, at *1 (1860); *see Cancemi v. People*, 18 N.Y. 128, 138 (1858) ("It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury . . . for the court to allow of any number short of a full panel of twelve jurors . . . ."); *State v. Everett*, 14 Minn. 439, 444 (1869) ("The word 'jury' . . . imports a body of *twelve* men.").

Justice Joseph Story embraced this requirement in his 1833 *Commentaries on the Constitution*. First, he explained that America's forbearers "brought this great privilege [of trial by jury] with them, as their birthright and inheritance, as part of that admirable common law." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1779, at 559 (5th ed. 1891). He then went on to explain that "[a] trial by jury is generally understood to mean . . . , a trial by a jury of *twelve* men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional." *Id.* at n.2 (emphasis in original).

In the early twentieth century, this Court repeatedly recognized that "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 v. Dow*, 176 U.S. 581, 586 (1900); *see Patton v. United States*, 281 U.S. 276, 288-90 (1930) (the "common law elements" of a jury, including that the "jury should consist of twelve" people, "are embedded in" the Sixth Amendment); *Rassmussen v. United States*, 197 U.S. 516, 528 (1905) (holding that a statute allowing for six-person juries in Alaska was unconstitutional); *id.* at 529 (Harlan, J., concurring) ("The constitutional requirement that 'the trial of all crimes . . . shall be by jury,' means, as this court has adjudged, a trial by the historical, common-law jury of twelve persons."); *see also Williams*, 399 U.S. at 117 (Marshall, J., dissenting) (noting that an "unbroken line of precedent going back over 70 years" recognized that "the jury guaranteed by the Sixth Amendment consists of twelve persons" (quotation marks omitted)).

And in more recent cases this Court has repeatedly observed that the Sixth Amendment's jury trial guarantee includes the right to a twelve-member jury. In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court explained that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies include the rule "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors.'" *Id.* at 301 (quoting 4 Blackstone, *Commentaries* at 343).

This Court reaffirmed this principle in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), explaining that "'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that 'the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's]

equals and neighbours.'" *Id.* at 477; *see id.* at 498 (Scalia, J., concurring) (charges must be determined "beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens"); *see also United States v. Booker*, 543 U.S. 220, 238-39 (2005) (same).

And in *Ramos*, this Court cited historical precedents confirming that jury decisions must be unanimous, many of which also confirmed that the jury must consist of twelve people. According to this Court, "'the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors,'" *Ramos*, 590 U.S. at 90 (quoting 4 Blackstone, *Commentaries* at 343) (alterations adopted); "a 'verdict, taken from eleven, was no verdict' at all," *id.* (quoting Thayer, *supra*, at 88-89 n.4); and "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,'" *id.* at 92 (quoting *Thompson*, 170 U.S. at 351).

Thus, this Court has repeatedly recognized what Framing-era history makes clear: the "sacred bulwark of liberty" that the Framers codified in the Sixth Amendment was the jury that existed at common law—a jury of *twelve* of the defendant's "equals and neighbours." *Apprendi*, 530 U.S. at 477 (quotation marks omitted). That history is the proper place to look to determine the meaning of the Sixth Amendment, as the next Section demonstrates.

II. The *Williams* Court Improperly Dismissed the History of the Sixth Amendment in Determining Its Meaning.

The *Williams* Court expressly rejected the relevance of history to determining the meaning of the Sixth Amendment. While recognizing that "[i]t may

well be that the usual expectation was that the jury would consist of 12," *Williams*, 399 U.S. at 98, *Williams* concluded that "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury," *id.* at 99.

