

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 *AMICUS CURIAE*  
PROFESSOR WANLING SU  
IN SUPPORT OF PETITIONER**

---

Eamon P. Joyce  
SIDLEY AUSTIN LLP  
787 Seventh Avenue  
New York, NY 10019  
(212) 839-5300

Jacob Steinberg-Otter  
*Counsel of Record*  
Kimberly R. Quick\*  
Bianca Mona Corgan  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
jacob.steinbergotter@sidley.com

\* Supervised by principals of the  
firm who are members of the  
District of Columbia bar

August 13, 2026

*Counsel for Amicus Curiae*

---

---

## TABLE OF CONTENTS

|                                                                                                                                                | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------|------|
| TABLE OF AUTHORITIES .....                                                                                                                     | iii  |
| INTEREST OF <i>AMICUS CURIAE</i> .....                                                                                                         | 1    |
| SUMMARY OF ARGUMENT .....                                                                                                                      | 2    |
| ARGUMENT .....                                                                                                                                 | 3    |
| I. Practices from before and during the<br>Founding era confirm that twelve jurors<br>defined the constitutional minimum. ....                 | 3    |
| A. Pennsylvania did not recognize criminal<br>juries of fewer than twelve before or at<br>the Founding. ....                                   | 3    |
| B. The Carolinas’ constitutions<br>presupposed that a jury had twelve<br>members. ....                                                         | 7    |
| C. South Carolina’s contrasting treatment<br>of enslaved persons confirms that fewer<br>than twelve jurors was no constitutional<br>jury. .... | 8    |
| D. North Carolina’s 1793 reform drew the<br>dividing line between a jury and a lesser<br>panel at twelve members. ....                         | 10   |
| II. Founding-era legal authorities understood<br>the right to a “jury” to require twelve<br>jurors. ....                                       | 11   |
| A. Dictionaries and treatises defined “jury”<br>as a body of twelve members. ....                                                              | 11   |
| B. The ratification debates treated twelve<br>members as inherent in a jury. ....                                                              | 14   |

## TABLE OF CONTENTS—continued

|                                                                                                                                      | Page |
|--------------------------------------------------------------------------------------------------------------------------------------|------|
| C. Justice Wilson’s lectures, read in full,<br>confirm the twelve-juror requirement. ....                                            | 16   |
| III. Early American courts interpreted<br>constitutional guarantees to a jury as<br>mandating twelve members.....                    | 19   |
| A. The New Jersey Supreme Court’s<br>decision in <i>Holmes v. Walton</i><br>invalidated six-person juries. ....                      | 19   |
| B. Founding-era interpretive principles<br>required giving “jury” its settled<br>common law meaning. ....                            | 22   |
| C. <i>State v. Starling</i> arose from South<br>Carolina’s resistance to Reconstruction,<br>not the settled meaning of “jury.” ..... | 25   |
| CONCLUSION .....                                                                                                                     | 29   |

## TABLE OF AUTHORITIES

|                                                                                            | Page          |
|--------------------------------------------------------------------------------------------|---------------|
| CASES                                                                                      |               |
| <i>Alden v. Maine</i> ,<br>527 U.S. 706 (1999) .....                                       | 12, 18        |
| <i>Cancemi v. People</i> ,<br>18 N.Y. 128 (1858) .....                                     | 25            |
| <i>Carpenter v. State</i> ,<br>5 Miss. (4 How.) 163 (High Ct. Err. & App.<br>1839).....    | 23            |
| <i>Colgrove v. Battin</i> ,<br>413 U.S. 149 (1973) .....                                   | 2, 16, 17, 22 |
| <i>District of Columbia v. Heller</i> ,<br>554 U.S. 570 (2008) .....                       | 12            |
| <i>Emerick v. Harris</i> ,<br>1 Binn. 416 (Pa. 1808) .....                                 | 24            |
| <i>Foote v. Lawrence</i> ,<br>1 Stew. 483 (Ala. 1828).....                                 | 24            |
| <i>Gibbons v. Ogden</i> ,<br>22 U.S. (9 Wheat.) 1 (1824) .....                             | 23            |
| <i>Holmes v. Walton</i> ,<br>(N.J. 1780) .....                                             | 18            |
| <i>Kinloch v. Harvey</i> ,<br>16 S.C.L. (Harp.) 508 (Ct. App. L. & Eq.<br>1830).....       | 8             |
| <i>State ex rel. Kohne v. Simons</i> ,<br>29 S.C.L. (2 Speers) 761 (Ct. Err.<br>1844)..... | 8, 9, 10      |
| <i>Larillian v. Lane &amp; Co.</i> ,<br>8 Ark. 372 (1848) .....                            | 24            |
| <i>N.Y. State Rifle &amp; Pistol Ass’n v. Bruen</i> ,<br>597 U.S. 1 (2022) .....           | 5             |
| <i>Op. of Justs.</i> ,<br>41 N.H. 550 (1860).....                                          | 25            |
| <i>Ramos v. Louisiana</i> ,<br>590 U.S. 83 (2020) .....                                    | 26            |

## TABLE OF AUTHORITIES—continued

|                                                          | Page       |
|----------------------------------------------------------|------------|
| <i>State v. Ben</i> ,                                    |            |
| 8 N.C. (1 Hawks) 434 (1821) .....                        | 11         |
| <i>State v. Burket</i> ,                                 |            |
| 9 S.C.L. (2 Mill) 310 (Const. Ct. App. 1818) ..          | 24         |
| <i>State v. Starling</i> ,                               |            |
| 49 S.C.L. (15 Rich.) 120 (Ct. App.                       |            |
| 1867).....                                               | 25, 26, 27 |
| <i>United States v. Smith</i> ,                          |            |
| 18 U.S. (5 Wheat.) 153 (1820) .....                      | 23         |
| <i>Vaughn v. Scade</i> ,                                 |            |
| 30 Mo. 600 (1860) .....                                  | 24         |
| <i>Ware v. Hylton</i> ,                                  |            |
| 3 U.S. (3 Dall.) 199 (1796) .....                        | 21         |
| <i>Wesberry v. Sanders</i> ,                             |            |
| 376 U.S. 1 (1964) .....                                  | 16         |
| <i>Williams v. Florida</i> ,                             |            |
| 399 U.S. 78 (1970) ..... 1, 2, 3, 11, 12, 13, 14, 22, 25 |            |
| <i>Wolford v. Lopez</i> ,                                |            |
| 146 S. Ct. 2032 (2026) .....                             | 26         |
| <i>Work v. State</i> ,                                   |            |
| 2 Ohio St. 296 (1853) .....                              | 24         |
| <i>Zylstra v. Corp. of Charleston</i> ,                  |            |
| 1 S.C.L. (1 Bay) 382 (Ct. Com. Pl.                       |            |
| 1794).....                                               | 8          |

# CONSTITUTIONS, STATUTES, AND REGULATIONS

|                                                  |    |
|--------------------------------------------------|----|
| U.S. Const. art. III, § 2, cl. 3 .....           | 21 |
| Fundamental Consts. of Carolina of 1669, art.    |    |
| 69, reprinted in 1 Bernard Schwartz, <i>The</i>  |    |
| <i>Bill of Rights: A Documentary History</i> 108 |    |
| (Leon Friedman & Karyn Gullen Brown              |    |
| eds., 1971) .....                                | 7  |
| N.J. Const. of 1776, art. XXII.....              | 20 |
| Pa. Const. of 1776, dec. of rights, art. IX..... | 6  |

