

No. 25-6623

IN THE
Supreme Court of the United States

HAMED KIAN,

Petitioner,

v.

FLORIDA,

Respondent.

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

**BRIEF OF AMICUS CURIAE
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POLITICAL SCIENCE, YALE UNIVERSITY
AND YALE UNIVERSITY SCHOOL OF LAW,
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

Akhil Reed Amar is a constitutional scholar and historian who seeks to aid this Court in its efforts to practice principled constitutional decision-making and faithful originalism. In previous briefs to this Court, he has advanced, and today he once again advances, positions that he has taken as an academic long before any partisan or narrowly political implications could have been known.

SUMMARY OF ARGUMENT

This case presents this Court a perfect opportunity to restore first principles of text, history, structure, and precedent.

The Constitution's Third Article and its Sixth and Fourteenth Amendments require criminal juries for serious criminal cases, state and federal. A proper criminal *jury* means twelve good persons, nothing less. In 1791 and 1868, the number twelve was implicit in the word "jury," a settled understanding overwhelmingly confirmed by subsequent American tradition.

Williams v. Florida, 399 U.S. 78 (1970), which held that a six-person pseudo-jury could suffice in a serious criminal case, is plainly wrong and should be overruled, both as a matter of constitutional originalism and as a matter of *meta-precedent*—that is, this Court's repeated precedents on when prior

¹ No party or party's counsel authored or financially supported any of this brief.

precedents can and should be overruled. In a series of landmark twentieth-century constitutional cases across a wide range of issues, this Court repeatedly overruled a prior case or line of cases simply and solely because the Court believed that the prior case law mangled the Constitution’s true meaning, and no special factors, such as reliance, prevented a judicial broom sweep. These meta-precedents strongly support Petitioner’s claim for relief in today’s case via a clean overruling of *Williams*.

Also, this Court’s recent landmark ruling in *Ramos v. Louisiana*, 590 U.S. 83 (2020), undermines the substantive and methodological foundations of *Williams* and thus provides yet another compelling reason to overrule this misshapen 1970 ruling. *Ramos*’s repeated references to a “unanimous” jury of “twelve,” *id.* at 90, 92, 96 n.38, 100 n.46, and the majority opinion’s faithful attention to the Constitution’s text, structure, and original meaning suggest that twelve out of twelve votes—not a mere ten out of twelve, and also not a mere six out of six—are constitutionally necessary to convict a defendant of a serious crime.

That is the easy part of today’s case. The hard part is how best to proceed remedially in future habeas cases that will present similar issues. There are several options, and each raises genuine complexities. But the Court need not decide these issues in this case. Future remedial complexities should not deter this Court from enforcing the Constitution’s true meaning today. *Cf. Learning Resources, Inc. v. Trump*, 607 U.S. 229 (2026).

ARGUMENT

Part I. On Originalist Scholarship

Amicus and this Court have been here before.

Nearly three decades ago, amicus published an ambitious book of originalist scholarship vigorously defending the modern Court’s general approach to “the Bill of Rights”—the various privileges, immunities, rights, and freedoms originally declared in the Constitution’s early amendments in the 1790s and later made applicable against states via the Fourteenth Amendment. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998). The book’s concluding sentence declared that “[f]rom start to finish this book has aimed to explain how today’s judges and lawyers have often gotten it right without quite realizing why.” *Id.* at 307.

The 1998 book and its precursor articles² identified several messy doctrinal areas that needed tidying up by the Court.

First, the book claimed that American citizens have a constitutional right to weapons for personal self-defense and that this right properly applies against both state and federal governments. *Id.* at 257-68. When the book first advanced these claims, they lay at the outer margins of mainstream constitutional scholarship and Supreme Court case

² *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992).

law. Yet in recent years, this Court has thoughtfully considered the book's suggestions in landmark cases involving personal weapons of self-defense, and the individual right to self-defense is today the law of the land. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742, 770, 774-5 (2010); *id.* at 832 (Thomas, J., concurring in part and concurring in the judgment); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 37-38 (2022).

Second and third, the 1998 book and its precursor articles raised questions about how the First Amendment's treatment of religious establishments might best be meshed with the Fourteenth Amendment's guarantees of equal citizenship and equal free exercise; and how best to think about the relationship of the Fourth Amendment's warrant clause to its reasonableness clause. Amar, *The Bill of Rights*, at 68-77, 246-54. On many occasions, members of this Court have engaged with the book's analysis of these important issues. *See, e.g., California v. Acevedo*, 500 U.S. 565, 581-84 (1991) (Scalia, J. concurring); *Lee v. Weisman*, 505 U.S. 577, 620 (1992) (Souter, J., concurring); *Atwater v. City of Lago Vista*, 532 U.S. 318, 332 n.6, 336, 339 n.10 (2001); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50-53 (2004) (Thomas, J., concurring in the judgment); *Virginia v. Moore*, 553 U.S. 164, 170 (2008); *Town of Greece v. Galloway*, 572 U.S. 565, 604-07 (2014) (Thomas, J., concurring in part, and concurring in the judgment); *Riley v. California*, 573 U.S. 373, 404 (2014) (Alito, J., concurring in part, and concurring in the judgment).

