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 OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PROFESSOR WANLING SU IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court should reconsider, and overrule, *Williams* v. *Florida*, 399 U.S. 78 (1970).

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Wanling Su is an Assistant Professor at Indiana University Bloomington whose scholarship examines the historical foundations of the constitutional jury right. Professor Su has conducted extensive archival research into how the Founding generation understood jury composition, drawing on ratifying convention records, contemporaneous treatises, Founding-era legal dictionaries, early state and federal precedents, as well as surviving records from the private libraries of the Sixth Amendment's drafters.

This research has revealed considerable historical evidence that was unavailable to the Court when it decided *Williams* v. *Florida*, 399 U.S. 78 (1970). The Court in *Williams* stated it could not "discover in the history and language of the Constitution" sufficient evidence that the Framers intended to preserve the right to twelve jurors, characterizing the twelve-juror tradition as a likely "historical accident." *Id.* at 89, 103. The Court lamented that "the intent of the Framers" was "an elusive quarry" and that "the very scanty history" provided "little light either way." *Id.* at 92–93, 98.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or her counsel made a monetary contribution to this brief's preparation or submission. All parties have received timely notice of the filing of this brief.

With the benefit of the ensuing half century, the historical record has become far less scanty than the Court believed. In fact, there is substantial evidence of the Founding generation's understanding of jury composition, which the digitization of early American collections at university libraries and state archives over the past five decades has made visible. Professor Su therefore now seeks to share with the Court this historical evidence that has emerged since *Williams*, which demonstrates that the twelve-juror requirement rests on firmer historical ground than *Williams* recognized. Because the Court's decision in *Williams* expressly turned on the perceived absence of historical evidence supporting the twelve-juror requirement, this subsequently discovered evidence is directly relevant to the question now before the Court.

SUMMARY OF ARGUMENT

In *Williams* v. *Florida*, this Court concluded that the historical record was too "scanty" to demonstrate that the Framers intended the right to a jury to necessitate the impaneling of twelve jurors. 399 U.S. at 92–93. The Court could not, at the time, find "a single instance where concern was expressed for preservation of the traditional number 12." *Colgrove* v. *Battin*, 413 U.S. 149, 156 n.10 (1973). It presumed that the dearth of historical evidence could be attributed to the Founders' indifference toward the number of jurors seated for trial. In the Court's words, "the most likely conclusion to be drawn is simply that little thought was actually given to the specific question we face today." *Williams*, 399 U.S. at 98–99.

New evidence has emerged from a variety of sources: what early American law deliberately excluded from constitutional protection—trials of enslaved persons—how contemporary legal authorities understood the

right to a "jury," and how early American courts interpreted broadly-worded constitutional jury guarantees. Each source points to the same conclusion: fewer than twelve jurors meant no jury at all.

This brief responds to *Williams*'s reliance on historical evidence—and its explicit conclusion that such evidence was insufficient. Where a precedent rests on a factual premise about the historical record that later proves faulty, scholarly integrity requires bringing the complete evidence to the Court's attention.

ARGUMENT

I. Practices from before and during the Founding era confirm that twelve jurors defined the constitutional minimum.

The Court has long looked to early American practice in expounding the Constitution—including its jury provisions. See*, e.g.*, *Alleyne* v. *United States*, 570 U.S. 99, 111 (2013); *S. Union Co.* v. *United States*, 567 U.S. 343, 353 (2012). Compare *United States* v. *Haymond*, 588 U.S. 634, 653 (2019) (Gorsuch, J.) (considering "practice in the early Republic"), with *id.* at 676 (Alito, J., dissenting) ("[T]he Court has time and again endeavored to draw its understanding of the jury trial right from historical practices that existed at the founding and soon afterward."). On the right size of juries, early American practice left no doubt: twelve jurors marked the constitutional floor. The practices of the Province of Carolina and its successor governments—particularly their contrasting treatments of enslaved persons versus free white persons—drive home this point.

A. The Carolinas' constitutions

The evolution of the constitutional practices of the Province of Carolina and of South Carolina, one of its successors, from the seventeenth to the eighteenth century show that twelve jurors was implicit in the very idea of what a jury is.