## TABLE OF AUTHORITIES—continued

|                                                                                                                                                                                                       | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| S.C. Const. of 1865, art. III, § 1.....                                                                                                                                                               | 27   |
| S.C. Const. of 1868, art. I, § 11 .....                                                                                                                                                               | 29   |
| Military Reconstruction Act of 1867, ch. 153,<br>§ 5, 14 Stat. 428 .....                                                                                                                              | 29   |
| Military Reconstruction Act of 1867, ch. 153,<br>§ 6, 14 Stat. 428 .....                                                                                                                              | 29   |
| Act of Oct. 1715, ch. XLVI, § XI, <i>reprinted in</i><br>23 <i>The State Records of North Carolina</i> 62–<br>64 (Goldsboro, N.C., Walter Clark ed., Nash<br>Bros. Book & Job Printers 1905) .....    | 10   |
| Act to Extend the Right of Trial by Jury to<br>Slaves, ch. V, § I, 1793 N.C. Sess. Laws 4. ....                                                                                                       | 11   |
| Act of Feb. 11, 1775, ch. DCXXIII, § 4,<br><i>reprinted in Acts of the General Assembly of</i><br><i>the Province of New Jersey</i> (Burlington, N.J.,<br>Samuel Allinson ed.1776) .....              | 19   |
| Act of Feb. 11, 1775, ch. DCXXIII, § 9,<br><i>reprinted in Acts of the General Assembly of</i><br><i>the Province of New Jersey</i> (Burlington, N.J.,<br>Samuel Allinson ed.1776) .....              | 20   |
| Act of Oct. 8, 1778, ch. XLV, § 3, <i>reprinted in</i><br><i>Acts of the Council and General Assembly of</i><br><i>the State of New Jersey</i> app. V (Trenton,<br>N.J., Peter Wilson ed., 1784)..... | 19   |
| Act of Oct. 8, 1778, ch. XLV, § 6, <i>reprinted in</i><br><i>Acts of the Council and General Assembly of</i><br><i>the State of New Jersey</i> (Trenton, N.J., Peter<br>Wilson ed., 1784) .....       | 19   |
| Act of Oct. 8, 1778, ch. XLV, § 7, <i>reprinted in</i><br><i>Acts of the Council and General Assembly of</i><br><i>the State of New Jersey</i> (Trenton, N.J., Peter<br>Wilson ed., 1784) .....       | 20   |
| Pa. Charter of 1681, app. I, § 5, 1 Pa. Stat. 303                                                                                                                                                     | 4    |
| Pa. Charter of 1681, app. I, § 6, 1 Pa. Stat. 303                                                                                                                                                     | 4    |

## TABLE OF AUTHORITIES—continued

|                                                                                                             | Page   |
|-------------------------------------------------------------------------------------------------------------|--------|
| Pa. Laws Agreed Upon in Eng. of 1682, art.<br>VIII, 1 Pa. Stat. app. III .....                              | 4      |
| Act of Jan. 12, 1705–06, ch. CXLIII, § I, 2 Pa.<br>Stat. 233.....                                           | 5      |
| Act of Jan. 12, 1705–06, ch. CXLIII, § II, 2 Pa.<br>Stat. 233.....                                          | 5      |
| Gradual Abolition Act of 1780, ch. 881, § 4, 10<br>Pa. Stat. 67 .....                                       | 6      |
| Gradual Abolition Act of 1780, ch. 881, § 10,<br>10 Pa. Stat. 67 .....                                      | 6      |
| Act of Mar. 19, 1785, ch. 1138, § 8, 11 Pa. Stat.<br>486 (1785) .....                                       | 5      |
| Act of Dec. 19, 1865, No. 4732, § VII, 13 S.C.<br>Stat. 254.....                                            | 27     |
| Act of Dec. 19, 1865, No. 4732, §§ XIV–XVII,<br>13 S.C. Stat. 254.....                                      | 27     |
| Act of Dec. 20, 1866, No. 4837, § III, 13 S.C.<br>Stat. 455.....                                            | 28     |
| Act of Sep. 21, 1866, No. 4794, § IV, 13 S.C.<br>Stat. 366-21.....                                          | 28     |
| Act of Sep. 21, 1866, No. 4798, § I, 13 S.C.<br>Stat. 366-29.....                                           | 28     |
| Act of Sep. 21, 1866, No. 4798, § II, 13 S.C.<br>Stat. 366-29.....                                          | 28     |
| <br>LEGISLATIVE HISTORY                                                                                     |        |
| 1 Annals of Cong. (1789) (Joseph Gales ed.,<br>1834).....                                                   | 21     |
| Proclamation No. 46, <i>reprinted in</i> 13 Stat. app.<br>(1865) .....                                      | 26     |
| <br>SCHOLARLY AUTHORITIES                                                                                   |        |
| Austin Scott, <i>Holmes vs. Walton: The New<br/>Jersey Precedent</i> , 4 Am. Hist. Rev. 456<br>(1899) ..... | 20, 21 |

## TABLE OF AUTHORITIES—continued

|                                                                                                                                                            | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Antonin Scalia & Bryan A. Garner, <i>A Note on the Use of Dictionaries</i> , reprinted in 16 Green Bag 2d 419 (2013).....                                  | 12   |
| Charles Warren, <i>Congress, the Constitution, and the Supreme Court</i> (1925) .....                                                                      | 21   |
| 1 Edward Coke, <i>The Institutes of the Lawes of England</i> (London 3d ed. 1633).....                                                                     | 13   |
| Edward Raymond Turner, <i>Slavery in Pennsylvania</i> (1911) .....                                                                                         | 5    |
| George R. Bentley, <i>A History of the Freedmen’s Bureau</i> (1955) .....                                                                                  | 28   |
| John A. Murley & Sean D. Sutton, <i>The Supreme Court Against the Criminal Jury: Social Science and the Palladium of Liberty</i> (2014) .....              | 15   |
| 2 Joseph Story, <i>Commentaries on the Constitution of the United States</i> (Boston, Mass., Little, Brown & Co. 4th ed. 1873) .....                       | 14   |
| Kellen R. Funk, <i>Uncomfortably Reminiscent: ODonnell v. Harris County in History and Memory</i> , 63 Hous. L. Rev. 981 (2026) .....                      | 28   |
| Max Farrand, <i>The Framing of the Constitution of the United States</i> (1913) .....                                                                      | 16   |
| Paul Samuel Reinsch, <i>The English Common Law in the Early American Colonies</i> , in 1 <i>Select Essays in Anglo-American Legal History</i> (1907) ..... | 4    |
| Roger M. Stevens, <i>A Legacy of Slavery: The Citizen’s Arrest Laws of Georgia and South Carolina</i> , 72 S.C. L. Rev. 1005 (2021) .....                  | 27   |
| Saikrishna B. Prakash & John C. Yoo, <i>The Origins of Judicial Review</i> , 70 U. Chi. L. Rev. 887 (2003) .....                                           | 21   |

