

No. 25-6623

IN THE
Supreme Court of the United States

HAMED KIAN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Petitioner was deprived of his right, under the Sixth and Fourteenth Amendments, to a trial by a 12-person jury.

PARTIES TO THE PROCEEDING

Petitioner Hamed Kian and Respondent Florida were the only parties to the proceeding in the court whose judgment is under review.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
OPINION BELOW.....	4
JURISDICTION.....	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT	5
A. Historical And Constitutional Background.....	5
1. Juries Have Been Composed Of 12 Members For A Millennium.....	5
B. Factual And Procedural Background	11
1. Florida And Several Other States Permit Small Juries To Try Felonies	11
2. Mr. Kian Is Convicted Of Felonies By A Six-Person Florida Jury	14
SUMMARY OF THE ARGUMENT.....	15
ARGUMENT.....	16
I. THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE DEFENDANTS CHARGED WITH SERIOUS CRIMES TO BE TRIED BEFORE 12-MEMBER JURIES.....	16

TABLE OF CONTENTS—Continued

	Page
A. <i>Ramos</i> Established That The Sixth Amendment’s Jury Trial Clause Is Defined By Its Original Public Meaning	16
B. The Original Public Meaning Of “Trial By An Impartial Jury” Requires A 12-Member Jury For Serious Crimes	18
C. The Sixth Amendment’s 12-Member Jury Requirement Applies To The States, Including Florida	23
II. TO THE EXTENT THIS COURT HAS NOT ALREADY OVERRULED <i>WILLIAMS</i> , IT SHOULD DO SO NOW	24
A. <i>Ramos</i> Effectively Overruled <i>Williams</i>	24
B. If <i>Williams</i> Remains Good Law, The Court Should Formally Overrule It	27
1. <i>Williams</i> Is Egregiously Wrong	29
a. <i>Williams</i> Conflicts With The Original Public Meaning Of The Sixth Amendment’s Jury Trial Right	29
b. <i>Williams</i> ’s Functionalist Reasoning Is Wrong On Its Own Terms	30
2. <i>Williams</i> Has Caused Significant Negative Jurisprudential And Real-World Consequences.....	34

TABLE OF CONTENTS—Continued

	Page
3. Any Reliance On <i>Williams</i> Is Outweighed By The Importance Of The Sixth Amendment Jury Trial Right	37
CONCLUSION	39

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Agostini v. Felton</i> , 521 U.S. 203 (1997)	27
<i>Alleyne v. United States</i> , 570 U.S. 99 (2013)	27, 28
<i>Apodaca v. Oregon</i> , 406 U.S. 404 (1972)	17, 26
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	23
<i>Baldwin v. New York</i> , 399 U.S. 66 (1970)	17
<i>Baldwin v. New York</i> , 399 U.S. 117 (1970)	25
<i>Ballew v. Georgia</i> , 435 U.S. 223 (1978)	3, 15, 26, 31, 33, 35, 39
<i>Brown v. Louisiana</i> , 447 U.S. 323 (1980)	35
<i>Burch v. Louisiana</i> , 441 U.S. 130 (1979)	26
<i>Calvin v. Smith</i> , 77 Eng. Rep. 377 (K.B. 1608)	6
<i>Cancemi v. People</i> , 18 N.Y. 128 (1858)	9, 20
<i>Capital Traction Company v. Hof</i> , 174 U.S. 1 (1899)	10, 22
<i>Codispoti v. Pennsylvania</i> , 418 U.S. 506 (1974)	36
<i>Cunningham v. Florida</i> , 144 S. Ct. 1287 (2024) ...	3, 4, 23
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968)	14, 38
<i>Edwards v. Vannoy</i> , 593 U.S. 255 (2021)	16, 17, 27, 38
<i>Emerick v. Harris</i> , 1 Binn. 416 (Pa. 1808)	8, 9
<i>Erlinger v. United States</i> , 602 U.S. 821 (2024)	23, 38
<i>Espinoza v. Montana Department of Revenue</i> , 591 U.S. 464 (2020)	27

TABLE OF AUTHORITIES—Continued

	Page
<i>Florida Fertilizer & Manufacturing Company</i> v. <i>Boswell</i> , 34 So. 241 (Fla. 1903)	11
<i>Foote v. Lawrence</i> , 1 Stew. 483 (Ala. 1828)	9
<i>Franchise Tax Board of California v. Hyatt</i> , 587 U.S. 230 (2019)	28
<i>Gibson v. State</i> , 16 Fla. 291 (1877).....	11
<i>Guzman v. State</i> , 350 So. 3d 72 (Fla. Dist. Ct. App. 2022)	12
<i>Herrera v. Wyoming</i> , 587 U.S. 329 (2019).....	15, 24, 26
<i>Hurst v. Florida</i> , 577 U.S. 92 (2016)	25, 27
<i>Khorrami v. Arizona</i> , 143 S. Ct. 22 (2022)	2, 4, 28, 30, 31, 36, 37
<i>Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy</i> , 512 U.S. 136 (1994).....	4
<i>Larillian v. Lane & Company</i> , 8 Ark. 372 (1848)	9
<i>Malloy v. Hogan</i> , 378 U.S. 1 (1964)	35
<i>Maxwell v. Dow</i> , 176 U.S. 581 (1900)....	10, 17, 19, 22, 24, 29
<i>Opinion of Justices</i> , 41 N.H. 550 (1860)	9, 21
<i>Opinion of Justices</i> , 431 A.2d 135 (N.H. 1981).....	32
<i>Patton v. United States</i> , 281 U.S. 276 (1930).....	11, 17, 23
<i>Phillips v. State</i> , 316 So. 3d 779 (Fla. Dist. Ct. App. 2021)	13
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2020)	1-3, 15-19, 22, 24, 26-30, 34-38

TABLE OF AUTHORITIES—Continued

	Page
<i>Rasmussen v. United States</i> , 197 U.S. 516 (1905)	22
<i>Rouse v. State</i> , 4 Ga. 136 (1848)	9
<i>South Carolina v. Baker</i> , 485 U.S. 505 (1988)	24
<i>Southern Union Company v. United States</i> , 567 U.S. 343 (2012)	23
<i>State v. Hamm</i> , 423 N.W.2d 379 (Minn. 1988)	32
<i>State v. Johnson</i> , 616 So. 2d 1 (Fla. 1993)	4
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975)	35, 36
<i>Thompson v. Utah</i> , 170 U.S. 343 (1898)	2, 6, 10, 17, 22
<i>Vaughn v. Scade</i> , 30 Mo. 600 (1860)	9, 20
<i>Western & Southern Life Insurance Company</i> <i>v. State Board of Equalization of</i> <i>California</i> , 451 U.S. 648 (1981)	24
<i>Whitehurst v. Davis</i> , 3 N.C. 113 (1800)	9
<i>Williams v. Florida</i> , 399 U.S. 78 (1970)	2, 6-7, 12, 15, 21, 23, 25-26, 30-31
<i>Work v. State</i> , 2 Ohio St. 296 (1853)	9, 20
<i>Zylstra v. Corporation of City of Charleston</i> , 1 S.C.L. (1 Bay) 382 (1794)	9
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995)	23, 27

DOCKETED CASES

<i>Parada v. United States</i> , No. 25-166 (U.S.)	13
--	----

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTIONS, STATUTES, AND RULES	
U.S. Constitution	
VI amend.	5
XIV amend.	5
Florida Constitution	
art. I, § 3 (1868)	11
art. I, § 6 (1838)	11
art. I, § 22	5, 12
Louisiana Constitution	
art. I, § 17	14
art. 116 (1898)	36
South Carolina Constitution art. III, § 1 (1865)	36
28 U.S.C. § 1257	4
Ariz. Rev. Stat. § 21-102	13
Conn. Gen. Stat. § 54-82	13
Fla. Stat.	
§ 460.411	14
§ 775.082	14
§ 913.10	5, 12, 14
Ind. Code Ann.	
§ 35-37-1-1	13
§ 35-50-2-7	13
Laws of Fla., ch. 3010 (1877)	12
Mass. Gen. Laws ch. 218	
§ 26	14
§ 26A	13, 14
1866 S.C. Sess. Laws 493	36

TABLE OF AUTHORITIES—Continued

	Page
Utah Code Ann. § 78B-1-104.....	14
Fed. R. Crim. P. 23	13

LEGISLATIVE MATERIALS

1 Annals of Cong. 435 (1789)	30
1 Annals of Cong. 755 (1789)	38

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TABLE OF AUTHORITIES—Continued

	Page
Colbert, Douglas L., <i>Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges</i> , 76 Cornell L. Rev. 1 (1990)	12
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TABLE OF AUTHORITIES—Continued

	Page
Holmes v. Walton: <i>The New Jersey Precedent</i> , 4 Amer. Hist. Rev. 456 (1886).....	7
Jacob, Giles, <i>Jury, A New Law-Dictionary</i> (1st ed. 1729)	7
Johnson, Samuel, <i>Jury, A Dictionary of the English Language</i> (4th ed. 1773)	7
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Saks, Michael & Mollie W. Marti, <i>A Meta- Analysis of the Effects of Jury Size</i> , 21 Law & Hum. Behav. 451 (1997).....	34
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TABLE OF AUTHORITIES—Continued

	Page
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Thayer, James B., <i>The Jury and Its Development</i> , 5 Harv. L. Rev. 295 (1892)	6
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Wambaugh, Eugene, <i>A Selection of Cases on Constitutional Law</i> (1915)	7
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TABLE OF AUTHORITIES—Continued

	Page
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BRIEF FOR PETITIONER

INTRODUCTION

How large must a jury be when trying a serious crime, such as a felony? For hundreds of years, the answer was the same: “[N]o person could be found guilty of a serious crime unless ‘the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors.’” *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020). “A verdict, taken from eleven, was no verdict at all.” *Id.* (quotation marks omitted).