The Fundamental Constitutions of Carolina—in which none other than John Locke had a hand—were adopted in 1669 and expressly codified the right to a jury of a particular size. Article Sixty-Nine provided, in no uncertain terms, that "[e]very jury shall consist to twelve men." Fundamental Consts. of Carolina, art. 69 (1669), *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 108, 118 (Leon Friedman & Karyn Gullen Brown eds., 1971).

The requirement of twelve jurors became so ingrained that it persisted despite the language of constitutional provisions on juries evolving. South Carolina's constitution changed after independence to drop the explicit reference to "twelve" in favor of more general constitutional language mirroring that of the Sixth and Seventh Amendments. But the insistence on twelve jurors remained unwavering. See Wanling Su & Rahul Goravara, *What Is a Jury?*, 103 N.C. L. Rev. 969, 984 (2025). Indeed, in 1794—three years after the Sixth Amendment was ratified—a South Carolina court treated language in the state constitution providing that "[t]he trial by jury . . . shall be for ever inviolably preserved" to mean that "the rights of the citizens are to be determined . . . by 12 men." *Zylstra* v. *Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 384, 389 (Ct. Com. Pl. 1794).

This contemporaneous interpretation thus demonstrates an important Founding-era understanding of constitutional jury guarantees: the

phrase "trial by jury" incorporated the twelve-juror requirement even when an explicit number of jurors is not stated.

B. The contrasting treatment of enslaved persons

Because early American legal systems denied enslaved persons constitutional protections, their treatment before the law in contrast to free white persons sheds light on what precisely those protections entailed. See Su & Goravara, *supra*, at 984. That treatment reveals a jury of fewer than twelve was, in fact, not considered a true "jury" at all.

1. Reflecting a system that refused to recognize their equal humanity, the jurisprudence of early America often cast enslaved persons as outside the ambit of the constitutional order. As one court of the era stated, enslaved people "have no rights, other than those which their masters or owners may give them. They are the property of their masters or owners, and are considered in this State, in law, as goods and chattels, and not as persons entitled to the benefits of freemen." *Kinloch* v. *Harvey*, 16 S.C.L. (Harp.) 508, 514 (S.C. Ct. App. L. & Eq. 1830). Or as another court stated, "[a]ll the Acts operating upon slaves directly, and to punish them, do not fall within the inhibition of the Constitution." *State ex rel. Kohne* v. *Simons*, 29 S.C.L. (2 Speers) 761, 768 (S.C. Ct. Err. 1844).

In that vein, North and South Carolina maintained an institution known as the Courts of Magistrates and Freeholders—often known colloquially as "slave courts." Su & Goravara, *supra*, at 984. Although they "functioned for over 150 years, few of their records seem to have survived." Terry W. Lipscomb & Theresa Jacobs, *The Magistrates and Freeholders Court*, 77 S.C. Hist. Mag. 62, 62 (1976). But the records that

have endured provide insight into the procedures that the Founding generation believed ran afoul of the constitutional minimum. See *id.* at 62–63.

Those records reveal that the idea of twelve jurors was intrinsic to the idea of a jury itself. The Courts of Magistrates and Freeholders impaneled at least three, and as many as five, jurors to try enslaved persons and free persons of color. See Su & Goravara, *supra*, at 987. But these "jurors" were not called as much. Rather, they were referred to as "freeholders" in historical records. Contemporaneous references to the institution did not use the term "jury" and certainly did not refer to individual members as "jurors." Indeed, proceedings before the Courts of Magistrates and Freeholders were uniformly described as non-jury trials by higher courts, as the number of freeholders impaneled fell below the minimum required for a constitutional jury. See *id.*