Fourth, and central to today's case: The 1998 book took issue with the 1970 case of *Williams v. Florida*, 399 U.S. 78 (1970), and its approval of six-person juries in serious criminal cases. Amar, *The Bill of Rights*, at 108, 289-90, 394 n.26. As the next Part of this brief will show, *Williams* was egregiously wrong. Today's case offers the Court a chance to tidy up yet another messy corner of rights doctrine and in the process to bring this Court's case law into proper alignment with the Constitution itself.

Part II. On Juries³

Why twelve? Why not six or seven or ten or eleven?

Although the line between empaneling only eleven jurors as a general rule in a serious criminal trial (impermissible!)⁴ and twelve (perfect!) might

³ Part II of this brief borrows heavily from Akhil Reed Amar, *America's Unwritten Constitution* 442-43 (2012). Although much more could be said here about Anglo-American jury history and the near-sacred nature of the number twelve, Petitioner's Brief covers this ground extremely well, and amicus is mindful of this Court's Rule 37, admonishing amici to focus on "relevant matter not already brought to its attention by the parties."

⁴ The issue before the Court today concerns the "general rule" of jury size. This issue is thus conceptually distinct from the unusual case in which an eleven-person jury becomes necessary or desirable after twelve persons are properly empaneled at the trial's outset and one juror becomes unavailable after the trial has commenced. *Compare Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) ("In a criminal case, [a defendant] cannot . . . be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men.") (dictum), *with Patton v. United States*, 281 U.S.

look arbitrary as a matter of pure logic, this line has a vast amount of pre- and post-Founding history behind it. Virtually all eighteenth-century criminal juries in England, the American colonies, and the newly independent states had twelve members. William Penn; John Peter Zenger; the Boston Massacre defendants, represented by John Adams—all were tried by juries featuring twelve persons, and not one fewer.⁵

Thus, the number twelve was implicit in the word “jury” itself, as that word was generally understood and embodied in 1787-91: A criminal trial jury was, in a phrase dating back to the seventeenth century, “*twelve good men, and true.*” Amar, *America’s Unwritten Constitution*, at 442-43 (emphasis added). At the Founding, to be sure, “twelve good men” meant twelve *men*. But the Constitution as amended—most notably by the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments—today guarantees juries of *twelve persons*, White or Black, male or female, landed or landless, eighteen or eighty.⁶

276 (1930) (holding contra, without so much as mentioning *Morse*); see also Fed. R. Crim. P. 23(b).

⁵ On Penn, see Amar, *America’s Unwritten Constitution*, at 423-24; on Zenger, see Amar, *The Bill of Rights*, at 84-85, 301; and on the Boston Massacre and Adams, see Akhil Reed Amar, *The Words That Made Us: America’s Constitutional Conversation, 1760-1840*, at 74-75 (2021).

⁶ See Amar, *The Bill of Rights*, at 272-74 & n*; Akhil Reed Amar, *America’s Constitution: A Biography* 400 & n*, 426-28, 612-13 n.106, 619-21 nn.51-52 (2005); Amar, *America’s Unwritten Constitution*, at 277, 287-89, 563 n.9.

America's lived tradition—the post-1787 gloss placed on the word “jury” by early and unbroken federal practice, and the kindred practices of almost every state, operating under similarly worded state constitutions—further confirms that twelve is the magic number.

The Court's blasé ruling in *Williams* cut against the near-universal assumption of virtually every judge and justice who had addressed the issue prior to 1968, when the Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968), properly held that the Fourteenth Amendment applied America's fundamental criminal-jury right against states. See Amar, *The Bill of Rights*, at 290; *Thompson v. Utah*, 170 U. S. 343, 349 (1898) (“[T]he 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.”); *Patton v. United States*, 281 U.S. 276, 288 (1930) (affirming that it “is not open to question” that a “jury should consist of twelve”); *Williams*, 399 U.S. at 122 (Harlan, J., concurring in the result) (“[B]efore today it would have been unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by a jury of six.”); *id.* at 116-17 (Marshall, J., dissenting) (“I adhere to the decision of the Court in *Thompson v. Utah* that the jury guaranteed by the Sixth Amendment consists ‘of twelve persons, neither more nor less.’ . . . *Thompson* was right when decided and still states sound doctrine. I am equally convinced that the requirement of 12 should be applied to the States.”) (citation omitted).

