

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 OF AMERICAN CIVIL LIBERTIES
UNION, AMERICAN CIVIL LIBERTIES UNION
OF FLORIDA, THE RUTHERFORD
INSTITUTE, AND THE MACARTHUR JUSTICE
CENTER, AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER**

CECILLIA D. WANG
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
425 California Street,
Suite 700
San Francisco, CA 94104

DEVI M. RAO
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE
CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
devi.rao@macarthurjustice.org

Additional counsel listed on inside cover

BRANDON BUSKEY
PRIYANKA MENON*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD
INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

DANIEL TILLEY
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
OF FLORIDA
4343 W. Flagler Street
Suite 400
Miami, FL 33134

STUART BANNER
UCLA SCHOOL OF LAW
SUPREME COURT CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095

*Admitted only in Maryland

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*¹

The American Civil Liberties Union (the “ACLU”) is a nationwide, non-profit, non-partisan organization with more than 1.3 million members, founded in 1920 and dedicated to the principles of liberty and equality enshrined in the Constitution. In support of those principles, the ACLU has appeared before this Court as *amicus curiae* in numerous cases concerning the Sixth Amendment right to a jury trial, including: *Minor v. Florida*, 146 S. Ct. 1668 (2026) (denying certiorari); *Khorrami v. Arizona*, 143 S. Ct. 22 (2022) (denying certiorari); *Edwards v. Vannoy*, 593 U.S. 255 (2021); *Ramos v. Louisiana*, 590 U.S. 83 (2020). The American Civil Liberties Union Foundation of Florida is a non-profit, non-partisan membership organization devoted to protecting civil rights and civil liberties for all Floridians. It is a state affiliate of the ACLU.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when

¹ No counsel for a party authored this brief in whole or in part. Neither of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

it infringes on the rights guaranteed by the Constitution and laws of the United States.

The Roderick and Solange MacArthur Justice Center (“MJC”) is a national not-for-profit civil rights organization founded in 1985 by the family of J. Roderick MacArthur to advocate for civil and human rights, and for a fair and humane criminal legal system. MJC attorneys have played a key role in advocacy on criminal legal system issues including criminal procedure issues generally and Sixth Amendment rights specifically. In addition to direct representation on behalf of its clients, MJC frequently files *amicus* briefs related to these issues throughout the federal circuits, in state appellate courts, and in this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sixth Amendment to the Constitution guarantees the right to trial by jury. That guarantee carries with it the Founding-era understanding that the jury—“the great bulwark of [our] civil and political liberties,” 2 Joseph Story, *Commentaries on the Constitution of the United States* §1779, at 540 (Thomas M. Cooley ed., Boston, 4th ed. 1873) (“Story, *Commentaries*”)—must have twelve members to convict the criminally accused.

The historical record is clear that the Sixth Amendment guarantees the right to be tried by a twelve-person jury. Under English common law, the jury was a body of twelve. A group that was smaller or larger could not deliver a verdict. When the Constitution and the Bill of Rights were ratified, the American common-law rule was identical. And numerous post-ratification cases and treatises demonstrate that the word “jury” in the Constitution

and the Bill of Rights was originally understood to bear its common-law meaning: It required twelve members.

This Court’s precedents have echoed this historical understanding. *See, e.g., Erlinger v. United States*, 602 U.S. 821, 831 (2024) (recognizing that a criminal defendant must be convicted “by the unanimous suffrage of *twelve* of his equals and neighbours”) (emphasis added; cleaned up); *Ramos v. Louisiana*, 590 U.S. 83, 92 (2020) (“[A] defendant enjoys a ‘constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a *jury of twelve persons.*’”) (quoting *Thompson v. Utah*, 170 U.S. 343, 351 (1898)) (emphasis added).