By any historical metric, the 12-person jury requirement falls within “what the term ‘trial by an impartial jury’ meant at the time of the Sixth Amendment’s adoption.” *Ramos*, 590 U.S. at 90. Because the rule was

recognized by “the common law, state practices in the founding era, [and] opinions and treatises written soon afterward,” *id.*, “[i]t must consequently be taken that the word ‘jury’ and the words ‘trial by jury’ were placed in the constitution of the United States with reference to [that] meaning affixed to them,” *Thompson v. Utah*, 170 U.S. 343, 350 (1898).

Petitioner Hamed Kian was accordingly entitled to a 12-member jury when he was charged with five counts of practicing chiropractic medicine with a suspended license—a felony punishable under Florida law by up to five years in prison for each count. Mr. Kian, however, was tried before a panel of six, based on a state law this Court upheld in *Williams v. Florida*, 399 U.S. 78 (1970). *Williams* gave no weight to the historical record, despite acknowledging that the Framers “may well” have had “the usual expectation” in drafting the Sixth Amendment “that the jury would consist of 12” members. *Id.* at 98-99. Instead, *Williams* rested on the view that the essential “function” of a jury is decision-making made with “community participation and shared responsibility”—a function the Court believed could be as easily performed with six jurors as with 12. *Id.* at 100-102 & n.48. Today, Florida and a few other States routinely empanel juries with as few as six members to try felonies that could result in significant terms of imprisonment.

“*Williams* was wrong the day it was decided,” *Khorrami v. Arizona*, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from denial of certiorari), and its reasoning quickly eroded. Even *Ramos*’s detractors have acknowledged that *Ramos*’s history-focused approach to the Sixth Amendment rejected “the same fundamental mode of analysis” adopted in *Williams*. *Ramos*, 590 U.S. at 157 (Alito, J., dissenting). And whatever the viability of the *Williams* functionalist approach today, this Court

has long recognized that *Williams*’s understanding of the available social science was badly flawed—smaller juries actually “lead[] to inaccurate fact-finding and incorrect application of the common sense of the community to the facts.” *Ballew v. Georgia*, 435 U.S. 223, 232-237 (1978). Today, moreover, it is well-established that “[s]ix-person juries produce more volatile verdicts, engage in lower-quality deliberations, and are significantly less likely to include minority voices.” Su & Goravara, *What Is a Jury?*, 103 N.C. L. Rev. 969, 1030 (2025); accord ABA, *Principles for Juries and Jury Trials*, Principle 3 cmt., at pp.25-26 (rev. 2023).

This Court should discard the ahistorical and unfounded *Williams* rule, just as *Ramos* overturned a similar decision from the *Williams* era that permitted a defendant to be convicted by a nonunanimous jury. Even if *Williams* still has precedential force after *Ramos*, its reasoning is egregiously wrong: It “substituted bad social science for careful attention to the Constitution’s original meaning.” *Cunningham v. Florida*, 144 S. Ct. 1287, 1288 (2024) (Gorsuch, J., dissenting from denial of certiorari). The *Williams* decision has also had real-world negative consequences: It increases the odds of an erroneous conviction and decreases the representative nature of the juries in the affected States. Finally, any “reliance interest” those States might claim in having to “retry a slice of their prior criminal cases ... cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties.” *Ramos*, 590 U.S. at 110-111 (plurality op.); *id.* at 129 (Kavanaugh, J., concurring in part) (invalidating a “limited class” of convictions that violate the Sixth Amendment is a “‘small price to pay for the uprooting of this weed’”).

Ultimately, the “right to trial by jury should mean no less today, and afford no fewer protections for

individual liberty, than it did at the Nation’s founding.” *Cunningham*, 144 S. Ct. at 1288 (Gorsuch, J., dissenting from denial of certiorari). Mr. Kian respectfully submits that this Court should take this opportunity to “correct [its] mistake in *Williams*,” *id.*, and restore to “the American people a liberty their predecessors long and justly considered inviolable,” *Khorrami*, 143 S. Ct. at 27 (Gorsuch, J., dissenting from denial of certiorari). The judgment below should be reversed.

OPINION BELOW

The decision of Florida’s Fourth District Court of Appeal, which is the first court in which the Sixth Amendment issue was raised, is reported at 421 So. 3d 439 (Fla. Dist. Ct. App. 2025) (mem.), Pet.App.2.¹

JURISDICTION

Florida’s Fourth District Court of Appeal affirmed Mr. Kian’s conviction on October 16, 2025, without written opinion, meaning Mr. Kian had “no right of review in the Florida Supreme Court.” *Ibanez v. Florida Dep’t of Bus. & Prof. Reg., Bd. of Accountancy*, 512 U.S. 136, 142 (1994) (granting certiorari under similar circumstances). On January 9, 2026, Mr. Kian timely filed a petition for a writ of certiorari, which the Court granted on June 15, 2026. This Court has jurisdiction under 28 U.S.C. § 1257(a).

¹ Florida law permits claims involving “fundamental” constitutional error to be raised for the first time on appeal, *see State v. Johnson*, 616 So. 2d 1, 3-4 (Fla. 1993), and Florida did not contest that Mr. Kian properly preserved his constitutional challenge in its brief in opposition to the petition for certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]”

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]”

Article I, § 22 of the Florida Constitution provides: “The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.”

Florida Statutes, § 913.10 provides: “Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.”

STATEMENT

A. Historical And Constitutional Background

1. Juries Have Been Composed Of 12 Members For A Millennium

The precise origins of the 12-person jury right are so ancient that they have been “lost in the night of time.” Forsyth, *History of Trial by Jury* 2 (James Appleton Morgan 2d ed. 1878). Greek mythology speaks of Ares’s trial before 12 gods, Miller, Comment, *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, 633 (1998), and at least as early as the 10th

century, English law “provided that twelve thanes—or knights—and a representative of the king would swear upon a relic that they would ‘accuse no innocent man, nor conceal any guilty one,’” Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1, 6 (1993). The reign of King Henry II later “established twelve as the usual number” for a jury, Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 295, 295 (1892), and this Court observed that the Magna Carta’s declaration in 1215 “that no freeman should be deprived of life, etc., ‘but by the judgment of his peers or by the law of the land,’” can be understood to “refer[] to a trial by twelve jurors.” *Thompson*, 170 U.S. at 349.

“[S]ometime in the 14th century the size of the jury at common law came to be fixed generally at 12[.]” *Williams v. Florida*, 399 U.S. 78, 89 (1970). Calvin’s Case, for example, describes a jury of “twelve free and lawful men.” *Calvin v. Smith*, 77 Eng. Rep. 377, 378 (K.B. 1608). Lord Coke wrote in 1628 that the “number of 12 is much respected[.]” *The First Part of the Institutes of the Laws of England* § 234 (1628). In 1713, Sir Matthew Hale explained that a jury should have “[t]welve, and no less,” *The History of the Common Law of England* 256 (1713), as did Matthew Bacon—who wrote a few decades later that a jury “can be neither more nor less” than twelve, 3 *A New Abridgment of the Law* 234 (1740). Drawing on this long history of consensus, Blackstone wrote in 1769 that no person could be found guilty of a serious crime unless “the truth of every accusation [was] confirmed by the unanimous suffrage of twelve of his equals and neighbors.” 4 Blackstone, *Commentaries on the Laws of England* 343 (1769).