## TABLE OF AUTHORITIES—continued

|                                                                                                                                                                                                                                    | Page   |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Terry W. Lipscomb & Theresa Jacobs, <i>The Magistrates and Freeholders Court</i> , 77 S.C. Hist. Mag. 62 (1976) .....                                                                                                              | 9      |
| Wanling Su & Rahul Goravara, <i>What Is a Jury?</i> , 103 N.C. L. Rev. 969 (2025) .....                                                                                                                                            | 7      |
| Joel Williamson, <i>After Slavery: The Negro in South Carolina During Reconstruction, 1861–1877</i> (Univ. Press of New Eng. 1990) (1965) .....                                                                                    | 28     |
| 3 William Blackstone, <i>Commentaries</i> .....                                                                                                                                                                                    | 13     |
| <br>OTHER AUTHORITIES                                                                                                                                                                                                              |        |
| <i>Extracts from Gov. Perry’s Message</i> , Anderson Intelligencer, Sep. 28, 1865 .....                                                                                                                                            | 27     |
| Giles Duncombe, <i>Tryals per Pais</i> 80 (7th ed. 1739) .....                                                                                                                                                                     | 13     |
| Giles Jacob, <i>A New Law Dictionary</i> (London, W. Strahan & W. Woodfall 10th ed. 1782) ....                                                                                                                                     | 12     |
| James Wilson, <i>Of the Different Steps Prescribed by the Law, for Apprehending, Detaining, Trying and Punishing Offenders, reprinted in 2 Collected Works of James Wilson</i> (Kermit L. Hall & Mark David Hall eds., 2007) ..... | 17, 18 |
| James Wilson, <i>The Subject Continued. Of Juries, reprinted in 2 Collected Works of James Wilson</i> (Kermit L. Hall & Mark David Hall eds., 2007) .....                                                                          | 17, 18 |
| Joseph Bingham, <i>A New Practical Digest of the Law of Evidence</i> (London, W. & J. Stratford 1797) .....                                                                                                                        | 14     |
| 4 Matthew Bacon, <i>A New Abridgment of the Law</i> (London, His Majesty’s L. Printers 3d ed. 1768) .....                                                                                                                          | 22     |

## TABLE OF AUTHORITIES—continued

|                                                                                                                                                                                      | Page   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| 2 Matthew Hale, <i>Historia Placitorum Coronae</i><br>(London, E. Nutt, R. Nutt & R. Gosling<br>1736).....                                                                           | 13     |
| Philip Hamburger, <i>Is Administrative Law<br/>Unlawful?</i> (2014) .....                                                                                                            | 19, 20 |
| Philip Hamburger, <i>Law and Judicial Duty</i><br>(2008) .....                                                                                                                       | 20     |
| 2 Richard Burn, <i>A New Law Dictionary</i><br>(London, John Burn ed., A. Strahan & W.<br>Woodfall 1792) .....                                                                       | 12     |
| 2 Richard Burn, <i>The Justice of the Peace and<br/>Parish Officer</i> (London, W. Strahan & W.<br>Woodfall 1785) .....                                                              | 14     |
| Richard Labunski, <i>James Madison and the<br/>Struggle for the Bill of Rights</i> (2006) .....                                                                                      | 21     |
| Sidney Andrews, <i>The South Since the War</i><br>(1866) .....                                                                                                                       | 27     |
| 2 <i>The Debates in the Several State Conventions<br/>on the Adoption of the Federal Constitution</i><br>(Washington, D.C., Jonathan Elliot, 2d ed.<br>1888).....                    | 15     |
| 3 <i>The Debates in the Several State Conventions<br/>on the Adoption of the Federal Constitution</i><br>(Washington, D.C., Jonathan Elliot, 2d ed.<br>1836).....                    | 15     |
| 4 <i>The Debates in the Several State Conventions<br/>on the Adoption of the Federal Constitution</i><br>(Washington, D.C., Jonathan Elliot, 2d ed.<br>1888).....                    | 16     |
| Walter Edgar, <i>South Carolina: A History</i><br>(1998) .....                                                                                                                       | 28, 29 |
| William Penn, <i>England's Present Interest<br/>Considered</i> (1675), reprinted in 3 <i>The Select<br/>Works of William Penn</i> 197 (London, James<br>Phillips, 3d ed. 1782) ..... | 4      |

## INTEREST OF *AMICUS CURIAE*\*

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

Professor Su submits this brief to provide an accurate historical perspective as the Court considers whether to overrule *Williams v. Florida*, 399 U.S. 78 (1970), and hold that the Sixth Amendment requires a criminal petit jury to have twelve members. *Williams* expressly turned on the perceived absence of historical evidence that the Framers intended to preserve the common law right to twelve jurors through the Sixth Amendment. See *id.* at 89, 103. Extensive historical research by Professor Su and others and the digitization of early American collections over the last half century reveal that the twelve-juror requirement rests on firmer historical ground than *Williams* recognized. This brief aims to correct the misunderstanding of the historical record as the Court considers the twelve-juror issue again.

---

\* No counsel for any party authored this brief in whole or in part, and no person or entity aside from *amicus curiae* and her counsel made a monetary contribution intended to fund its preparation or submission.

## SUMMARY OF ARGUMENT

*Williams v. Florida* centered on a historical premise: Although the common law jury unquestionably consisted of twelve members, the historical record was too “scanty” to say that the Framers intended that the Constitution preserve the twelve-juror requirement. 399 U.S. at 92–93. The Court could not find “a single instance where concern was expressed for preservation of the traditional number 12.” *Colgrove v. Battin*, 413 U.S. 149, 156 n.10 (1973). It presumed that the dearth of historical evidence could be attributed to the Founders’ indifference toward the number of jurors seated for trial. In the Court’s words, “the most likely conclusion to be drawn is simply that little thought was actually given to the specific question we face today.” *Williams*, 399 U.S. at 98–99.

That historical premise hasn’t survived scrutiny. Part of the problem was an incomplete record: historical materials unknown or unavailable to the Court now supply the evidence that *Williams* thought was missing. Those materials—ranging from Founding-era practices and legal authorities to early American state-court decisions—undermine what *Williams* inferred from silence. Furthermore, evidence that the Court considered in *Williams* and subsequently in *Colgrove* was misunderstood: The supposed Pennsylvania counterexample of smaller juries concerned a pre-Penn regime that vanished more than a century before the Sixth Amendment’s ratification. Dictionaries and treatises that supposedly didn’t show twelve was necessary in fact said just that. Justice James Wilson’s supposed indifference to the twelve-juror requirement was actually commentary on the distinction between grand and petit juries. And a postbellum South Carolina court decision invoked as supposed support for eight-juror panels rested on an

extraordinary provision in the State's 1865 constitution, adopted as part of a racially discriminatory and anti-Reconstruction regime.

With a more complete record and proper understanding of it, the answer to the juror-number question becomes plain. When the Framers guaranteed criminal defendants trial by an impartial jury, they used a settled legal term that meant twelve.

## ARGUMENT

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

#### **A. Pennsylvania did not recognize criminal juries of fewer than twelve before or at the Founding.**

*Williams* rested in part on a colonial-era jurisdiction that, in the Court's view, had treated twelve as negotiable: "Pennsylvania permitted majority verdicts and employed juries of six or seven." 399 U.S. at 98 n.45 (citing Paul Samuel Reinsch, *The English Common Law in the Early American Colonies, in 1 Select Essays in Anglo-American Legal History* 367, 398 (1907)). But the source the Court cited concerned a regime that ceased to exist more than a century before the Sixth Amendment—and never governed Pennsylvania in the first place. Pennsylvania's actual practice pointed the other way: it used a separate nonjury tribunal for Black defendants and later extended jury protections in the same enactment that began gradual abolition.