Yet, for half a century, criminal defendants in a small minority of States have been subject to a practice that never would have passed muster at our nation’s Founding: being denied the right to a jury comprised of twelve peers when their life and liberty are in jeopardy. As described below, this Court’s decision in *Williams v. Florida*, 399 U.S. 78 (1970), is demonstrably inconsistent with the original meaning of the Sixth Amendment. In *Ramos*, this Court established that *Williams*’s mode of analysis is dead wrong, and that the Sixth Amendment’s jury trial clause is defined by its original public meaning. To the extent that *Ramos* did not already overrule *Williams*, this Court should do so now.

ARGUMENT

The Original Meaning of “Jury,” as the Term Was Enshrined in the Constitution, Is a Body with Twelve Members

The Sixth Amendment provides that, “[i]n all criminal prosecutions,” the defendant has the right to trial by “jury.” As this Court has explained, that constitutional text must be “interpreted by reference to historical practices and understandings.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (cleaned up).² That is, the right to trial by “jury” in criminal cases under the Sixth Amendment carries its “original public meaning.” *Ramos*, 590 U.S. at 92; *accord Southern Union Co. v. United States*, 567 U.S. 343, 353 (2012); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *United States v. Gaudin*, 515 U.S. 506, 512-13, 516 (1995).

When the Bill of Rights was ratified, “jury” was a familiar term under English and American common law: It referred to a body of twelve members. *See Khorrami*, 143 S. Ct. at 27 (Gorsuch, J., dissenting from the denial of certiorari); *accord Cunningham v. Florida*, 144 S. Ct. 1287, 1287 (2024) (Gorsuch, J., dissenting from the denial of certiorari). The Court should therefore hold that the Sixth Amendment

² *Accord Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2303 (2025) (Thomas, J.); *United States v. Rahimi*, 602 U.S. 680, 691 (2024) (Roberts, C.J.); *Haaland v. Brackeen*, 599 U.S. 255, 288-91 (2023) (Barrett, J.); *Hemphill v. New York*, 595 U.S. 140, 150-52 (2022) (Sotomayor, J.); *Edwards v. Vannoy*, 593 U.S. 255, 266 (2021) (Kavanaugh, J.); *Chiafalo v. Washington*, 591 U.S. 578, 588 (2020) (Kagan, J.)

guarantees a constitutional right to a twelve-person jury in criminal cases.

A. Under English Common Law, a “Jury” Had Twelve Members.

By the eighteenth century, the institution of the twelve-member jury had been firmly established in English law. “If a prisoner pleaded Not guilty, as most did, and put himself on the country, twelve jurors were sworn in.” John H. Baker, *An Introduction to English Legal History* 509 (4th ed. 2002).

This requirement of twelve was emphasized in the leading eighteenth-century treatise on English criminal law, Matthew Hale’s *History of the Pleas of the Crown*. At trial, Hale explained, “the jury are commanded to look on the prisoners, and then severally twelve of them, neither more nor less, are sworn.”² Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 293 (London, 1736). Hale observed that, if the jurors numbered less than twelve, they had no power to act. If one juror “goes out of town,” he noted, “whereby only eleven remain, these eleven cannot give any verdict without the twelfth.” *Id.* at 295. The eleven remaining jurors had to “be discharged, and a new jury sworn, and new evidence given, and the verdict taken of the new jury.” *Id.* at 295-96. Likewise, “[i]f only eleven be sworn by mistake, no verdict can be taken of the eleven.” *Id.* at 296.

The same principle—that a jury must have twelve members—was repeated in many other English treatises of the period. The “Number must be Twelve,” insisted one treatise on juries. Giles Duncombe, *Trials per Pais: or the Law of England Concerning Juries* 79 (London, 5th ed. 1718). “And the Law is so precise in

this Number of Twelve, that if the Trial be by more or less, it is a Mistrial.” *Id.* at 79-80. As another author explained, “no One shall be Convict by Verdict, unless the Offence is found . . . by Twelve (not more or less) of the Petty Jury upon Trial.” Thomas Wood, *An Institute of the Laws of England* 623 (London, 3d ed. 1724). Another treatise declared that “on a trial by a petit jury no more nor less than twelve can be allowed.” Joseph Bingham, *A New Practical Digest of the Law of Evidence* 63 (London, 1797).