Twelve-member juries were fixtures in at least most of the American colonies at the time of the founding. As

in England, “trial by jury in criminal cases meant a twelve-person jury which delivered a unanimous verdict.” Bates, *Trial by Jury After Williams v. Florida*, 10 Hamline L. Rev. 53, 65 (1987). This tradition traced to the earliest settlers—“[t]he instructions for the governing of Virginia which were delivered in 1608 expressly provide for ‘trial by 12 honest and indifferent persons,’” and “[t]he New Plymouth Act of 1647 which established the judicial procedure for that settlement provided for trial by a jury of twelve persons.” *Id.*² By the time the Constitution was drafted, numerous States—including Virginia, Massachusetts, New Hampshire, New York, and Pennsylvania—had laws or constitutional provisions expressly referencing 12-member juries. Bates, 10 Hamline L. Rev. at 65-66. The 12-member requirement was so ingrained in the public consciousness that it appeared in several dictionaries. *See* Jacob, *Jury, A New Law-Dictionary* (1st ed. 1729) (noting that “the Petit Jury consisteth of twelve Men”); *see also* 1 Johnson, *Jury, A Dictionary of the English Language* (4th ed. 1773) (defining the grand and petit juries as “a company of men, as twenty-four or twelve, sworn to deliver a truth upon such evidence as shall be delivered them touching the matter in question”).³

² Indeed, the first American statute ever declared unconstitutional was a New Jersey law permitting trials by six jurors, which the New Jersey Supreme Court held in 1780 violated a colonial constitutional provision stating that “the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal forever.” Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 673 & n.17 (1918) (quoting Holmes v. Walton: *The New Jersey Precedent*, 4 Amer. Hist. Rev. 456 (1886); Wambaugh, *A Selection of Cases on Constitutional Law* 21 (1915)).

³ Florida suggests that Pennsylvania “employed juries of six or seven.” Brief in Opp. 8 (“Opp.”) (quoting *Williams*, 399 U.S. at

It is accordingly unsurprising that “most of the delegates to the Constitutional Convention in 1787” believed that “trial by jury in criminal cases meant trial by a body of twelve persons all of whom agreed to the verdict.” Bates, 10 Hamline L. Rev. at 66. For example, James Wilson—a framer of the Constitution and later justice of this Court—explained in 1790, shortly before the ratification of the Sixth Amendment, that “the unanimous sentiment of the twelve jurors is of indispensable necessity” to “the conviction of a crime.” 2 Wilson, *The Works of the Honourable James Wilson* 350 (Bird Wilson ed., Philadelphia, Bronson & Chauncey 1804). And during the ratification debates themselves, speakers from across the thirteen States repeatedly referred to juries as being comprised of twelve members. *See, e.g.*, 3 *The Debates in the Several State Conventions* 467 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1891) (Governor Edmund Randolph, at the Virginia convention, noted that “[t]here is no suspicion that less than twelve jurors will be thought sufficient”); 2 *The Debates in the Several State Conventions* 540 (Thomas McKean, at the Pennsylvania convention, observed that “[j]uries are not infallible because they are twelve in number”); 4 *The Debates in the Several State Conventions* 154 (Samuel Spencer, at the North Carolina convention, declared that “cases which affect ... lives and property, are to be

98 n.45 and citing Reinsch, *The English Common Law in the Early American Colonies*, in 1 *Select Essays in Anglo-American Legal History* 367, 398 (1907)). But Reinsch was describing “informal” procedures employed by Pennsylvania in 1673. Reinsch, *supra*, at 398. The “first settlers of the province” were soon granted the right to “trials by twelve men, and, as near as may be, peers, or equals[.]” *Emerick v. Harris*, 1 Binn. 416, 426 (Pa. 1808) (Brackenridge, J., op.); *see also* Su & Goravara, 103 N.C. L. Rev. at 1001-1002 & nn.213-214 (discussing *Emerick*).

decided, in a great measure, by the consent of twelve honest disinterested men”).

In the decades after the Sixth Amendment was ratified, state courts uniformly held that the term “trial by jury” in their own constitutions required 12 jurors. *E.g.*, Miller, 146 U. Pa. L. Rev. at 643 & n.133 (collecting cases). In 1794, for example, a South Carolina court interpreted its state constitution to require the “rights of the citizens ... to be determined ... by 12 men ... indiscriminately drawn from every class of their fellow citizens.” *Zylstra v. Corporation of City of Charleston*, 1 S.C.L. (1 Bay) 382, 389 (1794). Six years later, a North Carolina court explained that the same phrase in the North Carolina constitution referred to the “ancient mode” of a trial, in which a jury must contain 12 members. *Whitehurst v. Davis*, 3 N.C. 113, 113 (1800) (per curiam). In the following years, the supreme courts of Pennsylvania, Arkansas, and Georgia interpreted similar language in their constitutions to require 12-person juries. *See Emerick v. Harris*, 1 Binn. 416, 426 (Pa. 1808) (Pennsylvania) (Brackenridge, J., op.); *Larillian v. Lane & Co.*, 8 Ark. 372, 374-375 (1848) (Arkansas); *Rouse v. State*, 4 Ga. 136, 147 (1848) (Georgia). State high court decisions affirming the need for 12 jurors continued throughout the remainder of the 19th century. *See, e.g.*, *Foot v. Lawrence*, 1 Stew. 483, 483 (Ala. 1828) (Alabama); *Work v. State*, 2 Ohio St. 296, 304-305 (1853) (Ohio); *Cancemi v. People*, 18 N.Y. 128, 138 (1858) (New York); *Vaughn v. Scade*, 30 Mo. 600, 603-604 (1860) (Missouri); *Opinion of Justices*, 41 N.H. 550, 551 (1860) (New Hampshire).

Scholars in the 18th and 19th centuries held the same understanding of the Sixth Amendment right as the state courts. An 18th-century treatise on jury trials confirmed that a jury must “number twelve.”

1 Duncombe, *Trials per Pais: Or, The Law of England Concerning Juries by Nisi Prius, &c* 92 (8th ed. 1766). Justice Joseph Story’s *Commentaries on the Constitution* explained that “trial by jury is generally understood to mean ... a trial by a jury of *twelve* men, impartially selected.” 2 Story & Cooley, *Commentaries on the Constitution of the United States* § 1779, at p.541 n.2 (4th ed. 1873). Other treatises from that era agreed, noting that (1) “in a case in which the Constitution guarantees a jury trial,” a statute allowing “a verdict upon any thing short of the unanimous consent of the twelve jurors” is “void,” 1 Bishop, *Commentaries on the Law of Criminal Procedure* § 897, at p.546 (2d ed. 1872), and (2) “a trial by jury is understood to mean—generally—a trial by a jury of twelve men,” Tiffany, *A Treatise on Government and Constitutional Law* § 549, at p.367 (1867).

This Court, too, has repeatedly recognized that the Sixth Amendment was understood at the time of the founding to require a 12-member jury. In 1898, the Court reversed a conviction by an eight-person jury in the then-territory of Utah, explaining 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. A year later, the Court said that “[t]rial by jury,’ in the primary and usual sense of the term at the common law and in the American constitutions, is ... a trial by a jury of 12 men.” *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899). And again in 1900, the Court held that “[t]here can be no doubt” “[t]hat a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment.” *Maxwell v. Dow*, 176 U.S. 581, 586 (1900). By 1930, this Court had concluded that it was “not open to question” that “trial by jury” “means a trial by jury as understood and applied at

common law,” which required “[t]hat the jury should consist of twelve men, neither more nor less.” *Patton v. United States*, 281 U.S. 276, 288 (1930).

B. Factual And Procedural Background

1. Florida And Several Other States Permit Small Juries To Try Felonies

Florida’s founding constitution provided that “the right of trial by jury shall forever remain inviolate.” Fla. Const. art. I, § 6 (1838). Following the defeat of the Confederacy and passage of the federal Reconstruction Acts, Florida adopted a new constitution under the watchful eye of federal troops, which similarly guaranteed that the “right of trial by jury shall be secured to all and remain inviolate forever.” Fla. Const. art. I, § 3 (1868); see Florida’s Historic Constitutions, *Florida Memory: State Library and Archives of Florida*, https://www.floridamemory.com/discover/historical_records/constitution/ (visited Aug. 6, 2026). The Florida Supreme Court later recognized that this constitutional provision “taken by itself, refers to a jury, according to the common law, to be composed of twelve persons.” *Gibson v. State*, 16 Fla. 291, 300 (1877).

In 1875, Florida amended its constitution to provide for the first time that the “number of jurors for the trial of causes in any court may be fixed by law.” *Florida Fertilizer & Mfg. Co. v. Boswell*, 34 So. 241, 242 (Fla. 1903). And the month after federal troops left the State in January 1877, Florida’s legislature passed a law stating that “twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other offences.” *Gibson*, 16 Fla. at 297-298; Shofner, *Reconstruction and Renewal, 1865-1877*, in *The History of Florida* 273 (Michael Gannon ed., 2018).