1. Start with the basic error: The source *Williams* cited wasn't describing Pennsylvania law. It was describing proceedings in an era "before the coming of [William] Penn," conducted "under the Duke [of

York]’s laws,” in “the territory later called Pennsylvania.” Reinsch, *supra*, at 398. “The procedure was informal,” in no small part because “juries of six or seven were in use.” *Id.* It was so informal that “not even the distinctions between civil and criminal cases were clearly drawn,” and the administration of justice was “founded upon the ideas of the magistrates” rather than “any rules of positive law.” *Id.* The cited passage thus described not an exception to the twelve-juror rule adopted by Pennsylvania but the “rude institutions” of a sparsely settled frontier. *Id.* at 367, 398.

Pennsylvania’s “actual practice” conformed to the common law. *Id.* Its royal charter authorized Penn to establish “Courts and Tribunalls” and the “manner of Proceedings” but required the Province’s laws to remain “as neare as conveniently may bee agreeable to the Lawes Statutes and rights of” England. Pa. Charter of 1681, app. I, § 5, 1 Pa. Stat. 303, 306. It further provided that Pennsylvania’s laws “as to felonies shall bee and continue the Same” as those supplied “by the generall Course of the Law” in England unless altered. *Id.* § 6, at 307.

Critically, Penn’s founding charter of rights then made the relevant rule explicit: “all Tryals shall be by Twelve Men, and as near as may be, Peers or Equals.” Pa. Laws Agreed Upon in Eng. of 1682, art. VIII, 1 Pa. Stat. app. III at 320. That reflected Penn’s own settled understanding of the jury right. In 1675, Penn explained that no person could be imprisoned “unless he were first attainted by the verdict of twelve men; that is a jury.” William Penn, *England’s Present Interest Considered* (1675), reprinted in 3 *The Select Works of William Penn* 197, 208–09 (London, James Phillips, 3d ed. 1782).

2. Even standing alone, the pre-Pennsylvania practice could not bear the weight *Williams* placed on it. In

“interpreting the Constitution, not all history is created equal.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 34 (2022). Rights “are enshrined with the scope they were understood to have when the people adopted them,” and evidence “long predat[ing]” ratification “may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years.” *Id.* (citation omitted). The six- or seven-member panels that *Williams* cited fit that bill: they had become obsolete some 110 years before the Sixth Amendment was ratified.

Pennsylvania law on the eve of ratification was in lockstep with the common law tradition. In 1785, the Commonwealth enacted a statute that directed the drawing of names “until twelve persons ... be had to serve on the jury” and provided that those twelve, once sworn or affirmed, “shall be the jury to try the cause.” Act of Mar. 19, 1785, ch. 1138, § 8, 11 Pa. Stat. 486, 489–90.

**3.** Pennsylvania’s race-specific tribunals confirm that a six-member panel wasn’t understood to be a jury. A 1705 statute created “negro” courts composed of two justices and “six of the most substantial freeholders of the neighborhood” who together tried charges against Black defendants. Act of Jan. 12, 1705–06, ch. CXLIII, §§ I–II, 2 Pa. Stat. 233, 234. This statute called the lay members “freeholders,” not jurors, and removed Black defendants from the ordinary courts in which juries sat. As one account later explained, the tribunals afforded “no trial by jury” and placed Black defendants outside “the jurisdiction of the regular courts of the province.” Edward Raymond Turner, *Slavery in Pennsylvania* 27–28 (1911). That treatment reflected a racial caste system that denied Black people, and especially enslaved people, the same rights afforded to white persons. See *Hobbs v. Fogg*, 6

Watts 553, 558–59 (Pa. 1837) (describing earlier legal order as marked by an “unconquerable prejudice of caste” where “colored race” was excluded from “our social compact”). The six-freeholder body was thus not an undersized jury, but a denial of the jury right.

Pennsylvania’s transition away from that system sharpens the distinction. The 1776 constitution guaranteed a defendant a “trial, by an impartial jury of the country.” Pa. Const. of 1776, dec. of rights, art. IX. In 1779, an enslaved man named Larry was tried under that guarantee and “convicted by a Jury of twelve Men.” Turner, *supra*, at 28 n.32 (quoting *Pa. Packet*, Feb. 16, 1779). One local account called his case “the first instance” in which an enslaved person had been tried “by a Grand and Petit Jury” and said the constitution afforded enslaved and free defendants “the same mode of trial.” *Id.* (quoting *Pa. Packet*, Feb. 16, 1779).

Pennsylvania removed any doubt about this constitutional view when it began its abolition of slavery the next year—well before the Sixth Amendment. In the same statute setting gradual abolition in motion, the legislature required offenses by Black persons to be tried and punished “in like manner” as those of other inhabitants “and not otherwise” and expressly repealed the 1705 statute. Gradual Abolition Act of 1780, ch. 881, §§ 4, 10, 10 Pa. Stat. 67, 70, 72–73. Thus, eleven years before ratification, Pennsylvania subjected all defendants to the ordinary judicial process. And the Commonwealth’s jury statute made clear that process required twelve sworn persons who collectively formed “the jury.”

Pennsylvania thus supplies no Founding-era support for undersized criminal juries. Its founding charter of rights mandated trial “by Twelve Men”; its founder defined “jury” by that number; its ratification-

era statute declared that twelve sworn persons “shall be the jury”; and its race-specific tribunal of six freeholders that the law declined to call a jury disappeared before ratification. Properly understood, Pennsylvania confirms that a panel of fewer than twelve wasn’t a smaller jury—it was no jury.

**B. The Carolinas’ constitutions  
presupposed that a jury had twelve  
members.**

The Province of Carolina and South Carolina, one of its successors, likewise treated twelve as part of what “jury” meant, and their constitutional history makes that point especially clear. Carolina specified twelve jurors, and South Carolina later preserved that understanding even after its constitution ceased to specify a number.

The Fundamental Constitutions of Carolina—in which John Locke had a hand—were adopted in 1669 and expressly codified the right to a jury of twelve: “[e]very jury shall consist of twelve men.” Fundamental Consts. of Carolina of 1669, art. 69, *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 108, 118 (Leon Friedman & Karyn Gullen Brown eds., 1971).

The requirement of twelve jurors became so ingrained that it persisted despite changes in the constitutional language. After independence, South Carolina dropped the explicit reference to “twelve” in favor of more general language mirroring the Sixth and Seventh Amendments. But the insistence on twelve jurors remained unwavering. See Wanling Su & Rahul Goravara, *What Is a Jury?*, 103 N.C. L. Rev. 969, 984 (2025). Indeed, in 1794—three years after the Sixth Amendment was ratified—a South Carolina court construed language providing that “[t]he trial by

jury ... shall be for ever inviolably preserved” to mean that “the rights of the citizens are to be determined ... by 12 men.” *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 384, 389 (Ct. Com. Pl. 1794) (emphasis omitted).

This interpretation thus demonstrates an important Founding-era understanding of constitutional jury guarantees: the phrase “trial by jury” incorporated the twelve-juror requirement even when no explicit number is stated.

**C. South Carolina’s contrasting treatment of enslaved persons confirms that fewer than twelve jurors was no constitutional jury.**

Like Pennsylvania, South Carolina assigned proceedings for enslaved persons to separate tribunals that used panels with fewer than twelve lay participants but were not understood to provide trial by jury. And the State’s courts later explicitly held that these bodies were not “juries.”