Manuals for judges explained that, when conducting a criminal trial, exactly twelve jurors had to be sworn. “[C]all the Foreman of the Jury, and say to him, Lay your Hand on the Book,” instructed one guidebook. Michael Dalton, *The Country Justice* 654 (London, 1727). Once the foreman had been sworn, “[t]hen call the Second, and swear him in like Manner, and so to Twelve; and neither more nor less must be sworn.” *Id.* To be on the safe side, the judge was advised to “count them Twelve” before proceeding any further. *Id.*

Consistent with this historical understanding, legal dictionaries of the era defined “jury” as a body of twelve people. See 2 Timothy Cunningham, *A New and Complete Law-Dictionary* (London, 1765) (defining “jury” as body “of twelve, [which] can be neither more nor less”) (unpaginated; quotation is from section 3 of the definition of “jury”); 2 Richard Burn, *A New Law Dictionary* 45 (London, 1792) (“upon a trial by a petit jury, it can be by no more, nor less, than 12”). These sources support the conclusion that the ordinary meaning of “jury” is a twelve-member body, for constitutional interpretation is “guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and

phrases were used in their normal and ordinary as distinguished from technical meaning.” *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)) (brackets in *Heller*); accord *NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014) (using Founding-era dictionary definition to ascertain original meaning); *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 813-14 (2015) (similar).

The same point was made in works intended to summarize the English legal system for a general audience. “[B]y a fundamental law in our government,” one book explained, no one could be convicted “for any crime whatsoever, but upon being found guilty on two several tryals (for so may that of the grand and petit jury be called) and the judgment of twice twelve men at least.” *British Liberties, or the Free-born Subject’s Inheritance* 370 (London, 1766). The “twice twelve” referred to the size of the grand and petit juries: “twelve or more to find the bill of indictment against him, and twelve others to give judgment upon the general issue of *Not guilty*.” *Id.* The petit jury “always consists of twelve men, and no more nor any less.” *Id.* at 376-77 (footnote omitted). Another contemporary author likewise observed that conviction of a crime required the verdict of “no less than twelve honest, substantial, impartial” jurors. John Hawles, *The Englishman’s Right* 5 (London, 1771).

The requirement that juries have twelve members was so well established in eighteenth-century England that, when William Blackstone composed his ubiquitous *Commentaries*, he did not need to belabor the point, because it was already familiar to his readers. Blackstone praised “[t]he antiquity and

excellence” of the English institution of jury trial, which he contrasted with juryless places like “France or Turkey,” where monarchs could “imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure.” 4 William Blackstone, *Commentaries on the Laws of England* 343 (Oxford, 1769) (“Blackstone, *Commentaries*”). It was one of “the liberties of England” that one could not be convicted of a crime without “the unanimous suffrage of twelve of his equals and neighbours.” *Id.*; see *Khorrami*, 143 S. Ct. at 23 (Gorsuch, J., dissenting from the denial of certiorari) (“[i]n 1769, Blackstone stated the rule succinctly”); *Erlinger*, 602 U.S. at 831.

In the late eighteenth century, English law was thus clear. A “jury” was a body with twelve members. A group that was smaller could not render a verdict in a criminal case.

B. When the Constitution was Ratified, Americans Likewise Understood the Term “Jury” To Mean a Group of Twelve.

American law in the Founding era largely replicated English law. The size of criminal juries was no exception. American guidebooks for judges, like their English predecessors, instructed that juries should be no smaller or larger than twelve. See Matthew Hale, *Conductor Generalis: or, the Office, Duty and Authority of Justices of the Peace* 393 (Woodbridge, N.J., 1764); *Burn’s Abridgment, or the American Justice* 380 (Dover, N.H., 2d ed. 1792).

“In the 1790s, James Wilson, both a framer . . . and a Justice . . . , explained the common-law rule”: “[T]welve jurors is of indispensable necessity.”