That change to Florida law did not happen in a vacuum. In the very same Act, the legislature reinstated an “integrity, fair character, sound judgment and intelligence” test for jurors, Laws of Fla., ch. 3010 (1877)—a standard then “used to eliminate almost every black citizen from the southern trial venire,” Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 89-90 (1990). Black jury service quickly became so rare that a Black person being seated for a trial repeatedly made the newspaper. E.g., *First Two Women Are Picked for Possible Jury Duty in County 1*, Citrus Cnty. Chron. (Feb. 16, 1950) (noting “the county’s first [Black] juror” had served “[l]ast fall”); see also Pet. 23-25 (collecting similar articles from 1915, 1924, 1948, and 1952).

Today, Florida continues to follow the formula for jury size charted in the post-Reconstruction era. The current constitution, adopted in 1968, provides that “[t]he right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.” Fla. Const. art. I, § 22. Florida Statute § 913.10, in turn, states that “[t]welve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases.” Although this Court upheld Florida’s six-person jury approach in *Williams v. Florida*, 399 U.S. 78, 103 (1970), several Florida appellate judges have raised questions about the continuing vitality of that ruling following *Ramos*. See, e.g., *Guzman v. State*, 350 So. 3d 72, 78 (Fla. Dist. Ct. App. 2022) (Gross, J., concurring specially) (“Like Wile E. Coyote momentarily suspended in midair after running off a cliff, *Williams* hovers in the legal ether, waiting for further examination by the [U.S.] Supreme Court.”);

Phillips v. State, 316 So. 3d 779, 788 (Fla. Dist. Ct. App. 2021) (Makar, J., concurring) (“It seems a small step from the demise of the reasoning in *Apodaca* and *Johnson* as announced in *Ramos* to conclude that the reasoning in *Williams*, upon which both decisions relied, is also in jeopardy.”).

To Petitioner’s knowledge, just a handful of other states also permit juries of fewer than 12 members when the crime charged is a felony that could result in a significant term of imprisonment.⁴ Arizona permits eight-person juries except when “a sentence of death or imprisonment for thirty years or more is authorized.” Ariz. Rev. Stat. § 21-102(A)-(B). Connecticut allows six-person juries unless the defendant is “charged with an offense which is punishable by death, life imprisonment without the possibility of release or life imprisonment.” Conn. Gen. Stat. § 54-82(c). In Indiana, a six-person jury is permitted when a defendant is charged with a crime that is not “murder or a Level 1, Level 2, Level 3, Level 4, or Level 5 felony.” Ind. Code Ann. § 35-37-1-1(b); *see id.* § 35-50-2-7(b) (describing “Level 6 felony”). Massachusetts provides that criminal trials “in the Boston municipal court department and in the district court department,” Mass. Gen. Laws, ch. 218, § 26A—which have

⁴ Absent stipulation by the parties, the Federal Rules of Criminal Procedure generally require a “jury ... of 12 persons.” Fed. R. Crim. P. 23(b)(1). The only exception is that an 11-person jury may return a verdict without the consent of the parties if, “[a]fter the jury has retired to deliberate, ... the court finds good cause to excuse a juror.” *Id.* 23(b)(3). This Court need not resolve the constitutionality of that provision in this case, as it involves “the procedures to be applied ... when an emergency arises toward the end of deliberations” rather than the number of jurors who must be sworn at the outset. *Cf.* U.S. Brief in Opp. 16-17, *Parada v. United States*, No. 25-166 (U.S. Dec. 2025).

limited jurisdiction, including over “felonies punishable by imprisonment in the state prison for not more than five-years,” *id.* § 26—“shall be by a jury of six persons,” *id.* § 26A. Louisiana permits six-person juries for offenses where the crime charged “may” (but does not “necessarily”) result in “confinement at hard labor or confinement without hard labor for more than six months.” La. Const. art. I, §17; *cf. Duncan v. Louisiana*, 391 U.S. 145, 146, 161-162 (1968). Finally, Utah permits an eight-person jury for “noncapital first degree felony aggravated murder or other criminal case which carries a term of incarceration of more than one year as a possible sentence for the most serious offense charged.” Utah Code Ann. § 78B-1-104(1)(b)-(c).

2. Mr. Kian Is Convicted Of Felonies By A Six-Person Florida Jury

Mr. Kian was charged with five counts of practicing chiropractic medicine with a suspended license, a third-degree felony that is punishable by up to five years in prison for each count. Fla. Stat. §§ 460.411(1)(b), 775.082(3)(e); *see also* Pet.App.3-4. He was convicted on all counts by a six-person jury seated pursuant to Florida Statute § 913.10. Mr. Kian appealed his convictions, arguing, *inter alia*, that the use of a six-person jury violated his rights under the Sixth and Fourteenth Amendments. Pet.App.5-11. The District Court of Appeal affirmed his convictions without a written opinion, depriving the Florida Supreme Court of jurisdiction to review the decision. Pet.App.2; *supra* p.4. Mr. Kian timely filed a petition for a writ of certiorari, which this Court granted on June 15, 2026.

SUMMARY OF THE ARGUMENT

The Sixth Amendment’s “promise of a jury trial” is “fundamental to the American scheme of justice.” *Ramos v. Louisiana*, 590 U.S. 83, 89, 93 (2020). The scope of that right is controlled by “what the term ‘trial by an impartial jury’ meant at the time of the Sixth Amendment’s adoption.” *Id.* at 90. And both the *Williams* Court and Florida acknowledge that the “jury at common law came to be fixed generally at 12” by the time of the founding. *Williams v. Florida*, 399 U.S. 78, 89 (1970), *cited in* Opp. 8. Every relevant authority—English practice, colonial law, founding-era treatises, state court decisions following ratification, and this Court’s own precedents—confirms that general principle.

Under this Court’s decision in *Ramos*, the essentially undisputed historical record should be the end of the inquiry. But even if *Ramos* did not change the legal test to be applied, *Williams*’s reasoning regarding how many members are needed to serve a jury’s essential function simply has not stood the test of time. The reasoning did not even stand for a decade, as research quickly revealed that smaller juries are less representative of the community and more likely to reach inconsistent outcomes that are disproportionately unfavorable to defendants. *E.g.*, *Ballew v. Georgia*, 435 U.S. 223, 231-239 (1978).

Having effectively overruled *Williams* in *Ramos*, this Court need not engage in the traditional *stare decisis* inquiry at all. Instead, it must only “formalize what is evident in [*Ramos*] itself”—*Williams* retains no force of law. *Herrera v. Wyoming*, 587 U.S. 329, 342 (2019). Regardless, every factor this Court considers when evaluating precedent favors overruling *Williams*. That decision is egregiously wrong because of its conceded

inconsistency with the public meaning of the jury trial right and because the empirical studies it relied upon in determining the number of members needed to serve a jury’s function were almost immediately undermined. *Williams* has had significant negative consequences, both in creating confusion in the case law and in permitting the use of six-member juries (which are less likely to be representative and reliable than 12-member bodies). And overruling *Williams* affects limited reliance interests (retrials of a finite number of pending cases), which cannot outweigh the broader “reliance the American people place in their constitutionally protected liberties.” *Ramos*, 590 U.S. at 111 (plurality op.).

The Court should reverse the judgment below and hold that a criminal defendant charged with a serious crime must be tried by a 12-member jury.

ARGUMENT

I. THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE DEFENDANTS CHARGED WITH SERIOUS CRIMES TO BE TRIED BEFORE 12-MEMBER JURIES

A. *Ramos* Established That The Sixth Amendment’s Jury Trial Clause Is Defined By Its Original Public Meaning

In *Ramos*, this Court concluded that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious crime by “determin[ing] what the term ‘trial by an impartial jury’ meant at the time of the Sixth Amendment’s adoption[.]” 590 U.S. 83, 90 (2020); *see also Edwards v. Vannoy*, 593 U.S. 255, 266 (2021) (agreeing with petitioner that *Ramos* “adhered to the original meaning of the Sixth Amendment’s right to a

jury trial”).⁵ To assess that “original public meaning,” the Court considered “the common law, state practices in the founding era, [and] opinions and treatises written soon afterward.” *Ramos*, 590 U.S. at 90, 92. All those authorities pointed to the same result—the phrase “trial by ... jury” meant a unanimous jury at the time of the Sixth Amendment’s enactment. *Id.* at 90.