True, some erosion occurred in various states long after the Founding. But even in 1970 (when the *Williams* Court misread the Sixth and Fourteenth Amendments to permit six-person juries as a rule in serious felony cases), the overwhelming majority of states—forty-five, to be precise, accounting for roughly 85 percent of the nation’s population—used twelve-person juries for all serious crimes, as did the federal government. *Williams*, 399 U.S. at 98-99 n.45.

Thus, it is clear that six jurors do not a jury make, whether this Court today focuses on 1787-91 (when the jury language of Article III and the Sixth Amendment sprang to life), or 1866-68 (when the Fourteenth Amendment was drafted and adopted to apply fundamental rights of citizens and persons against states and localities, including the right to a proper criminal jury in cases of serious crime), or 1970 (when the *Williams* Court sat, and erred), or 2026-27 (under a proper *Glucksberg*-style counting of current state practice).⁷

Part III. On Precedent and Overruling⁸

That *Williams* was wrongly decided is the easy part of today’s case. The harder part is the remedy. If

⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 710-11 (1997) (opinion of the Court) (Rehnquist, C.J.) (canvassing state practice in analyzing a claimed constitutional right against states); see also *Bruen*, 597 U.S. at 79-80 (Kavanaugh, J., concurring) (describing the state law at issue as an “outlier” among the states and repeatedly noting that “43 states” employed a different regime).

⁸ Part III of this brief borrows heavily from Amar, *America’s Unwritten Constitution*, at 234-241.

this Court concludes that *Williams* was wrong as a matter of constitutional interpretation, *may* it overrule that precedent for that reason alone? *Must* it do so? How should the Court treat a confessedly wrong constitutional precedent going forward, and what relief—if any—is owed to those whose rights have already been denied?

In a nutshell: Both the Constitution and this Court's own meta-precedents (that is, its precedents about precedent) oblige the Court to say what the law is, and to tell the American people that a prior case deviated from the supreme law of the land. Then, and distinctly (for rights are distinct from remedies), the Court may decide to overturn the precedent for no other reason than that it got the Constitution wrong; or it may properly pause before doing so when structural and/or equitable principles, including reliance, so dictate. But in today's case—Petitioner Kian's case—neither structural nor equitable principles justify continued adherence to *Williams*, which *mangled* the *core* meaning of a *clear constitutional right*. Petitioner Kian deserves a proper retrial with a proper twelve-person jury. Ditto for all similarly situated defendants whose verdicts have not yet been blessed by this Court on direct review. Cases brought by future habeas petitioners will implicate different considerations, as shall be discussed in more detail *infra* Part IV.

A. On Rights Declaration

This Court's duty is to say what the law is, even (indeed, especially) when this Court previously got the supreme law—the Constitution—badly wrong.

True, Article III structures the Supreme Court as a continuous body. The Court never automatically turns over, as the House does every two years and the presidency does every four. A continuing body is designed to give some weight to its past and some thought to its future. It does not invent itself anew each day. Given the Court's clear constitutional architecture, today's justices may properly give past Court decisions a rebuttable presumption of correctness. A past case—*horizontal* precedent—may control until proved wrong, with those challenging it saddled with the burden of proof.

Precedent also operates with special force *vertically*, when this Court, the “supreme” Court, lays down the law for “inferior” courts. U.S. Const. art. III, § 1. And precedent may carry special weight in cases involving mere statutory construction or common-law rulings, or in constitutional cases in which the issue is not what the Constitution in fact *means*, but only how it might best be implemented, doctrinally—whether, say, to use this four-part test or that three-factor framework.

But today's Court in this case confronts an entirely different situation, involving the *core meaning* of a *bedrock constitutional right*. If any member of today's Court is convinced, based on Part II of this brief or for any other reason, that *Williams* misread — indeed, mangled — the written Constitution, then the judicial oath of office to the Constitution generally obliges that justice to follow the Constitution itself, and not *Williams*. Just as this Court under *Marbury* is generally obliged not to enforce constitutionally erroneous statutes passed by

Congress, so too is this Court generally obliged not to follow its own constitutionally erroneous precedents.

This basic principle of constitutional text and structure is strongly confirmed by this Court’s actual precedents—that is, its precedents on precedent, its *meta-precedents*, so to speak.