Khorrami, 143 S. Ct. at 23 (Gorsuch, J., dissenting from the denial of certiorari). In a series of lectures delivered in 1790-1791, Wilson further defined a “verdict” as “the joint declaration of twelve jurymen upon their oaths.” 2 Bird Wilson, *The Works of the Honourable James Wilson, L.L.D.* 343 (Philadelphia, 1804). And as Chief Justice McKean of the Pennsylvania Supreme Court put it in 1788, “I have always understood it to be the law, independent of [the state constitution’s bill of rights], that the *twelve jurors* must be unanimous in their verdict.” *Respublica v. Oswald*, 1 U.S. 319, 323 (Pa. 1788) (statement) (emphasis added).

The correspondence of members of the Continental Congress likewise shows that juries were understood to have twelve members. In one letter, John Dickinson explained that the right to jury trial means “that neither Life, Liberty, or property can be taken from the Possessor, until twelve of his Countrymen and Peers” reach a verdict. 1 *Letters of Delegates to Congress, 1774-1789*, at 236, 238 (Paul H. Smith ed., 1976). William Pierce of Virginia similarly insisted that the criminal jury have twelve members: “The solemnity of the trial by jury is suited to the nature of criminal cases, because . . . the fact or truth of every accusation . . . is to be confirmed by the unanimous suffrage of twelve good men, ‘superior to all suspicion.’” 24 *id.* at 445, 448 (1996).

In fact, the requirement that juries have twelve members was the basis for one of the first instances of judicial review in the United States. New Jersey’s constitution of 1776 provided that “the inestimable Right of Trial by Jury shall remain confirmed.” N.J. Const. of 1776, art. XXII. Although the state constitution did not specify the size of the jury, the

New Jersey Supreme Court held in *Holmes v. Walton* (N.J. 1780) that a statute providing for six-person juries was void because a jury of six “was not a constitutional jury.” *State v. Parkhurst*, 9 N.J.L. 427, 444 (1802).³

The right to a jury trial in criminal cases is so “fundamental to the American scheme of justice” that it appears “not only in the Sixth Amendment, but also in Article III.” *Ramos*, 590 U.S. at 89, 93; see U.S. Const. art. III, § 2, cl. 3. So important was the jury at the Founding that, “[i]n the ratification debates,” “some questioned” whether the guarantee in Article III alone sufficed. *Erlinger*, 602 U.S. at 830. “To address this and other concerns about the new Constitution, James Madison agreed to draft a series of amendments we now know as the Bill of Rights,” including the Sixth Amendment. *Id.*

During those disputes over whether the new Constitution sufficiently protected the right to a jury trial—a right that had to be “guarded with the most jealous circumspection,” *id.* (cleaned up)—the delegates understood that juries would have twelve members. For instance, in the Virginia ratifying convention, Edmund Randolph defended the Constitution against the claim that it was deficient because it lacked a bill of rights.⁴ Randolph argued that no bill of rights was necessary. “Is there not provision made, in this Constitution, for the trial by jury in criminal cases?” he asked. 3 *The Debates in the Several State*

³ *Holmes* was not reported, but it was discussed in *Parkhurst*.

⁴ Randolph was then the Commonwealth’s governor. When the Constitution was ratified, he became the nation’s first attorney general.

Conventions, on the Adoption of the Federal Constitution 467 (Jonathan Elliot ed., Washington, 2d ed. 1836). He insisted that there was no reason for the Constitution to address the topic in any more detail, because “[t]here is no suspicion that less than twelve jurors will be thought sufficient.” *Id.*

On the other side of the Virginia debate, Patrick Henry, the Commonwealth’s former governor, attacked the Constitution for lacking a bill of rights. He feared that “we are to part with that trial by jury which our ancestors secured their lives and property with.” *Id.* at 544. Henry extolled the jury as an “excellent mode of trial,” because “[t]he unanimous verdict of twelve impartial men cannot be reversed.” *Id.*

In the Pennsylvania ratifying convention, Thomas McKean, the Commonwealth’s chief justice, defended the Constitution’s grant of appellate jurisdiction to the Supreme Court by observing that, at common law, appellate courts often reviewed the decisions of trial courts, even in some cases tried to a jury. McKean declared: “Juries are not infallible because they are twelve in number.” 2 *id.* at 540.