Ramos also relied on this Court having “repeatedly and over many years[] recognized that the Sixth Amendment requires unanimity.” 590 U.S. at 92 & nn.19-22 (citing *inter alia* *Thompson v. Utah*, 170 U.S. 343, 351 (1898); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Patton v. United States*, 281 U.S. 276, 288 (1930)). The only detour from the Court’s adherence to this “simple” and “straightforward principle[]” arose in the 1970s, when *Apodaca v. Oregon*, 406 U.S. 404 (1972), was issued and the Court’s jurisprudence “took a strange turn,” *Ramos*, 590 U.S. at 93.

The *Apodaca* plurality erred, *Ramos* explained, by “subject[ing] the Constitution’s jury trial right to an incomplete functionalist analysis of its own creation” rather than meaningfully “grappling with the historical meaning of the Sixth Amendment’s jury trial right.” 590

⁵ While *Ramos* did not expressly define what constitutes a “serious crime” for its purposes, it appears to have used this term to distinguish “petty offenses”—crimes for which there is no right to a jury trial. *Ramos*, 590 U.S. at 88 & n.7; accord *Vannoy*, 593 U.S. at 262 & n.1. Here, the felony charges against Mr. Kian (which each carried a sentence of up to five years in prison) do not fall under the “petty offenses” doctrine, which applies to crimes where no “more than six months” imprisonment is authorized. See *Baldwin v. New York*, 399 U.S. 66, 69 (1970). Indeed, Florida agrees that this case squarely presents the question of whether “the Sixth Amendment requires the use of 12-person juries in serious criminal cases.” Opp. i.

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

A majority of the Court accordingly held that *Apodaca*’s logic was indefensible and not entitled to the protection of *stare decisis*. See *Ramos*, 590 U.S. at 105-106; *id.* at 115 (Sotomayor, J., concurring) (*Apodaca* “is rightly[] relegated to the dustbin of history[.]”); *id.* at 124 (Kavanaugh, J., concurring in part) (“I agree with the Court’s decision to overrule *Apodaca*.”); see also *id.* at 139 (Thomas, J., concurring in the judgment) (taking the position that *Apodaca* “does not bind us” because it did not address the scope of the Sixth Amendment when viewed in light of the Fourteenth Amendment’s Privileges or Immunities Clause). Instead, the Court held that the original public meaning of the Sixth Amendment controlled. *Id.* at 100 (majority op.).

B. The Original Public Meaning Of “Trial By An Impartial Jury” Requires A 12-Member Jury For Serious Crimes

Just as in *Ramos*, “the common law, state practices in the founding era, [and] opinions and treatises written soon afterward” all point to the same “unmistakable” “answer” here: the phrase “trial by an impartial jury”

referred to a 12-person jury at the time the Sixth Amendment was enacted. *Ramos*, 590 U.S. at 90; see also ABA, *Principles for Juries and Jury Trials*, Principle 3 cmt., at pp.25, 27 (rev. 2023) (“colonial and federal constitutional considerations [as well as] long historical experience” support requiring a “twelve-person jury in all non-petty criminal cases”).

As explained, the 12-member requirement has a long history that dates back nearly a millennium, such that by 1769, Blackstone could assert without equivocation that “no person could be found guilty of a serious crime unless ‘the truth of every accusation ... [was]... confirmed by the unanimous suffrage of twelve of his equals and neighbors[.]’” *Ramos*, 590 U.S. at 90 & n.10 (quoting 4 Blackstone, *Commentaries on the Laws of England* 343 (1769)). As a result, a “‘verdict, taken from eleven, was no verdict’ at all.” *Id.* at 90 & n.11 (quoting Thayer, *A Preliminary Treatise on Evidence at the Common Law* 88-89 n.4 (1898)). This history leaves “no doubt” that “a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution[.]” *Maxwell*, 176 U.S. at 586.⁶

State practices from the same period confirm that understanding. At least five States had laws expressly requiring 12-person juries at the time the Constitution was ratified. *Supra* p.7. In the first decades after the Sixth Amendment was enacted, a bevy of state courts interpreted the term “trial by jury” to require a 12-

⁶ *Maxwell*, along with several other of this Court’s pre-1970 decisions concerning the contours of a jury trial, were abrogated by the Court’s decision in *Williams v. Florida*, 399 U.S. 78 (1970). As discussed below, however, *Williams* was effectively overruled by *Ramos* and—if for some reason it was not—it should be now. See *infra* pp. 24-38.

person jury, *see, e.g.*, Miller, 146 U. Pa. L. Rev. at 643 & n.133 (collecting cases), including the supreme courts of both Carolinas, Pennsylvania, Alabama, and Georgia, *supra* p.9.

State courts repeatedly held that 12-member juries were required under the common law or state constitutional provisions analogous to the Sixth Amendment throughout the rest of the 19th Century. For example:

- The Ohio Supreme Court wrote in 1853 that its state constitutional provision protecting “[t]he right of trial by jury” required that “[t]he number [of jurors] must be twelve,” explaining that “diminishing the number impairs [the jury trial] right, lessens the security of the accused, and increases the danger of conviction.” *Work v. State*, 2 Ohio St. 296, 301, 304-305 (1853).
- The New York Court of Appeals warned in 1858 that “allow[ing] ... any number short of a full panel of twelve jurors” “would be a highly dangerous innovation” that “ought not to be tolerated” “in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial[.]” *Cancemi v. People*, 18 N.Y. 128, 138 (1858).
- The Supreme Court of Missouri held in 1860 that the Missouri Constitution, which “adopted” the “term ‘trial by jury’” from “the common law,” referred to a trial “of twelve men.” *Vaughn v. Scade*, 30 Mo. 600, 603-604 (1860).
- Also in 1860, the Supreme Court of New Hampshire ruled that its state’s legislature could not allow for juries of fewer than 12 because “[t]he term[] ... ‘trial by jury’ [is], and for ages ha[s] been well known in

the language of the law”—and was thus “used at the adoption of the constitution”—to refer to “a body of twelve men.” *Opinion of Justices*, 41 N.H. 550, 550-551 (1860).

Numerous scholars in the 18th and 19th centuries came to the same conclusion. James Wilson—considered by some “the second most important framer of the Constitution,” Mosvick, *Forgotten Founders: James Wilson, craftsman of the Constitution*, The National Constitution Center (July 13, 2020)—explained shortly after the Sixth Amendment was drafted that “[t]o the conviction of a crime, the undoubting and the unanimous sentiment of the *twelve jurors* is of indispensable necessity,” 2 Wilson, *The Works of the Honourable James Wilson* 350 (Bird Wilson ed., Philadelphia, Bronson & Chauncey 1804) (emphasis added).⁷ That view was echoed by Story’s *Commentaries*, which explained that “trial by jury is generally understood to mean ... a trial by a jury of *twelve* men, impartially selected[.]” 2 Story & Cooley, *Commentaries on the Constitution of the United States* § 1779, at p.541 n.2 (4th ed. 1873). Other treatises from that era agreed: “From time immemorial a jury of trials has consisted of twelve men. And it is a point upon which the authorities agree, that, within the meaning of our constitutional provisions, a jury of less than twelve men is not a jury[.]” 1 Bishop, *Commentaries on the Law of Criminal Procedure* § 897, at pp.545-546 (2d ed. 1872).

⁷ When Wilson also remarked that he felt “no peculiar predilection for the number twelve,” he appears to have been taking the position that a petit jury could conceivably be *larger* than twelve—not smaller. 2 Wilson, *The Works of the Honourable James Wilson* 304 (“[A] grand jury consists of more, and its number is not precisely fixed.”).

This Court, too, has “repeatedly and over many years,” *Ramos*, 590 U.S. at 92, acknowledged that the Sixth Amendment calls for a 12-member jury—and in many of the same cases that *Ramos* relied upon to show the consensus over the unanimous jury requirement. For example, the Court addressed the 12-person requirement in 1898 when it overturned a conviction by an eight-person jury in Utah. *Thompson*, 170 U.S. at 349. The Court explained that “the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less.” *Id.* Foreshadowing *Ramos*, *Thompson* reached this conclusion by relying on the Amendment’s original public meaning, determining that “the words ‘trial by jury’ were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in the country and in England at the time of the adoption of that instrument[.]” *Id.* at 350.

In the years following *Thompson*, this Court repeatedly noted the 12-person requirement. It held that “[t]rial by jury,” in the primary and usual sense of the term at the common law and in the American constitutions, is ... a trial by a jury of 12 men[.]” *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899). Then this Court wrote that “[t]here can be no doubt” “[t]hat a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment,” *Maxwell*, 176 U.S. at 586, and later reaffirmed *Thompson*’s conclusion that the Sixth Amendment guarantees “the right to be tried by a jury of twelve persons,” *Rasmussen v. United States*, 197 U.S. 516, 527 (1905).