But *Williams* "was wrong the day it was decided, it remains wrong today," and its approach is at odds with this Court's more recent Sixth Amendment cases. *Khorrami*, 143 S. Ct. at 23 (Gorsuch, J., dissenting from denial of certiorari). The Court in *Williams* relied primarily on the drafting history of the Sixth Amendment to support its conclusion that the Framers did not mean to include the essential features of the jury from the common law in the Constitution, noting that "provisions spelling out such common-law features of the jury as 'unanimity' or 'the accustomed requisites'" that appeared in Madison's original draft were omitted from the final version. *Williams*, 399 U.S. at 93-96. But this Court expressly rejected that reasoning in *Ramos*, pointing out that this interpretation of the drafting history essentially blinds the Court to "*everything* history might have taught us about what it means to have a jury trial," which would "leave the right to a 'trial by jury' devoid of meaning." *Ramos*, 590 U.S. at 98. Indeed, these deletions "just as easily support" the inference that the language was unnecessary in light of the well-understood meaning of the term "jury" at common law. *Id.* at 97; *see Baldwin*, 399 U.S. at 123 n.9 (Harlan, J., dissenting) (noting that "a more likely explanation of the Senate's action is that it was streamlining the Madison version on the assumption that the most prominent features of the jury would be preserved as a matter of course").

Based on its faulty interpretation of the drafting history, the *Williams* Court then decided to "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." *Williams,* 399 U.S. at 99. According to *Williams*, "[t]he relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." *Id.* at 99-100.

This approach to the Sixth Amendment inquiry cannot be reconciled with this Court's more recent Sixth Amendment jurisprudence. As this Court put it in *Ramos*, "[w]hen the American people chose to enshrine [the jury trial] right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses," and this Court's role is not to "reassess" whether the right to a twelve-person jury is "'important enough' to retain." *Ramos*, 590 U.S. at 100.

Indeed, long before *Ramos*, this Court repeatedly recognized that it is the original understanding of the Sixth Amendment that controls its meaning, not some abstract functional analysis. In *Apprendi*, this Court recognized that "the historical foundation for our recognition of [the rights in the Sixth Amendment] extends down centuries into the common law," 530 U.S. at 477, and it is thus appropriate to look to the common law as it existed at the Framing to determine how the Sixth Amendment's guarantee should apply in the context of sentencing, *see id.* at 478-83.

And as this Court explained in *Giles v. California*, 554 U.S. 353 (2008), when addressing the scope of the Confrontation Clause, courts are not supposed

to "extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values," because "[t]he Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id.* at 375; *see Crawford v. Washington*, 541 U.S. 36, 43-50 (2004) (looking to "historical background," including the common law and early state practices, to determine the meaning of the Confrontation Clause). And in holding that factors that increase a defendant's sentence must be proven to a jury beyond a reasonable doubt, this Court has emphasized that what matters is not "whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice," but rather "the Framers' paradigm for criminal justice." *Blakely*, 542 U.S. at 313.

In light of these more recent decisions and the Sixth Amendment's history, it was plainly wrong for the *Williams* Court to conclude that a criminal jury need not consist of twelve members. And since this Court overruled *Apodaca*, *Williams* stands alone in its rejection of the relevance of Sixth Amendment history. But even if this Court's decision in *Williams* to engage in a functionalist analysis were correct, that decision should still be overruled because, as the next Section discusses, empirical research belies the conclusion that juries of fewer than twelve persons are functionally equivalent to twelve-person juries.

III. Empirical Research Demonstrates that Juries of Fewer than Twelve People Undermine the Right to a Fair Trial Guaranteed by the Sixth Amendment.

Even if this Court were to adopt *Williams*'s functionalist approach, it should still conclude that twelve-person juries are constitutionally insufficient. *Williams* assessed the effect of jury size along three main dimensions: first, the quality of jury deliberations; second, the ability of the jury to properly represent a cross-section of the community; and third, the reliability of jury verdicts. *Williams*, 399 U.S. at 100-02. But the so-called "experiments" on which *Williams* relied amounted to little more than "conclusory statements . . . supported at best by limited experience and anecdote." Higginbotham et al., *supra*, at 52; *see* Zeisel, *supra*, at 714-15. Even at the time, those "experiments" did not support the conclusions the *Williams* Court drew, and since then, empirical studies have confirmed that smaller juries are worse in every regard *Williams* identified as being essential to the Sixth Amendment's fair trial right, *see* Su & Goravara, *supra*, at 1014 (collecting empirical research demonstrating that six-member juries are not the functional equivalent of twelve-member ones).