2. Especially instructive is the South Carolina Court of Errors' decision in *Kohne*, which held unconstitutional a statute concerning these courts' jurisdiction precisely because of the size of the "jury." The statute at issue authorized South Carolina to treat as forfeited by an enslaver any enslaved person who returned to the State after having ventured north of the Potomac River. See 29 S.C.L. at 765. In *Kohne*, the enslaver of an enslaved woman named Emma contested a forfeiture verdict rendered by the Court of Magistrates and Freeholders. See *id.* at 762, 768. The enslaver argued that, although the law afforded Emma no right to trial by jury—and thus permitted her criminal trial before five "jurors"—his asserted "property rights" could not be forfeited without a verdict returned by a jury of twelve. See *id.* at 768. The South Carolina Court of Errors agreed. In declaring the statute unconstitutional, a unanimous court held

that a trial before five jurors is "not a trial by jury, in any sense in which the words have ever been legally used; neither could a judgment pronounced by them be regarded as the judgment of her peers." *Id.*

The *Kohne* decision was unequivocal. The words "trial by jury" in the South Carolina Constitution meant "trial by twelve good and lawful men of the vicinage, in the presence of the accused, and by the oath of a witness." *Id.* The "[r]eport of the presiding judge" accompanying the court's opinion further stated that "it is impossible that the rights of property can be defeated by any proceeding so utterly inconsistent with a due course of law." *Id.* at 762, 764.

C. North Carolina's 1793 reform

North Carolina's early practice largely mirrored that of its neighbor to the south. In 1715, shortly after Carolina's partition, North Carolina vested its Courts of Magistrates and Freeholders with jurisdiction over offenses committed by enslaved persons. See Act Concerning Servants and Slaves, ch. 46, § 11, 1715 N.C. Sess. Laws 21, 21 (repealed 1741), *reprinted in Acts of the North Carolina General Assembly, 1715–1716*, 23 Colonial & St. Recs. N.C. 62, 64, https://tinyurl.com/mr2mc77h. Those courts impaneled a minimum of three "jurors"—again, that term was not used—and later four, when the legislature amended the statute in 1741. See *id.*; Act Concerning Servants and Slaves, ch. 24, § 48, *reprinted in Acts of the North Carolina General Assembly, 1741*, 23 Colonial & St. Recs. N.C. 191, 202, https://tinyurl.com/7y29yppw.

But the two Carolinas' paths diverged in 1793—two years after ratification of the Sixth Amendment. Although North Carolina courts continued to hold that enslaved persons possessed no constitutional rights,

the legislature took the extraordinary steps of transferring jurisdiction over offenses committed by enslaved persons to county courts and extending by statute what the state constitution had reserved for free white persons: the right to trial by twelve jurors. See Act to Extend the Right of Trial by Jury to Slaves, ch. 5, § 1, 1793 N.C. Sess. Laws 38, 38 (repealed). For the first time, the state used the term "jury" to describe the body sitting in judgment of enslaved persons and free persons of color. See *id.*

This legislative change was not a historical accident but a conscious act reflecting the moral and constitutional understandings of the time. In extending to enslaved persons the opportunity to be tried by twelve, the North Carolina legislature acknowledged—however imperfectly given the law's continued denial of equality to enslaved persons—that a panel with fewer risked compromising the impartiality of the verdict and, with it, the community's confidence in the result. See Su & Goravara, *supra*, at 989–90. The Supreme Court of North Carolina later remarked that "every time the Legislature have [sic] touched this subject since the revolution, it has been for the purpose of improving the condition of slaves, more especially in admitting them to the benefit of an impartial trial." *State* v. *Ben*, 8 N.C. (1 Hawks) 434, 436 (1821).

II. Founding-era legal authorities understood the right to a "jury" to require twelve jurors.

A. Dictionaries and treatises

Dictionaries and treatises provide another avenue of historical inquiry into the contemporaneous usage of the term "jury," as they capture the prevailing attitude "with less idiosyncratic risk" than that of a single remark or opinion. Wanling Su, *What Is Just*

Compensation?, 105 Va. L. Rev. 1483, 1492 (2019). Legal dictionaries and treatises of the era—the authoritative sources to which lawyers, judges, and educated citizens turned—unanimously defined "jury" as requiring twelve members, and no fewer.