C. Post-Ratification Cases and Treatises Demonstrate the Term “Jury” Was Originally Understood To Carry Its Common-Law Meaning—a Body of Twelve Members.

The question sometimes arose in the early United States: Was a body with less than twelve members a “jury” as the term was used in the state and federal constitutions? American courts and commentators consistently held that it was not. They reasoned that the word “jury” meant a jury with twelve members,

because the state and federal constitutions had incorporated the conventional common-law understanding of the term. *See Khorrami*, 143 S. Ct. at 23 (Gorsuch, J., dissenting from the denial of certiorari). Trials thus required “a jury of twelve men, as now established by the constitution.” William Barton, *Observations on the Trial by Jury* 10 (Strasburg, Pa., 1803).

Early American courts used the same interpretive method that is still used today: When a legal text, such as a constitution, includes a term with a well-established meaning, the term should be given that meaning where no contrary intent appears. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012). In the oft-repeated words of Justice Frankfurter, “if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.” Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

The word “jury,” as used in the state and federal constitutions, thus meant the familiar twelve-member body that had been standard for centuries. As one court explained:

The trial by jury is a great constitutional right, and when the convention incorporated the provision into the constitution of the country, they most unquestionably had reference to the jury trial as known and recognized by the common law. It is a well ascertained fact, that the common law jury consisted of twelve men, and as a necessary consequence, since the constitution is silent

upon the subject, the conclusion is irresistible [sic] that the framers of that instrument intended to require the same number.

Larillian v. Lane & Co., 8 Ark. 372, 374-75 (1848).

The Mississippi Supreme Court agreed in reversing a conviction by a jury of only eleven members. *Carpenter v. State*, 5 Miss. 163 (1839). To define the right to a trial by jury, the court observed, “we must necessarily recur to the provisions of the common law defining the qualifications, and ascertaining the number of which the jury shall consist; as the standard to which, doubtless, the framers of our constitution referred.” *Id.* at 166. Because “[a]t common law the number of the jury, for the trial of all issues involving the personal rights and liberties of the subject, could never be less than twelve,” the same was necessarily true under the constitution. *Id.*

The Ohio Supreme Court reached the same conclusion. It began by noting that, in the constitution, “the right of jury trial is recognized to exist.” *Work v. State*, 2 Ohio St. 296, 302 (1853). The court asked: “What, then, is this right? It is nowhere defined or described in the constitution. It is spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind.” *Id.* The court reviewed the history of juries in England and the United States, which showed “beyond controversy the number of the jury at common law The number must be twelve.” *Id.* at 304. Indeed, the court observed that the question of fewer than twelve jurors “has seldom arisen, but whenever it has, the same result has followed, without a single dissenting opinion or *dictum* to the contrary.”

Id. at 306. The court accordingly reversed a conviction obtained with a jury of less than twelve. *Id.* at 308.

Numerous other early state courts also reversed convictions that flowed from a jury of less than twelve. See *Doebler v. Commonwealth*, 3 Serg. & Rawle 237, 237 (Pa. 1817); *Jackson v. State*, 6 Blackf. 461, 461 (Ind. 1843); *Brown v. State*, 8 Blackf. 561, 561 (Ind. 1847); *Bowles v. State*, 37 Tenn. 360, 362-63 (1858); *State v. Meyers*, 68 Mo. 266, 266 (1878); *Byrd v. State*, 2 Miss. 163, 177 (1834). Such a result was necessary because a jury of less than twelve is “a fatal defect in criminal cases, without hesitation.” *Cowles v. Buckman*, 6 Iowa 161, 163 (1858).