Soon, it was “not open to question” “[t]hat ... ‘trial by jury’” “mean[t] a trial by jury as understood and applied at common law,” including the element “[t]hat the

jury should consist of twelve men, neither more nor less.” *Patton*, 281 U.S. at 288. *Williams* itself agreed that “the size of the jury at common law came to be fixed generally at 12” centuries before the Sixth Amendment was drafted. 399 U.S. at 89-90. And following *Williams*, this Court has repeated that same basic observation as historical fact time and again. *E.g.*, *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (citing Blackstone and Story regarding jury size); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (citing Blackstone); *Southern Union Co. v. United States*, 567 U.S. 343, 356 (2012) (citing Blackstone). As recently as two terms ago, this Court emphasized that “[f]rom the start,” the Sixth Amendment required that “the truth of every accusation against a defendant had to be confirmed by the unanimous suffrage of twelve of [his] equals and neighbours.” *Erlinger v. United States*, 602 U.S. 821, 831 (2024) (quotation marks omitted, second alteration in original).

Whatever historical measure is used, the answer is the same. The original public meaning of the term “trial by an impartial jury” required a 12-member jury. And because “the right to trial by jury should mean no less today, and afford no fewer protections for individual liberty, than it did at the Nation’s founding,” the Court should hold that the Sixth Amendment requires 12-person juries. *Cunningham v. Florida*, 144 S. Ct. 1287, 1288 (2024) (Gorsuch, J., dissenting from denial of certiorari).

C. The Sixth Amendment’s 12-Member Jury Requirement Applies To The States, Including Florida

Because the original public meaning of the jury-trial right at the founding required 12-person juries, the Sixth Amendment carries that understanding forward

to the present day. *See supra* pp.16-23. The Fourteenth Amendment, in turn, requires that the Sixth Amendment’s jury trial right “appl[y] to state and federal criminal trials equally.” *Ramos*, 590 U.S. at 93. That is so regardless of whether the right is guaranteed by the Amendment’s Due Process Clause, *id.*, or its Privileges or Immunities Clause, *id.* at 137-140 (Thomas, J., concurring in the judgment).⁸ Accordingly, the felony charges brought against Mr. Kian under Florida law should have entitled him to the full sweep of Sixth Amendment protections, including a 12-member jury. The contrary decision of the Florida District Court of Appeal should be reversed.

II. TO THE EXTENT THIS COURT HAS NOT ALREADY OVERRULED *WILLIAMS*, IT SHOULD DO SO NOW

A. *Ramos* Effectively Overruled *Williams*

This Court’s decision in *Ramos* “repudiated the reasoning on which” the Court relied in *Williams*, meaning that *Williams* “must be regarded as retaining no vitality.” *Herrera v. Wyoming*, 587 U.S. 329, 342 (2019); *see also South Carolina v. Baker*, 485 U.S. 505, 524 (1988) (confirming “that subsequent case law has overruled the holding” in a prior decision); *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 664 n.16 (1981) (similar). As a result, the Court need not address the traditional *stare decisis* factors to hold

⁸ Relying on the *Slaughter-House* cases, *Maxwell* held that the right to a 12-member jury was not among the privileges or immunities protected against state infringement by the Fourteenth Amendment. 176 U.S. at 600-602. For the reasons explained in Justice Thomas’s opinion in *Ramos*, that conclusion was “demonstrably erroneous” and poses no barrier to resolving this case under the Privileges or Immunities Clause. 590 U.S. at 137-138 (Thomas, J., concurring in the judgment).

that the Sixth Amendment requires 12-person juries for defendants like Mr. Kian. It is enough to say that “[t]ime and subsequent cases have washed away the logic” of *Williams*. *Hurst v. Florida*, 577 U.S. 92, 102 (2016).

Williams cannot be reconciled with *Ramos*’s holding that the scope of the Sixth Amendment’s jury trial right is determined by its original public meaning. The *Williams* Court admitted that the Framers “may well” have had “the usual expectation” in drafting the Sixth Amendment “that the jury would consist of 12” members. 399 U.S. at 98-99. But *Williams* took the view that such “purely historical considerations” were not dispositive. *Id.* at 99. Instead, the Court focused on the “function” the jury plays in the Constitution. *Id.* at 100-101. It concluded that “the essential feature” of a jury is that it leaves justice to the “commonsense judgment of a group of laymen” and thus allows “guilt or innocence” to be determined via “community participation and [with] shared responsibility.” *Id.* at 100. Relying on this understanding of the jury right, the *Williams* Court concluded that “[w]hat few experiments have occurred—usually in the civil area”—“suggest[ed]” that that function could just as easily be performed with six jurors as with 12. *Id.* at 101-102 & nn.48-49.

As Justice Harlan explained at the time, this reading “stripp[ed] off the livery of history from the jury trial” and ignored both “the intent of the Framers” and the Court’s long-held understanding that constitutional “provisions are framed in the language of the English common law, and ... read in the light of its history.” *Baldwin v. New York*, 399 U.S. 117, 122-124 (1970) (Harlan, J., concurring in the result in *Williams*). The Court did not dispute that characterization, and three times during that same decade, it reaffirmed that *Williams* had “departed from the strictly historical requirements

of jury trial.” *Burch v. Louisiana*, 441 U.S. 130, 137 (1979); accord *Ballew*, 435 U.S. at 229 (“[C]ommon-law juries included 12 members[.]”); *Apodaca*, 406 U.S. at 407-408 (plurality op.) (“[T]he requirement that juries consist of 12 men ... arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century.”).

Williams’s choice to discard the original public meaning of the Sixth Amendment deprives the decision of any ongoing “vitality,” *Herrera*, 587 U.S. at 342, now that *Ramos* is the law of the land. In overruling *Apodaca*, *Ramos* rejected the “same fundamental mode of analysis as that in *Williams*,” *Ramos*, 590 U.S. at 157 (Alito, J., dissenting). *Apodaca* expressly recognized that *Williams* “consider[ed] a related issue” and used *Williams* as the North Star for its reasoning. *Apodaca*, 406 U.S. at 406-414 (plurality op.); accord *Ramos*, 590 U.S. at 152 (Alito, J., dissenting) (noting that *Apodaca* “built on the analysis in *Williams*”). All told, the *Apodaca* plurality cited *Williams* 11 times, including to (1) “cast[] ... doubt on the ... assumption ... that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution[,]” (2) conclude that “[o]ur inquiry” in determining the scope of the Sixth Amendment “must focus upon the function served by the jury in contemporary society,” and (3) hold that the only “essential feature of a jury” guaranteed by the Sixth Amendment is that it must “consist[] of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate.” 406 U.S. at 408-410 (quoting *Williams*, 399 U.S. at 92-93, 96-97, 99-100). *Ramos* rejected precisely this *Williams*-inspired reasoning as an improperly “muddy yardstick” for safeguarding “the right to trial by jury”

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

Accordingly, *Ramos*’s decision to “reject[] [the plurality] opinion in *Apodaca*” and hold that “the Fourteenth Amendment incorporates the Sixth Amendment right to a unanimous jury against the States[,]” *Vannoy*, 593 U.S. at 262, necessarily overruled *Williams* as well. And because “*Ramos* is the law,” it should be “give[n] ... all the consequence it deserves.” *Id.* at 295 n.1 (Kagan, J., dissenting); see *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 497 (2020) (Alito, J., concurring) (“I lost, and *Ramos* is now precedent.”). “[S]tare decisis does not compel adherence to a decision,” like *Williams*, “whose “underpinnings” have been “eroded” by subsequent developments of constitutional law.” *Hurst*, 577 U.S. at 102.

B. If *Williams* Remains Good Law, The Court Should Formally Overrule It

“The force of *stare decisis* is at its nadir in cases,” like this one, “concerning procedural rules that implicate fundamental constitutional protections.” *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013). Because this Court’s interpretation of the Constitution “can be altered only by constitutional amendment or by overruling ... prior decisions,” *Agostini v. Felton*, 521 U.S. 203, 235 (1997), the strength of *stare decisis* considerations is “reduced all the more when the rule is not only procedural but rests upon an interpretation of the Constitution,” *Gaudin*, 515 U.S. at 521.