1. Giles Jacob's *A New Law Dictionary* enjoyed unparalleled popularity in American law libraries, appearing in the private collections of John Adams and Thomas Jefferson, among many others. That dictionary defined "Twelve Men" as persons "by whom and whose oath as to matter of fact all trials pass," and it added: "They are otherwise called the *jury*." Giles Jacob, *A New Law Dictionary* 947 (London, W. Strahan & W. Woodfall 10th ed. 1782). The entry for "Jury" also specified that "the certain number" is twelve and "all the twelve must agree." *Id.* at 537. Jacob's definition of "verdict" emphasized that "every one of the *twelve* jurors must agree, or it cannot be a *verdict*," and that "*tales*" jurors "supply the places of such of the jurors as were wanting of the number of *twelve*." *Id.* at 952, 909.

2. Contemporary publications on English law confirm this understanding of "jury." William Blackstone's *Commentaries*—"the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 527 U.S. 706, 715 (1999)—stated that 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 William Blackstone, *Commentaries* 379 (emphasis added). Matthew Hale's *History of the Pleas of the Crown* addressed precisely the eleven-juror scenario: What if "one [juror] goes out of town, whereby only eleven remain"? 2 Matthew Hale, *Historia Placitorum Coronae* 295 (London, E. Nutt, R. Nutt & R. Gosling 1736). His answer: "no verdict can be taken of the

eleven, and if it be, it is error." *Id.* at 296. The remaining eleven must "be discharged, and a new jury sworn." *Id.* at 295–96. And Lord Coke explained that "there must . . . be 12 Jurors for the tryall of all matters of fact." 1 Edward Coke, *The Institutes of the Lawes of England* 155 (London 3d ed. 1633).

3. Post-ratification American treatises also confirm this understanding. Joseph Bingham's 1797 treatise stated: "on a trial by a petit jury no more nor less than *twelve* can be allowed." Joseph Bingham, *A New Practical Digest of the Law of Evidence* 63 (London, Holborn-Hill 1796) (emphasis added). William Barton's 1803 work declared that trials require "a jury of *twelve* men, as now established by the constitution." William Barton, *Observations on the Trial by Jury* 10 (Strasburg, Pa., Brown & Bowman 1803) (emphasis added). And Justice Story wrote that "trial by jury" means "*ex vi termini* [by definition], a trial by a jury of *twelve* men." 2 Joseph Story, *Commentaries on the Constitution of the United States* 541 n.2 (Boston, Little, Brown & Co. 4th ed. 1873).

Thus, Founding-era dictionaries and treatises show that when the Framers guaranteed "trial by an impartial jury" in 1789 and state legislatures ratified it in 1791, they used a term with an established meaning that required twelve jurors.

B. Understanding at the ratification debates

The public understanding at ratification of the Constitution mirrored the legal authorities. At Virginia's ratifying convention, Governor Edmund Randolph—also a delegate at the Philadelphia Convention—defended Article III by noting "[t]here is no suspicion that less than *twelve* jurors will be thought sufficient." 3 *The Debates in the Several State*

Conventions 467 (N.Y., Jonathan Elliot, 2d ed. 1888) [hereinafter *Debates*] (emphasis added). Randolph's phrasing suggests that the assumption was so obvious it did not require argument. No one would even suspect otherwise. Even Patrick Henry, no friend of the proposed Constitution, did not question this understanding. Henry "found danger to liberty in almost every clause" of the Constitution. John A. Murley & Sean D. Sutton, *The Supreme Court Against the Criminal Jury: Social Science and the Palladium of Liberty* 32 (2014). Yet he proclaimed without hesitation that "[t]he unanimous verdict of *twelve* impartial men cannot be reversed." 3 *Debates*, *supra*, at 544 (emphasis added). Henry's matter-of-fact reference to twelve jurors was reflected what everyone in the room understood: juries numbered twelve.

Thomas McKean, the Pennsylvania Supreme Court's Chief Justice, made a similarly casual reference at the State's convention. While defending the Constitution's provision for Supreme Court appellate jurisdiction, he observed, "Juries are not infallible because they are *twelve* in number." 2 *id.* at 540 (emphasis added). His point was that even jury verdicts could be reviewed in some circumstances because juries sometimes erred, but the fact that he referred to juries as "twelve in number" without explanation reveals the shared assumption about what "jury" meant.