A. *Thoroughness of Deliberations*

Williams was not altogether clear about what factors it understood help to "promote group deliberation," 399 U.S. at 100, but it suggested that the ability of a dissenting juror to withstand the pressure to conform to the majority's view was important, *id.* at 101 n.49. *Williams* reasoned that the "operative factor" influencing dissenting jurors' propensity to conform to majority pressure during

deliberations is the "proportional size of the majority aligned against them," *id.*, meaning that "a minority faction in a jury divided 10-2 would be no better able to withstand majority influence than the minority faction in a jury divided 5-1," Smith & Saks, *supra*, at 457.

But every study *Williams* cited in support of this proposition "found exactly the opposite." *Id.* Each study showed that if a dissenter has just one attitudinal ally, the dissenter is far more likely to resist pressures to conform, regardless of the proportional size of the majority against them. *Id.* Because twelve-person juries are more likely to have multiple dissenting members, *see* Zeisel, *supra*, at 722, twelve-person juries improve dissenters' ability to resist majority pressure, leading to more considered jury deliberations.

Research conducted since then confirms that twelve-person juries are more deliberative in other ways as well: they more accurately discuss facts in deliberation, they rely on more probative information, they better recall such information, and they deliberate longer. Smith & Saks, *supra*, at 465. In one study of seventy-three mock criminal juries, researchers found that the twelve-person juries discussed trial testimony more accurately than their six-person counterparts. Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 L. & Hum. Behav. 451, 458-59 (1997). Another study from 2002 found twelve-person juries relied less on non-probative and evaluative statements than six-person juries. Horowitz & Bordens, *supra*, at 125-28. These findings are consistent with group psychology literature explaining that larger groups perform better because they can marshal more resources than smaller groups. Saks & Marti,

supra, at 458; *see Ballew*, 435 U.S. at 232-33 ("Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.").

Studies also indicate that larger juries deliberate longer than smaller ones. Eleven studies examined in a meta-analysis compared length of deliberations between large and small juries, and all found larger juries deliberated longer. Saks & Marti, *supra*, 457-58. "The mean time difference for studies of actual juries . . . is forty-four minutes." Smith & Saks, *supra*, at 465. Longer deliberation time suggests "the sharing of more facts, more ideas, and more challenges to the tentative conclusions of others." Saks & Marti, *supra*, at 458.

B. *Representativeness of the Community*

While *Williams* recognized that an "essential feature of the jury obviously lies . . . in the community participation and shared responsibility that results from that group's determination of guilt or innocence," 399 U.S. at 100; *cf. Ballew*, 435 U.S. at 237 ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940))), it dismissed as "unrealistic" the concern that representation "will be significantly diminished" by reducing the size of juries to six, *Williams*, 399 U.S. at 102.

But *Williams*'s assumptions on this point contradict basic "principles of statistical sampling" that were well known at the time. Smith & Saks, *supra*, at 458; *see* Zeisel, *supra*, at 716. These principles make clear that increasing a sample's size necessarily increases the likelihood that it will contain

"populations of any given stratification." Smith & Saks, *supra*, at 458. To illustrate, in randomly impaneled six- and twelve-person juries from a population that is 10% minority, over half the six-person juries will contain *no* minority members, while fewer than a third of the twelve-person juries will lack minority representation. Zeisel, *supra*, at 716.