The New Hampshire Supreme Court provided an especially thorough discussion of the issue in response to a request from the legislature for an opinion as to whether the legislature had the authority to reduce the size of juries. *Opinion of Justices*, 41 N.H. 550 (1860). “The terms ‘jury,’ and ‘trial by jury,’ are, and for ages have been well known in the language of the law,” the court began. *Id.* at 551. “They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men.” *Id.* When the constitution was adopted, the court continued, “no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices, had ever been known, or ever been the subject of discussion in any country of the common law.” *Id.* at 552. For this reason, the court concluded that “no body of less than twelve men, though they should be by law denominated a jury, would be a jury within the meaning of the constitution; nor would a trial by such a body, though called a trial by jury, be such, within the meaning of that instrument.” *Id.*

In short, early American courts consistently held that juries must have twelve members. *See Burk v. State*, 2 H. & J. 426, 426 (Md. 1809) (referring to “the legal number of twelve sworn on the jury”); *State v. Burket*, 9 S.C.L. 155, 155 (S.C. Const. Ct. App. 1818) (“To constitute a jury, every lawyer knows that twelve lawful men are necessary, and that without this number no jury can exist[.]”); *Footte v. Lawrence*, 1 Stew. 483, 483 (Ala. 1828) (“The term *jury* is well understood to be twelve men[.]”); *Wolfe v. Martin*, 2 Miss. 30, 31 (1834) (“There is no jury for the trial of issues known to the constitution and laws of this state, except that which consists of ‘twelve good and lawful men[.]’”); *Grayson v. Cummins*, Dallam 391, 393 (Tex. 1841) (“It has been often ruled that a less number than twelve is no jury[.]”); *Dixon v. Richards*, 3 Miss. 771, 771 (1838) (“The third error assigned is fatal. A jury must consist of twelve men: no other number is known to the law: here there was but eleven. The judgment must be reversed.”); *Norval v. Rice*, 2 Wis. 22, 26-29 (1853) (collecting sources reflecting the common law and holding that the constitutional right to trial by jury requires twelve-member juries); *In re Klein*, 14 F. Cas. 719, 729 (D. Mo.) (No. 7,866) (“Could congress direct a trial by jury, and provide that the jury should consist of three men; and that a majority should convict? No person will assert the affirmative.”), *rev’d on other grounds*, 42 U.S. (1 How.) 277 (C.C.D. Mo. 1843) (No. 7,865); *Cancemi v. People*, 18 N.Y. 128, 135 (1858) (“A legal jury, according to the common law, consists of twelve persons; our constitution declares that ‘the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever[.]’”) (citations omitted); *Briant v. Russel*, 2 N.J.L. 146, 146 (1806) (“It

appeared by the record, that the cause was tried by eleven jurors; for which cause the judgment was reversed.”). As one court summarized, “[w]henever there is a constitutional guaranty of the right of trial by jury, the jury must be composed of twelve men.” *State v. Mansfield*, 41 Mo. 470, 475 (1867).

Early American treatises reflected the consensus that the Constitution’s use of the term “jury” required a jury of twelve, because such was the accepted meaning of the term at common law. *See* 2 Story, *Commentaries* § 1779, at 541 (“[A] trial by jury is generally understood to mean, *ex vi termini* [by definition], a trial by a jury of *twelve* men, impartially selected, who must unanimously concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional.”); 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 761, at 532 (Boston, 1866) (“[I]t 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; and a statute authorizing a jury of less, in a case in which the constitution guarantees a jury trial, is void.”); *see also* Arthur J. Stansbury, *Elementary Catechism on the Constitution of the United States* 63 (Boston, 1828) (“[T]he jury consists of twelve persons[.]”); Peter Oxenbridge Thacher, *Observations on Some of the Methods Known in the Law of Massachusetts to Secure the Selection and Appointment of an Impartial Jury in Cases Civil and Criminal* 7 (Boston, 1834) (“The trial by jury is by twelve free and lawful men[.]”); Francis Hilliard, *The Elements of Law* 288 (Boston, 1835) (“A jury consists of twelve men[.]”); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 411