North Carolina's convention featured remarks by state judge Samuel Spencer, who declared that "cases which affect . . . lives and property, are to be decided in a great measure, by the consent of *twelve* honest, disinterested men." 4 *id.* at 154 (emphasis added). Spencer was praising the jury system as a protection for individual rights. His description of juries as

"twelve honest, disinterested men" assumed the audience understood this as the definition of a jury.

These references are as revealing, if not more, than elaborate debates. No delegate felt the need to explain or justify the number. No one questioned whether "jury" might mean something other than twelve. That shared understanding was so complete that speakers could simply invoke "twelve" as a synonym for "jury" without fear of confusion.

III. Early American courts interpreted constitutional guarantees to a jury as mandating twelve members.

A. The New Jersey Supreme Court's decision in *Holmes* v. *Walton*

Years before the ratification of the Constitution and the Sixth Amendment, in the midst of the Revolutionary War, the New Jersey Supreme Court struck down a statute authorizing trials of alleged traitors by six-person juries in *Holmes* v. *Walton* (1780). The case sheds further light on how the Framers thought of the constitutional right to a jury—especially since historical evidence shows principal figures at the Philadelphia Convention and the First Congress had *Holmes* on their minds.

1. The threat that New Jersey faced during much of the Revolution was severe: the State straddled the border separating the American and British armies, and smuggling across state lines undermined American morale while giving the British tactical advantages. See Philip Hamburger, *Is Administrative Law Unlawful?* 152 (2014). In an attempt to address the British threat, New Jersey enacted the Enemy Seizure Act of 1778 to target loyalists who smuggled provisions to British troops and authorize forfeiture of the goods and property. See Act of Oct. 8, 1778, §§ 3, 6,

reprinted in Acts of the Council and General Assembly of the State of New Jersey app. at 9–11 (Trenton, N.J., Peter Wilson ed., 1784).

Critical here, the Enemy Seizure Act permitted these forfeitures to be decided by juries of only six persons. See *id.* § 6 (incorporating by reference the provisions of the statute enacted February 11, 1775); Act of Feb. 11, 1775, ch. 623, § 4, *reprinted in Acts of the General Assembly of the Province of New Jersey* 468, 470–72 (Burlington, N.J., Samuel Allinson 1776) (providing for six-member juries). No appeals could be taken from the verdict, see Act of Feb. 11, 1775, § 9, and American militiamen who seized goods en route to the enemy could keep the proceeds from their sale, see Act of Oct. 8, 1778, § 7. The New Jersey legislature enacted the Enemy Seizure Act without a single nay vote. See Austin Scott, *Holmes* v. *Walton: The New Jersey Precedent*, 4 Am. Hist. Rev. 456, 461 (1899).

The *Holmes* case arose when loyalists John Holmes and his colleagues were convicted of smuggling under the 1778 Act and had their property seized. They petitioned the New Jersey Supreme Court for certiorari, listing "the unconstitutionality of the trial with six jurors" as a ground for reversal. Philip Hamburger, *Law and Judicial Duty* 414 (2008).

The New Jersey Supreme Court agreed that the law didn't pass constitutional muster—and did so based on a provision describing a right to a jury in only general terms. The New Jersey Constitution of 1776 provided: "[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal, forever." N.J. Const. of 1776, art. XXII. Nowhere did the text specify a required number of jurors. Yet archival sources confirm (the written decision has not survived) that, in a decision announced by Chief Justice David Brearley, the court

reversed "on the ground that the legislature's authorization of six person juries violated the state's constitutional guarantee of 'the inestimable right of trial by jury.'" Hamburger, *Is Administrative Law Unlawful?*, *supra*, at 152.

The stakes in *Holmes* v. *Walton* cannot be overstated. It was wartime. New Jersey was situated between the belligerents' armies. Smuggling posed a significant threat to the Revolutionary cause. The New Jersey legislature had acted unanimously to address it. Yet the court held that constitutional principles could not be compromised, even in wartime emergency. The message was clear: the right to a "jury" meant twelve jurors.