At least seven times in the twentieth century alone, this Court overruled itself in a constitutional case simply and solely because the Court believed that the prior case was wrongly decided as a matter of constitutional meaning. Modern *stare decisis* “factors” emphasized by Respondent—factors like workability, consistency with other case law, and compatibility with subsequent factual developments—played no role in these cases and were not necessary to the Court’s decision to overrule.

1. *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (overruling *Long v. Rockwood*, 277 U.S. 142 (1928)) (federal immunity from state taxation);
2. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)) (federal general common law);
3. *O’Malley v. Woodrough*, 307 U.S. 277 (1939) (overruling *Evans v. Gore*, 253 U.S. 245 (1920) and *Miles v. Graham*, 268 U.S. 501 (1925)) (taxation of Article III salary);
4. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville*

Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)) (free expression);

5. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)) (congressional power under the Thirteenth Amendment);
6. *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (overruling *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871)) (state taxation of imports);
7. *Daniels v. Williams*, 474 U.S. 327 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527 (1981)) (due process).

These seven precedents span decades and cover a wide range of constitutional questions. This set of seven includes several truly iconic decisions, household names in legal households—most notably, *Erie* and *Barnette*. None of these seven overruling precedents has itself ever been overruled.

Taken as a group, these meta-precedential cases confirm that today’s Court may indeed properly overrule yesterday’s case, *Williams*, simply because *Williams* grossly misinterpreted the Constitution—and strongly suggest that today’s Court *should* do so, absent certain special countervailing considerations (which this brief analyzes in Section III.C and Part IV *infra*).

If this Court generally felt free (or obliged!) to follow *clearly erroneous* case law concerning the *core meaning* of the *Constitution*, then the foundational

document might ultimately be wholly eclipsed. Rather than simply filling the document's gaps, judicial doctrine would erase its outlines. If the written Constitution indeed contemplated this odd result, one would expect to see a rather clear statement to that effect: "This Constitution may be wholly superseded by conceded judicial misinterpretations; all branches are oath-bound to follow these misinterpretations, howsoever egregious." But the Constitution says nothing of the sort. On the contrary, it explicitly and self-referentially obliges all officials to swear oaths to itself, not to conceded and egregious misinterpretations of it. U.S. Const. art. VI.

Indeed, the Constitution establishes a system of coordinate powers. If neither the legislature nor the executive may unilaterally change the document's meaning, *see Trump v. Barbara*, 146 S. Ct. 2438 (2026), why may the judiciary? The Constitution details elaborate checks and balances. If conceded misinterpretations become the supreme law of the land, what checks adequately limit judicial self-aggrandizement? Prior to the Constitution's ratification, none of its prominent supporters suggested that egregious judicial misconstructions would bind successor judges. Rather, the basic structure of the document suggested to ratifiers that whatever "We the People" deliberately laid down could not be changed, except by a later amendment reflecting wide and deep popular approval.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall declared that the American people's "original right to establish, for

their future government, such principles as, in their opinion, shall most conduce to their own happiness” was “the basis, on which the whole American fabric has been erected.” *Id.* at 176. Marshall went on to observe that “[t]he exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.” *Id.* Given that acts of constitution and amendment require great popular exertion that cannot be expected or desired to occur routinely, it seems perverse to insist that We the People must repeat what We proclaimed whenever judges garble what We proclaimed the first time.

The basic structural argument is that *Marbury*-style judicial review presupposes that judges are enforcing the People’s document, not their own deviations. Departures from the document—amendments—should come from the People, not from the high court. Otherwise, we are left with constitutionalism without the Constitution, popular sovereignty without the People.

B. On Remedies

So, this Court *may* overrule a past case whenever it believes that the past case plainly misinterpreted the central meaning of some part of the Constitution. But *must* it do so?

Not quite. Several moderating structural and remedial ideas come into play—“equitable”

considerations that Article III allows to be taken into account. (That article of course features language explicitly empowering federal courts to hear cases “in Law and Equity” arising under “this Constitution.”)

One structural and equitable notion may be stated as follows: Once We the People have struggled to put a rule or principle in the document, that rule or principle should not be altered, *except by the people themselves*.

On this view, an erroneous precedent that improperly deviates from the written Constitution may in some situations stand if the precedent is later championed not merely by the Court, but also by the people. When the citizenry has widely and enthusiastically embraced an erroneous precedent—when even most initial skeptics have deemed the precedent to be fundamental and admirable—a court of equity may sometimes, consistent with the document’s emphasis on popular sovereignty, view this precedent as sufficiently ratified by the American people so as to insulate it from judicial overruling. This is especially true if the erroneous precedent recognized an unenumerated right before its time.