1. Early American jurisprudence often cast enslaved people as outside the ambit of the constitutional order. As one court stated, enslaved people “have no rights, other than those which their masters or owners may give them. They are the property of their masters or owners, and are considered in this State, in law, as goods and chattels, and not as persons entitled to the benefits of freemen.” *Kinloch v. Harvey*, 16 S.C.L. (Harp.) 508, 514 (Ct. App. L. & Eq. 1830); see *State ex rel. Kohne v. Simons*, 29 S.C.L. (2 Speers) 761, 768 (Ct. Err. 1844) (enslaved person at issue) (“All the Acts operating upon slaves directly, and to punish them, do not fall within the inhibition of the Constitution.”).

In that vein, South Carolina maintained an institution known as the Courts of Magistrates and

Freeholders—commonly known as “slave courts.” Su & Goravara, *supra*, at 984. Although they “functioned for over 150 years, few of their records seem to have survived.” Terry W. Lipscomb & Theresa Jacobs, *The Magistrates and Freeholders Court*, 77 S.C. Hist. Mag. 62, 62 (1976). But the records that have endured illuminate the procedures that the Founding generation believed ran afoul of the constitutional minimum. See *id.* at 62–63.

Those records reveal that the idea of twelve was intrinsic to the idea of a jury. The Courts of Magistrates and Freeholders impaneled three to five individuals to try enslaved persons and free persons of color. See Su & Goravara, *supra*, at 987. But the members of these panels were not called “jurors” but rather “freeholders.” Nor did contemporaneous references to the institution use the term “jury.” Indeed, these proceedings were uniformly described as nonjury trials by higher courts, as the number of freeholders impaneled fell below the minimum required for a constitutional jury. See *id.*

2. Especially instructive is the South Carolina Court of Errors’ decision in *Kohne*, which held unconstitutional a statute concerning these courts’ jurisdiction precisely because of the size of the “jury.” The statute authorized South Carolina to treat any enslaved person who returned to the State after having ventured north of the Potomac River as forfeited by an enslaver. See 29 S.C.L. at 765–66. In *Kohne*, the enslaver of a woman named Emma contested a forfeiture verdict by the Court of Magistrates and Freeholders. See *id.* at 762, 768. The enslaver argued that, although the law afforded Emma no right to trial by jury—and thus permitted her criminal trial before five “jurors”—his “property rights” could not be forfeited without a verdict by a

jury of twelve. See *id.* at 768. The Court of Errors agreed. In declaring the statute unconstitutional, a unanimous court held that a trial before five jurors is “not a trial by jury, in any sense in which the words have ever been legally used; neither could a judgment pronounced by them be regarded as the judgment of her peers.” *Id.*

The *Kohne* decision was unequivocal. The words “trial by jury” in the South Carolina Constitution meant “trial by twelve good and lawful men of the vicinage, in the presence of the accused, and by the oath of a witness.” *Id.* The report of the presiding judge accompanying the court’s opinion further stated that a proceeding with fewer is “utterly inconsistent with a due course of law.” *Id.* at 762, 764.

**D. North Carolina’s 1793 reform drew the dividing line between a jury and a lesser panel at twelve members.**

North Carolina’s early practice largely mirrored that of its neighbor. In 1715, shortly after Carolina’s partition, North Carolina vested its Courts of Magistrates and Freeholders with jurisdiction over offenses by enslaved persons. See Act of Oct. 1715, ch. XLVI, § XI, *reprinted in* 23 *The State Records of North Carolina* 62–64 (Goldsboro, N.C., Walter Clark ed., Nash Bros. Book & Job Printers 1905) (repealed 1741). Those courts impaneled at least three “Freeholders”—again, “jury” wasn’t used—and later four, when the legislature amended the statute. *Id.*; Act of Apr. 4, 1741, ch. XXIV, § XLVIII, 1741 N.C. Sess. Laws 57, 65.

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

transferring jurisdiction over offenses by enslaved persons to county courts and extending by statute what the state constitution had reserved for free white persons: the right to trial by twelve jurors. See Act to Extend the Right of Trial by Jury to Slaves, ch. V, § I, 1793 N.C. Sess. Laws 4, 4. For the first time, the state used the term “jury” to describe the body trying enslaved persons and free persons of color. See *id.*

This legislative change was a conscious act reflecting the moral and constitutional understandings of the time. In extending to enslaved persons the right to be tried by twelve, the legislature acknowledged—however imperfectly, given the law’s continued denial of freedom and equality—that a panel with fewer risked compromising the impartiality of the verdict and, with it, the community’s confidence in the result. See Su & Goravara, *supra*, at 989–90. The Supreme Court of North Carolina later remarked that “every time the Legislature have [sic] touched this subject since the revolution, it has been for the purpose of improving the condition of slaves, more especially in admitting them to the benefit of an impartial trial.” *State v. Ben*, 8 N.C. (1 Hawks) 434, 436 (1821) (enslaved party).

## **II. Founding-era legal authorities understood the right to a “jury” to require twelve jurors.**

### **A. Dictionaries and treatises defined “jury” as a body of twelve members.**

*Williams* faulted earlier decisions for “assum[ing]” in dicta a twelve-person requirement based on contemporary authorities that showed merely “that at common law the jury did indeed consist of 12.” 399 U.S. at 90–92. But those sources in fact answered the question the Court thought was unresolved. See

generally *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (relying on such sources). These sources defined “jury” by the number twelve and treated a departure as legally defective. Indeed, some of the same authorities *Williams* cited for other propositions said exactly that.

1. Giles Jacob’s *A New Law Dictionary* enjoyed unparalleled popularity in American law libraries, appearing in the private collections of John Adams and Thomas Jefferson, among many others. That dictionary defined “Twelve Men” as persons “by whom and whose oath as to matter of fact all trials pass,” and it added: “They are otherwise called the *jury*.” Giles Jacob, *A New Law Dictionary* 947 (London, W. Strahan & W. Woodfall 10th ed. 1782). The entry for “Jury” also specified that “the certain number” is twelve and “all the twelve must agree.” *Id.* at 537. Jacob’s definition of “verdict” emphasized that “every one of the *twelve* jurors must agree, or it cannot be a *verdict*,” and that “*tales*” jurors “supply the places of such of the jurors as were wanting of the number of *twelve*.” *Id.* at 952, 909. Richard Burn’s dictionary—another influential source—was in accord: “upon a trial by a petit jury, it can be by no more, nor less, than 12, and all assenting to the verdict.” 2 Richard Burn, *A New Law Dictionary* 45 (London, John Burn ed., A. Strahan & W. Woodfall 1792); see Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, reprinted in 16 Green Bag 2d 419, 424 (2013).

2. Contemporary English publications confirm this understanding of “jury.” William Blackstone’s *Commentaries*—“the preeminent authority on English law for the founding generation,” *Alden v. Maine*, 527 U.S. 706, 715 (1999)—stated that a person could not be “affected either in his property, his liberty, or his person, but by the unanimous consent of *twelve* of his

neighbours and equals.” 3 William Blackstone, *Commentaries* 379 (emphasis added); see *Williams*, 399 U.S. at 93 n.35 (citing 4 William Blackstone, *Commentaries* for other proposition). Matthew Hale’s *History of the Pleas of the Crown* addressed precisely the eleven-juror scenario: What if “one [juror] goes out of town, whereby only eleven remain”? 2 Matthew Hale, *Historia Placitorum Coronae* 295 (London, E. Nutt, R. Nutt & R. Gosling 1736). The answer: “these eleven cannot give any verdict without the twelfth.” *Id.* The remaining eleven must “be discharged, and a new jury sworn.” *Id.* And “[i]f only eleven are sworn by mistake, no verdict can be taken of the eleven, and if it be, it is error.” *Id.* at 296.