2. Apart from *Holmes*'s significance of equating a right to a jury with a right to twelve jurors in its own right, the decision also exerted a profound and demonstrable influence on the Framers.

Delegates to the Philadelphia Convention almost certainly had *Holmes* on their minds when they convened in the summer of 1787. See Su & Goravara, *supra*, at 1008. Archival evidence indicates the case was discussed in Philadelphia newspapers and Convention-era pamphlets. See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 936 n.184, 939 (2003). Gouverneur Morris, one of Pennsylvania's delegates, mentioned the case in an address to the Commonwealth's legislature two years before the Convention. See Scott, *supra*, at 464. And, of course, one of the few rights codified in the document that the Convention ultimately yielded was that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III, § 2, cl. 3.

What's more, three of the leading participants in *Holmes* went on to play key roles at the Philadelphia Convention and First Congress. First, Chief Justice Brearley—who, again, delivered the oral opinion on behalf of the New Jersey Supreme Court—served as a representative to the Philadelphia Convention. See Charles Warren, *Congress, the Constitution, and the Supreme Court* 44–45 (1925). Second, New Jersey Attorney General William Paterson was a U.S. Senator who served on the conference committee that reconciled the Sixth Amendment's language between the House and Senate. See Richard Labunski, *James Madison and the Struggle for the Bill of Rights* 239 (2006). He later became a U.S. Supreme Court justice. See, *e.g.*, *Ware ex rel. Jones* v. *Hylton*, 3 U.S. (3 Dall.) 199, 245–56 (1796) (Paterson, J.) (first Supreme Court decision to hold a state law unconstitutional). Third, Holmes's defense attorney Elias Boudinot served as a representative in the First Congress, where he participated in a House committee addressing the proposal of what ultimately became the Bill of Rights. 1 Annals of Cong. 690–91 (1789) (Joseph Gales ed., 1834). After their involvement in *Holmes*, a case that garnered national attention, it's doubtful that these three men would have agreed—without debate—to drafting of the jury trial right in a manner contrary to the definition decided by the highest court of their home state, or in the case of Chief Justice Brearley, the definition that he himself announced in *Holmes*.

B. Other Founding-era decisions

The Court in *Williams* concluded there was "absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." 399 U.S. at 99. The Court repeated this presumption three years later: "constitutional history reveals no intention on

the part of the Framers 'to equate the constitutional and common-law characteristics of the jury.'" *Colgrove*, 413 U.S. at 156 (quoting 399 U.S. at 99). On this foundation—the supposed distinction between constitutional juries and common law juries—*Williams* built its holding that the Sixth Amendment permits fewer than twelve jurors.

That foundation crumbles under historical scrutiny. When the constitutional text used the term "jury"—a term with a precise common law meaning—eighteenth-century canons of construction required reading it according to that meaning. And early American courts uniformly applied these canons to imbue general constitutional provisions codifying a right to a "jury" with the term's common law meaning.

1. Chief among contemporary interpretive principles was that when a legal text uses a term with a settled common law meaning, that term carries its established definition. This principle appeared, for instance, in Matthew Bacon's *A New Abridgment of the Law*, where he stated: "If a Statute make use of a Word the Meaning of which is well known at the Common Law, such Word shall be taken in the same Sense it was understood at the Common Law." 4 Matthew Bacon, *A New Abridgment of the Law* 647 (London, His Majesty's L. Printers 3d ed. 1768).

This principle of interpretation was common fare in early America. Justice Story and Chief Justice Marshall, for example, applied this principle to constitutional interpretation. Justice Story emphasized that when the Constitution uses common law terms, their "definitions are necessarily included, as much as if they stood in the text." *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820). Thus, the constitutional text need not explicitly define "jury" because the contours of the term were already well

defined within the common law. Chief Justice Marshall agreed. If a word had a known meaning "when the [C]onstitution was framed[,] . . . [t]he [constitutional] convention must have used the word in that sense." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824). The presumption was strong: established legal meanings governed constitutional interpretation.

The word "jury" had a well-known meaning at common law by 1791. Legal dictionaries, treatises, and judicial guidebooks defined it as requiring twelve members. The Founders would have expected that meaning to carry into the Sixth Amendment's text.