(Philadelphia, 1819) (“The petit jury, when sworn, must consist precisely of twelve If, therefore, the number returned be less than twelve, any verdict must be ineffectual, and the judgment will be reversed[.]”); 3 John Bouvier, *Institutes of American Law* § 3035, at 327 (Philadelphia, 1851) (“By jury is understood a body of twelve[.]”); Henry Flanders, *An Exposition of the Constitution of the United States* 217 (Philadelphia, 1860) (“A petit jury consists of twelve men[.]”); Seymour D. Thompson & Edwin G. Merriam, *A Treatise on the Organization, Custody and Conduct of Juries, Including Grand Juries* § 6, at 6 (St. Louis, 1882) (“[W]here the record shows that the cause was tried by a jury of less than twelve men, the trial will be held to be a nullity[.]”).

In short, post-ratification interpretations support the conclusion that the Framers incorporated the original, common-law meaning of “jury” in the Sixth Amendment—a twelve-member body. Michigan judge Thomas Cooley summed up this consensus in his mid-19th century treatise on constitutional law:

A petit, petty, or traverse jury is a body of twelve men, who are sworn to try the facts of a case as they are delivered from the evidence placed before them. Any less than this number of twelve would not be a common-law jury, and not such a jury as the constitution preserves to accused parties

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 319 (Boston, 1868).

D. Twelve-Member Juries Fulfilled the Historical Purpose of the Jury Right.

At common law and at ratification, the jury right was understood as a guard against tyranny and a guarantor of liberty. “As John Adams put it, the founders saw representative government and trial by jury as ‘the heart and lungs’ of liberty.” *Erlinger*, 602 U.S. at 829-30 (quoting Letter from Clarendon to William Pym (Jan. 27, 1766), in 1 *Papers of John Adams* 164, 169 (Robert J. Taylor ed., 1977) (“*Adams Papers*”)); see also *Flowers v. Mississippi*, 588 U.S. 284, 293 (2019) (“Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.”). The jury was a “guard against a spirit of oppression and tyranny on the part of rulers”: it was, and remains today, a “great bulwark of . . . civil and political liberties.” 2 Story, *Commentaries* §§ 1779-1780, at 540-41.

In light of this core purpose of the jury, the Sixth Amendment “carrie[s] with it *some* meaning about the content and requirements of a jury.” *Ramos*, 590 U.S. at 89. Like the requirement of unanimity this Court recognized in *Ramos*, the requirement that a defendant be convicted by a jury of twelve members is “[i]nhering” in the constitutional guarantee to a jury trial. *Erlinger*, 602 U.S. at 830; see *id.* at 831 (criminal charges must be “confirmed by the *unanimous* suffrage of *twelve*” jurors) (emphases added). After all, the right to trial by jury is “no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004).

The authors and defenders of the Constitution were preeminently concerned with oppression by majorities: “[T]he majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.” THE FEDERALIST NO. 10 (James Madison). In the jury context, this concern is abated by the rule that a jury must consist of twelve: The greater number provides greater opportunities for dissenters to put the government to its proof. *See Erlinger*, 602 U.S. 829 (without juries, “we ‘have no other fortification . . . against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds’”) (quoting *Adams Papers* at 169) (ellipsis in *Erlinger*). For this reason, the drafters were acutely concerned that “the new federal government might fall prey to the kinds of temptations that led the British to restrict the jury trial right in the colonies.” *Id.* at 830; *see also* The Declaration of Independence paras. 2, 20 (U.S. 1776) (“[t]he history of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States” by, among other things, “depriving us in many Cases, of the Benefits of Trial by Jury”).

As Members of this Court have recognized, “a person in the minority will adhere to his position more frequently when he has at least one other person supporting his argument,” a more likely outcome with twelve than with six or eight. *Ballew v. Georgia*, 435 U.S. 223, 236 (1978) (plurality opinion). Indeed, smaller juries were a feature of the Jim Crow era because they allowed majorities “to suppress minority voices in public affairs.” *Khorrami*, 143 S. Ct. at 27

(Gorsuch, J., dissenting from the denial of certiorari) (citing *Ramos*, 590 U.S. at 86-89).