Two other treatises are especially significant because *Williams* itself relied on them. Giles Duncombe’s *Tryals per Pais* stated that “the law is so precise in this [n]umber of [t]welve, that if the [t]rial be by more or less, it is a mistrial.” Giles Duncombe, *Tryals per Pais* 80 (7th ed. 1739). And Lord Coke explained that “there must ... be 12 Jurors for the tryall of all matters of fact.” 1 Edward Coke, *The Institutes of the Lawes of England* 155 (London 3d ed. 1633). *Williams* invoked both sources in discussing the origins of the twelve-member rule while overlooking statements that the law required it. See 399 U.S. at 88–90 & nn.22–23.

This understanding of what “jury” meant wasn’t confined to the treatise literature; it was also what the magistrates administering the criminal law in courtrooms across early America were instructed. Burn’s *The Justice of the Peace and Parish Officer*—the standard working manual of the magistrates who actually administered the criminal law, and a fixture of American and English law libraries—recited the rule in the same terms: “upon a trial by a petit jury; it

can be by no more nor less than 12, and all assenting to the verdict.” 2 Richard Burn, *The Justice of the Peace and Parish Officer* 602 (London, W. Strahan & W. Woodfall 1785).

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

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

#### **B. The ratification debates treated twelve members as inherent in a jury.**

*Williams* looked to the ratification debates in determining what attributes the constitutional “jury” carried with it. See 399 U.S. at 93–94 & n.35. Those debates show that the twelve-juror requirement was too settled to warrant discussion. At conventions in Virginia, Pennsylvania, and North Carolina, speakers on both sides of ratification referred to juries as bodies

of twelve without stopping to explain or defend the number.

At Virginia’s convention, Governor Edmund Randolph—also a delegate at the Philadelphia Convention—defended Article III by noting “[t]here is no suspicion that less than *twelve* jurors will be thought sufficient.” 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 467 (Washington, D.C., Jonathan Elliot, 2d ed. 1836) [hereinafter *Debates*] (emphasis added). Randolph’s phrasing suggests that twelve was so obvious it did not require argument. Even Patrick Henry, no friend of the proposed Constitution, did not question this understanding despite finding “danger to liberty in almost every clause.” John A. Murley & Sean D. Sutton, *The Supreme Court Against the Criminal Jury: Social Science and the Palladium of Liberty* 32 (2014). He proclaimed without hesitation that “[t]he unanimous verdict of *twelve* impartial men cannot be reversed.” 3 *Debates, supra*, at 544 (emphasis added). Henry’s matter-of-fact reference to twelve jurors reflected what everyone in the room understood: juries numbered twelve.

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

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

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

**C. Justice Wilson’s lectures, read in full,  
confirm the twelve-juror requirement.**

Three years after *Williams* was decided, the Court believed it had found one instance in which a Founder expressed indifference “for preservation of the traditional number 12”—a 1790s lecture by Justice Wilson to the College of Philadelphia (now the University of Pennsylvania). *Colgrove*, 413 U.S. at 156 n.10. Wilson no doubt served as a bellwether of Founding-era sentiment: he was “one of the most active members of the Constitutional Convention” of 1787 and delivered his lecture while the Bill of Rights was still being ratified. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); see also Max Farrand, *The Framing of the Constitution of the United States* 198 (1913) (calling Wilson “[James] Madison’s ablest supporter”). But the lecture doesn’t show Wilson viewed the number twelve as dispensable. Read as a whole, it shows the opposite.

1. Wilson did not express apathy to the twelve-juror requirement in his lecture; he was commenting on juries generally, not just petit juries. The sentence that *Colgrove* invoked, as quoted, reads: “When I speak of juries, I feel no peculiar predilection for the number twelve ....” *Colgrove*, 413 U.S. at 156 n.10 (alteration in original) (quoting 2 *The Works of James Wilson* 503 (Robert Green McCloskey ed., 1967)). But that ellipsis omits the most important part. The full quote reads: “When I speak of juries, I feel no peculiar predilection for the number twelve: a grand jury consists of more, and its number is not precisely fixed.” James Wilson, *The Subject Continued. Of Juries*, reprinted in 2 *Collected Works of James Wilson* 954, 954 (Kermit L. Hall & Mark David Hall eds., 2007) [hereinafter Wilson, *Of Juries*].

Wilson then clarified three sentences later that he was describing the broader institution of the jury encompassing different forms: “When I speak of juries, I mean a convenient number of citizens, selected and impartial, who, on particular occasions, or in particular causes, are vested with discretionary powers to try the truth of facts ....” *Id.* Thus, the variation Wilson had in mind was different kinds of juries, and he used grand juries to show the number of jurors may vary by kind. And even as to grand juries, he identified twelve as the floor: “A grand jury must consist of at least twelve members, because twelve are necessary.” James Wilson, *Of the Different Steps Prescribed by the Law, for Apprehending, Detaining, Trying and Punishing Offenders*, reprinted in 2 *Collected Works of James Wilson*, *supra*, at 1175, 1181 [hereinafter Wilson, *Of the Different Steps*].

2. Elsewhere, Wilson addressed petit juries directly and tied them to twelve. As a general matter, he instructed that “no less than twelve persons should be

called in all ordinary causes.” Wilson, *Of Juries, supra*, at 967; cf. 2 Burn, *A New Law Dictionary, supra*, at 45 (“[U]pon a trial by a petit jury, it can be by no more, nor less, than 12 and all assenting to the verdict.”). He defined the verdict itself by reference to the number. He posed the question, “What is a verdict?” and answered that it’s “the joint declaration of twelve jurymen upon their oaths.” Wilson, *Of Juries, supra*, at 980. Wilson also quoted English legal scholar and judge Sir Thomas Littleton, who referred to jury verdicts as “the verdict of twelve men.” *Id.*

And Wilson was emphatic that the criminal petit jury required twelve jurors: “To the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity.” *Id.* at 985. He also noted in another lecture that the First Congress—whose judgment “provides contemporaneous and weighty evidence of the Constitution’s meaning,” *Alden*, 527 U.S. at 743–44 (cleaned up)—implemented Article III’s jury right in line with the common law: “By the national constitution, crimes committed in any state shall be tried in that state: and by a law of the United States, twelve, at least, of the jurors must be summoned from the very county, in which the crime was committed.” Wilson, *Of the Different Steps, supra*, at 1194.

The consequences of all this for *Williams* are significant. Wilson gave the sustained thought to the juror-number question, in public, in the year the Sixth Amendment was ratified, and reached the opposite conclusion as *Williams*. *Colgrove*’s lone example of supposed indifference in the Founding-era is, in fact, clear evidence that a criminal jury requires twelve jurors.