2. Early state courts applying these interpretive principles confirmed this understanding. When state courts faced the question of whether their state constitutional jury guarantees—each worded similarly or identically to the Sixth Amendment—incorporated the common law twelve-juror requirement, they answered uniformly in the affirmative. These decisions provide valuable evidence of how the Founding generation understood constitutional jury language.

The Mississippi Supreme Court clearly articulated this principle, vowing to "recur to the provisions of the common law" to understand what the constitutional framers intended. *Carpenter* v. *State*, 5 Miss. 163, 166 (High Ct. Err. & App. 1839). Because "[a]t common law the number of the jury . . . could never be less than twelve," the constitutional provision incorporated that requirement. *Id.* The court stated the general rule: "where terms used in the common law are contained in a statute or the constitution, without an explanation of the sense in which they are there employed, should receive that construction which has been affixed to them by the former." *Id.* at 166–67.

The Ohio Supreme Court employed the same approach. Examining its constitution's declaration that "the *right* of jury trial is recognized to exist," the court asked: "What, then, is this right? It is nowhere defined or described in the constitution." *Work* v. *State*, 2 Ohio St. 296, 302 (1853). Looking to history, the court concluded that, "beyond controversy the number of the jury at common law . . . must be twelve." *Id.* at 304. The court accordingly reversed a verdict rendered by fewer than twelve jurors.

State after state reached the same result. Arkansas declared that "when the convention incorporated the provision into the constitution . . . , they most unquestionably had reference to the jury trial as known and recognized by the common law." *Larillian* v. *Lane & Co.*, 8 Ark. 372, 374 (1848). Because "the common law jury consisted of twelve men," the constitutional provision required the same. *Id.* at 375. So too in Pennsylvania. When its 1776 constitution provided "the parties have a right to trial by jury, which ought to be held sacred," its high court reasons that this required "that all trials shall be by twelve men." *Emerick* v. *Harris*, 1 Binn. 416, 426 (Pa. 1808). Courts in South Carolina and Alabama likewise recognized that "every lawyer knows" or that it is "well understood" that juries consist of twelve members. *State* v. *Burket*, 9 S.C.L. 155, 155 (S.C. Const. Ct. App. 1818). And, Wisconsin's Supreme Court echoed this agreement: "the meaning of the language used in our Constitution must be gleaned from the common law," which required twelve jurors. *Labowe* v. *Balthazor*, 193 N.W. 244, 245 (Wis. 1923).

Missouri's Supreme Court explicitly acknowledged this pattern when it observed that courts across the early republic were "unite[d] in declaring that where there is a constitutional guaranty of the right to trial

by jury, twelve is the number of which the jury must be composed." *Vaughn* v. *Scade*, 30 Mo. 600, 604 (1860).

Several courts further underscored the *risks* of departure from that understanding. The New York Court of Appeals cautioned 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." *Cancemi* v. *People*, 18 N.Y. 128, 138 (1858). New Hampshire's Supreme Court observed that "[a] jury for the trial of a cause was a body of twelve men," adding that "no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices, had ever been known." *Opinion of Justices*, 41 N.H. 550, 551–52 (1860).

The pattern demonstrates how the Founding generation's rules of construction operated in practice. State after state applied Bacon's canon: when a constitution uses a common law term without defining it, courts must give it the meaning it had at common law. Every court that applied this rule to constitutional jury guarantees reached the same conclusion—twelve jurors were required.

An attempt to distinguish between the common law meaning and the constitutional meaning of the word "jury" would have startled eighteenth-century Americans who understood, both pragmatically and legally, that a jury in a constitutional court required twelve people. This is even more so since the text of the Sixth Amendment itself refers to criminal trials—a core common law proceeding. When the Framers who drafted the Sixth Amendment in 1789 (and the state legislatures that ratified it in 1791) guaranteed criminal defendants "trial by an impartial jury," they used a term of art with a fixed and well-understood meaning. That meaning required exactly twelve

jurors, as confirmed by the consistent application of Founding-era interpretive principles in early state courts.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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