Subject to those principles, this Court’s *stare decisis* analysis considers a variety of factors that “fold into three broad considerations”: (1) whether the precedent is “egregiously wrong as a matter of law,” taking into account “the quality of the precedent’s reasoning,

consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors”; (2) whether “the prior decision caused significant negative jurisprudential or real-world consequences”; and (3) whether “overruling the prior decision [would] unduly upset reliance interests.” *Ramos*, 590 U.S. at 121-122 (Kavanaugh, J., concurring in part); *see also Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 248-249 (2019) (laying out similar factors). Each consideration indicates that *Williams* should be overruled—just as in *Alleyne*, an earlier decision (*Williams*) “is irreconcilable with the reasoning of” a later decision (*Ramos*) “and the original meaning of the Sixth Amendment.” *Alleyne*, 570 U.S. at 116 n.5. So this Court should “follow the latter.” *Id.*

Williams, moreover, is a singular “anomaly” in this Court’s case law, *Khorrami v. Arizona*, 143 S. Ct. 22, 24 (2022) (Gorsuch, J., dissenting from denial of certiorari), with a unique, close link to *Apodaca*, *see supra* p.26. Even the *Ramos* dissenters acknowledged that a notable effect of “[r]epudiating the reasoning of *Apodaca*” would be to “prompt calls to overrule *Williams*.” 590 U.S. at 158 (Alito, J., dissenting). Accordingly, there is no reason that a narrow ruling in this case must have the wide-ranging impact on the Sixth Amendment—or other constitutional doctrines—that Florida threatens. *See, e.g.*, Opp. 8-9, 12-13. To the extent, for example, that Florida believes overruling *Williams* will lead to juries limited to “male landowners hailing from a particular county,” Opp. 8-9, this Court has already rejected precisely this attack on *Ramos*’s history-based test, explaining that “further constitutional amendments ... prohibit [such] invidious discrimination.” *See Ramos*, 590 U.S. at 100 n.47.

1. *Williams* Is Egregiously Wrong

a. *Williams* Conflicts With The Original Public Meaning Of The Sixth Amendment's Jury Trial Right

Williams is flawed for the same reason *Apodaca* was. *See supra* pp.17-18. The *Williams* Court spent relatively little time “grappling with the historical meaning of the Sixth Amendment’s jury trial right [or] this Court’s long-repeated statements” about the number of required jurors, and instead “subjected the Constitution’s jury trial right to an incomplete functionalist analysis of its own creation.” *Ramos*, 590 U.S. at 106. This error in approach was “not just wrong”—it was “egregiously wrong.” *Id.* at 121-123 (Kavanaugh, J., concurring in part).

At the date of its issuance, *Williams* (like *Apodaca*) was “already an outlier in the Court’s jurisprudence,” *Ramos*, 590 U.S. at 125 (Kavanaugh, J., concurring in part), given its inconsistency with centuries of related decisions and history. It contradicted ancient common law guarantees and hundreds of years of precedent from state high courts and this Court alike. *See supra* pp.5-11, 18-23. In 1900—70 years before *Williams* was decided—this Court had already expressed “no doubt” that “the Sixth Amendment” “intended” “a jury composed ... of twelve jurors.” *Maxwell*, 176 U.S. at 586. And within a decade of *Williams*, three other decisions from this Court recognized that it had departed from the traditional historical understanding of the jury trial right. *See supra* pp.25-26.

Williams’s reasoning and holding have also been fatally undercut by *Ramos*. *Supra* pp.24-27. As one additional example, *Williams* “sought to sidestep any serious inquiry into the ‘intent of the Framers’ of the Sixth

Amendment,” *Khorrami*, 143 S. Ct. at 25 (Gorsuch, J., dissenting from certiorari), by focusing on the Senate’s choice not to include language that had been proposed by James Madison to clarify that “trial by jury” included the “requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites,” *Williams*, 399 U.S. at 94 & n.36 (quoting 1 Annals of Cong. 435 (1789)) *cited in* Opp. 9. That omission suggested to the *Williams* Court that the Sixth Amendment was not intended to include a jury’s “accustomed requisites,” such as the common law requirement of including 12 members. *Id.* at 95-97. *Ramos*, however, explicitly rejected the same basic argument when considering unanimity. As the Court explained, that “snippet of drafting history could just as easily support the opposite inference” that the language was deleted because it was “so plainly included in the promise of a ‘trial by an impartial jury.’” *Ramos*, 590 U.S. at 97-98. “So rather than dwelling on text left on the cutting room floor,” as *Williams* did in its brief foray into historical research, *Ramos* held that “we are much better served by interpreting the language Congress retained and the States ratified.” *Id.* at 98. There, as with unanimity, “the right to a jury trial meant a trial in which the jury” consists of 12 people. *Id.*

b. *Williams’s* Functionalist Reasoning Is Wrong On Its Own Terms

Even if *Williams* were right to consider the function of a jury, it was wrong to conclude that a six-member jury can serve that function as well as a 12-member jury. Numerous studies have established that a six-person jury is less representative, less consistent, and more likely to rule against a criminal defendant than a jury of 12.

The *Williams* Court conducted its functionalist analysis in part by considering the “currently available evidence” about the impact of jury size. 399 U.S. at 100-101 & nn.48-49. These “few experiments ... usually in the civil area” led the Court to “find little reason to think” that the goals and traditional function of the jury—including, among others, “to provide a fair possibility for obtaining a representative[] cross-section of the community”—“are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12.” *Id.* at 100-101. The Court theorized that “in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible.” *Id.* at 102. Even “[b]efore the ink dried on the decision,” however, “scholars began criticizing *Williams* for overreading the handful of studies it cited to support its tepid assertion that 6-member panels would ‘probably’ operate as well as 12-member juries.” *Khorrami*, 143 S. Ct. at 26 (Gorsuch, J., dissenting from denial of certiorari) (citing Zeisel, ... *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 712-715 (1971)).

Within less than a decade, *Williams* had generated a cottage industry in “scholarly work on jury size.” *Ballew*, 435 U.S. at 231. *Ballew*, which held that the Sixth Amendment barred the use of a five-person jury, concluded that the post-*Williams* research showed that (1) “smaller juries are less likely to foster effective group deliberation[s],” *id.* at 232; (2) smaller juries may be less accurate and cause “increasing inconsistency” in verdict results, *id.* at 234; (3) the chance for hung juries decreases with smaller juries, disproportionately harming the defendant, *id.* at 236; and (4) decreasing jury sizes “foretell[] problems ... for the representation of minority

groups in the community,” undermining a jury’s likelihood of being “truly representative of the community,” *id.* at 236-237. Moreover, the *Ballew* Court “readily admit[ted]” that it “d[id] not pretend to discern a clear line between six members and five,” effectively concluding that the studies it relied on also cast doubt on the effectiveness of the six-member jury. *Id.* at 239; *see also id.* at 245-246 (Powell, J., concurring) (observing that “the line between five- and six- member juries is difficult to justify”). Although *Ballew* declined to overrule *Williams* outright, the bench, bar, and scholars have all recognized that it called into question the strength of *Williams*’s reasoning. As the American Bar Association explained, *Ballew* “acknowledged the empirical findings pointing to the superiority of twelve-member juries ... when it concluded that juries of fewer than six are unconstitutional.” ABA, *Principles of Juries and Jury Trials*, Principle 3 cmt., at p.24.⁹

⁹ *See also State v. Hamm*, 423 N.W.2d 379, 382 n.2 (Minn. 1988) (noting that *Ballew*’s “acknowledge[ment] [of] the substantial threat to the right to a jury trial posed by smaller juries” makes “an excellent argument that could be used to support a 12-person jury” and “declin[ing] to follow” *Williams* when interpreting state constitution); *Opinion of Justices*, 431 A.2d 135, 136 (N.H. 1981) (“Although ... *Ballew* expressed these concerns [regarding decreases in jury size] in the context of a decision regarding a further reduction of criminal trial juries from six to five, we note that these problems may also arise in the context of reducing the size of juries in civil cases from twelve to six.”); Smith & Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441, 441 (2008) (arguing that *Ballew* rendered *Williams* “a dead letter” because “the [*Ballew*] Court implicitly abandoned” *Williams*’s functionalist reasoning); Frampton, Comment, *The Uneven Bulwark: How (And Why) Criminal Jury Trial Rates Vary By State*, 100 Cal. L. Rev. 183, 218 (2012) (“When the Court declined to extend *Williams* in 1978 ... it persuasively articulated many of the reasons why juries with less

Research after *Ballew* has further undermined Williams’s view that a small jury can provide a representative cross-section of the community. The current evidence indicates that “reducing jury size *inevitably* has a drastic effect on the representation of minority group members on the jury.” Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. of Empirical Legal Stud. 425, 426-427 (2009) (noting that the “change most likely to promote diversity on the jury is a return to the jury of 12”); *see also* Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 Judicature 47, 52 (2020) (“Larger juries are also more inclusive and more representative of the community. ... In reality, cutting the size of the jury dramatically increases the chance of excluding minorities.”). Because “the 12-member jury produces significantly greater heterogeneity than does the six-member jury,” Diamond, 6 J. of Empirical Legal Stud. at 425, 449, it increases “the opportunity for meaningful and appropriate representation” and helps ensure that juries “represent adequately a cross-section of the community,” *Ballew*, 435 U.S. at 237; *see also* Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1049 (2012) (“[I]ncreasing the number of jurors on the seated jury would ... increase black representation in the jury pool and on seated juries, and make trial outcomes more equal for white and black defendants.”).

than twelve jurors significantly disadvantage criminal defendants.”); Higginbotham et al., *Better by the Dozen*, 104 Judicature 46, 49 n.32 (2020) (“[I]n what reads like a *de facto mea culpa*, the Court’s opinion in *Ballew v. Georgia* includes a lengthy discussion of the social science demonstrating the benefits of larger juries.”).