An example: Let’s assume *arguendo* that *Miranda v. Arizona*, 384 U.S. 436 (1966), was wrong when it was handed down in 1966. Let’s assume further that because of shifts in popular culture, including the hit TV show *Dragnet*, *Miranda* quickly caught fire and captured the imagination of a wide swathe of citizens. If so, then *Miranda* at some point arguably became a proper Ninth Amendment/*Glucksberg*-style entitlement even though the Court

(by hypothesis) jumped the Fifth Amendment gun in 1966.

This line of analysis helps explain the central intuition of Chief Justice Rehnquist that *Miranda* has “become part of our national culture” in his opinion reaffirming *Miranda* for the Court in *Dickerson v. United States*, 530 U.S. 428, 443 (2000), even though the Chief had been a fierce critic of *Miranda* in earlier years. (It bears remembering that Chief Justice Rehnquist in 1997 had authored *Glucksberg*.)

In certain *Glucksberg* situations, unenumerated constitutional rights encompass, among other things, those basic rights that the people at large, in practice and in fact, believe that they have and should have under the Constitution. If enough people believe in a given right and view it as fundamental, then that right can—in certain situations—become a proper, albeit unenumerated, right of the people: a basic privilege of citizenship as understood by citizens themselves. It usually does not matter how the people’s belief arose—even if it arose as a result of a Supreme Court case that was wrong as a matter of text and original intent when decided.

Thus, if the Court at time T1 gets the Constitution’s text and original understanding wrong and proclaims a right that does not in fact properly exist at time T1, and if the vast majority of Americans come to rejoice in this right, the Court at time T2 should affirm the originally erroneous precedent. *Cf. Dickerson*. The case, though wrong when decided, has become right thanks to an intervening change of fact—broad and deep popular endorsement—that the

Constitution's own text, via the Ninth and Fourteenth Amendments, endows with special significance.

But here is a crucial asymmetry: A case such as Williams, which construes a textual constitutional right too narrowly, is quite different from a case (arguably, Miranda) that construes a textual constitutional right too broadly. Even if both cases come to be widely embraced by the citizenry, only the rights-expanding case (*Miranda*, in this example) interacts with the text of the Ninth and Fourteenth Amendments so as to specially immunize it from subsequent reversal. In other words, unenumerated rights, including those ratifying erroneous judicial precedents, may go *above and beyond* the textually enumerated rights, but they may never *dilute* or *underenforce* those rights. *Cf. Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (explaining that Congress, acting pursuant to Section 5 of the Fourteenth Amendment, may at times properly go above the floor of Section 1 rights as enforced by courts, but not below).

A second equitable principle—reliance, prominent in judicial decisions stretching back hundreds of years—directs judges to give due weight to the ways in which litigants who come before the Court may have reasonably relied upon prior case law. Judicial power, by its nature, is retrospective. The judiciary applies law to transactions that have already occurred. Erroneous precedents create facts on the ground that properly influence the application of retrospective judicial power. In some cases, these facts limit the Court's ability to abruptly change course, even if persuaded of past error. For example,

even if the Court were tomorrow to deem erroneous its long-standing precedents upholding the constitutionality of paper money, surely the justices could not ignore the vast economic system that has built up in reliance on greenbacks. *Cf. Trump v. Cook*, 143 S. Ct. 2234 (2026) (Kavanaugh, J., concurring).

Erroneous precedents are not unique in this respect. Prior unconstitutional conduct of other branches may likewise create *faits accomplis* that courts cannot easily undo after the fact. A sound structural and equitable approach would respect the general coordinacy of the three branches and would recognize that judges must have due regard for facts on the ground created by prior actions of all branches and levels of government. This feature of judicial underenforcement is built into the very structure of Article III, under which judicial review can sometimes occur long after certain practices have become settled and virtually impossible for courts to reverse.

Impossible for courts to reverse—but not necessarily for legislatures. A prior erroneous Court ruling does not properly amend the Constitution, and other branches of government may be able to return to a constitutionally proper regime by acting purely prospectively in a way that judges perhaps should not. Imagine, for example, a statute proposing a gradual ten-year phase-in of a new, more constitutionally appropriate regime to replace the old case law that the Court now admits was erroneous. Were the Court itself to announce such a purely prospective phase-in, this announcement might strain the traditional boundaries of proper “judicial

Power,” precisely because the announcement would look purely “legislative” in nature. But legislatures, of course, typically act in precisely this purely prospective fashion, and phase-in statutes are commonplace.

It is thus important for today’s Court to tell the public if the justices erred in *Williams*, precisely so that the other branches may ponder their constitutionally permissible options.