Empirical studies confirm that smaller juries exclude minorities much more often than twelve-person ones. A 1997 meta-analysis of all studies published over nearly two decades that assessed the empirical differences between six- and twelve-person juries found overwhelming support for the proposition that twelve-person juries are significantly more representative than six-person ones. Saks & Marti, *supra*, at 457. The report analyzed seventeen studies involving over 2,000 juries. *Id.* at 452. Assessing the aggregate results across the five studies that focused on minority representation, the authors concluded that the "effect of reduced jury size on minority representation is equivalent to a decrease in the opportunity of representation from about 63-64% to about 36-37%." *Id.* at 457. "Not one study contradicted this result." Smith & Saks, *supra*, at 464.

A more recent study confirmed these earlier findings. The researchers in that study collected data from 277 trials conducted between 2001 and 2007; eighty-nine trials used six-person juries, and 188 used twelve-person juries. Shari S. Diamond et al., *supra*, at 434-35. Even though potential Black jurors comprised 25% of the venire before and after peremptory challenges, 28% of the six-person juries lacked even a single Black juror compared to only 2% of the twelve-person ones. Moreover, 41% of six-person juries contained at least two Black jurors as compared to over 80% of twelve-person ones. *Id.* at 443.

This is important because, as a separate study found, Black jurors are "vastly overrepresented" as dissenting jurors urging acquittal. Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1599 (2018). Relatedly, a study examining felony trials in two Florida counties found that all-white jury pools convicted Black defendants significantly more often—by 16 percentage points—than white defendants. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1034-35 (2012). When there was at least one Black juror in the jury pool, "the entire gap is eliminated." *Id.* at 1035. And these results are particularly significant when combined with the studies discussed above that show that a dissenter's propensity to conform to majority pressures significantly decreases in the presence of at least one attitudinal ally. *See* Smith & Saks, *supra*, at 457.

Another study focused on the representation of Hispanic jurors found that 66% of six-person juries had no Hispanic jurors compared to only 40% of twelve-person juries. Diamond et al., *supra*, at 444. Similarly, only 9% of six-person juries included at least two Hispanic jurors compared to 25% of twelve-person juries. *Id.* The researchers emphasized that such underrepresentation "would emerge for *any* minority," not just racial or ethnic ones. *Id.* at 445.

C. *Reliability of Verdicts*

Williams claimed that "[w]hat few experiments have occurred . . . indicate that there is no discernible difference between the results reached by the two different-sized juries." 399 U.S. at 78. But once again, that proposition was completely wrong.

As an initial matter, "not one of [the] 'experiments'" *Williams* cited "provide any evidence on the

question at hand." Smith & Saks, *supra*, at 455-56 (one source reported judges, clerks, and attorneys' perceptions as to jury reliability, while another simply stated that a test on this question was planned for the future).

And *Williams*'s claim was not only unsupported, it was also demonstrably wrong at the time and has only been further contradicted by studies conducted in the years since. Researchers assess the reliability of jury deliberations by analyzing the relationship between jury size and variance from an average verdict. This methodology is premised on the notion that "the jury is a substitute for the full community," meaning that "the most correct verdict that could be obtained would be one rendered by the full community." Saks & Marti, *supra*, at 461. Thus, juries that more consistently reach verdicts close to that which the full community would reach are considered more reliable.

Basic statistical principles explain that smaller groups are more likely to reach outlier verdicts and less likely to converge around the average outcome the community would have reached. Zeisel, *supra*, at 717. Empirical studies show the same thing. In a 2002 study, researchers found that twelve-person juries' damage awards varied less than six-person juries' awards. *See* Horowitz & Bordens, *supra*, at 126. And another study involving mock criminal juries indicated that larger juries may be more sensitive to factual ambiguities than smaller ones. *See* Angelo Valenti & Leslie Downing, *Six Versus Twelve Member Juries: An Experimental Test of the Supreme Court Assumption of Functional Equivalence*, 1 Personality & Soc. Psych Bull. 273, 274 (1974).

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In sum, the central premises underlying the *Williams* decision have all been undermined by more recent legal and factual developments. This Court should grant review to protect the "sacred bulwark" of the jury and restore coherence to its Sixth Amendment jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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