Other important considerations also weigh in favor of the 12-member jury. For instance, studies indicate that 12-member juries deliberate longer, recall evidence better, and are less likely to rely on irrelevant factors during deliberation. See Smith & Saks, *The Case for Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441, 465 (2008); Saks & Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 Law & Hum. Behav. 451, 458-459 (1997). Minority views are more likely to be considered in a larger jury, as “having a large minority helps make the minority sub-group more influential,” and, unsurprisingly, “the chance of minority members having allies is greater on a twelve-person jury.” Smith & Saks, 60 Fla. L. Rev. at 466.

Ultimately, whether *Williams*’s reasoning is analyzed under the historical test laid out in *Ramos* or under *Williams*’s own functionalist test, it is egregiously wrong.

2. *Williams* Has Caused Significant Negative Jurisprudential And Real-World Consequences

Decisions following *Williams* have illustrated the jurisprudential difficulties it created. In *Ballew*, for example, a split Court struggled to apply the functionalist approach, with multiple members acknowledging that the line being drawn between five- and six-member juries had little foundation in law or fact. See *supra* pp.31-32. And, of course, this Court rejected the *Williams* approach in *Ramos*. See *supra* pp.24-27.

Moreover, the *Williams* Court’s conclusion that a six-member jury is no different than a 12-member jury has “caused significant negative ... real-world consequences.” *Ramos*, 590 U.S. at 122 (Kavanaugh, J.,

concurring in part). As noted above, juries of fewer than 12 are less likely to include members of minority groups, spend less time deliberating, recall less evidence, are more likely to rely on irrelevant factors, are less likely to consider minority viewpoints, and are less predictable than 12-member juries. *See supra* pp.30-34. *Williams* thus permits “the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule,” *Ramos*, 590 U.S. at 126 (Kavanaugh, J., concurring in part)—increasing the “risk of convicting an innocent person,” *Brown v. Louisiana*, 447 U.S. 323, 332 (1980) (plurality op.); *accord Ballew*, 435 U.S. at 234 (“Statistical studies suggest that the risk of convicting an innocent person ... rises as the size of the jury diminishes.”). That drastic “consequence has traditionally supplied some support for overruling an egregiously wrong criminal-procedure precedent.” *Ramos*, 590 U.S. at 126 (Kavanaugh, J., concurring in part) (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)).

Even beyond the individual defendants affected by the *Williams* rule, permitting six- or eight-person juries in cases involving serious crimes does real harm to public perception of the jury as a legitimate, representative body. As this Court has explained, “[o]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic system and representative government,” and, to fulfill that function, the jury must “be a body truly representative of the community.” *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (quotation marks omitted). The *Williams* rule increases the odds that in the States that continue to permit juries of fewer than 12, the jury will not include a true cross-section of the community—and that the members who belong to a racial, religious, or cultural minority will be given fewer opportunities to express their views. Put slightly

differently, *Williams* threatens the vitality of one of the “most essential” constitutional protections, *Ramos*, 590 U.S. at 113 (Sotomayor, J., concurring): America’s “deep commitment ... to the right of a jury trial ... as a defense against arbitrary law enforcement,” *Codispoti v. Pennsylvania*, 418 U.S. 506, 515-516 (1974) (quotation marks omitted). In this way, *Williams* is also an outlier—other seminal decisions have made it more likely that the “jury [will be] selected from a representative cross section of the entire community.” *Ramos*, 590 U.S. at 100 n.47; see also, e.g., *Taylor*, 419 U.S. at 527, 531 (noting that “[t]o exclude racial groups from jury service [is] ... ‘at war with our basic concepts of a democratic society and a representative government’” and that “the fair-cross-section requirement is violated by the systematic exclusion of women”).

These effects are unsurprising given that “[d]uring the Jim Crow era, some States restricted the size of juries and abandoned the demand for a unanimous verdict as part of a deliberate and systematic effort to suppress minority voices in public affairs.” *Khorrami*, 143 S. Ct. at 27 (Gorsuch, J., dissenting from denial of certiorari). South Carolina, for example, adopted smaller juries specifically for cases “wherein the accused is a person of color” immediately after the Civil War. S.C. Const. art. III, § 1 (1865); 1866 S.C. Sess. Laws 493, § 3. Louisiana’s 1898 Constitution established that “[c]ases in which the punishment may be at hard labor shall be tried by a jury of five.” La. Const. art. 116 (1898). As this Court noted, Louisiana’s 1898 constitutional convention was convened to “establish the supremacy of the white race,” *Ramos*, 590 U.S. at 87 & n.1 (citing *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 374 (H. Hearsey ed. 1898)), and the five-person jury provision was part of the same

constitution that included “a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements,” *id.* at 87. Florida’s own six-person jury law can similarly be traced back to the post-Reconstruction era, where it was implemented (within weeks of Federal troops leaving) together with a discriminatory test for jury service. *Supra* pp.11-12.

Although other States have asserted interests in cost-savings or other efficiencies to justify smaller juries, “the reality that smaller panels tend to skew jury composition and impair the right to a fair trial is” a “sad truth borne out by hard experience.” *Khorrami*, 143 S. Ct. at 27 (Gorsuch, J., dissenting from denial of certiorari). Moreover, research has disproven the theory that smaller juries have significant cost and efficiency benefits. ABA, *Principles for Juries and Jury Trials*, Principle 3 cmt., at pp.26-27. At best, “six-person juries are only minimally more efficient or cheaper than twelve-person juries” and “[o]verall, little court time is saved by reducing jury size.” *Id.*

3. Any Reliance On *Williams* Is Outweighed By The Importance Of The Sixth Amendment Jury Trial Right

Much like in *Ramos*, overruling *Williams* would not implicate the kind of “prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke.” *Ramos*, 590 U.S. at 107. Nor can anyone reasonably argue that juries with fewer than 12 members “have ‘become part of our national culture,’” *id.* at 107-108, as the vast majority of states and federal court require that a 12-member jury to be empaneled in felony cases involving significant terms of imprisonment, *see supra* p.13. While States that permit smaller

juries in serious criminal cases may well have to hold a new trial in some cases that are pending on direct appeal, “new rules of criminal procedures ... often affect[] significant numbers of pending cases across the ... country.” *Ramos*, 590 U.S. at 108.

At the same time, allowing *Williams* to remain in place harms “the most important” “reliance interest[]”—that “of the American people” “in the preservation of our constitutionally promised liberties.” *Ramos*, 590 U.S. at 110-111 (plurality op.). That States might have “to retry a slice of their prior criminal cases ... cannot outweigh” that broader liberty interest “we all share.” *Id.*; *accord id.* at 129-130 (Kavanaugh, J., concurring in part); *see also Vannoy*, 593 U.S. at 298 (Kagan, J., dissenting) (recognizing “the need to ensure” that the Sixth Amendment “keep[s] with the Nation’s oldest traditions” so that defendants are provided “fair and dependable adjudications of [their] guilt”). There does not appear to be a single “case in which the one-time need to retry defendants has ever been sufficient to inter a constitutional right forever.” *Ramos*, 590 U.S. at 111 (plurality op.). This case should certainly not be the first.

* * *

“This Court has long explained that the Sixth Amendment right to a jury trial is ‘fundamental to the American scheme of justice.’” *Ramos*, 590 U.S. at 93 & n.23 (quoting *Duncan*, 391 U.S. at 149). “Madison himself described protections for the jury trial right as among ‘the most valuable’ that appear in ‘the whole list’ of amendments he produced.” *Erlinger*, 602 U.S. at 830 (quoting 1 Annals of Cong. 755 (1789)). That right is diminished by the continuing use of juries smaller than 12—a phenomenon the Framers would not have recognized—since a “reduction [in jury size] that promotes

inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance,” *Ballew*, 435 U.S. at 239.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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AUGUST 2026