The Court’s duty, then, is not to avoid deciding whether precedent rightly or wrongly interpreted the Constitution. Rather, the judicial duty is *first* (in its role as rights-declarer) to admit error whenever the Court finds that error has occurred, and then *second* (in its role as remedy-provider) to consider whether special reliance interests apply and how those interests might limit the use of retrospective judicial power. *Cf. Marbury*, 5 U.S. at 154 (treating the judicial recognition of a right as conceptually distinct from the availability of a judicial remedy).

In other words, the Court’s province and duty is to say what the law is—the law of the Constitution, of course. If, in the process, the Court decides that this supreme law has been violated, whether by a state law, a federal law, or a presidential proclamation—or *a past ruling of the Court itself*—the justices should declare that fact and then do their best to analyze how, if at all, this wrong might be righted, and by whom. *Cf. Ramos*, 590 U.S. at 105 (“[S]tare decisis isn’t supposed to be the art of methodically ignoring what everyone knows to be true.”). When the Court itself is the source of a constitutional wrong, as it was

in *Williams*, it has a particular obligation to help right that wrong, or at least to identify how the wrong could be righted by sister branches.

Happily, the Constitution and the case law on issues of meta-precedent cohere. What the text says about itself (the text) and what it says about precedent mesh nicely with what the precedents say about the text and what the precedents say about themselves (the precedents). Though the issues in today's case might seem rather small in the grand scheme of things, they offer this Court a very special opportunity to clarify first principles of text, history, structure, and precedent.

Indeed, today's case is all the easier because, as Petitioner's brief explains in careful detail, a recent precedential development—a landmark decision of this Court that postdates *Williams*—undercuts the conceptual foundations of that ill-reasoned 1970 ruling. *See Ramos*, 590 U.S. at 90 (insisting on jury unanimity in both federal and state criminal cases of a serious nature). Quoting underlying authorities, *Ramos* itself thrice referred to a “unanimous” jury of “twelve.” *Id.* at 90, 92, 96 n.38; *see also id.* at 100 n.46. *Kian*'s resolution is thus arguably implicit in *Ramos*'s holding and reasoning. On this broad reading of *Ramos*, the Court has *already* acknowledged, *contra Williams*, that the Constitution requires twelve votes to convict a criminal defendant of a serious crime. Ten out of twelve is not sufficient, and ten out of ten is not either.

Even if it wanted to, then, today's Court cannot simply invoke the mindless mantra of “precedent,

precedent, precedent.” *The precedents themselves conflict at their very foundations*. Either today’s Court follows the clean substantive and methodological logic of *Ramos* (which of course *overruled* the 1972 *Apodaca* case,⁹ a close cousin of the 1970 *Williams* case, and did so with pointed fidelity to the Constitution’s text, structure, and original meaning); or today’s Court perpetuates the mushy mess and constitutional infidelity of *Williams*.¹⁰

C. On Reliance¹¹

Properly understood, reliance should not become a magic shield to insulate all previous judicial error. Rather, reliance, when deployed to insulate prior judicial error, must be understood precisely and narrowly. One key equitable idea is that litigants, especially private litigants, who structured their conduct around an erroneous precedent should, if possible, not be rendered *grossly worse off* than if that erroneous precedent had never existed.

Imagine, for example, that in 2016, this Court had ruled in the hypothetical case of *Rosey v. Dosey* that the *malum prohibitum* Florida law at issue

⁹ The Court in *Apodaca v. Oregon*, 406 U.S. 404 (1972), upheld a nonunanimous jury conviction in a case involving a serious crime.

¹⁰ According to existing doctrine, a six-person “jury” is just fine, see *Williams*, but not a five-person jury, see *Ballew v. Georgia*, 435 U.S. 223 (1978). Where in the world did this utterly arbitrary line come from? Here too, we see that the precedents conflict at their very foundation.

¹¹ Part III.C of this brief borrows from Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 Harv. L. Rev. 145, 156-61 (2008).