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

#### **A. The New Jersey Supreme Court's decision in *Holmes v. Walton* invalidated six-person juries.**

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

1. The threat that New Jersey faced during much of the Revolution was severe: the State straddled the border separating the American and British armies, and smuggling across state lines undermined American morale while giving the British tactical advantages. See Philip Hamburger, *Is Administrative Law Unlawful?* 152 (2014). To address the British threat, New Jersey enacted the Enemy Seizure Act of 1778 to target loyalists smuggling provisions to British troops and authorize forfeiture of the property. See Act of Oct. 8, 1778, ch. XLV, §§ 3, 6, *reprinted in Acts of the Council and General Assembly of the State of New Jersey* app. V at 9–11 (Trenton, N.J., Peter Wilson ed., 1784).

Critical here, the Enemy Seizure Act permitted verdicts by juries of only six people. See *id.* § 6 (incorporating provisions of Feb. 11, 1775 statute); Act of Feb. 11, 1775, ch. DCXXIII, § 4, *reprinted in Acts of the General Assembly of the Province of New Jersey* 468, 470 (Burlington, N.J., Samuel Allinson 1776)

(providing for six-member juries). No appeals could be taken, see Act of Feb. 11, 1775, ch. DCXXIII, § 9, and American militiamen who seized goods en route to the enemy could keep proceeds from their sale, see Act of Oct. 8, 1778, § 7. The legislature enacted the Act without a single nay vote. See Austin Scott, *Holmes vs. Walton: The New Jersey Precedent*, 4 Am. Hist. Rev. 456, 461 (1899).

*Holmes* found the six-person provision unconstitutional—and did so based on a provision describing a right to a jury in only general terms. The case arose when John Holmes and other loyalists were convicted of smuggling and then petitioned the New Jersey Supreme Court for certiorari. See Philip Hamburger, *Law and Judicial Duty* 414 (2008). The State’s 1776 constitution provided that “the inestimable right of trial by jury shall remain confirmed as a part of the law of this [c]olony, without repeal, forever.” N.J. Const. of 1776, art. XXII. Nowhere did the text specify a required number of jurors. Yet archival sources confirm (the written decision has not survived) that, in a decision announced by Chief Justice David Brearley, the court reversed “on the ground that the legislature’s authorization of six person juries violated the state’s constitutional guarantee of ‘the inestimable right of trial by jury.’” Hamburger, *Is Administrative Law Unlawful?*, *supra*, at 152.

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

2. Apart from *Holmes*'s significance on its own terms, the decision exerted a profound and demonstrable influence on the Framers.

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

What's more, three leading participants in *Holmes* went on to play key roles at the Philadelphia Convention and First Congress. Chief Justice Brearley—who, again, delivered the oral opinion for the court—was a delegate to the Convention. See Charles Warren, *Congress, the Constitution, and the Supreme Court* 44–45 (1925). Attorney General William Paterson was a U.S. Senator who served on the conference committee that reconciled the Sixth Amendment's language between the House and Senate and later became a justice on this Court. See Richard Labunski, *James Madison and the Struggle for the Bill of Rights* 239 (2006); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245–56 (1796) (Paterson, J.). *Holmes*'s defense attorney Elias Boudinot served as a representative in the First Congress, where he participated in a House committee addressing the proposal of what ultimately became the Bill of Rights. 1 Annals of Cong. 690–91 (1789) (Joseph Gales ed.,

1834). After their involvement in *Holmes*, a case that garnered national attention, it's doubtful that these three men would have agreed without debate to codifying a jury right contrary to the definition of their home state's highest court—or in the case of Chief Justice Brearley, the definition that he himself announced.

**B. Founding-era interpretive principles required giving “jury” its settled common law meaning.**

The Court in *Williams* rested on the supposed distinction between the constitutional and common law contexts, reasoning there was “absolutely no indication in ‘the intent of the Framers’ of an explicit decision to equate the constitutional and common-law characteristics of the jury.” 399 U.S. at 99; see also *Colgrove*, 413 U.S. at 156. That distinction, however, is untenable. When constitutional text used a term with a settled common law meaning, eighteenth-century canons of construction required courts to give the term that meaning. And early American courts consistently applied these canons to imbue general constitutional provisions codifying a right to a “jury” with its common law meaning.

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

This principle was commonplace in early America. Justice Story, for instance, observed that when the

Constitution uses common law terms, their “definitions are necessarily included, as much as if they stood in the text.” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820). Chief Justice John Marshall similarly noted that if a word had a known meaning “when the [C]onstitution was framed[,] ... [t]he [constitutional] convention must have used the word in that sense.” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824).

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

**2.** Early state courts applying these interpretive principles confirm this gloss. When state courts faced the question of whether their state constitutional jury guarantees—each worded similarly or identically to the Sixth Amendment—incorporated the common law twelve-juror requirement, they answered in the affirmative.

The Mississippi Supreme Court, for example, “recur[red] to the provisions of the common law” to understand what the State’s constitutional framers intended by “jury.” *Carpenter v. State*, 5 Miss. (4 How.) 163, 166 (High Ct. Err. & App. 1839). Because “[a]t common law the number of the jury ... could never be less than twelve,” the constitutional provision incorporated that requirement. *Id.* Stated generally, “where terms used in the common law are contained in a statute or the constitution, without an explanation of the sense in which they are there employed, should receive that construction which has been affixed to them by the former.” *Id.* at 166–67.

The Ohio Supreme Court employed the same approach. Examining language declaring that “the *right* of jury trial is recognized to exist,” the court asked: “What, then, is this right? It is nowhere defined or described in the constitution.” *Work v. State*, 2 Ohio St. 296, 302 (1853), *overruled in part by State ex rel. City of Columbus v. Boyland*, 391 N.E.2d 324 (Ohio 1979). Its answer: “beyond controversy the number of the jury at common law ... must be twelve.” *Id.* at 304. The court accordingly reversed a verdict rendered by fewer than twelve jurors.

Mississippi and Ohio weren’t outliers. State courts across the early Republic were “unite[d] in declaring that where there is a constitutional guaranty of the right to trial by jury, twelve is the number of which the jury must be composed.” *Vaughn v. Scade*, 30 Mo. 600, 604 (1860). The Arkansas Supreme Court held that “when [its] convention incorporated the provision into the constitution ..., they most unquestionably had reference to the jury trial as known and recognized by the common law.” *Larillian v. Lane & Co.*, 8 Ark. 372, 374 (1848). Because “the common law jury consisted of twelve men,” the constitutional provision required the same. *Id.* at 375. Pennsylvania’s 1776 constitution provided “a right to trial by jury,” which its high court interpreted to require “that all trials shall be by twelve men.” *Emerick v. Harris*, 1 Binn. 416, 426 (Pa. 1808). Courts in South Carolina and Alabama observed that “every lawyer knows” that juries consist of twelve members, *State v. Burket*, 9 S.C.L. (2 Mill) 310, 311 (Const. Ct. App. 1818), and “[t]he term jury is well understood to be twelve men,” *Foote v. Lawrence*, 1 Stew. 483, 483 (Ala. 1828).

Other courts underscored the risks of departing from that understanding. The New York Court of Appeals cautioned that “allow[ing] ... any number short of a

full panel of twelve jurors” “would be a highly dangerous innovation” that “ought not to be tolerated.” *Cancemi v. People*, 18 N.Y. 128, 138 (1858). The New Hampshire Supreme Court stated that “[a] jury for the trial of a cause was a body of twelve men,” adding that “no such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices, had ever been known.” *Op. of Justs.*, 41 N.H. 550, 551–52 (1860).