And twelve are necessary to safeguard another guarantee of the Sixth Amendment: that of impartiality. “The common law required a juror to have ‘freedom of mind’ and to be ‘indifferent as he stands unsworn.’” *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 231 (2017) (Thomas, J., dissenting) (quoting 1 Edward Coke, *The First Part of the Institutes of the Laws of England* § 234, at 155a (Dublin, 16th ed. 1809)). A juror at common law was to “have no interest of their own affected, and no personal bias, or prepossession, in favor or against either party.” *Pettis v. Warren*, 1 Kirby 426, 427 (Conn. Super. Ct. 1788). Juries of twelve are necessary to achieve this purpose: “[T]he smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result,” whereas “objectivity result[s]” from larger groups. *Ballew*, 435 U.S. at 233 (plurality opinion). The guarantee of jury impartiality, itself well-established at common law, is reinforced by the guarantee of a twelve-member jury. *See Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) (“[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.”). Courts have long recognized that “diminishing the number [of jurors] impairs the right, lessens the security of the accused, and increases the danger of conviction,” and, “[i]f corruption or prejudice are to be feared and avoided, they are much more likely to influence the conduct of six [jurors] than of twelve.” *Work*, 2 Ohio St. at 305; *accord Carpenter*, 5 Miss. at 166 (“[A] speedy public trial by an impartial jury of [the accused’s] country” is “justly regarded as the palladium of the personal liberties of the citizen[.]”) (cleaned up).

A jury of twelve is required as a matter of text, history, and tradition. And it fulfills the Constitution’s aim to effectively deter governmental tyranny and ensure impartiality. All evidence points in the same direction: A “jury,” at common law and at the Founding, was—and remains today—a body of twelve members.

E. This Court’s Precedents Recognize the Original Meaning of “Jury” Is a Body of Twelve.

Consistent with the historical consensus, in 1898, this Court spoke unequivocally: “[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.*” *Thompson*, 170 U.S. at 349 (emphasis added). The Court reiterated this historical understanding in subsequent years on numerous occasions. *See, e.g., Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899) (“the primary and usual sense of the term [‘trial by jury’] at the common law and in the American constitutions, is . . . trial by a jury of 12”); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900) (“That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt.”); *Rasmussen v. United States*, 197 U.S. 516, 527 (1905) (similar); *Apprendi*, 530 U.S. at 477 (similar; quoting 4 Blackstone, *Commentaries* at 343).

In *Ramos*, the Court echoed those precedents and reaffirmed the original public meaning of the Sixth Amendment: “[A] defendant enjoys a ‘constitutional

right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a *jury of twelve persons*.” 590 U.S. at 92 (quoting *Thompson*, 170 U.S. at 351) (emphasis added). Most recently, just two years ago in *Erlinger* the Court again recognized that a criminal defendant must be convicted “by the unanimous suffrage of *twelve* of his equals and neighbours.” 602 U.S. at 831 (emphasis added; cleaned up). *Williams* is in grave tension with those intervening decisions. To the extent this Court has not already overruled *Williams*, it should do so now.

CONCLUSION

For the foregoing reasons, and those set out by Petitioner, the judgment below should be reversed.

Respectfully submitted,

CECILLIA D. WANG
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
425 California Street,
Suite 700
San Francisco, CA 94104

BRANDON BUSKEY
PRIYANKA MENON*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

DEVI M. RAO
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE
CENTER
501 H Street NE, Ste. 275
Washington, DC 20002
(202) 869-3434
devi.rao@macarthurjustice.org

JOHN W. WHITEHEAD
WILLIAM E. WINTERS
THE RUTHERFORD
INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

DANIEL TILLEY	STUART BANNER
AMERICAN CIVIL LIBERTIES	UCLA SCHOOL OF LAW
UNION FOUNDATION	SUPREME COURT CLINIC
OF FLORIDA	405 Hilgard Ave.
4343 W. Flagler Street	Los Angeles, CA 90095
Suite 400	
Miami, FL 33134	

*Admitted only in Maryland

Counsel for Amici Curiae

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