today—Fla. Stat. § 460.411(1)(b), criminalizing the unauthorized practice of chiropractic medicine—was unconstitutional under, say, the doctrine of substantive due process. Imagine further that a hypothetical law-abiding citizen, Kamed Hian, practiced chiropractic medicine in 2025 without a license, notwithstanding the formal existence on the books of Fla. Stat. § 460.411(1)(b), because Hian correctly believed that his conduct was in every relevant respect identical to the conduct at issue in *Rosey v. Dosey*. Were the Court today to deem *Rosey v. Dosey* clearly erroneous and squarely overrule it, Hian’s unauthorized practice of chiropractic medicine in 2025 should never subject him to prosecution or penalty. In this hypothetical, Hian *relied* on *Rosey v. Dosey* in a rather obvious way: Had that precedent never existed, the scrupulously law-abiding Hian would not have practiced chiropractic medicine because he would have understood that Fla. Stat. § 460.411(1)(b) fully applied to his conduct. To punish or penalize Hian for his 2025 conduct would render him *grossly worse off* than he would have been had the erroneous *Rosey v. Dosey* case never existed. Punishment of Hian would be inequitable and perhaps also violate his due-process-and-rule-of-law right to fair notice. *Cf. United States v. Harriss*, 347 U. S. 612, 617 (1954) (“[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”); *Cox v. Louisiana*, 379 U.S. 536, 571 (1965) (condemning “entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him”).

In this hypothetical, even though *Rosey v. Dosey* should be overruled today—because the Court now views it as plainly erroneous—the Court would need to attend to the reliance interests that it itself created back in *Rosey v. Dosey* and should try to minimize the degree to which persons are made *grossly worse off* than they would have been had *Rosey v. Dosey* never existed.

Part IV. On Habeas

Today's case involving the very real Hamed Kian is of course sharply distinct from the case of the entirely hypothetical Kamed Hian. *Williams v. Florida* underread a key constitutional right of a private person rather than overreading a private right as did the hypothetical case of *Rosey v. Dosey*. How then should today's Court proceed after it declares that *Williams* was wrong and is no longer good law?

In Kian's case and in all pending cases on direct review, the Court should vacate the conviction and allow the state government to re prosecute before a properly constituted twelve-person jury. Under the sound and well-established doctrine of continuing jeopardy, double-jeopardy principles of course pose no bar to retrial. See *Burks v. United States*, 437 U.S. 1, 14-18 (1978); see also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1806, 1842-45 (1997). The government in each retrial must endure some expense, but it has only itself to blame. Nothing in *Williams* required Florida or any other state government to skimp on juries and flout basic principles that have always applied in all federal

courts and have almost always applied in almost all state courts. Each defendant, too, of course, must endure a second trial, alas, but this is the inescapable cost of the strong and legitimate interest of society to fairly try the matter.

In future cases on habeas, the Court will need to make hard choices. (It need not make these choices today, unless it is so inclined.) Here are the basic options, as amicus now sees the matter.

First, the Court could vacate all convictions, while permitting retrial, just as on direct review. The theory here would be that a six-person jury is not a proper jury at all. Legally, it is as if all these persons are currently being held extrajudicially, with no proper conviction to warrant their continued incarceration.

But the number of possible cases here is perhaps astronomical, unlike the handful of cases now pending on direct review. Many of these habeas cases involve facts from long ago, where evidence has now faded or disappeared entirely, and where key witnesses have moved away or died. In many situations, a fair retrial may no longer be possible. States and crime victims would thus be rendered massively worse off than they would have been had *Williams* been decided rightly back in 1970, and had states thereafter used proper twelve-person juries.

Second, today's (or tomorrow's) Court could say that today's ruling is categorically unavailable to habeas petitioners. Each defendant, it could be said, did in fact get a jury of sorts, even if not a perfect one.

On this view, the issue is not truly identical to extra-judicial incarcerations. Rather, a pro-defendant ruling in today's case is essentially a "new" rule, and habeas does not apply to new rules. *See Teague v. Lane*, 489 U.S. 288 (1989); *Edwards v. Vannoy*, 593 U.S. 255 (2021). If a *Batson*-defective jury¹² is a good enough jury for habeas purposes, *see Teague*, and a *Ramos*-defective jury is a good enough jury for habeas purposes, *see Edwards*, so too a size-defective jury is good enough for habeas purposes.

But really? A ruling today for Hamed Kian would not in truth be a "new" judge-made rule. Rather, such a ruling would simply restore what almost all sound jurists thought the law was in the decades—centuries!—before Justice Byron White and some others on the Burger Court blithely gave the Constitution the back of their judicial hand in *Williams*. To apply today's ruling fully retroactively would be to apply the law that clearly *should have applied* back in 1970 and in every year before and after. *Cf. Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (distinguishing between a "new" rule that should not apply in habeas and a situation in which the Court has "simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

¹² The Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), ruled that the Constitution prohibits race-based peremptory challenges and structured a judicial process for implementing this prohibition.