The pattern demonstrates how Founding-era rules of construction operated in practice. State court after state court treated “jury” in constitutional text as bearing its settled common law meaning, and every court applying that principle interpreted “jury” to require twelve jurors. The conclusion is inescapable: when the Framers guaranteed criminal defendants “trial by an impartial jury,” they used a well-understood term of art whose meaning required no fewer than twelve jurors.

**C. *State v. Starling* arose from South Carolina’s resistance to Reconstruction, not the settled meaning of “jury.”**

*Williams* also invoked *State v. Starling*, 49 S.C.L. (15 Rich.) 120 (Ct. App. 1867), which upheld an eight-person jury in South Carolina’s postbellum District Courts. See 399 U.S. at 98 n.45. Even standing alone (to say nothing of the broader context set forth above), *Starling* is dubious evidence that the State regarded twelve as constitutionally dispensable. The court emphasized the importance of twelve jurors and sustained a panel with eight only because the State’s 1865 constitution specifically authorized departures from the norm in those courts. And the case arose from a distinctive Reconstruction-era scheme whose racist origins and rapid displacement undermine its historical value.

1. *Starling* isn't affirmative evidence that South Carolina regarded twelve as nonessential. Far from it: The court "venture[d] not to declare" whether that number was among the essentials of jury trial. 49 S.C.L. at 134. The court instead observed that twelve had become "so associated with the common idea of a jury" that changing it "by mere legislative authority might be expected to excite apprehension." *Id.* at 134. And it predicted that the rule of twelve probably "would have been left to prevail in the District Courts" if the 1865 state constitution had not authorized the legislature to provide otherwise. *Id.* at 134–35. The court upheld an eight-juror panel only because the legislature had exercised that authority. *Id.* at 135.

2. Nor should much weight be placed on *Starling*; its pedigree is, at best, deeply suspect. A historical episode rooted in racial subordination and hostility to the constitutional settlement secured in the Second Founding is a "tainted artifact." *Wolford v. Lopez*, 146 S. Ct. 2032, 2053 (2026). And a historical assessment of an unconventional legal rule can't overlook "the very functions" it was adopted to serve. *Ramos v. Louisiana*, 590 U.S. 83, 99 & n.44 (2020). That caution applies with force here: the exception *Starling* condoned emerged from a state constitutional convention marked by racism and resistance to Reconstruction.

The 1865 convention's composition and proceedings reflect those "tainted" origins. Its electorate comprised those who had taken President Andrew Johnson's "oath of amnesty," which allowed most former Confederates to regain their political rights, and qualified under South Carolina's antebellum voting laws—effectively excluding Black persons. Proclamation No. 46, *reprinted in* 13 Stat. app. at 769–71 (1865). Governor Benjamin Franklin Perry—the "chief man in the Convention" whose word carried "unusual significance,"

Sidney Andrews, *The South Since the War* 49 (1866)—decried Northern Republicans for “forget[ting] that this is a white man’s government, and intended for white men only; and that the Supreme Court of the United States has decided that the negro is not an American citizen,” *Extracts from Gov. Perry’s Message*, *Anderson Intelligencer*, Sep. 28, 1865, at 1. Convention delegates sounded the same theme, calling Black people “animal[s] whose character the North seems utterly unable to comprehend” and “no more qualified to vote now than children.” Andrews, *supra*, at 87, 89.

That sentiment shaped the legal scheme the convention produced. The constitution created District Courts with jurisdiction over “criminal cases wherein the accused is a person of color.” S.C. Const. of 1865, art. III, § 1. While it generally preserved jury trials “as heretofore used,” it empowered the legislature to “determine the number of persons who shall constitute the jury in” those courts. *Id.* art. IX, § 7. The convention also called for laws governing “the colored population of the State.” Roger M. Stevens, *A Legacy of Slavery: The Citizen’s Arrest Laws of Georgia and South Carolina*, 72 S.C. L. Rev. 1005, 1031–33, 1031, n.180, 1032 & nn.186–88, 1033 n.193 (2021) (citation omitted). The resulting Black Code gave the District Courts exclusive jurisdiction over prosecutions of Black defendants, imposed race-specific criminal rules, and prescribed two types of petit juries—monthly “common” juries of four persons and quarterly “special” juries of six. See *id.*; *Starling*, 49 S.C.L. at 136; Act of Dec. 19, 1865, No. 4732, §§ VII, XIV–XVII, 13 S.C. Stat. 254, 256, 258–59.

The September 1866 extension of District Court jurisdiction to white defendants doesn’t erase that history. It came only after the Civil Rights Act of 1866 forced South Carolina to revise its racial regime. The

governor convened the legislature to make state law “so as to conform to the ‘civil rights Act,’ and the requirements of the Freedmen’s Bureau.” Joel Williamson, *After Slavery: The Negro in South Carolina During Reconstruction, 1861–1877*, at 72 (Univ. Press of New Eng. 1990) (1965) (citation omitted). The legislature equalized criminal penalties for white and Black defendants and largely repealed the original District Court legislation, replacing its race-specific jurisdiction with a facially general grant. See Act of Sep. 21, 1866, No. 4794, § IV, 13 S.C. Stat. 366-21, 366-22; Act of Sep. 21, 1866, No. 4798, §§ I–II, 13 S.C. Stat. 366-29, 366-29 to -30. But that “tinker[ing]” was designed merely to satisfy “the letter of the ... Civil Rights Act” and prevent cases from being transferred to federal court. Walter Edgar, *South Carolina: A History* 385 (1998). And within months, the legislature prescribed the eight-person jury later upheld in *Starling*. See Act of Dec. 20, 1866, No. 4837, § III, 13 S.C. Stat. 455, 456.

Nor did facial neutrality ensure equal administration. Such equalizing measures “were frequently not translated from the law books into courtroom practice” in the postbellum South. George R. Bentley, *A History of the Freedmen’s Bureau* 157 (1955). And Freedmen’s Bureau records continued to document federal intervention when South Carolina authorities failed to pursue white violence against Black victims adequately. See Kellen R. Funk, *Uncomfortably Reminiscent: ODonnell v. Harris County in History and Memory*, 63 Hous. L. Rev. 981, 993–94 (2026).

That backdrop sharply limits *Starling*’s value as evidence of constitutional meaning. The eight-person jury was of a piece with the Black Code regime that produced the District Courts. And it proved short-lived. Congress soon required new constitutional conventions in the South without racial restrictions. See

Military Reconstruction Act of 1867, ch. 153, §§ 5–6, 14 Stat. 428, 429–30. Black men voted for the first time in South Carolina’s 1868 convention elections, and roughly three-fifths of delegates were Black. See Edgar, *supra*, at 385–87. The new constitution discarded the race-defined District Court system and the special jury-size authority. See S.C. Const. of 1868, art. I, § 11. The eight-person jury was thus a short-lived feature borne of a Black Code and dismantled during Reconstruction—hardly reliable evidence of a settled understanding that twelve jurors were constitutionally optional.

### CONCLUSION

The Court should overturn *Williams* and reverse the judgment below.

Respectfully submitted,

/s/ Jacob Steinberg-Otter

Eamon P. Joyce  
SIDLEY AUSTIN LLP  
787 Seventh Avenue  
New York, NY 10019  
(212) 839-5300

Jacob Steinberg-Otter  
*Counsel of Record*  
Kimberly R. Quick\*  
Bianca Mona Corgan  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
jacob.steinbergotter@sidley.com

\* Supervised by principals of the  
firm who are members of the Dis-  
trict of Columbia bar

*Counsel for Amicus Curiae*