Put differently, *Williams* was obviously wrong the day it was decided. A rose is a rose is a rose; a jury is a jury is a jury. An American criminal jury has always meant twelve, as a general rule, as anyone in 1970 should have known, if for no other reason than Henry Fonda in the unforgettable 1957 movie with the iconic title, *Twelve Angry Men*. (Had there only been six jurors, there would have been a fifty-fifty chance that the Fonda character would not even have made the cut!) See generally Kirk Semple, *The Movie That Made a Supreme Court Justice*, N.Y. Times (Oct. 17, 2010).

On this view, a *Batson*-defective jury is still a *jury* of sorts, and so is a *Ramos*-defective jury. But a six-person thing is simply *not a jury at all and never was a jury*, and thus such a thing is and always has been a clear violation of the *jury*-mandate rule that this Court laid down way back in *Duncan v. Louisiana* in 1968, even before *Williams*. The ancient definition was never “twelve good men, and true and unanimous.” But it was always “*twelve* good men, and true.” If *Teague* means that truly new rules do not properly apply in habeas, the new rule, in truth, is not the age-old rule that Petitioner and amicus seek to revive today, but rather the astonishingly new rule that the *Williams* majority simply made up back in 1970. Recall Justice Harlan’s honest reminder in *Williams*: “[B]efore today it would have been *unthinkable* to suggest that the Sixth Amendment’s right to a trial by jury is satisfied by a jury of six.” *Williams*, 399 U.S. at 122 (Harlan, J., concurring in the result) (emphasis added).

A *third* approach would distinguish pre-*Ramos* convictions from post-*Ramos* convictions. On this view, as powerfully elaborated in Petitioner’s brief and discussed above, the deep logic of *Ramos* itself overruled *Williams*, albeit *sub silentio*, and put all states on notice that they were obliged to honor criminal defendants’ Sixth Amendment and Fourteenth Amendment jury rights as originally understood. All undersized jury convictions that became final after *Ramos* occurred, essentially, without the blessing of this Court and at the states’ own risk—occurred not in express compliance with *Williams* but rather in implicit violation of *Ramos*. All such convictions should be voided on habeas (with future retrials permitted, of course) under the strict logic of *Teague*, and in line with Justice Harlan’s analysis in *Desist*. As a practical matter, it will generally be easier to retry the warehouse-size stack of relatively recent post-*Ramos* cases than to retry the mountain-size and much older pile of all post-*Williams* cases.

A *fourth* approach would be to use harmless-error analysis to distinguish close cases, where six more jurors might well have changed the trial outcome long ago, from the mine-run of cases where twelve jurors would quite likely have done the same thing that six jurors in fact did. There are doubtless a wide variety of ways for today’s (or tomorrow’s) Court to allocate burdens of proof in these harmless-error inquiries.

A *fifth* approach, which has all the virtues and all the vices of extreme formalism, is to allow habeas claims only in the tiny handful of cases in which the

inadequate-jury issue was in fact squarely raised before or at trial by defendant's counsel. On this view, defendants who agreed to smaller juries essentially waived their right to a full-sized jury. And they did get something of value in exchange for this implicit waiver: the possibility of full acquittal by a smaller jury, whereas a larger jury might well have simply deadlocked and thus subjected them to a higher risk of immediate retrial.

The choice among these above-catalogued options will best be made in a later habeas case or series of habeas cases brought to this Court—presumably with detailed briefing on, among other things, the precise numbers, dates, and offense-grades of skimpy-jury guilty verdicts in each affected state. *See Ramos*, 590 U.S. at 109 (overturning a precedent and reserving the retroactivity question for a future case). Amicus candidly concedes that none of the five options canvassed above is wildly attractive, given the fact that so many trials have occurred over so long a time under a regime that was, is, and always has been, so clearly constitutionally defective. Most of the fault for this sorry state of affairs does not fall upon the current members of this Court. But one lesson that today's justices should take home is this: Bad things usually ensue when this Court for decades turns a blind eye to the plain meaning of core constitutional rights.

To recap: *Williams* was, when decided, and remains today, egregiously wrong and should thus be tossed on the ash-heap of history alongside the likes

of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Gobitis*. The transition to a proper new criminal-jury regime in a handful of states may well involve hard remedial choices—choices that need not be made by today’s Court.

On the jury-size issue, the sole dissenter in *Williams*, the great Thurgood Marshall, was plainly right, just as the sole dissenter in *Plessy*, the great John Marshall Harlan, was plainly right, and the sole dissenter in *Gobitis*, the great Harlan Fiske Stone, was plainly right. In its landmark decisions in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and *Barnette*, this Court quite properly vindicated Justice Harlan and Justice Stone. Today it should do the same for Justice Marshall.

CONCLUSION

Amicus urges that this Court reverse the judgment below and set aside Hamed Kian’s constitutionally improper conviction.

Respectfully submitted,

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